

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before Administrative Judges:**

**09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

In the Matter of:)	July 2, 2009
U.S. Department of Energy)	
(High Level Waste Repository)	Docket No. 63-001
Construction Authorization Application))	
)	

**U.S. DEPARTMENT OF ENERGY'S ANSWER TO STATE OF
NEVADA'S NEW CONTENTIONS BASED ON FINAL NRC RULE**

The U.S. Department of Energy (DOE) hereby files its Answer to the State of Nevada's New Contentions Based on Final NRC Rule (May 12, 2009) (Filing). DOE submits this Answer under 10 C.F.R. §§ 2.309(h)(1) and 2.335(b), and the Construction Authorization Boards' (CABs) Case Management Order #1.¹ In its Filing, Nevada submits two new proposed contentions, NEV-SAFETY-202 and -203, and includes two waiver requests under 10 C.F.R. § 2.335, one associated with each new contention.²

¹ Slip op. at 4 (Jan. 29, 2009) (CMO #1).

² A petitioner under 10 C.F.R. § 2.335 does not have the opportunity to file a reply. Accordingly, if Nevada chooses to file a reply under 10 C.F.R. § 2.309(h)(2) and CMO #1 at 4, the reply may not address its waiver request nor may it address the information provided in any party's response under Section 2.335(b).

As discussed below, the CAB should dismiss this Filing in its entirety on timeliness grounds. However, if the CAB evaluates the substance of NEV-SAFETY-202, DOE would not object to the admissibility of that contention under 10 C.F.R. § 2.309(f)(1) to the extent it challenges DOE's use of the deep percolation rate specified in the proposed rule,³ rather than the final rule.⁴ NEV-SAFETY-202 is inadmissible, however, to the extent that it raises a legal challenge to 10 C.F.R. § 63.342(c)(2). Moreover, Nevada's associated request for a waiver under 10 C.F.R. § 2.335 is deficient for multiple reasons. NEV-SAFETY-203 is inadmissible in its entirety. Its associated Section 2.335 waiver request is deficient for reasons similar to those discussed in response to the waiver request in NEV-SAFETY-202.

Background information relevant to Nevada's new contentions can be found in the NRC Staff Answer to State of Nevada's New Contentions Based on Final NRC Rule at 1-3 (June 11, 2009) (Staff Response). Briefly, the Commission, in its Hearing Notice, specified that amended contentions based on the final Environmental Protection Agency (EPA) rule will be deemed timely if filed within 60 days of the Federal Register notice publishing the revised NRC implementing rules.⁵ The NRC published its Final Rule on March 13, 2009.⁶ Nevada submitted its Filing and new contentions on May 12, 2009, 60

³ Proposed Rule, Implementation of a Dose Standard After 10,000 Years, 70 Fed. Reg. 53,313 (Sept. 8, 2005) (NRC Proposed Rule).

⁴ Final Rule, Implementation of a Dose Standard after 10,000 Years, 74 Fed. Reg. 10,811 (Mar. 13, 2009) (NRC Final Rule).

⁵ 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, 63,032 (Oct. 22, 2008) (Hearing Notice); *see also* CMO #1 at 4.

⁶ NRC Final Rule, 74 Fed. Reg. at 10,811.

days later. This Answer is timely filed in accordance with the CAB's June 22, 2009 Order.⁷

I. NEVADA'S FILING SHOULD BE DISMISSED IN ITS ENTIRETY FOR LACK OF TIMELINESS

As Nevada points out, under the Hearing Notice it "may *amend* [its] contentions to the extent that the NRC's *final rule* implementing the EPA standards for the post-10,000-year performance assessment offers *fresh grounds*."⁸ In other words, the Commission has established a narrow exception to its late-filing rules to permit parties to amend previously proffered contentions to address issues that could not have been raised prior to the NRC's Final Rule. Nevada, however, has submitted two "*new contentions*."⁹ It does not seek to raise *fresh grounds* for *existing* contentions.

As explained below, NEV-SAFETY-202 is in part an impermissible challenge to the EPA's final rule, rather than the NRC's. The EPA's rule pre-dates Nevada's Initial Petition.¹⁰ As to the second part of NEV-SAFETY-202 (Nevada's challenge to DOE's use of the deep percolation rate specified in the NRC's Proposed Rule rather than the Final Rule), Nevada does not identify what previously proffered contention it is seeking to amend. Nor do the contentions referenced in NEV-SAFETY-202 raise issues

⁷ See Order (Granting Nevada's Request for Extension of Time) at 2 (June 22, 2009); see also 10 C.F.R. § 2.1017.

⁸ Filing at 1 (emphasis added, internal quotations omitted).

⁹ *Id.* (emphasis added).

¹⁰ Final Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, Nevada, 73 Fed. Reg. 61,256 (Oct. 15, 2008) (EPA Final Rule); State of Nevada's Petition to Intervene as a Full Party at 92 (Dec. 19, 2008) (Initial Petition).

regarding the percolation of water through the repository during the post-10,000-year period. Specifically,

- NEV-SAFETY-09 (Increasing CO₂ Levels on Future Climate Projections) alleged a failure to address the impact of increasing CO₂ concentrations on climate during the *first* 10,000-year period.¹¹
- NEV-SAFETY-10 (Consideration of Forcing Functions on Future Climate Change) alleged a failure to address “climate forcing” functions during the *first* 10,000-year period.¹²
- NEV-SAFETY-11 (Human-Induced Climate Change on Prediction of the Next Glacial Period) alleged a failure to accurately calculate the timing of the next glacial period.¹³
- NEV-SAFETY-12 (Projections of Future Wetter Climate Conditions) alleged a failure to account for “significantly greater monsoon rainfall amounts” during the *first* 10,000-year period.¹⁴

NEV-SAFETY-202, on the other hand, raises the issue of the proper deep percolation rate to be used during the period of geologic stability.¹⁵ This new contention cannot be fairly read to amend any of these previous contentions.¹⁶ Thus, NEV-SAFETY-202 is a new contention, not an amended contention.

