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 16, 2005**

STATE OF NEVADA'S SECOND 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. Several of those issues were briefed in Nevada's first Memorandum Regarding Issues Arising From the Board's May 4, 2005 Hearing, filed May 12. This second memorandum addresses three additional issues required by the Board to be briefed.

1. Redacted Documents at Initial Certification

I. Redaction of Information from Documents

As recognized by the Board in its January 25, 2005 "First Case Management Order," the scope of privileges available in the LSN context is addressed in 10 C.F.R. Section 2.1006(a):

> [T]he traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in Sec. 2.390 may be asserted by potential parties, interested States, local governmental bodies, Federally-recognized Indian Tribes, and parties.

The Board accurately observed that the exemptions from disclosure in 10 C.F.R. §2.390 are also those specified in the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The regulation

prescribes the general rules of public disclosure and adopts the nine FOIA exemptions. Finally, the Board required in its Order that "procedures associated with privilege claims and disputes in this proceeding shall be based upon the regulatory requirements and procedures of Subpart J," thus embracing the exclusions allowed by FOIA (articulated in 10 C.F.R. § 2.390).

Nevada shows below that (1) NRC's criteria in 10 C.F.R. Section 2.390; (2) the provisions of FOIA; and (3) NRC regulations setting out the ground rules for documentation to be incorporated in fully searchable electronic form on the LSN, each require the production of partially privileged documents in redacted form.

A. NRC Rules of General Applicability

NRC's Rules of General Applicability for hearings and prehearing discovery are set forth in 10 C.F.R. §§ 2.300, *et seq*. Section 2.390 deals with the recognized exemptions from discovery requirements. Section 2.390(a) identifies the nine categories of information exempt from disclosure, adapted from the exemptions in the FOIA. In section 2.390(b), NRC articulates its rules with respect to a party seeking to withhold information on the basis of the claimed exemptions. NRC states: "(b) The procedures in this section must be followed by anyone submitting a document to the NRC who seeks to have the document, *or a portion of it*, withheld from public disclosure. . ." (emphasis added throughout, unless otherwise noted). Detailing the methodology to be employed by the producer of a document wishing to withhold information, NRC states, in section 2.390(b)(1)(i)(B): " Each document, *or page*, as appropriate, containing *information* sought to be withheld from public disclosure must indicate, adjacent to the *information*, or at the top if the entire page is affected, the basis . . . for proposing that the *information* be withheld from public disclosure under paragraph (a) [the list of exemptions] of this section." Articulating further, section 2.390(b)(1)(ii)(E) requires that the request for

withholding "[i]ndicates the *location(s) in the document* of all *information* sought to be withheld." Thus, NRC's rules mandate that only those portions of a document disclosing protected information, and not an entire document or even necessarily a whole page, is what is eligible for withholding (unless, of course, the document is privileged *in toto*, which is an entirely different circumstance where consideration of partial redaction would be inapplicable).

B. Freedom of Information Act

FOIA provides that "each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. § 552(a)(3)(A). Under 5 U.S.C. § 552(b), FOIA articulates nine exemptions, the same ones which have been adopted in 10 C.F.R. § 2.390(a) and by the Board in this proceeding. After enumerating the exemptions, that statute states: "Any reasonably segregable *portion of a record shall be provided* to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of *information* deleted shall be indicated on the released portion of the record ...." As in the case of 10 C.F.R. § 2.390(a), the provisions of FOIA and its interpretation by the courts make clear that its provisions relate to what *information* must be disclosed and what *information* may be withheld, and neither NRC's Rules nor FOIA speak in terms of entire documents which must be produced or may be withheld.

Krikorian v. Department of State, 984 F.2d 461 (D.C. Cir. 1983) is instructive. The court there cites the seminal case *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977) for the proposition that: "It has long been a rule in this Circuit that *non-exempt portions of a document must be disclosed* unless they are inextricably intertwined with exempt portions." 984 F.2d at 466. The court in *Krikorian* concluded: "We have made

clear that '[t]he "segregability" requirement applies to all documents and all exemptions in the FOIA.'" *Id.*, citing *Center for Auto Safety v. EPA*, 731 F.2d 16, 21 (D.C. Cir. 1984).

