

May 16, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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

DEPARTMENT OF ENERGY'S SECOND MEMORANDUM
IN RESPONSE TO MAY 11, 2005 MEMORANDUM AND ORDER
REGARDING SECOND CASE MANAGEMENT CONFERENCE

In its May 11, 2005 Order, the Pre-License Application Presiding Officer (PAPO) Board directed the parties to file on or before May 16, 2005 a memorandum addressing two issues: (i) whether the initial Licensing Support Network (LSN) certification must include a redacted version of any document that would require redaction under the Freedom of Information Act (FOIA); and (ii) the meaning of "potential party" as it applies in this proceeding and specifically to receiving documents under a protective order. The United States Department of Energy (DOE) submits this memorandum addressing those issues.

I. PRODUCTION OF REDACTED DOCUMENTS ON LSN

The parties already have briefed the issue of whether the Subpart J regulations require a participant to make available on the LSN in connection with its initial certification redacted copies of its privileged documents. The answer to that question is no. *See* Department of Energy's Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges, April 25, 2005, at pp. 8-13; NRC Staff Supplement Regarding Proposed Order Regarding Privilege Logs, April 25, 2005, at pp. 3-6.

As set forth in those briefs—which are incorporated herein—no regulation requires production of redacted copies of privileged documents on the LSN as a condition of certification, or at any other time. To the contrary, the regulations expressly and solely direct that a document subject to a privilege claim is to have a bibliographic header *only* on the LSN. 10 C.F.R. § 2.1003(a)(4). Neither § 2.1003(a)(4) nor any other provision of Subpart J contains any additional requirement for production of redacted versions of such documents.

This is true even for documents that a participant might otherwise produce in redacted form in response to a request under FOIA. As the Board observed on pages 3 and 4 of its January 25, 2005 Order, the privileges that the participants can claim in this proceeding include those specified in 10 C.F.R. § 2.390, which are those set forth in FOIA. *See* 10 C.F.R. § 2.1006(a) (providing that participants may assert “the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.390”).

Despite incorporation of the FOIA exemptions, the Commission did not exempt from the bibliographic-header-only requirement the documents withheld under a FOIA exemption, or otherwise call for production of these documents in redacted form on the LSN. That the Commission expressly allowed the participants to withhold documents subject to FOIA exemptions, but did not require production of redacted versions of these documents, speaks

volumes. Imposing now such a production obligation would add a requirement that the Commission declined to adopt.

Nor is it appropriate to impose such an extra-regulatory requirement for the purpose of informing the general public. As discussed more fully below in connection with the “potential party” issue, the Commission has consistently declared that the purpose of the LSN is to benefit the parties and other participants by allowing a head start on discovery. The LSN’s core purpose is not to inform the public generally. *See, e.g.*, 69 Fed. Reg. 32836 at 32837 (June 14, 2004) (“the LSN could facilitate the timely review of DOE’s application by providing for electronic access to relevant documents via the LSN before the application is submitted, rather than the traditional, and potentially time-consuming, discovery process associated with the physical production of documents after an application is submitted”); 54 Fed. Reg. 14925 at 14926 (April 14, 1989) (the LSS would eliminate the most “burdensome and time-consuming aspect” of document discovery and enable “comprehensive and early” review of relevant documents “resulting in a substantial saving of time”).

As such, the Commission did not impose the revolutionary requirement that the public be afforded access to participants’ most sensitive, privileged documents or otherwise be treated on the same keel as the parties without qualifying as participants. Rather, the Commission addressed the issue of public availability in the Subpart J regulations and mandated that “[p]ublic availability of paper and electronic copies of the records of NRC and DOE, as well as duplication fees, and fee waiver for those records, is governed by the regulations of the respective agencies.” 10 C.F.R. § 2.1007(b). The Commission thus directed that if members of the general public want a document that DOE or NRC has properly withheld from full-text production on the LSN, they can request the document under the agencies’ respective FOIA

regulations. Mandating production of redacted versions on the LSN would write § 2.1007(b) out of the regulations.

