

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

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

In the Matter of)	
)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY)	
)	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository))	
)	January 21, 2011

**U.S. DEPARTMENT OF ENERGY’S JOINT REPORT IN RESPONSE TO
CAB ORDERS OF DECEMBER 8, 2010 AND LBP-10-22**

By Orders dated December 8¹ and 14,² 2010, this Board instructed the parties to confer and submit by January 21, 2011 their views regarding (1) the status of discovery in this proceeding and any proposals for modifications to CAB Case Management Order (CMO) #2, and (2) the effects of LBP-10-22 on admitted contentions. The parties have conferred as directed, including a telephonic meet-and-confer on January 14, 2011, in which all parties other than the “Four Counties” participated either live or by proxy. This joint report and its attachment respond to the Board’s Orders. It is submitted on behalf of DOE and (except where otherwise noted) the State of Nevada, the Nuclear Energy Institute (NEI), the NRC Staff, Clark

¹ Order (Addressing Nevada’s Motion and Discovery Status) (Dec. 8, 2010).

² Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, ___ N.R.C. ___ (Dec. 14, 2010).

County, White Pine County, Inyo County, State of Washington, Aiken County, and Native Community Action Council (NCAC).

I. Status of Discovery and Proposals for Modification of CMO #2

The parties have continued to conduct document discovery and document production via the LSN system, and to observe their LSN reporting obligations. Otherwise, they have not conducted any discovery since the expiration of the previous stay on June 29, 2010.

With respect to the process established in CMO #2 for management of discovery, there was a consensus among the parties at the January 14 meet-and-confer that the process was, and remains, well founded and does not require alteration. The parties recognized, though, that the deadline for expiration of the Phase I discovery period would need to be extended so the parties have at least the same amount of time for discovery as was available when the proceeding was suspended last February. Additional time also may be appropriate to allow for the coordination and logistics necessary to reconstitute a deposition schedule. Further, DOE believes, though Nevada and perhaps other parties do not, that time may be needed to enable it to evaluate and organize available resources for discovery. The parties, accordingly, agreed on the following statement:

The parties do not currently believe that any change will prove needed to the structure of the discovery process outlined in Case Management Order #2, though the actual discovery schedule will need to include adjusted dates for discovery commencement and completion, and to account for issuance of SER Volume 3.

With respect to commencing active discovery, DOE informed the other parties that it intended to seek a renewal of a temporary stay of discovery on the following terms:

DOE intends to request a stay of further proceedings before the CAB through May 20, 2011. Should the stay be granted, it would be without prejudice to any party's right to move to lift the stay before its expiration because of changed circumstances. The stay would also be without

prejudice to the parties’ right to move for, or to oppose, any additional stay. The parties would meet and confer in advance of May 20, and report to the CAB by May 13 their views regarding the resumption and schedule for discovery.

DOE outlined the bases of its intended request but did not circulate a draft of its intended motion, and thus did not seek the response of other parties on any issue other than its intended request for relief. The responses at the January 14 meet and confer were as follows:

Support Relief Requested	Do Not Oppose Relief Requested	No Position, Reserve Right to Respond to DOE Motion When Filed	Oppose Relief Requested	Not Present on Call
Eureka County	Clark County	Aiken County*	[NONE]	Four Counties
Nuclear Energy Institute	Inyo County	California Energy Commission		
	Joint Timbisha Shoshone	NARUC		
	Lincoln County	Nye County		
	NCAC	Prairie Island Indian Community		
	State of Nevada	State of South Carolina*		
	NRC Staff	State of Washington		
		White Pine County		
*Party not present on meet-and-confer, but communicated position in advance to DOE.				

DOE is filing simultaneously with this joint report its Motion To Renew Temporary Suspension of the Proceeding requesting the relief discussed above.

