

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
	)	
	)	

NUCLEAR ENERGY INSTITUTE’S ANSWER  
TO THE DEPARTMENT OF ENERGY’S MOTION TO DISMISS  
NEI SAFETY-05

On December 14, 2010, the Safety and Licensing Board (“Licensing Board”) issued a Memorandum and Order entitled “Deciding Phase I Legal Issues and Denying Rule Waiver Petitions.”<sup>1</sup> Among other legal issues, the Licensing Board decided Legal Issue 1. In accordance with the stipulation of the parties, Legal Issue 1 related to one Phase I contention: NEI-SAFETY-05, asserting excessive conservatism in the analysis and design related to criticality control in spent fuel transportation and disposal canisters, resulting in unnecessary radiation doses, environmental impacts, and economic costs. The Licensing Board held that, as a matter of law, the Department of Energy (“DOE”) is not required to take into account NRC requirements for maintaining occupational exposures “as low as reasonably achievable” (“ALARA”), with respect to activities that occur outside of the Yucca Mountain geologic repository operations area (“GROA”). In addition, the Licensing Board decided that the excessive design conservatism and the associated economic and environmental costs asserted in the contention are matters beyond the scope of this licensing proceeding.

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<sup>1</sup> LBP-10-22, \_\_\_ NRC \_\_\_ (Dec. 14, 2010).

By order dated March 24, 2011, the Licensing Board instructed DOE to file timely dispositive motions regarding the Phase I contentions for which the parties did not jointly stipulate dismissal.<sup>2</sup> On April 8, 2011, DOE filed a motion for summary disposition of NEI-SAFETY-05. DOE takes the position that the Licensing Board's resolution of Legal Issue 1 renders NEI-SAFETY-05 inadmissible as a matter of law.

NEI acknowledges that, as the law of the case, the Licensing Board's Memorandum and Order on legal issues will apply (unless ultimately reversed or modified by the Commission) in this and subsequent phases of this proceeding. The decision does not render the contention inadmissible, given that the contention was previously admitted for hearing, and that admissibility was upheld by the Commission. However, the Licensing Board's ruling would appear to preclude the Licensing Board from providing any remedy in connection with the occupational exposures outside the GROA asserted in NEI-SAFETY-05, or the unnecessary design measures proposed by DOE for criticality control, NEI does not oppose the DOE motion for summary disposition.

NEI reserves its right to appeal the Board's December 14, 2010, Memorandum and Order addressing Legal Issue 1 and summary disposition of NEI-SAFETY-05 at the appropriate time, as governed by the Commission's regulations in 10 CFR § 2.1015.

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<sup>2</sup> Order (Dismissing Contentions) (March 24, 2011). *See* U.S. Department of Energy's Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22 (filed Jan. 21, 2011) and the Nuclear Energy Institute's Position on Effect of Ruling on Phase I Legal Issue 1 (NEI-SAFETY-05) (filed Jan. 21, 2011).

April 18, 2011

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Nuclear Energy Institute’s Answer to the Department of Energy’s Motion to Dismiss NEI-SAFETY-05” have been served upon the following persons on this 18<sup>th</sup> day of April 2011 by Electronic Information Exchange.

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