

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-892-HLW-CAB04 Thomas S. Moore, Chairman Paul S. Ryerson Richard E. Wardwell
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In the Matter of)	
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U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	August 21, 2009
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**RESPONSE OF THE STATE OF NEVADA TO
JULY 21, 2009 ORDER
(CONCERNING SERIAL CASE MANAGEMENT)**

On July 21, 2009, Construction Authorization Board-04 ("Board") issued an Order Concerning Serial Case Management ("Order") directing the parties in this proceeding to consult and seek agreement on responses to six questions and to file a joint response on or before August 17, 2009. The Board also noted, "In the event one or more parties cannot agree, any differing views shall be filed within five (5) days of the majority filing." Order at 3. The United States Department of Energy ("DOE") took the lead in this regard, prepared a draft response to the six questions, and sought agreement from the parties on those responses. On August 17, 2009, DOE filed a Joint Response to the Order ("DOE's Joint Response").

Pursuant to the Board's Order and consistent with the intent of 10 C.F.R. § 2.323(b), the State of Nevada offered written comments on DOE's proposed response and also offered oral explanations for the positions contained within those comments. Many of the comments offered by the State of Nevada were adopted by DOE, including changes to the text of the proposed response and the accompanying spreadsheets that provided the detailed information responsive to the Board's questions. However, a significant number of comments offered by the State of Nevada were not accepted. In addition, the manner in which the differences and disagreements were to be presented in the proposed response was not sufficient to fully address the State of Nevada's underlying issues. Accordingly, the State of Nevada declined to join in DOE's filing and chooses instead to file its differing views in this pleading as permitted by the Order.

Board Question 1: Which Admitted Contentions are Associated with Each of the Five Proposed Volumes of the SER?

The State of Nevada agrees with the categorization of the majority of its admitted safety and miscellaneous contentions against the five proposed volumes of the NRC Staff's Safety Evaluation Report ("SER") as presented in Spreadsheet 1 of DOE's Joint Response with the following 24 exceptions:

Admitted Nevada Safety Contention	DOE Proposed SER Volume	Nevada Proposed SER Volume
NEV-SAFETY-110	2	3
NEV-SAFETY-123	2	3
NEV-SAFETY-128 & 130	2	3
NEV-SAFETY-131-133 & 137	2	3
NEV-SAFETY-134, 168 & 169	2	3
NEV-SAFETY-138 & 140	2	3
NEV-SAFETY-139	4	3
NEV-SAFETY-141	2	3
NEV-SAFETY-145	2	3
NEV-SAFETY-146	2	3

NEV-SAFETY-162	2	3
NEV-SAFETY-164 through 167	4	3
NEV-SAFETY-172	4	3
NEV-SAFETY-173	2	3

General Comments

The State of Nevada acknowledges that each of the above-identified contentions identifies various sections of DOE's Safety Analysis Report ("SAR") that will be addressed in an NRC Staff's SER volume other than Volume 3. However, that fact alone must not be dispositive of when the contention should be adjudicated because it elevates form over substance and focuses on only one aspect of the contention (*i.e.*, the cited SAR section(s)). Rather, the specific issue(s) present in each contention and the claimed regulatory noncompliance(s) should control when adjudication of the contention proceeds. Thus, if the contention involves post-closure issues and asserts that particular SAR sections violate post-closure regulatory requirements, *e.g.*, 10 C.F.R. §§ 63.113 - 63.115, that contention should be adjudicated on a schedule associated with the issuance of SER Volume 3 (post-closure issues). For example, DOE would categorize NEV-SAFETY-165, 166, and 167, which challenge DOE's expert elicitation procedures, as associated with SER Volume 4. Yet, if these contentions are sustained, the principal effect would be to invalidate critical Total Systems Performance Assessment ("TSPA") assumptions and models relating to movement of radionuclides through the saturated zone and seismic and igneous events, and any prior hearing and initial decision on SER Volume 3 (post-closure) issues would need to be reopened. In addition, in many instances a specific expert witness will be opining on several related contentions for the State of Nevada, and to bifurcate deposition testimony (*i.e.*, providing some as part of the adjudication of post-closure issues and some as part

of the adjudication of pre-closure issues) would not be appropriate, economical, or a wise use of scarce resources.

