In accordance with Case Management Order #2, issued on September 30, 2009 by the Construction Authorization Board – 04 (Board), the U.S. Department of Energy (DOE) and the State of Nevada (Nevada) have agreed to submit their differing views on the nature of the legal issue to be briefed under NEV-SAFETY-162 (Drip Shield Installation Schedule). DOE’s views are provided below.

NEV-SAFETY-162 states as follows:

From [the] SAR . . . it is clear that DOE plans to install drip shields about one-hundred years from now, after all of the wastes are emplaced in the tunnels and just prior to repository closure, but this cannot be justified as safe because if installation of the drip shields proves to be defective or impossible, it will be too late to assure safety by alternative means.

State of Nevada’s Petition to Intervene as a Full Party (Dec. 19, 2008) at 861 (Nevada Petition). Nevada exclusively cites 10 C.F.R. §§ 63.31(a)(2), 63.113(b), and the “multiple barrier” requirement in NWPA § 121(b)(1)(B), and most importantly, states that “[t]his
contention challenges compliance with *these* provisions . . . .” *Id.* at 861-62 (emphasis added).

This contention, therefore, must be interpreted to raise the following legal issue:

Whether 10 C.F.R. §§ 63.31(a)(2) and 63.113(b), and NWPA § 121(b)(1)(B) require DOE to install the drip shields prior to emplacing all of the waste in the repository.¹

This interpretation is a straightforward reading of the allegations in the contention, and refers exclusively to the regulations and the statutory provisions for which Nevada has stated it is challenging DOE’s compliance: “This contention challenges compliance with these provisions . . . .” Nevada Petition at 861.

It is DOE’s understanding that Nevada believes that the legal issue to be briefed is essentially as follows:

Whether under 10 C.F.R. § 63.31(a)(2), given DOE’s plans to install drip shields only after wastes have been emplaced, it will be impossible to make the pre-operational finding in 10 C.F.R. § 63.41(a) that construction of the underground facility has been substantially completed in accordance with the LA, [unspecified provisions of] the Atomic Energy Act, and the applicable regulations.

This cannot be the legal issue fairly raised by NEV-SAFEY-162 for the following reasons:

- First and foremost, this definition of the legal issue challenges DOE’s compliance with 10 C.F.R. § 63.41(a). This provision sets forth findings that the NRC must make as a “pre-operational” matter in determining whether to issue a license to receive and possess radioactive material, and not as a prerequisite to issuance of a

¹ Nevada’s Reply to DOE on this contention states, “[t]his challenges DOE’s drip shield concept, not the absence of retrieval plans.” State of Nevada’s Reply to DOE’s Answer to Nevada’s Petition to Intervene as a Full Party (Feb. 24, 2009) at 693 (Nevada Reply to DOE).
construction authorization. Thus, this issue (as Nevada now proposes to articulate it) is not within the scope of this proceeding.²

- Second, 10 C.F.R. § 63.41(a) is never cited in the contention and is not included in the specific regulations for which Nevada states that it is “challeng[ing DOE’s] compliance.” Nevada cannot raise a legal issue under NEV-SAFETY-162 regarding DOE’s compliance with a regulation it never cited in the contention.³

- Third, nowhere in the contention does Nevada refer to the assertion that the NRC will not be able to determine that “construction . . . has been substantially completed in accordance with” applicable requirements. Instead, the contention alleges non-compliance with the requirement to have multiple barriers to ensure compliance with the EPA dose standards by virtue of DOE’s plans for drip shield installation.⁴

² Even if the language of the contention that “it will be too late to assure safety by alternative means” was somehow intended to convey the point that NRC cannot make the determination that construction has been substantially completed in accordance with applicable requirements, that determination is to be made as a condition of issuing the license to receive and possess and is outside the scope of this proceeding. In addition, Nevada repeatedly links its claim that it will be “too late to assure safety by alternative means” to DOE’s alleged insufficient retrieval plans. See Nevada Petition at 861, 862 (linking this contention to NEV-SAFETY-130). Nevada’s Initial Petition does not link this claim to 10 C.F.R. § 63.41.

