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, DOE submits that the Board’s resolution of Legal Issues 7, 8, and 10 on December 14, 2010 in LBP-10-22 renders the following State of Nevada contentions inadmissable and they should be dismissed: NEV-Safety 149 (Legal Issue 7); and NEV-Safety-161, NEV-Safety-162, and NEV-Safety-130 (Legal Issues 8 and 10).

¹ Order (Dismissing Contentions) (March 24, 2011). The Board said: “with regard to the remaining Phase I contentions identified by the parties in the joint stipulation 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).
I. The Board Should Dismiss NEV-Safety-149

The parties stipulated that NEV-Safety-149 was affected by the Board’s resolution of Legal Issue 7. Nevada had raised NEV-Safety-149 to argue that DOE could not 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. DOE agrees with Nevada on this point. NEV-Safety-149 is thus moot inasmuch as there is nothing to decide under that contention.

Nor should Nevada be allowed to recast this contention as raising a factual issue concerning DOE’s QA program. As Nevada conceded in its Reply Brief on Phase I Legal Issues, NEV-Safety-149 involves no factual issues, but, rather, “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].” With that legal issue resolved, NEV-Safety-149 should be dismissed in accordance with DOE’s prior briefing on this issue.


4 As the Board noted: “[the] legal issue appears to have arisen from a misunderstanding based upon an erroneous statement in a supporting technical document, which was corrected before the License Application was filed.” DOE’s correction means that it is not categorically relying on its QA program in the manner NEV-Safety-149 posits. LBP-10-22 at 19-20 (emphasis added).

5 State of Nevada Reply Brief on Phase I Legal Issues (Reply Brief) at 26 (filed Jan. 6, 2010 (emphasis in original).

6 U.S. Department of Energy’s Statement of Additional Views on the Contentions Affected by the CAB Order of December 14, 2010 at 1-3 (filed Jan. 21, 2011); U.S. Department of Energy Brief on Nevada-Safety Contention 149 (filed Dec. 7, 2009). See also Advanced Medical Systems, Inc. (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 N.R.C. 181, 185 (1993) (dismissing a case as moot when no “litigable controversy” remained); Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), ASLB 06-844-01-LR, 63 N.R.C. 737, 743-44 (2006) (dismissing a contention of omission as moot when the applicant committed to provide periodic measurement updates during the renewal period).
II. The Board Should Dismiss NEV-Safety-161, -162, and -130

Legal Issues 8 and 10 concern legal issues associated with the drip shields. With respect to Issue 8, the Board held in LBP-10-22 that there is no requirement that DOE postulate the absence or complete failure of drip shields, or perform a drip shield neutralization analysis. The Board held in Issue 10 that “[b]ecause the drip shields are not required for initial operation, they are not part of the substantial completion determination [of § 63.41(a)]. Thus, 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.” DOE contends that the holdings on these two legal issues resolve NEV-Safety-161, -162, and -130.

A. NEV-Safety-161

Nevada raised this contention as a legal issue, and the parties stipulated that Legal Issue 8 affected it. Following the Board’s decision in LBP-10-22, Nevada has attempted to recast this contention as a factual one, saying that it now concerns whether the multi-barrier system is not “wholly dependent on a single barrier.” NEV-Safety-161 does not, however, address that issue. NEV-Safety-161 is predicated solely on the absence of drip shields or the total failure of all the drip shields. The thrust of NEV-Safety-161 is that DOE had to evaluate the absence or failure of drip shields, and the Board held that, as a matter of law, DOE was not required to perform such an evaluation, thereby disposing of this contention.