NEV-SAFETY-203 is, in its entirety, an impermissible challenge to the EPA’s Final Rule. As previously noted, that rule pre-dates Nevada’s Initial Petition.

¹¹ See Initial Petition at 92.

¹² See *id.* at 97.

¹³ See *id.* at 102.

¹⁴ See *id.* at 107.

¹⁵ See Filing at 2.

¹⁶ See *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 & 3), CLI-09-08, 69 NRC ___, slip op. at 9 (May 18, 2009) (“the initial burden of showing whether the contention meets our admissibility standards still lies with the petitioner”).

Thus, the Commission’s narrow exception to the late-filing rules in 10 C.F.R. §§ 2.309(c) and (f)(2)—for amended contentions based on fresh grounds in the NRC Final Rule—does not apply to Nevada’s Filing.¹⁷ As a result, Nevada’s failure to address the late filing rules is by itself sufficient grounds for the CAB to reject Nevada’s Filing in its entirety.¹⁸

II. LEGAL STANDARDS GOVERNING NEVADA’S NEW CONTENTIONS

A. Contention Admissibility

The standards governing the admissibility of the two new contentions in Nevada’s Filing are set forth in 10 C.F.R. § 2.309(f)(1)(i) through (vi), which require a petitioner to “set forth with particularity the contentions sought to be raised,” and to satisfy the following six criteria: (i) provide a specific statement of the legal or factual issue sought to be raised; (ii) provide a brief explanation of the basis for the contention; (iii) demonstrate that the issue raised is within the scope of the proceeding; (iv) demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the licensing action that is the subject of the proceeding; (v) provide a concise statement of the alleged facts or expert opinions, including references to specific sources and documents which support the petitioner’s position on the issue and upon which the petitioner intends to rely at hearing; and (vi) provide sufficient information to show that a

¹⁷ See Hearing Notice, 73 Fed. Reg. at 63,032.

¹⁸ See *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC ___, slip op. at 32 (Apr. 1, 2009) (“[F]ailure to comply with our pleading requirements for late filings constitutes sufficient grounds for rejecting . . . intervention and hearing requests.”) (quoting *Fla. Power & Light Co., et al.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2, et al.), CLI-06-21, 64 NRC 30, 33 (2006)). It is important to remember that there is no categorical prohibition on filing new contentions. Nevada could have chosen to address the requirements of 10 C.F.R. §§ 2.309(c) and (f)(2) in its Filing, but did not do so. That failure is grounds for rejecting the contentions.

genuine dispute exists with regard to a material issue of law or fact.¹⁹ A failure to comply with any one of the six admissibility criteria is grounds for rejecting a proffered contention.²⁰ Under Section 2.309(f)(1)(i) through (vi), and as discussed below, NEV-SAFETY-202 is admissible in part. NEV-SAFETY-203 is inadmissible in its entirety.

B. Waiver Requests under Section 2.335

Under 10 C.F.R. § 2.335,

The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule was adopted. The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response by counter affidavit or otherwise.²¹

If the petitioner makes a *prima facie* showing with respect to the above requirements, then the presiding officer shall certify the matter to the Commission.²² If there is no *prima facie* showing, then the matter may not be litigated, and “the presiding officer may not further consider the matter.”²³

¹⁹ See 10 C.F.R. § 2.309(f)(1)(i)-(vi).

²⁰ See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2221 (Jan. 14, 2004).

²¹ 10 C.F.R. § 2.335(b).

²² See *id.* § 2.335 (d).

²³ *Id.* § 2.335(c).

*Millstone*²⁴ is the leading recent Commission decision on a petition for waiver under Section 2.335. *Millstone* sets forth a four-part test, under which a petitioner must demonstrate that: (1) the rule’s strict application “would not serve the purposes for which [it] was adopted”; (2) the movant has alleged “special circumstances” that were “not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived”; (3) those circumstances are “unique” to the facility rather than “common to a large class of facilities”; and (4) a waiver of the regulation is necessary to reach a “significant safety problem.”²⁵ Notably, the Commission made clear that “[t]he use of ‘and’ in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four factors must be met.*”²⁶

III. NEV-SAFETY-202 – CONTINUATION OF CLIMATE CHANGE FEPS

A. Statement of Issue of Law or Fact to Be Controverted

DOE expresses no legal objection based upon this requirement.

B. Brief Explanation of Basis

DOE expresses no legal objection based upon this requirement.

²⁴ *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-05-24, 62 NRC 551 (2005).

²⁵ *Id.* at 560; *see also Pub. Serv. Co. of N. H.* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989).

²⁶ *Millstone*, CLI-05-24, 62 NRC at 560 (emphasis added); *see also Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), ALAB-895, 28 NRC 7, 16 (1988), *aff’d*, CLI-88-10, 28 NRC 573, 595 (1988), *reconsid. denied*, CLI-89-3, 29 NRC 234 (1989) (a petition to waive a regulation “can be granted only in unusual and compelling circumstances”).

