

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

**DOCKETED 07/08/05**

Before Administrative Judges:

**SERVED 07/08/05**

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

July 8, 2005

**SECOND CASE MANAGEMENT ORDER**  
(Pre-License Application Phase Document Discovery and Dispute Resolution)

The Pre-License Application Presiding Officer (PAPO) Board's Second Case Management Order addresses the conduct of document discovery of material on the Licensing Support Network (LSN) for which there appears only a bibliographic header, generally signifying that the underlying document is subject to a claim of privilege or some other exemption from disclosure. Such pre-license application phase document discovery includes the resolution of disputes over claims of privilege and related issues that might arise prior to the expected filing and docketing of the application of the United States Department of Energy (DOE) for a Nuclear Regulatory Commission license to construct a high-level waste repository at Yucca Mountain, Nevada. This order represents the culmination of an extended examination of numerous legal and procedural issues requiring resolution at this time in the interest of achieving an orderly and timely discovery process in this matter.

That examination entailed the receipt, both in numerous written submissions and during the course of extended conferences with counsel and other representatives, of the views of several potential parties to the adjudicatory proceeding that is to follow the expected docketing of the DOE application. In addition to DOE, the NRC Staff, the State of Nevada (State), the Nuclear Energy Institute (NEI), and the Nuclear Information and Resource Services (NIRS), played a role in the formulation of the terms of this order.

The Board has given careful consideration to the sometimes divergent views that were presented to it both in writing and orally. To the extent that those views related to such legal issues as the existence or ingredients of a particular asserted privilege or exemption from disclosure during pre-license application phase document discovery, the order resolves the disagreement on the basis of the Board's understanding of the governing legal principles respecting such privileges. Many of the differing opinions related, however, to procedural matters not likewise subject to the application of settled doctrine but, rather, falling within the realm of the discretion of the Board in the carrying out of its responsibility to manage efficiently the pre-license application phase document discovery process.<sup>1</sup>

In exercising that discretion, the Board has given recognition, first and foremost, to the fact that pre-license application phase document discovery will be conducted in a setting not merely extraordinary but, indeed, totally without precedent. Among other things, given the awareness that there will be millions of relevant documents in the hands of potential parties to the anticipated adjudicatory proceeding on the DOE application, the NRC established the internet-based LSN electronic document retrieval system. That system requires each potential

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<sup>1</sup>For example, because pre-license application document discovery will be conducted electronically, the Board found it necessary in prescribing the information required for electronic privilege logs to go beyond the bare bones elements establishing a prima facie case for the claimed privilege in order to integrate the bibliographic headers and privilege logs so that they can be used together.

party to place all of its documentary material on the LSN. Until hearing requests are filed and acted upon, the number and identity of the actual parties to the proceeding cannot be determined. This is a radical departure from what customarily obtains with regard to the timing of discovery in NRC adjudicatory proceedings. To the Board's knowledge, no like system has been established in advance of the adversarial proceeding with regard to any other judicial or quasi-judicial proceeding.

In short, the document discovery procedures that are being prescribed in this order have been tailored to take account of the very special circumstances that attend upon the conduct of discovery in this matter. To the extent that they might depart from what the potential parties now before the Board might have agreed upon, they represent this Board's best judgment as to what is called for to ensure that pre-license application phase document discovery, and the resolution of any disputes arising from it, are accomplished in the most efficient and timely manner possible given the certain magnitude of the undertaking.

#### I. DEFINITIONS

For purposes of this case management order, the following definitions shall apply:

- A. "Document" means any "document" that contains "documentary material" as those terms are defined in 10 C.F.R. § 2.1001.
- B. "Employee concern program document" and "allegation program document" (hereinafter both "ECP document") means a document created or collected by the NRC, DOE, or a DOE contractor, as part of a regulatory employee concern or allegations program in which a document is received and maintained as confidential and identifies (1) a person reporting a concern or allegation, (2) a person interviewed during a concern or allegation investigation, or (3) a person against whom a concern or allegation is directed. The term "ECP document" excludes any document that (1) identifies a person whose identity would otherwise be kept

confidential in an employee concern or allegation program who has authorized the release of his or her name or (2) is in the public domain or has otherwise been made publicly available.

C. "Potential party" means DOE, the NRC Staff, the State, and any person or entity that meets the definitions of "party," "potential party," or "interested governmental participant" under 10 C.F.R. § 2.1001.

D. "Prima facie case" means information and proof sufficient to support a finding in favor of a claimed privilege in the absence of any information or evidence to the contrary.

E. "Primary privilege" means the attorney-client communication privilege, the litigation work-product privilege, or the deliberative process privilege.

F. "Privilege claimant" means a potential party asserting or claiming that a document or communication qualifies, in whole or in part, for a primary privilege or secondary privilege.

G. "Privilege log" means a chart that identifies documents claimed to be privileged and that, without revealing information itself claimed to be privileged or protected, establishes a prima facie case that each identified document is entitled to the privilege.

H. "Requester" means the potential party requesting a document pursuant to 10 C.F.R. §§ 2.1004 or 2.1018(a)(1)(iii) or any such potential party who moves for an order to compel production of such document.

I. "Secondary privilege" means any privilege, exception, exclusion, or exemption from disclosure available under 10 C.F.R. § 2.1006 that entitles a potential party to withhold the text of a document from the LSN pursuant to 10 C.F.R. § 2.1003(a)(4), including the exceptions from disclosure under 10 C.F.R. § 2.390 for such things as privacy, proprietary information, law enforcement purposes, or archeological protection concerns, but excluding any primary privilege or any claims associated with safeguards information or with an ECP document.

## II. GENERAL REQUIREMENTS

### A. Scope.

The requirements of this case management order shall apply equally to all potential parties. The order does not address the procedures to be followed for documents containing safeguards information or other unclassified sensitive information.

### B. Burden of Persuasion.

The privilege claimant shall have the ultimate burden of persuasion that a document or communication qualifies for a claimed privilege.

### C. Appearance, Practice and Representation.

Any person appearing before the PAPO Board shall review and comply with 10 C.F.R. § 2.314, "Appearance and practice before the Commission in adjudicatory proceedings." Any person appearing in a representative capacity, shall file a written notice of appearance conforming to the requirements of that regulation. In addition, any person appearing before the PAPO Board on his or her own behalf (i.e., pro se) shall file a written notice of appearance stating his or her full name, address, and telephone number as well as facsimile number and e-mail address, if any.

### D. Signature.

As specified in the Board's initial order of July 9, 2004, 69 Fed. Reg. 42,465 (July 15, 2004), each filing submitted or filed herein shall be signed and dated by an attorney of record having authority to do so, an individual potential party acting pro se, or an authorized representative of an organization participating without counsel. For example, the attorney, pro se individual, or authorized representative must sign each privilege log and supplement thereto. In accordance with 10 C.F.R. § 2.705(g), the signature is a certification that the filing has been subscribed in the capacity with full authority, that he or she has read it and knows the contents,

and that, to the best of his or her knowledge, information, and belief, formed after a reasonable inquiry, the filing is:

1. Consistent with 10 C.F.R. Part 2, and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
2. Consistent with this Second Case Management Order and any other discovery ruling or order previously issued in this proceeding;
3. Not interposed for any improper purpose, such as to harass or to cause unnecessary delay or expense; and
4. Not unreasonable or unduly burdensome or expensive, given the nature of this case and the importance of the issues at stake.