Furthermore, when a contention involves mixed post-closure and pre-closure issues, the contention needs to be adjudicated on a schedule associated with the issuance of SER Volume 3 rather than SER Volume 2. If the Board were to defer the adjudication of any mixed post-closure/pre-closure issues until after it had held a hearing and issued a decision on pure post-closure issues, the State of Nevada may be precluded from reopening the post-closure decision to incorporate the effects of a favorable decision on a mixed post-closure/pre-closure issue. NEV-SAFETY-141 offers a good example of this dilemma. DOE characterizes that contention as involving the "lack of demonstration of the ground support components to function properly in the emplacement [sic] drifts during the preclosure period." DOE Joint Response, Spreadsheet 1 at 1. While indeed NEV-SAFETY-141 cites to SAR Subsection 1.3.4.4 as containing inappropriate descriptions of ground support items for a final repository design, the State of Nevada made clear that the crux of the contention is the allegation that "it is not possible to evaluate the impacts of ground support items on the hydrological, thermal, and mechanical characteristics of the near field of the repository" contrary to the requirements of 10 C.F.R. §§ 63.21(c)(14), 63.102(h), 63.113 and 63.115. State of Nevada Petition to Intervene as a Full Party, filed December 19, 2008 (hereinafter "Petition") at 748. Thus, if this contention is adjudicated as part of pre-closure issues after a post-closure decision by the Board, and the State of Nevada succeeds in proving that the ground support descriptions are inappropriate, then the post-closure decision record will have to be reopened to allow the effects of that proof on the hydrological, thermal, and mechanical characteristics of the near field of the repository to be addressed.

Justifications for Specific Differences

NEV-SAFETY-110 addresses corrosion of rock bolts but within the context of compliance with 10 C.F.R. § 63.114(f) (setting forth the requirements for the post-closure performance assessment). *See* Petition at 585-86. The State of Nevada grouped this post-closure contention together with 33 other similar post-closure contentions (*i.e.*, NEV-SAFETY-077 through 110) addressing corrosion. *See id.* at vi-viii. DOE's proposal would adjudicate this one post-closure contention with SER Volume 2 because it allegedly "is focused on rock bolt corrosion during the preclosure period," *see* DOE Joint Response, Spreadsheet 1, at 1. However, DOE's proposal wholly fails to acknowledge the noncompliance with a post-closure requirement that is at issue in the contention. Moreover, DOE's proposal would segregate the adjudication of this one single post-closure contention from the adjudication of 33 related post-closure contentions, which DOE admits should be associated with SER Volume 3. *See id.*, at 4. To avoid segregation of similar post-closure contentions and in light of the issue involved in this contention and the noncompliance alleged, the State of Nevada believes NEV-SAFETY-110 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-123 addresses the speculative life-times of ground support systems, *i.e.*, rock bolts and Bernold sheets have been in use for less than 40 years, in emplacement drifts but specifically within the context of compliance with 10 C.F.R. §§ 63.114(a) and (f) (setting forth requirements for the post-closure performance assessment).

[T]he presumed 100-year life for the Super Swellex™ friction-type rock bolts and the Bernold sheets is unproven as a consequence of this ground support system having been in use for less than 40 years. Because this has not been considered, the assumptions made relating to isolation of the wastes within the waste package are unfounded and the LA does not comply with 10 C.F.R. § 63.114(a) . . . [or] 10 C.F.R. § 63.114(f)

Petition at 660. The State of Nevada included this post-closure contention among numerous similar post-closure contentions. *See id.* at ix-x (generally grouping NEV-SAFETY-123 with NEV-SAFETY-121, 122, and 124 to 146). DOE's argument that this contention should be associated with SER Volume 2 because it "focused on rock bolt corrosion during the preclosure period," DOE Joint Response, Spreadsheet 1, at 1, is simply not an accurate representation of the issue presented and thus not an appropriate basis for segregating the adjudication of this post-closure contention from other similar post-closure contentions. To avoid segregation of similar post-closure contentions and in light of the issue involved in this contention as well as the noncompliance alleged, the State of Nevada believes NEV-SAFETY-123 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-128 addresses codes and standards to fabricate the drip shield and NEV-SAFETY-130 addresses DOE's assumption that drip shield emplacement over waste packages can and will occur in the future notwithstanding deterioration, corrosion, and in-drift conditions. Each of these post-closure contentions alleges noncompliance with 10 C.F.R. § 63.113 (which requires the geologic repository to be designed with proper consideration to the engineered barrier system working in combination with the natural barrier to limit radiological exposures). *See* Petition at 692 (NEV-SAFETY-128) and 709 (NEV-SAFETY-130). The State of Nevada grouped these two post-closure contentions together with five other post-closure contentions (*i.e.*, NEV-SAFETY-124 through 130) that collectively address the effects of fabrication and welding of titanium drip shields. *See id.* at ix. DOE's proposal would segregate the adjudication of these two post-closure contentions from the adjudication of the five other related post-closure contentions, which DOE admits should be associated with SER Volume 3. *Compare* DOE Joint Response, Spreadsheet 1, at 1 *with* Spreadsheet 1, at 5. To avoid segregation of similar

