

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 63-001
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository)	)	09-877-HLW-CAB02
	)	09-878-HLW-CAB03
	)	

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NRC STAFF NOTICE OF APPEAL OF LBP-09-06 AND BRIEF IN SUPPORT OF APPEAL  
FROM LBP-09-06

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Daniel W. Lenehan  
Andrea L. Silvia  
Kevin C. Roach  
Mitzi A. Young  
Adam S. Gendelman  
Counsel for NRC Staff

May 21, 2009

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NRC STAFF NOTICE OF APPEAL OF LBP-09-06

Pursuant to 10 C.F.R. § 2.1015(b), the Staff of the Nuclear Regulatory Commission hereby provides this notice of appeal from “Memorandum and Order (Identifying Participants and Admitted Contentions),” issued on May 11, 2009. *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC \_\_\_, slip op. (May 11, 2009). For the reasons set forth in the Staff’s accompanying brief, the Construction Authorization Boards’ rulings with respect to certain contentions are erroneous. Accordingly, the rulings on these contentions should be reversed.

Respectfully submitted,

**/Signed (electronically) by/**

Andrea L. Silvia  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15-D21  
(301) 415-8554  
alc1@nrc.gov

Dated at Rockville, Maryland,  
this 21st day of May, 2009

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NRC STAFF BRIEF IN SUPPORT OF APPEAL OF LBP-09-06

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NRC STAFF BRIEF IN SUPPORT OF APPEAL FROM LBP-09-06

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1015(b), the Staff of the U.S. Nuclear Regulatory Commission (Staff) hereby appeals “Memorandum and Order (Identifying Participants and Admitted Contentions)” filed in the above-captioned proceeding. *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-09-06, 69 NRC \_\_\_ slip op. (May 11, 2009). For the reasons set forth below, the Staff submits that the ruling admitting certain contentions should be reversed because the Licensing Boards erred in concluding that they met or need not satisfy the contention admissibility criteria set forth in 10 C.F.R. § 2.309(f)(1).

BACKGROUND

On June 3, 2008, the Department of Energy (DOE) submitted the Yucca Mountain Repository License Application (LA) to the NRC, seeking authorization to construct a geologic repository at a geologic repository operations area at Yucca Mountain, Nevada, in accordance with the provisions of 10 C.F.R. Part 63. The notice of receipt of this application was published in the *Federal Register* on June 17, 2008. Yucca Mountain; Notice of Receipt and Availability of

Application, 73 Fed. Reg. 34,348 (June 17, 2008); Yucca Mountain; Notice of Receipt and Availability of Application; Correction, 73 Fed. Reg. 40,883 (July 16, 2008).

In September 2008, the Staff determined that the application contained sufficient information, pursuant to 10 C.F.R. Part 2 and Part 63, to begin its detailed technical review and docketed the application. Department of Energy; Notice of Acceptance for Docketing of a License Application for Authority to Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 53,284 (Sept. 15, 2008).<sup>1</sup> On October 17, 2008, the Commission issued its "Notice of Hearing and Opportunity to Petition for Leave to Intervene." *U.S. Dept' of Energy (High-Level Waste Repository)*, CLI-08-25, 68 NRC \_\_\_ slip op. (Oct. 17, 2009). The Notice of Hearing was subsequently published in the *Federal Register* on October 22, 2008. In the Matter of U.S. Department of Energy (High-Level Waste Repository); Notice of Hearing and Opportunity To Petition for Leave to Intervene on an Application for Authority To Construct a Geologic Repository at a Geologic Repository Operations Area at Yucca Mountain, 73 Fed. Reg. 63,029 (Oct. 22, 2008).

Petitions for leave to intervene and requests for hearing were filed by the State of Nevada;<sup>2</sup> the Nuclear Energy Institute (NEI);<sup>3</sup> Nye County, Nevada; the Nevada Counties of Churchill, Esmeralda, Lander and Mineral (jointly); the State of California;<sup>4</sup> Clark County,

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<sup>1</sup> The notice of docketing stated that it was the Staff's position that it is practicable to adopt, with further supplementation, the Environmental Impact Statement (EIS) and Supplements prepared by DOE. The basis for the Staff's decision was presented in "*U.S. Nuclear Regulatory Commission Staff's Adoption Determination Report for the U.S. Department of Energy's Environmental Impact Statements for the Proposed Geologic Repository at Yucca Mountain*" (Agencywide Documents Access and Management System (ADAMS) Accession No. ML082420342). 73 Fed. Reg. at 53,285.

<sup>2</sup> State of Nevada's Petition to Intervene as a Full Party, filed December 19, 2008 (Nevada Petition).

<sup>3</sup> The Nuclear Energy Institute's Petition to Intervene, filed December 19, 2008 (NEI Petition).

<sup>4</sup> State of California's Petition for Leave to Intervene in the Hearing, filed December 20, 2008 (California Petition).

Nevada; the County of Inyo, California; White Pine County, Nevada; the Timbisha Shoshone Tribe; the Native Community Action Council; the Timbisha Shoshone Yucca Mountain Oversight Program Non-Profit Corporation; and Caliente Hot Springs Resort, LLC. See LBP 09-06, slip. op. at 4-5.

DOE filed answers to the petitions on January 15 and 16, 2009, and the Staff filed its answer to all petitioners on February 9, 2009<sup>5</sup>. By February 24, 2009, Nevada, NEI, and California were among ten petitioners who filed timely replies.<sup>6</sup> A telephonic prehearing conference was held on March 13, 2009, and the three Construction Authorization Boards (CABs or Boards) designated to rule on the petitions<sup>7</sup> heard oral argument on contention admissibility on March 31 through April 2, 2009, in Las Vegas, Nevada.

On May 11, 2009, the Boards granted ten petitions to intervene and admitted all but 17 of 318 proffered contentions. LBP-09-06, slip op. at 1, 8-10 and (Attachments A and B).<sup>8</sup> The Boards reached their decision based on a consideration of over 12,000 pages in filings by the DOE, NRC Staff and various petitioners in the proceeding, and noted the time constraints imposed on their decision. See LBP-09-06, slip op. at 101, 21. The Boards addressed

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<sup>5</sup> NRC Staff Answer to Intervention Petitions (Feb. 9, 2009) (Staff Answer).

<sup>6</sup> See, e.g., State of Nevada's Reply to DOE's Answer to Nevada's Petition to Intervene as a Full Party," filed on Feb. 24, 2009; "State of Nevada's Reply to NRC Staff's Answer to Nevada's Petition to Intervene as a Full Party," filed on Feb. 24, 2009 (Nevada Reply); "Reply of the Nuclear Energy Institute to the Answers to its Petition to Intervene by the Department of Energy, the NRC Staff, and the State of Nevada," filed on February 24, 2009 (NEI Reply); "State of California's Reply to Answer of the U.S. Department of Energy and NRC Staff Answer," filed on Feb. 23, 2009 (California Reply).

<sup>7</sup> Department of Energy; Establishment of Atomic Safety Licensing Boards, 74 Fed. Reg. 4477 (Jan. 26, 2009).

<sup>8</sup> Two parties, Joint Timbisha Shoshone Tribal Group and Native Community Action Council (NCA), were found to have standing and to have presented at least one admissible contention, but were not granted intervenor status pending a showing of compliance with the Commission's LSN requirements. Id. at 93, 99.

proffered contentions globally in terms of overarching issues. See *id.* at 21-62.<sup>9</sup> The overarching issues discussed included pleading requirements for NEPA contentions, *id.* at 21, HLW transport under NEPA, *id.* at 36, and the treatment of contentions that present legal issues, *id.* at 61. The Boards departed from the traditional approach of including a contention-by-contention discussion of their rationale for finding that contention admissibility standards were met and delineating the scope of admitted issues.<sup>10</sup> Each Board adopted as its own the discussion of legal standards that govern Board decisions, as well as the conclusions reached on overarching issues, but each Board independently ruled upon the petitions and contentions it was assigned. See LBP-09-06, slip op. at 2-3.