The court in *Krikorian,* at 467, cited a prior case (*Schiller v. NLRB*, 964 F.2d 1205 (D.C. Cir. 1992)) in which it had criticized the National Labor Relations Board for its proffer of an index and affidavits discussing memoranda withheld *in toto*, without correlating the claimed exemptions to *particular passages* in those memoranda. Its criticism in *Schiller* had been that the index and affidavits "[we]re written in terms of *documents, not information*, but '[t]he focus in the FOIA is *information, not documents*, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.'" *Schiller,* at 1205 (quoting *Mead, supra*, at 260).

C. 10 C.F.R. 2 Subpart J

Subpart J prescribes procedures applicable in proceedings for the issuance of licenses for the receipt of high-level radioactive waste in a geologic repository (*i.e.*, the current proceeding). The definition of "Documentary Material" in Subpart J is a lengthy one, encompassing in part *"[a]ny information* upon which a party ... intends to rely and/or to cite in support of its position ... *any information* that is known to, and in the possession of ... the party . . . but does not support ... that party's position ...." As in the cases of FOIA and NRC's Rules of General Applicability, the requirement for disclosure (and accordingly the eligibility for withholding) apply to information and not to documents. To appreciate this distinction, Nevada suggests reading other key provisions of Subpart J which refer to "Documentary Material" by substituting phrase "any information on which a party intends to rely."

(1) Section 2.1003 would require that "DOE shall make available . . . all [information upon which it intends to rely]";

(2) Section 2.1009(b) would require that "The responsible official (for each party) . . . shall certify to the Pre-License Application Presiding Officer that . . . the [information upon which the party intends to rely][. . . has been identified and made electronically available"; and

(3) With respect to privileged or exempt documents, Section 2.1003(a)(4) would require each party to provide on the LSN "An electronic bibliographic header for [all information upon which a party intends to rely] . . . for which a claim of privilege is asserted."

This substitution of wording does not change, but does explain, the meaning of the provisions.

Consequently, the handling of "mixed" (partially privileged, partially not) documents on the LSN is straightforward: First, a party must include a bibliographic header in its LSN submission to identify a document which contains some protected information; because of its protected content, that document would be present on the LSN in "header-only" form. Second, that party is required to produce on the LSN (as "information on which it intends to rely") the portion of information in the documents which is *not* protected information. It can simply treat that "redacted" document as a separate document. That separate document would be entered into the LSN with its own bibliographic header. The document would also be placed on LSN in electronic fully searchable form, since it no longer contains privileged information.

The foregoing procedure would serve to ensure, as required by Section 2.1003, that all non-privileged documentary information on which a party intends to rely (or on which others may rely) would be on the LSN and publicly accessible in electronic form for the full six months that the regulations afford for its review. At the same time, it would facilitate the identification of information which a party has properly withheld on the basis of privilege.

This procedure is neither difficult nor burdensome. Indeed, it was specifically recognized in the current LSN guidelines distributed by LSN Administrator Mr. Graser, which provide in Guideline 14 for two headers and two versions of a "mixed" document on the LSN. The first, in

header-only form, would identify the entire "mixed" document, but provide no access to it; the second would identify the redacted version, providing it in full-text searchable form.

> Standard practice for identifying sensitive documents in the LSN is to create a bibliographic record and withhold the text and/or image (also known as a "header-only") of the sensitive document. Parties may choose to make a redacted, or sanitized, version of a sensitive document available to other parties via the LSN; however, the process of redaction creates a new item of documentary material that is distinct from the original, sensitive document. (LSN Guideline 14, § 14.5).