The Board also should be mindful that production of redacted versions of all documents subject to a FOIA exemption would be very expensive. As explained at the May 4, 2005 hearing, it would cost approximately \$500,000 just for the IT processing required to produce on the LSN redacted versions of DOE's privacy protected documents. May 4, 2005 Transcript at p. 154. That sum does not include the costs associated with making, reviewing and approving the necessary redactions, which would be on the same order of magnitude as the IT work. Nor does it include the costs to produce redacted versions of the business proprietary and archeological privilege documents, which also would be substantial.

It would be grossly unfair, and not consonant with the Commission's intent, to require DOE to expend substantial amounts of taxpayer money for that purpose. The Commission has noted that the LSN provides both early and "equitable" access to the participants' documents. *See* 66 Fed. Reg. 29453 at 29459 (May 31, 2001) (noting that purpose of LSN is "to provide early, *equitable* document discovery and contention formulation for the participants") (emphasis added).

There is nothing equitable in making DOE spend upwards of a million dollars, if not more, to produce on the LSN redacted versions of documents that no participant may use in the proceeding. The legitimate discovery needs of the parties and other participants can be met by providing full text versions of the privacy, archeological and business proprietary documents under an appropriate protective order. If a participant ends up wanting to use one of these documents in the proceeding, it can propose redactions for that particular document. That way, the redactions, and the expense, is limited to those documents that the litigants will actually use.

II. MEANING OF “POTENTIAL PARTY” AND ACCESS TO PRIVILEGED DOCUMENTS UNDER PROTECTIVE ORDERS

An argument has been advanced that the Commission’s regulations, specifically 10 C.F.R. § 2.1001, extend “potential party” status to anyone with access to an internet connection who is willing to submit to this Board’s jurisdiction and consent to a protective order covering the litigants’ privileged documents. This argument, which would extend one of the most substantial privileges of party/participant status—access to other litigants’ most confidential, privileged documents—to the general public with no showing of standing or need, would be unprecedented in adjudicatory litigation. Such an interpretation risks making the pre-license application phase unimaginably cumbersome and potentially chaotic. The Board should not adopt that interpretation and should provide reasonable limits on access to privileged documents.

A. Meaning of “potential party”

There is no evidence that the Commission intended the term “potential party” to be synonymous with the general public. In the first place, there is no regulation that defines the term “potential party” to mean “any person” or “any member of the public,” and so sweeping an interpretation would be at odds with both the Commission’s regulations and with logic, which show that a “potential party” is not the same thing as the world at large:

- The term “potential party” denotes someone who has the potential to qualify as a party. That is, someone who at the least has the potential to satisfy the standing requirements of 10 C.F.R. § 2.309 and be admitted as a party. Not every member of the public will fit that bill.
- If the term “potential party” were supposed to encompass anyone and everyone, there would be no need for the Commission’s regulations governing the pre-license application

phase to refer separately to parties, interested governmental participants, and potential parties. The term “potential party” would already encompass everyone, and those other terms would be surplusage.¹

- If the Commission intended “potential party” to encompass the general public, it would have been more simple and direct for the Commission to use the term “any person,” “any member of the public” or the like. That the Commission instead used the term “potential party” indicates that term has some meaningful limitation.
- Potential parties can conduct certain discovery in the pre-license application phase pursuant to 10 C.F.R. § 2.1018. If “potential party” meant everybody, then everybody in the United States, and even the world, could conduct that discovery. By the same token, every member of the public presumably also would be entitled to a password to access the DDMS database, which is the proposed situs of the privilege log, so they could participate in motions to compel during the pre-license application phase. There is no evidence that the Commission intended a discovery process that is so unimaginably unbounded.
- The regulations authorize the Board to order the production of privileged documents, as necessary and appropriate, under a protective order that “limit[s] the disclosure to potential participants, interested governmental participants and parties” 10 C.F.R. § 2.1010(b)(6). That provision would be meaningless if the general public were allowed to have access to privileged documents as a “potential party.” The documents would be

¹ Cf. *In the Matter of Houston Lighting & Power Co., et al. (South Texas Project, Unit Nos. 1 & 2)*, CLI-77-13, 5 N.R.C. 1303, 1977 NRC LEXIS 101 at *34 (June 15, 1977) (rejecting construction of a statute that rendered a statutory provision redundant).

available to anyone in the world to see under that interpretation, and the protective order would provide no limited disclosure or protection at all.²

