

I. The Board Should Dismiss NEV-Safety-149

The parties stipulated that NEV-Safety-149 was affected by the Board's resolution of Legal Issue 7. Nevada had raised NEV-Safety-149 to argue that DOE could not rely on its quality assurance (QA) program categorically to exclude from consideration in the TSPA potential deviations from repository design or errors in waste emplacement. DOE agrees with Nevada on this point.³ NEV-Safety-149 is thus moot inasmuch as there is nothing to decide under that contention.⁴

Nor should Nevada be allowed to recast this contention as raising a factual issue concerning DOE's QA program. As Nevada conceded in its Reply Brief on Phase I Legal Issues, NEV-Safety-149 involves no factual issues, but, rather, "the pertinent question is whether, as a *legal* matter, DOE is entitled to ignore this possibility [that some errors will be made in DOE's QA program]."⁵ With that legal issue resolved, NEV-Safety-149 should be dismissed in accordance with DOE's prior briefing on this issue.⁶

³ U.S. Department of Energy's Statement of Additional Views on the Contentions Affected by the CAB Order of December 14, 2010 at 2 (filed Jan. 21, 2011).

⁴ As the Board noted: "[the] legal issue appears to have arisen from a misunderstanding based upon an erroneous statement in a supporting technical document, which was corrected *before* the License Application was filed." DOE's correction means that it is not categorically relying on its QA program in the manner NEV-Safety-149 posits. LBP-10-22 at 19-20 (emphasis added).

⁵ State of Nevada Reply Brief on Phase I Legal Issues (Reply Brief) at 26 (filed Jan. 6, 2010 (emphasis in original)).

⁶ U.S. Department of Energy's Statement of Additional Views on the Contentions Affected by the CAB Order of December 14, 2010 at 1-3 (filed Jan. 21, 2011); U.S. Department of Energy Brief on Nevada-Safety Contention 149 (filed Dec. 7, 2009). *See also Advanced Medical Systems, Inc.* (One Factory Row, Geneva, Ohio 44041), CLI-93-8, 37 N.R.C. 181, 185 (1993) (dismissing a case as moot when no "litigable controversy" remained); *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), ASLB 06-844-01-LR, 63 N.R.C. 737, 743-44 (2006) (dismissing a contention of omission as moot when the applicant committed to provide periodic measurement updates during the renewal period).

II. The Board Should Dismiss NEV-Safety-161, -162, and -130

Legal Issues 8 and 10 concern legal issues associated with the drip shields. With respect to Issue 8, the Board held in LBP-10-22 that there is no requirement that DOE postulate the absence or complete failure of drip shields, or perform a drip shield neutralization analysis.⁷ The Board held in Issue 10 that “[b]ecause the drip shields are not required for initial operation, they are not part of the substantial completion determination [of § 63.41(a)]. Thus, Nevada’s argument that the § 63.41(a) findings will be ‘impossible to make’ is flawed because the finding purported to be ‘impossible’ is not required by the regulations.”⁸ DOE contends that the holdings on these two legal issues resolve NEV-Safety-161, -162, and -130.

A. NEV-Safety-161

Nevada raised this contention as a legal issue, and the parties stipulated that Legal Issue 8 affected it. Following the Board’s decision in LBP-10-22, Nevada has attempted to recast this contention as a factual one, saying that it now concerns whether the multi-barrier system is not “wholly dependent on a single barrier.”⁹ NEV-Safety-161 does not, however, address that issue. NEV-Safety-161 is predicated solely on the absence of drip shields or the total failure of all the drip shields.¹⁰ The thrust of NEV-Safety-161 is that DOE had to evaluate the absence or failure of drip shields, and the Board held that, as a matter of law, DOE was not required to perform such an evaluation, thereby disposing of this contention.

⁷ LBP-10-22 at 20-23.

⁸ LBP-10-22 at 29.

⁹ State of Nevada’s Separate Comments Regarding the Impact of LBP-10-22 on NEV-Safety-130, 149, 161, and 162 (Nevada Comments on LBP-10-22) (filed Jan. 21, 2011).

¹⁰ State of Nevada’s Petition to Intervene as a Full Party (Nevada Petition) at 859 (filed Dec. 19, 2008).

