In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

July 13, 2009

REPLY OF THE STATE OF NEVADA TO NRC STAFF'S ANSWER TO NEV-SAFETY 204 AND 205

Honorable Catherine Cortez Masto
Nevada Attorney General
Marta Adams
Chief, Bureau of Government Affairs
100 North Carson Street
Carson City, Nevada  89701
Tel:  775-684-1237
Email:  madams@ag.nv.gov

Egan, Fitzpatrick, Malsch & Lawrence, PLLC
Charles J. Fitzpatrick *
Martin G. Malsch *
John W. Lawrence *
12500 San Pedro Avenue, Suite 555
San Antonio, TX  78216
Tel:  210.496.5001
Fax:  210.496.5011
cfitzpatrick@nuclearlawyer.com
mmalsch@nuclearlawyer.com
jlawrence@nuclearlawyer.com

*Special Deputy Attorneys General
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I. INTRODUCTION

On June 8, 2009, the State of Nevada (Nevada) timely filed two new contentions designated as NEV-SAFETY-204 and NEV-SAFETY-205. These new contentions focus on the methodology and content of DOE's PVHA-U volcanism expert elicitation adopted in its February 19, 2009 License Application Update.

On July 6, 2009, the NRC Staff (Staff) filed an Answer objecting to NEV-SAFETY-204 and NEV-SAFETY-205. The Staff conceded the admissibility of NEV-SAFETY-204 and NEV-SAFETY-205. The Staff Answer confirms that no party objected to the admissibility of NEV-SAFETY-204 or 205, and that both contentions should be admitted. "Staff does not oppose admission of these contentions" (Staff Answer at 2). The Staff went on to state that it "opposes certain of the assertions made by Nevada" in its contentions. Id.
II. NEVADA'S REPLY TO NRC STAFF'S ANSWER REGARDING NEV-SAFETY-204

In its Answer, the Staff argues that, because NUREG-1563 (its bible for expert elicitation methodology) is guidance and not a binding regulation, the assertion that DOE failed to follow it is not "material to the findings the NRC must make to support the action that is involved in the proceeding," citing 10 C.F.R. 2.3009(f)(1)(iv) (Staff Answer at 3-4). It should be noted that this materiality argument by Staff applies only to the narrow aspect of Nevada's contention NEV-SAFETY-204 which asserts that DOE was deficient (in its PVHA-U) in not following NUREG-1563. The Staff does not oppose admission of NEV-SAFETY-204 generally, but only the aspect of it which asserts this failure by DOE.

The Staff's "parsing" of NEV-SAFETY-204 goes further than merely selecting only one aspect (adherence to NUREG-1563 by DOE) to disagree with, while not disagreeing with the remainder of the contention. In fact, the Staff further breaks down even the narrow issue of NUREG-1563 compliance. It acknowledges that Nevada's NUREG-1563 argument has two separate prongs: "that DOE failed to follow NUREG-1563, Branch Technical Position on the Use of Expert Elicitation in the High-Level Radioactive Waste Program, despite having previously committed itself to do so in a Key Technical Issue (KTI) agreement, as well as in the Quality Assurance Requirements and Description (QARD) which is incorporated into the updated LA" (Staff Answer at 3). Having correctly stated Nevada's twofold argument with respect to NUREG-1563 compliance, the Staff proceeds to totally ignore one of those two predicates, the one based on DOE's QARD. DOE asserted in QARD 2.2.9 and 2.2.13.B.7 that its own expert elicitations "shall be conducted in accordance with NUREG-1563, Branch Technical Position on the Use of Expert Elicitation in the High-Level Radioactive Waste Program (Nov. 1996), with a single exception," but DOE failed to do so in its implementation of the PVHA-U,
which update is adopted as a component part of its License Application Update No. 1 at SAR Subsection 5.4.1. (See Quality Assurance Requirements and Description (01/31/2008), LSN# DEN001574022 at 32, 36.)

Accordingly, in its effort to comply with 10 C.F.R. 63.21(c)(19) regarding the description of its implementation of expert elicitation, DOE committed in its QARD to comply with NUREG-1563, and in its License Application, represented that it did so. The Staff utterly ignores this one of Nevada's two separate arguments as to why DOE's failure to follow NUREG-1563 is material in this proceeding.