- The Commission differentiates between potential parties and the public in its regulations. After specifying systems for access to the LSN, 10 C.F.R. § 2.1007 goes on to mandate that “[p]ublic availability” of DOE’s and NRC’s records “is governed by the regulations of the respective agencies.” 10 C.F.R. § 2.1007(b). That differentiation makes no sense if “potential participant” means the public.³

The contrary suggestion—that no limits exist on “potential party” status notwithstanding the foregoing textual considerations—is based on a faulty syllogism. That syllogism goes: (i) the definition of “potential party” in 10 C.F.R. § 2.1001 refers to any person who is “given access” to the LSN prior to issuance of the first pre-hearing conference order and who consents to comply with the Subpart J regulations; (ii) everybody has access to the LSN because the LSN as currently configured is freely accessible via the internet; therefore, (iii) every person qualifies as a “potential party” so long as they file some type of document acknowledging the Board’s authority over them.

That construction reads too much into the regulations. The regulation regarding access to the LSN, 10 C.F.R. § 2.1007, has no provision requiring public access via the internet. Nor does any other regulation. To be sure, § 2.1007(a)(2) directs that a system to provide electronic

² *In the Matter of U.S. Enrichment Corp. (Paducah, Kentucky Gaseous Diffusion Plant)*, DD-01-3, 54 N.R.C. 305, 2001 NRC LEXIS 261 at *37 (June 14, 2001) (rejecting a “plain meaning” interpretation of a regulation where a literal construction would have led to an absurd, unjust or unintended result, and holding that the language should instead be construed to avoid such results).

³ *In the Matter of Northeast Nuclear Energy Co., (Millstone Nuclear Power Station, Unit No. 3)*, CLI-01-10, 53 N.R.C. 353, 2001 NRC LEXIS 78 at *21 (May 10, 2001) (“In construing a regulation’s meaning, it is necessary to examine the agency’s entire regulatory scheme. Regulations dealing with the same subject should be construed together...”); *Cowherd v. Million*, 380 F.3d 909, 913 (6th Cir. 2004) (interpretations that make provisions “inconsistent, meaningless or superfluous” should be avoided).

access to the LSN shall be provided through the NRC website, but that provision does not mandate open public access to the documents through that means. In other words, that provision requires an internet link to the LSN, but it does not proscribe password protections and other measures to limit those who can access the LSN's databases via the NRC's website. So while the LSN Administrator has currently configured the LSN to allow public access via the NRC's website, it does not follow under the regulations that the general public *must* be given that unfettered access and that the scope of "potential party" *must* therefore encompass everybody in the world.

The rulemaking for the Subpart J regulations further confirms that the Commission did not intend to equate the scope of "potential party" with the general public. In their original formulation, the Subpart J regulations provided for access to documentary material via the Licensing Support System (LSS). The LSS was not an internet-based system but a stand-alone, centralized database system. The NRC was to administer that system, and persons would access the database through special equipment. *See* 54 Fed. Reg. 14925 at 14936 (April 14, 1989).

The public was to have access to the LSS via public access terminals to be located at DOE and NRC public document rooms. 10 C.F.R. § 2.1007(a) & (b) (1989), *amended by* 10 C.F.R. § 2.1007 (1998). Parties, interested governmental participants and potential parties were to have remote access via their own equipment. 10 C.F.R. § 2.1007(c) (1989), *amended by* 10 C.F.R. § 2.1007 (1998). For a person who was neither a statutory party nor an interested governmental participant to obtain remote access through such individual equipment during the pre-license application phase, that person had to petition the pre-license presiding officer board and essentially make a showing of standing. 10 C.F.R. § 2.1008 (1989), *repealed by* 63 Fed. Reg. 71729 at 71730 (Dec. 30, 1998).

Also significant is that, as with the current formulation, no provision in the original regulations afforded public access to privileged documents. In fact, the regulations expressly provided that while the public would be allowed access to all the bibliographic headers on the LSS, the public could have access to the text of non-privileged documents only. 10 C.F.R. § 2.1007(a) (1989), *amended by* 10 C.F.R. § 2.1007 (1998). Consistent with that restriction, the original regulations additionally provided, and still do, that protective orders are to limit the distribution of privileged documents to parties, interested governmental participants and potential parties. 10 C.F.R. § 2.1010(a)(6).