### DISCUSSION

#### I. Legal Standards for Review and Contention Admission

This appeal is governed by 10 C.F.R. § 2.1015, which permits an appeal from “a presiding officer prehearing conference order issued under 10 C.F.R. § 2.1021.” See LBP-09-06, slip op. at 142. The Commission gives “substantial deference to [Board] determinations on threshold issues, such as standing and contention admissibility. *Amergen Energy Co, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 121 (2006) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999)); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

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<sup>9</sup> The Boards indicated that the decision “to admit a large proportion of proffered contentions is driven by our resolution of the overarching issues that formed major portions of the DOE and NRC Staff opposition to the proffered contentions . . . [and] the Boards’ determination that in many respects, opposition to the contentions was based on an attempt to address the underlying factual merits.” LBP-09-06, slip op. at 102.

<sup>10</sup> See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), 47 NRC 142 (1998) (over 80 contentions discussed individually); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 & 3), LBP-08-13, 68 NRC 43 (2008) (over 50 contentions discussed individually).

The Commission will defer to Board rulings on contention admissibility “in the absence of clear error or abuse of discretion.” *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-09-08, 69 NRC \_\_\_\_ (May 18, 2009) (slip op. at 7) (citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-08-17, 68 NRC 231, 234 (2008)) The Commission’s standard for “clear error” is quite high. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-08, 58 NRC 11, 25-26 (2003). For example, the Commission will not overturn a Board’s findings simply because it might have reached a different result or because the record could support a view sharply different from that of the Board. See *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2 & 3), CLI-04-24, 60 NRC 160, 190 (2004). Notwithstanding this high standard, the Commission will reverse a Board’s legal conclusions “if they are ‘a departure from or contrary to established law.’” *Watts Bar*, CLI-04-24, 60 NRC at 190.

Proffered contentions must meet all six of the contention admissibility criteria of 10 C.F.R. § 2.309(f)(1). A proffered contention that fails to satisfy any one of the six requirements may not be admitted. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004); see also *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999). Consequently, a Board decision to admit a contention that does not meet all six of the 10 C.F.R. § 2.309(f)(1) standards is a “departure from or contrary to established law” that the Commission will reverse. See *Watts Bar*, CLI-04-24, 60 NRC at 160.

## II. APPEAL OF SPECIFIC CONTENTIONS

Staff maintains that a number of contentions were admitted in error. Because the Boards do not specifically articulate the bases for their admissibility decisions with respect to certain individual contentions, the Staff focuses its arguments herein on the arguments

advanced by the petitioners in their intervention petitions and replies. The Boards stated that they “have done nothing more nor less than admit contentions that comply with the Commission’s pleading requirements and not admit the relatively few that fail to comply,” and that “[i]mplicit in each Board’s rulings on contentions . . . is the rejection of the specific arguments raised in opposition to that contention.”<sup>11</sup> LBP-09-06, slip op at 103, 102.

The Staff notes the Boards’ statement that they “contemplate that many contentions that are admitted in this initial phase might have to be narrowed or otherwise restructured at later stages in the proceeding.” *Id.* at 21. Accordingly, the Staff expects that the Boards will provide further opportunities to refine and clarify the admitted contentions. Thus, the Staff’s appeal focuses only on those contentions where the Boards’ admission of the contention was clear, reversible error. The Staff asks that the Commission dismiss these contentions for the reasons set forth below and in the Staff’s Answer.

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<sup>11</sup> While the Staff appreciates the time constraints under which the Boards were working to review the numerous contentions in this proceeding, see LBP-09-06, slip op. at 21, in many instances, the Boards did not provide meaningful explanation of their reasoning for admitting a contention. Specifically, for many contentions, the only basis identified for admission is that “[e]ach contention listed in Attachment A satisfies the six requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi),” is otherwise admissible, and that “[i]mplicit in each Board’s rulings on contentions . . . is the rejection of the specific arguments raised in opposition to that contention.” LBP-09-06, slip op. at 102. This broad brush approach to addressing contention admissibility deprives the Commission, the hearing participants, other interested stakeholders, and the public of the ability to understand the rationale for the Boards’ conclusions. While hearing participants, including the Staff, and other stakeholders might well have agreed with the Boards’ decision to admit many of the contentions, the absence of meaningful analysis for each admission determination leaves room for doubt as to the reasoning underlying those determinations. This hampers the ability of the participants in the proceeding to fully understand the scope of the issues admitted for litigation. The Commission, in an exercise of its inherent supervisory authority over licensing proceedings, may wish to direct the Boards to clarify their Order, and to provide more reasoned bases for their admission decisions. See *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-104, 6 AEC 179, 179-180 (1973) (“[T]he Board was required at the very least (1) to make specific determinations on the questions respecting whether [the petitioner] had established the requisite personal interest and had set forth adequate contentions; and (2) to articulate in reasonable detail the basis for those determinations. . . . Accordingly, we are constrained to remand the proceeding to the Licensing Board with instructions to issue and transmit to us . . . a supplemental memorandum which takes into account this obligation.”)

A. Legal Contentions

The Licensing Boards, in designating certain contentions as legal contentions, stated that:

The Boards have admitted as legal issue contentions: (1) certain contentions so identified by petitioners; (2) certain contentions not so identified by petitioners but identified as such by the Boards; and (3) certain contentions that contain factual allegations but that also are in part appropriate for resolution as a legal issue.

LBP-09-06, slip op. at 62. With respect to certain contentions designated by the CABs as “legal contentions,” the Boards state that each admitted contention satisfies all of the Commission’s admissibility standards. LBP-09-06, slip op at 102. But the Boards also stated that “[n]ot all the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) necessarily apply to legal issue contentions.” *Id.* at 61. As an example, the Boards point to Section 2.309(f)(1)(v), noting that “a purely legal issue contention obviously need not allege ‘facts.’” *Id.* However, there is no exception to the admissibility requirements in 10 C.F.R. § 2.309(f)(1)(v) for legal contentions. Further, section 2.309(f)(1)(v) requires a petitioner to “[p]rovide a concise statement of the alleged facts or expert opinions which support the requestor’s/petitioner’s position on the issue and on which the petitioner intends to rely at hearing . . . .” Merely because a contention raises a legal issue does not excuse a petitioner from having to allege the facts that show *why* resolution of a legal question implicates the Commission’s licensing decision that is the subject of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iv).

In the *Bellefonte* decision, the Commission stated that “[a]lthough the *Bellefonte* Board was free to view [i]ntervenors’ support for [a proffered contention] in the light most favorable to [i]ntervenors, the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).” *Tenn. Valley Authority (Bellefonte Nuclear Power Plant, Units 3 & 4)*, CLI-09-03, 69 NRC \_\_ slip op. at 6 (Feb. 17, 2009). No exception for “legal contentions” is specified in 10 C.F.R. Part 2. In fact, in a recent *Calvert Cliffs* decision, the licensing board

admitted a contention that it found raised only a question of law concerning the proper timing for the applicant to submit financial tests for parent company guarantees, but still subjected that contention to the Commission's contention admissibility criteria without any suggestion that some were inapplicable. *Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC* (Calvert Cliffs Unit 3), LBP-09-04, 69 NRC \_\_\_ slip op. at 76-77 (Mar. 24, 2004). Thus, the CABs erred as a matter of law in ruling that legal issues do not have to meet all the admissibility criteria of 10 C.F.R. § 2.309(f)(1). 69 Fed. Reg. at 2221 (“[N]o contention will be admitted for litigation in any NRC adjudicatory proceeding unless these requirements are met.”); *see also, Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC at 325.

The Commission emphasized in *Bellefonte* that “the Board was not free to ignore the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1).” *Bellefonte*, CLI-09-03, slip op. at 6. Although the basis for the admission of the legal contentions is not addressed with respect to each contention, based on the Boards' ruling, it appears that the Board admitted these contentions notwithstanding the fact that not all of the admissibility standards were met. The erroneously admitted legal contentions are: NEV-SAFETY-004; NEV-SAFETY-5; NEV-SAFETY-006; NEV-SAFETY-009; NEV-SAFETY-0010; NEV-SAFETY-11; NEV-SAFETY-12; NEV-SAFETY-0013; NEV-SAFETY-0019; NEV-SAFETY-00139; NEV-SAFETY-146; NEV-SAFETY-149; NEV-SAFETY-161; NEV-SAFETY-169; NEV-SAFETY-171; NEV-SAFETY-184 through NEV-SAFETY-00194; NEV-SAFETY-201; NEV-MISC-002; CAL-NEPA-005; NCA-MISC-001 and NYE-SAFETY-4. *See* LBP-09-06, slip op. at 125, 126-27, 128, 130, 136, 138-39.