The other prong of Nevada's argument, which the Staff undertook to challenge, was based on the premise that DOE made a solemn agreement with NRC Staff to maintain and follow NUREG-1563, not just in expert elicitations in general, but in its conduct of the PVHA-U, specifically. As acknowledged by DOE (LSN# DEN001601965 at 1-2), "the NRC Staff concluded that the information DOE submitted [with regard to new volcanism data acquired after the 1996 PVHA] did not provide an adequate technical basis to evaluate the likely impacts of the new aeromagnetic and ground magnetic data on the volcanic hazard estimate." As a consequence, DOE and NRC negotiated and reached a formal agreement on the "Key Technical Issue" relating to igneous activity. DOE admits (id.) "the agreement includes provisions for updating the PVHA expert elicitation in accordance with NUREG-1563, Branch Technical Position on the Use of Expert Elicitation in the High-Level Radioactive Waste Program" (emphasis added).

The second aspect of Nevada's argument with respect to NUREG-1563 compliance, then, was based on a solemn written commitment made by DOE to NRC Staff. Neither of Nevada's two arguments regarding NUREG-1563 compliance assert that NUREG-1563 is a "regulation"
or a "binding regulation." On the contrary, Nevada conceded that standing alone, NUREG-1563 was guidance expected to be followed, but not required to be followed, by DOE. Staff's argument in this regard is a red herring. Rather, Nevada argued that (in addition to its QARD and LA representations) DOE was bound to follow NUREG-1563 by its solemn written agreement to do so.

Not surprisingly, DOE's Answer to NEV-SAFETY-204 did not raise the issue of NUREG-1563 compliance – DOE itself does not try to wiggle off a hook of its own making. Incredibly, however, the Staff (the negotiator for, and recipient of, DOE's solemn written promise to follow NUREG-1563) proposes to give DOE a "pass" on such compliance. Despite DOE's solemn commitment, the Staff attempts to write off that obligation as though it were a mere artifact from some other era: "Nevada also asserts that DOE is required to comply with NUREG-1563 because of commitments DOE undertook in a Key Technical Issue (KTI) agreement. However, the KTI agreement was in support of the pre-licensing process, and was applicable only to the period before DOE submitted the LA" (Staff Answer at 4-5). One can only marvel at this Staff position. The obligor (DOE) who promised to comply with NUREG-1563 makes no effort in its Answer to shirk or evade its commitment. But Staff is willing to erase the DOE commitment simply because it was made before the License Application was filed! The Staff's position ignores the fact that not only this KTI agreement, but all 293 KTI agreements made in writing between NRC Staff and DOE were for the express purpose of ensuring that their compliance would lead to a sufficiently complete License Application.

When NRC Chairman Richard A. Meserve issued the NRC's "sufficiency letter" on November 13, 2001, he explained that sufficient information for the License Application "although not available now, will be available at the time of a potential License Application such
that development of an acceptable License Application is achievable" (LSN# NRC000019147 at 1). Chairman Meserve went on to state "although significant additional work is needed prior to submission of a possible License Application, we believe that agreements reached between DOE and NRC Staff regarding the collection of additional information provide the basis for concluding that development of an acceptable License Application is achievable." Id. at 2. A detailed enclosure to Chairman Meserve's correspondence addressed the "agreements that document additional work that DOE will need to complete before submitting any potential License Application are reached. . . . Based on the agreements, NRC has reasonable confidence DOE will assemble the information before filing a possible License Application." Id. at Appendix p. 3. The letter concluded "reliance on DOE's agreements to complete this work forms the basis for many conclusions regarding the sufficiency of information." Id.

While DOE obviously reached its "KTI agreements" with NRC Staff before its LA submission, it did not do so in a vacuum, or without an intimate relationship between those agreements and the License Application. As articulated by NRC Chairman Meserve, compliance by DOE with the KTI agreements was a prerequisite to a complete and reviewable License Application. For any party to suggest now that written KTI agreement commitments are irrelevant to the License Application is deplorable. For NRC Staff itself to seek to excuse DOE's deficient performance in derogation of its written commitments to the Staff is stunning.