C. Whether the Issue Is Within the Scope of the Proceeding

Nevada's challenge to the manner in which DOE has limited its consideration of climate change for the period of geologic stability is outside the scope of this proceeding. Its challenge to the specific deep percolation rate that DOE used in its license application is, however, within the scope of this proceeding.

Nevada argues that:

After 10,000 years, no FEPs [features, events, and processes] or TSPA [total systems performance assessment] models are used to estimate net infiltration. Instead, the deep percolation flux as stated in the NRC's proposed rule is used. However, this violates the requirement in 10 C.F.R. § 63.342(c) that FEPs included in the 10,000-year performance assessment must also be included in the post-10,000-year performance assessment.²⁷

This aspect of the contention is an attack upon the Commission's rule in 10 C.F.R. § 63.342(c)(2), which specifies the manner in which DOE may limit its climate change analysis. There is no ambiguity in the rule. Section 63.342(c)(2) specifies that DOE's "climate change analysis may be limited to the effects of increased water flow through the repository as a result of climate change" and specifies constant-in-time deep percolation rates that "shall" be used as the basis for that analysis.²⁸ There is no

²⁷ Filing at 2.

²⁸ See also 40 C.F.R. § 19736(c)(2) (providing identical language). Nevada's attempt to exclude 10 C.F.R. § 63.342(c)(2) from its reading of Section 63.342(c), Filing at 5, also violates standard principles of regulatory law. "The interpretation of a regulation, like the interpretation of a statute, begins with the language and structure of the provision itself . . . [and] *the entirety of the provision must be given effect.*" *AmerGen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC __, slip op. at 21 (Nov. 6, 2008) (emphasis added) (*quoting U.S. Dept. of Energy* (High Level Waste Repository), CLI-06-5, 63 NRC 143, 154 (2006)).

qualification on this limitation for climate change FEPs that were included in the TSPA for the first 10,000 years, as Nevada suggests.²⁹

Nevada's interpretation is also unsupported by the rulemaking history. The EPA and NRC statements of consideration show that both agencies considered climate change for the period of geologic stability in detail and provided clear direction on how such climate change should be evaluated. As explained in the EPA rulemaking, EPA found that "the nature and extent of climate change can be reasonably represented by constant conditions taking effect after 10,000 years out to the time of geologic stability."³⁰ As a result, "[t]he assessment [of climate change] may be limited to the effects of increased water flow through the repository"³¹ EPA directed the NRC to "determine the parameter values that would define future climate."³² NRC, in turn, specified the "use of the deep percolation rate to represent the effect of future climate in performance assessments after 10,000 years."³³

For both agencies, the primary concern was the potentially unlimited scope of speculation on the topic of future climate. The NRC explained that its limitations on various performance assessments, including climate change, were intended in part to

²⁹ See Filing at 5.

³⁰ Proposed Rule, Public Health and Environmental Radiation Protection Standards for Yucca Mountain, NV, 70 Fed. Reg. 49,014, 49,060 (Aug. 22, 2005) (EPA Proposed Rule).

³¹ *Id.*; see also EPA Final Rule, 73 Fed. Reg. at 61,284-85, 61,288 ("retaining the provision related to climate change as it was proposed").

³² EPA Final Rule, 73 Fed. Reg. at 61,284.

³³ NRC Proposed Rule, 70 Fed. Reg. at 53,315-16; see also NRC Final Rule, 74 Fed. Reg. at 10,819 (discussing the use of deep percolation rate to assess post-10,000-year climate conditions in the NRC Final Rule). Nevada appears to recognize that, ultimately, this aspect of its new contention is an attack on 10 C.F.R. § 63.342(c), which "has the effect of excluding this contention." Filing at 4.

“avoid unbounded speculation and to provide a reasonable test of repository safety.”³⁴

The EPA emphasized in its Final Rule that its regulation “provides a reasonable approach to address a point of fundamental uncertainty . . . an uncertainty that cannot be removed by additional research”³⁵ Contrary to these concerns, and contrary to the NRC’s and EPA’s thorough assessments in the rulemakings, Nevada’s contention merely presents additional research—and demands for still more research—in an attempt to introduce into this proceeding unbounded speculation regarding the future climate at Yucca Mountain.³⁶

Moreover, Nevada challenges an aspect of the rule that is not a matter of discretion for the NRC. Nevada’s view that DOE is required to analyze all climate change FEPs during the period of geologic stability is a challenge to the *EPA*’s rule in 40 C.F.R. § 197.36(c)(2), a rule that the NRC was required to adopt in 10 C.F.R. § 63.342(c)(2).

As the NRC’s Final Rule explains, the Energy Policy Act of 1992 (EnPA) “directs the Commission to modify its technical criteria to be consistent with EPA’s standards.”³⁷ Under EnPA, the NRC “shall, by rule, modify its technical requirements and criteria . . . as necessary to be consistent with the [EPA] Administrator’s standards”³⁸ Thus, “NRC emphasized in its notice of proposed rulemaking that *comments on EPA’s revised*

³⁴ NRC Final Rule, 74 Fed. Reg. at 10,815.

³⁵ EPA Final Rule, 73 Fed. Reg. at 61,285.

³⁶ See Filing at 6-7 (discussing the alleged implications of “Development and Application of a Methodology for taking Climate-driven Environmental Change into account in Performance Assessments” (BIOCLIM, 2004, Deliverable D10-12) Châtenay-Malabry, France) (BIOCLIM Study)).

³⁷ See NRC Final Rule, 74 Fed. Reg. at 10,813.