The Licensing Boards also erred by admitting legal contentions where the legal issue is whether the proffered contention is within the scope of this proceeding, material to the NRC's licensing decision, or otherwise compliant with 10 C.F.R. § 2.309(f)(1). But by admitting these contentions and explicitly stating that “[e]ach contention listed in Attachment A satisfies the six requirements of 10 C.F.R. § 2.309(f)(1)(i)-(vi),” LBP-09-06, slip op. at 102, the Licensing Boards

appear to have already decided the legal issue presented in the contention in the petitioners' favor. That is, if resolution of a legal question means that a contention is not within the scope of this proceeding, or is not material to the Commission's licensing decision, it thus fails to satisfy 10 C.F.R. § 2.309(f)(1)(iii) or (iv), and should not have been admitted in the first place. The Licensing Boards should have made determinations on these legal contentions in their Order, rather than admitting the contentions pending further briefing where the issue to be briefed has effectively already been determined by virtue of the admission of the contention.

For example, the Boards stated, in describing an exemplar legal contention, that "NYE-SAFETY-004 alleges that DOE has inadequately considered the radiation doses to members of the public from naturally occurring radon and its decay products emitted as a result of repository construction and normal operations. The threshold legal issue of what authority, if any, the NRC has to regulate radon and its daughters will require further briefing." LBP-09-06 slip op. at 126. This statement demonstrates error in the Board's treatment of legal contentions. The "threshold legal question" that the Board believes requires further briefing *is* whether the contention is within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii). By admitting the contention, the Board effectively resolved the very question that it believes requires further briefing. A contention that presents a "threshold legal issue" is not exempted from complying with the Commission's contention admissibility criteria. See *Private Fuel Storage, L.L.C.*, CLI-99-10, 49 NRC at 325.

Admission of NEV-SAFETY-146 and the identical NEV-SAFETY-201 are examples. Here, Nevada asserts that the LA cannot be granted because it relies on only preliminary or conceptual design information. NEV Petition at 770. The Staff opposed this contention, among other reasons, because it does not raise an issue that was material to the Commission's licensing decision because Nevada has not alleged that any of DOE's design information (preliminary, conceptual, final or otherwise) fails to satisfy Part 63 or other requirements. Staff Answer at 805. Nevada replied that the contention was material because it "raises one very

specific legal issue – whether Part 63 requires that the application include final design information.” NEV Reply at 483. But just as above, the legal issue here is a contention admissibility criterion (here, the materiality of the contention pursuant to section 2.309(f)(1)(iv)). If in construing Nevada’s petition, the Board concluded that Part 63 or another applicable requirement requires final design information, then DOE’s reliance upon conceptual or preliminary design information, if proven, would fail to satisfy Commission regulations, and prevent the issuance of a CA; thus the contention presents a material issue.

But if, on the other hand, the licensing board construing the petition found that NRC requirements do not require final design information, then DOE’s reliance upon conceptual or preliminary design information does not impact the Commission’s licensing decision, and thus, does not present a material issue. Accordingly, the contention would not satisfy 10 C.F.R. § 2.309(f)(1)(iv). Therefore, the Boards erred in admitting legal contentions where the legal issue to be briefed is a contention admissibility criterion itself. Admitted contentions where the legal issue is a contention admissibility criterion include NYE-SAFETY-4, NEV-SAFETY-004; NEV-SAFETY-5, NEV-SAFETY-006, NEV-SAFETY-146 (and the identical NEV-SAFETY-201), NEV-SAFETY-161, NEV-SAFETY-169, NEV-SAFETY-171, and CAL-NEPA-5.

The Licensing Boards erroneously failed to apply each of the Commission’s contention admissibility criteria to identified legal contentions. Further, the Boards admitted contentions where the legal issue is a contention admissibility criterion. Accordingly, those admitted contentions listed above should be dismissed.

B. Specific Contentions

The following contentions should not have been admitted for the specific reasons discussed below.

1. CAL-NEPA-005: Incomplete and Inaccurate Project Description

This contention asserts that DOE's NEPA documents contain an inadequate project description because it is reasonably foreseeable that, at DOE's request, Congress could increase the capacity limit of the repository by up to four times. CAL Petition at 37. The Boards admitted this contention as a legal issue stating that although "the current capacity of the repository is fixed at 70,000 metric tons by section 114(d) . . . in these circumstances, the significance of the current capacity limitation is unclear." *High-Level Waste Repository*, LBP-09-06, 69 NRC \_\_\_ slip op. at 136. As the Staff stated in its Answer, however, this contention does not raise an issue that is material to the findings NRC must make to support the action involved in this licensing proceeding. Staff Answer at 1104-05, *citing* 10 C.F.R. § 2.309(f)(1)(iv).

For the purposes of this licensing proceeding, the Nuclear Waste Policy Act of 1982, as amended, limits the repository disposal capacity to 70,000 MTHM. Staff Answer at 1104, *citing* 42 U.S.C. § 10134(d) (2005). This limit is also incorporated by reference in Part 63. See 10 C.F.R. § 63.42(d). If the law were changed to increase the capacity limit of the repository, a late-filed contention advancing the arguments in CAL-NEPA-5 could be filed. But so long as the Commission only has the authority to grant a license that "shall prohibit the emplacement in the first repository . . . a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal," the scope of the EIS is limited to the proposed action. 42 U.S.C. § 10134(d) (2005).

California's Reply argued that NEPA compels DOE to conduct an analysis for "every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." CAL Reply at 141, *citing* 42 U.S.C. § 4332(2)(C) (emphasis in original). While DOE may be required to perform an EIS to satisfy its NEPA obligations when proposing legislation, the issue in this proceeding is the proposed issuance of a construction authorization and not proposed legislation. The license application requests a construction authorization for a facility with a 70,000 MTHM capacity limit; the NEPA documents need only analyze the impacts of the project described in this pending

application. See *Louisiana Energy Services, L.P.* (National Enrichment Facility), LBP-06-8, 63 NRC 241, 258 (2006); see, e.g., SAR Section 1.2.1 at 1-15. Although DOE's FSEIS included some discussion of scenarios in which the repository capacity would be increased, this discussion was not necessary to support the action proposed in this proceeding. See, e.g., FSEIS Section 8.1.2.1 at 8-4-7. The Licensing Board's admission of this contention, therefore, was an error of law and should be reversed.

2. NEI - SAFETY - 001: Spent Nuclear Fuel  
Direct Disposal in Dual Purpose Canisters

In NEI's initial petition, NEI-SAFETY-001 asserts the LA statement that all commercial spent nuclear fuel will be loaded into Transportation, Aging, and Disposal (TAD) canisters for disposal is inconsistent with ALARA, leads to unnecessary generation of LLRW, and results in increased resource use and costs because Dual Purpose Canisters (DPCs) can be directly disposed of in the repository. NEI Petition at 9. NEI claimed that workers at either Yucca Mountain or reactor sites will be unnecessarily exposed to increased radiation as a result of unloading the fuel from DPCs and reloading it into TADs. *Id.* In its Answer, the Staff argued that NEI-SAFETY-001 was inadmissible because it: (a) did not raise an issue material to the findings the NRC must make to support the action involved in the proceeding; and (b) insofar as the contention relates to reactor sites' compliance with ALARA, it does not raise an issue within the scope of this proceeding. Staff Answer at 120.

With respect to the materiality criterion (section 2.309(f)(1)(iv)), the Staff argued that the ALARA principle only applies to the operational and decommissioning phases of the repository, but not to the achievement of the long-term performance objective. Staff Answer at 121 (citing Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV, 66 Fed. Reg. 55,732, 55,751 (Nov. 2, 2001)). However, DOE's decision to unload fuel from DPCs and reload it into TADs is a design decision affecting postclosure repository performance; it is not part of the operations of the geologic repository operations

area. *Id.* at 121-22 (citing 10 C.F.R §§ 63.2; 63.113). As the Staff noted in its Answer, once the decision to repackage the waste at Yucca Mountain is made, and approved, such repackaging would be subject to ALARA requirements. *Id.* at 122 n. 37, citing 10 C.F.R. § 63.111. Thus, the Staff argued, because ALARA does not apply to the achievement of post-closure performance objectives, NEI's contention is not material to a finding the NRC must make.

