

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

**Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell**

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

)
) **Docket No. 63-001-HLW**
)

) **ASLBP No. 09-892-HLW-CAB04**
)

) **January 31, 2011**
)

**U.S. DEPARTMENT OF ENERGY'S OPPOSITION TO THE STATE OF NEVADA'S
MOTION FOR RECONSIDERATION**

On January 20, 2011, the State of Nevada (Nevada) filed a motion for reconsideration (Reconsideration) in which it asked the Board to reconsider the earlier rejection of NEV-Misc-001 in LBP-09-06.¹ Nevada's Reconsideration is based on the Board's holding on Legal Issue 5 in LBP-10-22, where the Board held that there is no legal requirement for DOE to consider the effects of erosion for "the post-10,000 year performance assessment" when "there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years."² The U.S. Department of Energy (DOE) opposes Nevada's Reconsideration because NEV-Misc-001 was properly dismissed in LBP-09-06, and LBP-10-22 reinforces the earlier dismissal of that contention.

¹ Memorandum and Order (Identifying Participants and Admitted Contentions), LBP-09-06 (May 11, 2009).

² Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, 72 N.R.C. ____ (slip. op. at 17) (Dec. 14, 2010).

Nevada argues that the Board should reconsider the earlier rejection of NEV-Misc-001 because the “factual predicate” of NEV-Misc-001 (*i.e.*, NEV-Safety-041) will not be addressed due to the Board’s holding on Legal Issue 5 and, therefore, the Board’s premise for dismissing NEV-Misc-001 will never be proven correct or not.³ But NEV-Misc-001 has already been proven incorrect as a matter of fact and law.

NEV-Misc-001 was entirely predicated on NEV-Safety-041 and concerns the alleged effect of erosion 500,000 years after waste emplacement. NEV-Misc-041 states:

Legal issue: The construction authorization cannot be granted because, as contention NEV-SAFETY-041 establishes, Yucca Mountain will erode to the level of the repository drifts beginning around 500,000 years after waste emplacement, thereby exposing the waste packages to the atmosphere, with the result that for the period after about 500,000 years and continuing throughout the period of geologic stability the facility will no longer constitute a ‘repository’ but would, at best, constitute a retrievable storage facility, in violation of sections 2(18), 114(d), 141(g) and 302(d) of the NWPA, section 801(a) of the EnPA, and Public Law No. 107-200 (42 U.S.C. § 10135 note).⁴

Assuming NEV-Misc-001 had not already been dismissed, the Board’s holding in LBP-10-22 would subject this contention to dismissal. The Board held that 10 C.F.R. § 63.342(c) does not require the post-10,000 year assessment to include erosion effects if Nevada cannot show that erosion causes increases in radiological exposures or releases within the first 10,000 years.⁵ As the Board additionally held: “Unless erosion is ‘screened in’ as a FEP because of its effects during the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years.”⁶

³ Reconsideration at 2.

⁴ State of Nevada’s Petition to Intervene as a Full Party at 1144 (Dec. 19, 2008).

⁵ LBP-10-22 at 17.

⁶ *Id.* at 36.

Nevada concedes in its Reconsideration that erosion would not increase radiological exposures or releases during the first 10,000 years.⁷ This admission accordingly renders NEV-Safety-041 *and* NEV-Misc-001 inadmissible as a matter of law.

Nevada's admission also proves that NEV-Misc-001 is irrelevant -- one of the reasons behind the dismissal of that contention in LBP-09-06. The following reason was stated for dismissal of that contention:

The contention does not satisfy section 2.309(f)(1)(vi) because it does not present a genuine dispute on a material issue of law or fact. The contention raises a legal issue that depends upon resolution of factual issues presented in NEV-SAFETY-041. . . *If, on the other hand, the factual issues underlying NEV-SAFETY-041 are invalid, then this legal issue contention is **irrelevant**.* Accordingly, NEV-MISC-001 is inadmissible.⁸

Nevada candidly states that erosion will not cause an increase in dose or releases within the first 10,000 years.⁹ As a consequence, the factual issues underlying NEV-Safety-041 are invalid, and, thus, NEV-Misc-001 has been proven irrelevant.

The Board should deny Nevada's motion for reconsideration.

⁷ Reconsideration at 2.

⁸ LBP-09-06, slip op. at 128 (emphasis added).

