

July 9, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE ATOMIC SAFETY AND LICENSING BOARDS

In the Matter of	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP Nos. 09-876-HLW-CAB01
(High-Level Waste Repository)	09-877-HLW-CAB02
	09-878-HLW-CAB03
	09-892-HLW-CAB04

**REPLY OF CLARK COUNTY, NEVADA TO THE ANSWERS OF THE U.S.
DEPARTMENT OF ENERGY AND THE NUCLEAR REGULATORY COMMISSION
STAFF TO CLARK COUNTY'S NEW CONTENTION ARISING FROM THE
DEPARTMENT OF ENERGY'S FEBRUARY 19, 2009
LICENSE APPLICATION UPDATE**

Pursuant to 10 C.F.R. § 2.309(h)(2) and the notice published by the Nuclear Regulatory Commission ("NRC" or "Commission") at 73 Fed. Reg. 205 (October 22, 2008), Clark County, Nevada ("Clark County") respectfully submits its Reply to the U.S. Department of Energy's ("the DOE") and the Nuclear Regulatory Commission Staff's ("NRC Staff") Answers to Clark County's New Contention Arising from the Department of Energy's February 19, 2009 License Application Update. No other parties filed an answer to Clark County's new contention.

I. REPLY TO THE DOE

A. Clark County's New Contention Is Timely

The caption of the DOE's Answer refers to Clark County's New Contention as "Late-Filed,"¹ but the DOE never explains why it characterizes CLK-SAFETY-013 as late-filed. Clark County's new contention was timely filed.

¹ U.S. Department of Energy's Answer to the State of Nevada's and Clark County's Late Filed Contentions Related to the February 19, 2009 License Application Update (July 2, 2009) ("the DOE's Answer") at 1.

As the DOE admits in its Answer, “[t]he CABs authorized Petitioners to file contentions challenging the LA Update in their March 13, 2009 Order.”² Specifically, the March 13, 2009 Order stated that:

new or amended contentions arising from DOE’s February 19, 2009 updates and supplements to DOE’s initial application for construction authorization shall be deemed timely if filed within 30 days from the date of the CABs’ [Three Construction Authorization Boards’] initial order identifying the parties and admitted contentions.³

The CABs issued the initial order identifying participants and admitted contentions on May 11, 2009.⁴ New contentions were thus due to be filed by June 10, 2009, the date on which Clark County submitted its single new contention arising from the DOE’s February 19, 2009 updates and supplements.⁵ Accordingly, Clark County timely filed its new contention within 30 days of the CABs’ initial order and this Board should disregard the DOE’s erroneous and unexplained allegation that CLK-SAFETY-013 was late.

B. CLK-SAFETY-013 Should Be Admitted On All Grounds

CLK-SAFETY-013 states that the DOE’s reliance on its Probabilistic Volcanic Hazard Analysis Update (“PVHA-U”) does not remedy the deficiencies of the Probabilistic Volcanic Hazard Analysis (“PVHA”) as set forth in Clark County’s contentions designated as CLK-SAFETY-003 through CLK-SAFETY-011, all of which were admitted for hearing.⁶ Clark County, through its expert witness Dr. Eugene I. Smith, submitted a single new contention (CLK-SAFETY-013) asserting that the inadequacies identified in the previously admitted contentions relative to the PVHA remain uncured by the PVHA-U.

² *Id.* at 2 (citing *U.S. Dep’t of Energy*, Order (Clarifying CAB Case Management Order #1) (March 13, 2009) at 2).

³ *U.S. Dep’t of Energy*, Order (Clarifying CAB Case Management Order #1) (March 13, 2009) at 2.

⁴ *U.S. Dep’t of Energy*, Memorandum and Order (Identifying Participants and Admitted Contentions), LBP-09-06, 142, May 11, 2009 (“May 11 Order”).

⁵ Clark County, Nevada’s New Contention Arising From The Department of Energy’s February 19, 2009 License Application Update (June 10, 2009) (“Clark County’s New Contention” or “CLK-SAFETY-013”).

⁶ See May 11 Order, at Attachment A.

Specifically, four inadequacies were explained in CLK-SAFETY-013 and titled as follows: (1) Lack of Consideration of Alternative Models; (2) Lack of Consideration of the Entire Volcanic Record; (3) A Larger Volcanic Field about Yucca Mountain; and (4) Lack of Modern, High Quality Geophysical Data. None of these inadequacies were challenged by the DOE in its Answer to CLK-SAFETY-013. In fact, the DOE states that it “does not generally object” to the admissibility of this new contention.⁷

The DOE nevertheless challenges one aspect of CLK-SAFETY-013, alleging that CLK-SAFETY-013 contends that each expert on the PVHA-U expert elicitation panel “must not only consider, but fully adopt, Dr. Smith’s theories [on magma melting depth] in order for the results of the PVHA-U to be appropriate.”⁸ The DOE argues that this is insufficient “to show a genuine dispute of material fact or law, as required by 10 C.F.R. § 2.309(f)(1)(vi) . . .”⁹

The DOE misconstrues the basis for the contention. It is not Clark County’s position that the DOE must “fully adopt Dr. Smith’s theories [on magma melting depth] in order for the results of the PVHA-U to be appropriate,” and it is difficult to divine how the DOE conjured that conclusion. Thus, the DOE’s sole objection is to an argument that Clark County did not make. The DOE did not object to any of the arguments that Clark County raises in its new contention, rendering the DOE’s Answer unresponsive to the new contention.

