UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	**Docket No. PAPO-00**
	)	
U.S. DEPARTMENT OF ENERGY	)	**ASLBP No. 04-829-01 PAPO**
	)	
(High Level Waste Repository:	)	**NEV-01**
Pre-Application Matters)	)	**May 12, 2005**

STATE OF NEVADA'S MEMORANDUM REGARDING ISSUES ARISING FROM THE BOARD'S MAY 4, 2005 HEARING

In its hearing on May 4, 2005, the PAPO Board instructed the parties to submit memoranda on several specific issues. The Board's instructions were clarified in its Memorandum and Order of May 11, 2005. Those issues are briefed below by the State of Nevada, in the order that they were addressed in the Board's May 11 Order.

1. APPENDICES A, B, AND C

Nevada commends the Board for developing Appendices A, B, and C, which appear to have thoughtfully and faithfully stated applicable legal requirements for assertion of the attorney/client, attorney work product, and deliberative process privileges.

A. Appendix A

Nevada has no suggested changes or additional briefing with respect to Appendix A.

B. Appendix B

It is clear from prior submissions of the parties and from their comments at the PAPO Board at the May 4 hearing that there is general agreement on the basic premise that Documentary Material prepared "in anticipation of litigation" may be privileged. In addition,

there was general agreement with respect to an exception, or at least a *caveat*, to the applicability of that general rule, as stated by NRC counsel at the hearing: "but materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes would not be covered." Tr. 86.

An excellent annotated analysis of the general rule and the noted exception (which is critical in this case, as it applies to the vast majority of all DOE documents regarding Yucca Mountain generated over the last 20 years) is set out in *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998):

> The formulation of the work-product rule used by the Wright & Miller treatise, and cited by the Third, Fourth, Seventh, Eighth and D.C. Circuits, is that documents should be deemed prepared "in anticipation of litigation," and thus within the scope of the Rule, if "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994) (emphasis added). *See In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987).
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> Conversely, it should be emphasized that the "because of" formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well established that work-product privilege does not apply to such documents. *See* FED. R. CIV. P. 26(b)(3), Advisory Committee's note ("Materials assembled in the ordinary course of business ... are not under the qualified immunity provided by this subdivision."); *see, e.g., National Union Fire*, 967 F.2d at 984. Even if such documents might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created "because of" actual or impending litigation. *See* WRIGHT & MILLER § 2024, at 346 ("even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation").

Cases mandating the same result include *U.S. v. Frederick*, 182 F.3d 496, 501 (7th Cir. 1999) (a document prepared for use in preparing tax returns and for use in litigation is not privileged, despite its dual purpose); *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968) (in patent litigation, party had duty to disclose facts relating to the possible equities of the patent application, and could not "hide behind the work product doctrine the research, tests, and experiments which are pertinent to the patent application").

Perhaps the case most on point for this proceeding, dealing with documents prepared in accordance with NRC regulatory requirements, is *Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-7, 23 NRC 177, 179 (1986). The issues there were various quality assurance and corrective action reports. The applicant sought to assert work-product privilege on two grounds: that the documents were prepared in anticipation of litigation, and that attorneys had played a substantial role in their preparation. The ASLB rejected the applicant's argument, holding:

> ... [T]hese programs and reports were assumed by Applicant under its obligations to NRC Staff and the Commission's regulations. That the drafts may have been prepared with an eye towards litigation and by Applicant's attorneys, rather than its technical staff and consultants, should be of more interest to NRC's technical staff than to the Licensing Board. The input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize these documents from discovery. Counsel in this case were assisting in a management function that is outside the scope of both attorney-client and work product privilege.

Id. Applying those principles to this proceeding, DOE's characterization of its draft License Application ("LA") as litigation work product is instructive as a vehicle to expose DOE's untenable misinterpretation of the meaning of "anticipation of litigation," and it illustrates that further guidance (including further articulation of the predicate for assertion of work-product

privilege in the Board's Appendix B) is critical to prevent abuse of that privilege and endless disputes being brought before the Board.

With respect to the draft LA, Judge Karlin suggested, "I don't think it is being prepared for the adjudicatory process.... It's required in the normal regulatory process. It's got nothing to do with an administrative hearing or litigation. You've got to file an application. So in the ordinary course, that document is prepared because of the normal process for getting a license, not because of a hearing." Tr. 89-90. Nonetheless, DOE counsel defended DOE's withholding of the document and insisted on its characterization as litigation work product, arguing "it is not being prepared for *some independent regulatory reason.*" Tr. 90 (emphasis added).

DOE's position is patently wrong. Regulations adopted by the NRC solely in connection with the potential licensing of the candidate Yucca repository dispositively set out "some independent regulatory reason" for DOE's preparation of an LA. In 10 C.F.R. § 63.1, NRC provides:

> This part prescribes rules governing the licensing (including issuance of a construction authorization) of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992.

Making even clearer the prerequisite nature of DOE's LA, the regulation mandates that:

> (a) DOE may not receive nor possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site except as authorized by a license issued by the Commission under this part.
>
> (b) DOE may not begin construction of a geologic repository operations area at the Yucca Mountain site unless it has filed an application with the Commission and has obtained construction authorization as provided in this part. *Failure to comply with this requirement is grounds for denial of a license.*

10 C.F.R. § 63.3 (emphasis added). In Section 63.21, NRC's regulations set out 24 separate paragraphs over numerous pages specifically detailing the information which must be included in DOE's LA and adding that it must be accompanied by an Environmental Impact Statement prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended. Finally, NRC mandates, at Section 63.22(a):

> An application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area at Yucca Mountain, and an application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site that has been characterized, any amendments to the application, and an accompanying environmental impact statement and any supplements, must be signed by the Secretary of Energy or the Secretary's authorized representative and must be filed with the Director in triplicate on paper and optical storage media.

The broad scope and ominous implications of DOE's mischaracterization of its draft LA as litigation work product is further aggravated by DOE's refusal to provide to Nevada the key documents underlying the LA – a refusal it did not acknowledge at the May 4 hearing. Thus, DOE counsel sought to trivialize the LA, calling it (Tr. 89) "a derivative document that sort of provides a roll-up description of the underlying science" and reciting (Tr. 92), "I would say the technical nuts and bolts they're going to review are the information that's cited and relied on in the license application. And *we're not claiming litigation work-product on that*" (emphasis added). However, as illustrated by DOE counsel's January 12, 2005 correspondence to Nevada (attached as Exhibit No. 1), Nevada had requested not only DOE's draft LA, but also the critical underlying Total System Performance Assessment ("TSPA") calculations and other documents associated therewith, all of which were *refused* by DOE on grounds, *inter alia,* of the litigation work product privilege.

This skirmish regarding access to DOE's draft LA and supporting materials is perhaps a forerunner of literally thousands[1] of improper invocations of work-product privilege that will ensue unless the Board amends the criteria in its Appendix B to make it clear that all Documentary Materials created by DOE to meet NRC regulatory requirements (including all scientific and engineering analyses, correspondence associated therewith, emails discussing such analyses, etc.) developed in the effort to meet the licensing requirements set out in 10 C.F.R. 63 or to produce the FEIS that will accompany DOE's license application are excluded from any assertion of litigation work-product privilege. Put in other terms, a "but for" test should be applied, under which only those documents that would not ordinarily have been created in the effort to comply with 10 C.F.R. 63, and which would not exist "but for" the anticipated litigation, would be eligible for this privilege.