II. The Timing of Placing Redacted Information on the LSN

Nevada submits that unredacted information in a "mixed" document must be placed on the LSN at the time of initial certification. As Nevada noted in its April 25, 2005 filing, this obligation arises from the Commission's stated objective to use FOIA as a model for the LSN. It is also made clear by the combined effect of the definition of Documentary Material (§ 2.1001), the requirement for the LSN to include *all* non-privileged information upon which a party intends to rely (§ 2.1003), and the requirement that each party certify in its initial LSN certification that "all" such information has been identified and made electronically available (§ 2.1009(b)). Indeed, there is no other way to read these requirements in concert.

DOE has proposed a number of alternative scenarios under which it would make substantial portions of its Documentary Material available at some later time following initial certification. For example, at the Board's May 4 hearing, DOE argued for the delivery of redacted documents in hard copy form seven business days after its LSN certification, and inclusion of those documents on the LSN in electronically searchable form within "a reasonable time" (though totally unspecified) thereafter. Such a proposition is both practically unnecessary, since DOE controls the timing of its initial certification, and antithetical to the letter and the spirit of the LSN regulations, and the laws and regulations on which they are premised.

LSN is "[t]he combined system that makes Documentary Material *available electronically* to parties, potential parties, and interested government participants...." 10 C.F.R. § 2.1001. This prerequisite for certification was first set out by the NRC in 1989, discussing what was then the LSS: "Access to these documents will be provided through *electronic full-text search capability* .... [B]ecause the relevant information would be readily available through access to the LSS, the initial time-consuming discovery process, including the physical production and on-site review of documents by parties to the HLW licensing proceeding, will be substantially reduced." 54 Fed. Reg. 14925, 14926 (1989). The Commission disavowed the suggestion that anything less than electronic full-text search accessibility would be acceptable: "The Commission does not believe that the mere availability of documents in hard copy or microfiche without electronic full-text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWPA time frame." 54 Fed. Reg. at 14929.

In its August 31, 2004 Order, the Board described the LSN as "A computer-based electronic system designed to streamline the document discovery process and to coordinate a massive amount of Documentary Material pertaining to Yucca Mountain." Order at 4. The Board warned that "DOE's failure to make all its Documentary Material available [on the day of certification] is not excused by its intent to supplement ... later ... to accept such a position would destroy the six-month document discovery period that is critical to the entire discovery proceeding." Order at 35. Emphasizing the importance of the parties' having a substantial period of time to review DOE's Documentary Material (which has tripled in volume since the Board's ruling), the Board concluded, "A full and fair six-month document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a

necessary precondition to the development of well-articulated contentions and the Commission's ability to meet the statutory mandate to issue a final decision within three years." Order at 17-18.

Under DOE's proposed Case Management Order, a substantial quantity of DOE's Documentary Material would be *unavailable* at the time of initial certification. DOE would mitigate this infraction, it says, by producing hard copies of requested documents within seven business days, and would make them available electronically at some later, undefined date. But this proposal is as impractical as it is illegal under LSN regulations. The practical impact of having DOE dump an enormous quantity of hard-copy documents on another party, after the mandatory six-month clock has already begun to run, is far from trivial. DOE would deliver thousands of documents some time after certification to the office of an attorney for Nevada, who would then have to carefully peruse them for the purpose of distributing their contents to some 30 consulting experts and attorneys from around the world who are participating in the Nevada effort. The attorney could then either make thousands of copies of pages and distribute them across the globe, or, more likely, decide that the only practical means of getting the information into the hands of the individuals who needed them would be to scan them into an electronically searchable full-text form made available to the litigation team. Thus, DOE would have succeeded in relieving itself of a substantial part of its obligations and costs under LSN regulations, transferring those obligations and costs to Nevada and the other participants, and by so doing, substantially defeat the mandatory six-month period during which full access to those documents was supposed to have been made electronically available to all parties and the public.

DOE also proposes to deliver its redacted documents only upon a request from one of the participants. Moreover, the suggested delivery of hard copy would be made only to the participant in the proceeding who requested it. No such "request" or "delivery-only-on-demand"

concepts are found in, or consistent with, Subpart J. As the Board made clear at the May 4 hearing, this is a nationwide proceeding, open to every member of the public.