II. Effect of LBP-10-22 on Admitted Contentions Involving Legal Issues

The Board’s Memorandum and Order of December 14, 2010, LBP-10-22, addressed eleven legal issues raised by certain contentions sponsored by the State of Nevada and NEI. These issues were identified to the Board in a Joint Proposal from DOE, Nevada and NEI,³ and were the subject of briefing by those parties and the NRC Staff.

³ U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Joint Proposal Identifying Phase 1 Legal Issues for Briefing (Oct. 6, 2009).

As directed in that Order,⁴ DOE, Nevada, NEI and the NRC Staff have conferred to reach agreement on the effect of LBP-10-22 on the contentions identified in the Joint Proposal as well as any other Phase I admitted contentions. They recognize that LBP-10-22 is not self-implementing, but constitutes the law of the case. As a result, it will govern the disposition of all contentions if their subsequent development reveals that those contentions raise issues decided in LBP-10-22. The parties also recognize that the ultimate effect of LBP-10-22 on some specific contentions may not be fully determinable at this time. The attached STIPULATION REGARDING ADMITTED CONTENTIONS AFFECTED BY LBP-10-22 summarizes the parties' positions more fully. The affected parties may submit further comments on those contentions where disagreement remains.

In this context, the parties are in agreement with respect to the effect of LBP-10-22 on most contentions, and disagree with respect to five, as follows:

1. The following contentions identified in the Joint Proposal remain in the proceeding: NEV SAFETY-009, -010, -011, -012, -013, & -019, NEV-Safety-171
2. The logic of LBP-10-22 indicates that the following contentions are susceptible of being dismissed in their entirety, if they are pursued further by their sponsors: NEI-Safety-05, NEV-Safety-41, NEV-Safety-146, NEV-Safety-201, NEV-Safety-169, NEV-Safety-203
3. The parties agree that the following contentions are affected in part: NEV-Safety-11, NEV-Safety-202
4. The parties disagree with respect to the following contentions: (NEI-Safety-06),⁵ NEV-Safety-149, NEV-Safety-161, NEV-Safety-162, (NEV-Safety-130).

⁴LBP-10-22 at 36-37. The Order specifically provided that any agreement was “[w]ithout waiver of any party’s eventual appeal rights. . . .” *Id.* at 36.

⁵ Contentions enclosed (within parentheses) were not directly treated in LBP-10-22 but were identified by the parties as being potentially affected by that decision.

The attached stipulation was circulated in draft form prior to the collective meet-and-confer of January 14 among the parties, and then on January 20, to all parties of record. At the meet-and-confer, none of the other parties expressed any comments on the draft or otherwise expressed any interest in participating with DOE, Nevada, NEI and the NRC Staff in its finalization.

DOE nonetheless asked the other parties if they concurred in having this joint report and the attached stipulation submitted on their behalf. None expressed objection, and the following affirmatively concurred: State of Nevada, NEI, the NRC Staff, Clark County, White Pine County, Inyo County, State of Washington, Aiken County, and NCAC.

Respectfully submitted,

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DATED: January 21, 2011

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S JOINT REPORT IN RESPONSE TO CAB ORDERS OF DECEMBER 8, 2010 AND LBP-10-22** have been served on the following persons on this 21st day of January, 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04

