

April 18, 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  
 )

NRC STAFF RESPONSE TO U.S. DEPARTMENT OF  
ENERGY MOTION TO DISMISS NEI SAFETY CONTENTION 05

INTRODUCTION

On March 24, 2011, the Atomic Safety and Licensing Board (Board) issued an Order dismissing four legal contentions in the above-captioned proceeding. Order (Dismissing Contentions), dated March 24, 2011 (Order) (unpublished).<sup>1</sup> With respect to the remaining Phase I legal contentions identified by the parties in the joint stipulation,<sup>2</sup> the Board stated that the Department of Energy (DOE) or the U.S. Nuclear Regulatory Commission (NRC) staff (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.<sup>3</sup>

On April 8, 2011, DOE filed “U.S. Department of Energy’s Motion to Dismiss NEI Safety Contention 05” (Motion) and on April 16, 2011, filed a supplement to its Motion. See

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<sup>1</sup> This ruling was based on the Board’s December 14, 2010 Memorandum and Order deciding Phase I Legal Issues and denying rule waiver petitions. *U.S. Dep’t of Energy* (High-Level Waste), LBP-10-22, 72 NRC \_\_ (slip op.) (Dec. 14, 2010) (LBP-10-22).

<sup>2</sup> 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 (Joint Report). In addition, consistent with LBP-10-22, the parties filed separate differing positions on the contentions with which they could not fully agree. See, e.g., U.S. Department of Energy’s Statement of Additional Views on the Contentions Affected by the CAB Order of December 14, 2010, dated January 21, 2011; Nuclear Energy Institute’s Position on Effect of Ruling on Phase I Legal Issue 1, dated January 21, 2011; Differing Position of the NRC Staff in Response to LBP-10-22, dated January 21, 2011.

<sup>3</sup> The Board noted that the time period prescribed in 10 C.F.R. § 2.323(a) would not apply to such motions. Order at 2 n.8.

Supplement to U.S. Department of Energy's Motion to Dismiss NEI Safety Contention 05, dated April 16, 2011 (Supplement).<sup>4</sup> For the reasons set forth below, the Board should dismiss NEI-SAFETY-05.

## DISCUSSION

### NEI-SAFETY-05

NEI-SAFETY-05 challenges DOE's postclosure criticality analysis described in Section 2.2.1.4.1.1 of the License Application ("LA") Safety Analysis Report ("SAR"). The Nuclear Energy Institute's Petition to Intervene, dated December 19, 2008, at 31; see The Nuclear Energy Institute's Brief on Phase I Legal Issue No. 1, dated December 7 2009, at 1. The joint statement of the parties, as accepted by the Board, specifies that the threshold legal issues for NEI-SAFETY-05 are: (1) whether 10 C.F.R. §§ 20.1002, 20.1003, 20.1101, 50.40, and 63.111 require As Low As Reasonably Achievable (ALARA) considerations at individual nuclear plant sites remote from the geologic repository operations area (GROA) to be addressed in DOE's License Application (LA); and (2) whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources. Order (Identifying Phase I Legal Issues for Briefing), dated October 23, 2009, at 1; see U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Joint Proposal Identifying Phase 1 Legal Issues for Briefing, dated October 6, 2009, Attachment 1 at 1.

NEI states that the Board's ruling on Legal Issue 1 does not have any self-executing effect on NEI-SAFETY-05. Nuclear Energy Institute's Position on Effect of Ruling

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<sup>4</sup> DOE's Supplement addresses the 10 C.F.R. § 2.323(b) requirement that a motion "include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." The Staff does not object to DOE's Motion as supplemented because, as DOE indicated in its supplement, the parties previously conferred regarding the effects of LBP-10-22 on admitted contentions and DOE certified that it had conferred with the Nuclear Energy Institute (NEI) and the Staff regarding the Motion. See Supplement at 1-2.