³⁸ EnPA § 801(b)(1), 42 U.S.C. § 1041(b)(1) note.

standards were to be addressed to EPA and that the scope of NRC’s revised rule was limited to its adoption of EPA’s revised standards . . . and its proposal to specify the use of a deep percolation rate to represent the effect of future climate”³⁹ Nevada’s demand that DOE perform additional climate change modeling in its TSPA, beyond consideration of “increased water flow through the repository,”⁴⁰ is therefore a collateral attack on the *EPA’s* rule and EnPA, neither of which are subject to challenge in this proceeding, under 10 C.F.R. § 2.335 or otherwise.⁴¹

For these reasons, and because, as explained in Section III.G, below, Nevada has not made the required *prima facie* evidentiary showing under Section 2.335, this aspect of NEV-SAFETY-202 remains outside the scope of this proceeding and should be dismissed.

³⁹ NRC Final Rule, 74 Fed. Reg. at 10,816 (emphasis added); *see also* EPA Final Rule, 73 Fed. Reg. at 61,261 (“To address climate change, *we required* DOE to focus on the effects of increased water flow through the repository, which is the climatic effect with the most influence on release and transport of radionuclides. We determined that such a focus would provide the basis for a reasonable test of the disposal system, and that climate change beyond 10,000 years could be represented by constant conditions reflecting precipitation levels that differ from current conditions, which eliminates unresolvable speculation regarding the timing, magnitude, and duration of climatic cycles over this time frame. *We also directed that NRC* establish the exact nature of future climate characteristics to be used in performance assessments. NRC subsequently issued a proposal to specify a range of values for deep percolation into the repository, which DOE would use as another parameter in its probabilistic performance assessments.”) (emphasis added) (*citing* EPA Proposed Rule, 70 Fed Reg. at 53,313).

⁴⁰ *Compare* Filing at 2 (“climate change processes included as FEPs in the TSPA for the first 10,000 years are [not] carried forward for the next 990,000 years”) with 40 C.F.R. § 197.36(c)(2).

⁴¹ *See Carolina Power & Light* (Shearon Harris Nuclear Power Plant Unit 1), LBP-07-11, 65 NRC 41, 57-58 (2007) (stating that any contention that collaterally attacks applicable statutory requirements must be rejected by the Board as outside the scope of the proceeding) (*citing Phila. Elec. Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974)).

DOE, however, expresses no legal objection based on the scope of the proceeding to Nevada's claim regarding DOE's alleged use of a deep percolation rate different from the "specified deep percolation rate" in the NRC Final Rule.⁴²

D. Whether the Issue Is Material to Findings that the NRC Must Make

To the extent this contention contains allegations that, as explained in Section III.C, above, are outside the scope of this proceeding, it is also not material to the findings that the NRC must make.

DOE expresses no legal objection based on the materiality requirement to Nevada's claim regarding DOE's alleged use of a deep percolation rate different from the specified deep percolation rate in the NRC Final Rule.

E. Statement of Alleged Facts or Expert Opinion Supporting Petitioner's Position and Supporting References

DOE explains the deficiencies in the information supporting this contention in its response to Nevada's Section 2.335 Petition in Section III.G, below. In addition, and with respect to the level of support required under 10 C.F.R. § 2.309(f)(1)(v), Nevada offers no expert opinion or other information to connect the BIOCLIM Study to a purported need for a similar study at Yucca Mountain.⁴³

In this respect, NEV-SAFETY-202 is analogous to two contentions submitted in *Crow Butte Resources, Inc.*⁴⁴ In *Crow Butte*, the Commission recently reversed an Atomic Safety and Licensing Board's (Board) decision to admit two contentions, one

⁴² Filing at 2.

⁴³ *See id.* at 7. As explained in Section III.G.4, below, the affidavits referenced in NEV-SAFETY-202 do not adopt or incorporate the text of NEV-SAFETY-202.

⁴⁴ (License Renewal for In Situ Leach Facility, Crawford, Nebraska), CLI-09-09, 69 NRC ___, slip op. (May 18, 2009).

regarding the effect of the applicant’s facility upon wetlands and the other regarding the alleged health effects of low levels of arsenic.⁴⁵ The first contention “provided no support for [its] underlying premise” and the other contained “gaps in . . . reasoning.”⁴⁶ In both contentions, the fatal flaw was the petitioner’s failure to connect—through alleged facts or expert opinion rather than through assertions of counsel—generic studies regarding wetlands and arsenic effects to the conditions at the applicant’s facility.⁴⁷ Nevada’s reliance solely upon a study of climate change in Europe⁴⁸ is similarly deficient. In fact, Nevada argued in its Reply to DOE’s Answer to Nevada’s Petition to Intervene that it would be “highly misleading” to apply to the “vicinity of Yucca Mountain” conclusions from the very same BIOCLIM study that underlies NEV-SAFETY-202.⁴⁹

DOE expresses no legal objection to the factual basis for Nevada’s claim regarding DOE’s alleged use of a deep percolation rate different from the specified deep percolation rate in the NRC Final Rule.

F. Existence of a Genuine Dispute on a Material Issue of Law or Fact, with Supporting References to the License Application

To the extent this contention contains allegations that, as explained in Section III.C, above, are outside the scope of this proceeding, it also fails to raise a genuine dispute on a material issue of law or fact.

⁴⁵ See *id.* at 31-32, 39-43.

⁴⁶ *Id.* at 32, 42.

⁴⁷ See *id.* at 31-32, 39-43.

