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 16, 2011**

SUPPLEMENT TO U.S. DEPARTMENT OF ENERGY'S MOTION TO DISMISS NEI SAFETY CONTENTION 05

On April 8, 2011, the U.S. Department of Energy (DOE) filed its Motion to Dismiss Nuclear Energy Institute (NEI) Safety Contention 05 in light of LBP-10-22. [1] DOE filed that motion pursuant to this Board's Order dated March 24, 2011, which directed DOE to file such a motion.[2] The Board's order followed a joint submittal by DOE and NEI, and others. The joint submittal stated that DOE and NEI had conferred about the effect of LBP-10-22 on NEI's contentions--as LBP-10-22 directed them to do--and that they disagreed about its effect on the subject contention.[3]

[1] Memorandum and Order (Deciding Phase I Legal Issues and Denying Rule Waiver Petitions), LBP-10-22, ___ N.R.C. ___ (Dec. 14, 2010).

[2] Order (Dismissing Contentions) (March 24, 2011). The Board said: "with regard to the remaining Phase I contentions identified by the parties in the joint stipulation 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.

[3] DOE's Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22 (Jan. 21, 2011).

DOE understood that the extensive conferring that resulted in the joint submittal satisfied the obligation to meet and confer over DOE's motion to dismiss and that a certification pursuant to 10 C.F.R. § 2.323 was unnecessary since the Board directed DOE to file the motion. DOE has conferred with NEI's counsel, Michael Bauser, who has represented that he shares that view.

To eliminate any doubt on the issue, however, DOE hereby certifies pursuant to 10 C.F.R. § 2.323 that it conferred in good faith with counsel for NEI in a sincere effort to resolve the issues raised in the motion, and that DOE's efforts to resolve the issues have been unsuccessful. DOE additionally certifies that it has conferred with the NRC Staff about the motion to dismiss, and the Staff has stated that it reserves its position to respond to the motion.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Electronically Signed by Michael R. Shebelskie

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CERTIFICATE OF SERVICE

I hereby certify that copies of the **SUPPLEMENT TO U.S. DEPARTMENT OF ENERGY'S MOTION TO DISMISS NEI SAFETY CONTENTION 05** have been served on the following persons on this 16th day of April, 2011 through the Nuclear Regulatory Commission's Electronic Information Exchange.

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