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ATTACHMENT

21 JANUARY 2011

**JOINT STIPULATION AMONG DOE, NEVADA, NEI AND NRC STAFF
REGARDING ADMITTED CONTENTIONS AFFECTED BY LBP-10-22⁶**

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution⁷	Resolution As Of 19 January 2011
1	NEI-Safety-05 Excessive Conservatism in the Postclosure Criticality Analysis	(1) whether the above regulations [10 C.F.R. §§ 20.1002, 20.1003, 20.1101, 50.40, and 63.111] require ALARA considerations at individual nuclear plant sites remote from the GROA to be addressed in DOE's LA; and (2) whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources.	There are no such requirements. LBP-10-22 at 9.	The parties agree that the basis for NEI-Safety-005 is removed by LBP-10-22. NEI does not intend to withdraw it but recognizes that it is susceptible to a summary disposition motion. The parties other than NEI agree that logic similar to that applicable to NEI-Safety-05 applies also to NEI-Safety-06, and in Phase 2 could apply also to NEI-Safety-01, NEI- Safety-02. NEI agrees that the Board's holdings on the two issues decided have a bearing on NEI-Safety-05, and may have a bearing on its other contentions mentioned, but believes that it is premature to speculate on what that effect would be.
2	NEV SAFETY-009, -010, -011, -012, -013, & -019 Future Overall Patterns of	Whether 10 C.F.R. § 63.305 requires DOE to project future levels of anthropogenic greenhouse gas emissions such as CO2 and evaluate the impact of these gases on future climate	Contention as defined by CAB raises permissible issues for litigation. Whether it is sufficient under § 63.305 for DOE to analyze the effects of	The parties agree that the contentions, as clarified by the CAB's decision, remain in the proceeding. See also Issues 3 and 4 below for Contention 11.

⁶ Basis: Joint DOE, Nevada, NEI Proposal Identifying Phase I Legal Issues for Briefing, 6 October 2009, as modified by CAB Order (Identifying Legal Issues for Briefing), 23 October 2009; LBP-10-22, Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), 14 December 2010; Conference call among DOE, NEI, Nevada, NRC Staff, 11 January 2011.

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution ^Z	Resolution As Of 19 January 2011
	Climate	at Yucca Mountain in the 10,000 year performance assessment, or whether it is sufficient under that regulation for DOE to analyze the effects of anthropogenic greenhouse gas emissions on future climate based upon the historical geologic record.	anthropogenic greenhouse gas emissions on future climate based upon the historical geologic record raises questions of fact. LBP-10-22 at 9-12	
3&4	NEV-Safety-11 Human-Induced Climate Changes On Prediction Of The Next Glacial Period	Whether 10 C.F.R. § 63.342(c) requires climate change processes included as FEPs in the first 10,000 years to be carried forward for the next 990,000 years.	NO: 10 C.F.R. § 63.342(c) does not require climate change processes included as FEPs in the first 10,000 years to be carried forward for the next 990,000 years. DOE may use simplifying assumptions for the 990,000-year analysis of climate change and percolation rates. LBP-10-22 at 12-14	The parties agree that for the period beyond 10,000 years, the contention as initially filed is not admissible; and that it should be limited to the following issues: (a) whether DOE's safety analysis should be required to use the final version of deep percolation rate per 10 CFR § 63.342(c)(2); and (b) if so, what the effects are of using that deep percolation rate for long-term evaluation of the effects of the repository safety. DOE agrees that if it is required to go forward with the proceeding, it will use final version of deep percolation rate per 10 CFR § 63.342(c)(2). The parties agree that NEV-Safety-202 is similarly dispositioned. See WAIVER REQUEST below.
5	NEV-Safety-41 Erosion FEP Screening.	Whether 10 C.F.R. § 63.342(c) requires the post-10,000-year performance assessment to include the continued effects of erosion if, assuming for purposes of legal argument, in the 10,000-year assessment erosion is shown to increase infiltration and seepage rates and thereby be potentially adverse to performance, with that potential	There is no such requirement: 10 C.F.R. § 63.342(c) does not require the post-10,000 year performance assessment to include the continued effects of erosion if, assuming for purposes of legal argument, in the 10,000-year assessment erosion	All parties agree that NEV-Safety-041 is subject to dismissal.