contentions and in light of the issues involved in these contentions and the noncompliances alleged, the State of Nevada believes NEV-SAFETY-128 and 130 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-131, 132, 133, and 137 address similar and related post-closure issues involving engineered barrier systems ("EBS"), and each alleges noncompliance with 10 C.F.R. § 63.114(a) (which requires inclusion of information on the design of the EBS used to define parameters and conceptual models used in the post-closure performance assessment).

[NEV-SAFETY-131 addresses the] fail[ure] to include sufficient detail [in the SAR] to demonstrate that consideration has been given to the potential need to remove rock debris from around the waste packages prior to removal of the waste packages, if necessary, and/or installation of the drip shields, and as a result, the TSPA-LA assumptions relating to drip shield emplacement and effectiveness of the engineered barrier system are unfounded.

[NEV-SAFETY-132 addresses the] fail[ure] to include sufficient detail [in the SAR] to determine whether the TEV will fulfill the requirements that the TSPA-LA places on it, and as a result, the TSPA-LA assumptions relating to waste package emplacement and effectiveness of the engineered barrier system are unfounded.

[NEV-SAFETY-133 addresses the] fail[ure] to include sufficient detail [in the SAR] to determine whether the Drip Shield Gantry will fulfill the requirements that the TSPA-LA places on it, and as a result, the TSPA-LA assumptions relating to waste package emplacement and effectiveness of the engineered barrier system are unfounded.

[NEV-SAFETY-137 addresses the] fail[ure] to include sufficient detail [in the SAR] to determine whether the tunnel boring machine will fulfill the requirements that the LA places on it, and as a result the LA assumptions concerning the excavation of the emplacement drifts are unfounded.

Petition at 714-15, 718-19, 722, and 735. The State of Nevada grouped these 4 post-closure contentions with 12 other related post-closure contentions involving the EBS (*i.e.*, NEV-SAFETY-131 to 146). *See id.* at x. DOE's proposal would adjudicate these four post-closure contentions as part of SER Volume 2 because they allegedly emphasize activities that occur during the pre-closure period. *See* DOE Joint Response, Spreadsheet 1 at 1. However, DOE

overlooks the fact that each contention addresses how those particular activities preclude compliance with post-closure requirements specifically including assumptions underlying the TSPA. To avoid segregation of similar post-closure contentions and in light of the issues involved in these contentions and the noncompliances alleged, the State of Nevada believes NEV-SAFETY-131, 132, 133 and 137 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-134 alleges that DOE's concept of retrieval (*i.e.*, merely a reversal of the emplacement process) does not account for rock-fall and other off-normal conditions. *See* Petition at 723-25. NEV-SAFETY-168 alleges that DOE's description of plans for retrieval is not sufficiently detailed to demonstrate that waste packages can be retrieved. *See id.* at 908-11. NEV-SAFETY-169 is a legal contention that alleges that only conceptual plans for retrieval, as opposed to actual retrieval plans, have been included in DOE's License Application. *See id.* at 912-14. Each of these post-closure contentions allege noncompliance with the requirements contained in 10 C.F.R. §§ 63.21(c)(7) and/or 63.111(e). While the retrieval provisions of 10 C.F.R. § 63.111(e) appear under the Part 63 subject heading "Preclosure Performance Objectives," retrieval does not in fact advance any pre-closure safety objective. Indeed, the development and execution of retrieval plans would likely pose numerous challenges regarding compliance with occupational radiation protection standards and ALARA, and if pre-closure safety were the only relevant consideration, there would never be any retrieval requirement. When it promulgated the original technical criteria in 10 C.F.R. Part 60, the Commission stated that the purpose of its retrieval requirements was to "protect public health and safety in the event the site or design proves unsuitable," and that while "retrievability implies additional costs . . . [the Commission] believes this is an acceptable and necessary price to pay if it enables the Commission to determine with reasonable assurance, prior to an irrevocable act of closure, that

