

**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	Docket No. 63-001-HLW
U.S. DEPARTMENT OF ENERGY	ASLBP No. 09-892-HLW-CAB04
(High Level Waste Repository)	November 9, 2009

**JOINT RESPONSE OF CLARK COUNTY, NEVADA AND INYO COUNTY,
CALIFORNIA TO NRC STAFF’S COMMENTS REGARDING
CONSOLIDATION OF CONTENTIONS**

On October 13, 2009, Clark County, Nevada (“Clark County”) filed a Joint Proposal to Consolidate Contentions of Clark County, Nevada, State of Nevada and Inyo County, California (collectively, “the Consolidating Parties”), pursuant to Section B of CAB Case Management Order #2 (“CMO #2”), issued on September 30, 2009. Therein, the Consolidating Parties proposed to consolidate NEV-SAFETY-150 through 152 and NEV-SAFETY-154 through 158 with CLK-SAFETY-003 through 005 and CLK-SAFETY-007 through 011, respectively, and to consolidate NEV-SAFETY-153, INY-SAFETY-003 and CLK-SAFETY-006, resulting in a total of nine volcanism contentions (“Volcanism Contentions”). On October 30, 2009, the NRC Staff filed “comments” regarding this request for contention consolidation.

Pursuant to CMO #2, Section B (at 5), Clark County and Inyo County, California (“Inyo County”) (collectively, “the Counties”) hereby file a joint response to the NRC Staff’s Comments. The Counties urge the Board to reject NRC Staff’s Comments because they are directly at odds with CMO #2, the NRC Staff’s prior agreement to the June 10, 2009 “Joint

Proposed Process and Schedule for Grouping and Consolidating Contentions,” and the fact that all of the Volcanism Contentions were admitted by the CABs in their entirety.

I. DISCUSSION

A. The NRC Staff’s Comments Are Not Permitted By CMO #2

Although the NRC Staff costumed its pleading as “comments,” the pleading in actuality is a motion to the Board to “clarify the scope of consolidated contentions and direct that they be rewritten in accordance with the Board’s clarification.”¹ This request is not permitted under CMO #2, which specifically provides that: “Any party may file any *objection* to any proposed consolidation or grouping or may *propose alternate consolidation* or grouping.”² The NRC Staff is neither objecting to the proposed consolidation here,³ nor is it proposing alternate consolidation. To the contrary, the NRC Staff itself previously urged that the Board consolidate the Volcanism Contentions that the Consolidating Parties proposed.⁴

Since NRC Staff’s Comments are not an objection to the proposed consolidation, their filing is outside of the scope of CMO #2 and should be denied. Further, the NRC Staff’s Comments cannot be considered objections to the proposed consolidation because the Consolidating Parties have not yet submitted the text of the rewritten contentions in consolidated form. If the NRC Staff have an objection to the consolidated contentions after they are rewritten and submitted, it will have its opportunity to file an objection at that time.⁵

¹ NRC Staff Comments, at 3.

² CMO #2, at 5 (emphasis added).

³ See NRC Staff Comments, at 1 (“The Staff does not object to any of the proposed consolidations”).

⁴ See NRC Staff Answer to Intervention Petitions (February 9, 2009) at 11.

⁵ See Joint Proposal to Consolidate Contentions of Clark County, Nevada, State of Nevada and Inyo County, California (October 13, 2009) at 2 (proposing that replies to the rewritten consolidated contentions be permitted within 10 days after they are submitted).

B. The NRC Staff's Comments Contradict Its Previous Filings and Commitments

Even if the NRC Staff's Comments were permitted under CMO #2, they directly contradict their own joint filing and commitments made in this proceeding on June 10, 2009 (Joint Proposed Process and Schedule for Grouping and Consolidating Contentions). In that filing, the parties, including the NRC Staff, specifically agreed that:

[T]he Parties want to *ensure that any consolidation preserves all of the issues contained within an admitted contention* that would be withdrawn upon consolidation with another contention but does not expand the scope or bases beyond the originally admitted contentions. Accordingly, any proposed consolidation would be premised upon the CAB's grant of a specific request by a party or parties to amend or modify an admitted contention to incorporate issues from another contention identified for withdrawal.⁶

The consolidation involved here concerns contentions that the CABs have already ruled are admissible *in their entirety*.⁷ It thus would make no sense for any aspect of any admitted contention to be stripped out by virtue of being consolidated with other similar contentions. No party would litigate to get its contentions admitted and then allow them to be whittled away by participating in consolidation with others.

The NRC Staff's Comments directly contradict the letter and spirit of its June 10 commitment. Abandoning its specific commitment to the contrary, the NRC Staff argues that "[T]he proposed inclusion of INY-SAFETY-003, if adopted, would interject an issue separate and distinct from that raised in CLK-SAFETY-006 and NEV-SAFETY-153."⁸ Similarly, the NRC Staff addresses an additional issue that is raised in NEV-SAFETY-150 through 154 and 156, but not raised in the corresponding Clark County contentions (i.e., its impact on DOE's

⁶ Joint Proposed Process and Schedule for Grouping and Consolidating Contentions (June 10, 2009) at 3 (emphasis added).

⁷ See Memorandum and Order (Identifying Participants and Admitted Contentions) May 11, 2009, at Attachment A (admitting each of the Volcanism Contentions).

⁸ NRC Staff Comments, at 2.

TSPA).⁹ In both instances the NRC Staff urges the Board to clarify whether or not these issues will be considered as part of the consolidated contentions.¹⁰

All of the parties, including the NRC Staff, agreed on June 10 exactly how this specific situation would be handled: the contentions to be consolidated would be rewritten in such a way as to “preserve[] all of the issues contained within” each admitted contention.¹¹ Thus, there is nothing to be clarified. The NRC Staff’s request for the Board to “direct” the rewriting of the Volcanism Contentions is unnecessary. Moreover, it is improper for the NRC Staff to now try to eliminate admitted contention issues that it previously promised would be preserved in the course of any consolidation.

⁹ See NRC Staff Comments, at 2-3.

¹⁰ See *id.*

¹¹ Joint Proposed Process and Schedule for Grouping and Consolidating Contentions (June 10, 2009) at 3.

II. CONCLUSION

For the foregoing reasons, the Counties respectfully urge the Board to reject the NRC Staff's Comments.

Respectfully submitted,
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November 9, 2009

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NUCLEAR REGULATORY COMMISSION
Before the Atomic Safety and Licensing Board

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

I hereby certify that copies of the foregoing Joint Response of Clark County, Nevada and Inyo County, California to NRC Staff's Comments Regarding Consolidation of Contentions have been served on the following persons this 9th day of November, 2009 by Electronic Information Exchange.

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