

January 21, 2011

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
U. S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High-Level Waste Repository))	ASLBP No. 09-892-HLW-CAB04
)	

DIFFERING POSITION OF THE NRC STAFF IN RESPONSE TO LBP-10-22

INTRODUCTION

The “Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions)” issued by Construction Authorization Board 4 (Board) directed the parties to confer and submit their stipulated views regarding the impact of its order on certain admitted contentions. *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-10-22, 72 NRC ___ (slip op. at 5, 36) (Dec. 14, 2010) (LBP-10-22). The Board also directed the parties to submit a separate differing position on any contention for which the parties cannot fully agree on a stipulation. *Id.*

The Department of Energy (DOE) submitted a joint report regarding the parties’ stipulated views with respect to the impact of LBP-10-22 on admitted Phase I contentions and the parties’ disagreement with respect to the impact on NEV-SAFETY-130, NEV-SAFETY-149, NEV-SAFETY-161, NEV-SAFETY-162 and NEI-SAFETY-06. See U.S. Department of Energy’s Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22, dated January 21, 2011, at 4 (Joint Report). The U.S. Nuclear Regulatory Commission Staff (Staff) differing position with respect to these contentions is set forth below.

DISCUSSION

NEV-SAFETY-130 – DRIP SHIELD EMLACEMENT PLAN, EQUIPMENT, AND SCHEDULE, NEV-SAFETY-161 – CRITICAL ROLE OF DRIP SHIELD, AND NEV-SAFETY-162 – DRIP SHIELD INSTALLATION SCHEDULE

NEV-SAFETY-161, -162, and -130 challenge various portions of DOE's license application related to drip shields. NEV-SAFETY-161 claims that DOE violates the requirements for a multiple barrier system because its safety depends on a single element of the barrier system – the drip shield. State of Nevada's Petition to Intervene as a Full Party, dated December 19, 2008, at 857 (Nevada Petition). NEV-SAFETY-130 asserts that installation of the drip shields cannot be assumed because DOE did not identify the features, events and processes (FEPs) that could prevent their installation. *Id.* at 701. NEV-SAFETY-162 claims that DOE's plan to install drip shields about 100 years from now cannot be justified as safe because installation may be defective or impossible, and that the Commission cannot make a substantial determination until after the drip shields are installed. *See id.* at 861; State of Nevada's Reply to DOE's Answer to Nevada's Petition to Intervene as a Full Party, dated February 24, 2009, at 695.

The Board addressed matters regarding drip shields in its rulings on Legal Issues 8 and 10. In Legal Issue 8, the Board considered whether DOE is required to evaluate the absence or failure of all drip shields, *i.e.*, perform a drip shield neutralization analysis. LBP-10-22 at 20. The Board determined that there is no such requirement. *Id.* at 21, 23. Accordingly, to the extent that NEV-SAFETY-161, -162, and -130 claim that DOE is required to consider the absence or complete failure of all drip shields, these contentions should be dismissed. Further, in Legal Issue 10, the Board held that drip shields do not have to be installed before the Commission can make a substantial completion determination. LBP-10-22 at 28-29 ("We do not conclude that, as a matter of law, the required finding concerning construction completion cannot be made."). Accordingly, NEV-SAFETY-162 should be dismissed to the extent that it claims that the Commission cannot make a substantial completion

determination until after drip shields are installed.

NEV-SAFETY-149 – DEVIATIONS IN DESIGN AND WASTE EMPLACEMENT

Nevada asserts that DOE improperly excluded deviations from repository design or errors in high-level waste emplacement from its Total System Performance Assessment (TSPA) on purely legal grounds. Nevada Petition at 783. Nevada characterizes this as a legal issue and alleges that DOE's exclusion of FEP 1.1.03.01.0A (deviations from repository design or errors in high-level waste emplacement) from events considered in the TSPA on "the basis of the regulation" is unexplained. See *id.* at 784.

The Board noted that Nevada's concern arose from an erroneous statement that DOE had corrected prior to filing its License Application. LBP-10-22 at 19-20 (citing U.S. Department of Energy Brief on Nevada Safety Contention 149, dated December 7, 2009, at 3 n.6 (DOE Brief)). DOE had corrected an error in a technical document stating that FEP 1.1.03.01.0A had been excluded "by regulation" to clarify that it had been excluded "on the basis of low consequence." See DOE Brief at 3 n.6 (citing Answer of the U.S. Department of Energy to the State of Nevada's Petition to Intervene, dated January 16, 2009, at 1381-82 (DOE Answer)). DOE asserts that its exclusion justification for FEP 1.1.03.01.0A explains that deviations from design or errors in waste emplacement will be of low significance due the requirements of the Quality Assurance program. See DOE Answer at 1383-384. The Board ruled that "[a]lthough coverage of a potential event by DOE's quality assurance does not operate as a matter of law to exclude consideration of a FEP, the effects of the quality assurance program can be taken into account in determining the probability and consequences of the FEP." LBP-10-22 at 20. Accordingly, based on the Board's ruling and DOE's clarification, this contention is moot and should be dismissed.

NEI-SAFETY-06 - DRIP SHIELDS ARE NOT NECESSARY

The Nuclear Energy Institute (NEI) asserts that the drip shields proposed by DOE as part of the engineered barrier system are not necessary because DOE's post-closure analysis is

overly conservative and that installation of drip shields is inconsistent with “as low as reasonably achievable” (ALARA) principles because their installation will lead to unnecessary radiation exposure to site workers, resource use, and costs. The Nuclear Energy Institute’s Petition to Intervene, dated December 19, 2008, at 35-36.

The Board ruled that 10 C.F.R. §§ 20.1002, 20.1003, 20.1101, 50.40, and 63.111 do not require DOE to address ALARA considerations at individual nuclear plant sites remote from the geologic repository operations area (GROA) or to meet applicable safety and environmental standards without any unnecessary expenditures of resources. LBP-10-22 at 9. Consequently, to the extent NEI-SAFETY-06 claims that DOE is required to consider ALARA principles outside the GROA and must demonstrate regulatory compliance without unnecessary expenditure of resources, it should be dismissed.

CONCLUSION

For the reasons set forth herein, the Board should adopt the Staff’s positions with respect to the effect of LBP-10-22 on NEV-SAFETY-130, -149, -161, -162 and NEI-SAFETY-06.

Respectfully submitted,

/Signed (electronically) by/

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/Executed in accord with 10 C.F.R. § 2.340(d)/

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Dated at Rockville, Maryland
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "DIFFERING POSITION OF THE NRC STAFF IN RESPONSE TO LBP-10-22" in the above-captioned proceeding have been served on the following persons this 21st day of January, 2011, by Electronic Information Exchange.

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