

June 1, 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)	)	

THE NRC STAFF'S SUBMISSION OF A PROPOSED JOINT PROTECTIVE ORDER

As directed by the Pre-License Application Presiding Officer Board during the Second Case Management Conference, the Nuclear Regulatory Commission Staff ("Staff"), Department of Energy ("DOE"), and the State of Nevada ("State") have developed a Revised Joint Proposed Protective Order. See Transcript of Second Case Management Conference, May 18, 2005, at 365-375. Having otherwise reached agreement, the parties have not been able to reach a consensus regarding footnote 1 of the Joint Proposed Protective Order. Specifically, the parties cannot agree on the scope of the Staff's access to, and use of, protected material disclosed in the course of this litigation that would otherwise be available to the Staff or its consultants or contractors by statute, regulation or licensing condition, or information submitted or available to the NRC Staff in support of a requested licensing action. The parties will continue to work to resolve differences relative to footnote 1. The State has not expressed a preference for either the Staff's or DOE's position. Having failed to reach agreement on the foregoing point, the attached is submitted. There are no other substantive disagreements with regards to the Proposed Protective Order.

Separately, two comments were received from Nye County, Nevada. The first expressed a “weak preference” for the Staff’s proposed language for footnote 1 and requires no change. The second expressed concern that the sanctions contemplated in paragraph N of the Proposed Order should not be applied to local governments because of the actions of counsel, an expert, or other non-elected or non-policy representatives. The Staff, DOE and State agree that this concern is dealt with by the addition of footnote 8 of the Proposed Protective Order.

Respectfully submitted,

*/RA/*

Harry E. Wedewer  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 1<sup>st</sup> day of June, 2005

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PROPOSED MEMORANDUM AND ORDER  
(Protective Order)

- A. This Protective Order governs the disclosure and use of protected material, as defined in Paragraph B, produced in this proceeding.<sup>1</sup> Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-license Application Presiding Officer Board ("PAPO Board"), another Presiding Officer in this proceeding, or the Commission.
- B. The term "protected material" means:

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<sup>1</sup> [Staff Proposal] The provisions of this Protective Order do not apply to NRC employees, contractors, or consultants with respect to protected material that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g. information available to, or required to be submitted to, the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Disclosure of such protected material is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this Protective Order do apply to NRC employees, contractors, or consultants with respect to protected material that NRC would not be entitled to receive except by virtue of an Order in this proceeding.

[DOE Proposal] The provisions of this Protective Order do not restrict use by NRC employees, contractors, or consultants of documents containing protected material that the NRC receives apart from its role as a litigant in this proceeding (e.g. documents containing information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Rather, NRC's use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this Protective Order do apply to NRC employees, contractors, or consultants with respect to documents containing protected material that NRC receives solely by virtue of an Order in this proceeding.

1. documentary material, as defined by 10 C.F.R. § 2.1001, in any form (including electronic form) produced by a participant<sup>2</sup> in this proceeding and designated by the participant producing it as protected material;<sup>3</sup>

2. any information contained in or obtained from protected material;

3. notes of protected material;<sup>4</sup>

4. copies of protected material; and

5. any other material that is made subject to this Protective Order by the PAPO Board, another Presiding Officer in this proceeding, or the Commission.

C. The term “protected material” does not include any material that a participant obtains through any other lawful means outside of this Protective Order.

D. The participant producing protected material shall mark it on each page as “PROTECTED MATERIAL.” Individuals with access to protected material pursuant to this Order may make copies of and take notes on the protected material, but such copies and notes become protected material and must be marked on each page as “PROTECTED MATERIAL.”

E. Only participants and counsel, consultants, assistants, and others representing a participant, who have executed the attached Non-Disclosure Declaration may have access to

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<sup>2</sup> The term "participant" means any party, potential party, or interested governmental participant, as defined by 10 C.F.R. § 2.1001, that is entitled, under an order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission, to receive documents in this proceeding subject to this Protective Order and Non-Disclosure Declaration.

