

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 NEVADA SAFETY CONTENTIONS 149, 161, 162 AND 130

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 Order (Dismissing Contentions), dated March 24, 2011 (Order) (unpublished).¹ With respect to the remaining Phase I contentions identified by the parties in the joint stipulation,² the Board stated that the Department of Energy (DOE)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

¹ 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).

² 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 (DOE Differing Position); State of Nevada’s Separate Comments Regarding the Impact of LBP-10-22 on NEV-SAFETY-130, 149, 161, and 162, dated January 21, 2011 (Nevada Differing Position); Differing Position of the NRC Staff in Response to LBP-10-22, dated January 21, 2011 (Staff Differing Position).

contention in whole or in part.” *Id.* at 2.³

On April 8, 2011, DOE filed “U.S. Department of Energy’s Motion to Dismiss Nevada Safety Contentions 149, 161, 162, and 130” (Motion) and on April 16, 2011, filed a supplement to its Motion. See Supplement to U.S. Department of Energy’s Motion to Dismiss Nevada Safety Contentions 149, 161, 162, and 130, dated April 16, 2011 (Supplement).⁴ For the reasons set forth below, the Board should dismiss NEV-SAFETY-149 and -161, and dismiss NEV-SAFETY-130 and -162 in part.

DISCUSSION

A. NEV-SAFETY-149

NEV-SAFETY-149 alleges that DOE excludes deviations from repository design or errors in waste emplacement from events considered in the total system performance assessment (TSPA) on purely legal grounds that are unexplained and violate 10 C.F.R. §§ 63.114(d), 63.114(e), 63.114(f) and 63.342. See State of Nevada Petition to Intervene as a Full Party, dated December 19, 2008, at 783 (Nevada Petition). DOE argues that the resolution of Legal Issue 7 in LBP-10-22 renders NEV-SAFETY-149 moot, citing the Board’s observation

³ 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.

⁴ 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 Nevada and the Staff regarding the Motion. See Supplement at 1-2.

that Nevada's concern arose from a statement that DOE corrected prior to filing its license application. Motion at 2 & n.4 (citing LBP-10-22 at 19-20).

Nevada acknowledged DOE's changes to its LA, but iterated its legal argument that DOE could not demonstrate that DOE's exclusion of deviations from repository design or errors in waste emplacement complies with the regulatory requirements. See State of Nevada's Reply to DOE's Answer to Nevada's Petition to Intervene as a Full Party, dated February 24, 2009, at 654 (Nevada Reply to DOE Answer); see State of Nevada Reply Brief on Phase I Legal Issues, filed January 6, 2010, at 26. Nevada argues that NEV-SAFETY-149 is not moot because the contention "challenged the technical sufficiency of DOE's claim," and asserts that it is challenging DOE's conclusion that deviations from repository design or errors in waste emplacement are unlikely, and may therefore be excluded from analysis. State of Nevada Reply Brief on Phase I Legal Issues, dated January 6, 2010, at 25 n.6 (citing Nevada Reply to DOE Answer at 653-654).

In LBP-10-22, the Board ruled that under 10 C.F.R. § 63.114, DOE may rely upon its quality assurance (QA) program as a basis to categorically exclude from consideration in the TSPA potential deviation from repository design or errors in waste emplacement. LBP-10-22 at 19. Therefore, inasmuch as NEV-SAFETY-149 claims that the effects of the QA program cannot be considered in determining the probability and consequences of deviations from repository design or errors in waste emplacement, it should be dismissed. See Staff Differing Views at 3.

Further, Nevada's assertion that NEV-SAFETY-149 is admissible as a factual contention is not persuasive. See Nevada Differing Views at 2. The contention lacks any factual support as to why DOE's reliance on its QA program to exclude deviations from repository design or errors in waste emplacement from the TSPA is flawed. See State of Nevada Reply Brief on

Phase I Legal Issues, dated January 6, 2010, at 26 (“[T]he pertinent question is whether, as a *legal* matter, DOE is entitled to ignore” deviations from repository design or errors in waste emplacement (emphasis in original)). Therefore, the Board’s rejection of the legal basis of NEV-SAFETY-149 renders this legal contention moot. Accordingly, the contention should be dismissed.

