

**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:	)	December 7, 2009
	)	
U.S. Department of Energy	)	
	)	Docket No. 63-001
(High Level Waste Repository	)	
Construction Authorization Application)	)	
	)	

**U.S. DEPARTMENT OF ENERGY BRIEF ON  
CONTENTION NEV-SAFETY-169**

**I. Introduction**

In its May 11, 2009 “Memorandum and Order (Identifying Participants and Admitted Contentions),” Construction Authorization Boards (CABs) 01, 02 and 03 admitted for hearing Nevada Safety Contention 169 concerning DOE’s preparation of a retrieval plan.<sup>1</sup> The CAB identified this as a “legal” contention to be briefed.<sup>2</sup> DOE and the State of Nevada have agreed that this contention involves the following legal issue:

Whether 10 C.F.R. §§ 63.21(c)(7) and 63.31 allow DOE to submit in the LA a description of its retrieval plans without having a full retrieval plan available for review.<sup>3</sup>

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<sup>1</sup> See U.S. Dep’t of Energy (High Level Waste Repository), LBP-09-06, 69 NRC \_\_ (slip. op at 138) (May 11, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> See U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Joint Proposal Identifying Phase 1 Legal Issues for Briefing, Attachment 1 at 4 (Oct. 6, 2009).

CAB 04 approved this formulation of the legal issue.<sup>4</sup>

As required by 10 C.F.R. §§ 63.21(c)(7), the Safety Analysis Report (SAR) in DOE's license application (LA) includes a "description" of DOE's plans for retrieval and alternate storage of the radioactive wastes, should retrieval be necessary.<sup>5</sup> DOE explained in the SAR that it would develop and define in detail specific retrieval procedures "should the need for retrieval be identified."<sup>6</sup>

The regulation's plain language requires only a "description" of DOE's plans at this stage of the proceeding. DOE has provided such a description.

## **II. Argument**

### **A. *The Regulations Require That the LA Include a "Description" of Its Plans for Retrieval and Alternate Storage.***

There is no dispute that the LA contains DOE's description of its plans for retrieval and alternate storage of the radioactive wastes, should retrieval be necessary.<sup>7</sup> The relevant regulations require no more. On its face, § 63.21(c)(7) requires the LA to include a "description" of DOE's plans for retrieval and alternate storage of radioactive wastes. Part 63 does not require the applicant to have or make available for review final detailed plans for retrieval and alternate storage at this stage of the proceeding.

Had the Commission intended to require more than a "description" of retrieval plans, it would have said so explicitly. Indeed, in the Statements of Consideration (SOC) accompanying the promulgation of Part 63, the NRC directly addressed the distinction between a plan itself and a "description" of that plan, as those terms are used in § 63.21. As originally proposed,

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<sup>4</sup> See CAB 04, Order (Identifying Phase 1 Legal Issues for Briefing) (Oct. 23, 2009) (unpublished).

<sup>5</sup> SAR references in this brief are to SAR revision 1, dated February 19, 2009.

<sup>6</sup> SAR § 1.11 at 1.11-1 to -2.

<sup>7</sup> See *id.* § 1.11.

§ 63.21(b)(3) called for a “detailed plan” for providing physical protection for high-level waste. In response to DOE’s concerns that all information would not be available at the construction authorization stage, the NRC changed the language of the rule to its present form requiring only a “description” of that plan.<sup>8</sup> The NRC observed that this change would provide greater consistency with other provisions that require only that a “description” of plans be submitted with the LA.<sup>9</sup> This change also was consistent with the principle expressed in § 63.24(a) that the application should be “reasonably complete” based on available information at the time of the construction authorization.<sup>10</sup>

The NRC expressed a similar interpretation with respect to § 60.21 (from which § 63.21 was adapted):

*Preliminary Nature of the Information to be Included in an Application for Construction Authorization.* A number of commenters expressed the opinion that the wording of § 60.21 did not explicitly reflect the preliminary nature of some of the information that would be available at the construction authorization stage. *Some commenters believed that certain categories of information, such as emergency plans and plans for retrieval, did not seem necessary, at least in full detail, at the construction authorization stage.* In view of the fact that § 60.21 must be read in conjunction with § 60.24(a), which specifies that the application “shall be as complete as possible in light of information that is reasonably available at the time of docketing,” no change to the proposed rule is required.<sup>11</sup>

Hence, the NRC did not disturb § 60.21(c)(12)’s requirement that the LA include a “description of plans for retrieval,” recognizing that the plans’ “full detail” may await a later stage of the proceeding.

