

**UNITED 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:	)	October 6, 2009
U.S. Department of Energy	)	
(High Level Waste Repository	)	Docket No. 63-001
Construction Authorization Application)	)	

**U.S. DEPARTMENT OF ENERGY VIEWS ON NEV-SAFETY-162**

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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

- 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.<sup>3</sup>
- 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.<sup>4</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> 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*

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this 6th day of October 2009

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NUCLEAR REGULATORY COMMISSION

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**CERTIFICATE 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.

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