The original formulation of the Subpart J regulations thus clearly demonstrated that the Commission did not view “potential party” as synonymous with the general public. While the Commission provided a means for public access to the non-privileged documents on the LSS, those regulations made clear that the Commission did not think that the public interest required the general public to be accorded the same degree of participation and rights to documents in the proceeding as the statutory parties and other persons who could satisfy traditional standing requirements.

The Commission did not express any contrary view when it amended the regulations to their current formulation in 1998 in order to substitute the LSN for the LSS. While the Commission stated as part of that rulemaking that the LSN could provide expanded *means* for public access beyond the terminals in DOE’s and NRC’s public reading rooms—such as through personal computers—there is nothing in the rulemaking that suggests that the Commission intended to expand the *scope* of the materials the public could access. Nor is there anything in that rulemaking that shows that the Commission intended to expand the definition of “potential party” or otherwise allow public access to the parties’ privileged documents.

To the contrary, the Commission made clear that its amendments did not mandate equal public access to even the non-privileged documents on the LSN, stating that potential parties could be given priority access over the general public:

NRC agrees that under the final rule, information can be made available to all members of the public, even in the pre-license application phase. Practical considerations, including the operating capacities of the systems, may require that priority be given to potential parties. . . .

63 Fed. Reg. 71729, 71730 (Dec. 30, 1998). Such matters—the terms for providing public access to the LSN—was something the Commission went on to say “may be worked out” afterwards in the implementation of the regulations, *id.*, hardly a mandate for the proposition that the regulations equate the general public with “potential party.”

To be sure, § 2.1008, which required a showing of standing to obtain individualized remote access to the LSS, was deleted as part of these amendments. The Commission’s explanation for that deletion, however, in no way indicated that the Commission did so because it believed that standing was not an appropriate consideration for potential party status, or that it intended to otherwise expand the scope of “potential party.” Rather, the *sole* reason given for the deletion was the Commission’s expectation that the public *in addition to* potential parties would have remote access to the LSN, and thus the showing required under § 2.1008 would not be necessary *for access to the LSN*. Nothing in that explanation indicates that the Commission intended this deletion to expand who was otherwise an appropriate “potential party” for purposes of conducting discovery or obtaining access to privileged documents under a protective order. 63 Fed. Reg. at 71730 & 71734.

Similarly, there is no evidence that the Commission intended the amendment to the definition of “potential party” in 10 C.F.R. § 2.1001 that occurred at the same time to have an expansive effect. That amendment essentially retained the original definition of “potential party”

and substituted LSN for LSS. The Commission's *sole* explanation for this change was that it was substituting LSN for LSS "to describe the material to which the potential party will be given access." 63 Fed. Reg. at 71733. Again, there is nothing in the Commission's rulemaking to suggest that the reason for the amendment was to expand the universe of persons who could qualify as a "potential party" or otherwise be eligible to conduct discovery or receive privileged documents under a protective order. The amendment was a housekeeping change to conform terminology and was not intended to effect a substantive expansion in the scope of "potential party."

To the extent, therefore, there is ambiguity in the Commission's current regulations that might suggest, however strained, that "potential party" means the general public, that interpretation cannot stand. It is at best an unintended consequence of amendments made for other reasons, and an ambiguous consequence at that. When the regulations are viewed as a whole, and against the background of their regulatory history, it is clear that the Commission did not intend "potential party" to encompass any member of the public. Limitations imposed by traditional standing elements are both sensible and prudent, and still fully supportable by the regulations.⁴

B. Access to privileged documents

The appropriate provision regarding access to protective orders is 10 C.F.R. § 2.1010(a)(6), which provides that in ruling on any claim of document withholding, the Board should determine whether the document

should be disclosed under a protective order containing such protective terms and conditions (including affidavits of

⁴ *In the Matter of U.S. Dept. of Energy (High Level Waste Repository: Pre-Application Matters)*, ASLBP No. 04-829-01-PAPO, LBP-04-20 at 38-39, 45 & n.49 (holding that each part or section of a regulation should be construed with every other part so as to produce a harmonious whole).

nondisclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel.