⁴⁸ See Filing at 6-7.

⁴⁹ State of Nevada’s Reply to DOE’s Answer to Nevada’s Petition to Intervene as a Full Party (Feb. 24, 2009) at 118 (Nevada’s Reply).

DOE expresses no legal objection based on the genuine dispute requirement to Nevada's claim regarding DOE's alleged use of a deep percolation rate different from the specified deep percolation rate in the NRC Final Rule.

G. Section 2.335 Waiver Request

1. *Nevada's Challenge to the EPA's Regulation Is Brought in the Wrong Forum*

As explained in Section III.C, above, under EnPA the NRC does not have discretion to depart from the EPA's revised standards. Nevada seeks to have the NRC require DOE to carry forward climate change processes as FEPs in the TSPA for the post-10,000-year period.⁵⁰ The EPA has specified, however, in 40 C.F.R. § 197.36(c)(2), that DOE's consideration of climate change processes may be limited to consideration of the effects of increased water flow through the repository. Nevada, therefore, is challenging the EPA's rule, not the NRC's. As a result, its challenge is brought in the wrong forum.

In addition, Nevada has separately petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review and overturn the EPA's 2008 rulemaking and the NRC's 2009 rulemaking.⁵¹ It would therefore be wasteful of the Board's resources to refer, and of the Commission's resources to consider, the same challenge.

⁵⁰ See Filing at 2.

⁵¹ *Nevada v. EPA*, Nos. 08-1327 & 08-1345 (D.C. Cir. filed Oct. 10, 2008 & Oct. 29, 2008); see also *Nevada v. NRC*, No. 09-1133 (D.C. Cir. Filed May 12, 2009).

2. *Nevada Incorrectly Characterizes the Test for a Waiver under Section 2.335*

Nevada incorrectly states the legal standard to be applied under Section 2.335. According to Nevada, the Commission “provided that a waiver of a provision of the new rule under 10 C.F.R. § 2.335 would be appropriate if the provision ‘no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence.’”⁵²

This quotation, however, is taken out of context and does not accurately reflect the Commission’s statements of consideration.

The full relevant quotation is:

if any person believes that the specification for climate change no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence, *they can petition NRC to amend the rules*. In addition, NRC’s procedural rules enable any party to an adjudicatory proceeding to petition that the application of a rule be waived in circumstances when the rule would not serve the purpose for which it was adopted.⁵³

Thus, the language Nevada quotes refers to a petition for rulemaking under 10 C.F.R. § 2.802, not to waiver requests under 10 C.F.R. § 2.335. The Commission’s statement does not alter the standards of Section 2.335 in any way. If Nevada believes that it has new scientific evidence that undermines the rulemaking, then the Commission has explained that Nevada’s proper remedy is to petition the NRC (and/or EPA, as appropriate) to amend its rules under Section 2.802.

⁵² Filing at 4 (*quoting* NRC Final Rule, 74 Fed. Reg. at 10,824).

⁵³ NRC Final Rule, 74 Fed. Reg. at 10,824 (emphasis added).

3. *Nevada Does Not Correctly Articulate the Purposes of the EPA and NRC Rules*

Nevada does not correctly articulate the purposes of the NRC's rule. According to Nevada, the purposes of 10 C.F.R. § 63.342(c), "were to specify which FEPs must be included in the post-10,000-year performance assessment in order to assure that the results of the assessment would contribute meaningfully to the safety finding required by 10 C.F.R. § 63.31(a)(2)."⁵⁴ Nevada cites no legal authority for this assertion.

In fact, the portion of the NRC's rule that Nevada challenges is required by statute to be consistent with the EPA's rule.⁵⁵ The purpose of the EPA's rule, as explained by that agency, was "to design an assessment that is a reasonable test of the disposal system's performance over a very long time period."⁵⁶ The purpose of the NRC's rule, beyond the requirement to be consistent with EPA's rule, was "to specify a reasonable basis for evaluating safety using current knowledge."⁵⁷ With regard to addressing climate change during the period of geologic stability, the Commission found that its use of a deep percolation rate constituted a reasonable basis to address long term performance.⁵⁸

⁵⁴ Filing at 7.

⁵⁵ See NRC Final Rule, 74 Fed. Reg. at 10,811; see also Section C, above.

⁵⁶ See EPA Proposed Rule, 70 Fed. Reg. at 49,049.

⁵⁷ NRC Final Rule, 74 Fed. Reg. at 10,823.

⁵⁸ See NRC Proposed Rule, 70 Fed. Reg. at 53,315-16 ("It is the rate of deep percolation, however, that directly influences repository performance. Therefore, the NRC proposes to specify use of the deep percolation rate to represent the effect of future climate in performance assessments after 10,000 years."); see also NRC Final Rule, 74 Fed. Reg. at 10,827 ("A range and distribution for deep percolation rates are specified that DOE must use to represent the effects of climate change after 10,000 years and through the period of geologic stability."). Moreover, "[g]iven the current approach for estimating deep percolation, it would take a *major* shift in scientific understanding for the deep percolation rates to change significantly." *Id.* at 10,823 (emphasis added). As explained in the Staff

Nevada does not articulate how the application of the challenged NRC rule to this proceeding would be inconsistent with the EPA's rule, or why the application of either agency's rule would be inconsistent with its *stated* purposes. Nevada, therefore, cannot and has not made the requisite *prima facie* showing that the rule "would not serve the purposes for which [it] was adopted."⁵⁹

4. *Nevada's Affidavits Do Not State with Particularity the Alleged Special Circumstances that Could Justify a Waiver*

Nevada's affidavits do not address the information required under 10 C.F.R. § 2.335 and are therefore insufficient to support Nevada's position. Under Section 2.335(b), the affidavit "must state with particularity the special circumstances alleged to justify the waiver or exception requested."