B. NEV-Safety-162

The resolution of Legal Issue 10 in LBP-10-22 requires dismissal of NEV-Safety-162. In Legal Issue 10, the Board rejected Nevada’s attempt in NEV-Safety-162 “to jump the gun,” holding that the Board would not “read section 63.31 so broadly as to import the substantial completion test of section 63.41 (which is an analysis required during the subsequent license to receive and possess stage) into the construction authorization test of section 63.31.”¹¹ Rather than being “impossible,” as Nevada asserted in NEV-Safety-162,¹² the Board said it would “not conclude that, as a matter of law, the required finding concerning construction completion cannot be made.”¹³

The Board’s resolution of Legal Issue 10 also demonstrates that NEV-Safety-162 is immaterial and therefore provides the Board another reason for dismissal. A contention is immaterial, and must be dismissed, if its resolution would not make a difference in the outcome of the proceeding.¹⁴ Here, NEV-Safety-162 is immaterial because the Board has found that the requirements of 10 C.F.R. § 63.41(a)(2) cannot be incorporated into the construction authorization finding for § 63.31(a).

Nevada contends in response that NEV-Safety-162 asserts as a factual issue that DOE’s drip shield installation plan “cannot be justified as safe,”¹⁵ because, according to Nevada, “if installation of the drip shields proves to be *defective or impossible* it will be too late to assure

¹¹ LBP-10-22 at 28.

¹² Nevada Petition at 861.

¹³ *Id.* at 28-29.

¹⁴ *Nuclear Management Company, LLC* (Palisades Nuclear Plant), LBP-06-10, 63 N.R.C. 314, 353 (2006), *aff’d*, CLI-06-17, 63 N.R.C. 727 (2006).

¹⁵ Nevada Comments on LBP-10-22 at 7.

safety by alternative means.”¹⁶ NEV-Safety-162 thus assumes that there will be no drip shields. But the Board’s resolution of Legal Issue 8 (see discussion of NEV-Safety-161 *supra*) forecloses such an assumption and thus precludes Nevada from trying to salvage the contention on that basis.

C. NEV-Safety-130

While the parties did not stipulate that NEV-Safety-130 was affected by the Board’s resolution of LBP-10-22, DOE identified it as such consistent with LBP-10-22.¹⁷ This contention should be dismissed because it presumes the absence of drip shields. NEV-Safety-130 states: “the contribution of the drip shields in the predicted performance of the repository ***should be ignored in the TSPA or, at a minimum, the no drip shield scenario should be considered as an alternative conceptual model and propagated through the assessment.***”¹⁸

DOE is not required “to assume and then analyze the complete failure” of the drip shields (Legal Issue 8),¹⁹ which is what NEV-Safety-130 would require. DOE is not required, further, to make a case for something in the construction authorization stage that it will have to make in a later stage and, that, thus, “is not required by the regulations.”²⁰ The Board should dismiss NEV-Safety-130 as it is inconsistent with LBP-10-22.²¹

¹⁶ Nevada Petition at 861 (emphasis added).

¹⁷ DOE Statement on LBP-10-22 at 5.

¹⁸ Nevada Petition at 701 (emphasis added).

¹⁹ LBP-10-22 at 21.

²⁰ *Id.* at 29.

²¹ See DOE Statement on LBP-10-22 at 5; *see also* U.S. Department of Energy Brief on Contention NEV-Safety-161 (filed Dec. 7, 2009); U.S. Department of Energy Brief on Contention NEV-Safety-162 (filed Dec. 7, 2009).

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

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

**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)	Docket No. 63-001-HLW
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP NO. 09-892-HLW-CAB04
)	
(High Level Waste Repository))	April 8, 2011
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S MOTION TO DISMISS NEVADA SAFETY CONTENTIONS 149, 161, 162, AND 130** have been served on the following persons on this 8th day of April, 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

Albert, Michelle D.

Andersen, Robert M.

Bailey, Annie

Barlow, Gregory

Baughman, Mike

Bauser, Michael A.

Bell, Kevin W.

Berkey, Curtis

Berger, Michael

E-mail Addresses

madams@ag.nv.gov

Michelle.Albert@nrc.gov

robert.andersen@akerman.com

baileys@lcturbonet.com

lcda@lcturbonet.com

mikebaughman@charter.net

mab@nei.org

kwbell@energy.state.ca.us

cberkey@abwwlaw.com

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
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@jsslaw.com
Roby, Debra	droby@jsslaw.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@me.com
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
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

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