U.S. DEPARTMENT OF ENERGY’S MOTION TO DISMISS
NEI SAFETY CONTENTION 05

By Order dated March 24, 2011,¹ this Board instructed the U.S. Department of Energy (DOE) to timely file dispositive motions, such as a motion to dismiss, regarding those contentions that DOE indicated should be dismissed as a result of the Board’s decision in LBP-10-22 but that the party sponsoring the contention has not stipulated should be dismissed.² Accordingly, in response to the March 24, 2011 Order, DOE moves to dismiss NEI-Safety-05 filed by the Nuclear Energy Institute (NEI). The Board’s resolution of Legal Issue 1 on December 14, 2010 in LBP-10-22 makes NEI-Safety-05 inadmissible as a matter of law.

¹ Order (Dismissing Contentions) (March 24, 2011). The Board said that concerning the Phase I contentions that were identified “as directly or indirectly affected by the Board’s rulings in LBP-10-22, DOE or the NRC Staff should timely file dispositive motions seeking appropriate relief, such as a motion to dismiss a contention in whole or in part.” Id. at 2.

² Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, ___ N.R.C. ___ (Dec. 14, 2010).
The parties stipulated that NEI-Safety-05 was affected by the Board’s resolution of Legal Issue 1.\(^3\) NEI argues in NEI-Safety-05 that DOE is required to address “as low as reasonably achievable” (ALARA) considerations with respect to certain activities outside the Yucca Mountain geologic repository operations area (GROA).\(^4\) DOE and NRC Staff disagreed with NEI.\(^5\) The Board in LBP-10-22 agreed with DOE and NRC Staff, and specifically held that DOE was not required as a matter of law to take into account ALARA considerations outside the GROA.\(^6\) That ruling is dispositive of NEI-Safety-05. No other issue of law or fact remains to be decided under that contention. Accordingly, the Board should dismiss that contention.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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\(^4\) Reply of the Nuclear Energy Institute to the Answers to Its Petition to Intervene of the Department of Energy, the NRC Staff, and the State of Nevada at 80-83 (filed Feb. 24, 2009).

\(^5\) U.S. Department of Energy Brief on NEI-Safety Contention 05 at 2-9 (filed Dec. 7, 2009); see also NRC Staff Answer to Intervention Petitions at 134-136 (filed Feb. 9, 2009).

\(^6\) LBP-10-22 at 9.
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
U.S. DEPARTMENT OF ENERGY
(High Level Waste Repository)
Docket No. 63-001-HLW
ASLBP NO. 09-892-HLW-CAB04
April 8, 2011

CERTIFICATE OF SERVICE

I hereby certify that copies of the U.S. DEPARTMENT OF ENERGY’S MOTION TO DISMISS NEI SAFETY CONTENTION 05 have been served on the following persons on this 8th day of April, 2011 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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