Nevada has never asserted that, standing alone, NUREG-1563 is a binding regulation. On the contrary, recognizing that NUREG-1563 was NRC Staff guidance, Nevada instead focused on the two DOE actions which made NUREG-1563 adherence mandatory: first, its adoption in its QARD, as part of its License Application, of a commitment to NUREG-1563 compliance; and second, its written KTI agreement with NRC Staff promising that the conduct
of this specific expert elicitation (the PVHA-U) would be performed in accordance with NUREG-1563.

In the face of DOE's multiple commitments to follow NUREG-1563, the Staff's repetitious mantra that NUREGs constitute guidance and not regulations is irrelevant. Its recitation also intentionally ignores Nevada's actual position, and should be given no weight. NEV-SAFETY-204 should be considered in its entirety. No party, including NRC Staff has challenged its admissibility in this proceeding.
III. NEVADA'S REPLY TO NRC STAFF'S ANSWER REGARDING NEV-SAFETY-205

As in the case of NEV-SAFETY-204, the Staff does not oppose the admission of NEV-SAFETY-205, but rather disagrees with one aspect of Nevada's contention: specifically, Nevada's assertion that the PVHA-U does not adequately consider the entire 11-million-year history of volcanism in the Yucca Mountain area. The Staff argues (Staff Answer at 8) that "DOE did consider volcanic events for an 11-million-year period" and for evidence cites a brief mention in the SAR of an entirely different type of volcanic activity from that which is the focus of Nevada's contentions (NEV-SAFETY-151 and 155 in its original December 19, 2008 submission; and NEV-SAFETY-205, its current contention directed to the updated PVHA).

Thus, the early volcanism briefly mentioned (as occurring between 15 and 11 million years ago) by DOE is silicic volcanism. The focus of Nevada's contentions, on the other hand, is that which occurred in an entirely different, more recent era: basaltic volcanism. As pointed out by Nevada, DOE assumes there exists a diminishing supply of new basalt and therefore predicts a smaller probability of future volcanic events.

In its inadequate consideration of that phenomenon – basaltic volcanism – DOE's focus is on basaltic events which have occurred only over the past five million years. This approach obscures the long-term trends and patterns in basaltic volcanism and provides an inaccurate prediction of future events.

In addition to totally missing the point of Nevada's contentions by citing SAR references to silicic volcanism instead of basaltic volcanism, the Staff makes another error: it suggests that, since DOE did mention volcanism of an earlier vintage, Nevada's complaint must somehow be DOE's failure to wholeheartedly embrace Nevada's model and rationale. Again, this is not the case. On the contrary, Nevada's contention is that, with respect to basaltic volcanism over the
last 11 million years, neither DOE nor any of its PVHA-U experts analyzed its long-term trends or patterns. In that regard, their horizon was limited to only five million years, a partial "look back" whose consequence was a result diametrically opposed to that which Nevada found, and believes DOE would have found, had it analyzed the trends and patterns in basaltic volcanism over the entire 11-million-year period.

Because the Staff did not object to the admissibility of NEV-SAFETY-205, because its partial criticism of Nevada's contention was predicated upon erroneous quotations dealing with an entirely different era in volcanism, and because neither DOE nor its PVHA-U experts analyzed the long-term trends or patterns of volcanism with respect to the 11-million-year history of basaltic volcanism in the Yucca Mountain area, NEV-SAFETY-205 should be considered in its entirety.