A related issue is that of the identity and role under the LSN regulations of "circulated drafts." 10 C.F.R. 2.1003(a)(1) provides that "all Documentary Material" which must be made available in electronic form on the LSN specifically includes circulated drafts. Section 2.1001 defines "circulated draft" as

> a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

While circulated drafts and final documents are part of the Documentary Material required to be certified on the LSN, preliminary draft documents need not be. DOE counsel

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[1] A recent Nevada search on DOE's LSN document collection under the term "seismic analysis" resulted in the identification of hundreds of "hits," all of them bearing purely scientific-sounding document titles; however, an attempt to review them was futile, since 83 of the first 150 "hits" turned out to be in "header-only" form, with the access field on the header marked "PRI," with no full-text document available.

mentioned this fact at the May 4 hearing, but appropriately stopped short of contending that DOE's draft LA was merely a preliminary draft. Such a suggestion could not credibly be made. The draft LA was circulated to the Nuclear Waste Technical Review Board, presumably pursuant to its request under Section 504(b)(1) of the NWPA, 42 U.S.C. §10264, which allows the TRB access to "drafts" of "final work products." As illustrated by DOE's contract with its M&O contractor (excerpt attached as Exhibit No. 2), the submission of the draft LA by Bechtel/SAIC to its federal customer by July 26, 2004 (which it is believed was successfully accomplished) would, under the contract, have apparently earned that contractor a bonus of over $11 million. This was scarcely a "preliminary" draft. The contract goes into great detail articulating what the draft LA must possess:

> The draft LA must satisfy the following attributes: the draft must address all applicable requirements of 10 C.F.R. 63 and the NUREG-1804 Rev. 2 [NRC's License Application Review Plan, a list of requirements comprising some 400 pages]; it must have all technical team reviews, as defined in the DOE License Application Management Plan, completed; and all DOE mandatory comments and applicable technical direction letters must be resolved.

The draft LA took DOE years to complete, and it obviously contains a very substantial majority of what Nevada's team of expert consultants will need to dissect and analyze as part of Nevada's preparation for the licensing proceeding. It is also *the* key document to assess whether the claims DOE is now making to EPA – that long-range uncertainty in performance modeling for Yucca is so great that EPA's 15 millirem radiation dose standard cannot be extended out to peak dose – are credible or a mere subterfuge for obtaining a new dose standard that Yucca can meet. If ever there was a "circulated draft," this is surely it.

C. Appendix C

Nevada believes the deliberative process privilege will not be available to protect the vast majority of DOE documentary material. Based on currently available information, Nevada plans

to challenge DOE's fitness to be a licensee and, as a part of this contention, will challenge DOE's internal safety decision process on the grounds, *inter alia*, that it elevates schedule and cost concerns over safety and encourages the withholding of known and important safety concerns from the NRC. Since DOE's own safety decision process and its unlawful intention to advance the licensing of Yucca Mountain regardless of known concerns about safety and compliance will be the subject of litigation, the deliberative process privilege cannot be used to shield DOE's safety decision process from scrutiny. *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the Currency*, 145 F.3d 1422 (D.C. Cir. 1998). Specifically, the deliberative process privilege should not be available to shield DOE's (and its contractors') decision processes related to preparation of the application and underlying analyses (e.g., AMRs, KTI submittals, draft LA chapters, etc.) or related to what should be communicated to NRC.

In any event, although Nevada agrees generally with the Board's specifications in Appendix C, we believe the privilege header for any document withheld on the basis of the deliberative process privilege should include the name(s) of the relevant decision-maker(s) who did or would have (if the decision was not made) made the decision for which the deliberative process privilege is being asserted. It should also identify the relative positions in the agency's chain of command occupied by the document's author and recipient. This is especially the case since DOE and NRC Staff have each proposed simply to designate one individual to assert the privilege across their entire suites of deliberative process documents, no matter what the subject matter or time period.

The law and logic governing who is entitled to claim the deliberative process privilege is well-established, resting on the foundational proposition that a claim of this privilege is "dependent upon the individual document and the role it plays in the administrative process."

Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F2d. 574, 586 (D.C. Cir. 1987) (quoting *Coastal States Gas Corp. v. DOE,* 617 F.2d 854, 867 (D.C. Cir. 1980)). Thus, the claim of privilege must "pinpoint an agency decision or policy to which the document contributed." *Id. See also Wilderness Society v. U.S. Dept. of Interior,* 344 F.Supp.2d 1, 12 (D.D.C. 2004). Related to that focus are "two factors that can assist the court in determining whether this privilege is available: the 'nature of the decisionmaking authority vested in the officer or person issuing the disputed document,' . . . and the relative positions in the agency's 'chain of command' occupied by the document's author and recipient." *Puerto Rico*, 823 F.2d at 586 (internal citations omitted). "[B]uilt into the requirements [for such individualized consideration of a document claimed to be privileged] is the need for '*actual personal consideration' by the asserting official.*" *Landry v. FDIC,* 204 F.3d 1125, 1135 (D.C. Cir. 2000) (emphasis added).

Thus, Nevada proposes adding a No. 7 to Appendix C, requiring designation of the actual decision maker(s) in the deliberative process, and a No. 8, requiring designation of the place in the chain of command of the author of the document and its recipients.

2. CONFIDENTIAL CLIENT DISCUSSIONS REGARDING LEGAL ADVICE

DOE has argued that it is entitled to claim as privileged documents evidencing the transmission by a non-attorney to a non-attorney of an attorney's legal advice for the purpose of implementing such advice. Though a qualified privilege along these lines is recognized in the law, it is subject to several constraining features. Nevada seeks to assure that, if such a privilege is recognized by the Board for Yucca documentary material, it be applied pursuant to the ground rules for assertion that have been recognized by the courts.

Though "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States,* 449 U.S. 383, 389

(1981), there are special challenges in applying the privilege in the context of the "artificial creature" of a modern corporate entity.[2] *Id.* at 389-90. Specifically, the Supreme Court has recognized that the purpose of the privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389. To achieve that purpose in the corporate context, the privilege must ensure that "full and frank legal advice [can be conveyed] to the employees who will put into effect the client corporation's policy." *Id.* at 392. That is, "(a)fter the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it." *Id.* (quoting *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1164 (D.S.C. 1974)).

Accordingly, it is well-recognized that "[c]orporations may communicate privileged information at various levels without waiving the attorney-client privilege." *Santrade, Ltd. v. General Electric Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993). *See also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995) (The attorney-client "privilege protects from disclosure communications among corporate employees that reflect advice rendered by counsel to the corporation."); 24 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5954 (2005) ("The courts have allowed the privilege to be claimed when corporate officials discuss the lawyer's advice among themselves, on the theory that such advice would reveal confidential communications of the corporation.").

Certainly, to qualify for the attorney-client privilege such communications must meet the traditional standard for the privilege:

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[2] This memorandum speaks of the "corporate entity," but the law applies equally in context to a governmental agency. *See, e.g., Tax Analysts v. Internal Revenue Service,* 117 F.3d 607, 618 (D.C. Cir. 1997); *Evans v. Atwood,* 177 F.R.D. 1, 3 (D.D.C. 1997).

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Bank Brussels Lambert, 160 F.R.D. at 441 (quoting *United States v. United Shoe Machinery Corp.,* 89 F. Supp. 357, 358-59 (D. Mass. 1950)). *See also Santrade,* 150 F.R.D. at 542; *McCook Metals L.L.C. v. Alcoa, Inc.,* 192 F.R.D. 242, 251 (N.D. Ill. 2000); 8 JOHN HENRY WIGMORE, EVIDENCE § 2292 (McNaughton rev. 1961).

Most commonly the attorney-client privilege applies to intra-corporate communications involving non-lawyers in two contexts. First, documents "transmitted between non-attorneys to relay information requested by attorneys" are protected by the privilege. *Santrade*, 150 F.R.D. at 545. *See also Adams v. Gateway, Inc.,* 2003 WL 23787856, at *11 (D. Utah 2003); *Cuno, Inc. v. Pall Corp.,* 121 F.R.D. 198, 202-03 (E.D.N.Y. 1988). Second, the privilege protects documents "transmitted between non-attorneys (especially individuals involved in corporate decision-making) so that the corporation may be properly informed of legal advice and act appropriately." *Santrade*, 150 F.R.D. at 545. *See also Adams,* at *11 n. 68; *Eutectic Corp. v. Metco, Inc.,* 61 F.R.D. 35, 38 (E.D.N.Y.).

The practical application of the attorney-client privilege tends to focus on two inquiries reflecting these two contexts. First, on the face of the document "it must be 'apparent that the communication from one employee to another was for the purpose of the second employee transmitting the information to counsel for advice' or the document itself must 'reflect the requests and directions of counsel.'" *Adams,* at *11.