<sup>3</sup> A participant may designate as protected material any documentary material that it believes, in good faith, is subject to a privilege under 10 C.F.R. § 2.1006 or under any order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission. A determination that documentary material is subject to a privilege shall be reviewed and approved by counsel for the participant or by a designated representative of a participant appearing *pro se*. A participant's designation of protected material is subject to challenge in accordance with Paragraph K, below. Protected material does not include classified information, Safeguards Information, unclassified controlled nuclear information, and any similarly sensitive unclassified information; such information is to be covered by a separate Protective Order in this proceeding.

<sup>4</sup> “Notes of protected material” means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses information in protected material.

protected material.<sup>5</sup> Only a participant authorized to receive protected material under this Protective Order may request access to protected material. After receiving protected material, a participant may provide protected material to its counsel, consultants, assistants, and other representatives authorized to receive protected material under this Protective Order. Protected material shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the minimum number of counsel, consultants, assistants, or other participant representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding.

F. Participants, and counsel, consultants, assistants, and others representing a participant, who receive any protected material shall maintain its confidentiality as required in the attached Non-Disclosure Declaration, the terms of which are hereby incorporated in this Protective Order.

G. Participants, and counsel, consultants, assistants, and others representing a participant, who receive any protected material shall take all reasonable precautions necessary to ensure that protected material is not distributed to unauthorized persons.<sup>6</sup> Reasonable precautions include maintaining all protected material in a secure place and limiting access to that material to persons authorized to receive such material. Any person who receives protected material shall take all reasonable precautions to ensure that persons under their supervision or control comply with this Protective Order.

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<sup>5</sup> A copy of each executed Non-Disclosure Declaration will be served on the PAPO Board or other Presiding Officer in this proceeding. Other participants need not be served with a copy of executed Non-Disclosure Declarations, but will be provided notice, at the time of filing, of the number of such declarations filed with the PAPO Board or other Presiding Officer.

<sup>6</sup> Reasonable precautions include such cyber security precautions as necessary to ensure the protection and accountability of access to the materials while in custody of the recipient as well as to ensure the integrity and security of the network and storage environment where the material is stored.

H. Protected material shall remain available to all participants until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected material is concluded and no longer subject to judicial review. Absent further order, the participants shall, within fifteen (15) days of the later date described above, return the protected material (excluding notes of protected material) to the participant that produced it, or shall destroy the information, except that copies of filings, official transcripts, and exhibits in this proceeding that contain protected material, and notes of protected material may be retained, if they are maintained in a secure place.<sup>7</sup> Within such time period, each participant shall also submit to the producing participant an affidavit stating that, to the best of its knowledge, all protected material and all notes of protected material have been returned or have been destroyed or, if retained, will be maintained in accordance with the above. To the extent protected material is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

I. From the time that an individual who has received protected material under this Protective Order no longer qualifies as a participant, as defined in footnote 2 above, or counsel, consultant, or representative of a participant, that individual shall within 15 days return or destroy protected material in accordance with Paragraph H and submit an affidavit that it has done so.

J. All copies of all documents filed in this proceeding that disclose information contained in protected material shall be filed and served in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission.

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<sup>7</sup> Destruction of protected material shall include the destruction of electronic storage media (e.g. computer diskette or compact disk) containing protected material. This shall also include permanent removal of the protected material from the hard drives of electronic media on which it has been processed, using Secure Clean PC software or its equivalent.

K. Nothing in this Protective Order shall prevent any participant from challenging the designation of material as protected. Such a challenge shall be conducted and resolved in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission.

L. Participants, and counsel, consultants, assistants, or any other individual representing a participant, who have reason to suspect that protected material may have been lost or misplaced or that protected material has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the PAPO Board, or other appropriate Presiding Officer in this proceeding, promptly of those suspicions and the reasons for them.

M. Each participant that receives protected material under this Protective Order shall keep a record that identifies all documents containing protected material received by that participant (including counsel, consultants, assistants, and others representing the participant) and shall account for those documents on an annual basis. No later than twelve (12) months after a participant first receives protected material under this Protective Order, that participant shall file a list of the documents that it has received under this Protective Order, including the Licensing Support Network Accession number of each document, and indicate the maximum number of persons given access to protected material received by the participant in this proceeding. This first accounting shall be served, via Electronic Information Exchange, on the PAPO Board, or other Presiding Officer, and those on the service list for this proceeding. Each subsequent accounting shall contain the same information and shall be served in the same manner at intervals not to exceed 12 months.