NEV-SAFETY-202 relies upon the affidavits of Dr. Michael Thorne and Dr. Jonathan Overpeck, which were attached to Nevada's Initial Petition, as those affidavits relate to contentions NEV-SAFETY-09, -10, -11, and -12.⁶⁰ Dr. Thorne's affidavit adopts the information that appears in Nevada's Initial Petition under paragraphs 5 and 6 of those contentions. Dr. Overpeck's affidavit adopts the information that appears in Nevada's Initial Petition in all paragraphs of those contentions. Neither affidavit adopts

Response, Nevada does not present information in its request to show that there has been such a major shift in scientific understanding. *See* Staff Response at 11-12.

⁵⁹ 10 C.F.R. § 2.335(b). In addition, Section 63.342(c), unlike most other generic regulations issued by the NRC, was promulgated to apply to one facility and to the specific manner in which climate change was to be assessed for that facility. Most other NRC regulations are intended to apply to a range of applicants and licensees, increasing the chances that, in a given circumstance, a given regulation might not achieve its intended purpose. In this case, such a result seems unlikely.

⁶⁰ *See* Filing at 7.

the text of NEV-SAFETY-202.⁶¹ Nevada cannot rely upon those earlier affidavits for this new purpose.

First, the affidavits are dated prior to Nevada's original petition of December 18, 2008. Thus, they do not provide any explanation of why the NRC's rule, published on March 13, 2009, "would not serve the purposes for which [it] was adopted."⁶²

Second, the information presented in NEV-SAFETY-09, -10, -11, and -12, as proffered in Nevada's Initial Petition, does not address or explain any special circumstances that could support a waiver of the new EPA or NRC rules;⁶³ much less does it do so with the requisite "particularity."⁶⁴ Specifically, the *affidavits* do not "set[] forth the special circumstances justifying the requested waiver" nor do they "explain[] why the regulation would not serve its intended purpose."⁶⁵

Third, Nevada knows the requirement for particularity in Section 2.335 affidavits. For example, Nevada presented a detailed affidavit with Nevada's Initial Petition challenging the application of certain regulations in 10 C.F.R. Parts 72 and 73 to this proceeding.⁶⁶

Nevada cannot rely upon previously filed, seemingly irrelevant, and unparticularized affidavits to satisfy Section 2.335.

⁶¹ Section 2.335 does not authorize a reply, so Nevada may not cure a failure to meet the requirements of that regulation in any reply. *See* note 2, *supra*.

⁶² 10 C.F.R. § 2.335(b).

⁶³ *See* Initial Petition at 92-111. The affidavits do not adopt, or therefore include, any information presented in Nevada's Reply to DOE or the NRC Staff. *See, e.g.*, Oral Argument Tr. (Apr. 1, 2009) at 439 (Polonsky) ("there are no affidavits attached to Nevada's reply").

⁶⁴ *Id.*

⁶⁵ *Seabrook*, ALAB-895, 28 NRC at 16.

⁶⁶ *See* Affidavit of Charles J. Fitzpatrick (Dec. 10, 2008), Attachment 2 to Nevada's Initial Petition.

5. *No Special Circumstances Exist, So No Waiver Is Warranted*

To satisfy the requirement in Section 2.335 to show that special circumstances exist, Nevada cites a study regarding the effects of climate change in Europe.⁶⁷ It then asserts that “neither DOE nor NRC has conducted corresponding studies for Yucca Mountain. Therefore, the range of climatic conditions that could apply in the post-10,000-year period has not been determined.”⁶⁸ This is a bare assertion of counsel because, as discussed above, the affidavits referenced in Nevada’s Filing provide no support for this assertion. In fact, they do not even adopt this contention or refer to NEV-SAFETY-202.⁶⁹ Nevada’s attempt to apply its cited study to Yucca Mountain therefore lacks the requisite evidentiary foundation specified in Section 2.335.

Moreover, the Staff’s affidavit and Response explain that the Staff *did* consider much of the alleged new scientific information in its rulemaking.⁷⁰ Nevada also failed to disclose significant limitations in its cited study that undermine its applicability to Yucca Mountain.⁷¹

⁶⁷ See Filing at 6-7.

⁶⁸ *Id.* at 7.

⁶⁹ Regardless, Nevada cannot rely upon previous affidavits, supplied for different contentions and for a different purpose, to establish this essential evidentiary foundation. *Cf. Oyster Creek*, CLI-09-07, slip op. at 79 n.318 (rejecting an expert affidavit that adopted previously submitted arguments of counsel in an attempt to satisfy the evidentiary requirements of 10 C.F.R. § 2.326(b) for a motion to reopen the record). Nevada’s Filing is similarly suspect because Nevada attempts to rely upon previously-filed affidavits for an entirely new purpose.

⁷⁰ See Staff Response at 11.

⁷¹ See *id.* at 11-12; Affidavit of Eugene Peters, M.S., P.G., C.E.M., Concerning NRC Staff’s Response to NEV-SAFETY-202 ¶ 9 (June 11, 2009). As discussed earlier, in any reply it files under 10 C.F.R. § 2.309(h)(2), Nevada may not seek to cure or address the deficiencies in its description of the scientific information it relies upon to challenge NRC rules. See 10 C.F.R. § 2.335(b).

