U.S. DEPARTMENT OF ENERGY'S OPPOSITION TO THE STATE OF NEVADA’S MOTION FOR RECONSIDERATION

On January 20, 2011, the State of Nevada (Nevada) filed a motion for reconsideration (Reconsideration) in which it asked the Board to reconsider the earlier rejection of NEV-Misc-001 in LBP-09-06.1 Nevada’s Reconsideration is based on the Board’s holding on Legal Issue 5 in LBP-10-22, where the Board held that there is no legal requirement for DOE to consider the effects of erosion for “the post-10,000 year performance assessment” when “there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.”2 The U.S. Department of Energy (DOE) opposes Nevada’s Reconsideration because NEV-Misc-001 was properly dismissed in LBP-09-06, and LBP-10-22 reinforces the earlier dismissal of that contention.

1 Memorandum and Order (Identifying Participants and Admitted Contentions), LBP-09-06 (May 11, 2009).

2 Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, 72 N.R.C. ____ (slip. op. at 17) (Dec. 14, 2010).
Nevada argues that the Board should reconsider the earlier rejection of NEV-Misc-001 because the “factual predicate” of NEV-Misc-001 (i.e., NEV-Safety-041) will not be addressed due to the Board’s holding on Legal Issue 5 and, therefore, the Board’s premise for dismissing NEV-Misc-001 will never be proven correct or not.³ But NEV-Misc-001 has already been proven incorrect as a matter of fact and law.

NEV-Misc-001 was entirely predicated on NEV-Safety-041 and concerns the alleged effect of erosion 500,000 years after waste emplacement. NEV-Misc-041 states:

Legal issue: The construction authorization cannot be granted because, as contention NEV-SAFETY-041 establishes, Yucca Mountain will erode to the level of the repository drifts beginning around 500,000 years after waste emplacement, thereby exposing the waste packages to the atmosphere, with the result that for the period after about 500,000 years and continuing throughout the period of geologic stability the facility will no longer constitute a ‘repository’ but would, at best, constitute a retrievable storage facility, in violation of sections 2(18), 114(d), 141(g) and 302(d) of the NWPA, section 801(a) of the EnPA, and Public Law No. 107-200 (42 U.S.C. § 10135 note).⁴

Assuming NEV-Misc-001 had not already been dismissed, the Board’s holding in LBP-10-22 would subject this contention to dismissal. The Board held that 10 C.F.R. § 63.342(c) does not require the post-10,000 year assessment to include erosion effects if Nevada cannot show that erosion causes increases in radiological exposures or releases within the first 10,000 years.⁵ As the Board additionally held: “Unless erosion is ‘screened in’ as a FEP because of its effects during the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years.”⁶

³ Reconsideration at 2.
⁴ State of Nevada’s Petition to Intervene as a Full Party at 1144 (Dec. 19, 2008).
⁵ LBP-10-22 at 17.
⁶ Id. at 36.
Nevada concedes in its Reconsideration that erosion would not increase radiological exposures or releases during the first 10,000 years.⁷ This admission accordingly renders NEV-Safety-041 and NEV-Misc-001 inadmissible as a matter of law.

Nevada’s admission also proves that NEV-Misc-001 is irrelevant -- one of the reasons behind the dismissal of that contention in LBP-09-06. The following reason was stated for dismissal of that contention:

The contention does not satisfy section 2.309(f)(1)(vi) because it does not present a genuine dispute on a material issue of law or fact. The contention raises a legal issue that depends upon resolution of factual issues presented in NEV-SAFETY-041. . . If, on the other hand, the factual issues underlying NEV-SAFETY-041 are invalid, then this legal issue contention is irrelevant. Accordingly, NEV-MISC-001 is inadmissible.⁸

Nevada candidly states that erosion will not cause an increase in dose or releases within the first 10,000 years.⁹ As a consequence, the factual issues underlying NEV-Safety-041 are invalid, and, thus, NEV-Misc-001 has been proven irrelevant.

The Board should deny Nevada’s motion for reconsideration.

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⁷ Reconsideration at 2.
⁸ LBP-09-06, slip op. at 128 (emphasis added).
⁹ Reconsideration at 2.
Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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DATED:  January 31, 2011
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 31, 2011
Docket No. 63-001-HLW

CERTIFICATE OF SERVICE

I hereby certify that copies of U.S. DEPARTMENT OF ENERGY’S OPPOSITION TO THE STATE OF NEVADA’S MOTION FOR RECONSIDERATION have been served on the following persons on this 31st day of January 2011 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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