In its Reply, NEI argues that the Staff misunderstood its contention. NEI Reply at 33. NEI asserts that it is not seeking to apply ALARA to long-term performance objectives, but to the operation of the repository. *Id.* at 33-34. Further, NEI acknowledges that the Commission sought to prohibit using ALARA as a tool to reduce short-term exposures at the expense of potential long-term exposures. *Id.* at 33. NEI argues that all of the unnecessary increased dose and costs will occur during the preclosure period and that long-term repository performance is not a consideration apart from demonstrating that those requirements will be met with direct disposal of DPCs. *Id.* at 33-34. However, in order to achieve the benefits during preclosure that NEI argues can be realized through direct disposal of the DPCs, NEI is necessarily proposing a change to a design parameter chosen by DOE to meet postclosure performance objectives. Therefore, any benefits realized during preclosure from not repackaging waste into TADs would need to be counterbalanced by any performance reductions during the postclosure period. This balancing of present-day costs and benefits with future costs and benefits was precisely what the Commission sought to avoid in deciding not to apply ALARA considerations to the postclosure period. 66 Fed. Reg. 55,732, 55,751. The Commission stated:

Application of ALARA during operations compels the consideration of the benefits of further reduction in potential doses to present-day populations (e.g., increased cost to reduce potential doses further). The application of ALARA to the achievement of the postclosure performance objective would involve considerations far more complicated than those evaluated for operations. The reasonableness of further reduction of potential doses would need to evaluate the benefits and impacts that span many generations (e.g., costs incurred today versus a reduction of potential doses thousands of years in the future; repository designs that reduce potential doses in the future but increase doses to present-day workers during fabrication of the design such as installing a special backfill)...Therefore, although the Commission will require ALARA

considerations for the operational phase and decommissioning of the surface facilities, NRC will not explicitly require an ALARA analysis as part of the postclosure performance assessment.

*Id.* A design parameter, such as the waste package, cannot be changed to achieve benefits during the preclosure period without examining the impact that such a change would have on postclosure performance. The Commission has stated that the balancing of present-day costs and benefits with future costs and benefits is far more complicated than the balancing of costs and benefits to present-day populations and workers, and therefore, it will not apply ALARA principles to postclosure but instead adopt EPA's dose limit for long-term performance. *Id.* Because NEI seeks to apply ALARA principles to a design parameter important to postclosure performance, NEI-SAFETY-001 does not raise an issue material to the findings the NRC must make. Thus, the Board erred in failing to conclude that 10 C.F.R. § 2.309(f)(1)(iv) was not satisfied.

With respect to the scope, 10 C.F.R. § 2.309(f)(1)(iii), the Staff argued that to the extent NEI-SAFETY-001 claims activities that occur at the reactor sites will not be ALARA, it does not raise a safety issue within the scope of this proceeding because reactor licensees' compliance with Part 20, pursuant to 10 C.F.R. § 50.40 is not an issue in this proceeding regarding whether a construction authorization should be granted or denied for the Yucca Mountain repository. See Staff Answer at 120. In its Reply, NEI essentially argues that because DOE's proposed design and operating procedures will have an impact on activities at other sites, its contention is within the scope of the proceeding. See NEI Reply at 26, 29. However, there is no basis for NEI's assertion. As discussed more fully below, with respect to NEI-SAFETY-002, the focus on this proceeding is whether DOE meets the requirements of 10 C.F.R. Part 63. See Notice of Hearing, 73 Fed. Reg. at 63,029. Part 63 focuses on activities at the GROA and whether those activities (construction and operation) can be conducted without exceeding prescribed dose

criteria. See 10 C.F.R. § 63.311. NEI's assertion that the activities of Part 50 reactor licensees at reactor sites are within the scope of this proceeding is not supported.

Because NEI-SAFETY-001 fails to raise an issue material to a finding the NRC must make in this proceeding, and insofar as it concerns reactor sites' compliance with ALARA, it does not raise an issue within the scope of this proceeding and it is inadmissible. The Board's admission of this contention, therefore, was an error of law and should be reversed.

3. NEI-SAFETY-002: Insufficient Number of Non-TAD SNF Shipments to Yucca Mountain

In NEI-SAFETY-002, NEI claimed that because the repository surface facilities are designed to receive at least 90 percent of commercial spent nuclear fuel at the repository in TAD canisters, this will cause reactor site workers to unload commercial SNF from dual-purpose canisters (DPCs) and transportable bare fuel casks (BFCs) and reload it into TAD canisters, which results in unnecessary exposure to radiation to reactor site workers and is therefore inconsistent with ALARA principles. NEI Petition at 13. The Staff opposed the admission of this contention, in part, based on the fact that it was outside the scope of the proceeding and did not raise an issue that was material to the findings the NRC must make to support the action in this proceeding. Staff Answer at 123 (citing 10 C.F.R. § 2.309(f)(1)((iii), (iv))). Specifically, the Staff argued that NEI-SAFETY-002 was outside the scope of the proceeding because it raised the issue of whether repackaging of fuel at the reactor sites was consistent with ALARA. *Id.* at 123-24. Because the contention did not allege any potential failure to meet the requirements of Part 63, the Staff argued that it was outside the scope of the proceeding. *Id.* Similarly, with respect to the section 2.309(f)(1)(iv) criterion, the Staff argued that with respect to ALARA requirements, the only relevant finding is whether DOE's GROA meets the ALARA requirements pursuant to section 63.111(a). The Staff need not make any finding regarding whether reactor licensees are compliant with their independent ALARA requirements. See *id.* at 124.

In its Reply, NEI asserts that its contention is within the scope of the proceeding and is material to a finding the NRC must make because in considering whether to grant a construction authorization (CA), the NRC must consider whether DOE's proposed operating procedures will protect health and minimize danger to life or property. NEI Reply at 54 (citing 10 C.F.R. § 63.31). Further, DOE is required to carry out its operations at the GROA in a manner calculated to minimize radiation exposure. See NEI Reply at 54. Thus, it appears that NEI is arguing that because DOE's proposed operation at the GROA could cause unnecessary increased radiation exposure to workers at reactor sites, DOE's proposal to have spent fuel loaded into TADs at reactor sites violates DOE's ALARA obligations under Part 63. See NEI Reply at 54, 55.<sup>12</sup> NEI states that the regulations do not provide that the application of ALARA must "cease at the boundary of the GROA" and that because DOE's design choices have impacts beyond the GROA's boundary, these impacts must be addressed in this proceeding. *Id.* at 56.

NEI's interpretation of what ALARA requires goes well beyond the scope of this proceeding and is not material to any findings the NRC must make with respect to issuance of a CA. NEI argues that Part 63 and ALARA require the NRC to consider the "impacts" from the issuance of the CA. NEI asserts that "nowhere do the Commission's regulations state that the application of ALARA principles in this proceeding must cease at the boundary of the GROA." NEI Reply at 56. However, NEI points to no regulations or other authority that support its view that ALARA considerations require the NRC to regulate activities not conducted at the GROA site in the context of licensing a repository under 10 C.F.R. Part 63. NEI simply quotes a Commission statement that the ALARA principle ensures that no member of the public or workers will receive unnecessary radiation doses during operations. See *id.* at 54-55 (citing

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<sup>12</sup> "DOE cannot avoid its ALARA obligations by foisting them off on other licensees and then closing its eyes on the necessary consequences." NEI Reply at 54. See *also id.* at 55.

66 Fed. Reg. 55,732 at 55,751 (2001)). Based on this statement, NEI asserts that the Commission never intended to limit consideration of doses only to populations near, and workers at, the site. NEI Reply at 55.

NEI misinterprets the Commission's statements in this regard. The Commission was simply stating that ALARA requires consideration of doses to workers and members of the public at the GROA site. Nothing in the Commission's statement indicates that consideration must be given to activities conducted off the GROA site. The Commission also stated that "during the operational and surface facility decommissioning phases, the *facility* will need to meet the ALARA requirement." 66 Fed. Reg. at 55,752 (emphasis added). If the Commission had intended for DOE to consider activities at facilities other than the GROA, the Commission would have clearly said so. Thus, it is clear that the focus of the ALARA considerations is on the *activities* at the GROA. These activities must be consistent with ALARA principles such that potential doses to members of the public and workers are reduced.<sup>13</sup>

Thus, for the reasons set forth above, NEI-SAFETY-002 fails to meet the requirements for an admissible contention. The Board's admission of this contention, therefore, was an error of law and should be reversed.

