

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

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

March 7, 2011

ORDER

(Denying Nevada's Reconsideration Motion)

Before us is the January 20, 2011 motion of the State of Nevada (Nevada) for reconsideration of the 2009 rejection by CAB-01, one of the three original contention admission licensing boards, of Nevada's contention, NEV-MISC-001.<sup>1</sup> According to Nevada, reconsideration is required because CAB-04's December 2010 ruling in LBP-10-22, 72 NRC \_\_\_ (slip op.) (Dec. 14, 2010) undercut the CAB-01's premise for rejection of the contention.<sup>2</sup> The Department of Energy (DOE) and the NRC Staff oppose the motion.<sup>3</sup> As explained below, Nevada's reconsideration motion is denied.

I. BACKGROUND

The context for Nevada's motion involves two Nevada contentions, NEV-MISC-001 and NEV-SAFETY-041, and two different Licensing Board rulings, LBP-09-6, 69 NRC 367, 472-73

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<sup>1</sup> State of Nevada's Motion for Reconsideration of the Rejection of NEV-MISC-001 (Jan. 20, 2011) [hereinafter Nevada Reconsideration Motion].

<sup>2</sup> Id. at 2.

<sup>3</sup> See U.S. Department of Energy's Opposition to the State of Nevada's Motion for Reconsideration (Jan. 31, 2011) at 1; NRC Staff Response to State of Nevada's Motion for Reconsideration of the Rejection of NEV-MISC-001 (Jan. 31, 2011) at 1.

(2009)<sup>4</sup> and LBP-10-22, 72 NRC at \_\_\_ (slip op. at 14-17). NEV-MISC-001 was proffered by Nevada as a legal issue contention in its December 19, 2008 intervention petition.<sup>5</sup> The contention asserted that construction authorization must be denied because, as NEV-SAFETY-041 establishes, Yucca Mountain will erode to the level of the repository drifts beginning around 500,000 years after waste emplacement and continuing thereafter so that the facility will no longer constitute a repository. Rather, the contention asserts that the facility would, at best, constitute a retrievable storage facility in violation of, inter alia, enumerated provisions of the Nuclear Waste Policy Act.<sup>6</sup>

For its part, NEV-SAFETY-041 alleges that DOE's exclusion of land-surface erosion as a feature, event, or process (FEP) in its Yucca Mountain performance assessment is incorrect because modeling studies and field observations demonstrate that erosion will significantly affect infiltration and seepage fluxes at Yucca Mountain within the first 10,000 years after closure.<sup>7</sup> The contention then asserts that erosion will progressively and grossly change the topography of the mountain within one million years.<sup>8</sup>

In ruling that NEV-MISC-001 was inadmissible, CAB-01 held that

[t]he contention does not satisfy section 2.309(f)(1)(vi) because it does not present a genuine dispute on a material issue of law or fact. The contention raises a legal issue that depends upon resolution of factual issues presented in NEV-SAFETY-041. If those factual issues are ultimately proven valid, the Application fails and the legal issue raised in NEV-MISC-001 is moot. If, on the

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<sup>4</sup> LBP-09-6, 69 NRC 367 (2009) set forth the independent rulings of the three Construction Authorization Boards (CABs) in one decision. On appeal, the Commission in large measure affirmed those rulings and reversed several rulings, none of which are involved here, in CLI-09-14, 69 NRC 580 (2009).

<sup>5</sup> State of Nevada's Petition to Intervene as a Full Party (Dec. 19, 2008) at 1144.

<sup>6</sup> Id.

<sup>7</sup> Id. at 238.

<sup>8</sup> Id.

other hand, the factual issues underlying NEV-SAFETY-041 are invalid, then this legal issue contention is irrelevant.<sup>9</sup>

In LBP-10-22, CAB-04 addressed the overarching legal issue that the affected parties agreed was involved with NEV-SAFETY-041, i.e., whether the Commission's regulation, 10 C.F.R. § 63.342(c) requires the post-10,000-year performance assessment to include the effects of erosion if there is no showing that erosion causes increases in radiological exposures or releases within the first 10,000 years.<sup>10</sup> CAB-04 answered the question in the negative.<sup>11</sup>

## II. ANALYSIS

The Commission's Rules of Practice, 10 C.F.R. § 2.323(e), govern motions for reconsideration and require that the motion "be filed within ten (10) days of the action for which reconsideration is requested." The regulation also mandates that the movant makes a showing of "compelling circumstances, such as the existence of a clear and material error in a decision . . . that renders the decision invalid."<sup>12</sup> Here, Nevada's motion fails to meet either requirement.

Nevada's motion was filed on January 20, 2011, thirty-seven days after LBP-10-22 was issued and far outside the time limit for reconsideration motions. Nevada states that before it could file a reconsideration motion it needed to consult with its expert to ensure that the technical analysis offered in support of NEV-SAFETY-041 would support the proposition that erosion of Yucca Mountain within 10,000 years after closure would increase radiological doses

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<sup>9</sup> LBP-09-6, 69 NRC at 473.

<sup>10</sup> See LBP-10-22, 72 NRC at \_\_\_ (slip op. at 14-15).

<sup>11</sup> Id. at \_\_\_ (slip op. at 15, 17).