Second, and perhaps most importantly as a practical matter,

> the person to whom an executive relays legal advice must "share [ ] responsibility for the subject matter underlying the consultation" in order for the privilege to be preserved. . . . Furthermore, the originator of the communication must have intended that it be kept confidential, and it may not be circulated beyond those employees with a need to know the information.

Verschoth v. Time Warner, Inc., 2001 WL 286763, at *2 (S.D.N.Y. 2001) (internal citation omitted). *See also Upjohn,* 449 U.S. at 394 (privileged "communications concerned matters within the scope of the employees' corporate duties"); *Federal Trade Comm'n v. GlaxoSmithKline,* 294 F.3d 141, 147 (D.C. Cir. 2002) ("The applicable standard is . . . whether "the documents were distributed on a 'need to know' basis or to employees that were 'authorized to speak or act' for the company.").

Thus, interoffice memoranda were held to be privileged because they constituted "documents between business personnel responsible for a project that outlines a situation and requests or relays both legal and business advice from the addressee and those on the circulation list, which includes both legal and non-legal personnel." *McCook Metals,* 192 F.R.D. at 254. These memoranda effectively served to "updat[e] the business people responsible for the operating unit." *Id. See also Eutectic Corp.,* 61 F.R.D. at 38 (interdepartmental memoranda held to be privileged). Reflecting more contemporary forms of communication, in *Long v. Anderson University*, 204 F.R.D. 129, 134 (S.D. Ind. 2001), an email sent from one non-lawyer to another that related a conversation with "legal counsel and his legal advice" was held to be privileged.

In sum, Nevada believes that while DOE may claim this particular privilege in certain limited contexts, it should have to do so pursuant to the ground rules discussed above, and its header information for a document so claimed as privileged should have to itemize each of the specific criteria recognized in the law as prerequisites for its assertion.

3. OFFICIAL ASSERTING DELIBERATIVE PROCESS PRIVILEGE

As counsel for Nevada stated at the May 4 hearing, Nevada does not presently anticipate asserting the deliberative process privilege on any of its documents. However, if Nevada does assert this privilege, the persons authorized for the State to make such assertions are

- Mr. Robert R. Loux
  Executive Director
  Agency for Nuclear Projects
  State of Nevada

- Marta A. Adams, Esq.
  Senior Deputy Attorney General, Civil Division
  State of Nevada

Neither DOE nor NRC Staff objects to the designation of these two individuals.

In discussions with NRC Staff and DOE over the past week, Nevada has learned that NRC plans simply to name a "title position" instead of a specific individual, and that DOE proposes to name a single individual, Mr. Ronald A. Milner, who is purported to be qualified to assert the privilege for DOE for all purposes, all times, and all subject matters.

Nevada believes NRC should designate an individual, so that a particular person's qualifications to assert the privilege can be assessed. As noted above and in earlier briefing on the deliberative process privilege, the law specifically contemplates designation of an individual, not an empty suit.

Nevada does not object in principle to the designation by DOE of Mr. Millner, provided that sufficient information is made available in the header for each document so that Nevada can make a reasonable determination as to whether to challenge designation of the underlying document as privileged. This would include, in addition to those items listed in the Board's Appendix C, a number 7, requiring designation of the ultimate decision maker in the deliberative

process, and a number 8, requiring designation of the place in the chain of command of the author of the document and the recipients.

4. DOE'S EMPLOYEE CONCERNS FILES

A. Introduction

Nearly a year ago, the DOE urged the PAPO Board that it should not be required to disclose millions of internal archival Yucca Mountain project emails that it argued would contain little or nothing relevant to the licensing proceeding. Because of this Board's August 31, 2004 order, DOE's concealment effort was unsuccessful, and the American public has recently been treated to a diet of scandalous internal email revelations[3] that have spawned criminal inquiries[4] and now appear to threaten the very viability of the project.

This time around, DOE argues that it should not be compelled to disclose a cache of other documents which, Nevada believes, promise to document serious deficiencies in DOE's effort to site and license a nuclear waste repository at Yucca Mountain. In support of its position now, DOE inaccurately argues that employees who bring forward their concerns about health and safety matters are given "guarantees" of confidentiality (5/4/2005 Hearing Tr. p. 110) and that Employee Concerns Program ("ECP") records are "sacrosanct" (Tr. 127). DOE's sudden concern for its whistle-blowing employees will undoubtedly come as a surprise to many of them.

Indeed, Nevada is likely far more interested than DOE in protecting the individuals who were conscientious enough to report health and safety concerns, as well as to avoid any "chilling

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[3] *E.g.*, (1) "There should be no question that this site leaks like a sieve;" (2) "This is as good as it's going to get. If they need more proof, I'll be happy to make up more stuff;" and (3) "I know you are trying to dodge the geologic disposal problem, and steering clear of fatal flaw type concerns. But the simple fact is that the only purpose of the natural system now is to provide a benign environment for the engineering." *See* http://www.state.nv.us/nucwaste/news2005/pdf/ymchron01.pdf.

[4] *See, e.g.*, http://www.reviewjournal.com/lvrj_home/2005/Apr-09-Sat-2005/news/26255643.html.

effect" disclosure of their files may have on future reporting of similar concerns. To the limited extent Nevada has been made aware of whistleblower concerns at Yucca, those concerns have tended to echo the concerns long expressed by the State. Thus, Nevada is amenable to limited safeguards on the production of ECP documents, such as the redaction of the names or other identifying information which would expose a concerned employee who wished to maintain his or her confidentiality, recognizing that some individuals do not desire such confidentiality. With that caveat, Nevada's position is that there is no privilege or other justification authorizing the denial by DOE of access to ECP files in their entirety.

B. Employee Concerns Files are Not Legally Privileged

According to DOE counsel at the May 5 hearing, DOE's documentary material apparently includes about five thousand ECP documents. Nevada has been unable to locate any legal privilege accorded to these employee concerns files which would weigh against their disclosure, either in whole or in part. The employee concerns files in question are, by definition, "Documentary Material," acknowledged as such by DOE and accordingly captured within the mandate of 10 C.F.R. Section 2.1003(a) to be included along with "all Documentary Material" on the LSN. Under any conceivable analysis, information regarding health and safety concerns at YUCCA is either admissible evidence in the licensing proceeding, or clearly calculated to lead to the discovery of admissible evidence. Apart from the individual deficiencies encapsulated within specific employee concerns reports, the potential generic mishandling of the entire program by DOE is also a relevant inquiry in the context of DOE's character and competence to receive a license to construct and operate the repository.[5]

[5] Counsel for Nevada have already uncovered two examples of DOE's handling of employee concerns which suggest that DOE's entire concerns program may in fact be corrupt.

An employee concerns program is one component of a desirable "Safety Conscious Work Environment," or "SCWE." It is a program whereby an employee of an applicant, licensee, or contractor may report safety concerns to his or her employer outside of normal management channels. *See* "Proposed Generic Communication: Establishing and Maintaining a Safety Conscious Work Environment," 69 Fed. Reg. 61049, October 14, 2004 ["Draft Guidance"] and "Policy Statement for Nuclear Employees Raising Safety Concerns Without Fear of Retaliation,"

In the first, James Mattimoe, a Yucca employee of DOE contractor Navarro Research, filed a complaint in February 2002 asserting he had been terminated due to his protected activities as a quality assurance program manager at Yucca. A Sept. 13, 2002 Department of Labor report (attached as Exhibit No. 3) found that Mattimoe had reported "significant deficiencies, related to the overall integrity/safety of the Yucca Mountain project at the time that the U.S. Congress was to consider whether or not to recommend that the site be designated to manage and store nuclear waste products." The report found that Navarro was informed by Yucca Program director Lake Barrett that Mattimoe "should be removed from his duties as the Project Manager for the Respondent/Company at the Yucca Mountain site." This mandate was issued by DOE "despite complainant's demonstrated record of managerial competence...." During the investigation, company owner Navarro acknowledged that her motivation to terminate Mr. Mattimoe "was due, at least in part, to her fear that she might not receive future contracts with DOE unless she took this action."

