U.S. DEPARTMENT OF ENERGY’S STATEMENT OF ADDITIONAL VIEWS ON THE CONTENTIONS AFFECTED BY THE CAB ORDER OF DECEMBER 14, 2010

By Order dated December 14, 2010,1 this Board instructed the parties to confer and submit their views concerning the effects of LBP-10-22 on admitted contentions. The parties have submitted a report and attached matrix summarizing the areas of agreement and disagreement with respect to these contentions. The U.S. Department of Energy (DOE) submits its additional views on those contentions affected by the Board’s Order on which DOE and the State of Nevada could not reach agreement.

I. NEV-Safety-149 Should Be Dismissed (Legal Issue #7)

This legal issue concerns whether DOE could rely on its quality assurance (QA) program categorically to exclude from consideration in the TSPA potential deviations from repository design or errors in waste emplacement. As the Board observed, this “legal issue appears to have arisen from a misunderstanding based upon an erroneous statement in a supporting technical

1 Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, ___ N.R.C. ____ (Dec. 14, 2010).
document, which was corrected before the License Application was filed.” 2 The erroneous statement in the initial technical document was corrected and placed on the LSN more than 5 months before the deadline for filing intervention petitions. 3

The contention that Nevada has submitted is thus moot. DOE’s analyses did not rely on the legal error that this contention raises.

Nevada nonetheless argues that there may be factual issues concerning DOE’s use of its QA program in its FEP analyses. This contention, however, raises no such factual issues. Nevada’s “statement of the contention itself” provided:

Legal issue: In SAR Subsection 2.2.1.2 at 2.2-17, DOE excludes deviations from repository design or errors in HLW emplacement from events considered in the TSPA (FEP 1.1.03.01.0A) on purely legal grounds that are unexplained and erroneous. 4

On its face, the contention statement raises a purely legal issue. Consistent with that, Nevada’s discussion of this contention in the briefing on this matter did not identify any factual issues in dispute. Indeed, Nevada stated in its Reply Brief that “the pertinent question is whether, as a legal matter, DOE is entitled to ignore this possibility [that some errors will be made in DOE’s QA program].” 5

The Board, and DOE, agreed with Nevada that DOE could not as a matter of law exclude deviations from repository design or errors because DOE had a QA program. That disposes of

2 Id. at 19-20 (emphasis added)

3 Id. at 20, n.75.

4 State of Nevada’s Petition to Intervene as a Full Party (Nevada Petition) at 783 (Dec. 19, 2008).

the legal issue raised in this contention, and since that is the only issue raised by the contention, the Board should dismiss it.

II. NEV-Safety-161, NEV-Safety-162 and NEV-Safety-130 Should Be Dismissed (Legal Issue ##8/10)

In Issue # 8, the Board held that DOE was not “required to evaluate the absence or failure of all drip shields.”6 In related Issue #10, the Board held that because the drip shields are not required for initial repository operation, they are not part of the substantial completion determination of 10 C.F.R. § 63.41(a)(2).7 Taken together, these two holdings should dispose of NEV-Safety-161, NEV-Safety-162, and NEV-Safety-130.8

With respect to NEV-Safety-161, Nevada’s contention assumes the complete and total failure of the drip shields. In the Nevada Petition, Nevada contended that “if it is assumed that all 11,200 waste packages . . . are unprotected by drip shields” then the “rescaled mean annual peak dose is about 1.5mSv (150 mrem).”9 Continuing, Nevada argued that the safety of the repository is “dependent on a single barrier system,” and “the failure of this single barrier will cause the total system to fail.”10 As Nevada makes clear in NEV-Safety-161, the contention is totally predicated on all of the drip shields failing. This contention does not discuss the “related

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6 LBP-10-22 at 20.
7 Id. at 28-29.
8 Although the parties did not identify NEV-Safety-130 as being one of the affected contentions during their initial briefing of these legal issues, DOE understands that the Board’s direction to the parties to comment on the effect of LBP-10-22 is not limited to previously identified contentions. See LBP-10-22 at 5, 36. DOE submits that the Board’s resolution of these two issues affects NEV-Safety-130.
9 Nevada Petition at 859.
10 Id.
factual question of whether DOE has adequately demonstrated that the multibarrier protection system is not ‘wholly dependent on a single barrier.”’\(^{11}\)

Nevada asserts that NEV-Safety-162 remains valid because it raises a factual, safety question. Nevada is wrong. The Board need look no further than Nevada’s “statement of the contention itself,” which provides:

From SAR Subsections 1.1.3.1 and 1.1.3.2, and related subsections, it is clear that DOE plans to install the 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 \textit{defective or impossible} it will be too late to assure safety by alternative means.\(^{12}\)