³ Nevada does refer to 10 C.F.R. § 63.41(a) for the first time in its Replies to DOE and the NRC Staff. See Nevada Reply to DOE at 694; State of Nevada’s Reply to NRC Staff’s Answer to Nevada’s Petition to Intervene as a Full Party (Feb. 24, 2009) at 524. Nevada’s Reply, however, cannot be read to expand the scope of issues raised in its contentions. See Crow Butte Resources, Inc. (North Trend Expansion Area), CLI-09-12, 69 NRC __ (slip op. at 44) (June 25, 2009) (holding that the Board admitted a contention in error because “a reply cannot expand the scope of the arguments set forth in the original hearing request”). Therefore, Nevada’s admitted contentions, including NEV-SAFETY-162, are limited in scope to the issues raised in Nevada’s Petition.

⁴ Nevada’s new legal issue statement also separately challenges, for the first time, DOE’s compliance with the “Atomic Energy Act,” an issue that also is not raised in the contention.
Finally, NEV-SAFETY-162 discusses DOE’s allegedly “scant” plans for retrieval. See Nevada Petition at 862. But, as discussed in Note 1, above, Nevada has stated that it is not challenging the alleged absence of retrieval plans in this contention.

Accordingly, DOE respectfully requests that the Board adopt DOE’s statement of the legal issue for briefing.

Respectfully submitted,

Signed electronically by Donald J. Silverman

Donald J. Silverman  
Counsel for the U.S. Department of Energy  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004

James Bennett McRae  
Martha S. Crosland  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, SW  
Washington, DC 20585

Dated in Washington, DC  
this 6th day of October 2009
UNIVERS STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

09-892-HLW-CAB04

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of:
U.S. Department of Energy

October 6, 2009

Docket No. 63-001

(Certification of Service)

I hereby certify that copies of the “U.S. DEPARTMENT OF ENERGY VIEWS ON NEV- SAFETY-162” have been served on the following persons on this 6th day of October 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

CAB 01
Atomic Safety and Licensing Board Panel
William J. Froehlich, Chair
E-mail: wjf1@nrc.gov
Thomas S. Moore
E-mail: tsm2@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

CAB 02
Atomic Safety and Licensing Board Panel
Michael M. Gibson, Chair
E-mail: mmg3@nrc.gov
Alan S. Rosenthal
E-mail: rsnth1@nrc.gov; axr@nrc.gov
Nicholas G. Trikouros
E-mail: ngt@nrc.gov

CAB 04
Atomic Safety and Licensing Board Panel
Thomas S. Moore, Chair
E-mail: tsm2@nrc.gov
Paul S. Ryerson
E-mail: psr1@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

CAB 03
Atomic Safety and Licensing Board Panel
Paul S. Ryerson, Chair
E-mail: psr1@nrc.gov
Michael C. Farrar
E-mail: mcf@nrc.gov
Mark O. Barnett
E-mail: mob1@nrc.gov; mark.barnett@nrc.gov
Parties Served
Adams, Marta
Andersen, Robert M.
Bailey, Annie
Barlow, Gregory
Barnett, Mark O.
Baughman, Mike
Bauser, Michael A.
Belete, Elene
Bell, Kevin W.
Berger, Michael
Berkey, Curtis
Beutel, Theodore
Bollwerk III, G. Paul
Borella, Edward
Borski, Laurie
Brooks, Felicia M.
Bupp, Margaret
Carter, Lorraine
Cereghino, Stephen
Chandler, Christopher
Choate, Zoe
Colburn, Ross
Cottingham, Anne
Crosland, Martha S.
Curran, Diane
Damele, Ronald
DiNunzio, Nicholas
Dobie, Julie
Dreher, Michael
Dudley, Sherry
Durbin, Susan
Eredia, Sally
Faglioni, Kelly L.
Farrar, Michael C.
Fitzpatrick, Charles J.
Francis, Karin
Fraser, Matthew
Frishman, Steve
Froehlich, William J.
Gendelman, Adam S.
Gibson, Michael M.
Gitter, Rebecca
Gilman, Joseph
Ginsberg, Ellen C.
Golshan, K. G.
Gores, Jennifer A.
Gutierrez, Jocelyn
Hanna, Robert S.