the EPA standard will be satisfied." 48 Fed. Reg. 28,194 at 28,196 through 28,197 (June 21, 1983). The clear implication is that a finding of compliance with post-closure dose standards will be impossible unless retrieval is available as an option. Therefore, there is a link between retrieval and post-closure safety that should not be severed, as would occur if there is a hearing and decision on post-closure contentions (*i.e.*, SER Volume 3) before there is any hearing and decision on NEV-SAFETY-134, 168 or 169. This is the reason why Nevada believes that NEV-SAFETY-134, NEV-SAFETY-168 and NEV-SAFETY-169 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-138 and 140 address similar and related post-closure issues involving the EBS, and each alleges noncompliance with 10 C.F.R. § 63.112(e) (which requires an analysis of the structures, systems and components to identify those that are important to safety). Petition at 738 and 745. The State of Nevada grouped these 2 post-closure contentions with 14 other related post-closure contentions involving the EBS (*i.e.*, NEV-SAFETY-131 to 146). *See id.* at x. DOE's proposal would adjudicate these two post-closure contentions as part of SER Volume 2 because they allegedly emphasize functions that occur during the pre-closure period. *See* DOE Joint Response, Spreadsheet 1 at 1. However, DOE overlooks the fact that each contention addresses how those functions preclude compliance with post-closure requirements. To avoid segregation of similar post-closure contentions and in light of the issues involved in these contentions and the noncompliances alleged, the State of Nevada believes that NEV-SAFETY-138 and NEV-SAFETY-140 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-139 draws a direct connection between an inadequate description of plans for addressing radiological emergencies before permanent closure and the post-closure effectiveness of engineered barriers. *See* Petition at 739-40. Specifically, the amount of detail

contained within the SAR is insufficient to determine if recovery from a radiological emergency involving waste placement or installation of drip shields will leave affected waste packages and drip shields within the design bases assumed in the TSPA. *See id.* at 740 ("the LA assumptions related to the effectiveness of the engineered barrier system are unfounded.") Accordingly, this post-closure connection warrants associating NEV-SAFETY-139 with SER Volume 3 (not 4).

NEV-SAFETY-141 addresses the lack of detailed descriptions of ground support items in the context of compliance with 10 C.F.R. §§ 63.21(c)(14), 63.102(h), and 63.115 (setting forth the multiple barrier requirements for the post-closure performance assessment), and 63.113 (setting forth post-closure performance objectives). "With only this limited information available, it is not possible to evaluate the impacts of ground support items on the hydrological, thermal, and mechanical characteristics of the near field of the repository." Petition at 748. The State of Nevada grouped this post-closure contention with 15 other related post-closure contentions involving the EBS (*i.e.*, NEV-SAFETY-131 to 146). *See id.* at x. DOE's proposal would adjudicate this contention as part of SER Volume 2 because it allegedly focuses on the function of ground support systems during the pre-closure period. *See* DOE Joint Response, Spreadsheet 1 at 1. However, DOE overlooks the fact that this contention addresses how the absence of information on ground support systems precludes compliance with post-closure requirements. To avoid segregation of similar post-closure contentions and in light of the issue involved in this contention and the noncompliances alleged, the State of Nevada believes NEV-SAFETY-141 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-145 addresses drip shield specifications but within the context of compliance with 10 C.F.R. § 63.113 (which requires the geologic repository to be designed with

proper consideration to the engineered barrier system working in combination with the natural barrier to limit radiological exposures).

[NEV-SAFETY-145] provide[s] insufficient and irrelevant specifications on design and fabrication of drip shields, making predictions of performance/failure mechanisms of the drip shields as represented in the TSPA unreliable. Drip shield failure impacts the timing and dose to the RMEI. Thus, [relevant SAR sections do not comply with 10 C.F.R. § 63.113

Petition at 769. The State of Nevada grouped this post-closure contention with 15 other related post-closure contentions involving the EBS (*i.e.*, NEV-SAFETY-131 to 146). *See id.* at x.