In accordance with Section 4.0 of the electronic information exchange (EIE) "Guidance for Submission of Electronic Docket Materials Under 10 CFR Part 2, Subpart J" (EIE Guidance Document),<sup>2</sup> the attorney, pro se individual, or authorized representative shall digitally sign the HLW Submittal Form used to transmit the filing. Digital signature of the HLW Submittal Form shall be deemed equivalent to an original signature on the transmitted filing.

Each document request or response submitted by one potential party to another via e-mail (but not filed via the EIE), shall be deemed to be signed by the sender of the e-mail and he or she shall be subject to the same responsibilities and conditions as specified above. Any such electronic submission (but not filing) shall include the following legend:

THE SENDER OF THIS ELECTRONIC DOCUMENT IS DEEMED THE SIGNER OF THIS DOCUMENT AND CONSENTS TO COMPLY WITH THE REGULATIONS SET FORTH IN 10 C.F.R. PART 2 AND WITH ALL ORDERS OF THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD IN THE MATTER OF THE U.S. DEPARTMENT OF ENERGY HIGH LEVEL WASTE REPOSITORY.

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<sup>2</sup> The EIE Guidance Document may be found at:  
<http://www.nrc.gov/reading-rm/ehd/ml041560341.pdf>

E. Designation of Point of Contact.

Each potential party certifying an LSN document collection pursuant to 10 C.F.R. § 2.1009(b) shall file a notice identifying the person who will serve as its primary point of contact (POC) for purposes of document requests and the pre-motion consultations required under 10 C.F.R. § 2.323(b). The notice shall include the name, address, e-mail address, and office phone number of the POC. All potential parties are encouraged to designate at least one alternate POC. The POC, or alternate POC, should generally be available for consultation between the hours of 9:00 a.m. and 5:00 p.m. in the time zone in which the principal office or residence of the POC is located. The LSN Administrator (LSNA) shall prominently post a list of the POCs on the LSN. Each potential party that has already certified its LSN document collection shall file the notice by July 22, 2005. Other potential parties shall file such notice at the time they certify their document collection.

F. Requests.

For purposes of pre-license application phase document discovery, a request for a document under 10 C.F.R. § 2.1004 will be handled under the same procedures as a request for a document under 10 C.F.R. § 2.1018(a)(1)(iii). All document requests shall be submitted electronically to the e-mail address of the POC posted on the LSN for the document collection containing the requested document and shall include the requester's name, address, telephone number, e-mail address, and the legend specified in Part II.D. Failure of a requester to submit the document request to the posted e-mail address for the document collection containing the document at issue and to include the required information shall vitiate the request. In light of the availability of documents on the LSN, and the affirmative measures specified in this case management order (e.g., submission of privilege logs for documents subject to claims of primary privilege and submission of redacted versions of documents subject to claims of secondary

privilege), potential parties should be able to access most documents themselves, and the Board expects that, except for requests for ECP documents, the need for requests will be minimal.

G. No Subject Matter Waiver.

The production of a privileged document, even if intended, shall not cause a subject-matter waiver with respect to that potential party's other privileged documents. A potential party shall not be permitted to compel the production of another potential party's privileged document on the ground that its production will not effect a subject-matter waiver regarding other privileged documents.

H. Re-claiming Privileged Documents.

Upon timely motion, a potential party that inadvertently produces a privileged document may be permitted, in appropriate circumstances and upon a showing of good faith inadvertence, to re-claim the document from other potential parties.

I. Format of Privilege Logs.

The format of each privilege log shall include separate fields or columns for each of the elements specified in Appendices A through G. A separate privilege log should be provided for each type of privilege (e.g., attorney-client communication privilege log). If multiple privileges are claimed for a document, the log for each of the applicable privileges shall include an additional field or column identifying the other primary and secondary privileges that are claimed for the document.

J. Withdrawal or Waiver of Privilege Claims.

A potential party that withdraws or waives a privilege claim for a document shall, within three (3) days, make all necessary corrections to its LSN document collection and privilege logs.

K. Good Faith Consultation.

In order to maximize the early resolution of issues without PAPO Board intervention, motions will be summarily rejected if they are not preceded by a sincere attempt to resolve the



issues and include the certification specified in 10 C.F.R. § 3.232(b). Each potential party shall make itself available for consultation and shall cooperate in attempting to resolve the issues. Without revealing the substance of any settlement discussions, the required certification shall state if the other potential party was not available or refused to discuss the matter.

L. Copyrighted Material.

The LSN bibliographic header field for access control information shall identify, in accordance with the Licensing Support Network Baseline Design Requirements, Release 1.0, Table A, that the document is copyrighted. Upon a request by a potential party for a copyrighted document that is not otherwise reasonably available to the requester, it shall be provided to the requester either by mailing a copy to the requester or electronically transmitting the document to the requester. Any potential party requesting copyrighted material shall include with its request both its regular mailing address and its e-mail address. Failure of the requester to include both addresses vitiates the request for the copyrighted material. In response to a request, no potential party shall make available a copyrighted document on the LSN.

M. Timely Completion of Pre-License Application Phase Document Discovery.

In the interest of completing pre-license application phase document discovery in a timely manner, the procedures prescribed in this case management order are without prejudice to a potential party's right to move, for good cause, to cut off another potential party's right to pursue privilege claims. A potential party should pursue its challenges to privilege claims over the pre-license application period consistent with the schedules prescribed by this order and should avoid delaying and raising such challenges at the end of the period. Except as provided in Parts IV and V, the time period in 10 C.F.R § 2.323(a) is inapplicable to privilege challenges during pre-license application phase document discovery.

N. Filings and Service via the NRC's Adjudicatory EIE System.

The PAPO Board reminds all potential parties that its initial July 9, 2004 order directed, inter alia, that all filings in the proceeding be filed and served via the NRC's adjudicatory EIE. See 69 Fed. Reg. 42,465 (July 15, 2004).

Because the agency's adjudicatory EIE system was a new electronic document exchange system at the time of the July 9, 2004 initial order, out of an abundance of caution, the PAPO Board directed all participants also to file and serve pleadings by e-mail. Use of the agency's adjudicatory EIE system over the past year has demonstrated the reliability of the system. Therefore, the previously-ordered additional e-mail filing and service of pleadings, as a backup to the EIE, is no longer necessary and that directive in the July 9, 2004 initial order is withdrawn.

All potential parties should note, however, that not all of the required steps in the various procedures set forth in this case management order require filing and service via the EIE. For example, a potential party's request for a DOE ECP program document is to be submitted by electronic mail directly to the DOE POC and should not be filed and served via the EIE. Similarly, the DOE response to such a request is submitted by electronic mail directly to the requester and should not be filed and served via the EIE. As used in this order, the term "submit" denotes an action that is not filed and served via the EIE. On the other hand, a requester's motion to compel access to such a document must be filed and served via the EIE, as does DOE's answer to such a motion. As used in this order, the term "file" denotes an action that is filed and served via the EIE.