7 LBP-10-22 at 20-23.
8 LBP-10-22 at 29.
9 State of Nevada’s Separate Comments Regarding the Impact of LBP-10-22 on NEV-Safety-130, 149, 161, and 162 (Nevada Comments on LBP-10-22) (filed Jan. 21, 2011).
10 State of Nevada’s Petition to Intervene as a Full Party (Nevada Petition) at 859 (filed Dec. 19, 2008).
B. **NEV-Safety-162**

The resolution of Legal Issue 10 in LBP-10-22 requires dismissal of NEV-Safety-162. In Legal Issue 10, the Board rejected Nevada’s attempt in NEV-Safety-162 “to jump the gun,” holding that the Board would not “read section 63.31 so broadly as to import the substantial completion test of section 63.41 (which is an analysis required during the subsequent license to receive and possess stage) into the construction authorization test of section 63.31.”\(^{11}\) Rather than being “impossible,” as Nevada asserted in NEV-Safety-162,\(^{12}\) the Board said it would “not conclude that, as a matter of law, the required finding concerning construction completion cannot be made.”\(^{13}\)

The Board’s resolution of Legal Issue 10 also demonstrates that NEV-Safety-162 is immaterial and therefore provides the Board another reason for dismissal. A contention is immaterial, and must be dismissed, if its resolution would not make a difference in the outcome of the proceeding.\(^{14}\) Here, NEV-Safety-162 is immaterial because the Board has found that the requirements of 10 C.F.R. § 63.41(a)(2) cannot be incorporated into the construction authorization finding for § 63.31(a).

Nevada contends in response that NEV-Safety-162 asserts as a factual issue that DOE’s drip shield installation plan “cannot be justified as safe,”\(^{15}\) because, according to Nevada, “if installation of the drip shields proves to be defective or impossible it will be too late to assure

\(^{11}\) LBP-10-22 at 28.

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

\(^{13}\) Id. at 28-29.


\(^{15}\) Nevada Comments on LBP-10-22 at 7.
safety by alternative means.” NEV-Safety-162 thus assumes that there will be no drip shields. But the Board’s resolution of Legal Issue 8 (see discussion of NEV-Safety-161 supra) forecloses such an assumption and thus precludes Nevada from trying to salvage the contention on that basis.

C. NEV-Safety-130

While the parties did not stipulate that NEV-Safety-130 was affected by the Board’s resolution of LBP-10-22, DOE identified it as such consistent with LBP-10-22. This contention should be dismissed because it presumes the absence of drip shields. NEV-Safety-130 states: “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.”

DOE is not required “to assume and then analyze the complete failure” of the drip shields (Legal Issue 8), which is what NEV-Safety-130 would require. DOE is not required, further, to make a case for something in the construction authorization stage that it will have to make in a later stage and, that, thus, “is not required by the regulations.” The Board should dismiss NEV-Safety-130 as it is inconsistent with LBP-10-22.

16 Nevada Petition at 861 (emphasis added).
17 DOE Statement on LBP-10-22 at 5.
18 Nevada Petition at 701 (emphasis added).
19 LBP-10-22 at 21.
20 Id. at 29.
Respectfully submitted,

**U.S. DEPARTMENT OF ENERGY**

By  Electronically Signed by Michael R. Shebelskie

Donald P. Irwin  
Michael R. Shebelskie  
HUNTON & WILLIAMS LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, Virginia  23219-4074

Sean A. Lev  
James Bennett McRae  
U.S. DEPARTMENT OF ENERGY  
Office of General Counsel  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC  20585

*Counsel for the U.S. Department of Energy*
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 NEVADA SAFETY CONTENTIONS 149, 161, 162, AND 130 have been served on the following persons on this 8th day of April, 2011 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

CAB 04
Atomic Safety and Licensing Board Panel
Thomas S. Moore, Chair
E-mail: tsm2@nrc.gov
Paul S. Ryerson
E-mail: psr1@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

Parties Served
Adams, Marta
Albert, Michelle D.
Andersen, Robert M.
Bailey, Annie
Barlow, Gregory
Baughman, Mike
Bauser, Michael A.
Bell, Kevin W.
Berkey, Curtis
Berger, Michael