4. NEI-SAFETY-003: Excessive Seismic Design of Aging Facility

In NEI-SAFETY-003, NEI argued that the "3g design requirement is excessively conservative and inappropriate," and "the excessive design requirement could increase licensing uncertainty and delay, and could increase the occupational exposures associated with the facility." NEI Petition at 17. The Staff opposed the admission of this contention, among other reasons, because NEI's assertion that the excessive design could lead to licensing

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<sup>13</sup> Moreover, if NEI were correct, then all licensees, including reactor licensees, would be required to ensure that their operational procedures do not cause workers at other nuclear facilities to receive unnecessary radioactive doses.

uncertainty and delay failed to meet 10 C.F.R. § 2.309(f)(1)(iv) in that NEI has failed to demonstrate a material issue. Staff Answer at 127. In its Reply, NEI asserts, without any basis in law, that the NWPA imposes another regulatory requirement on the issuance of the CA; that is DOE's design, must advance the goal of the NWPA of constructing a repository and assuring sufficient revenue to cover the cost. See NEI Reply at 64, 71. NEI does not cite to any regulation or statutory provision that would support its interpretation, which it raises for the first time in its Reply. Nor is there such a requirement in Part 63. Further, NEI fails to articulate what these additional requirements may be or how the Staff is to evaluate the LA. Thus, to the extent that NEI-SAFETY-003 fails to raise an issue material to a finding the NRC must make in this proceeding, it is inadmissible. The Board's admission of this contention, therefore, was an error of law and should be reversed.

5. NEI-SAFETY-004: Low Igneous Event Impact on TSPA

In NEI-SAFETY-004, NEI alleges that DOE uses an unreasonable set of assumptions in the TSPA that lead to an excessively conservative estimate of the consequences of a potential igneous event. NEI Petition at 23. The Staff opposed admission of this contention because it fails to meet 10 C.F.R. § 2.309(f)(1)(iv) in that NEI has failed to demonstrate the issues raised in the contention are material to the findings the NRC must make to support the grant or denial of the construction authorization, and insofar as the contention alleges DOE's conservatism could lead to licensing uncertainty and delay the development of the repository, it does not meet 10 C.F.R. § 2.309(f)(1)(iii) because it does not raise an issue within the scope of this proceeding. See Staff Answer at 131.

In response to the Staff's argument that NEI has not alleged a violation of any regulatory requirement, NEI argued that its "demonstration of conservatism supports licensing by supporting *compliance* on this and all other issues implicating the TSPA, which makes NEI's contention very material." NEI Reply at 76 (emphasis in original). In explaining the materiality requirement the APAPO Board stated that it "requires citation to a statute or regulation that,

explicitly or implicitly, has not been satisfied by reason of the issue raised in the contention.”

*U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-08-10, 67 NRC 450, 455 (2008). NEI has not met this burden of demonstrating materiality because it has not pointed to any regulatory requirement that DOE fails to satisfy.

Furthermore, the claim in NEI-SAFETY-004 that DOE’s excessive conservatism could lead to licensing uncertainty and delay the development of the repository is not within the scope of this proceeding. As the Staff noted in its Answer, the Notice of Hearing specifies the matters to be considered in the proceeding are “whether the application satisfies the applicable safety, security, and technical standards of the AEA and NWPA and the NRC’s standards in 10 CFR Part 63 for construction authorization for a high-level waste geologic repository, and also whether the applicable requirements of the National Environmental Policy Act (NEPA) and NRC’s NEPA regulations, 10 CFR Part 51, have been met.” Staff Answer at 132 (citing 73 Fed. Reg. 63,029). Licensing uncertainty and possible delay do not fall within the safety, security, and technical or environmental standards that the NRC considers. NEI’s Reply does not offer any support for the proposition that the NRC has authority to consider licensing uncertainty and delay.

For the reasons set forth above, NEI-SAFETY-004 fails to meet the requirements for an admissible contention. The Board’s admission of this contention, therefore, was an error of law and should be reversed.

6. NEI-SAFETY-005: Excessive Conservatism  
in the Postclosure Criticality Analysis

NEI-SAFETY-005 alleges that the postclosure criticality analysis in the LA is overly conservative, and by “de facto” requiring insertion of disposal control rod assemblies at nuclear power plants, will lead to unnecessary radiation exposure to workers violative of ALARA. NEI Petition at 31. This contention was admitted by CAB-03 without discussion. LBP-09-06, Attachment A at 10. The Licensing Board committed reversible error in admitting a contention

that is outside the scope of this proceeding, and immaterial to the Commission's licensing decision, per 10 C.F.R. § 2.309(f)(1)(iii), (iv).

In this admitted contention, NEI claimed that DOE used an overly conservative postclosure criticality analysis, and that "the overly conservative analysis unnecessarily increases licensing uncertainty and creates a de facto expectation that disposal control rod assemblies (Section 2.2.1.4.1.1.3) be inserted into some fuel assemblies at the nuclear power plants. That activity will result in increased occupational dose to the workers who must install these devices and is not consistent with the principles of ALARA." NEI Petition at 32. The Staff opposed the admission of this contention because it is outside the scope of the proceeding and does not raise an issue that is material to the findings the NRC must make to support its licensing decision. Staff Answer at 134-36 (citing 10 C.F.R. § 2.309(f)(1)(iii), (iv)). Specifically, the Staff argued that this contention was outside the scope of the proceeding because the issue raised, whether the alleged "de facto" requirement to insert disposal control rod assemblies into fuel assemblies at nuclear power plants was consistent with ALARA, does not allege a violation of 10 C.F.R. Part 63. Staff Answer at 134-35. Similarly, with respect to the section 2.309(f)(1)(iv) criterion, the Staff argued that NEI had not alleged that occupational exposure from the Yucca Mountain facility will not be ALARA; nor does the contention discuss exposure to individuals from the proposed Yucca Mountain facility. *Id.* Accordingly, the outcome of this contention would not in any way affect the NRC's licensing decision under 10 C.F.R. Part 63.

In its reply, NEI asserts that its contention is within the scope of the proceeding because, in considering whether to grant a CA, the NRC must determine that the proposed design poses no "unreasonable risks to the health and safety of the public." NEI Reply at 81. NEI further states that its contention is within the scope of this proceeding because the Commission explicitly requires the application of ALARA principles during operation in Part 63:

The ALARA principle deals with optimizing the reduction of potential doses from radiation to members of the general public and workers . . . . Application of ALARA during operations compels the consideration of the

benefits of further reduction in potential doses to present-day populations and workers relative to impacts to present-day populations (e.g., increased cost to reduce potential doses further).

Final Rule, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, NV 66 Fed. Reg. 55,732, 55,751 (Nov. 2, 2001). NEI contends that the plain meaning of the Commission's references to "the general public and workers" above includes reactor sites, and that if the Commission wanted to limit its consideration only to populations near, and workers at, the repository, it would have said so explicitly. NEI Reply at 83. NEI makes a similar argument with respect to the Staff's opposition based upon materiality. *Id.* at 87.

But the Commission was clear that the application of ALARA requirements applies to the operations of the repository, even if not explicitly limited to the populations and workers near it. 66 Fed. Reg. at 55,751. This contention challenges a postclosure analysis. The Commission also stated that ALARA principles are inappropriate for postclosure analysis. 66 Fed. Reg. 55,751 ("[a]lthough the Commission will require ALARA considerations for the *operational phase and decommissioning* of the surface facilities, NRC will not explicitly require an ALARA analysis as part of the *postclosure* performance assessment." (emphasis added)).

Thus, for the reasons set forth above, NEI-SAFETY-005 fails to satisfy the Commission's scope and materiality contention admissibility requirements found at 10 C.F.R. § 2.309(f)(1)(iii) and (iv) because ALARA principles do not explicitly apply to the postclosure performance assessment. The Board's admission of this contention, therefore, was error and should be reversed.

#### 7. NEI-SAFETY-006: Drip Shields Are Not Necessary

In NEI's initial petition, NEI-SAFETY-006 argued that drip shields as part of the Engineered Barrier System are not necessary for the repository to meet regulatory requirements and are inconsistent with "as low as is reasonably achievable" (ALARA) principles because installation of the drip shields will result in significant and unnecessary radiation exposures,

resource use, and costs. NEI Petition at 35. In response to NEI-SAFETY-006, the Staff argued that it was inadmissible because it did not raise an issue material to the findings the NRC must make to support the action involved in the proceeding. Staff Answer at 137.