For all these reasons, Nevada has failed to make the requisite *prima facie* showing that all four parts of the *Millstone* test are met. Thus, its 2.335 request must be denied. Accordingly, although DOE does not object to the admissibility of NEV-SAFETY-202 under 10 C.F.R. § 2.309(f)(1) to the extent it challenges DOE’s use of the deep percolation rate specified in the proposed rule, rather than the final rule, this contention is inadmissible to the extent that it raises a legal challenge to 10 C.F.R. § 63.342(c)(2).

IV. NEV-SAFETY-203 – EROSION FEP SCREENING AFTER 10,000 Years

A. Statement of Issue of Law or Fact to Be Controverted

DOE expresses no legal objection based upon this requirement.

B. Brief Explanation of Basis

DOE expresses no legal objection based upon this requirement.

C. Whether the Issue Is Within the Scope of the Proceeding

Nevada contends that, “land surface corrosion [sic – erosion] cannot be excluded from the TSPA in the period between 10,000 years and 1,000,000 years because topography modifications will continue to the point that topography is grossly altered.”⁷² Specifically, Nevada seeks to require DOE to include land-surface erosion (FEP 1.2.07.01.0A) in the TSPA for the post-10,000-year period.⁷³ Allegedly, “[e]ven if DOE’s exclusion” of this FEP for the first 10,000 years is correct, it “cannot be excluded from the TSPA” during the period of geologic stability.”⁷⁴

⁷² Filing at 9.

⁷³ *Id.*

⁷⁴ *Id.*

Nevada recognizes that 10 C.F.R. § 63.342(c)(2), “has the effect of excluding this contention.”⁷⁵ Nevertheless, Nevada seeks to litigate this contention based solely on its request that the Board certify this issue to the Commission under 10 C.F.R. § 2.335. The challenged rule, however, is once again not a matter of discretion for the NRC. The scope of NRC’s rulemaking is limited in pertinent part to the implementation of EPA’s revised rule in 40 C.F.R. § 197.36(c)(2).⁷⁶

For this reason, and because, as explained in Section IV.G, below, Nevada fails to make the required *prima facie* evidentiary showing under 10 C.F.R. § 2.335, this contention remains outside the scope of this proceeding and should be dismissed.

D. Whether the Issue Is Material to Findings that the NRC Must Make

Because, as explained in Section IV.C, above, this contention is outside the scope of this proceeding, it is also not material to the findings that the NRC must make.

E. Statement of Alleged Facts or Expert Opinion Supporting Petitioner’s Position and Supporting References

DOE explains the deficiencies in the information supporting this contention in its response to Nevada’s 2.335 Petition, in Section IV.G, below.

F. Existence of a Genuine Dispute on a Material Issue of Law or Fact, with Supporting References to the License Application

Because, as explained in Section IV.C, above, this contention is outside the scope of this proceeding, it also fails to raise a genuine dispute on a material issue of law or fact.

⁷⁵ *Id.* at 10.

⁷⁶ *See* NRC Final Rule, 74 Fed. Reg. at 10,813; 42 U.S.C. § 10141(b)(1).

G. Section 2.335 Waiver Request

1. *Nevada's Challenge to the EPA's Regulation Is Brought in the Wrong Forum*

As explained in Section IV.C, above, the rule that Nevada ultimately seeks to challenge is the EPA's rule in 40 C.F.R. § 197.36(c)(2). The NRC does not have discretion to depart from this standard. Indeed, Nevada's desire to have the NRC depart from the EPA's rule is effectively an attack on EnPA. Nevada cannot rely upon 10 C.F.R. § 2.335 as a vehicle to challenge EnPA and the EPA's rule in this proceeding.

In addition, as explained in Section III.G, above, Nevada has already separately petitioned the U.S. Court of Appeals for the District of Columbia Circuit to review and overturn the EPA's 2008 rulemaking and the NRC's 2009 rulemaking. It would therefore be wasteful of the Board's resources to refer, and of the Commission's resources to consider, the same challenge.

2. *Nevada Incorrectly Characterizes the Test for a Waiver under Section 2.335*

Nevada once again incorrectly states the legal standard applied under 10 C.F.R. § 2.335. According to Nevada, the Commission allegedly "provided that a waiver of a provision of the new rule under 10 C.F.R. § 2.335 would be appropriate if the provision 'no longer provides a reasonable basis for demonstrating compliance based on new scientific evidence.'"⁷⁷ As explained in Section III.G.2, above, however, this quotation refers to a petition for rulemaking, not a petition for a waiver.

⁷⁷ Filing at 10 (*quoting* NRC Final Rule, 74 Fed. Reg. at 10,824).

3. *Nevada Does Not Correctly Articulate the Purposes of the EPA and NRC Rules*

Nevada again does not correctly articulate the purposes of the NRC's rule. According to Nevada, the purposes of the NRC's rule in Section 63.342(c) "were to specify which FEPs must be included in the post-10,000-year performance assessment in order to assure that the results of the assessment would contribute meaningfully to the safety finding required by 10 C.F.R. § 63.31(a)(2)."⁷⁸ Nevada cites no legal authority for this assertion.