At the May 4 hearing, DOE made an even more far-fetched suggestion: that it deliver purportedly protected documents to a requester (such as Nevada) and that the recipient (of what could be thousands of documents) then review them and make a recommendation back to DOE with respect to each of those documents, as to what the recipient believes should fairly be redacted. Tr. 158. Then, the documents would be returned to DOE to accomplish that redaction (provided it agreed) and for placement on the LSN in electronically searchable form. This proposal is a recipe for disaster, in that it introduces the probability of hundreds or thousands of disagreements with respect to the appropriate material to be redacted from a collection of documents; and it effectively puts the burden on the recipient of the document to identify privileged material – a burden which must be borne by the party wishing to withhold any information on the basis of a privilege claim. This entire process would occur after DOE's initial certification and would accordingly eat away once again at the six-month pre-License Application discovery period. It suggests a scenario nowhere authorized by 10 C.F.R. 2 Subpart J. But perhaps most inappropriately, it ignores the rights of any number of other potential participants by arrogantly assuming that one purveyor of documents and one recipient ought to decide between the two of them what information should be protected from disclosure.

Ironically, DOE's proposal appears as impractical for DOE as it is for other participants. Under DOE's proposal, before the documents in question could be delivered by DOE to the requester for its "recommendations" in the first place, DOE would necessarily have reviewed each one and would have already decided it was a candidate for redaction. Instead of simply implementing the redactions at the time of this initial review and placing the appropriate

information on the LSN, DOE proposes a multi-step process in which, long after completing its own initial review of a document for privilege issues, DOE would get the document back, accompanied by a redaction recommendation from the recipient, and then the document would be placed back in the DOE pipeline for a second review process.

DOE's argument that it should be permitted to deliver redacted documents in hard copy many days after its certification, and to take many more weeks or months to make those documents electronically accessible, is predicated entirely on the unremarkable fact that the word "redaction" is not specifically found in 10 C.F.R. Part 2. But it was entirely logical to omit the term "redaction" since the focus of the LSN regulations is on provision of *information*, not documents. As shown above, moreover, Nevada's counter-argument is based on clear requirements that *are* found in the LSN, and in NRC's Rules of General Applicability and the FOIA as well, neither of which use the word "redaction" but concur in requiring it. Only by requiring "all" non-protected documentary material on the LSN at the time of initial certification can the letter and the spirit of Subpart J be met.

2. Protective Orders and Nondisclosure Affidavits

Nevada's attorneys have discussed with NRC Staff and DOE a sample protective order for this proceeding that was developed by NRC Staff. Several modest changes were proposed, which were implemented by Staff. Nevada is in accord with the latest version of that protective order, which is being provided to the Board by Staff.

3. Requirements for Potential Parties' Participation

Since the LSN is a web-based system, public access to documentary material placed on the LSN is provided without restriction. However, Subpart J provides for certain pre-application

discovery rights beyond access to documentary materials on the LSN. "Parties, potential parties, and interested governmental participants" may, pursuant to 10 C.F.R. § 2.1018 (b)(1), obtain discovery by production of header-only documentary material, entry on land for inspection and other purposes, and admissions, and make informal requests for information, before the license application is docketed and formal rights to intervene are established. The question posed is whether the PAPO may impose any pre-conditions to the exercise of these discovery rights by "potential parties." Nevada submits that no conditions may be imposed except for an agreement to comply with Subpart J and to accede to the authority of the PAPO.