With respect to the materiality criterion, 10 C.F.R. § 2.309(f)(1)(iv), the Staff argued that the ALARA principle only applies to the operational and decommissioning phases of the repository, but not to the achievement of the long-term performance objective. *Id.* at 138 (citing 66 Fed. Reg. 55,732 at, 55,751). However, DOE's decision to install drip shields is a design decision affecting postclosure repository performance; it is not part of the operations of the geologic repository operations area. Staff Answer at 138-39 (citing 10 C.F.R §§ 63.2; 63.113). Thus, the Staff argued, because ALARA does not apply to the achievement of post-closure performance objectives, NEI's contention is not material to a finding the NRC must make. *Id.* at 139.

In its Reply, NEI asserts that it is not seeking to apply ALARA to long-term performance objectives, but to the operation of the repository. NEI Reply at 96-97. Further, NEI acknowledges that the Commission sought to prohibit using ALARA as a tool to reduce short term exposures at the expense of potential long-term exposures. *Id.* at 97. NEI argues that all of the unnecessary increased dose and costs will occur during the preclosure period and that long-term repository performance is not a consideration apart from demonstrating that those requirements will be met without the installation of drip shields. *Id.* However, in order to achieve the benefits during preclosure that NEI argues can be realized through not installing drip shields, NEI is necessarily urging a change to a design parameter chosen by DOE to meet postclosure performance objectives. Therefore, any benefits realized during preclosure from not installing drip shields would need to be counterbalanced by any performance reductions during the postclosure period. This balancing of present-day costs and benefits with future costs and benefits was precisely what the Commission sought to avoid in deciding not to apply

ALARA considerations to the postclosure period. 66 Fed. Reg. 55,732, 55,751. The Commission stated:

Application of ALARA during operations compels the consideration of the benefits of further reduction in potential doses to present-day populations (e.g., increased cost to reduce potential doses further). The application of ALARA to the achievement of the postclosure performance objective would involve considerations far more complicated than those evaluated for operations. The reasonableness of further reduction of potential doses would need to evaluate the benefits and impacts that span many generations (e.g., costs incurred today versus a reduction of potential doses thousands of years in the future; repository designs that reduce potential doses in the future but increase doses to present-day workers during fabrication of the design such as installing a special backfill)...Therefore, although the Commission will require ALARA considerations for the operational phase and decommissioning of the surface facilities, NRC will not explicitly require an ALARA analysis as part of the postclosure performance assessment.

*Id.* A design parameter, such as drip shields, cannot be changed to achieve benefits during the preclosure period without examining the impact that such a change would have on postclosure performance. The Commission has stated that the balancing of present-day costs and benefits with future costs and benefits is far more complicated than the balancing of costs and benefits to present-day populations and workers, and therefore, it will not apply ALARA principles to postclosure but instead adopt EPA's dose limit for long-term performance. *Id.* Because NEI seeks to apply ALARA principles to a design parameter important to postclosure performance, NEI-SAFETY-006 does not raise an issue material to the findings the NRC must make. The Board's admission of this contention, therefore, was an error of law and should be reversed.

#### 8. NEV-MISC-003: LA References

In its initial petition, Nevada argued that DOE's LA Safety Analysis Report (SAR) was insufficient on its face because DOE did not specifically incorporate by reference 196 references cited in the SAR, thereby preventing determination of whether the SAR's safety conclusions are sound. NEV Petition at 1149. The Staff opposed admissibility of NEV-MISC-003 because it failed to establish a genuine dispute on a material issue of fact or law under § 2.309(f)(1)(vi) in that Nevada did not cite any provision in the Commission's regulations that requires the LA to

be a “stand-alone” document in terms of directly incorporating extrinsic source information to support an assessment of the safety conclusions in the SAR. Staff Answer at 1556-57. As the Staff noted in its Answer, the 196 references are publically available and on the docket for this proceeding. *Id.* Nevada’s Reply does not offer any additional support for its claim that the SAR must specifically incorporate by reference any document used by the NRC to make a safety finding. In fact, there is no such requirement in the Commission’s regulations. Insofar as Nevada argues that the Staff assumes it will be able to use certain materials in its review (NEV Reply at 781), the Staff notes that its review is not an issue in this proceeding. *See, e.g., Curators of the University of Missouri*, CLI-95-1, 41 NRC 71, 121-22 (1995). Moreover, to the extent that the Staff needs additional information to complete its safety review, it can issue requests for additional information to DOE.

Because NEV-MISC-003 does not identify any regulatory or statutory authority requiring the SAR to be a “stand-alone” document with respect to incorporating all source material by reference, it fails to raise a genuine dispute on a material issue of fact or law. The Board’s admission of this contention, therefore, was an error of law and should be reversed.

9. NEV-SAFETY-001: DOE Integrity and  
NEV-SAFETY-002: DOE Management

NEV-SAFETY-001 questions whether DOE possesses the requisite integrity to be the licensee to construct the proposed Yucca Mountain repository, NEV Petition at 16, and NEV-SAFETY-002 alleges that DOE lacks the management ability to construct and safely operate the proposed repository. NEV Petition at 28. The Board admitted NEV-SAFETY-001 and NEV-SAFETY-002.

In admitting these contentions, the Boards found that section 182a of the AEA applies to DOE, notwithstanding Congress’ designation of DOE as the Applicant. LBP-09-06, slip op. at 115, 124. Despite the Board’s acknowledgement that Congress designated DOE to be the sole applicant for the high-level waste repository, the Boards’ ruling in admitting these two

contentions is incongruent with the NWPA and section 202 of the Energy Reorganization Act. As the Staff argued in its Answer, “DOE, by virtue of this statutory mandate, is the appropriate applicant. If “the Commission authorize[s] construction of a geologic repository at Yucca Mountain, the NRC staff will conduct an ongoing, performance-based inspection program to evaluate DOE’s compliance with the performance objectives and any conditions established in the construction authorization. . . .” Staff Answer at 142 (citing Final Rule, Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,731, 55,744 (Nov. 2, 2001)). See *also* Staff Answer at 144. It is reasonable to assume that Congress would not have directed DOE to be the applicant if DOE did not possess the requisite competence and integrity to be an NRC licensee.<sup>14</sup> Accordingly, the Boards erred in admitting NEV-SAFETY-001 and NEV-SAFETY-002.

Further, the Boards recognize that these contentions raise a policy issue. At the conclusion of its discussion of NEV-SAFETY-001 and NEV-SAFETY-002, the Board notes that it

cannot close its eyes to the apparent incongruity of one federal agency ... presiding over and ultimately reaching a decision about the integrity and management competence of another federal department – even though DOE is statutorily defined as a “person” just as any other applicant under the AEA... [T]he unique circumstances of the Yucca Mountain proceeding may present an institutional policy issue that the Commission may wish to consider. Accordingly, the Board believes it is appropriate to call this matter to the attention of the Commission.

LBP-09-06, slip op. at 125.

The Commission should review the Boards’ statement that DOE is a “person” under Section 11(s) of the Atomic Energy Act (AEA). See *id.* at 116, 120, 121 and 125. Although not dispositive with respect to the Boards’ ruling on these contentions, the Staff submits that DOE is

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<sup>14</sup> The Staff does note that 10 C.F.R. Part 63 requires DOE to submit information regarding its organizational structure, key positions with responsibility safety at the GROA and personnel qualifications and training requirements. See 10 C.F.R. § 63.22(c)(22)(i), (ii), (iii).

not a “person” under Section 11(s) of the AEA, 42 U.S.C. § 2014(s).<sup>15</sup> When Section 11(s) was enacted in 1954, neither DOE nor the NRC existed. Section 11(s) defined a “person” to include a “Government agency other than the Commission . . . and its legal successor(s).” In turn, “Commission” was defined as the Atomic Energy Commission. AEA § 11(f), 42 U.S.C. § 2014(f). Consequently, the definition of “person” under the AEA excluded the Atomic Energy Commission. Twenty years later, the Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified at 42 U.S.C. §5801 (1974)), abolished the Atomic Energy Commission and in its place established two new agencies, the Nuclear Regulatory Commission and the Energy Research and Development Administration, the predecessor of the Department of Energy. Therefore, the earlier exclusion of the Atomic Energy Commission from the AEA’s definition of “person” was carried forward to its “legal successors”, the NRC and the Energy Research and Development Administration. In 1977, the Energy Research and Development Administration was terminated and its functions were transferred to the newly created Department of Energy by the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, (codified at 42 U.S.C. 7101 (1977)). Therefore, the exclusion of the Energy Research and Development Administration from the AEA’s definition of “person” automatically vested in its “legal successor”, the Department of Energy.