⁹ Reconsideration at 2.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean A. Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Counsel for the U.S. Department of Energy

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Construction Authorization Application))	
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CERTIFICATE OF SERVICE

I hereby certify that copies of **U.S. DEPARTMENT OF ENERGY'S OPPOSITION TO THE STATE OF NEVADA'S MOTION FOR RECONSIDERATION** have been served on the following persons on this 31st day of January 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

CAB 04
Atomic Safety and Licensing Board Panel
Thomas S. Moore, Chair
E-mail: tsm2@nrc.gov
Paul S. Ryerson
E-mail: psr1@nrc.gov
Richard E. Wardwell
E-mail: rew@nrc.gov

Parties Served
Adams, Marta
Andersen, Robert M.
Bailey, Annie
Barlow, Gregory
Baughman, Mike
Bauser, Michael A.

E-mail Addresses
madams@ag.nv.gov
robert.andersen@akerman.com
baileys@lcturbonet.com
lcd@lcturbonet.com
mikebaughman@charter.net
mab@nei.org

Bell, Kevin W.	kwbell@energy.state.ca.us
Berkey, Curtis	cberkey@abwwlaw.com
Berger, Michael	michael@lawofficeofmichaelberger.com
Beutel, Theodore	tbeutel.ecda@eurekanv.org
Bielecki, Jessica	Jessica.bielecki@nrc.gov
Bollwerk III, G. Paul	paul.bollwerk@nrc.gov
Borski, Laurie	lborski@nuclearlawyer.com
Bowers, Todd	toddb@atg.wa.gov
Brooks, Felicia M.	fbrooks@ndnlaw.com
Carter, Lorraine	lcarter@captionreporters.com
Choate, Zoie	zchoate@co.nye.nv.us
Colburn, Ross	rcolburn@ndnlaw.com
Cottingham, Anne	awc@nei.org
Crosland, Martha S.	Martha.Crosland@hq.doe.gov
Culler, Sara	Sara.culler@nrc.gov
Curran, Diane	dcurran@harmoncurran.com
Damele, Ronald	rdamele@eurekanv.org
Deucher, Joseph	Joseph.deucher@nrc.gov
Dinunzio, Nicholas	Nicholas.Dinunzio@hq.doe.gov
Dobie, Julie	jdobie@gklaw.com
Dreher, Michael	michael.dreher@nrc.gov
Dudley, Sherry	sdudley@co.nye.nv.us
Dunning, Michael	MichaelD@atg.wa.gov
Durbin, Susan	susan.durbin@doj.ca.gov
Eiteim, Anthony C.	Anthony.Eitreim@nrc.gov
ThinElk, Shane	sthinelk@ndnlaw.com
Eredia, Sally	seredia@ndnlaw.com
Fitz, Andrew	andyf@atg.wa.gov
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com
Francis, Karin	Karin.francis@nrc.gov
Fraser, Matthew	mfraser@harmoncurran.com
Frishman, Steve	steve.frishman@hotmail.com
Gitter, Rebecca	rll@nrc.gov
Gilman, Joseph	jsg1@nrc.gov
Ginsberg, Ellen C.	ecg@nei.org
Gores, Jennifer A.	jgores@armstrongteasdale.com
Gottshall, Thomas R.	tgottshall@hsblawfirm.com
Graser, Daniel J.	djg2@nrc.gov
Hanna, Robert S.	robert@lawofficeofmichaelberger.com
Harich, Patricia	Patricia.harich@nrc.gov
Harrington, Arthur J.	aharrington@gklaw.com
Harris, Scott Blake	Scott.Harris@hq.doe.gov
Hart, Joshua	jhart@inyocounty.us
Hawkins, E. Roy	erh@nrc.gov
Hearing Docket	hearingdocket@nrc.gov