"Potential party" is defined in 10 C.F.R. § 2.1001 as "any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d), is given access to the Licensing Support Network ["LSN"] and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to § 2.1010." Obviously, everyone is given access to the LSN, and so this part of the definition contains no effective restriction on who may be a potential party. The second part of the definition imposes the simple requirement that the person or entity consent to comply with Subpart J. This would mean that potential parties with documentary material may be dismissed from the pre-application phase for failing to make documentary material available in accordance with 10 C.F.R. § 2.1003 or for failing to certify on a timely basis in accordance with 10 C.F.R. § 2.1009. It would also mean that potential parties would be required to comply with protective orders and other orders of the PAPO. Such protective orders could require return of discovered materials at a later date if intervention is not requested or denied. Protective orders could also address especially burdensome or oppressive discovery requests. However, many potential parties may have no documentary material and numerous

potential parties may be willing to give the required consent. Nevertheless, there is nothing in the definition to suggest that a "potential party" must pass some test of standing or interest. Indeed, to impose such a requirement would appear to lead inevitably to a premature formal adjudication of a prospective participant's standing, since a person denied participation on grounds of some "standing test" would be forced to litigate the issue, and such litigation appears not to be contemplated by the regulations at this pre-application stage of the proceedings.

The history of the regulation confirms that no standing or interest test is required to be a "potential party" in the pre-application phase. The definition of "potential party" in the original subpart J was the same as the current one except that the "potential party" had to be "granted access to the Licensing Support System." 54 Fed. Reg. 14925 at 14945 (April 14, 1989). This required a potential party to petition the PAPO for access under [then] 10 C.F.R. § 2.1008 and, under that section, granting access required some showing of the petitioner's interest. *See* [former] 10 C.F.R. § 2.1008 (b), 54 Fed Reg. 14925 at 14948. In 1998, when Subpart J was revised to replace the Licensing Support System with the web-based LSN, 10 C.F.R. § 2.1008 was deleted. In doing so the Commission explained simply that "[t]he requirements for petitioning for access during the pre-application phase are not consistent with allowing public access to the electronic information." 63 Fed. Reg. 71729 at 71734, December 30, 1998. Thus the concept that some showing of standing could be required before one could qualify as a "potential party" was apparently considered and expressly rejected by the Commission.

In any event, given the potential nationwide impact of the Yucca Mountain Project, it would seem that thousands of persons or entities would have standing to intervene. Thus, requiring some showing of interest before one could qualify as a potential party may have little practical effect on the number of potential parties. And while some potential parties may try to

abuse the pre-application discovery process under subpart J, there is no *a priori* reason why those with standing may be less inclined to abuse the system than those without standing. Nevada suggests that a requirement that a potential party show standing has not only been expressly been rejected by the Commission, but that such a requirement would likely have limited effect on the number of parties or the potential for abuse.

Instead of requiring some showing of interest, Nevada suggests that a potential party simply be required to file with the PAPO a written consent or agreement to comply with Subpart J and submit to the authority of the PAPO before engaging in discovery under 10 C.F.R. §§ 2.1018 (a)(1)(ii) (entry on land), 2.1018 (a)(1)(iii) (access to header-only documentary material), or 2.1018 (a)(1)(v) (admissions). This can be seen as a logical interpretation of the definition of "potential party" and would serve as a modest notice to any potential party intending to engage in discovery beyond access to materials on the LSN that discovery is a serious business that entrails right as well as obligations.

Respectfully submitted,

Joseph R. Egan
Charles J. Fitzpatrick
Martin G. Malsch
Robert J. Cynkar
EGAN, FITZPATRICK, MALSCH
& CYNKAR, PLLC
8300 Boone Boulevard, Suite 340
Vienna, Virginia 22182
(703) 891-4050 Telephone
(703) 891-4055 Facsimile

Attorneys for the State of Nevada

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Pre-Application Matters)	)	**May 16, 2005**

CERTIFICATE OF SERVICE

I certify that copies of the foregoing STATE OF NEVADA'S SECOND MEMORANDUM REGARDING ISSUES ARISING FROM THE BOARD'S MAY 4, 2005 HEARING has been served upon the following persons by electronic mail:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop – T–3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
E-mail: PAPO@nrc.gov
Alex S. Karlin
Administrative Judge
E-mail: PAPO@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: PAPO@nrc.gov & rsnthl@comcast.net
G. Paul Bollwerk, III
Administrative Judge
E-mail: PAPO@nrc.gov
Anthony C. Eitreim, Esq.
Chief Counsel
E-mail: PAPO@nrc.gov
James M. Cutchin
E-mail: PAPO@nrc.gov
Bethany L. Engel
E-mail: PAPO@nrc.gov
Amy C. Roma, Esq.
E-mail: PAPO@nrc.gov
Jonathan Rund
E-mail: PAPO@nrc.gov
Susan Stevenson-Popp
E-mail: PAPO@nrc.gov
Christopher M. Wachter
E-mail: PAPO@nrc.gov