O. Captions for Filings.

The PAPO Board also reminds all potential parties that its initial July 9, 2004 order in the pre-license application phase of this proceeding ordered, following the direction of the Commission in CLI-04-20, 60 NRC 15, 19 (2004) designating the PAPO, the manner in which

all filings shall be captioned. See 69 Fed. Reg. at 42,466-67. All potential parties shall review those instructions and comply with them.

### III. PRIVILEGE LOGS FOR PRIMARY PRIVILEGES

#### A. Privilege Logs.

Each privilege claimant that withholds a document on the grounds of a primary privilege shall prepare and file a privilege log in accordance with the terms of this case management order.

1. Each document for which the attorney-client communication privilege is claimed shall set forth, at a minimum, the data elements specified in Appendix A.

2. Each document for which the litigation work product privilege is claimed shall set forth, at a minimum, the data elements specified in Appendix B.

3. Each document for which the deliberative process privilege is claimed shall set forth, at a minimum, the data elements specified in Appendix C.

#### B. Multiple Privilege Claims.

For each document, the privilege log shall include a column or field identifying all other claims of privilege. Thereafter, except upon motion and good cause shown, the potential party shall be precluded from claiming additional privileges for a document.

C. DOE Production of Primary Privilege Logs.<sup>3</sup>

DOE shall file privilege logs, identifying and covering each document claimed to be subject to a primary privilege, as follows:

1. Within seven (7) days of its certification under 10 C.F.R. § 2.1009(b), DOE shall file partial privilege logs covering all documents for which it has already completed the necessary privilege log information.

2. Every seventh day thereafter, DOE shall file its updated partial privilege logs, supplementing the logs with such additional documents for which it has completed the necessary privilege log information.

3. Within twenty-one (21) days of its certification, DOE shall file its completed deliberative process privilege log.

4. Within thirty-five (35) days of its certification, DOE shall file its completed litigation work product privilege log.

5. Within forty-five (45) days of its certification, DOE shall file its completed attorney-client communication privilege log.

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<sup>3</sup> In its written filing, DOE proposed that it produce its privilege logs in three stages -- deliberative process, litigation work product, and attorney-client communication privileges -- respectively 30, 60, and 90 days after its certification. [DOE's] Memorandum in Response to May 11, 2005 Memorandum and Order Regarding Second Case Management Conference (May 12, 2005) at 9. During the May 18, 2005 case management conference, the Board pointed out the importance of providing all potential parties a full six-month document discovery period and indicated to the potential parties that they needed to begin working on their redactions immediately. Tr. at 319, 321, 435-37. Obviously, the same holds true for preparation of privilege logs. On this basis, assuming DOE commenced preparation of its privilege logs on May 19, 2005 (in actuality, the Board's initial order raising the privilege log issue occurred on January 24, 2005), and given the timing of this order, the prescribed schedule should give DOE ample time within which to comply.

D. Production of Primary Privilege Logs by Other Privilege Claimants.

All other privilege claimants shall file privilege logs, identifying and covering each document claimed to be subject to a primary privilege, within seven (7) days of the date prescribed by 10 C.F.R. §§ 2.1003 and 2.1009 for their initial certification.

E. Form and Format for Primary Privileges.

The privilege log entry for each document shall set forth the data elements specified in Appendices A-C. The information file shall be in data elements arrayed in a columnar format corresponding to the specific data elements identified in the Appendix corresponding to the privilege claimed. The privilege log shall be filed via NRC's EIE process (<http://www.nrc.gov/site-help/eie.html>) in PDF format as specified in the EIE Guidance Document. The privilege log submitted by a privilege claimant will be available to potential parties via the NRC's Electronic Hearing Docket (EHD) ([http://hlwehd.nrc.gov/Public\\_HLW-EHD/home.asp](http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp)).<sup>4</sup> Potential parties, such as DOE, the NRC Staff, and the State may request access to privilege logs on the Atomic Safety and Licensing Board Panel's Digital Data Management System (DDMS) from the LSNA and by scheduling DDMS training (LSNWebmaster@nrc.gov). The LSNA will make the initial determination of access to privilege logs on the DDMS.

Concurrent with any such filing, parties shall submit the electronic file used to generate the above noted privilege log to the LSNA in the data format and via transfer media as mutually agreed upon by the party and the LSNA. Proposed file format and transfer media specifications should be provided to the LSNA, at the earliest possible opportunity and, without

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<sup>4</sup>Assistance in the use of the EHD may be found at [http://hlwehd.nrc.gov/Public\\_HLW-EHD/home.asp](http://hlwehd.nrc.gov/Public_HLW-EHD/home.asp) by logging in and then clicking on the "?".

exception, prior to file creation and submission to the LSNA. The LSNA will review and make the sole determination of the technical acceptability of any such proposal.

F. General Process - Motions to Compel Challenging Primary Privilege Claims.

1. After reviewing the LSN header of a document whose text has been withheld and the privilege logs covering the document in question, a potential party that disagrees with all the claimed primary privileges and seeks to obtain a copy of the text of the document, may file a motion to compel production of the document in accordance with 10 C.F.R. §§ 2.323 and 2.705(h). A motion to compel production of a document for which multiple primary privileges are claimed by the privilege claimant must challenge all claimed primary privileges. As provided in Part II.M., the ten (10) day period specified in 10 C.F.R. § 2.323(a) shall not apply.

2. As provided in Part II.K., prior to filing a motion to compel the requester must in good faith confer with the POC of the privilege claimant. The good faith discussion shall include (a) a disclosure by the privilege claimant as to whether, during this proceeding, it has previously waived the privileges claimed for the document or otherwise disclosed all or part of it to another potential party, (b) whether the document is subject to multiple claims of privilege, which may moot a challenge concerning a particular privilege claim, and (c) whether the requester or the privilege claimant believe that the dispute raises a controlling issue of law. The certification by the requester shall specify the results of the discussion of these issues.

3. If a motion to compel challenges only whether the privilege log establishes a prima facie case for the claimed privileges, the motion shall clearly so state in the first paragraph of the motion.

4. Within seven (7) days of filing a written motion to compel, the privilege claimant (but no other potential party) may file an answer to the motion, accompanied by any supporting affidavits or other evidence. If the motion to compel, however, challenges only whether the

privilege log establishes a prima facie case for the claimed privilege, and so states, then the answer shall be strictly limited to this issue and may not be accompanied by other arguments or evidence.

5. The requester shall have no right to reply, except as permitted by the Board pursuant to 10 C.F.R. § 2.323(c).

#### IV. PRODUCTION OF REDACTED VERSIONS OF DOCUMENTS SUBJECT TO CLAIMS OF SECONDARY PRIVILEGES

##### A. Requirement to Produce Redacted Versions.

1. Each privilege claimant that withholds a document on the grounds of a secondary privilege shall make an electronic redacted version of the document available on the LSN with an appropriate bibliographic header. The header shall cross-reference the redacted document with the original bibliographic header for the document. The redacted version shall be a separate document on the LSN.