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution ^Z	Resolution As Of 19 January 2011
		increasing over time both before and after 10,000 years, but there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000-years.	is shown to increase infiltration and seepage rates and thereby be potentially adverse to performance, with that potential increasing over time both before and after 10,000 years, but there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000-years. LBP-10-22 at 14-17.	
6	NEV-Safety-146 [reliance on preliminary or conceptual design information in post-closure phase] NEV-Safety-201 [reliance on preliminary or conceptual design information in pre-closure phase]	Whether, under 10 C.F.R. Part 63, DOE is required to provide and rely upon final design information in the [License Application].	NO. LBP-10-22, at 17-19	All parties agree that NEV-Safety-146 and NEV-Safety-201 are subject to dismissal. Nevada believes that LBP-10-22 does not preclude Nevada from arguing, with respect to contentions other than NEV-Safety-146 and NEV-Safety-201, that the information presented by DOE with respect to any given issue is not sufficient, as a factual matter, to permit the NRC to reach required safety findings. DOE reserves judgment on this issue until it sees Nevada's intended presentations.
7	NEV-Safety-149 Deviations In	Whether, under 10 C.F.R. § 63.114, DOE may rely upon its quality assurance program and	Although coverage of a potential event by DOE's quality assurance does	The parties do not agree on the effect of the Board's ruling on NEV-Safety-149. DOE believes that the contention is resolved by DOE's

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution ^Z	Resolution As Of 19 January 2011
	Design And Waste Emplacement	procedures as a basis for excluding from consideration in the TSPA [Total System Performance Assessment] potential deviations from repository design or errors in waste emplacement.	not operate as a matter of law to exclude consideration of a FEP, the effects of the quality assurance program can be taken into account in determining the probability and consequences of the FEP. LBP-10-22, at 19-20.	clarification that it was not contending that the existence of its QA program enabled it, definitionally, to screen out possibilities for human error in repository design or waste emplacement; but that the QA program was a permissible factor in considering whether to fully evaluate a FEP in the TSPA, or whether it can be screened out based on low probability or consequences. Nevada believes that as submitted and as argued in its reply brief, NEV-Safety-149 raises an admissible factual contention as to whether DOE's basis for exclusion of this class of FEPs is factually sufficient. The NRC Staff's view is that NEV-SAFETY-149 should be dismissed because the Board concluded the contention incorrectly states DOE's position.
8	NEV-Safety-161 Critical Role Of Drip Shield	Whether, under NWSA § 121(b)(1)(B) or 10 C.F.R. §§ 63.113(a) through (d) and 63.115(a) through (c), DOE is required to evaluate the absence or failure of all drip shields.	There is no requirement to postulate the absence or complete failure of drip shields, or to perform a drip shield neutralization analysis: that is, a performance analysis in which a barrier (the drip shields) is neutralized (assumed not to inhibit the movement of water or radionuclides), and a determination is made of the difference in result. LBP-10-22, at 20-23.	The parties are not in agreement as to the proper disposition of NEV-Safety-161, and of related contentions NEV-Safety-130 [drip shield emplacement issues] and NEV-Safety-162 [timing of drip shield installation] (see Issue 10, below). Nevada agrees that the CAB rejected the need to do a neutralization analysis, but believes that NEV-Safety-161 raises also a factual question as to whether DOE has adequately demonstrated that the multiple barrier system is not wholly dependent on a single barrier. Nevada also believes that related contentions Safety-130 and NEV-Safety-162 are not affected by the CAB's resolution of Issue 8. DOE believes that all three contentions are