DOE's proposal would adjudicate this contention as part of SER Volume 2 because it allegedly addresses a "lack of detail . . . necessary to design and fabricate the drip shield during the preclosure period." *See* DOE Joint Response, Spreadsheet 1 at 1. However, DOE overlooks the fact that this contention is focused not just on the absence of the required detail but more importantly on the conclusion that, as a result of the lack of detail, TSPA predictions are unreliable including drip shield failure impacts on the timing and dose to the RMEI contrary to the 10 C.F.R. § 63.113 – a post-closure requirement. To avoid segregation of similar post-closure contentions and in light of the issue involved in this contention as well as the noncompliance alleged, the State of Nevada believes that NEV-SAFETY-145 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-146 is a legal issue contention that addresses the impact of preliminary or conceptual design information on compliance with both pre-closure and post-closure requirements. Specifically, the State of Nevada made clear that the preliminary and conceptual design information contained in various sections of both SAR Chapter 1 and 2 violates the requirements contained in 10 C.F.R. §§ 63.21, 63.24, 63.31, 63.101, 63.102, and 63.111 through 115. *See* Petition at 770-72. While clearly both pre-closure and post-closure issues are present,

DOE weighs them to conclude that "this legal issue contention is more appropriately associated with SER Volume 2." DOE Joint Response, Spreadsheet 1, at 2. Such an approach, however, would delay the resolution of the impact of preliminary or conceptual design information until *after* a decision on post-closure and thus precludes addressing those impacts *within* the post-closure decision. *See infra* at 4 (discussing why contentions involving mixed post-closure/pre-closure issues should be adjudicated on a schedule associated with the issuance of SER Volume 3 not SER Volume 2). Accordingly, the State of Nevada believes that NEV-SAFETY-146 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-162 addresses the installation schedule for the drip shield but within the context of compliance with 10 C.F.R. §§ 63.31(a)(2) and 63.113(b) (which sets forth requirements that the engineered barrier system work with the natural barriers to comply with EPA individual dose standards).

[I]f installation of the drip shields proves to be defective or impossible it will be too late to assure safety by alternative methods short of retrieving the wastes from the tunnels. However, there are no retrieval plans, or even retrieval details, and therefore there is no reasonable assurance that retrieval will be feasible as a fall-back to protect safety.

Petition at 861. The State of Nevada grouped this post-closure contention with one other post-closure contention involving the drip shield (*i.e.*, NEV-SAFETY-161), *see id.* at xi-xii, which DOE acknowledges should be adjudicated on a schedule associated with the issuance of SER Volume 3, *see* DOE Joint Response, Spreadsheet 1, at 5. DOE argues that because this "contention is focused on rock bolt corrosion during the preclosure period," it should be categorized against SER Volume 2. *Id.* at 2. Clearly DOE is confused, but even if DOE's Joint Response meant to refer to the "drip shield installation schedule" instead of "rock bolt corrosion," DOE's argument wholly misses the fact that this contention alleged noncompliance with a post-closure requirement. To avoid segregation of similar post-closure contentions and in

light of the issue involved in this contention as well as the noncompliance alleged, the State of Nevada believes that NEV-SAFETY-162 must be associated with SER Volume 3 (not 2).

NEV-SAFETY-164 addresses the method of aggregating probability distributions from groups of experts in the context of compliance with 10 C.F.R. § 63.114(b) and (c) (setting forth requirements for the post-closure performance assessment), and NEV-SAFETY-165 through 167 address the expert elicitation process itself in the context of compliance with 10 C.F.R. § 63.21(c)(19). The State of Nevada believes that these post-closure contentions should be associated with SER Volume 3 (not 2) because they collectively address the expert elicitation process as it relates to post-closure issues – i.e., saturated zone flow and transport, probabilistic seismic hazards analysis, and probabilistic volcanic hazards analysis. DOE would have these four post-closure contentions associated with SER Volume 4 simply because "[t]he expert elicitation process will be discussed in SER Volume 4." DOE Joint Response, Spreadsheet 1, at 5. However, if the State of Nevada were successful in demonstrating the validity of these four post-closure contentions, DOE's modeling of seismic and igneous events and saturated zone flow in the TSPA would be undercut. As a result, it would not be possible for DOE to prove compliance with post-closure dose standards. Therefore, a complete hearing and decision on SER Volume 3 issues would be impossible without including these four post-closure contentions. Accordingly, the State of Nevada believes that NEV-SAFETY-164, 165, 166 and 167 must be associated with SER Volume 3 (not 4).