on Phase I Legal Issue 1, dated January 21, 2011, at 2. NEI acknowledged that the Board's ruling in LBP-10-22 establishes the law of the case, which affects whether NEI-SAFETY-05 should be dismissed. *Id.* DOE argues that the Board's resolution of Legal Issue 1 in LBP-10-22 renders NEI-SAFETY-05 inadmissible as a matter of law. Motion at 2.<sup>5</sup>

DOE is correct. The Board held that DOE is not required as a matter of law to take into account ALARA considerations outside the GROA. See LBP-10-22 at 9; see NRC Staff Brief on Phase I Legal Issues, dated December 7, 2009, at 4. In addition, the Board ruled that there is no requirement for DOE to demonstrate that the repository meets applicable safety and environmental standards without any unnecessary expenditure of resources. LBP-10-22 at 9. NEI does not argue that its contention raises a factual issue. See Nuclear Energy Institute's Position on Effect of Ruling on Phase I Legal Issue 1 (NEI-SAFETY-05), dated January 21, 2011, at 1. The assertions and bases provided in NEI-SAFETY-05 are predicated on whether ALARA considerations are required outside of the GROA and whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources. See The Nuclear Energy Institute's Petition to Intervene, dated December 19, 2008, at 31. In the Board's ruling on Legal Issue 1, the Board precluded such assertions and bases. See LBP-10-22 at 5-9. Accordingly, the factual support in NEI's contention requires no further consideration in light of the Board's ruling on the legal issues and the contentions should therefore be dismissed.

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<sup>5</sup> The parties previously stipulated that the legal issue raised by NEI-SAFETY-05 was resolved by the Board's resolution of Legal Issue 5 and NEI recognized the contention is susceptible to a summary disposition motion. See Joint Report, Attachment at 1 (citing LBP-10-22 at 9).

CONCLUSION

The Board should grant the Motion and dismiss NEI-SAFETY-05.

Respectfully submitted,

**/Signed (electronically) by/**

Christopher C. Hair  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15D21  
Washington, DC 20555-0001  
(301) 415-2174  
[Christopher.Hair@nrc.gov](mailto:Christopher.Hair@nrc.gov)

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

Jessica A. Bielecki  
Counsel for NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15D21  
Washington, DC 20555-0001  
(301) 415-1391  
[Jessica.Bielecki@nrc.gov](mailto:Jessica.Bielecki@nrc.gov)

Dated at Rockville, Maryland  
this 18th day of April, 2011

UNITED STATES OF AMERICA  
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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO U.S. DEPARTMENT OF ENERGY MOTION TO DISMISS NEI SAFETY CONTENTION 05" in the above-captioned proceeding have been served on the following persons this 18th day of April, 2011, by Electronic Information Exchange.

CAB 04

Thomas S. Moore, Chairman  
Paul S. Ryerson  
Richard E. Wardwell  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
E-mail: [tsm2@nrc.gov](mailto:tsm2@nrc.gov)  
[psr1@nrc.gov](mailto:psr1@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, DC 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

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

Charles J. Fitzpatrick, Esq.  
John W. Lawrence, Esq.  
Egan, Fitzpatrick, Malsch & Lawrence PLLC  
1777 N.E. Loop 410, Suite 600  
San Antonio, TX 78217  
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, DC 20006  
E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)

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)

Alan I. Robbins, Esq.  
Debra D. Roby, Esq.  
Jennings Strouss & Salmon, PLC  
1350 I Street, NW Suite 810  
Washington, DC 20005-3305  
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.  
Raphael P. Kuyler, 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)  
[rkuyler@morganlewis.com](mailto:rkuyler@morganlewis.com)

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

Martha S. Crosland, Esq.  
Angela M. Kordyak, Esq.  
Nicholas P. DiNunzio  
James Bennett McRae, Esq.  
Sean A. Lev  
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)  
[Sean.Lev@hq.doe.gov](mailto:Sean.Lev@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)