In finding Mattimoe's claim of retaliatory discharge to be supported by the evidence, the report concluded that "[t]hough Respondent/Owner [Navarro] claims to be unaware of specific safety issues raised by the Complainant, his activities were well known by DOE/OCRWM and its Director, Dr. Barrett, whose agency set in motion the chain of events ... that resulted in his termination." But since Barrett had declined to respond to questions during the investigation, the report concluded that the testimony of Navarro, "who stated that she feared that she would possibly suffer severe economic consequences if she did not remove Mr. Mattimoe, at the urging of Dr. Barrett," was uncontradicted. The report found the actions of OCRWM/DOE to be "extraordinarily egregious" in the termination it had "sanctioned."

In the second example, DOE produced to Nevada's counsel, in response to a FOIA request, wholly unredacted ECP documents relating to a 1995 complaint by an employee at Yucca about apparent dangerous levels of toxic silica dust in the tunnels being drilled at Yucca and in his food. DOE's January 16, 1996 response, attached as Exhibit No. 4, dismissed the concern after a purported investigation, concluding that "there will be no corrective action required as a result of this concern." According to DOE, "Industrial hygiene professionals have been taking air samples since the TBM [tunnel boring machine] started operation.... These samples have shown no exposures to respirable dust which exceed the OSHA standards." In 2004, after newspaper revelations about excessive silica exposures in the Yucca tunnels, DOE ordered a "Review of Silica Exposures During Yucca Mountain Tunneling Operations." That review (front page and excerpt attached as Exhibit No. 5) found that silica dust exposures were in fact *not* in compliance with OSHA limits, and that this excess exposure information was "consistent with industrial hygiene reports of the time," delineated as the period June 1993 to December 1995. In short, DOE's dismissal of the 1995 employee complaint based on alleged full compliance with OSHA limits had been a blatant deception.

61 Fed. Reg. 24336, May 14, 1996 ["Policy Statement"]. Such programs are entirely voluntary. *Id.* In fact, the Nuclear Regulatory Commission has expressly declined to impose any legally binding requirement to establish or maintain a SCWE in general or an employee concerns program in particular. *See* Staff Requirements Memorandum of March 26, 2003 (on SECY-02-0116).

NRC Staff guidance on the desirable content of employee concerns programs can be found in the two guidance documents cited above. Among other things, NRC Staff suggests that "provisions to protect the identity of employees" are not prime factors in the success of a given program. Policy Statement, 61 Fed. Reg. at 24338. The Draft Guidance provides that anonymity can be assured only "to the extent appropriate," 69 Fed. Reg. at 61056, and an NRC brochure disseminated to nuclear employees about reporting concerns to the NRC advises them that confidentiality cannot absolutely be assured and that disclosure may be required "to respond to a court order or NRC Licensing Board order." "Reporting Safety Concerns," NUREG/BR-0240, Rev. 1 at pg. 3.

DOE has established an employee concerns program as part of the Yucca Mountain project. In general, it appears, at least on paper, to be consistent with the NRC Staff guidance discussed above. In particular, no guarantee of confidentiality or anonymity is made. DOE's "Employee Concerns Program Guide" warns that "[c]oncerned individuals must be informed of limitations in providing confidentiality in evaluating and attempting to resolve certain types of concerns. Confidentiality cannot be protected if maintaining that confidentiality puts at risk the health and safety of workers or the public." DOE G 442.1-1(020199) at 8. DOE further warns that "Confidentiality will not be extended to any person who in the course of his or her employment, or due to the nature of his or her position, is required to provide such information."

Id. at 9. In the context of planning, designing, and constructing a nuclear waste repository, the latter requirement is one which appears to perhaps dramatically limit confidentiality, since in the very same guide DOE mandates that "DOE employees and any contractor or subcontractor fulfilling DOE's mission have the right and *responsibility* to report concerns relating to the environment, safety, health, or management of department operations." *Id.* at 1 (emphasis added.) DOE's guide also recognizes and warns employees that "employee concerns records may be subject to disclosure under the Privacy Act or the Freedom of Information Act ["FOIA"]." Indeed, counsel for Nevada have routinely obtained ECP files from both DOE and NRC under FOIA over the past decade, and more recently specifically concerning the Yucca project.

C. Privacy Act and FOIA Considerations

The Privacy Act, 5 U.S.C. § 552a, relates to nondisclosure by federal agencies of certain "records" maintained in a "system of records." 5 U.S.C. § 552a(b). The term "record" means "any item, collection, or grouping of information *about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history." 5 U.S.C. § 552a(a)(4) (emphasis added). The focus of such records protected by the Act is obviously individual, personal, private information about an individual. While an employee concern record collection may disclose the identity of those reporting concerns, the records are not principally "information about an individual;" indeed, they generally are not about the individual at all, but typically relate to deficiencies in programs or management that go to issues of the health and safety of the workplace or the integrity of the project. Moreover, even if employee concerns could be construed as "records," the Privacy Act

makes clear that such "records" can be disclosed with the consent of the individual. 5 U.S.C. 552a(b).

Likewise for FOIA, there clearly is no exemption in that statute for "employee concerns" records. Exemption Six, which has been mentioned by DOE, is almost always inapplicable here, since it applies only to "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5. U.S.C. § 552(b)(6). And even then, whether such a document may be withheld requires a careful balancing of the harm to the employee's privacy interest and the public's interest in disclosure. *See, e.g., Air Force v. Rose,* 425 U.S. 352 (1976)(protecting from disclosure personal information regarding Air Force Academy cadets dismissed in cheating scandal); *Department of State v. Ray*, 502 U.S. 164 (1991)(protecting from disclosure names and other personal information regarding Hatian refugees who reasonably believed they would be killed if released). Given the nature of the Yucca proceeding, it is difficult to imagine how an individual's privacy interest would more than rarely outweigh the public's interest in information that may bear directly on the health, safety, or environmental impacts of the nation's first high-level waste repository.

On several occasions Nevada has requested documents from DOE under FOIA that included employee concerns files and DOE's response has been to disclose the requested documents with employee privacy information redacted or to produce such documents entirely unredacted. *See* Exhibit No. 4. This reflects the pattern of practice under FOIA that Nevada's counsel has observed for ECP files in similar FOIA requests of both DOE and NRC over the past decade. This practice, which reflects applicable law, is that documentation of the safety concern at issue is disclosed but with any privacy information, if it in fact qualifies, redacted. In the unlikely event the name of the employee must be disclosed to identify and address the safety

concern at issue, a document-by-document balancing test must be applied under *Air Force v. Rose* and its progeny.

D. DOE's Attempt to Create a New Blanket Privilege

Notwithstanding its own past practice, DOE now appears, based on its statements at the May 4, 2005 PAPO hearing, to be attempting to assert some new kind of broad privilege for all of its employee concerns program documentary material, even documentary material with all privacy information identifying employees redacted. Nevada can find no legal basis whatsoever for the kind of broad new privilege claimed by DOE.[6]

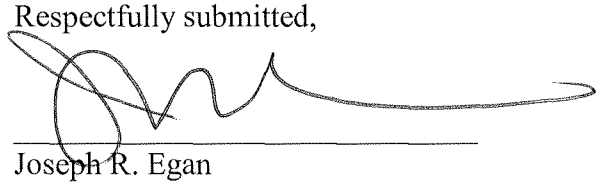
The Supreme Court has cautioned that tribunals should be sparing in recognizing new privileges. The circumstances must be "distinctly exceptional" and justified by "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). Here, the "means for ascertaining the truth" must surely include documentary evidence of safety issues of sufficient importance to cause a knowledgeable employee to go outside of normal management channels to obtain a fair resolution. A possible chilling effect on employees' raising of safety concerns would be the only possible countervailing consideration. However, we have no adjudicative facts that could form the basis for a conclusion that disclosure of underlying safety concerns would have an adverse impact on DOE's employee concerns program at Yucca. The reverse may in fact be the case. We do know from NRC Staff's assessment of employee concerns programs in general that assuring confidentiality is not a prime factor in the success of such programs. Policy Statement, 61 Fed. Reg. at 24338. This suggests that employees in general are willing to report safety

[6] Indeed, Nevada finds it difficult if not impossible to respond fully to DOE's suggested privilege without seeing DOE's purported legal basis.

concerns regardless of whether they or their concerns will be disclosed, provided that their employers support the program and a SCWE in general.