2. Unless ordered by the PAPO Board, a privilege claimant need not make an electronic redacted version of a document available on the LSN if the document is also subject to a claim of primary privilege.

3. The redacted version of a document shall provide all information that is not exempt from disclosure under the claimed secondary privileges. All non-privileged information that can be segregated from privileged information shall be provided in the redacted version. The amount of information deleted shall be fully and accurately indicated in the redacted version of the document. See 10 C.F.R. § 9.19.

B. Schedule for Producing Redacted Versions of Documents by DOE.

DOE, as a privilege claimant, shall make a redacted version of each document claimed to be subject to a secondary privilege available on the LSN, with appropriate bibliographic header, as follows:

1. Within seven (7) days of its certification under 10 C.F.R. § 2.1009(b), DOE shall make available on the LSN all documents that already have been redacted.
2. Every seventh day thereafter, DOE shall make available on the LSN all documents that have been redacted since the last submission.
3. Within thirty (30) days of its certification, DOE shall make available on the LSN a redacted version of at least one-third of the documents for which it claims a secondary privilege.
4. Within sixty (60) days of its certification, DOE shall make available on the LSN a redacted version of at least two-thirds of the documents for which it claims a secondary privilege.
5. Within ninety (90) days of its certification, DOE shall make available on the LSN a redacted version of the remaining documents for which it claims a secondary privilege.<sup>5</sup>

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<sup>5</sup> DOE estimated that redaction will be a four to five month process. [DOE's] Estimate of Schedule for Redaction of Privacy, Archeological, and Business Proprietary Documents (May 25, 2005) at 1. During the May 18, 2005 case management conference, the Board pointed out that potential parties needed to begin working on redactions immediately. Tr. at 319, 321, 435-37. Given the timing of this order, the prescribed schedule should give DOE ample time within which to comply.



C. Schedule for Producing Redacted Versions of Documents by Other Privilege Claimants.

All other privilege claimants shall make a redacted version of each document claimed to be subject to a secondary privilege available on the LSN, with an appropriate bibliographic header, within seven (7) days of the date prescribed by 10 C.F.R. §§ 2.1003 and 2.1009 for their initial certification.<sup>6</sup>

D. Process for Resolving Disputes Concerning Secondary Privilege Claims.

1. If a requester disagrees with a claim of secondary privilege for, or the extent of redaction with respect to, a document and seeks a copy of the full or greater text of the document, the requester may submit an electronic mail request to the privilege claimant POC for production of the document. The request shall specify whether the requester is challenging (a) the validity of the privileges claimed, (b) the over-redaction of the document, or (c) both.

2. The privilege claimant shall respond to the request within ten (10) days. If the requester is challenging the validity of the privilege claims, the privilege claimant shall file a privilege log that sets forth a prima facie case supporting each secondary claim of privilege for each document in question. The information needed to establish a prima facie case that a document, or a portion of a document, qualifies for a claim of a secondary privilege under the Privacy Act, as confidential business proprietary information, as compiled for law enforcement purposes, or as protected archeological information are set forth in Appendices D, E, F, and G, respectively. If the requester is challenging the extent of the redaction of the document, the privilege claimant shall submit to the requester a response, fully justifying and explaining, without revealing the privileged information, the nature, and extent of the redaction.

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<sup>6</sup> Other potential parties are expected to have substantially fewer documents than DOE. Similarly, many of these potential parties will have substantially fewer resources than DOE. All of these potential parties (other than the NRC Staff), however, have an additional 90 days (after DOE) to certify. In consideration of the foregoing factors, together with the requirement that potential parties should begin working on redactions immediately, the prescribed schedule should give other potential parties ample time within which to comply.

3. If, after reviewing the privilege log and any response, the requester disagrees with the privilege claim or the response, the requester may file a motion to compel production of the document within ten (10) days of the filing of the privilege log or response in accordance with 10 C.F.R. §§ 2.323 and 2.705(h). A motion to compel production of a document for which multiple secondary privileges are claimed by the privilege claimant must challenge each claimed secondary privilege.

4. Thereafter, the procedures set forth in Part III.F.3-5 shall govern the resolution of the dispute.

E. Form and Format for Secondary Privileges.

If a privilege log is required pursuant to Part IV.D.2, the potential party shall file a privilege log entry for each document setting forth the data elements specified in Appendices D-G. The information filed shall be in data elements arrayed in a columnar format corresponding to the specific data elements identified in the Appendix corresponding to the privilege claimed. The privilege log shall be filed via NRC's EIE process in PDF format as specified in the EIE Guidance Document. The privilege log will be available to potential parties via the NRC's EHD.

Concurrent with any such filing, parties shall submit the electronic file used to generate the above noted privilege log to the LSNA in accordance with the second paragraph of Part III.E.

V. EMPLOYEE CONCERNS PROGRAM  
AND ALLEGATION PROGRAM DOCUMENTS

A. Production of Redacted Versions.

1. DOE and the NRC shall make available on the LSN a bibliographic header for all of their ECP documents. For each document withheld on the ground that it is an ECP document, DOE or the NRC, as appropriate, shall prepare and submit to the LSNA an electronic redacted version of the document in accordance with the provisions of this case management order.

2. The redacted version of an ECP document shall not be made available on the LSN. Absent compelling circumstances, there shall be no access to any unredacted ECP document during pre-license application phase document discovery.

3. The redacted version of the ECP document shall provide all information that does not reveal the identity of the person making or reporting the concern or allegation, the identity of a person interviewed during a concern or allegation investigation, or the identity of a person against whom an allegation is made. The amount of information deleted shall be fully and accurately indicated in the redacted version of the document. See 10 C.F.R. § 9.19.

4. The bibliographic header for any document withheld on the grounds that it is an ECP document shall include in the LSN access control information field the designation "ECP." Without revealing the redacted information, the header for any such document also shall include in the LSN descriptors field a description of the concern or allegation.

B. Form and Format of Redacted Versions of ECP Documents and How Transmitted.

DOE and the NRC shall deliver bibliographic headers, and searchable PDF files consistent with the specifications provided in Section 2.0 of the EIE Guidance Document. This data shall not be filed via the EIE, rather, DOE and the NRC shall deliver such documents via courier on CD-ROMs, directly to the LSNA at the Nuclear Regulatory Commission. Appendix H provides the data specification for the XML file elements and the field size for bibliographic information to be submitted directly to the LSNA.

C. Procedures for Access to Redacted Versions.

1. A potential party seeking access to the redacted version of an ECP document shall submit an electronic mail request either to DOE or NRC, as appropriate, stating its need for such information.

2. Within ten (10) days of receiving a request for access, DOE or the NRC shall either (a) grant access to the requested redacted version of its documents subject to the Protective

Order set forth in Appendix I and upon the execution and filing by the requester of the non-disclosure declaration set forth in Appendix J, or (b) notify the requester in accordance with Part V.C.4.