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<sup>8</sup> Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada, 66 Fed. Reg. 55,732, 55,738-39 (Nov. 2, 2001).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Disposal of High-Level Radioactive Wastes in Geologic Repositories: Licensing Procedures, 46 Fed. Reg. 13,971, 13,974 (Feb. 25, 1981) (emphasis added).

Section 63.21 respects the distinction between “plans” and “descriptions of plans” by variously requiring the applicant to submit one or the other with respect to different aspects of the LA.<sup>12</sup> And in other NRC regulations, the NRC similarly has spoken clearly when it expects more than a simple description.<sup>13</sup> The NRC even has made clear when it wants *both* a description and the plans themselves.<sup>14</sup>

The Commission’s different word choices should be presumed deliberate: Section 63.21(c)(7)’s requirement for a “description” means just that.<sup>15</sup> There is no requirement that DOE have completed its full retrieval plans at this stage of the proceeding.

Moreover, this understanding of the nature of DOE’s obligation at this point in the proceeding comports with the multi-phased nature of the licensing process. The NRC has explained:

[P]art 63 provides for a multi-staged licensing process that affords the Commission the flexibility to make decisions in a logical time sequence that accounts for DOE collecting and analyzing additional information over the construction and operational phases of the repository. The multi-staged approach comprises four major decisions by the Commission: (1) Construction authorization; (2) license to receive and emplace waste; (3) license amendment for permanent closure; (4) termination of license. The time required to complete the stages of this process . . . is extensive

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<sup>12</sup> Compare, e.g., 10 C.F.R. § 63.21(c)(7) (description of retrieval plans) with *id.* § 63.21(c)(22)(iv) (plans for startup activities and testing) and § 63.21(c)(22)(v) (plans for conducting normal activities including maintenance, surveillance, and periodic testing).

<sup>13</sup> See, e.g., 10 C.F.R. § 50.82(b)(2) (requiring “updated detailed plans” before commencing certain decommissioning activities); *id.* § 52.110(i)(2)(iv) (requiring “detailed plans” for a final radiation survey as part of a “license termination plan”).

<sup>14</sup> See *id.* § 50.34(b)(8) (requiring final SAR to contain “a description and plans” for implementing an operator requalification plan).

<sup>15</sup> See, e.g., *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”); *Lewis v. Atlas Van Lines, Inc.*, 542 F.3d 403, 409 (3d Cir. 2008) (stating that “the basic tenets of statutory construction apply to construction of regulations” and applying the fundamental canon of construction that words should be interpreted “as taking their ordinary, contemporary, common meaning,” to regulations) (citations omitted).

and will allow for generation of additional information. Clearly, the knowledge available at the time of construction authorization will be less than at the subsequent stages.<sup>16</sup>

Section 63.31, which governs the construction authorization, requires that DOE's LA provide enough information so that the Staff can make a construction authorization decision.<sup>17</sup> The question at this stage of the proceeding is whether the information provided in DOE's LA demonstrates that DOE can "design (and build) the repository in such a way that the retrieval option is not rendered impractical or impossible."<sup>18</sup> This standard is reflected in 10 C.F.R. § 63.111(e) ("Retrievability of waste"), which requires that the repository "be designed to preserve the option of waste retrieval." DOE's compliance with this design criterion is what the NRC will consider when deciding whether the requisite determinations can be made under § 63.31(a). The "description" of DOE's retrieval plans in SAR § 1.11 is one of many places in the SAR where the NRC will look to determine whether it has "reasonable assurance" that the option of retrieval has been preserved.

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<sup>16</sup> 66 Fed. Reg. at 55,738.

<sup>17</sup> *See id.* at 55,739.

<sup>18</sup> *Id.* at 55,743.

### **III. Conclusion**

In sum, DOE is required only to include a “description” of its plans for retrieval and alternate storage of the radioactive wastes should retrieval become necessary. Part 63 does not require DOE to prepare or make available for review a final detailed retrieval plan at this stage of the proceeding.

Respectfully submitted,

*Signed electronically by Donald J. Silverman*

Donald J. Silverman  
Counsel for the U.S. Department of Energy  
Morgan, Lewis & Bockius LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004

James Bennett McRae  
Martha S. Crosland  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, SW  
Washington, DC 20585

Dated in Washington, DC  
this 7th day of December 2009