NEV-SAFETY-172 alleges that DOE is required to, but does not intend to, require reasonable assurance with respect to the contents and proper packaging of the transportation, aging and disposal ("TAD") canisters by applying its quality assurance ("QA") program to these activities. *See* Petition at 923-32. The contention alleges that, because of this failure,

assumptions in the LA about waste package emplacement and effectiveness of engineered barriers are unfounded. *See id.* at 932 ("a complete quality assurance failure with respect to the important-to-safety (ITS) TAD . . . renders the TAD unusable for emplacement and storage of waste in the proposed Yucca Mountain repository.") This conclusion goes directly to assumptions about the source term and the effectiveness of the TAD canister, within the waste disposal package, as engineered barriers in the TSPA. DOE asserts that this contention should be associated with SER Volume 4 because its "focus . . . is on DOE's Quality Assurance Program." DOE Joint Response, Spreadsheet 1, at 5. However, DOE fails to recognize that this contention is not about an inadequacy in its QA program *per se*, but rather DOE's complete failure to implement its QA program to TAD canisters and the resultant impact on DOE's assumptions about waste package emplacement and EBS effectiveness. Accordingly, a complete hearing and decision on SER Volume 3 issues would be impossible without including NEV-SAFETY-172.

NEV-SAFETY-173 alleges that the monitoring processes for waste emplacement lack sufficient detail in the context of compliance with 10 C.F.R. §§ 63.21(c)(9), 63.21(c)(15), and 63.114(a).

[Relevant SAR sections] fail to include sufficient detail to determine whether these monitoring efforts will fulfill the requirements that the LA places on them, and as a result, the LA assumptions related to waste package emplacement and the effectiveness of the engineered barrier system are unfounded. These LA assumptions are fundamental to the post-closure safety analysis.

Petition at 935. DOE argues that this contention should be associated with SER Volume 2 because it "emphasizes an alleged lack of demonstration of the subsurface instrumentation to function properly in the emplacement drifts during the preclosure period." DOE Joint Response, Spreadsheet 1, at 2. However, DOE's argument clearly misses the "fundamental" linkage

contained in the contention between monitoring and the post-closure safety analysis. In light of the issue involved in this contention as well as the noncompliance alleged, the State of Nevada believes that NEV-SAFETY-173 must be associated with SER Volume 3 (not 2).

Board Question 2: Which admitted legal contentions, as identified in the Construction Authorization Boards' May 11, 2009 Memorandum and Order, are associated with each of the five proposed volumes of the SER?

The Board's Memorandum and Order dated May 11, 2009, LBP-09-06 (at 125-27 and 138-39) identified 28 admitted contentions proffered by the State of Nevada that involved legal issues, each of which is associated with the following NRC Staff SER Volumes:

Admitted Nevada Legal Contention	DOE Proposed SER Volume	Nevada Proposed SER Volume
NEV-SAFETY-004 to 006	4	4
NEV-SAFETY-009 to 013	3	3
NEV-SAFETY-019	3	3
NEV-SAFETY-041	3	3
NEV-SAFETY-146	2	3
NEV-SAFETY-149	3	3
NEV-SAFETY-161	3	3
NEV-SAFETY-169	2	3
NEV-SAFETY-171	3	3
NEV-SAFETY-184 to 194	4	4
NEV-SAFETY-201	2	2
NEV-Misc-002	2	2

An explanation for the disagreement between the State of Nevada and DOE in SER volume categorization for two of these contentions – *i.e.*, NEV-SAFETY-146 and 169 – is provided in the above response to Board Question 1.

Of particular concern here, however, is the fact that DOE's Joint Response identifies several more contentions proffered by the State of Nevada that should be treated as legal contentions. The Board did not ask any of the parties to identify any additional contentions as

legal, *i.e.*, other than those identified in the Board's Memorandum and Order dated May 11, 2009 (LBP-09-06). Therefore, DOE's unilateral effort to categorize eight additional contentions proffered by the State of Nevada – *i.e.*, NEV-MISC-003, 004 and 005, and NEV-SAFETY-007, 172, 196, 199, and 200 – as legal should be rejected. If DOE believes these additional contentions involve legal issues, Nevada is willing to discuss the matter with DOE at the appropriate time.