N. Any violation of the terms of this Protective Order or a Non-Disclosure Declaration executed in furtherance of this Protective Order may result in the imposition of sanctions as the PAPO Board, another Presiding Officer in this proceeding, or the Commission may deem appropriate. Such sanctions may include, but are not limited to, refusal to consider a filing by

the offending participant; denial of the right to receive documents under this or any other protective order in this proceeding; denial of the right to cross-examine or present evidence; refusal to allow the counsel, consultant, or other representative of a participant to participate in this proceeding; dismissal of one or more of a participant's contentions; or dismissal of the participant from the proceeding.<sup>8</sup> In addition, sanctions may include referral of the violation to appropriate bar associations and/or other disciplinary authorities, including the U.S. Department of Justice for criminal prosecution, if appropriate.

O. The PAPO Board, another Presiding Officer in this proceeding, or the Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding. The participants shall be afforded notice and an opportunity to be heard before any such alteration or amendment comes into effect.

It is so ORDERED.

The Pre-License Application  
Presiding Officer Board

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<sup>8</sup> In listing the sanctions that may be imposed pursuant to this paragraph, the Staff, DOE and State understand that doing so is without prejudice to any participant arguing that a particular sanction cannot or should not be imposed in this circumstance.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF'S SUBMISSION OF A PROPOSED JOINT PROTECTIVE ORDER" in the above captioned proceeding have been served on the following persons this 1<sup>st</sup> day of June, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (\*).

Thomas S. Moore, Chair \*  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-Mail: [papo@nrc.gov](mailto:papo@nrc.gov)

Alex S. Karlin \*  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-Mail: [papo@nrc.gov](mailto:papo@nrc.gov)

Alan S. Rosenthal \*  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-Mail: [papo@nrc.gov](mailto:papo@nrc.gov)  
[rsnthl@comcast.net](mailto:rsnthl@comcast.net)

G. Paul Bollwerk, III \*  
Administrative Judge  
U.S. Nuclear Regulatory Commission  
Atomic Safety and Licensing Board Panel  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-Mail: [papo@nrc.gov](mailto:papo@nrc.gov)

Office of the Secretary \*  
ATTN: Rulemakings and Adjudication Staff  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16 C1  
Washington, D.C. 20555  
E-mail: [HEARINGDOCKET@nrc.gov](mailto:HEARINGDOCKET@nrc.gov)

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: O-16C1  
Washington, D.C. 20555  
E-mail: [hlb@nrc.gov](mailto:hlb@nrc.gov)

Donald P. Irwin, Esq. \*  
Kelly L. Faglioni, Esq. \*  
Edward P. Noonan, Esq. \*  
W. Jeff Edwards, Esq. \*  
Melissa Grier, Esq. \*  
Stephanie Meharg, Esq. \*  
Michael R. Shebelskie, Esq. \*  
Audrey B. Rusteau \*  
Belinda A Wright \*  
Christopher A. Updike \*  
Hunton & Williams LLP  
951 East Byrd Street  
Richmond, VA 23219  
E-mail: [dirwin@hunton.com](mailto:dirwin@hunton.com)  
[kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)  
[enoonan@hunton.com](mailto:enoonan@hunton.com)  
[arusteau@hunton.com](mailto:arusteau@hunton.com)  
[jedwards@hunton.com](mailto:jedwards@hunton.com)  
[mgrier@hunton.com](mailto:mgrier@hunton.com)  
[smeharg@hunton.com](mailto:smeharg@hunton.com)  
[bwright@hunton.com](mailto:bwright@hunton.com)  
[cupdike@hunton.com](mailto:cupdike@hunton.com)  
[mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)

Michael A Bauser, Esq. \*  
Associate General Counsel  
Robert W. Bishop, Esq.  
Ellen C. Ginsberg, Esq.  
Rod McCullum  
Stephen P. Kraft  
Nuclear Energy Institute  
1776 I Street, NW, Suite 400  
Washington, DC 20006-3708  
E-mail: [mab@nei.org](mailto:mab@nei.org)  
[ecg@nei.org](mailto:ecg@nei.org)  
[rbw@nei.org](mailto:rbw@nei.org)  
[rxm@nei.org](mailto:rxm@nei.org)  
[spk@nei.org](mailto:spk@nei.org)