E-mail Addresses
madams@ag.nv.gov
Michelle.Albert@nrc.gov
robert.andersen@akerman.com
baileys@lcturbonet.com
lcda@lcturbonet.com
mikebaughman@charter.net
mab@nei.org
kwbell@energy.state.ca.us
cberkey@abwwlaw.com
michael@lawofficeofmichaelberger.com
Beutel, Theodore
Bielecki, Jessica
Bollwerk III, G. Paul
Borski, Laurie
Bowers, Todd
Brooks, Felicia M.
Carter, Lorraine
Choate, Zoie
Colburn, Ross
Cottingham, Anne
Crosland, Martha S.
Culler, Sara
Curran, Diane
Damele, Ronald
Deucher, Joseph
Dinizio, Nicholas
Dobie, Julie
Dreher, Michael
Dudley, Sherry
Dunning, Michael
Durbin, Susan
Eiteim, Anthony C.
ThinElk, Shane
Eredia, Sally
Fitz, Andrew
Fitzpatrick, Charles J.
Francis, Karin
Fraser, Matthew
Frishman, Steve
Gitter, Rebecca
Gilman, Joseph
Ginsberg, Ellen C.
Gores, Jennifer A.
Gottshall, Thomas R.
Graser, Daniel J.
Hanna, Robert S.
Harich, Patricia
Harrington, Arthur J.
Hart, Joshua
Hawkins, E. Roy
Hearing Docket
Heinzen, Steven A.
Hembacher, Brian
Horin, William
Houck, Darcie L.
James, Gregory L. Esq.  gljames@earthlink.net
Johnson, Abigail  eurekanrc@gmail.com
Julian, Emile  Emile.julian@nrc.gov
Keskey, Don  donkeskey@publiclawresourcenter.com
Klevorick, Phil  klevorick@co.clark.nv.us
Larimore, Patricia  plarimor@talisman-intl.com
Lawrence, John W.  jlawrence@nuclearlawyer.com
Leigh, Rovianne  rleigh@abwwlaw.com
Lembke, Alisa  alembke@inyocounty.us
Lenehan, Daniel  daniel.lenehan@nrc.gov
Lev, Sean  sean.lev@hq.doe.gov
Lewis, Linda  linda.lewis@nrc.gov
List, Robert F.  rlist@armstrongteasdale.com
Loveland, Bryce  bloveland@jsslaw.com
Lunt, Robin  rlunt@naruc.org
Lynch, Susan  slynch1761@gmail.com
Maerten, Daniel  Daniel.Maerten@caci.com
Mahowald, Phillip  pmahowald@piic.org
Malsch, Martin G.  mmalsch@nuclearlawyer.com
Martin, Circe  ogcmailcenter@nrc.gov
Martinez, Melanie  wpnucwst2@mwpower.net
Mathias, Linda  yuccainfo@mineralcountynv.org
MacDonald, Diana  dianam@atg.wa.gov
McRae, James Bennett  Ben.McRae@hq.doe.gov
Mercado, Michele  michele.mercado@doj.ca.gov
Miller, Cynthia  cmiller@psc.state.fl.us
Miras-Wilson, Rachel  rwilson@winston.com
Montesi, Susan  smontesi@nuclearlawyer.com
Moore, Thomas S.  tsm2@nrc.gov
Mueller, Edwin  muellered@msn.com
Murphy, Malachy  mrmurphy@chamberscable.com
Nelson, Sharon  sharonn@atg.wa.gov
Nezhad, Cyrus  Cyrus.Nezhad@hq.doe.gov
Niegemann, Brian  bniegemann@ndnlaw.com
OCAA Mail Center  OCAAMAIL@nrc.gov
Overton, H. Lee  Leeo1@atg.wa.gov
Pak, Christina  Christina.Pak@hq.doe.gov
Peebles, John M.  jpeebles@ndnlaw.com
Pitchford, Loreen, LSN Coordinator  lpitchford@comcast.net
Pitts, Jason  jayson@idtservices.com
Poland, Douglas M.  dpoland@gklaw.com
Putzu, Frank  frank.putzu@navy.mil
Ramsay, James  jramsay@naruc.org
Renfro, Hanna  hrenfro@gklaw.com
Repka, David A.  dreika@winston.com
Sean A. Lev  
James Bennett McRae  
U.S. DEPARTMENT OF ENERGY  
Office of General Counsel  
Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC  20585  

Counsel for the U.S. Department of Energy