3. DOE or the NRC, as appropriate, shall notify the LSNA by electronic mail at LSNWebmaster@nrc.gov of the full name (surname, first name, middle initial) of the individual who is being provided access to the ECP document, together with that person's organizational affiliation, an e-mail address, and phone number where the requester can be contacted. The LSNA shall provide the requester access to the requested document on the Atomic Safety and Licensing Board Panel's DDMS. Additionally, DOE or the NRC, as appropriate, shall identify any timeframe for providing access to the requestor where such access is not indefinite. The LSNA will notify DOE or the NRC, as appropriate, and the requester via electronic mail when document access has been enabled.

4. If DOE or the NRC denies a request for access to a redacted version of its ECP document, it shall notify the requester by electronic mail at the requester's e-mail address stating the reasons for the denial. Within ten (10) days of the denial of the request for access, the requester may file a motion to compel access to the redacted version of the document in accordance with 10 C.F.R. §§ 2.323(a) and 2.705(h). As specified in Section 2.323(b), prior to filing a motion to compel, the requester must in good faith confer or attempt to confer with, as appropriate, the POC for DOE or NRC to resolve the document request. The motion shall certify that the requester made a sincere effort to resolve the document request and state the requester's need for access to the requested document.

5. Within seven (7) days of the filing of the requester's motion to compel, DOE or NRC, as appropriate, shall file an answer to the motion, accompanied by any supporting affidavits or other evidence. The answer shall fully recite the reasons for denying the request for access to the requested document.

6. Within five (5) days of the filing of the answer to the request for access, the requester shall file a reply, limited to addressing the reasons given in the answer for denying access to the requested ECP document and rebutting any arguments in the answer regarding why the requester has no need for the requested document.

7. Upon a ruling granting the motion to compel access to the redacted ECP document subject to the terms and conditions of the Protective Order in Appendix I, the requester shall execute and file the non-disclosure declaration set forth in Appendix J. Thereafter, the PAPO Board will instruct the LSNA to provide the requester access to the requested ECP document on the Atomic Safety and Licensing Board Panel's DDMS.

8. If a requester disagrees with the extent of the redaction after obtaining access to a redacted version, the requester, within ten (10) days of being provided access to the document on the DDMS, may submit a second electronic request seeking access to greater text of the document.

9. Within ten (10) days of a second request, DOE or the NRC, as appropriate, shall respond by electronic mail. The response shall justify and explain, without revealing the redacted information, the nature, basis, and extent of the redactions.

10. If the requester continues to disagree with the extent of the redactions of the document after reviewing the response, the requester may, within ten (10) days of the response, file a motion requesting the PAPO Board to examine the extent of the redactions. The motion shall attach as an exhibit the requester's second electronic mail request and the electronic response.

## VI. DUTY TO SUPPLEMENT

### A. Periodic Supplementation.

After its initial certification, each potential party shall comply with 10 C.F.R. § 2.1003(e) by supplementing its document collection by the first of each month and certifying to the PAPO

Board that it has duly supplemented its documentary material on the LSN. At the same time, each potential party shall update and supplement any of its required privilege logs, provide redacted versions of any additional documents as required under Parts IV and V, and certify to the PAPO Board that it has done so. Except as provided in Part III.B., supplementation shall not include claiming additional privileges for documents previously listed on a privilege log.

B. Form and Format for Supplemental Privilege Logs.

Parties shall file an updated entry for each document included in a previously filed privilege log as part of each supplement. Each entry shall set forth the data elements specified in Appendices A-G. The information filed shall be in data elements arrayed in a columnar format corresponding to the specific data elements identified in the Appendix corresponding to the privilege claimed. The privilege log shall be filed via NRC's EIE process as specified in the EIE Guidance Document. The updated privilege logs will be available to potential parties via the NRC's EHD.

Concurrent with any such filing, parties shall submit the electronic file used to generate the above noted privilege log, together with a list of LSN Accession Numbers and Participant Accession Numbers in standard spreadsheet format for any items for which all privilege claims have been added or withdrawn, to the LSNA in the data format and via transfer media as mutually agreed upon by the party and the LSNA. Proposed file format and transfer media specifications should be provided to the LSNA, at the earliest possible opportunity, and without exception, prior to file creation and submission to the LSNA. The LSNA will review and make the sole determination of the technical acceptability of any such proposal.

## VII. OTHER MATTERS

### A. Status Report.

As directed at the PAPO Board's second case management conference (Tr. at 308-10), counsel for DOE shall file by the first of every month a status report stating counsel's then current, best, good faith estimate of when DOE will certify its LSN document collection and file its application to construct a high-level waste repository at Yucca Mountain, Nevada.

### B. No Tolling of Time Periods.

All potential parties should note that the pendency of a challenge to DOE's certification of its LSN document collection will not stay any other potential party's time for complying with the requirements of 10 C.F.R. §§ 2.1003(a) and 2.1009, or automatically toll the time in which potential parties have to complete discovery. See 10 C.F.R. § 2.342. See also 10 C.F.R. § 2.1015(e).

### C. Subsequent Case Management Orders.

The PAPO Board will address the procedures to be followed for documents containing safeguards information or other unclassified sensitive information in a subsequent order. If necessary, the Board also will address in a future order the procedures to be followed with regard to corrupted electronic documents and non-imageable electronic material such as databases.

### D. Controlling Issues.

If the Board concludes that a dispute presents a controlling issue of law that may have broad or general relevance to the discovery process, the Board may call for additional briefing by the requester, the privilege claimant, and other potential parties. If the Board designates the dispute as presenting a controlling issue of law, its ruling shall become the law of the case and, as appropriate, a potential party may be required to revise its LSN document collection and privilege logs.

E. Motion for Reconsideration.

Any motion for reconsideration of this order shall be filed by July 13, 2005. Answers to any such motion shall be filed by July 18, 2005.

It is so ORDERED.

The Pre-license Application  
Presiding Officer Board

*/RA/*

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Alex S. Karlin  
ADMINISTRATIVE JUDGE

*/RA/*

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
July 8, 2005



## APPENDIX A

### Attorney-Client Communication Privilege:

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. The name, job title or capacity, and employer of the author(s) of the document.
6. The name, job title or capacity, and employer of all named recipients of the document and any other persons who received or were sent (e.g., forwarded an e-mail string) a copy of the document (excluding clerical support staff).
7. The relationship between the persons listed in response to question 5 and the persons listed in response to question 6.
8. Statement of facts supporting the assertion that the primary purpose of the communication in the document was either (a) to provide legal advice, or (b) to request legal advice.
9. A statement that the document was created and subsequently handled and maintained under procedures or practices that preserved the confidentiality of the document, listing any exceptions.
10. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
11. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.

## APPENDIX B

### Litigation Work Product Privilege:

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. The name, job title or capacity, and the employer of the author(s) of the document.
6. The name, job title or capacity, and employer of all named recipients of the document and any other persons who received or were sent (e.g., forwarded an e-mail string) a copy of the document (excluding clerical support staff)
7. The relationship between the persons listed in response to question 5 and the persons listed in response to question 6.
8. Statement of facts supporting the assertion that the document was prepared in anticipation of a hearing or litigation.
9. A designation whether the document contains opinion work product (e.g., counsel's mental impressions, opinions, conclusions or legal theories) fact work product (e.g., facts obtained by counsel or at the request of counsel), or both.
10. A statement that the document was created and subsequently handled and maintained under procedures or practices that preserved the confidentiality of the document, listing any exceptions.
11. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
12. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.