B. NEV-SAFETY-161

NEV-SAFETY-161 claims that DOE violates requirements for a multiple barrier system because its proposed barrier system’s safety depends on a single element --the drip shield-- and if the drip shields are not in place, the entire system will fail. See Nevada Petition at 857, 859. Nevada claims that the Board’s ruling in LBP-10-22 does not preclude NEV-SAFETY-161 from being litigated as a factual contention, arguing that the Board did not resolve “the related factual question of whether DOE has adequately demonstrated that the multibarrier protection system is not ‘wholly dependent on a single barrier.’” See Nevada Differing Position at 6 (quoting LBP-10-22 at 23 (internal quotations omitted)). DOE argues that this contention should be dismissed because it is predicated on the absence or failure of all the drip shields, a legal question addressed by the Board’s ruling on Legal Issue 8, and that no factual questions remain. See Motion at 3.

DOE is correct. The Board resolved Legal Issue 8 by concluding that there “is no regulatory requirement for DOE to assume and then to analyze the complete failure of any barrier in the absence of a finding that such a failure is within the bounds of probability or consequence that must be analyzed in the performance assessment.” LBP-10-22 at 21. The Board noted that “[t]he emphasis should not be on the isolated performance of” an individual barrier such as the drip shield, and that DOE’s proposed barrier system would be evaluated as an integrated whole. See LBP-10-22 at 22 (quoting Implementation of a Dose Standard After

10,000 Years, 74 Fed. Reg. 10,811, 10,826 (March 13, 2009) (internal citation omitted)).

Accordingly, inasmuch as NEV-SAFETY-161 claims that DOE is required to analyze the no drip shield scenario and presumes drip shield failure, this contention should be dismissed consistent with LBP-10-22. See Staff Differing Position at 2.

In addition, DOE correctly argues that the contention lacks a factual basis for whether DOE adequately demonstrated that its system is not wholly dependent on a single barrier. See Motion at 3. The assertions and bases provided in the contention focus on the no drip shield scenario, an analysis precluded by the Board's ruling. See Nevada Petition at 857-59; LBP-10-22 at 21. Therefore, because the contention is predicated on the no drip shield scenario, the factual issue is precluded by the Board's resolution of Legal Issue 8, and the contention should be dismissed.

C. NEV-SAFETY-162

NEV-SAFETY-162 claims that DOE's plan to install drip shields about 100 hundred years from now "cannot be justified as safe because if installation of the drip shields proves to be defective or impossible it will be too late to assure safety by alternative means." Nevada Petition at 861. Nevada argues that this contention (1) does not ask DOE to postulate a no drip shield scenario; (2) raises a factual issue as to whether installing the drip shields after emplacement of wastes "is a safe concept;" and (3) would be moot if DOE agreed to install the drip shields earlier. See Nevada Differing Views at 6, 9. Nevada suggests that the Board postpone a decision on the admissibility of this contention or postpone its litigation until after related contentions are litigated. *Id.* at 8-9 ("especially but not limited to NEV-SAFETY-130").

DOE argues that NEV-SAFETY-162 should be dismissed consistent with the Board's resolution of Legal Issue 10. See Motion at 4 (citing LBP-10-22 at 28). DOE acknowledges that although the Board noted that Legal Issue 10 does not preclude Nevada from raising factual

issues regarding “DOE’s ability to install the drip shields,” the contention does not raise this factual issue. See DOE Additional Views at 5 (citing LBP-10-22 at 5). DOE states that the factual question framed by Nevada is predicated on the assumption that drip shield installation is defective or impossible, and that the Board ruled DOE is not required to consider the absence or complete failure of all drip shields. See *id.*; LBP-10-22 at 21.

NEV-SAFETY-162 should be dismissed in part. The Board ruled that it is not impossible, “as a matter of law, for the Commission to make the finding required by 10 C.F.R. § 63.31(a)(2) in light of DOE’s drip shield installation plan,” and Nevada is “jump[ing] the gun by invoking standards that do not apply at the construction authorization stage.” LBP-10-22 at 27-28. Therefore, in as much as NEV-SAFETY-162 argues that the Commission cannot, as a matter of law, make the required regulatory findings in light of DOE’s installation plan, it should be dismissed. See Staff Differing Views at 2-3.