In fact, the portion of the NRC's rule that Nevada challenges is required by statute to be consistent with the EPA's rule.⁷⁹ The EPA explained that its rule was intended "to design an assessment that is a reasonable test of repository performance" for the post-10,000-year period.⁸⁰ The EPA further explained the rationale for its explicit limitations on the consideration of FEPs in the post-10,000-year period as follows: "It is possible to generate complex and vaguely-defined circumstances and insist that DOE analyze them thoroughly. We see such an exercise as being of no value."⁸¹

Nevada does not articulate how the application of the challenged NRC rule to this proceeding would be inconsistent with the EPA's rule, or why the application of either agency's rule would be inconsistent with its *stated* purposes.⁸²

⁷⁸ Filing at 13.

⁷⁹ See NRC Final Rule, 74 Fed. Reg. at 10,811; see also Section IV.C, above.

⁸⁰ See EPA Proposed Rule, 70 Fed. Reg. at 49,048.

⁸¹ *Id.* at 49,054.

⁸² In addition, Section 63.342(c), unlike most other generic regulations issued by the NRC, was promulgated to apply to one facility and to the specific manner in which climate change was to be assessed for that facility. Most other NRC regulations are intended to apply to a range of applicants

4. *Nevada's Affidavits Do Not State with Particularity the Alleged Special Circumstances that Could Justify a Waiver*

Nevada's affidavits do not address the information required under 10 C.F.R. § 2.335 and are therefore insufficient to support Nevada's petition. Under Section 2.335(b), the affidavit "must state with particularity the special circumstances alleged to justify the waiver or exception requested."

NEV-SAFETY-203 relies upon the affidavits of Dr. Michael Thorne and Dr. Stephan Matthai, attached to Nevada's Initial Petition, as those affidavits relate to contention NEV-SAFETY-41.⁸³ Dr. Thorne's affidavit adopts the information that appears in Nevada's Initial Petition under paragraph 5 of NEV-SAFETY-41. Dr. Matthai's affidavit adopts the information that appears in Nevada's Initial Petition in all paragraphs of NEV-SAFETY-41. Neither affidavit adopts the text of NEV-SAFETY-203.⁸⁴ As explained in Section III.G.4, above, with respect to NEV-SAFETY-202, Nevada cannot rely upon those earlier affidavits for this new purpose.

First, the affidavits are dated prior to Nevada's original petition of December 18, 2008. Thus, they do not provide any explanation of why the NRC's rule, published on March 13, 2009, "would not serve the purposes for which [it] was adopted."⁸⁵

and licensees, increasing the chances that, in a given circumstance, a given regulation might not achieve its intended purpose. In this case, such a result seems unlikely.

⁸³ See Filing at 13.

⁸⁴ Section 2.335 does not authorize a reply, so Nevada may not cure a failure to meet the requirements of that regulation in any reply. See note 2, *supra*.

⁸⁵ 10 C.F.R. § 2.335(b).

Second, the information presented in NEV-SAFETY-41 does not address the new EPA or NRC rules or their associated statements of consideration;⁸⁶ much less does it do so with the requisite “particularity.”⁸⁷ Once again, the *affidavits* do not “set[] forth the special circumstances justifying the requested waiver” nor do they “explain[] why the regulation would not serve its intended purpose.”⁸⁸

Third, Nevada is well aware of the requirement for particularity in Section 2.335 affidavits. For example, Nevada presented a detailed affidavit with Nevada’s Initial Petition challenging the application of certain regulations in 10 C.F.R. Parts 72 and 73 to this proceeding.⁸⁹

Thus, Nevada cannot rely upon previously filed, seemingly irrelevant, and unparticularized affidavits to satisfy Section 2.335.

5. *No Special Circumstances Exist, So No Waiver Is Warranted*

Nevada cites to a variety of studies that purportedly provide the special circumstances warranting a waiver.⁹⁰ Nevada, however, fails to disclose critical limitations of these studies that are identified in the Staff Response to this contention and its associated affidavit.⁹¹ Therefore, Nevada has failed to demonstrate the requisite “special circumstances” under 10 C.F.R. § 2.335.

⁸⁶ See Initial Petition at 238-42.

⁸⁷ 10 C.F.R. § 2.335(b).

⁸⁸ *Seabrook*, ALAB-895, 28 NRC at 16.

⁸⁹ See Affidavit of Charles J. Fitzpatrick (Dec. 10, 2008), Attachment 2 to Nevada’s Initial Petition.

⁹⁰ See Filing at 11.

⁹¹ See Staff Response at 16-17; Affidavit of Brittain Hill, Ph.D., Philip Justus, Ph.D., L.G., and Timothy McCartin, Concerning NRC Staff’s Response to NEV-SAFETY-203 ¶¶ 15-16 (June 11, 2009).

For all these reasons, Nevada has failed to make the requisite *prima facie* showing that all four parts of the *Millstone* test are met. Thus, its 2.335 request must be denied. Accordingly, NEV-SAFETY-203 is inadmissible in its entirety.

V. **CONCLUSION**

For the reasons set forth above, Nevada's Filing should be rejected in its entirety as untimely. With respect to the substance of the new contentions, NEV-SAFETY-202 is admissible in part, NEV-SAFETY-203 is inadmissible in its entirety, and Nevada's Section 2.335 Petition must be denied.

Respectfully submitted,

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Dated in Washington, DC
this 2nd day of July 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

09-892-HLW-CAB04
Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

_____)	
In the Matter of:)	
U.S. Department of Energy)	July 2, 2009
)	
(High Level Waste Repository)	Docket No. 63-001
Construction Authorization Application))	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the “U.S. Department of Energy’s Answer To State of Nevada’s New Contentions Based On Final NRC Rule” have been served on the following persons this 2nd day of July 2009 through the Nuclear Regulatory Commission’s Electronic Information Exchange.

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