

April 18, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
U. S. DEPARTMENT OF ENERGY ) Docket No. 63-001-HLW  
 )  
(High-Level Waste Repository) ) ASLBP No. 09-892-HLW-CAB04  
 )

NRC STAFF RESPONSE TO U.S. DEPARTMENT OF  
ENERGY MOTION TO DISMISS NEI SAFETY CONTENTION 05

INTRODUCTION

On March 24, 2011, the Atomic Safety and Licensing Board (Board) issued an Order dismissing four legal contentions in the above-captioned proceeding. Order (Dismissing Contentions), dated March 24, 2011 (Order) (unpublished).<sup>1</sup> With respect to the remaining Phase I legal contentions identified by the parties in the joint stipulation,<sup>2</sup> the Board stated that the Department of Energy (DOE) or the U.S. Nuclear Regulatory Commission (NRC) staff (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>3</sup>

On April 8, 2011, DOE filed “U.S. Department of Energy’s Motion to Dismiss NEI Safety Contention 05” (Motion) and on April 16, 2011, filed a supplement to its Motion. See

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<sup>1</sup> This ruling was based on the Board’s December 14, 2010 Memorandum and Order deciding Phase I Legal Issues and denying rule waiver petitions. *U.S. Dep’t of Energy* (High-Level Waste), LBP-10-22, 72 NRC \_\_ (slip op.) (Dec. 14, 2010) (LBP-10-22).

<sup>2</sup> U.S. Department of Energy’s Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22, dated January 21, 2011 (Joint Report). In addition, consistent with LBP-10-22, the parties filed separate differing positions on the contentions with which they could not fully agree. See, e.g., U.S. Department of Energy’s Statement of Additional Views on the Contentions Affected by the CAB Order of December 14, 2010, dated January 21, 2011; Nuclear Energy Institute’s Position on Effect of Ruling on Phase I Legal Issue 1, dated January 21, 2011; Differing Position of the NRC Staff in Response to LBP-10-22, dated January 21, 2011.

<sup>3</sup> The Board noted that the time period prescribed in 10 C.F.R. § 2.323(a) would not apply to such motions. Order at 2 n.8.

Supplement to U.S. Department of Energy's Motion to Dismiss NEI Safety Contention 05, dated April 16, 2011 (Supplement).<sup>4</sup> For the reasons set forth below, the Board should dismiss NEI-SAFETY-05.

## DISCUSSION

### NEI-SAFETY-05

NEI-SAFETY-05 challenges DOE's postclosure criticality analysis described in Section 2.2.1.4.1.1 of the License Application ("LA") Safety Analysis Report ("SAR"). The Nuclear Energy Institute's Petition to Intervene, dated December 19, 2008, at 31; see The Nuclear Energy Institute's Brief on Phase I Legal Issue No. 1, dated December 7 2009, at 1. The joint statement of the parties, as accepted by the Board, specifies that the threshold legal issues for NEI-SAFETY-05 are: (1) whether 10 C.F.R. §§ 20.1002, 20.1003, 20.1101, 50.40, and 63.111 require As Low As Reasonably Achievable (ALARA) considerations at individual nuclear plant sites remote from the geologic repository operations area (GROA) to be addressed in DOE's License Application (LA); and (2) whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources. Order (Identifying Phase I Legal Issues for Briefing), dated October 23, 2009, at 1; see U.S. Department of Energy, State of Nevada and Nuclear Energy Institute Joint Proposal Identifying Phase 1 Legal Issues for Briefing, dated October 6, 2009, Attachment 1 at 1.

NEI states that the Board's ruling on Legal Issue 1 does not have any self-executing effect on NEI-SAFETY-05. Nuclear Energy Institute's Position on Effect of Ruling

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<sup>4</sup> DOE's Supplement addresses the 10 C.F.R. § 2.323(b) requirement that a motion "include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful." The Staff does not object to DOE's Motion as supplemented because, as DOE indicated in its supplement, the parties previously conferred regarding the effects of LBP-10-22 on admitted contentions and DOE certified that it had conferred with the Nuclear Energy Institute (NEI) and the Staff regarding the Motion. See Supplement at 1-2.

on Phase I Legal Issue 1, dated January 21, 2011, at 2. NEI acknowledged that the Board's ruling in LBP-10-22 establishes the law of the case, which affects whether NEI-SAFETY-05 should be dismissed. *Id.* DOE argues that the Board's resolution of Legal Issue 1 in LBP-10-22 renders NEI-SAFETY-05 inadmissible as a matter of law. Motion at 2.<sup>5</sup>

DOE is correct. The Board held that DOE is not required as a matter of law to take into account ALARA considerations outside the GROA. See LBP-10-22 at 9; see NRC Staff Brief on Phase I Legal Issues, dated December 7, 2009, at 4. In addition, the Board ruled that there is no requirement for DOE to demonstrate that the repository meets applicable safety and environmental standards without any unnecessary expenditure of resources. LBP-10-22 at 9. NEI does not argue that its contention raises a factual issue. See Nuclear Energy Institute's Position on Effect of Ruling on Phase I Legal Issue 1 (NEI-SAFETY-05), dated January 21, 2011, at 1. The assertions and bases provided in NEI-SAFETY-05 are predicated on whether ALARA considerations are required outside of the GROA and whether DOE must demonstrate that the repository not only meets applicable safety and environmental regulatory standards, but must show that it does so without any alleged unnecessary expenditures of resources. See The Nuclear Energy Institute's Petition to Intervene, dated December 19, 2008, at 31. In the Board's ruling on Legal Issue 1, the Board precluded such assertions and bases. See LBP-10-22 at 5-9. Accordingly, the factual support in NEI's contention requires no further consideration in light of the Board's ruling on the legal issues and the contentions should therefore be dismissed.

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<sup>5</sup> The parties previously stipulated that the legal issue raised by NEI-SAFETY-05 was resolved by the Board's resolution of Legal Issue 5 and NEI recognized the contention is susceptible to a summary disposition motion. See Joint Report, Attachment at 1 (citing LBP-10-22 at 9).

CONCLUSION

The Board should grant the Motion and dismiss NEI-SAFETY-05.

Respectfully submitted,

**/Signed (electronically) by/**

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**/Executed in accord with 10 C.F.R. § 2.340(d)/**

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO U.S. DEPARTMENT OF ENERGY MOTION TO DISMISS NEI SAFETY CONTENTION 05" in the above-captioned proceeding have been served on the following persons this 18th day of April, 2011, by Electronic Information Exchange.

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