

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))	ASLB No. 09-892-HLW-CAB-04
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)	

NUCLEAR ENERGY INSTITUTE’S POSITION ON EFFECT OF RULING
ON PHASE I LEGAL ISSUE 1 (NEI-SAFETY-05)

On December 14, 2010, the Atomic Safety and Licensing Board (“Board”) issued its Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions).¹ Among other legal issues, the Board decided Legal Issue 1. Legal Issue 1 was defined by agreement of the parties² in response to CAB Case Management Order 2,³ and was subsequently adopted by Board order dated October 23, 2009.⁴ In accordance with the stipulation of the parties, Legal Issue 1 related to one Phase I contention: NEI-SAFETY-05 on alleged excessive conservatism in the post-closure criticality analysis resulting in unnecessary radiation doses, environmental impacts, and economic costs.

The Nuclear Energy Institute (“NEI”) has engaged in discussions among the parties regarding the effect of the Board’s ruling on Legal Issue 1, as directed by the Board’s

¹ LBP-10-22, ___ NRC ___ (Dec. 14, 2010).

² “U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Proposal Identifying Phase I Legal Issues for Briefing,” Docket No. 63-001, ASLB No. 09-892-HLW-CAB-04, dated October 6, 2009.

³ CAB Case Management Order #2 (Sept. 30, 2009) (unpublished).

⁴ CAB Order (Identifying Phase I Legal Issues for Briefing) (Oct. 23, 2009) (unpublished).

Memorandum and Order of December 14, 2010.⁵ NEI agrees to the report being filed on behalf of the parties by the Department of Energy (“DOE”), to the extent reflected therein. However, NEI here more fully states its separate position, as contemplated by the Board.

First, NEI does not believe that the Board’s ruling on Legal Issue 1 has any self-executing effect on any contention, including NEI-SAFETY-05. Likewise, NEI does not plan to withdraw the contention. Rather, NEI understands the Board’s ruling to establish the law of the case, which would be relevant to resolution of NEI-SAFETY-05, in whole or part. Any resolution would require a summary disposition or other dispositive motion. NEI would be entitled to reply to such a motion in due course. A Board decision on such a motion (and the Board’s December 14, 2010, decision on the legal issue) would be subject to timely appeal.

Second, DOE and the parties other than NEI suggest that logic similar to that applicable to NEI-SAFETY-05 applies to other NEI contentions, such as NEI-SAFETY-01, NEI-SAFETY-02, and NEI-SAFETY-06. However, NEI contends that those contentions are not presently before the Board. None of these contentions were identified in the stipulation of the parties defining the Phase I legal issues. NEI-SAFETY-01 and NEI-SAFETY-02 are not even Phase I contentions.⁶ And NEI-SAFETY-06 was not framed as a contention subject to any Phase I legal issue and is therefore beyond the scope of the Board’s Memorandum and Order on legal issues.

Certainly, as the law of the case, the Board’s Memorandum and Order on legal issues will apply (unless reversed or modified by the Commission) in this and subsequent phases

⁵ LBP-10-22, slip op. at 36.

⁶ In CAB Case Management Order #2 (slip op. at 3) the Board directed that “[e]xcept as otherwise expressly provided, there shall be no discovery on or litigation of any other contentions that are not specifically identified as included in Phase I [emphasis added] until a schedule is established for those contentions by this Board.”

of this proceeding. But the Board need not address the effect of that decision on these contentions at this time. The law of the case can be the basis for a motion (*e.g.*, a motion *in limine*, a motion to strike, a summary disposition motion) by any party at an appropriate time during the applicable phase of this proceeding. NEI does not agree to any particular effect of the Board's decision on Legal Issue 1 on these contentions at this time, and would brief that issue in the context of a specific contention, if and when it arises later in this proceeding.⁷

NEI concludes that the Board's decision on Legal Issue 1 applies only to NEI-SAFETY-05 at this time; that absent a withdrawal by the proponent the decision is not self-executing with respect to any contention; and the decision establishes the law of the case that may form the basis for a timely motion of any party going forward. NEI reserves the right to respond to any such motions in accordance with the agency's rules of practice.

⁷ As an example, the suggestion in the stipulation that the logic in Legal Issue 1, as applied to NEI-SAFETY-05, may apply to NEI-SAFETY-06 is vague and premature. NEI-SAFETY-06, in contrast to NEI-SAFETY-05, by its terms clearly raises issues of onsite radiological doses and ALARA. Furthermore, the nature of the issue is fundamentally different from NEI-SAFETY-05. In upholding the admissibility of that contention, the Commission wrote:

NEI-SAFETY-6 presents, in some ways, the converse of the issue presented in Contention NEV-SAFETY-161, . . . , and other admitted contentions regarding the proposed drip shields. [fn omitted] We decline to disturb CAB-03's ruling admitting this contention, and find that the consideration of NEI-SAFETY-6 in tandem with other admitted contentions relating to the proposed drip shields, including NEV-SAFETY-161, would benefit from the development of a more complete adjudicatory record.

Memorandum and Order, CLI-09-14, slip op. at 28 (June 30, 2009). Nothing in the Board's ruling on Legal Issue 1 nullifies this contention.

January 21, 2011

Respectfully submitted,

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Dated in Washington, D.C.
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Nuclear Energy Institute’s Position
On Effect Of Ruling On Phase I Legal Issue 1 (NEI-SAFETY-05)” have been served upon the
following persons on this 21st day of January 2011 by Electronic Information Exchange.

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