Thomas R. Combs \*  
Office of Congressional Affairs  
U.S. Nuclear Regulatory Commission  
Mail Stop O-17 A3  
Washington, DC 20555  
E-mail: [trc@nrc.gov](mailto:trc@nrc.gov)

W. John Arthur, III, Deputy Director  
Susan L. Rives, Esq.  
Kerry M. Grooms  
U.S. Department of Energy  
Office of Civilian Radioactive Waste  
Management  
Office of Repository Development  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
E-mail: [john\\_arthur@notes.ymp.gov](mailto:john_arthur@notes.ymp.gov)  
[susan\\_rives@ymp.gov](mailto:susan_rives@ymp.gov)  
[kerry\\_grooms@ymp.gov](mailto:kerry_grooms@ymp.gov)

White Pine County  
City of Caliente  
Lincoln County  
Jason Pitts  
E-mail: [idt@idtservices.com](mailto:idt@idtservices.com)

Atomic Safety and Licensing Board Panel  
ASLBP HLW Adjudication  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [ASLBP\\_HLW\\_Adjudication@nrc.gov](mailto:ASLBP_HLW_Adjudication@nrc.gov)

Michele Boyd \*  
Legislative Representative  
Critical Mass Energy and Environment  
Public Citizen  
215 Pennsylvania Ave., SE  
Washington, DC 20003  
E-mail: [mboyd@citizen.org](mailto:mboyd@citizen.org)

Lea Rasura-Alfano, Coordinator  
Lincoln County (NV) Nuclear Oversight Prgm  
100 Depot Ave., Suite 15  
P.O. Box 1068  
Caliente, NV 89008-1068  
E-mail: [jcciac@co.lincoln.nv.us](mailto:jcciac@co.lincoln.nv.us)

Joseph R. Egan, Esq. \*  
Martin G. Malsch, Esq. \*  
Charles J. Fitzpatrick, Esq. \*  
Robert J. Cynkar, Esq. \*  
Elayne Coppage \*  
Jack Kewley \*  
Susan Montesi \*  
Nakita Toliver \*  
Egan, Fitzpatrick, Malsch & Cynkar, PLLC  
7918 Jones Branch Dr., Suite 600  
McLean, VA 22102  
E-mail: [eganpc@aol.com](mailto:eganpc@aol.com)  
[mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)  
[rcynkar@nuclearlawyer.com](mailto:rcynkar@nuclearlawyer.com)  
[cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)  
[ecoppage@nuclearlawyer.com](mailto:ecoppage@nuclearlawyer.com)  
[jkewley@nuclearlawyer.com](mailto:jkewley@nuclearlawyer.com)  
[smontesi@nuclearlawyer.com](mailto:smontesi@nuclearlawyer.com)  
[ntoliver@nuclearlawyer.com](mailto:ntoliver@nuclearlawyer.com)

Marta Adams  
State of Nevada  
100 N. Carson Street  
Carson City, NV 89710  
E-mail: [madams@govmail.state.nv.us](mailto:madams@govmail.state.nv.us)

Malachy Murphy  
Nye County Regulatory & Licensing Advisor  
18150 Cottonwood Rd. # 265  
Sunriver, OR 97707  
E-mail: [mrmurphy@cmc.net](mailto:mrmurphy@cmc.net)

Les Bradshaw  
Nye County Dept of Natural Resources  
and Federal Facilities  
1210 E. Basin Road, Suite 6  
Pahrump, NV 89048  
E-mail: [clittle@co.nye.nv.us](mailto:clittle@co.nye.nv.us)

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

Any C. Roma, Esq. \*  
Susan H. Lin, Esq.  
Christopher M. Wachter \*  
Brian F. Corbin  
Bethany L. Engel \*  
Sarah M. Haley  
James M. Cutchin \*  
Jonathon Rund \*  
Susan Stevenson-Popp \*  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [papo@nrc.gov](mailto:papo@nrc.gov)