For the reasons discussed above, the Boards’ admission of these contentions was an error of law and should be reversed. The Commission should also reverse the Board’s finding that DOE is a person under Section 11.s of the AEA.

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<sup>15</sup> Because the issue of whether section 182a applies to DOE is not dependent on the finding that DOE is a “person” under section 11(s) the conclusion that DOE is a “person” under that section is not essential to the Board’s decision and it is essentially dicta. However, the Staff believes that the Board’s conclusion that DOE is a “person” under section 11.s is erroneous and should be addressed by the Commission.

10. NEV-SAFETY-161: Critical Role of Drip Shield

This contention, which the Boards designated as legal, asserts that the SAR does not comply with the requirement that the repository have multiple barriers because its safety depends solely on the drip shield. See NEV Petition at 857. The Staff opposed this contention because, among other things, it relied on mere speculation and did not raise an issue that was material to grant or deny the license application. See Staff Answer at 881-85 (citing 10 C.F.R. § 2.309(f)(1)(iv)-(vi)).

Nevada's argument is not material to the proceeding because the D.C. Circuit has ruled on the issue. See *Nuclear Energy Institute v. Environmental Protection Agency*, 373 F.3d 1251 (D.C. Cir. 2004). The Court held, and the Staff noted in its Answer, that the NWPA "does not, as Nevada contends, require that each barrier type provide a quantified amount of protection or, indeed, independent protection." *Id.* at 1295; Staff Answer at 882. Thus, Part 63 does not require that a single barrier provide protection from radionuclide releases in excess of the limits in 10 C.F.R § 63.331 because the relevant benchmark is the protection provided by multiple barriers working together. See 10 C.F.R. § 63.113.

The geologic setting is a natural barrier intended to work in concert with the waste package and the drip shield, which are both engineered barriers. This meets the regulatory requirements of 10 C.F.R. § 63.113. For these reasons, to the extent that Nevada alleges that the multiple barriers requirement is not met because safety depends in part on the drip shield, this contention is in conflict with settled case law that upheld the permissibility and reasonableness of NRC's regulations. See *NEI v. EPA*, 373 F.3d at 1295.

Nevada's initial petition also posited a number of reasons why the state believes the drip shields may never be installed. NEV Petition at 859. As the Staff pointed out in its Answer, these arguments merely consist of a number of speculative scenarios. Staff Answer at 883-85. Nevada's arguments rely on the implied premise that future events are inherently unknowable. This speculation does not suffice to satisfy the requirements of 10 C.F.R. 2.309(f)(1)(v)-(vi).

Nothing in Nevada's Reply effectively refutes the issues raised in the Staff's argument. Neither does Nevada's speculation about various scenarios, where one of the barriers of the planned multiple barrier system could be absent, support the admission of a contention that is in conflict with settled law and NRC regulations. The Board's admission of this contention, therefore, was an error of law and should be reversed.

CONCLUSION

For reasons discussed in the foregoing, the Boards erred in concluding that the following legal contentions need not meet the admissibility standards of 10 C.F.R. § 2.309(f)(1): NEV-SAFETY-004 through NEV-SAFETY-006; NEV-SAFETY-009; NEV-SAFETY-0010 through NEV-SAFETY-0013; NEV-SAFETY-0019; NEV-SAFETY-00139; NEV-SAFETY-146; NEV-SAFETY-149; NEV-SAFETY-161; NEV-SAFETY-169; NEV-SAFETY-171; NEV-SAFETY-184 through NEV-SAFETY-00194; NEV-SAFETY-201; NEV-MISC-002; CAL-NEPA-005; NCA-MISC-001, and NYE-SAFETY-4. In addition, the Boards specifically erred in concluding that CAL-NEPA-5, NEI-SAFETY-001 through NEI-SAFETY-006, NEV-MISC-003, NEV-SAFETY-001, NEV-SAFETY-002, and NEV-SAFETY-161 satisfied the contention admissibility standards in 10 C.F.R. § 2.309(f)(1). Accordingly, the Commission should reverse the Boards' rulings and dismiss the foregoing listed contentions.

Respectfully submitted,

***/Signed (electronically) by/***

Andrea L. Silvia  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
Alc1@nrc.gov

***Executed in accordance with 10 C.F.R. § 2.304***

Daniel W. Lenehan  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
Dwl2@nrc.gov

***Executed in accordance with 10 C.F.R. § 2.304***

Kevin C. Roach  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
Kevin.Roach@nrc.gov

***Executed in accordance with 10 C.F.R. §2.304***

Mitzi A. Young  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
May@nrc.gov

***Executed in accordance with 10 C.F.R. §2.304***

Adam Gendelman  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop O-15 D21  
Washington, DC 20555-0001  
Asg3@nrc.gov

Dated at Rockville, Maryland  
this 21<sup>st</sup> day of May 2009

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	)	
	)	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository)	)	09-877-HLW-CAB02
	)	09-878-HLW-CAB03

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF NOTICE OF APPEAL OF LBP-09-06 AND BRIEF IN SUPPORT OF APPEAL FROM LBP-09-06" in the above-captioned proceeding have been served on the following persons this 21st of May, 2009, by Electronic Information Exchange.

CAB 01

William J. Froehlich, Chairman  
Thomas S. Moore  
Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [wjf1@nrc.gov](mailto:wjf1@nrc.gov)  
[tsm2@nrc.gov](mailto:tsm2@nrc.gov)  
[rew@nrc.gov](mailto:rew@nrc.gov)

Office of the Secretary  
ATTN: Docketing and Service  
Mail Stop: O-16C1  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

Office of Commission Appellate  
Adjudication  
[ocaamail@nrc.gov](mailto:ocaamail@nrc.gov)

CAB 02

Michael M. Gibson, Chairman  
Alan S. Rosenthal  
Nicholas G. Trikouros  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [mmg3@nrc.gov](mailto:mmg3@nrc.gov)  
[axr@nrc.gov](mailto:axr@nrc.gov)  
[nqt@nrc.gov](mailto:nqt@nrc.gov)

Charles J. Fitzpatrick, Esq.  
John W. Lawrence, Esq.  
Egan, Fitzpatrick & Malsch, PLLC  
12500 San Pedro Avenue, Suite 555  
San Antonio, TX 78216  
E-mail: [cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)  
[jlawrence@nuclearlawyer.com](mailto:jlawrence@nuclearlawyer.com)

Martin G. Malsch, Esq.  
Egan, Fitzpatrick & Malsch, PLLC  
1750 K Street, N.W. Suite 350  
Washington, D.C. 20006  
E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)

CAB 03

Paul S. Ryerson, Chairman  
Michael C. Farrar  
Mark O. Barnett  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001  
E-mail: [psr1@nrc.gov](mailto:psr1@nrc.gov)  
[mcf@nrc.gov](mailto:mcf@nrc.gov)  
[mob1@nrc.gov](mailto:mob1@nrc.gov)  
[mark.barnett@nrc.gov](mailto:mark.barnett@nrc.gov)

Brian W. Hembacher, Esq.  
Deputy Attorney General  
California Attorney General's Office  
300 South Spring Street  
Los Angeles, CA 90013  
E-mail: [brian.hembacher@doj.ca.gov](mailto:brian.hembacher@doj.ca.gov)

Timothy E. Sullivan, Esq.  
Deputy Attorney General  
California Department of Justice  
1515 Clay Street., 20<sup>th</sup> Flr.  
P.O. Box 70550  
Oakland, CA 94612-0550  
E-mail: [timothy.sullivan@doj.ca.gov](mailto:timothy.sullivan@doj.ca.gov)

Kevin W. Bell, Esq.  
Senior Staff Counsel  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814  
E-mail: [kwbell@energy.state.ca.us](mailto:kwbell@energy.state.ca.us)