Nevada’s contention statement assumes the absence or failure of drip shields due to their defective or impossible installation. In other words, this contention is predicated on the assumption that there will be no drip shields and that the License Application is deficient because it does not account for this assumption. Moreover, in support of this contention, Nevada specifically refers to NEV-Safety 161 (paragraph 5 in particular). But the Board has held that in the context of this contention Nevada cannot assume that all drip shields fail or are absent.\(^{13}\)

Also, the Board’s resolution of Legal Issue #10 renders NEV-Safety-162 subject to dismissal. There, the Board held that it will not be “impossible” for the Commission to make the finding required by 10 C.F.R. § 63.31(a)(2) considering DOE’s drip shield installation plan.\(^{14}\) And, Nevada’s discussion of the contention itself in its Petition and the arguments it raised in its

\(^{11}\) LBP-10-22 at 23.

\(^{12}\) Nevada Petition at 861 (emphasis added).

\(^{13}\) LBP-10-22 at 22-23.

\(^{14}\) LBP-10-22 at 27.
Reply Brief on Legal Issue # 10 demonstrate that it has not raised any factual issue.\textsuperscript{15} Rather, Nevada’s arguments on Legal Issue #10 in its Reply Brief show that NEV-Safety-162 essentially is a request for an amendment or exception to the provisions of Part 63,\textsuperscript{16} which Nevada should present to the Commission rather than to the Board.

As the Board noted in its Order, “Nevada will be able to raise factual issues concerning DOE’s ability to install the drip shields” under other admitted contentions.\textsuperscript{17} But NEV-Safety-162 does not address this factual issue.

DOE has identified NEV-Safety-130 as another contention that is affected by LBP-10-22. NEV-Safety-130 contends that “the contribution of the drip shields in the predicted performance of the repository should be ignored in the TSPA or, at a minimum, the no drip shield scenario should be considered as an alternative conceptual model and propagated through the assessment.”\textsuperscript{18} That contention assumes total failure of the drip shield system.

NEV-Safety-130 is affected by LBP-10-22 because that decision makes clear that Nevada cannot, as a matter of law, presume the absence of the drip shields. Nor is DOE required to evaluate the absence or failure of all drip shields. The Board stated that the NRC “has twice declined the opportunity to require DOE to evaluate, as a general matter, the absence or failure of the drip shields.”\textsuperscript{19} For Nevada’s argument to succeed, it would need to petition the Commission to amend Part 63.

\begin{itemize}
\item \textsuperscript{15} Nevada Petition at 861-63; Nevada Reply at 37-41.
\item \textsuperscript{16} See Nevada Reply at 37-38 (construing 10 C.F.R. §§ 63.31(a)(2) and 63.41(a), Nevada argued that for DOE’s drip shield installation, which would occur during the last phase of operation, an exception should be made to the “ordinary circumstances” in which “it would make no sense to be concerned about the status of construction completion at the pre-construction stage”). As the Board stated, “Nevada’s argument that the § 63.41(a) findings will be ‘impossible to make’ is flawed because the finding purported to be ‘impossible’ is not required by the regulations.” LBP-10-22 at 29. For Nevada’s argument to succeed, it would need to petition the Commission to amend Part 63.
\item \textsuperscript{17} LBP-10-22 at 29.
\item \textsuperscript{18} Nevada Petition at 701.
\end{itemize}
of all drip shields."\textsuperscript{19} The Board continued, holding that it would not “in effect, rule for Nevada on an argument that it has lost twice before the Commission and once before the Court of Appeals."\textsuperscript{20} While Nevada discusses a number of things that it believes can go wrong with the construction and installation of the drip shields in NEV-Safety-130,\textsuperscript{21} it uses this discussion to support its proposition that the contribution of all the drip shields should be ignored in the TSPA or that a “no drip shield scenario” should be used as an alternative conceptual model. Nevada cannot do this consistent with LBP-10-22. The Board should thus rule that NEV-Safety-130 is inadmissible too.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Michael R. Shebelskie

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\item LBP-10-22 at 22 (emphasis added).
\item \textit{Id.} at 23.
\item Nevada Pet. at 703-09,
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DATED: January 21, 2011

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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
(High Level Waste Repository Construction Authorization Application)

January 21, 2011
Docket No. 63-001-HLW

CERTIFICATE OF SERVICE

I hereby certify that copies of U.S. DEPARTMENT OF ENERGY’S STATEMENT OF ADDITIONAL VIEWS ON THE CONTENTIONS AFFECTED BY THE CAB ORDER OF DECEMBER 14, 2010 have been served on the following persons on this 21st day of January 2011 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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