There is no good reason for the Board to invent an entirely new privilege and possibly compromise the search for truth in this uniquely important nuclear safety proceeding because of unsupported (and likely disingenuous) concerns about a possible chilling effect on employees' reporting of safety concerns. The PAPO should be especially reluctant to recognize a new "employees concern program" privilege where the Commission has expressly declined either to mandate such programs or to control their content.[7] Presumably, if employee concerns programs were an essential part of an adequate safety program, the Commission would have required them, and if protecting the confidentiality of employees' reporting of safety concerns were an essential element of any required employee concerns program, the Commission would have added a new employee concerns program privilege to its regulations. For similar reasons, Nevada urges the Board not to impose unnecessary and cumbersome protective order requirements on the disclosure of DOE's ECP files.

Respectfully submitted,



Joseph R. Egan
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Martin G. Malsch
Robert J. Cynkar
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[7] Arguably the creation of an entirely new privilege in this area to encourage safety reporting is a matter best left to the Congress since, in Section 211 of the Energy Reorganization Act, it has legislated in this area and thus far has not seen the need for the creation of any new employee concerns privilege. Moreover, in another related area, the Commission has balanced the possible benefits of confidentiality against the need for disclosure of internal safety disputes and concluded that the interests of disclosure prevail. *See* 10 C.F.R § 2.1006 (c) (no deliberative process privilege for circulated drafts).

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May 12, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	**Docket No. PAPO-00**
	)	
U.S. DEPARTMENT OF ENERGY	)	**ASLBP No. 04-829-01 PAPO**
	)	
(High Level Waste Repository:	)	**NEV-01**
Pre-Application Matters)	)	**May 12, 2005**

CERTIFICATE OF SERVICE

I certify that copies of the foregoing STATE OF NEVADA'S MEMORANDUM REGARDING ACCESS TO EMPLOYEE CONCERNS PROGRAM FILES has been served upon the following persons by electronic mail.

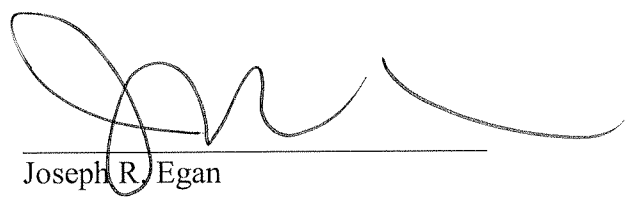

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EXHIBIT
No. 1

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January 12, 2005

Via Fax and First Class Mail

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Fax: 210.820.2668

Draft Yucca Mountain LA, TSPA Calculations and Associated Documents

Dear Mr. Fitzpatrick:

This responds to your December 13, 2004 letter, which requests copies of the Department of Energy's draft License Application to the NRC for the Yucca Mountain repository, Total System Performance Analysis (TSPA) calculations, and other, unspecified documents "associated therewith." All of the materials you have requested are privileged, predecisional litigation work product draft documents. None of them constitute "information regarding determinations or plans." The Department intends to make timely disclosure of these materials and other documentary information with respect to the License Application in conformity with the NRC's LSN regulations.

Sincerely yours,

Donald P. Irwin

EXHIBIT
No. 2

PART I - THE SCHEDULE

SECTION B

SUPPLIES OR SERVICES AND PRICES/COST

TABLE OF CONTENTS

The PBIs and Award Fee Incentive for the final performance period are set forth below with the distribution of the balance of the available fee:

	PBI	Completion Date	Fee Amount
1.	Submission of a Complete Draft LA	Jul 26, 2004	$11,043,476
2.	Final LA Document Ready for DOE Tender to NRC	Nov 30, 2004	$15,290,967
3.	LA Docketed by the NRC	Mar 2005	$22,086,954
4.	Development of Engineering, Procurement, and Construction (EPC) Performance Specifications	Apr 15, 2005	$ 6,795,985
5.	Development and Support of CD-2	Sep 30, 2005	$ 1,698,996
6.	Closure of NRC Requests for Additional Information	Apr 1, 2005 thru Mar 31, 2006	$ 6,795,985
	Award Fee Incentive – Program Management of Worldclass Quality for a Regulated Entity	Apr 1, 2004 thru Mar 31, 2006	$21,237,455

The following describes the PBIs and the Award Fee Incentive:

- PBI 1, Submission of a Complete Draft LA: To obtain a license, the Department must demonstrate that a repository can be constructed, operated, monitored, and eventually closed without unreasonable risk to the health and safety of workers and the public. The content of the LA must be adequate to support NRC docketing of the LA within 90 days of the date DOE tendered the LA to the NRC, timely technical review by the NRC, and to facilitate completion of the NRC's licensing process within the three-year time frame required by the Nuclear Waste Policy Act. The contractor will have to develop the safety case for the demonstration of compliance with the Commission's performance objectives for preclosure radiological safety. The contractor will also present discussions of potential hazards, analyses of events that might disrupt operations and affect safety, and identify structures, systems, and components of the repository that would assure safety before and after repository closure. The contractor will also develop a Total System

Performance Assessment conducted to support licensing, including a discussion of the models, inputs, and assumptions used to demonstrate compliance with postclosure safety objectives; discussions of features, events, and processes that affect postclosure performance; and summaries of the contribution of engineered barriers to performance. To meet the current Program milestone schedule for submission of the *LA Document Ready for DOE to Tender to NRC* on November 30, 2004, a complete draft of all sections of the LA must be provided to DOE by July 26, 2004.

Performance Measure: The draft LA must satisfy the following attributes: the draft must address all applicable requirements of 10 CFR 63 and the NUREG 1804 revision 2; it must have all technical team reviews, as defined in the DOE License Application Management Plan, completed; and all DOE Mandatory comments and applicable Technical Direction Letters must be resolved.

Assumptions and Conditions: The following conditions are assumed: the Preclosure Safety Analysis (PCSA) and the Total System Performance Assessment (TSPA) have been completed; all AMR's consistency reviews/mandatory comments have been resolved; quality assurance Corrective Action Report (CAR) numbers 1 and 2 have been closed; level-A or level-B Condition Reports (CRs) relevant to the draft LA have been dispositioned; and disposition of all Key Technical Issues (KTIs) has been confirmed.

The following parameters are key drivers to the information contained in the Draft LA.

- The major nuclear facilities addressed in the LA and in the Preclosure Safety Analysis (PCSA) for the LA are:
  - Dry Transfer Facility #1 and #2
  - Remediation Facility #1
  - Canister Handling Facility
  - Aging System
  - Transportation Cask Receipt/Return Facility
  - Underground Facility, including emplacement drifts and shafts
- The preclosure period analyzed in the LA is 100 years and the postclosure period is 10,000 years.
- The PCSA analyzes repository preclosure performance based on the maximum throughput capability of 3,000 MTHM per year.
- The aging system capability is 20,000 MTHM.
- The waste inventory used for commercial spent nuclear fuel and high-level waste used in the TSPA cannot be changed. (Shall be per Initial Radionuclide Inventories ANL-WIS-MD-000020 Rev 00)

EXHIBIT
No. 3

September 13, 2002

Dr. Susana Navarro
President, Navarro Research and Engineering, Inc.
659 A, Emory Valley Road,
Oak Ridge, TN 37830

Re: Navarro Research and Engineering, Inc./Mattimoe/1084672

Dear Dr. Navarro:

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mr. James Mattimoe against Navarro Research and Engineering, Inc. under the employee protection provisions of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C., Section 5851.