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution ^Z	Resolution As Of 19 January 2011
				<p>premised on the total absence, failure or removal of drip shields, and that that premise was not accepted by the CAB in LBP-10-22. All three contentions should therefore be dismissed. With respect to NEV-Safety-162 see Issue 10, below.</p> <p>The NRC Staff's view is that NEV-SAFETY-161, -162, and -130 should be dismissed to the extent that they claim DOE is required to assume and then analyze the complete failure of all drip shields. See LBP-10-22 at 20-21.</p>
9	NEV-Safety-169	Whether 10 C.F.R. §§ 63.21(c)(7) and 63.31 allow DOE to submit in the [License Application] a description of its retrieval plans without having a full retrieval plan available for review.	<p>YES: Part 63 does not require that the description of waste retrieval plans in the LA at the CA stage include the "full retrieval plan."</p> <p>LBP-10-22, at 23-26.</p>	The parties agree that NEV-Safety-169 should be dismissed.
10	NEV-Safety-162 Drip Shield Installation Schedule	Whether, in making the pre-construction authorization finding required by 10 C.F.R. § 63.31(a)(2), it must be considered whether, given DOE's plan to install drip shields only after all of the 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 license application, as amended, the Atomic Energy Act, and	<p>No. Such a finding is not required at the CA stage.</p> <p>LBP-10-22, at 27-29.</p>	<p>The parties do not agree on the disposition of this contention. DOE believes that it should be dismissed. Nevada believes that NEV-Safety-162 should remain admissible, but that it raises a question that is should be addressed following resolution of other contentions on the drip shield, e.g, NEV-Safety-130 (drip shield installation difficulties).</p> <p>DOE believes that Nevada's construction of NEV-Safety-162 involves a request for an amendment or exception to the provisions of Part 63, which Nevada should present to the Commission rather than to the CAB.</p>

CAB Legal Issue in LBP-10-22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution ^Z	Resolution As Of 19 January 2011
		applicable NRC regulations.		The NRC Staff's view is that NEV-SAFETY-162 should be dismissed to the extent that it claims that the Commission cannot make a substantial completion determination until after drip shields are installed.
11	NEV-Safety-171 [PMA and QA]	Whether, under 10 C.F.R. §§ 63.113, 63.114, and Part 63 Subpart G, the PMA [Performance Margins Analysis] can be used to validate or provide confidence in the TSPA, if its data and models are not qualified under DOE's quality assurance program.	NO: If the PMA is needed to establish "adequate confidence" in the TSPA, then it is subject to the quality assurance requirements of 10 C.F.R. § 63.142. LBP-10-22, at 30-31.	The parties agree that the contention remains viable. DOE notes that whether the PMA satisfies applicable quality assurance requirements is a question of fact.
Waiver Request	NEV-Safety-202	Whether climate change processes included as FEPs for the first 10,000-year period are carried forward for the post-10,000-year performance assessment using the same methodology, and not represented by the deep percolation flux that applies to climate change FEPs that are excluded for the pre- 10,000-year period.	CONTENTION DISMISSED to extent that it contends that same climate change methodology is required for first 10,000 years and remaining 990,000 years. CONTENTION ADMITTED to extent that it challenges use of deep percolation rates used in NRC proposed rule rather than final rule. WAIVER REQUEST UNDER 10 CFR § 2,235 DENIED. LBP-10-22, at 31-34.	The parties agree that NEV-Safety-202 has been dismissed to the extent that it contends that same climate change methodology is required for the first 10,000 years and remaining 990,000 years. The parties agree that NEV-Safety-202 has been admitted to the extent that it challenges use of deep percolation rates used in the NRC proposed rule rather than final rule. The parties agree that Nevada's waiver request under 10 CFR § 2.235 was denied.
Waiver Request	NEV-Safety-203	Whether, even if exclusion of land-surface ["corrosion"] were correct for the first 10,000 years,	CONTENTION AND WAIVER REJECTED: Nevada fails to make	The parties agree that Nevada will not pursue NEV-Safety-203 before the CAB..

CAB Legal Issue in LBP-10- 22	Affected Contentions Identified in Joint Stipulation	Contention Subject/Issue Statement	CAB Issue Resolution^z	Resolution As Of 19 January 2011
		land surface erosion should not be excluded from the TSPA in the subsequent period, notwithstanding 10 C.F.R. § 63.342(c), because “topography modifications will continue to the point that topography is grossly altered.”	prima facie showing that the issues it seeks to advance were not considered by the Commission in its rulemaking on 10 CFR § 63.342. LBP-10-22, at 34-36.	