The new contention seeks, *inter alia*, analytical integration of alternative models into the DOE’s probability calculations, which the DOE has failed to do. If the DOE disagrees with a particular alternative model, then it must give a reasoned explanation for its exclusion of that

⁷ The DOE’s Answer, at 4.

⁸ *Id.*

⁹ *Id.* at 5.

model. The DOE has not done so in its Answer here, nor did it do so in its prior Answer to Clark County's Petition to Intervene, where similar arguments were made.¹⁰

Wholesale adoption of Dr. Smith's theories may not be required, but sufficient explanation and analysis of alternative models is. Rather than address these deficiencies, however, the DOE chose to summarily misconstrue one element of CLK-SAFETY-013. The result is that the DOE has neither integrated alternative models into its analysis, as Clark County and its expert witness Dr. Eugene Smith urge, nor explained the bases for omitting alternative models into its analyses.

CLK-SAFETY-013 should be admitted for hearing in its entirety. It reiterates issues embodied in previously admitted contentions and clarifies that the DOE's reliance on the PVHA-U does not cure those deficiencies. The DOE asserts it has no objection to the admission of this new contention, but rather solely contests a single argument of the DOE's own conjuring – an argument that Clark County's contention does not assert.

II. REPLY TO THE NRC STAFF

The NRC Staff likewise states that it does not oppose admission of this contention.¹¹ “However, the Staff opposes admitting this contention on the basis of Clark County's assertion that the PVHA-U does not adequately consider the entire 11 million year history of volcanism in the Yucca Mountain area, because it fails to show a genuine dispute with the DOE on a material

¹⁰ See Answer of the U.S. Department of Energy to Clark County, Nevada's Request for Hearing, Petition to Intervene and Filing of Contentions (January 15, 2009), at 106-08; *see also* Reply of Clark County, Nevada to the Answers of the U.S. Department of Energy and the Nuclear Regulatory Commission Staff (February 24, 2009), at 87.

¹¹ NRC Staff Answer to New Contentions Filed by State of Nevada and Clark County (July 6, 2009), at 1 and 2.

issue of fact or law.”¹² NRC Staff argue that the “DOE did consider the 11 million year volcanic record” but “deliberate[ly] deci[ded] not to use [that] approach.”¹³

Arguments nearly identical to these proffered by NRC Staff were made by the DOE and NRC Staff in their Answers to CLK-SAFETY-008, which, despite those arguments, has been admitted for hearing in this proceeding.¹⁴ As Clark County stated in its Reply to the DOE’s and NRC Staff’s Answers to CLK-SAFETY-008,¹⁵ there is an important difference between mentioning a word or concept and analytically integrating it into a petrologic or probability model. It was Clark County’s intent that the phrase “lack of consideration” refer to the DOE’s failure to analytically integrate a concept into a model or a calculation. The DOE mentioned pre-5 million year volcanism in the SAR, but because this information was not used to determine long term trends, important data regarding the episodic nature of volcanism was lost. It is critical to understand and analyze the full span of volcanism in any probability model because the process of volcanism is a major factor in controlling the timing and nature of future volcanic eruptions. As future volcanic eruptions are of critical importance to the proposed repository at Yucca Mountain, this element of the new contention should be admitted in this proceeding.

The NRC Staff fails to provide any evidence in its Answer here (as it failed to do so in its prior Answer to Clark County’s Petition to Intervene), to suggest that the PVHA-U expert panel adequately considered the entire 11 million year long period of volcanism in the area of and surrounding the proposed repository. Instead the NRC Staff’s Answer focuses on the mere fact that the DOE merely mentioned pre-5 million year volcanism in the SAR. Consequently, there is a genuine dispute between the DOE and Clark County on this issue, along with the other issues

¹² *Id.* at 10-11 (citing 10 C.F.R. § 2.309(f)(1)(vi)).

¹³ *Id.* at 12.

¹⁴ See NRC Staff Answer to Intervention Petitions (February 9, 2009), at 79-80; Answer of the U.S. Department of Energy to Clark County, Nevada’s Request for Hearing, Petition to Intervene and Filing of Contentions (January 15, 2009), at 101-02; May 11 Order, at Attachment A (admitting CLK-SAFETY-008).

¹⁵ Reply of Clark County, Nevada to the Answers of the U.S. Department of Energy and the Nuclear Regulatory Commission Staff (February 24, 2009), at 87.

presented in CLK-SAFETY-013 to which the NRC did not object. CLK-SAFETY-013 should therefore be admitted for hearing in its entirety.

III. Conclusion

For the foregoing reasons, Clark County's New Contention, CLK-SAFETY-013, is properly admitted for hearing in its entirety.

Dated: July 9, 2009

Respectfully submitted,

/s/ filed electronically

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply of Clark County, Nevada to the Answers of the U.S. Department of Energy and the Nuclear Regulatory Commission Staff to Clark County's New Contention Arising from the Department of Energy's February 19, 2009 Update," have been served on the following persons this 9th day of July, 2009, by Electronic Information Exchange.

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