Mr. Mattimoe, the Complainant in this matter, claimed that the Respondent, Navarro Research and Engineering, Inc., terminated him in retaliation for his protected safety activities, i.e., the full penumbra of the duties he completed as a Quality Assurance Program Manager, for your firm and for predecessor contractors. Those duties included preparation and submission to the United States Department of Energy, DOE, of Corrective Action Reports, regarding issues related to safety and efficacy of projects completed by other, prime contractors at the Yucca Mountain Project Site.

The evidence supports a *prima facie* complaint and ultimately a merit finding. The Respondent's purported reasons for terminating Mr. Mattimoe are deemed pretextual, unsupported by verifiable and thus credible evidence or testimony to show otherwise, obviating the need to apply a dual-motive analysis to this case.

Jurisdiction and timeliness of complaint:

The Complainant was discharged from his employment on August 24, 2001, and filed his discrimination complaint on February 20, 2002, thereby meeting the statutory requirement of Section 211 of the Energy Reorganization Act of 1974 (ERA), to file within 180 days.

Although he has suspended from his employment several weeks earlier in 2002, such an action does not trigger the 180 day clock: the ultimate termination is the controlling act in this matter, for purposes of timely filing See: **English v. Whitfield, 858 F.2d 957 (4th Cir., 1988).**

Findings:

The Complainant, who had been employed as a Quality Assurance Program Manager at the Yucca Mountain site for several years with predecessor contractors to DOE, was hired as its onsite Program/Quality Assurance Manager and given a significant ($30,000) signing bonus by the Respondent company in May, 2001. His principal duty was to manage a staff of quality control experts who would oversee engineering activities, related to design and safety of the Yucca Mountain project components managed by lead contractors such as Bechtel.

The Complainant had previously worked at this site for SAIC, a contractor that provided similar services to DOE/OCRWM.

In his earlier capacity and up to his hiring by Navarro in the spring of 2001, the Complainant managed quality assurance projects that resulted in the submission of numerous Corrective Action Reports (CARs) to OCRWM. These noted significant deficiencies, related to the overall integrity/safety of the Yucca Mountain Project at the time that the U.S. Congress was to consider whether or not to recommend that the site be designated to manage and store nuclear waste products described above.

In November, 2001, several months after the Complainant had been terminated, the U.S. Nuclear Regulatory Commission (NRC) recognized the effectiveness of the performance of the Quality Assurance organization that the Complainant, as evidenced in the November 2, 2001, Federal Register, Part II, (NRC comments for Part 63):

"The QA staff of DOE and their contractors have been successful in identifying the QA program deficiencies in the various participants' programs and in many cases, highlighting repetition of similar deficiencies. In the past, inadequate corrective action was taken, and the DOE organizations responsible for correcting the deficiencies were not held accountable."

It should be noted here that OSHA had previously conducted a whistle blower investigation at this site, which involved the Complainant, covering the time frame 1999-2000. In that case, Mactec/Mitchell/1083435, the Complainant and another management official determined that the Complainant in that case, Mr. Mitchell, who alleged that he had been terminated for protected activities, had in fact been terminated for exhibiting hostile behavior towards a supervisor, and therefore did not have a merit case. This matter was eventually settled prior to an ALJ determination.

[redacted]

Concurrently, Mr. Mattimoe was a target of an investigation instigated within OCRWM organization, related to his Lead Assessor qualifications and certification. That investigation was triggered in part, by the Complainant in the case cited above, Mr. Mitchell, who alleged improprieties on the part of the Complainant, Mr. Mattimoe, in obtaining his credentials and certifications for his position as a Quality Assurance Manager, and further alleged, though he did not file a complaint with this Office/OSHA, that Mr. Mattimoe retaliated against him and other witnesses in that case.

It is not within the scope of this investigation to examine nor focus on the issues regarding that particular set of allegations and counter-allegations. However, an analysis of the relevance of that matter is provided below.

The Respondent/Owner stated that she was not aware of any managerial shortcomings on the part of Mr. Mattimoe at the time he was hired.

Nevertheless, despite Complainant's demonstrated record of managerial competence at the Yucca Mountain site with predecessor firms in which he completed managerial, quality assurance activities similar to the ones for which the Respondent hired him in May, 2001, DOE/OCRWM, directed by Dr. Lake Barrett, who did not avail himself of the opportunity to answer questions during this investigation, contracted with the law firm of Morgan, Lewis and Bockius (Morgan, Lewis), also in May, 2001, to perform three tasks:

1. Survey the "Safety Conscious Work Environment" (SCWE) at the Project, with a particular focus on the Quality Assurance Program.

2. Assess the adequacy and effectiveness of the Quality Assurance (QA) organization in implementing its duties related to a SCWE.

3. Investigate specific concerns raised by OCRWM personnel related to an SCWE.

When the Complainant became aware of this audit/investigation, but unaware that he was a target of it and that his job was in jeopardy, he submitted a list of his own concerns to his DOE/OCRWM.

Subsequent to its audit/investigation, Morgan, Lewis issued its report, the conclusion of which ultimately lead to the Complainant's termination.

The Respondent/Owner, Dr. Navarro, on August 3, 2001, was informed by Dr. Lake Barrett/OCRWM Director, of the interim findings of the report, that there were management problems with Mr. Mattimoe and that he should be removed from his duties as the Project Manager for the Respondent/Company at the Yucca Mountain Site.

The Respondent interpreted this intimation from Dr. Barrett that Mr. Mattimoe should be terminated, but that she would defer that decision until she saw the final and complete report. Nevertheless, she called Mr. Mattimoe on August 6, 2001, and informed him that he was suspended, with pay, from all activities at the worksite. Mr. Mattimoe protested this decision, but had no recourse but to comply.

On August 21, 2001, the Respondent called the DOE/OCRWM general counsel, Yucca Mountain site, Ms. Susan Rives, and told her that Mr. Mattimoe would be terminated when the logistics of that action were completed.

In a memo provided to this Office by another witness, Dr. Rives wrote that Dr. Navarro claimed that she was given a contract without being told of existing problems; that the prior contract did nothing to address the situation she now had to address; that she will be sued for doing the right thing and will incur legal expenses, likely for year. Dr. Navarro testified that Ms. Rives did not comment on this matter.

When questioned about this telephone call and memo to Dr. Barrett, Ms. Rives recalled the telephone conversation but not the particulars of a memorandum she may have written to him. She recounted that she was not present for all conversations between Dr. Barrett and Dr. Navarro; that she did have discussions with Dr. Barrett about Mr. Mattimoe and they discussed the range of disciplinary actions that could be taken by the Respondent and DOE, in light of the Morgan, Lewis report.

She stated that all DOE contracts of this type allow for DOE direct contractors to remove key personnel from designated positions if their activities interfere with the completion of contractual terms. She does not believe that the Respondent was pressured into terminating Mr. Mattimoe. She was not aware of the coincidental timing of the contract with Navarro Research (May 14, 2001) and DOE's contract with Morgan, Lewis (May 17, 2001). She believed this may have been due to the length of time necessary to enter into both contracts.

When she received the final report on August 22, 2001, and upon her belief it laid out significant managerial shortcomings and abusive actions on Mr. Mattimoe's part, Dr. Navarro, Respondent/Owner, called him on August 24, 2001, and terminated his employment contract. When specifically questioned, Dr. Navarro acknowledged that her motivation to do so was due, at least in part, to her fear that she might not receive future extensions or contracts with DOE unless she took this action.

She did not complete an independent on-site investigation of her own, nor did she or DOE/OCRWM provide Mr. Mattimoe with the final copy of the Morgan, Lewis report, or an opportunity to rebut the charges or appeal his termination.

[redacted]

Analysis and Conclusion:

Complainant has satisfied the four basic elements to make a *prima facie* case, i.e.,

1) Protected Activity: In his predecessor firms, in the position of Quality Assurance Program Manager, the Complainant supervised various staffs of quality control experts at the Yucca Mountain Site, whose principal activity was to monitor critical operations, to include safety issues, and report items of concern to/through the appropriate DOE agency, OCRWM, and eventually the Nuclear Regulatory Commission. Case law and ERA statutory language direct that all activities related to Quality Assurance/Control are considered protected activity.