In LBP-10-22, CAB-04 also denied Nevada's 10 C.F.R. § 2.335 petition for waiver of 10 C.F.R. § 63.342(c) holding that Nevada failed "to make a prima facie showing that its concerns about long-term erosion were not previously considered by the Commission" in promulgating section 63.342. Id. at \_\_\_ (slip op. at 36). In that regard, the Board also noted that "[u]nless erosion is 'screened in' as a FEP because of its effects during the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years." Id.

<sup>12</sup> 10 C.F.R. § 2.323(e).

or releases as held in LBP-10-22.<sup>13</sup> According to Nevada, this consultation, which Nevada undertook on December 28, 2010, in concert with the Christmas holidays and the number of contentions Nevada needed to review to determine the effects of LBP-10-22, constitutes good cause for not timely filing its motion.<sup>14</sup> Nevada's good cause assertion, however, neither explains nor excuses its failure to seek an extension of time before the regulatory deadline for a reconsideration motion. By its own admission, Nevada failed even to begin the consultation with its expert until after the time for filing a reconsideration motion already had expired.<sup>15</sup> Accordingly, Nevada's motion is untimely and is denied on that basis.<sup>16</sup>

Nevada's reconsideration motion also fails to demonstrate any circumstances, much less compelling ones, that render CAB-01's decision rejecting NEV-MISC-001 invalid. Nevada argues that the "factual predicate of NEV-MISC-001, as set forth NEV-SAFETY-041, will never be proven to be correct or incorrect, contrary to the premise underlying the CAB's dismissal of NEV-MISC-001 in LBP-09-06."<sup>17</sup> CAB-01's holding in finding NEV-MISC-001 inadmissible, however, remains valid and that contention, then, as now, fails to present a genuine dispute on a material issue of law or fact as required by 10 C.F.R. § 2.309(f)(1)(vi). In that regard, if the contention had not already been dismissed, this Board's ruling in LBP-10-22 would require it. NEV-MISC-001 attempts to get in through the back door an issue (the effects of erosion despite no showing that erosion causes increases in radiologic exposures or releases within the first 10,000 years) that, in LBP-10-22, we found to be legally irrelevant. In 10 C.F.R. § 63.342, the

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<sup>13</sup> See Nevada Reconsideration Motion at 3.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-05-19, 62 NRC 403, 409 (2005) ("Lateness alone is sufficient to reject [a] reconsideration request.").

<sup>17</sup> Nevada Reconsideration Motion at 2.

Commission carefully delineated which features, events, and processes the applicant must—or need not—address in its performance assessments. Surely the Commission never intended that events or processes that are expressly excluded by section 63.342 might nonetheless be evaluated on the basis of their theoretical capacity to render the Yucca Mountain facility less of a “geologic” repository.

As previously noted, in LBP-10-22, CAB-04 held that 10 C.F.R. § 63.342(c) does not require that DOE’s post-10,000-year performance assessment include the effects of erosion absent a showing that erosion will cause increases in radiological doses or releases within the first 10,000 years after closure.<sup>18</sup> Similarly, in denying Nevada’s waiver petition, the Board stated that unless erosion is screened in as a FEP in DOE’s performance assessment for the first 10,000 years, section 63.342 prevents Nevada from litigating the effects of erosion during the next 990,000 years.<sup>19</sup> In its reconsideration motion, Nevada concedes that its technical analysis underlying NEV-SAFETY-041 “do[es] not support the proposition that erosion will cause an increase in radiological dose or releases within 10,000 years after closure.”<sup>20</sup> Finally, in the joint stipulation pending before CAB-04, Nevada, along with DOE and the NRC Staff, agree that the Board’s resolution of Legal Issue 5 renders NEV-SAFETY-041 subject to dismissal.<sup>21</sup> Accordingly, CAB-04’s rulings in LBP-10-22 render irrelevant the factual allegations of NEV-SAFETY-041 upon which NEV-MISC-001 relies and necessarily removes from further consideration the legal issue presented in that contention, thereby eliminating any genuine dispute on a material issue of law involving NEV-MISC-001. Thus, because Nevada’s motion

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<sup>18</sup> LBP-10-22, 72 NRC at \_\_\_ (slip op. at 14-15).

<sup>19</sup> *Id.* at \_\_\_ (slip op at 36).

<sup>20</sup> Nevada Reconsideration Motion at 2.

<sup>21</sup> U.S. Department of Energy’s Joint Report in Response to CAB Orders of December 8, 2010 and LBP-10-22 (Jan. 21, 2011), Attachment, Joint Stipulation Among DOE, Nevada, NEI and NRC Staff Regarding Admitted Contentions Affected by LBP-10-22 at 2 (Jan. 21, 2011).

fails to present any compelling circumstances demonstrating that CAB-01's rejection of NEV-MISC-001 is invalid, the motion must be denied on this ground as well.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
March 7, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Licensing Board **ORDER (Denying Nevada's Reconsideration Motion)**, dated March 7, 2011, have been served upon the following persons by Electronic Information Exchange.

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**ORDER (Denying Nevada's Reconsideration Motion)**

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U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW  
**ORDER (Denying Nevada's Reconsideration Motion)**

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[Original Signed by Linda D. Lewis] \_\_\_\_\_  
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Dated at Rockville, Maryland  
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