

October 13, 2009

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 Nos. 09-876-HLW-CAB01
)	09-877-HLW-CAB02
)	09-878-HLW-CAB03
)	09-892-HLW-CAB04

NRC STAFF COMMENT ON
JOINT PROPOSAL IDENTIFYING PHASE I LEGAL ISSUES FOR BRIEFING

INTRODUCTION

On October 6, 2009, the U.S. Department of Energy ("DOE"), the State of Nevada, and the Nuclear Energy Institute ("NEI") filed a joint proposal outlining legal issues to be briefed in Phase I of the above-captioned proceeding.¹ Nevada and DOE also filed separate opinions defining the legal issue to be briefed under NEV-SAFETY-162.² Pursuant to the CAB Case Management Order #2, dated September 30, 2009 ("Order") (unpublished), the NRC staff ("Staff") hereby presents its view of the legal issue presented in NEV-SAFETY-162.

DISCUSSION

Nevada and DOE differ on the legal issue presented by NEV-SAFETY-162. Nevada frames the legal issue as:

¹ 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 ("Joint Proposal").

² State of Nevada's Legal Issue for NEV-SAFETY-162, October 6, 2009 ("Nevada Views"); U.S. Department of Energy Views on NEV-SAFETY-162, dated October 6, 2009 ("DOE Views").

Whether, in making the pre-construction authorization finding required by 10 C.F.R. § 63.31(a)(2), it must be considered whether, given DOE's plan to install drip shields only after all of the wastes have been emplaced, it will be impossible to make the preoperational finding in 10 C.F.R. § 63.41(a) that construction of the underground facility has been substantially completed in accordance with the license application, as amended, the Atomic Energy Act, and applicable NRC regulations.

Nevada Views at 1. DOE asserts the legal issue is limited to "[w]hether 10 C.F.R.

§§ 63.31(a)(2) and 63.113(b), and [Nuclear Waste Policy Act ("NWP")] § 121(b)(1)(B) require DOE to install the drip shields prior to emplacing all of the waste in the repository." DOE Views at 2. The Staff's view is that DOE's interpretation of the legal issue presented in NEV-SAFETY-162 is appropriate.

NEV-SAFETY-162 alleges that DOE's plan to install drip shields after all waste canisters have been emplaced violates the requirement in 10 C.F.R. § 63.113(b) that the engineered barrier system, combined with natural barriers, comply with the EPA's individual dose standards. State of Nevada's Petition to Intervene as a Full Party, dated December 19, 2008 ("Nevada Petition"), at 861. The contention further alleges that this precludes the issuance of a construction authorization because NRC cannot find that "there is reasonable expectation that the materials can be disposed of without unreasonable risk to the health and safety of the public," as required by 10 C.F.R. § 63.31(a)(2). *Id.*

The Commission has held that a reply "cannot expand the scope of the arguments set forth in the original hearing request." *Nuclear Management Co., LLC* (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006). As DOE points out, see DOE Views at 3, and Nevada acknowledges, see Nevada Views at 3, Nevada did not cite 10 C.F.R. § 63.41(a) in its original contention. However, Nevada cites several Licensing Board decisions to support its argument that material presented for the first time in reply may be considered if it "legitimately amplifie[s]" the initial contention. Nevada Views at 3 (citing *PPL Susquehanna LLC* (Susquehanna Steam Electric Station, Units 1 and 2), LBP-07-4, 65 NRC 281, 301 (2007); *Pai'ina Hawaii* (Material

License Application), LBP-06-12, 63 NRC 403, 416 (2006); *Louisiana Energy Services, LP* (National Enrichment Facility), LBP-04-14, 60 NRC 40, 58 (2004)). While this is a true statement of the rule regarding new material offered for the first time in reply, the rule is misapplied here, because Nevada's citation to 10 C.F.R. § 63.41(a) does more than merely "amplify" its original contention.

In its statement of the legal issue, Nevada expands the scope of NEV-SAFETY-162 to include a determination of whether "it will be impossible to make the pre-operation finding in 10 C.F.R. § 63.41(a) that construction of the underground facility has been substantially completed." Nevada Views at 1. Thus, Nevada's view of the legal issue encompasses not only the finding the NRC must make under 10 C.F.R. § 63.31(a)(2) prior to construction authorization, but also the finding the NRC must make under 10 C.F.R. § 63.41(a), prior to issuing a license to receive and possess source, special nuclear, or byproduct material, that construction of the repository "has been substantially completed in conformity with the application as amended, the provisions of the Atomic Energy Act, and the rules and regulations of the Commission. 10 C.F.R. § 63.41(a).

Although Nevada argues that it raises § 63.41(a) "only to suggest the meaning of 10 C.F.R. § 63.31(a)(2)," Nevada Views at 3, the citation to § 63.41 conflates the findings required to grant a construction authorization with those required to grant a license to receive and possess source, special nuclear, or byproduct material. In so doing, Nevada not only expands the scope of NEV-SAFETY-162 beyond the contention as originally proffered in the Nevada Petition, it expands the scope of the instant proceeding. See Notice of Hearing and Opportunity to Petition for Leave to Intervene, *U.S. Dep't of Energy* (High-Level Waste Repository), CLI-08-25, 68 NRC 497, 497, 503 (2008) (noting that the hearing will consider a construction authorization application). Therefore, the legal issue presented by NEV-SAFETY-162 should be limited to the issue as articulated by DOE.

CONCLUSION

For the reasons discussed above, the Board should adopt DOE's statement of the legal issue presented by NEV-SAFETY-162.

Respectfully submitted,

/Signed (electronically) by/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF COMMENT ON JOINT PROPOSAL IDENTIFYING PHASE I LEGAL ISSUES FOR BRIEFING" in the above-captioned proceeding have been served on the following persons this 13th day of October, 2009, by Electronic Information Exchange.

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