2) Employer Knowledge: Though Respondent/Owner claims to be unaware of specific safety issues raised by the Complainant, his activities were well known by DOE/OCRWM, and its Director, Dr. Barrett, whose agency set in motion the train of events, i.e., hired the audit/legal firm, Morgan Lewis, that resulted in his termination. This report, known to Respondent, chronicled not only the purported malfeasance of the Complainant but also described his safety activities.

3) Adverse Action: The controlling adverse action, in this matter, was the termination of Complainant's employment contract with Respondent/Company on August 24, 2001.

4) Nexus: The nexus between the above three elements is timing, i.e., the Complainant was first suspended one day after the Director of OCRWM made the Respondent/Owner, Ms. Navarro, aware of at least part of the Morgan Lewis Report, then terminated two days after she received full access to the report.

As a *prima facie* case has been made, the issues to be resolved in this matter are;

1) Has the company, by a preponderance of credible evidence, articulated non-discriminatory reasons for taking the adverse action; If no, merit case.

2) If credible evidence of non-discriminatory reasons have been submitted, has the Complainant provided, by a preponderance of evidence, testimony and submissions that those reasons are merely pretextual, to disguise an underlying discriminatory action, in violation of the controlling ERA statute; If yes,

3) Has the Respondent provided by clear and convincing testimony and documentation that it would have taken its actions even in the absence of the Complainant's, Mr. Mattimoe's, protected activities.

Though the Respondent has submitted a voluminous report, the Morgan, Lewis audit, it is determined that there is insufficient verifiable and credible evidence in it to conclude

that it is not more than a sophisticated recitation of anonymous charges designed to provide pretextual reasons to support an already-decided upon course of action to terminate Mr. Mattimoe.

The following supports this determination:

It is instructive to note that the first task for the Morgan, Lewis auditors was to survey the SCWE (safe conditions, working environment) at the Project, with a particular focus on the Quality Assurance Program. To this end, the authors of the report concluded the following:

1) At page 33 of the Morgan Lewis Report, Section VI, Overall Evaluation of SCWE,

"As discussed more fully above, in many respects, the survey responses indicate that the work-environment at the Project compares favorably with the expected environment at an NRC-licensed facility. For example, an overwhelming majority of employees indicate that they are encouraged by management to raise safety and compliance issues. Almost as many indicate that they are also encouraged to document their concerns. These responses are consistent with a healthy SCWE."

At page 34, Morgan, Lewis Report, Section V1:

It is important to note, however, that QA personnel believe that they can raise safety concerns with QA management, including the Director, without fear of retribution. In this regard, we found no evidence that there has been a deliberate attempt with the QA organization to not report all deficiencies throughout he QA program or to otherwise undermine the integrity of that program.

2) Despite a lengthy internal investigation by DOE/OCRWM, that preceded the Morgan Lewis audit, Mr. Mattimoe was never sanctioned for any actions that would have precluded his hiring by Respondent/Company/Navarro.

3) A careful reading of the Morgan, Lewis report and attachment related directly to the Complainant, Mr. Mattimoe, reveals that the allegations of Complainant's misconduct, which formed the basis for Dr. Barrett's "suggestion" to Dr. Navarro to terminate Mr. Mattimoe, are all made in an anonymous manner, fatally vitiating their probative value.

4) When several of these anonymous sources, and the lead attorney representing complainants and witnesses in the heretofore noted case, Mactec/Mitchell, became aware of OSHA's investigation into this matter, they wrote to complain that they were not interviewed in this matter, that is, given the opportunity to describe fully the anonymous charges contained in the Morgan, Lewis report.

[redacted]

Their credibility to provide probative, credible testimony is severely diminished by fact that they had not previously raised these issues, such as alleged retaliatory actions taken by Mr. Mattimoe against them in whistleblower complaints to OSHA in the past two years.

5. Dr. Lake Barrett, now retired from his position as Director of OCRWM/DOE failed to avail himself of the opportunity to respond to questions in this matter until after the Final Investigative Report and Secretary's Findings had been submitted to the Regional Administrator, at which point it was determined that his responses would not have sufficient probative value to affect the Findings in this matter.

6. Left uncontreverted, therefore, is the testimony of Dr. Navarro, who stated that she feared that she would possibly suffer severe economic consequences if she did not remove Mr. Mattimoe, at the urging of Dr. Lake, from his position as Quality Assurance Manager of the Respondent/Company.

7. Equally uncontraverted, and thus most persuasive, are the detailed submissions of not only the Complainant, and but also those of his principal witnesses.

The well-documented testimony and organized submissions of the Complainant and witnesses most fully support the Complainant's contention that he was impermissibly terminated as a consequence of his protected activities.

8. Finally, it is noted that the Department of Labor finds the actions of the OCRWM/Department of Energy extraordinarily egregious in the removal/termination it sanctioned, in light of the fact the Complainant, Mr. Mattimoe, was a principal witness, for the Department of Labor, in the prior matter described above, **Mactec/Mitchell.**

Respondent has not provided verifiable and thus credible testimony that a preponderance of evidence exists to justify discharging the Complainant. The preponderance of evidence submitted by the Complainant indicates that the Complainant was terminated for engaging in protected activities. Based upon the aforementioned investigative findings, the evidence sustains the finding of a violation of the employee protection provisions of the Energy Reorganization Act.

1. Immediately reinstate the Complainant to his former position as Program Manager and restore all benefits that would have accrued to him but for his impermissible discharge.

2. Pay Mr. Mattimoe for all lost wages from August 24, 2001, until Navarro Research and Engineering, Inc. makes Mr. Mattimoe a *bona fide* offer of reinstatement. The exact sum to be paid will be calculated by subtracting his actual, post-termination income from what his salary and bonuses would have been had he not been terminated. At this time, that figure would be [redacted], less actual earnings of [redacted]

3. Payment of Complainant's attorney's fees in the amount of [redacted] and future fees which may billed to the Complainant that are directly related to this matter.

4. Payment of medical and dental premiums, paid by the Complainant since August, 2001, of [redacted]

5. Payment for Complainant's purchase of computer, necessary to continue his profession as an independent contractor, in the amount of [redacted]

6. Upon re-employment and such time as Complainant provides receipts to document actual, economic loss as a direct consequence of his termination, payment for rent, travel and miscellaneous business expenses he has incurred since August, 2001.

7. Expunge from Complainant's employment records of any reference to the exercise of his rights under Section 211 of the Energy Reorganization Act of 1974.

8. Remove any letter of termination from his employment records.

9. If appropriate at some future date, agree to provide a neutral employment reference to include dates of employment, job title, and final salary to all potential employers.

10. Engage in no future retaliation of discrimination against Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the ERA.

[redacted]

If you wish to appeal the above findings, you have the right to a formal hearing on the record. To exercise this right, you must, within five (5) business days of receipt of this letter, file your request for a hearing by facsimile (fax), hand delivery, or overnight/next day delivery mail or telegram to:

Ms. Beverly Queen, Chief Docket Clerk
Office of Administrative Law Judges
U.S. Department of Labor
800 K Street, NW, Suite 400
Washington, DC 20001-8002

Fax #: (202)693-7365

Unless a request for appeal is received by the Administrative Law Judge within the five-day period, this notice of determination will become the Final Order of the Secretary of Labor. The Complainant, Mr. Mattimoe is similarly being advised of the determination in this case the his right to a hearing. A copy of this letter has also been sent to the Chief Administrative law Judge.

If you decide to request a hearing, it will be necessary for you to send copies of the request to Mr. Mattimoe and to this Office at the address noted in the above letterhead. If you have any questions, please do not hesitate to call me at (415)975-4305.

It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing and will either provide for appropriate relief or dismiss the complaint.

[redacted]

Sincerely,

FRANK STRASHEIM
Regional Administrator

cc: Complainant
Chief, Administrative Law Judge
Ms. Singeeta Singal, attorney for the Complainant
Messrs., Burgin and Robinson, attorneys for the Respondent
Manager, U.S. Department of Energy
Office of Employee Concerns, Washington, D.C.