## APPENDIX C

### Deliberative Process Privilege:

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. The name, job title or capacity, and the employer of the author(s) of the document.
6. The name, job title or capacity, and employer of all named recipients of the document and any other persons who received or were sent (e.g., forwarded an e-mail string) a copy of the document (excluding clerical support staff).
7. The relationship between the persons listed in response to question 5 and the persons listed in response to question 6.
8. The name, job title or capacity, and organizational position of the senior official who made the determination that the document meets the requirements of the deliberative process privilege.
9. The specific decision, potential decision, or decision-making process to which the document relates and, if a decision has been made, the date of the decision.
10. A specific explanation why the document is deliberative.
11. An affirmation that the document is not a "circulated draft", see 10 C.F.R. §§ 2.1001, 2.1006(c).
12. A specific explanation why any factual information in the document cannot be segregated.
13. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
14. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, *inter alia*, correct and consistent with the requirements of the Second Case Management Order.

## APPENDIX D

Privacy Privilege (5 U.S.C. § 552a and 10 C.F.R. § 2.390(a)(6)):<sup>1</sup>

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. Facts showing that the withheld information applies to a particular identifiable individual.
6. Facts showing that the withheld information is of such a nature that there is an expectation of privacy.
7. Facts showing that the withheld information is not well-known or widely available within the public domain.
8. Facts showing that disclosure of the information would clearly constitute an unwarranted invasion of personal privacy.<sup>2</sup>
9. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
10. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.

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<sup>1</sup> Document production in response to a FOIA request or even normal litigation usually only entails the physical delivery of hard copies of documents to a single requesting party. However, in this proceeding document production generally entails placing the document on the LSN which is available to everyone with access to the World Wide Web. Under these circumstances, the Board has adopted this appendix (essentially as agreed to by DOE, the NRC Staff and the State of Nevada), which provides protection to some information that might not otherwise qualify under a strict interpretation of the Privacy Act and FOIA.

<sup>2</sup> Information falling within one of the categories enumerated on Appendix D-1 is presumed to satisfy this element. In such case, for this element, the privilege claimant is only required to identify the category that applies to the withheld information.

## APPENDIX D-1

### Categories of Information about an Individual that Satisfy Privacy Privilege Element 8:

1. Medical condition information
2. Personal identifiers:
  - a. social security number
  - b. date of birth
  - c. place of birth
  - d. home address
  - e. home phone number
  - f. home e-mail address
  - g. passport number
  - h. driver's license and automobile tag number
3. Employee Identifiers
  - a. badge number
  - b. employee number
  - c. payroll number
4. Financial Information
  - a. credit or debit card number
  - b. bank checking or savings account number
  - c. brokerage account number
5. Foreign citizenship information
6. Employment related information
  - a. employment letters
  - b. salary and compensation for non-federal employees
  - c. security clearances
7. Future leave or travel plans.

## APPENDIX E

Business Proprietary Protection (10 C.F.R. §§ 2.390(a)(4) and 2.1003(a)(4)(ii)):

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. Facts showing that the document has been held in confidence by its owner.
6. Facts showing that the information is of a type customarily held in confidence by its owner.
7. Facts showing that the document is not available in public sources.
8. Facts showing that the public disclosure of the information is likely to cause substantial harm to the competitive position of the owner.
9. Facts showing that the alleged concern for the protection of the competitive position of the owner outweighs the right of the public to be fully apprised as to the bases for governmental action in this proceeding.
10. A statement that the document was created and subsequently handled and maintained, both by its owner and by other possessors, under procedures or practices that preserved the confidentiality of the document, listing any exceptions.
11. Facts showing that the document was not generated by federal, state, or local government.
12. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
13. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.

## APPENDIX F

### Law Enforcement Investigative Privilege (10 C.F.R. § 2.390(a)(7)):

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. Facts showing that the information was compiled for law enforcement purposes.
6. Facts showing that the information involved civil or criminal enforcement of a statute, regulation, or order within the authority of the agency asserting the privilege.
7. Facts showing that the disclosure of the information either:
  - a. could reasonably be expected to interfere with enforcement proceedings,
  - b. would deprive a person of a right to a fair trial or an impartial adjudication,
  - c. could reasonably be expected to constitute an unwarranted invasion of privacy,
  - d. could reasonably be expected to disclose the identity of a confidential source,
  - e. would disclose techniques and procedures for law enforcement investigations or prosecutions or disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
  - f. could reasonably be expected to endanger the life or physical safety of any individual.
8. A statement that the document was created and subsequently handled and maintained under procedures or practices that preserved the confidentiality of the document, listing any exceptions.
9. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
10. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.

## APPENDIX G

Archeological Privilege (16 U.S.C. § 470hh and 10 C.F.R. § 2.390(a)(3)):

1. LSN header number.
2. The date the document was created.
3. Title of the document.
4. Description of the subject matter of the document.
5. Facts showing that the information being withheld concerns the nature or location of any archeological resource for which the excavation or removal requires a permit.
6. Type of document (e.g., internal memorandum, e-mail, handwritten notes).
7. Identification of all other privileges or protections claimed for the document.

As specified in Part II.D of the Second Case Management Order, all discovery requests and responses, including privilege logs, shall be signed by the attorney of the potential party (or, if not represented by an attorney, by an otherwise authorized representative, or by the pro se individual), which signature constitutes a certification, in accordance with 10 C.F.R. § 2.705(g), that, to the best of the signer's knowledge, information, and belief, formed after reasonable inquiry, that the information on the privilege log and the claimed privilege for a document is, inter alia, correct and consistent with the requirements of the Second Case Management Order.



## APPENDIX H

### ECP Data File Specifications:

XML Tag	Format	Data Type	Data Type Size	Description
AccessionNumber	Any	Char	11	
DocumentDate	mm/dd/yyyy	datetime		
EstimatedPageCount		varchar	3	Estimated number of pages in the document.
Title		varchar	255	Document Title
Comment		varchar	255	Optional additional comments to describe a document.
Authors		varchar	255	Designates the author of a pre-filed document.
Author Org		varchar	255	
Addressees		varchar	255	
Addressee Org		varchar	255	
DocumentType	Default Value: "ECP Document"	varchar	90	<b><i>This value must be present and set to the default value</i></b>
DocumentDateReceived	mm/dd/yyyy	datetime		Submission Date
LSNNumber	For Example: DEN001249002	varchar	12	Accession Number assigned by the LSN system to uniquely identify each document within LSN.
HearingPartyExhibitNumber	<HearingPartyIdentifier>##### where ##### is a six character zero filled number. For Example: DOE000001 DOE000201	varchar	50	Exhibit number assigned by the parties for each document they submit.
HearingPartyIdentifier	DOE	varchar	10	Abbreviated description of a party name. Valid entries are currently DOE or NEV.