Andrew L. Bates \*  
Adria T. Byrdsong \*  
Rebecca L. Giitter \*  
Emile L. Julian \*  
Evangeline S. Ngbea \*  
Office of the Secretary of the Commission  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [alb@nrc.gov](mailto:alb@nrc.gov)  
[atb1@nrc.gov](mailto:atb1@nrc.gov)  
[rl@nrc.gov](mailto:rl@nrc.gov)  
[ldl@nrc.gov](mailto:ldl@nrc.gov)  
[elj@nrc.gov](mailto:elj@nrc.gov)  
[esn@nrc.gov](mailto:esn@nrc.gov)

Abby Johnson  
617 Terrace St.  
Carson City, NV 89703  
E-mail: [abbyj@gbis.com](mailto:abbyj@gbis.com)

Martha S. Crosland \*  
U.S. Department of Energy  
Office of the General Counsel  
1000 Independence Avenue, S.W.  
Washington, DC 20585  
E-mail: [martha.crosland@hq.doe.gov](mailto:martha.crosland@hq.doe.gov)

William H. Briggs  
Ross, Dixon & Bell  
2001 K Street, NW  
Washington, DC 20006-1040  
E-mail: [wbriggs@rdblaw.com](mailto:wbriggs@rdblaw.com)

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

Anthony C. Eitrem, Esq. \*  
Chief Counsel  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [papo@nrc.gov](mailto:papo@nrc.gov)

Daniel J. Graser \*  
Licensing and Support Network Administrator  
Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop: T-3 F23  
Washington, D.C. 20555  
E-mail: [djq2@nrc.gov](mailto:djq2@nrc.gov)

Steve Frishman  
Technical Policy Coordinator  
Nuclear Waste Project Office  
1761 East College parkway, Suite 118  
Carson City, NV 89706  
E-mail: [ssteve@nuc.state.nv.us](mailto:ssteve@nuc.state.nv.us)

Jeffrey Kriner \*  
Yucca Mountain Project, Licensing Group,  
DOE/BSC  
E-mail: [jeffrey\\_kriner@ymp.gov](mailto:jeffrey_kriner@ymp.gov)

Alan Kall  
155 North Taylor Street, Suite 182  
Fallon, NV 89406  
E-mail: [comptroller@churchillcounty.org](mailto:comptroller@churchillcounty.org)

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

Robert I. Holden, Director  
Nuclear Waste Program  
National Congress of American Indians  
1301 Connecticut Ave., NW - 2<sup>nd</sup> Floor  
Washington, DC 20003  
E-mail: [robert\\_holden@ncai.org](mailto:robert_holden@ncai.org)

George Hellstrom, Esq.  
U.S. Department of Energy  
Office of the General Counsel  
1551 Hillshire Drive  
Las Vegas, NV 89134-6321  
E-mail: [george.hellstrom@ymp.gov](mailto:george.hellstrom@ymp.gov)

Mike Sinom, Director  
(Heidi Williams, Adm. Asst.)  
White Pine County Nuclear Waste  
Project Office  
959 Campon Street  
Ely, NV 89301  
E-mail: [wpnucwst1@mwpower.net](mailto:wpnucwst1@mwpower.net)

Dr. Mike Baughman  
Intertech Services Corporation  
(For Lincoln County)  
P.O. Box 2008  
Carson City, NV 89702-2008  
E-mail: [bigoff@aol.com](mailto:bigoff@aol.com)

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

Ray Clark  
Environment Protection Agency  
E-mail: [clark.ray@epa.gov](mailto:clark.ray@epa.gov)

Laurel Marshall  
Eureka County (NV) Yucca Mtn Info Ofc  
P.O. Box 990  
Eureka, NV 89316  
E-mail: [ecmarshall@ymp.gov](mailto:ecmarshall@ymp.gov)

Loreen Pitchford Consulting  
LNS Administrator for Lander, Churchill and  
Mineral County's  
3888 Snow Valley Drive  
Reno, NV 89506  
E-mail: [qb4@charter.net](mailto:qb4@charter.net)

Victoria Reich  
Nuclear Waste Technical Review Board  
E-mail: [reich@nwtrb.gov](mailto:reich@nwtrb.gov)

Debora Teske  
Lander County Nuclear Waste Oversight  
315 S. Humboldt  
Battle Mountain, NV 89820  
E-mail: [dteske@landercounty.com](mailto:dteske@landercounty.com)

*/RA/*

---

Harry E. Wedewer  
Counsel for the NRC Staff