Daniel J. Graser
LSN Administrator
E-mail: djg2@nrc.gov
ASLBP HLW Adjudication
E-mail: ASLBP_HLW_Adjudication@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop -O-16 C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov
Andrew L. Bates
E-mail: alb@nrc.gov
Adria T. Byrdsong
E-mail: atb1@nrc.gov
Rebecca L. Glitter
E-mail: rll@nrc.gov
Emile L. Julian, Esq.
E-mail: els@nrc.gov
Evangeline S. Ngbea
E-mail: esn@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Congressional Affairs
Mail Stop -O-17A3
Washington, DC 20555-0001
Thomas R. Combs
E-mail: trc@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop -O-15-D21
Washington, DC 20555-0001
Karen D. Cyr, Esq.
General Counsel
E-mail: kdc@nrc.gov
Shelly D. Cole, Esq.
E-mail: sdc1@nrc.gov
David A. Cummings, Esq.
E-mail: dac3@nrc.gov
Gwendolyn D. Hawkins
E-mail: gxh2@nrc.gov
Janice E. Moore, Esq.
E-mail: jem@nrc.gov
Trip Rothschild, Esq.
E-mail: tbr@nrc.gov
Tyson R. Smith, Esq.
E-mail: trs1@nrc.gov
Harry E. Wedewer, Esq.
E-mail: hew@nrc.gov
Mitzi A. Young, Esq.
E-mail: may@nrc.gov
Marian L .Zobler, Esq.
E-mail: mlz@nrc.gov
OGCMailCenter
E-mail: OGCMailCenter@nrc.gov

Hunton & Williams LLP
Counsel for the U.S. Department of Energy
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
W. Jeffrey Edwards, Esq.
E-mail: jedwards@hunton.com
Kelly L. Faglioni, Esq.
E-mail: kfaglioni@hunton.com
Melissa Grier
E-mail: mgrier@hunton.com
Donald P. Irwin, Esq.
E-mail: dirwin@hunton.com
Stephanie Meharg
E-mail: smeharg@hunton.com
Edward P. Noonan, Esq.
E-mail: enoonan@hunton.com
Audrey B. Rusteau
E-mail: arusteau@hunton.com
Michael R. Shebelskie, Esq.
E-mail: mshebeleski@hunton.com
Christopher A. Updike
E-mail: cupdike@hunton.com
Belinda A. Wright
E-mail: bwright@hunton.com

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
Martha S. Crosland
E-mail: Martha.Crosland@hq.doe.gov

U.S. Department of Energy
Office of Civilian Radioactive Waste Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
W. John Arthur, III, Deputy Director
E-mail: john_arthur@notes.ymp.gov

U.S. Department of Energy
Office of Civilian Radioactive Waste Management
Office of Information Management
Mail Stop 523, P.O. Box 30307
North Las Vegas, NV 89036-0307
Harry Leake
E-mail: harry_leake@ymp.gov
Mark Van Der Puy
E-mail: mark_vanderpuy@ymp.gov

U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
George W. Hellstrom
E-mail: george.hellstrom@ymp.gov

Yucca Mountain Project Licensing Group
DOE/BSC
Jeffrey Kriner
E-mail: jeffrey_kriner@ymp.gov

Lander County Nuclear Waste Oversight Program
3185 South Humboldt St.
Battle Mountain, NV 89820
Loreen Pitchford
E-mail: gb4@charter.net
Deborah Teske
E-mail: dteske@Landercounty.com