The following is an example of a properly formatted xml data record reflecting the bibliographic data specification provided above:

```
<?xml version="1.0" encoding="UTF-8"?>
<Headers>
  <Header>
    <AccessionNumber>8963-763-98</AccessionNumber>
    <DocumentDate>06/25/2005</DocumentDate>
    <EstimatedPageCount>38</EstimatedPageCount>
    <Title><![CDATA[ Document Title ]]></Title>
    <Comment/>
    <Authors>
```

```
<Author Org="NRC/NRR/DIPM/IIPB">
  <![CDATA[Spector A K]]></Author>
</Authors>
<Addressees>
  <Addressee Org="">
</Addressee>
</Addressees>
<DocumentTypes>
  <DocumentType><![CDATA[Transcript]]></DocumentType>
</DocumentTypes>
<DocumentDateReceived />
<LSNNumber>DEN001249002</LSNNumber>
<HearingPartyExhibitNumber>DOE000001</HearingPartyExhibitNumber>
<HearingPartyIdentifier>DOE</HearingPartyIdentifier>
</Header>
</Headers>
```

Text-searchable electronic versions of each document shall be submitted to the LSNA via CD-ROM in Portable Document Format (PDF) format as specified in "Guidance for Submission of Electronic Docket Materials Under 10 CFR Part 2, Subpart J" (<http://www.nrc.gov/reading-rm/ehd/ml041560341.pdf>) with one exception regarding the file naming convention. The PDF document and its associated XML file must be in the following format: "ML801" followed by a zero-filled six-digit sequential number.

For example:

ML801000001.pdf & ML801000001.xml  
ML801000002.pdf & ML801000002.xml

File names that are not in this format will not be added to the document collection.

APPENDIX I

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

July 8, 2005

PROTECTIVE ORDER  
(Regarding ECP Documents)

This Protective Order governs the disclosure and use of redacted versions of employee concerns program (ECP) documents pursuant to Part V.C. of the Second Case Management Order issued on July 8, 2005.<sup>1</sup> Notwithstanding any order terminating this pre-license application phase proceeding, this order shall remain in effect until specifically modified or terminated by the Pre-License Application Presiding Officer (PAPO) Board, a subsequent

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<sup>1</sup>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, or acquired by, the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). 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 apply to NRC employees, contractors, or consultants with respect to documents containing protected material that NRC receives solely by virtue of Part V.C. of the Second Case Management Order.

presiding officer in this proceeding, or the Commission.

A. Definitions. Except where otherwise expressly defined in this order, all terms used herein shall have the same meaning and definition as in the Second Case Management Order.

1. The term "Protected ECP Document" means an ECP document that DOE or NRC has agreed to release, or has been ordered released, to a receiver pursuant to Part V.C. of the Second Case Management Order, including any information contained in or obtained from the protected ECP document, notes about the protected ECP document, and copies of the protected ECP document. The term "protected ECP document" does not include any material that a participant obtains through any other lawful means outside of this Protective Order.

2. The term "Receiver" means a potential party to whom the DOE or the NRC has agreed to grant access, or to whom the Board has granted access, to an ECP document pursuant to this order and to Part V.C. of the Second Case Management Order.

B. The participant producing a protected ECP document shall mark it on each electronic page as "PROTECTED ECP DOCUMENT." Individuals with access to protected ECP documents pursuant to this order may make copies of and take notes on the protected ECP documents, but such copies and notes become protected ECP documents and must be marked on each page as "PROTECTED ECP DOCUMENT."

C. Only receivers and counsel, consultants, assistants, and others representing a receiver,

who have executed the attached non-disclosure declaration may have access to protected ECP documents.<sup>2</sup> After receiving a protected ECP document, a receiver may provide it to its counsel, consultants, assistants, and other representatives authorized to receive protected ECP documents under this Protective Order. Protected ECP documents shall not be used except as necessary for the conduct of this proceeding, nor shall they 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.

D. Receivers, and counsel, consultants, assistants, and others representing a receiver, shall maintain the confidentiality of protected ECP documents as required in the attached non-disclosure declaration, the terms of which are hereby incorporated in this order.

E. Receivers, and counsel, consultants, assistants, and others representing a receiver, who receive any protected ECP documents shall take all reasonable precautions necessary to ensure that they are not distributed to unauthorized persons. Reasonable precautions include maintaining all protected ECP documents in a secure place and limiting access to that material to persons authorized to receive such material.<sup>3</sup> Any person who receives protected ECP

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<sup>2</sup>In the event a receiver wishes to keep the identity of the declarant from other potential parties, a copy of each such executed non-disclosure declaration will be filed only with the PAPO Board, with electronic information exchange (EIE) service notice only to the PAPO Board. To accomplish such restricted filing and service via the EIE, a receiver should follow the instructions set forth in the PAPO Board's July 9, 2004 order. See 69 Fed. Reg. 42,465, 42,468 (July 15, 2004). At the time of the restricted filing of the non-disclosure declarations with the PAPO Board, the receiver should also file a notice with regular service via the EIE setting forth the number of such confidential declarations filed. As an added precaution, the receiver making such a restricted filing should not list any sensitive information in the "Document Title" field of the HLW Submittal Form.

<sup>3</sup>Reasonable precautions also 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.

documents shall take all reasonable precautions to ensure that persons under their supervision or control comply with this Protective Order.

F. Protected ECP documents shall remain available to each receiver 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 ECP documents is concluded and no longer subject to judicial review. Absent further order, the receiver shall, within fifteen (15) days of the later date described above, return the protected ECP documents (excluding notes) 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 ECP documents may be retained, if they are maintained in a secure place.<sup>4</sup> Within such time period, each receiver shall also submit to the DOE or NRC, as appropriate, an affidavit stating that, to the best of its knowledge, all protected ECP documents and all notes of protected ECP documents have been returned or have been destroyed or, if retained, will be maintained in accordance with the above. To the extent protected ECP documents are not returned or destroyed, they shall remain subject to the provisions of this Protective Order.

G. If a receiver that has received protected ECP documents under this order no longer qualifies as a receiver or potential party, or if an individual serving as a counsel, consultant, assistant, or other representative of a receiver no longer qualifies as such, then, within fifteen (15) days, that receiver or individual shall return or destroy protected ECP documents in accordance with Paragraph F and submit an affidavit that it has done so.

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<sup>4</sup>Destruction of protected material shall include the destruction of electronic storage media (e.g., computer diskette or compact disc) 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.

H. All copies of all documents filed in this proceeding that disclose information contained in protected ECP documents shall be filed and served in accordance with procedures set out by the PAPO Board, a subsequent presiding officer in this proceeding, or the Commission.

I. If a receiver or counsel, consultant, assistant, or any other individual representing a receiver has reason to suspect that a protected ECP document may have been lost or misplaced or that a protected ECP document has otherwise become available to unauthorized persons during the pendency of this proceeding, then such person shall notify this Board, or a subsequent presiding officer in this proceeding, promptly of those suspicions and the reasons for them.

J. Each receiver shall keep a record that identifies all protected ECP documents that it (and its counsel, consultants, assistants, and other representatives) receives. On January 6, 2006, and annually thereafter, for as long as the receiver possesses protected ECP documents, each receiver shall file a list of the protected ECP documents that it has received under this order, including the Licensing Support Network Accession number of each document, and indicate the maximum number of persons given access to such protected ECP documents during the preceding year. The accounting shall be filed and served via the EIE.

