

**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**

_____	)	
<b>In the Matter of</b>	)	<b>Docket No. 63-001-HLW</b>
	)	
<b>U.S. DEPARTMENT OF ENERGY</b>	)	<b>ASLBP No. 09-892-HLW-CAB04</b>
	)	
<b>(High Level Waste Repository)</b>	)	<b>April 8, 2011</b>

**U.S. DEPARTMENT OF ENERGY’S MOTION TO DISMISS  
NEI SAFETY CONTENTION 05**

By Order dated March 24, 2011,<sup>1</sup> this Board instructed the U.S. Department of Energy (DOE) to timely file dispositive motions, such as a motion to dismiss, regarding those contentions that DOE indicated should be dismissed as a result of the Board’s decision in LBP-10-22 but that the party sponsoring the contention has not stipulated should be dismissed.<sup>2</sup> Accordingly, in response to the March 24, 2011 Order, DOE moves to dismiss NEI-Safety-05 filed by the Nuclear Energy Institute (NEI). The Board’s resolution of Legal Issue 1 on December 14, 2010 in LBP-10-22 makes NEI-Safety-05 inadmissible as a matter of law.

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<sup>1</sup> Order (Dismissing Contentions) (March 24, 2011). The Board said that concerning the Phase I contentions that were identified “as directly or indirectly affected by the Board’s rulings in LBP-10-22, DOE or the NRC Staff should timely file dispositive motions seeking appropriate relief, such as a motion to dismiss a contention in whole or in part.” *Id.* at 2.

<sup>2</sup> Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, \_\_\_ N.R.C. \_\_\_ (Dec. 14, 2010).

The parties stipulated that NEI-Safety-05 was affected by the Board's resolution of Legal Issue 1.<sup>3</sup> NEI argues in NEI-Safety-05 that DOE is required to address "as low as reasonably achievable" (ALARA) considerations with respect to certain activities outside the Yucca Mountain geologic repository operations area (GROA).<sup>4</sup> DOE and NRC Staff disagreed with NEI.<sup>5</sup> The Board in LBP-10-22 agreed with DOE and NRC Staff, and specifically held that DOE was not required as a matter of law to take into account ALARA considerations outside the GROA.<sup>6</sup> That ruling is dispositive of NEI-Safety-05. No other issue of law or fact remains to be decided under that contention. Accordingly, the Board should dismiss that contention.

Respectfully submitted,

**U.S. DEPARTMENT OF ENERGY**

By Electronically Signed by Michael R. Shebelskie

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<sup>3</sup> U.S. Department of Energy's Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22 at 3-5 and Attachment A (filed Jan. 21, 2011).

<sup>4</sup> Reply of the Nuclear Energy Institute to the Answers to Its Petition to Intervene of the Department of Energy, the NRC Staff, and the State of Nevada at 80-83 (filed Feb. 24, 2009).

<sup>5</sup> U.S. Department of Energy Brief on NEI-Safety Contention 05 at 2-9 (filed Dec. 7, 2009); *see also* NRC Staff Answer to Intervention Petitions at 134-136 (filed Feb. 9, 2009).

<sup>6</sup> LBP-10-22 at 9.

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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **U.S. DEPARTMENT OF ENERGY'S MOTION TO DISMISS NEI SAFETY CONTENTION 05** have been served on the following persons on this 8th day of April, 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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