Nevada, however, is permitted to raise factual issues concerning DOE’s ability to install the drip shields under other admitted contentions. LBP-10-22 at 29; see *also* U.S. Department of Energy Consolidated Reply Brief on Phase I Legal Issue Safety Contentions, dated January 6, 2010, at 42 (recognizing that DOE’s ability to meet its commitments to install drip shields is a factual question and if the legal issue is resolved in favor of DOE, compliance of DOE’s drip shield installation plan with the regulations is an issue that remains for litigation).

NEV-SAFETY-162 points to additional Nevada contentions, including NEV-SAFETY-161 and -130, for the proposition that concerns regarding installation and safety of the drip shields are well founded. See Nevada Petition at 862; Nevada Differing Position at 8.⁵ While, as

⁵ NEV-SAFETY-162 also discusses retrieval and references NEV-SAFETY-134, Retrieval or (continued. . .)

discussed above, the issues raised in NEV-SAFETY-161 are precluded by the Board's resolution of Legal Issue 8, factual issues regarding DOE's ability to install the drip shields will be addressed under NEV-SAFETY-130, consistent with LBP-10-22. See LBP-10-22 at 21, 29. Because this contention is predicated on resolution of factual issues in other contentions, a factual question remains regarding whether DOE's plan is safe. Accordingly, NEV-SAFETY-162 should be dismissed in part.

D. NEV-SAFETY-130

NEV-SAFETY-130 asserts that installation of the drip shields cannot be assumed because DOE did not identify the features, events and processes (FEPs) that could prevent their installation, and therefore, the contribution of the drip shields should be ignored in the TSPA or the no drip shield scenario should be considered. See Nevada Petition at 701. Nevada distinguishes NEV-SAFETY-130 from NEV-SAFETY-161 and -162, arguing that it does not invoke the multiple barrier requirement or require an analysis that postulates the absence of drip shields in order to assess whether DOE's system is wholly dependent on a single barrier,⁶ and does not raise safety problems associated with the concept that drip shields will be installed after emplacement. See Nevada Differing Position at 5. Nevada claims instead that NEV-SAFETY-130 provides a factual basis for the proposition that DOE has not shown

(. . .continued)

Alternate Storage, and NEV-SAFETY-168, Retrieval Practicability. Nevada Petition at 862. Nevada, however, in its reply to DOE stated the contention "challenges DOE's drip shield concept, not the absence of retrieval plans." State of Nevada's Reply to DOE's Answer to Nevada's Petition to Intervene as a Full Party, dated February 24, 2009, at 693.

⁶ To the extent that NEV-SAFETY-130 is interpreted to mean that DOE is required to analyze the complete failure of all drip shields, that issue may not be raised; that issue was rejected on legal grounds. See Motion at 5 (citing LBP-10-22 at 21).

reasonable assurance that the drip shields can be designed and installed as planned. See *id.* at 5.

DOE argues that NEV-SAFETY-130 should be dismissed because it presumes the absence of drip shields, which DOE is not required to consider in accordance with the Board's resolution of Legal Issue 8. See Motion at 5 (citing LBP-10-22 at 21). DOE also argues that it is not required "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.'" *Id.* (quoting LBP-10-11 at 29).

NEV-SAFETY-130 should be dismissed in part. The Board stated, and DOE acknowledged, that Nevada can "raise factual issues concerning DOE's ability to install drip shields" LBP-10-22 at 29 (citing DOE Legal Issue 10 Brief at 6 n.14 (identifying NEV-SAFETY-133, 142, 148 and 130; describing NEV-SAFETY-130 as questioning whether drip shields could be designed, fabricated and installed as planned)). NEV-SAFETY-130 includes information regarding the factual question concerning DOE's ability to install the drip shields. See, e.g., Nevada Differing View at 5; Nevada Petition at 705, 707. Accordingly, because NEV-SAFETY-130 raises a factual issue that remains after LBP-10-22, NEV-SAFETY-130 should be dismissed in part.

CONCLUSION

The Board should grant the Motion in part and dismiss NEV-SAFETY-149, and -161 in their entirety and NEV-SAFETY-130 and -162 in part.

Respectfully submitted,

/Signed (electronically) by/

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

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Dated at Rockville, Maryland
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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 NEVADA SAFETY CONTENTIONS 149, 161, 162 AND 130" 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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