Lincoln County Nuclear Oversight Program
100 Depot Avenue, Suite 15, P.O. Box 1068
Caliente, NV 89008-1068
Lea Rasura-Alfano, Coordinator
E-mail: jcciac@co.lincoln.nv.us

Nuclear Waste Technical Review Board
Victoria Reich
E-mail: reich@nwtrb.gov

Nevada Nuclear Waste Task Force
Alamo Plaza, 4550 W. Oakley Blvd.
Suite 111
Las Vegas, NV 89102
Judy Treichel, Executive Director
E-mail: judynwtf@aol.com

Churchill County
155 North Taylor Street, Suite 182
Fallon, NV 89406
Alan Kall
E-mail: comptroller@churchillcounty.org

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

Eureka County Yucca Mtn Info Office
P.O. Box 990
Eureka, NV 89316
Laurel Marshall, Program Coordinator
E-mail: ecmarshall@eurekanv.org

Intertech Services Corporation
(for Lincoln County)
P.O. Box 2008
Carson City, NV 89702-2008
Dr. Mike Baughman
E-mail: bigboff@aol.com

Mineral County Board of County Commissioners
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Administrator
Office of Nuclear Projects
E-mail: mineral@oem.hawtharne.nv.us

Nye County Department of Natural Resources & Federal Facilities
1210 E. Basin Road, Suite 6
Pahrump, NV 89048
Les Bradshaw
E-mail: clittle@co.nye.nv.us

Nye County Regulatory/Licensing Adv.
18150 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy
E-mail: mrmurphy@cmc.net

White Pine County Nuclear Waste Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
E-mail: wpnucwst1@mwpower.net

Inyo County (CA) Yucca Mountain Nuclear Waste Repository Assessment Office
P.O. Drawer L
Independence, CA 93526
Andrew Remus, Project Coordinator
E-mail: aremus@gnet.com

Abby Johnson
617 Terrace Street
Carson City, NV 89702
E-mail: abbyj@gbis.com

National Congress of American Indians
1301 Connecticut Avenue, NW – 2nd floor
Washington, DC 20036
Robert I. Holden, Director
Nuclear Waste Program
E-mail: robert_holden@ncai.org

Public Citizen
215 Pennsylvania Avenue, SE
Washington, DC 20003
Michele Boyd, Legislative Representative
Critical Mass Energy and Environment
E-mail: mboyd@citizen.org

Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
Brian Wolfman, Esq.
E-mail: bwolfman@citizen.org

Ross, Dixon & Bell
2001 K Street N.W.
Washington, D.C. 20006-1040
William H. Briggs
E-mail: wbriggs@rdblaw.com

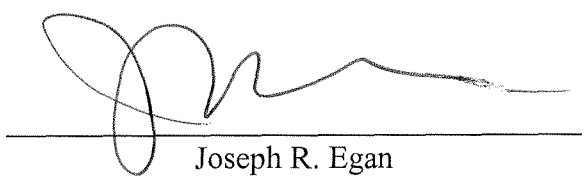
Environment Protection Agency
Ray Clark
E-mail: clark.ray@epa.gov

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel
E-mail: mab@nei.org
Robert W. Bishop, Esq.
E-mail: rwb@nei.org
Ellen C. Ginsberg, Esq.
E-mail: ecg@nei.org
Rod McCullum
E-mail: rxm@nei.org
Steven P. Kraft
E-mail: spk@nei.org

White Pine County
City of Caliente
Lincoln County
Jason Pitts
E-mail: idt@idtservices.com

U.S. Nuclear Regulatory Commission
Office of Nuclear Material Safety and Safeguards
Mail Stop -T-7 F3
Washington, D.C. 20555-0001
Jeffrey A. Ciocco
E-mail: jac3@nrc.gov

Nevada Agency for Nuclear Projects
Office of the Governor
1761 E. College Parkway, Suite 118
Carson City, NV 89706
E-mail: bloux@nuc.state.nv.us



Joseph R. Egan