Robert M. Andersen  
Akerman Senterfitt LLP  
750 9<sup>th</sup> N.W., Suite 750  
Washington, DC 20001  
E-mail: [robert.andersen@akerman.com](mailto:robert.andersen@akerman.com)

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)  
[dhouck@ndnlaw.com](mailto:dhouck@ndnlaw.com)

Shane Thin Elk  
Fredericks Peebles & Morgan, LLP  
3610 North 163rd Plaza  
Omaha, Nebraska 68116  
E-mail: [sthinelk@ndnlaw.com](mailto:sthinelk@ndnlaw.com)

Ellen C. Ginsberg  
Michael A. Bauser  
Anne W. Cottingham  
Nuclear Energy Institute, Inc.  
1776 I Street, N.W., Suite 400  
Washington, DC 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, DC 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, DC 20037-1122  
E-mail: [jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)  
[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)

Gregory L. James  
712 Owens Gorge Road  
HC 79, Box 11  
Mammoth Lakes, California 93546  
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, DC 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  
311 Murry Street  
Ely, NV 89301  
E-mail: [rwsears@me.com](mailto:rwsears@me.com)

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: [lcda@lcturbonet.com](mailto:lcda@lcturbonet.com)

Michael L. Dunning  
Andrew A. Fitz  
H. Lee Overton  
Jonathan C. Thompson  
Todd R. Bowers  
State of Washington  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504-0117  
E-mail: [MichaelD@atg.wa.gov](mailto:MichaelD@atg.wa.gov)  
[AndyF@atg.wa.gov](mailto:AndyF@atg.wa.gov)  
[LeeO1@atg.wa.gov](mailto:LeeO1@atg.wa.gov)  
[JonaT@atg.wa.gov](mailto:JonaT@atg.wa.gov)  
[toddb@atg.wa.gov](mailto:toddb@atg.wa.gov)

Thomas R. Gottshall  
S. Ross Shealy  
Haynesworth Sinkler Boyd, PA  
1201 Main Street, Suite 2200  
Post Office Box 11889  
Columbia, SC 29211-1889  
E-mail: [tgottshall@hsblawfirm.com](mailto:tgottshall@hsblawfirm.com)  
[rshealy@hsblawfirm.com](mailto:rshealy@hsblawfirm.com)

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

Kenneth P. Woodington  
Davidson & Lindemann, P.A.  
1611 Devonshire Drive  
P.O. Box 8568  
Columbia, SC 29202  
E-mail: [kwoodington@dml-law.com](mailto:kwoodington@dml-law.com)

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

Michael Berger  
Robert S. Hanna  
Attorney for the County of Inyo  
233 East Carrillo Street Suite B  
Santa Barbara, California 93101  
E-mail: [mberger@bsglaw.net](mailto:mberger@bsglaw.net)  
[rshanna@bsglaw.net](mailto:rshanna@bsglaw.net)

Don L. Keskey  
Public Law Resource Center PLLC  
505 N. Capitol Avenue  
Lansing, MI 48933  
E-mail: [donkeskey@publiclawresourcenter.com](mailto:donkeskey@publiclawresourcenter.com)

Philip R. Mahowald  
Prairie Island Indian Community  
5636 Sturgeon Lake Road  
Welch, MN 55089  
E-mail: [pmahowald@piic.org](mailto:pmahowald@piic.org)

James Bradford Ramsay  
National Association of Regulatory Utility  
Commissioners  
1101 Vermont Avenue NW, Suite 200  
Washington, DC 20005  
E-mail: [jramsay@naruc.org](mailto:jramsay@naruc.org)

**/Signed (electronically) by/**

Christopher C. Hair  
Counsel for the NRC Staff  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop O-15D21  
Washington, DC 20555-0001  
(301) 415-2174  
[Christopher.Hair@nrc.gov](mailto:Christopher.Hair@nrc.gov)