Bryce C. Loveland  
Jennings Strouss & Salmon, PLC  
8330 W. Sahara Avenue, Suite 290  
Las Vegas, NV 89117-8949  
Email: [bloveland@jsslaw.com](mailto:bloveland@jsslaw.com)

Alan I. Robbins, Esq.  
Debra D. Roby, Esq.  
Jennings Strouss & Salmon, PLC  
1700 Pennsylvania Ave, NW Suite 500  
Washington, D.C. 20005  
E-mail: [arobbins@jsslaw.com](mailto:arobbins@jsslaw.com)  
[droby@jsslaw.com](mailto:droby@jsslaw.com)

Donald J. Silverman, Esq.  
Thomas A. Schmutz, Esq.  
Thomas C. Poindexter, Esq.  
Paul J. Zaffuts, Esq.  
Alex S. Polonsky, Esq.  
Lewis Csedrik, Esq.  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
E-mail: [dsilverman@morganlewis.com](mailto:dsilverman@morganlewis.com)  
[tschmutz@morganlewis.com](mailto:tschmutz@morganlewis.com)  
[tpoindexter@morganlewis.com](mailto:tpoindexter@morganlewis.com)  
[pzaffuts@morganlewis.com](mailto:pzaffuts@morganlewis.com)  
[apolonsky@morganlewis.com](mailto:apolonsky@morganlewis.com)  
[lcsedrik@morganlewis.com](mailto:lcsedrik@morganlewis.com)

Malachy R. Murphy, Esq.  
18160 Cottonwood Rd. #265  
Sunriver, OR 97707  
E-mail: [mrmurphy@chamberscable.com](mailto:mrmurphy@chamberscable.com)

Robert M. Andersen  
Akerman Senterfitt  
801 Pennsylvania Avenue N.W., Suite 600  
Washington, DC 20004 USA  
E-mail: [robert.andersen@akerman.com](mailto:robert.andersen@akerman.com)

Martha S. Crosland, Esq.  
Angela M. Kordyak, Esq.  
Nicholas P. DiNunzio  
James Bennett McRae, Esq.  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
E-mail: [martha.crosland@hq.doe.gov](mailto:martha.crosland@hq.doe.gov)  
[angela.kordyak@hq.doe.gov](mailto:angela.kordyak@hq.doe.gov)  
[nick.dinunzio@rw.doe.gov](mailto:nick.dinunzio@rw.doe.gov)  
[ben.mcrae@hq.doe.gov](mailto:ben.mcrae@hq.doe.gov)

George W. Hellstrom  
U.S. Department of Energy  
Office of General Counsel  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
E-Mail: [george.hellstrom@ymp.gov](mailto:george.hellstrom@ymp.gov)

Jeffrey D. VanNiel, Esq.  
530 Farrington Court  
Las Vegas, NV 89123  
E-mail: [nbridvn@gmail.com](mailto:nbridvn@gmail.com)

Susan L. Durbin, Esq.  
Deputy Attorney General  
1300 I Street  
P.O. Box 944255  
Sacramento, CA 94244-2550  
E-mail: [susan.durbin@doj.ca.gov](mailto:susan.durbin@doj.ca.gov)

Frank A. Putzu  
Naval Sea Systems Command Nuclear  
Propulsion Program  
1333 Isaac Hull Avenue, S.E.  
Washington Navy Yard, Building 197  
Washington, DC 20376  
E-mail: [frank.putzu@navy.mil](mailto:frank.putzu@navy.mil)

John M. Peebles  
Darcie L. Houck  
Fredericks Peebles & Morgan LLP  
1001 Second Street  
Sacramento, CA 95814  
E-mail: [jpeebles@ndnlaw.com](mailto:jpeebles@ndnlaw.com)

Ellen C. Ginsberg  
Michael A. Bauser  
Anne W. Cottingham  
Nuclear Energy Institute, Inc.  
1776 I Street, N.W., Suite 400  
Washington, D.C. 20006  
E-mail: [ecg@nei.org](mailto:ecg@nei.org)  
[mab@nei.org](mailto:mab@nei.org)  
[awc@nei.org](mailto:awc@nei.org)

David A. Repka  
William A. Horin  
Rachel Miras-Wilson  
Winston & Strawn LLP  
1700 K Street N.W.  
Washington, D.C. 20006  
E-mail: [drepka@winston.com](mailto:drepka@winston.com)  
[whorin@winston.com](mailto:whorin@winston.com)  
[rwilson@winston.com](mailto:rwilson@winston.com)

Jay E. Silberg  
Timothy J.V. Walsh  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037-1122  
E-mail: [jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)  
[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)

John H. Huston, Esq.  
6722 Running Colors Avenue  
Las Vegas, NV 89131  
E-mail: [johnhhuston@gmail.com](mailto:johnhhuston@gmail.com)

Gregory L. James  
710 Autumn Leaves Circle  
Bishop, California 93514  
Email: [gljames@earthlink.net](mailto:gljames@earthlink.net)

Arthur J. Harrington  
Godfrey & Kahn, S.C.  
780 N. Water Street  
Milwaukee, WI 53202  
E-mail: [aharring@gklaw.com](mailto:aharring@gklaw.com)

Steven A. Heinzen  
Douglas M. Poland  
Hannah L. Renfro  
Godfrey & Kahn, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI 53701-2719  
E-mail: [sheinzen@gklaw.com](mailto:sheinzen@gklaw.com)  
[dpoland@gklaw.com](mailto:dpoland@gklaw.com)  
[hrenfro@gklaw.com](mailto:hrenfro@gklaw.com)

Robert F. List, Esq.  
Jennifer A. Gores, Esq.  
Armstrong Teasdale LLP  
1975 Village Center Circle, Suite 140  
Las Vegas, NV 89134-6237  
E-mail: [rlist@armstrongteasdale.com](mailto:rlist@armstrongteasdale.com)  
[jgores@armstrongteasdale.com](mailto:jgores@armstrongteasdale.com)

Diane Curran  
Harmon, Curran, Spielberg, & Eisenberg,  
L.L.P.  
1726 M Street N.W., Suite 600  
Washington, D.C. 20036  
E-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Ian Zabarte, Board Member  
Native Community Action Council  
P.O. Box 140  
Baker, NV 89311  
E-mail: [mrizabarte@gmail.com](mailto:mrizabarte@gmail.com)

Richard Sears  
District Attorney No. 5489  
White Pine County District Attorney's Office  
801 Clark Street, Suite 3  
Ely, NV 89301  
E-mail: [rwsears@wpcda.org](mailto:rwsears@wpcda.org)

Donald P. Irwin  
Michael R. Shebelskie  
Kelly L. Faglioni  
Hunton & Williams LLP  
Riverfront Plaza, East Tower  
951 East Byrd Street  
Richmond, VA 23219-4074  
E-mail: [dirwin@hunton.com](mailto:dirwin@hunton.com)  
[mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)  
[kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)

Curtis G. Berkey  
Scott W. Williams  
Rovianne A. Leigh  
Alexander, Berkey, Williams, & Weathers  
LLP  
2030 Addison Street, Suite 410  
Berkley, CA 94704  
E-mail: [cberkey@abwwlaw.com](mailto:cberkey@abwwlaw.com)  
[swilliams@abwwlaw.com](mailto:swilliams@abwwlaw.com)  
[rleigh@abwwlaw.com](mailto:rleigh@abwwlaw.com)

Bret O. Whipple  
1100 South Tenth Street  
Las Vegas, Nevada 89104  
E-mail: [bretwhipple@nomademail.com](mailto:bretwhipple@nomademail.com)

Gregory Barlow  
P.O. Box 60  
Pioche, Nevada 89043  
E-mail: [lca@lcturbonet.com](mailto:lca@lcturbonet.com)

Connie Simkins  
P.O. Box 1068  
Caliente, Nevada 89008  
E-mail: [jcciac@co.lincoln.nv.us](mailto:jcciac@co.lincoln.nv.us)

Dr. Mike Baughman  
Intertech Services Corporation  
P.O. Box 2008  
Carson City, Nevada 89702  
E-mail: [bigoff@aol.com](mailto:bigoff@aol.com)

**/Signed (electronically) by/**

Andrea L. Silvia  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15D21  
Washington, DC 20555-0001  
(301) 415-8554  
[alc1@nrc.gov](mailto:alc1@nrc.gov)