Heinzen, Steven A.	sheinzen@gklaw.com
Hembacher, Brian	brian.hembacher@doj.ca.gov
Horin, William	whorin@winston.com
Houck, Darcie L.	dhouck@ndnlaw.com
James, Gregory L. Esq.	gljames@earthlink.net
Johnson, Abigail	eurekanrc@gmail.com
Julian, Emile	Emile.julian@nrc.gov
Keskey, Don	donkeskey@publiclawresourcenter.com
Klevatorick, Phil	klevatorick@co.clark.nv.us
Larimore, Patricia	plarimore@talisman-intl.com
Lawrence, John W.	jlawrence@nuclearlawyer.com
Leigh, Rovicanne	rleigh@abwwlaw.com
Lembke, Alisa	alembke@inyocounty.us
Lenehan, Daniel	daniel.lenehan@nrc.gov
Lev, Sean	sean.lev@hq.doe.gov
Lewis, Linda	linda.lewis@nrc.gov
List, Robert F.	rlist@armstrongteasdale.com
Loveland, Bryce	bloveland@jsslaw.com
Lunt, Robin	rlunt@naruc.org
Lynch, Susan	slynch1761@gmail.com
Maerten, Daniel	Daniel.Maerten@caci.com
Mahowald, Phillip	pmahowald@piic.org
Malsch, Martin G.	mmalsch@nuclearlawyer.com
Martin, Circe	ogcmailcenter@nrc.gov
Martinez, Melanie	wpnucwst2@mwpower.net
Mathias, Linda	yuccainfo@mineralcountynv.org
MacDonald, Diana	dianam@atg.wa.gov
McRae, James Bennett	Ben.McRae@hq.doe.gov
Mercado, Michele	michele.mercado@doj.ca.gov
Miller, Cynthia	cmiller@psc.state.fl.us
Miras-Wilson, Rachel	rwilson@winston.com
Montesi, Susan	smontesi@nuclearlawyer.com
Moore, Thomas S.	tsm2@nrc.gov
Mueller, Edwin	muellered@msn.com
Murphy, Malachy	mrmurphy@chamberscable.com
Nelson, Sharon	sharonn@atg.wa.gov
Nezhad, Cyrus	Cyrus.Nezhad@hq.doe.gov
Niegemann, Brian	bniegemann@ndnlaw.com
OCAA Mail Center	OCAAMAIL@nrc.gov
Overton, H. Lee	Leeo1@atg.wa.gov
Pak, Christina	Christina.Pak@hq.doe.gov
Peebles, John M.	jpeebles@ndnlaw.com
Pitchford, Loreen, LSN Coordinator	lpitchford@comcast.net
Pitts, Jason	jayson@idtservices.com
Poland, Douglas M.	dpoland@gklaw.com

Putzu, Frank	frank.putzu@navy.mil
Ramsay, James	jramsay@naruc.org
Renfro, Hanna	hrenfro@gklaw.com
Repka, David A.	drepka@winston.com
Rhoan, Robert	rrhoan@ndnlaw.com
Robbins, Alan	arobbins@jsslw.com
Roby, Debra	droby@jsslw.com
Rosenthal, Alan S.	Alan.rosenthal@nrc.gov
Rotman, Matthew	matthew.rotman@nrc.gov
Ryan, Tom	Tom.Ryan@nrc.gov
Ryerson, Paul S.	psr1@nrc.gov
Schwartz, Jacqueline	jschwartz@gklaw.com
Sears, Richard	rwsears@wpcda.org
Shealy, Ross	rshealy@hsblawfirm.com
Silberg, Jay E.	jay.silberg@pillsburylaw.com
Silvia, Andrea L.	alc1@nrc.gov
Simkins, Connie	jcciac@co.lincoln.nv.us
Simon, Mike	wpnucwst1@mwpower.net
Sisco, Carlos L.	csisco@winston.com
Sullivan, Timothy E.	timothy.sullivan@doj.ca.gov
Thompson, Jonathan	JonaT@atg.wa.gov
Tucker, Katherine	Katie.Tucker@nrc.gov
VanNiel, Jeffrey D.	nbrjdn@gmail.com
Vazquez, Tameka	purpose_driven12@yahoo.com
Vibert, Elizabeth A.	Elizabeth.Vibert@ccdandv.com
Walsh, Timothy J.	timothy.walsh@pillsburylaw.com
Wardwell, Richard E.	rew@nrc.gov
Webb, Maria	maria.webb@pillsburylaw.com
Welkie, Andrew	Axw5@nrc.gov
Whetstine, Jack	jgw@nrc.gov
Whipple, Bret	bretwhipple@lcturbonet.com
Williams, Scott	swilliams@abwwlaw.com
Woodington, Kenneth	kwoodington@dml-law.com
Young, Mitzi A.	may@nrc.gov
Zabarte, Ian	mrizabarte@gmail.com
Zobler, Marian L.	mlz@nrc.gov

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Stephanie E. Meharg

Donald P. Irwin
Michael R. Shebelskie
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Scott Blake Harris
Sean A. Lev
James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

Counsel for the U.S. Department of Energy