This provision gives the Board considerable leeway in crafting terms and conditions as particular circumstances warrant. Indeed, under this provision the Board could deny certain participants access to certain privileged documents altogether, limiting access for instance to their counsel. The Board also could consolidate persons with substantially the same interests that may be affected by the proceeding and limit disclosure to select representatives and their counsel. *See* 10 C.F.R. § 2.316 (consolidation of parties with common interests). There also is nothing that prohibits the Board from limiting disclosure to persons who satisfy standing requirements or from otherwise limiting disclosure to the particular documents pertinent to the interests on which such persons' standing is predicated.⁵

Because of the need to tailor the terms and conditions of disclosure to particular circumstances under § 2.1010(a)(6), the Board should not prescribe universal criteria for access to the protective order at this time. It seems to make sense to require, presumptively, disclosure

⁵ It should be noted that § 2.1010(a)(6) does not use the term "potential party," but uses instead the term "potential participant." It is unclear whether the Commission meant anything by this different terminology. But to the extent there is concern that the definition of "potential party" in § 2.1001 somehow constrains the incorporation of standing criteria into the concept of "potential party" status, it could be maintained that standing criteria could be engrafted as a condition of "potential participant" status under § 2.1010(a)(6) for access to protective orders.

Also, 10 C.F.R. § 2.1018(a)(1)(iii) does not seem the appropriate provision for analyzing access to privileged documents. That provision directs that parties, potential parties, and interested governmental participants may obtain discovery by "[a]ccess to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to § 2.1003(a)." Read literally, that provision is inconsistent with the concept of privilege, for the whole point of a privilege is to safeguard against disclosure. That provision also is inconsistent with § 2.1018(b)(1), which provides that discovery may be had of any matter "not privileged." Section 2.1018(a)(1)(iii), therefore, more appropriately seems directed to the non-privileged documents for which bibliographic headers only have been provided, such as graphic and non-imageable documents. *See* 10 C.F.R. § 2.1003(a)(3) (requiring bibliographic header only for material not suitable for image or searchable full text).

to the statutory parties and interested governmental participants who request privileged documents that can appropriately be disclosed under a protective order. What is reasonable and appropriate disclosure beyond this should wait until after the deadline for potential parties' initial LSN certifications (which is 90 days after DOE's initial certification). The Board would not begin to know until that time at the earliest the extent of the persons who may seek access to privileged documents, the issues that those persons' access raise, and whether there is any objection to the requested access.

When those issues have come into focus, the Board would then be in a position to define a reasonable process and standards for potential parties' access to privileged documents based on such factors as:

- The requestor's compliance with Subpart J. It seems appropriate that a person who has not met the production and certification obligations of potential participants under Subpart J should not be allowed access to other's privileged documents.
- The nature of the person's purported interest. A person who intends to predicate standing on a narrow issue may not need access to all privileged documents but just those related to that narrow issue.
- The number of documents requested. The more documents someone seeks, the greater the need for scrutiny of their justification for those documents.
- Representation by counsel. If a person is represented by counsel, that person's counsel could be allowed greater access to the documents than otherwise may be the case.
- The potential for competing interests. A person that could potentially use the privileged information for other purposes may warrant a greater showing of need than others. For

example, a person who is a potential competitor of DOE's contractors ought not to have access to those contractors' business proprietary documents.⁶

These factors should be addressed on a case-by-case basis. A person seeking disclosure of privileged documents under a protective order should make its request to the Board, identifying the documents it seeks, its interest in the proceeding, and the reason the requested documents are expected to advance its preparation of contentions regarding that interest. In many cases the party whose documents are requested may have no objection to the request. For others, the party whose documents are requested could lodge objections to the disclosure, propose more limited disclosure, or suggest terms and conditions appropriate to the requested documents and the requestor.

It also should be kept in mind that the documents at issue for potential production under a protective order—documents subject to the privacy, archeological, and business proprietary privileges—are a very small group of documents compared to the universe of documents to be made available on the LSN. The State and the NRC Staff have stated that they currently have no documents in those categories. DOE's documents are estimated to be 2% or less of its 3.5 million documents. Other persons will not be prejudiced if their access to these documents is subject to this type of individualized review process. There are plenty other documents on every conceivable issue sufficient for potential parties to assess whether they ought to intervene and to develop contentions.⁷

⁶ See, e.g., *In re Sequoyah Fuel Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding)*, LBP-95-05, 41 N.R.C. 253, 1995 NRC LEXIS 13 (April 18, 1995) (holding that discovery should be circumscribed to avoid the invasion of "what otherwise are the private and confidential business domains of party litigants.").