DOE has also unilaterally announced that it will file with the Board, on or before September 11, 2009, a "list of specific legal issues . . . that need to be briefed for the contentions" it has designated as legal as well as a "briefing schedule" for those legal contentions. DOE Joint Response at 3-4. The State of Nevada is more than willing to consult with DOE in an effort to seek agreement on what specific legal issue(s) may be associated with each identified legal contention at the appropriate time. However, the State of Nevada is opposed to any effort by DOE to read into the Board's Order an opportunity to provide another filing on the eve of the Board's planned hearing on September 14, 2009. Even more troublesome is the apparent willingness of DOE to file documents with the Board reflecting a "joint response by the parties" without either identifying those specific parties that join in the filing or identifying those specific parties that do not join with DOE.¹ To the degree that DOE proceeds as it has announced in its Joint Response to file additional information regarding legal contentions on or before September 11, 2009, the Board should not treat the lack of a written response from the State of Nevada as

¹ DOE's Joint Response dated August 17, 2009, failed to identify the parties that joined in the response and also failed to identify the fact that the State of Nevada was not joining the response as has been specifically requested by counsel for the State of Nevada. DOE declined to correct the mis-leading perception created by DOE's Joint Response when asked to do so by counsel for the State of Nevada, which necessitated a clarification by the State of Nevada. *See* Notice by the State of Nevada Regarding DOE's Joint Response to July 19, 2009 Order, dated August 17, 2009. This pleading follows, articulating the differing views of the State of Nevada in response to the six questions posed by the Board in its Order.

implying any agreement with the filing itself and the information contained therein. Given the anticipated lateness of any such filing by DOE and the need for the Board members and counsel for the parties to travel to Las Vegas for the hearing, the State of Nevada likely will be unable to articulate any differing views in writing before the hearing. However, at the hearing on September 14, 2009, counsel for the State of Nevada will endeavor to address any and all questions the Board may ask regarding legal issue contentions or the information provided in response to Board Question 2. The concept that the parties should try to reach agreement on identifying the legal issues embedded in contentions is a good one. However, no party should be compelled to respond on an urgent basis to DOE's identification of legal issues just because DOE thinks that would be a good idea. This Board controls the licensing proceeding, not DOE.

Three additional matters involving admitted contentions with legal issues deserve brief discussion. First, with regard to NEV-SAFETY-161, the Commission noted that this contention "would benefit from the development of a more complete adjudicatory record." CLI-09-14 at 28. The "more complete adjudicatory record" the Commission had in mind cannot include only legal argument because, before it issued CLI-09-14 and decided more was needed, the legal issues associated with NEV-SAFETY-161 had already been fully briefed. Clearly, some further proceedings involving matters of fact and opinion will be required to resolve the contention at issue in NEV-SAFETY-161. This approach is also consistent with the underlying issues involved in NEV-SAFETY-161, which the State of Nevada did not designate as a legal contention and instead offered a supporting expert for the factual allegations raised. *See* Petition at 857-60, and Attachment 3 (Affidavit of Michael C. Thorne) at Att. B. At the least, limited discovery with regard to NEV-SAFETY-161 (and its converse NEI-Safety-006) may be needed before the legal issue is scheduled for briefing.

Second, the Board has already acknowledged that waiver petitions underlying three safety contentions proffered by the State of Nevada – NEV-SAFETY-195, 197 and 198 – "will be addressed in a subsequent order or orders, along with various admitted legal issue contentions." LBP-09-06 at 139 (emphasis added). Although these three contentions were not admitted by the Board, *ibid*, the State of Nevada agrees with the Board that they should be addressed "along with [the] various admitted legal issue contentions." And in that regard, the State of Nevada suggests that these three contentions – NEV-SAFETY-195, NEV-SAFETY-197 and NEV-SAFETY-198 – should be associated with SER Volume 1.

Third, it may be that some admitted contentions will still present issues of fact and opinion even after legal issues are identified and resolved. This possibility exists because it may turn out that the resolution of legal issues merely serves to narrow the contention, but does not fully resolve it.