E-mail Addresses
madams@ag.nv.gov
robert.andersen@akerman.com
baileys@lcturbonet.com
lcda@lcturbonet.com
mob1@nrc.gov; mark.barnett@nrc.gov
bigboff@aol.com
mab@nei.org
ebelete@jsslaw.com
kwbell@energy.state.ca.us
mberger@bsglaw.net
curtis.berkey@abwwlaw.com
tbeutel@eurekanv.org
gpb@nrc.gov
edward_borella@ymail.com
lborski@nuclearlawyer.com
fbrooks@ndnlaw.com
mjb5@nrc.gov
lcarter@captionreporters.com
stephen_cereghino@ymail.gov
ccc1@nrc.gov
zchoate@co.ency.nv.us
rcolburn@ndnlaw.com
awc@nei.org
Martha.Crosland@hq.doe.gov
dcurran@harmoncurran.com
rdamele@eurekanv.org
Nicholas.DiNunzio@hq.doe.gov
jdobie@gklaw.com
michael.dreher@nrc.gov
sdudley@co.ency.nv.us
susan.durbin@doj.ca.gov
seredia@ndnlaw.com
kflaglioni@hunton.com
mcf@nrc.gov
cfitzpatrick@nuclearlawyer.com
kxf4@nrc.gov
mfraser@harmoncurran.com
steve.frishman@gmail.com
wjfl@nrc.gov
Adam.Gendelman@nrc.gov
mmg3@nrc.gov
rfl@nrc.gov
jsg1@nrc.gov
ecg@nei.org
kg.golshan@nrc.gov
jgores@armstrongteasdale.com
Jocelyn.Gutierrez@ymail.com
rshanna@bsglaw.net
Roby, Debra
droby@jsslaw.com
Rosenthal, Alan S.
rsnthal@nrc.gov; axr@nrc.gov
Rotman, Matthew
matthew_rotman@nrc.gov
Ryan, Tom
Tom.Ryan@nrc.gov
Ryerson, Paul S.
psrl@nrc.gov
Schwartz, Jacqueline
jschwartz@gklaw.com
Sears, Richard
rwsears@wpcda.org
Shebelskie, Michael R.
mshebelskie@hunton.com
Silberg, Jay E.
jay.silberg@pillsburylaw.com
Silvia, Andrea L.
alc1@nrc.gov
Simkins, Connie
jcciac@co.lincoln.nv.us
Simon, Mike
wpnucast1@mwpower.net
Sisco, Carlos L.
csisco@winston.com
Sommer, Josephine
Josephine.Sommer@ymp.gov
Sullivan, Timothy E.
timothy.sullivan@doj.ca.gov
Trikouros, Nicholas G.
tag@nrc.gov
VanNiel, Jeffrey D.
nbrjdvn@gmail.com
Vazquez, Tameka
purpose_driven@yahoo.com
Vibert, Elizabeth A.
timothy.walsh@pillsburylaw.com
Walsh, Timothy J.
rew@nrc.gov
Wardwell, Richard E.
maria.webb@pillsburylaw.com
Webb, Maria
bretwhipple@lcturbonet.com
Whipple, Bret
swilliams@abbwlaw.com
Williams, Scott
bwright@hunton.com
Wright, Belinda A.
may@nrc.gov
Young, Mitzi A.
mrizabarte@gmail.com
Zabarte, Ian
mlz@nrc.gov
Zobler, Marian L.

(electronically signed by) Donald J. Silverman
Donald J. Silverman

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