⁷ See, e.g., *Knoll v. AT&T*, 176 F.3d 359, 365 (6th Cir. 1999) (litigant opposing protective order bears "burden to offer proof that the protective order would substantially harm his ability to collect the evidence necessary for prosecution of his case.").

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

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Pre-Application Matters))

DEPARTMENT OF ENERGY'S SECOND MEMORANDUM IN RESPONSE TO
MAY 11, 2005 MEMORANDUM AND ORDER REGARDING SECOND CASE
MANAGEMENT CONFERENCE CERTIFICATE OF SERVICE

I certify that copies of the foregoing DEPARTMENT OF ENERGY'S SECOND MEMORANDUM IN RESPONSE TO MAY 11, 2005 MEMORANDUM AND ORDER REGARDING SECOND CASE MANAGEMENT CONFERENCE has been served upon the following persons by electronic mail and/or Electronic Information Exchange as denoted by an asterisk (*).

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. Eitrein, 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. Byrdson*
E-mail: atbl@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 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: trsl@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. Jeffery 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: mshebelskie@hunton.com

Christopher A. Updike*
E-mail: cupdike@hunton.com

Belinda A. Wright*
E-mail: bwright@hunton.com

**Egan, Fitzpatrick, Malsch & Cynkar, PLLC
Counsel for the State of Nevada**

The American Center at Tysons Corner
8300 Boone Boulevard, Suite 340
Vienna, VA 22182

Robert J. Cynkar, Esq.*
E-mail: rcynkar@nuclearlawyer.com

Joseph R. Egan, Esq.*
E-mail: eganpc@aol.com

Charles J. Fitzpatrick, Esq.*
E-mail: cfitzpatrick@nuclearlawyer.com

Jack Kewley*
E-mail: jkewley@nuclearlawyer.com

Martin G. Malsch, Esq.*
E-mail: mmalsch@nuclearlawyer.com

Susan Montesi*
E-mail: smontesi@nuclearlawyer.com

Nakita Toliver*
E-mail: ntoliver@nuclearlawyer.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 Mgmt**

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 Mgmt**

Office of Information Mgmt
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

Nuclear Waste Project Office

1761 East College Parkway, Suite 118

Carson City, NV 89706

Steve Frishman, Tech. Policy Coordinator

E-mail: ssteve@nuc.state.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

State of Nevada (NV)

100 N. Carson Street

Carson City, NV 89710

Marta Adams

E-mail: madams@govmail.state.nv.us

Churchill County (NV)

155 North Taylor Street, Suite 182

Fallon, NV 89406

Alan Kall

E-mail: comptroller@churchillcounty.org

Clark County (NV) 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 (NV) Yucca Mtn Info Ofc

P.O. Box 990

Eureka, NV 89316

Laurel Marshall, Program Coordinator

E-mail: ecmarschall@eureka.nv.org

Lincoln County (NV) Nuclear Oversight Prgm

100 Depot Ave., Suite 15; P.O. Box 1068

Caliente, NV 89008-1068

Lea Rasura-Aifano, Coordinator

E-mail: jcciac@co.lincoln.nv.us

**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 (NV) Board of County
Commissioners**

P.O. Box 1600

Hawthorne, NV 89415

Linda Mathias, Administrator

Office of Nuclear Projects

E-mail: mineral@oem.hawthorne.nv.us

**Nye County (NV) 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 (NV) Regulatory/Licensing Adv.

18150 Cottonwood Rd. #265

Sunriver, OR 97707

Malachy Murphy

E-mail: mrmurphy@cmc.net

**White Pine County (NV) Nuclear
Waste Project Office**

959 Campton Street

Ely, NV 89301

Mike Simon, Director

(Heidi Williams, Adm. Assist.)

E-mail: wpnucwst1@mwpower.net

**Inyo County (CA) Yucca Mtn 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 St.

Carson City, NV 89703

E-mail: abbyj@gbis.com

National Congress of American Indians

1301 Connecticut Ave. NW - Second floor

Washington, DC 20036

Robert I. Holden, Director

Nuclear Waste Program

E-mail: robert_holden@ncai.org

Public Citizen
215 Pennsylvania Ave, 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. DEPARTMENT OF ENERGY

By Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585