Board Question 3: As to each admitted legal issue contention, what other admitted safety, NEPA, or miscellaneous contentions might potentially be resolved on the basis of how that legal issue contention is decided?

The State of Nevada agrees with the response to this question contained in the DOE Joint Response. To repeat and for the sake of simplicity and completeness, the State of Nevada has **no** admitted safety, NEPA or other miscellaneous contention that might potentially be resolved on the basis of how each admitted legal issue contention is decided.

Board Question 4: Which admitted NEPA contentions have no safety component, such that they could efficiently and appropriately be adjudicated without regard to the status of the SER or any similar safety-related contention?

The State of Nevada agrees with the response to this question contained in the DOE Joint Response, as well as the information specific to the contentions proffered by the State of Nevada

as contained in Spreadsheet 3 attached to the DOE Joint Response. To repeat and for the sake of simplicity and completeness, only two admitted NEPA contentions from the State of Nevada have a safety component – NEV-NEPA-18 and NEV-NEPA-23. All other admitted NEPA contentions from the State of Nevada have no safety component, and each could efficiently and appropriately be adjudicated without regard to the status of the SER or any similar safety-related contention.

Board Question 5: Which, if any, admitted NEPA contentions (in addition to NYE-NEPA-001) involve matters that are the subject of pending supplementation of DOE’s environmental impact statement concerning the proposed repository?

The State of Nevada agrees with the response to this question contained in the DOE Joint Response, as well as the information specific to the contentions proffered by the State of Nevada as contained in Spreadsheet 3 attached to the DOE Joint Response. To repeat and for the sake of simplicity and completeness, only two admitted NEPA contentions from the State of Nevada involve matters that are the subject of the pending supplementation of DOE’s environmental impact statement concerning the repository – NEV-NEPA-020 and 021.

One additional relevant point involves the fact that DOE recently informed the NRC Staff and the Board that it **will not** be supplementing its environmental impact statement to address the deficiencies that the NRC Staff identified in their Adoption Report of September 5, 2008, and instead DOE issued an Analysis of Postclosure Groundwater Impacts. *See* Letter from DOE Counsel dated August 5, 2009. To date the NRC Staff has not announced if, instead, it will supplement DOE’s environmental impact statement, and if so, whether it will rely upon, reference, or use in any manner the Analysis of Postclosure Groundwater Impacts submitted by DOE. Accordingly, it is not clear to the State of Nevada whether DOE’s environmental impact

statement will be supplemented or when. Absent supplementation of DOE's environmental impact statement in accordance with the procedural requirements of NEPA, the State of Nevada suggests that the issues raised in NEV-NEPA-020 and 021 be adjudicated in a time frame consistent with any new or amended contentions admitted as a result of DOE's Analysis of Postclosure Groundwater Impacts. *See* Joint Motion for Extension of Time to File New or Amended Contentions dated August 14, 2009.

Board Question 6: Which, if any, contentions identified in response to Question 4, but not in response to Question 5, require discovery before being ripe for adjudication? Describe the general nature of any such discovery.

The State of Nevada agrees with the response to this question contained in the DOE Joint Response, as well as the information specific to the contentions proffered by the State of Nevada as contained in Spreadsheet 3 attached to the DOE Joint Response. To repeat and for the sake of simplicity and completeness, NEV-NEPA-001 through 016 and 022 require discovery before being ripe for adjudication, and such discovery would take the form of document production in advance of depositions, deposition testimony, and requests for admission. To the degree that such discovery would also involve requests for interrogatories, the State of Nevada would seek leave of the Board prior to making such requests.

Finally, DOE's Joint Response (at 7) announces for the first time an apparent intent by DOE to file "a joint motion to the Board seeking the deferral of litigation, including discovery, of most of the NEPA contentions." The State of Nevada has not been contacted by DOE regarding this matter, and without a detailed explanation from DOE regarding the basis for the request, the State of Nevada cannot take a position on DOE's plan for a delay.

Respectfully submitted,

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Dated: August 21, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY) Docket No. 63-001-HLW
)
(High Level Waste Repository)) August 21, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response of the State of Nevada to July 21, 2009 Order (Concerning Serial Case Management) has been served upon the following persons by the Electronic Information Exchange:

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