Respectfully submitted,

(signed electronically)
Charles J. Fitzpatrick *
Martin G. Malsch *
John W. Lawrence *
Egan, Fitzpatrick, Malsch & Lawrence, PLLC
12500 San Pedro Avenue, Suite 555
San Antonio, TX  78216
Tel:  210.496.5001
Fax:  210.496.5011
cfitzpatrick@nuclearlawyer.com
mmalsch@nuclearlawyer.com
jlawrence@nuclearlawyer.com

*Special Deputy Attorneys General

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Reply to NRC Staff's Answer to NEV-SAFTY 204 and 205 has been served upon the following persons by the Electronic Information Exchange:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001

CAB 01
William J. Froehlich, Chair
Administrative Judge
E-mail: wjf1@nrc.gov
Thomas S. Moore
Administrative Judge
E-mail: tsm2@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

CAB 02
Michael M. Gibson, Chair
Administrative Judge
E-mail: mmg3@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: axr@nrc.gov
Nicholas G. Trikouros
Administrative Judge
E-mail: NGT@NRC.GOV

CAB 03
Paul S. Ryerson, Chair
Administrative Judge
E-mail: psr1@nrc.gov
Michael C. Farrar
Administrative Judge
E-mail: mcf@nrc.gov
Mark O. Barnett
Administrative Judge
E-mail: mob1@nrc.gov
mark.barnett@nrc.gov

CAB 04
Thomas S. Moore, Chair
Administrative Judge
E-mail: tsm2@nrc.gov
Paul S. Ryerson
Administrative Judge
E-mail: psr1@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
Email: ace1@nrc.gov
Daniel J. Graser, LSN Administrator
Email: dig2@nrc.gov
Lauren Bregman
Email: lrb1@nrc.gov
James Bennett McRae  
Email: ben.mcrae@hq.doe.gov
Mary B. Neumayr, Esq.  
Email: mary.neumayr@hq.doe.gov
Christina C. Pak, Esq.  
Email: christina.pak@hq.doe.gov

U.S. Department of Energy  
Office of Counsel  
Naval Sea Systems Command  
Nuclear Propulsion Program  
1333 Isaac Hull Avenue, SE  
Washington Navy Yard, Building 197  
Washington, DC 20376  
Frank A. Putzu, Esq.  
Email: frank.putzu@navy.mil

Yucca Mountain Project, Licensing Group, DOE/BSC  
1251 Center Crossing Road, M/S 423  
Las Vegas, NV 89144  
Jeffrey Kriner, Regulatory Programs  
Email: jeffrey_kriner@ym.gov
Stephen J. Cereghino, Licensing/Nucl Safety  
Email: stephen_cereghino@ym.gov

Yucca Mountain Project, Licensing Group, DOE/BSC  
6000 Executive Blvd., Suite 608  
North Bethesda, MD 20852  
Edward Borella, Sr Staff, Licensing/Nuclear Safety  
Email: edward_borella@ym.gov
Danny R. Howard, Sr. Licensing Engineer  
Email: danny_howard@ym.gov

U.S. Department of Energy  
Office of Civilian Radioactive Waste Mgmt  
Office of Repository Development  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
Timothy C. Gunter  
Email: timothy_gunter@ym.gov

Carter Ledyard & Milburn, LLP  
Counsel for Lincoln County  
1401 Eye Street, N.W., Suite 300  
Washington, DC 20005  
Barry S. Neuman, Esq.  
Email: neuman@clm.com
Churchill, Esmeralda, Eureka, Mineral and Lander Counties
1705 Wildcat Lane
Ogden, UT  84403
Loreen Pitchford, LSN Coordinator for Lander County
Email: lpitchford@comcast.net

Robert List
Armstrong Teasdale LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV  89134-62237
Email: rlist@armstrongteasdale.com

City of Las Vegas
400 Stewart Ave.
Las Vegas, NV  89101
Margaret Plaster, Management Analyst
Email: mplaster@LasVegasNevada.gov

Clark County Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
Irene Navis
Email: iln@co.clark.nv.us
Engelbrecht von Tiesenhausen
Email: evt@co.clark.nv.us
Philip Klevorick
Email: klevorick@co.clark.nv.us

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV  89706
Bruce Breslow
Email: breslow@nuc.state.nv.us
Steve Frishman, Tech. Policy Coordinator
Email: steve.frishman@gmail.com

Eureka County and Lander County
Harmon, Curran, Speilberg & Eisenberg
1726 M. Street N.W., Suite 600
Washington, DC 20036
Diane Curran, Esq.
Email: dcurran@harmoncurran.com

Nevada Nuclear Waste Task Force
P.O. Box  26177
Las Vegas, NV 89126
Judy Treichel, Executive Director
Email: judynwtf@aol.com