[redacted]

EXHIBIT NO. 4

Department of Energy
Office of Civilian Radioactive Waste Management
Yucca Mountain Site Characterization Office
P.O. Box 98608
Las Vegas, NV 89193-8608

JAN 16 1996

Nancy Voltura, Quality Concerns Program Manager, YMSCO, NV

QUALITY CONCERNS PROGRAM NUMBER 95-025

A concern relating to non-sanitary conditions in the tunnel has been received and investigated. The working conditions in the tunnel meet acceptable regulatory and construction industry practices.

Background

An employee expressed a concern that the "lunchroom" had been removed from the TBM and that the employees were not provided with an equivalent eating area. The "lunchroom" was actually a "doghouse" that had been provided for the tunnel superintendents and A&E engineers to lay out plans and blueprints in a well lit area. The "doghouse" as constructed did not have sufficient clearance above the upper conveyor belt to allow for the cut rock to pass freely under the house. As a result, the decision was made to remove the doghouse and redesign that particular area of the TBM.

The specific concern expressed by the employee was that there was "20% sand or dirt that gets in the food inside the tunnel" has been investigated. Industrial Hygiene Professionals have been taking air samples since the TBM started operation. There have been no samples that showed 20% sand was in the air. These samples have shown no exposures to respirable dusts which exceed the OSHA standards.

After consulting with the OSHA Construction Standards Division, it has been accurately determined that there is no OSHA requirement for a separate eating facility on the typical construction site which includes the underground. We also polled the following underground construction projects in the United

Rec'd 1/16/96
NVoltura

States and found that none of these projects provided for a separate eating facility.

Chicago Metro Water Reclamation District, two tunnels operated in Des Plaines and Morton Grove, Illinois

Washington D.C. Metro Subway System

Eisenhower Tunnel, Colorado

New York City Water Tunnels

Glennwood Springs, Colorado Highway Tunnel

Olmstead Water Tunnel, Utah

Superconducting Supercollider, five separate tunnels and tunneling contractors

The Boston Harbor Tunnel, 5 miles, no lunch room, all workers carry their lunches.

A potable water container which provides warm and cold water for washing hands is provided for on the TBM.

Business agents for the crafts have visited the worksite and looked at the situation. They agree that the work activities are acceptable and K/PB follows customary construction site practices.

On September 14, 1995, a State of Nevada, Department of Health engineer and attorney visited the site on a routine visit and to specifically look at the TBM. The hand wash equipment on the TBM was inspected by the state engineer and attorney and found to meet acceptable state requirements. We had discussions with them about the eating area and they clearly stated that they had no jurisdictional authority concerning that specific issue.

Conclusion

After an extensive investigation and code research through OSHA and DOE, the pertinent regulatory agencies, it has been determined that the manner in which K/PB is providing sanitary conditions for their employees working underground is acceptable. There will be no corrective action required as a result of this concern.

If there are any questions please call Russell Baumeister at 794-7122.

Wendy R. Dixon
Assistant Manager for
(for) Environment, Safety, and Health

AMESH:RBB

EXHIBIT NO. 5

RW-

DOE F 1325.8
(08-93)

United States Government

Department of Ene

memorandum

DATE: January 12, 2004

REPLY TO ATTN OF: EH-53:Paul Wambach:3-7373

SUBJECT: REVIEW OF SILICA EXPOSURES DURING YUCCA MOUNTAIN TUNNELING OPERATIONS

TO: Theodore J. Garrish, Deputy Director for Strategy and Program Development (RW-2E)

In response to a request during a meeting with Ronald Milner, RW-2E; Gene Runkle, Office of Civilian Radioactive Waste Management (RW-1); and Rick Jones, Office of Health (EH-5), on October 9, 2003, the Office of Occupational Health (EH-53) has reviewed the documentation you provided to us to determine the degree of occupational health risks associated with tunneling operations sponsored by the Department of Energy (DOE) Yucca Mountain Project Office from the period 1993 through 1998. The documentation identifies and discusses potential health risks due to three air contaminants present in the operations: (1) silica, which has the potential to produce a chronic, progressive lung disease called silicosis and, in some instances, lung cancer; (2) erionite, a zeolite-family substance, which has been associated with mesothelioma; and (3) diesel exhaust, which may also be associated with lung cancer.

The documentation contains several reports that characterize the exposure to silica as being out of compliance with, then current, DOE health standards. This triggered followup actions to improve working conditions through the use of ventilation, dust suppression techniques, and the use of personal respiratory protection equipment. The correspondence contains reports of varying degrees of success in the implementation of these health protection measures. Corrective actions continued to evolve and conditions improved, but full performance objectives were never fully realized over the period in question.

In order to get a better perspective of the situation, the available exposure data were reanalyzed. With your office's assistance, over 800 respirable silica exposure-monitoring results were extracted from industrial hygiene reports and entered into Microsoft Excel spreadsheets to facilitate analysis. Our analysis supports the RW position that allowable concentrations for respirable silica exposure were exceeded for some operations and for certain job categories during the 1993–1997 time period. See the enclosed "Review of Yucca Mountain Tunneling Health Protection Correspondence and Reports" for more related information. The effectiveness of the personal respiratory protection equipment used at the time is uncertain since documentation indicates that deficiencies existed on occasions in the selection, fitting, wearing, and/or maintenance of that equipment.

There was limited information on the evaluation of risks due to exposure to erionite and other fibrous zeolite minerals. One report contained twelve personal exposure-monitoring results apparently associated with core drilling operations in August and September 1997. Only one of these revealed the presence of erionite; and two detected

ratio is labeled "silica." Estimates are provided for personal monitoring results, which we assumed to be lognormal data. Support for this assumption comes from comparison showing a high degree of correlation between the log transformed exposure data and the standard normal distribution. Correlation coefficients (R^2) were above 0.95. Statistics are calculated from maximum likelihood estimates of the geometric mean and standard deviation. A method for censored data was used since 3 percent to 71 percent of monitoring results were nondetected.[6]

	Jun 93 - Dec 95 Silica	Jan - Jun 1996 Silica	Dec 96 - Mar 97 Silica	Diesel Particulate	Units
Number of Samples	48	125	18	39	
Minimum	<0.15	<0.15	<0.15	<0.05	8-Hr TWA/TLV
Median	<0.15	0.99	0.65	0.43	8-Hr TWA/TLV
Percent Non-Detects	71%	23%	33%	3%	
Maximum	7.1	91.0	5.9	4.8	8-Hr TWA/TLV
Percent greater than 1997 TLV	7%	45%	28%	19%	
Percent greater than 2003 TLV	11%	51%	32%	NA	
95/95 GUTL	3.5	27.3	25.0	3.6	8-Hr TWA/TLV

Table 1

Our review indicates that 7 percent to 45 percent of exposure levels were out of compliance with exposure limits for crystalline silica and diesel particulates. This is consistent with industrial hygiene reports of the time. Rates of noncompliance with current exposure limits are only slightly higher. The half face-piece respirators used for much of the tunneling operation have an assigned protection factor of 10. The 95/95 GUTL levels above 10 indicate that it is likely that these devices may not have provided the level of protection desired during a substantial portion of the tunneling activities.

Fibrous Zeolites

The documentation contained 40 monitoring results for the fibrous zeolites, erionite, and mordenite. These samples were collected during July and August 1997 during core drilling operations. There were 12 personal samples of which 2 detected 0.0145 f/cc of mordenite and 1 sample detected 0.0066 f/cc of erionite. There were 28 area samples of which 1 sample detected 0.0044 f/cc of erionite. The AIHA states that 10 or more consecutive samples less than one-tenth the exposure limit is convincing evidence of compliance (footnote 5.) Exposures to the fibrous zeolites during this operation were in compliance with the OSHA PEL for asbestos. However, the monitoring shows that the potential for exposure to these minerals existed; there is uncertainty as to a safe level of exposure.

[6] Finkelstein MM, Verma DK. "Exposure Estimation In The Presence Of Nondetectable Values: Another Look." AIHAJ. 2001 Mar-Apr;62(2):195-8.