Talisman International, LLC
1000 Potomac St., N.W., Suite 300
Washington, D.C. 20007
Patricia Larimore
Email: plarimore@talisman-intl.com

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel
Email: mab@nei.org
Anne W. Cottingham, Esq.
Email: awc@nei.org
Rod McCullum
Email: rxm@nei.org
Steven P. Kraft
Email: spk@nei.org
Jay E. Silberg
Email: jay.silberg@pillsburylaw.com
Timothy J.V. Walsh
Email: timothy.walsh@pillsburylaw.com

White Pine County
City of Caliente
Lincoln County
P.O. Box 126
Caliente, NV 89008
Jason Pitts
Email: jayson@idtservices.com

Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912
Michael Mariotte, Executive Director
Email: nirsnet@nirs.org
State of Nevada
100 N. Carson Street
Carson City, NV 89710
Marta Adams
Email: madams@ag.state.nv.us

White Pine County (NV) Nuclear Waste Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
(Heidi Williams, Adm. Assist.)
Email: wpnucwst1@mwpower.net

Fredericks & Peebles, L.L.P.
1001 Second Street
Sacramento, CA 95814
916-441-2700
FAX 916-441-2067
Darcie L. Houck
Email: dhouck@ndnlaw.com
John M. Peebles
Email: jpeebles@ndnlaw.com
Joe Kennedy, Chairman
Email: chairman@timbisha.org
Barbara Durham
Tribal Historic Preservation Officer
Email: dvdurbarbara@netscape.com

Susan Durbin
Deputy Attorney General
California Department of Justice
1300 I St.
P.O. Box 94255
Sacramento, CA, 94244-2550
Email: susan.durbin@doj.ca.gov

Brian Hembacher
Deputy Attorney General
California Department of Justice
300 S. Spring St
Los Angeles, CA 90013
Email: brian.hembacher@doj.ca.gov

Timothy E. Sullivan
Deputy Attorney General
California Department of Justice
1515 Clay St., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
Email: timothy.sullivan@doj.ca.gov

Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

Kevin W. Bell
Senior Staff Counsel
California Energy Commission
1516 9th Street
Sacramento, CA 95814
Email: kwbell@energy.state.ca.us

Jeffrey D. VanNiel
530 Farrington Court
Las Vegas, NV 89123
Email: nbridvnr@gmail.com

Ethan I. Strell
Carter Ledyard & Milburn LLP
2 Wall Street
New York, NY 10005
Email: strell@clm.com

Jennings, Strouss & Salmon, PLC
1700 Pennsylvania Avenue, N.W., Suite 500
Washington DC 20006-4725
Alan I. Robbins
Email: arobbins@jsslaw.com
Debra D. Roby
Email: droby@jsslaw.com

Steven A. Heinzen
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Email: sheinzen@gklaw.com
Douglas M. Poland  
Godfrey & Kahn, S.C.  
One East Main Street, Suite 500  
P.O. Box 2719  
Madison, WI  53701-2719  
Email: dpoland@gklaw.com

Arthur J. Harrington  
Godfrey & Kahn, S.C.  
780 N. Water Street  
Milwaukee, WI  53202  
Email: aharring@gklaw.com

Gregory Barlow  
P.O. Box 60  
Pioche, NV  89043  
Email: lcda@lcturbonet.com

Connie Simkins  
P.O. Box 1068  
Caliente, NV  89008  
Email: jcciac@co.lincoln.nv.us

Bret O. Whipple  
1100 South Tenth Street  
Las Vegas, NV  89104  
Email: bretwhipple@nomademail.com

Richard Sears  
801 Clark Street, Suite 3  
Ely, NV  89301  
Email: rwsears@wpcda.org

Alexander, Berkey, Williams & Weathers  
2030 Addison Street, Suite 410  
Berkeley, CA 94704  
Curtis G. Berkey  
Email: cberkey@abwwlaw.com  
Scott W. Williams  
Email: swilliams@abwwlaw.com  
Rovianne A. Leigh  
Email: rleigh@abwwlaw.com

(signing electronically)

Susan Montesi