K. Any violation of the terms of this Protective Order or a non-disclosure declaration executed in furtherance of this order may result in the imposition of sanctions as this Board, a subsequent 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 receiver; 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 receiver to participate in this proceeding; dismissal of one or more of a receiver's contentions; or dismissal of the receiver from the proceeding. 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.

L. This Board, a subsequent 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 potential parties shall be afforded notice and an opportunity to be heard before any such alteration or amendment comes into effect.

It is so ORDERED.

For the Pre-License Application  
Presiding Officer Board

*/RA/*

---

Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
July 8, 2005



APPENDIX J

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby declare my understanding that access to protected ECP documents is provided to me pursuant to the terms and restrictions of the Protective Order, dated July 8, 2005, that I have been given a copy of and have read this Protective Order; and that I agree to be bound by it. I understand that the contents of any protected ECP document, as defined in that order, shall not be disclosed to anyone other than in accordance with that order. I acknowledge that a violation of this declaration or the Protective Order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Pre-License Application Presiding Officer (PAPO) Board, a subsequent presiding officer in this proceeding, or the Commission may deem to be appropriate. Such sanctions may include, but are not limited to, refusal to consider a filing by the offending receiver; 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 receiver

to participate in this proceeding; dismissal of one or more of a receiver's contentions; or dismissal of the participant from the proceeding. 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.

WHEREFORE, I do solemnly agree to protect such protected ECP documents as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed): \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Subscribed to and sworn or affirmed before me this \_\_\_\_ day of \_\_\_\_\_, 200\_.

\_\_\_\_\_  
NOTARY PUBLIC

My commission expires on: \_\_\_\_\_

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB SECOND CASE MANAGEMENT ORDER (Pre-License Application Phase Document Discovery and Dispute Resolution) have 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](mailto:PAPO@nrc.gov)  
**Alex S. Karlin\***  
**Administrative Judge**  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Alan S. Rosenthal\***  
**Administrative Judge**  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov) & [rsnthl@comcast.net](mailto:rsnthl@comcast.net)  
**G. Paul Bollwerk, III\***  
**Administrative Judge**  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Anthony C. Eitrem, Esq.\***  
**Chief Counsel**  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**James M. Cutchin\***  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Bethany L. Engel\***  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Jonathan Rund\***  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Susan Stevenson-Popp\***  
E-mail: [PAPO@nrc.gov](mailto:PAPO@nrc.gov)  
**Daniel J. Graser\***  
**LSN Administrator**  
E-mail: [djg2@nrc.gov](mailto:djg2@nrc.gov)  
**ASLBP HLW Adjudication**  
E-mail: [ASLBP\\_HLW\\_Adjudication@nrc.gov](mailto: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](mailto:hearingdocket@nrc.gov)  
**Andrew L. Bates\***  
E-mail: [alb@nrc.gov](mailto:alb@nrc.gov)  
**Adria T. Byrdsong\***  
E-mail: [atb1@nrc.gov](mailto:atb1@nrc.gov)  
**Emile L. Julian, Esq.\***  
E-mail: [els@nrc.gov](mailto:els@nrc.gov)  
**Evangeline S. Ngbea\***  
E-mail: [esn@nrc.gov](mailto:esn@nrc.gov)  
**Rebecca L. Giitter\***  
E-mail: [rll@nrc.gov](mailto:rll@nrc.gov)

**U.S. Nuclear Regulatory Commission**  
**Office of Congressional Affairs**  
Mail Stop -O-17A3  
**Thomas R. Combs\***  
E-mail: [trc@nrc.gov](mailto: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](mailto:kdc@nrc.gov)  
**Shelly D. Cole, Esq.\***  
E-mail: [sdcl@nrc.gov](mailto:sdcl@nrc.gov)  
**David A. Cummings, Esq.\***  
E-mail: [dac3@nrc.gov](mailto:dac3@nrc.gov)

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(Pre-License Application Phase Document  
Discovery and Dispute Resolution)

**Gwendolyn D. Hawkins\***

E-mail: [gxh2@nrc.gov](mailto:gxh2@nrc.gov)

**Janice E. Moore, Esq.\***

E-mail: [jem@nrc.gov](mailto:jem@nrc.gov)

**Trip Rothschild, Esq.**

E-mail: [tbr@nrc.gov](mailto:tbr@nrc.gov)

**Tyson R. Smith, Esq.\***

E-mail: [trs1@nrc.gov](mailto:trs1@nrc.gov)

**Mitzi A. Young, Esq.\***

E-mail: [may@nrc.gov](mailto:may@nrc.gov)

**Marian L. Zobler, Esq.\***

E-mail: [mlz@nrc.gov](mailto:mlz@nrc.gov)

**Harry E. Wedewer, Esq.\***

E-mail: [hew@nrc.gov](mailto:hew@nrc.gov)

**OGCMailCenter\***

E-mail: [OGCMailCenter@nrc.gov](mailto: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](mailto:jedwards@hunton.com)

**Kelly L. Faglioni, Esq.\***

E-mail: [kfaglioni@hunton.com](mailto:kfaglioni@hunton.com)

**Melissa Grier\***

E-mail: [mgrier@hunton.com](mailto:mgrier@hunton.com)

**Donald P. Irwin, Esq.\***

E-mail: [dirwin@hunton.com](mailto:dirwin@hunton.com)

**Stephanie Meharg\***

E-mail: [smeharg@hunton.com](mailto:smeharg@hunton.com)

**Edward P. Noonan, Esq.\***

E-mail: [enoonan@hunton.com](mailto:enoonan@hunton.com)

**Audrey B. Rusteau\***

E-mail: [arusteau@hunton.com](mailto:arusteau@hunton.com)

**Michael R. Shebelskie, Esq.\***

E-mail: [mshebelskie@hunton.com](mailto:mshebelskie@hunton.com)

**Christopher A. Updike\***

E-mail: [cupdike@hunton.com](mailto:cupdike@hunton.com)

**Belinda A. Wright\***

E-mail: [bwright@hunton.com](mailto: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](mailto:rcynkar@nuclearlawyer.com)

**Joseph R. Egan, Esq.\***E-mail:

[eganpc@aol.com](mailto:eganpc@aol.com)

**Charles J. Fitzpatrick, Esq.\***

E-mail: [cfitzpatrick@nuclearlawyer.com](mailto:cfitzpatrick@nuclearlawyer.com)

**Jack Kewley\***

E-mail: [jkewley@nuclearlawyer.com](mailto:jkewley@nuclearlawyer.com)

**Martin G. Malsch, Esq.\***

E-mail: [mmalsch@nuclearlawyer.com](mailto:mmalsch@nuclearlawyer.com)

**Susan Montesi\***

E-mail: [smontesi@nuclearlawyer.com](mailto:smontesi@nuclearlawyer.com)

**Nakita Toliver\***

E-mail: [ntoliver@nuclearlawyer.com](mailto: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](mailto: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@ymp.gov](mailto:john_arthur@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](mailto:harry_leake@ymp.gov)

**Mark Van Der Puy**

E-mail: [mark\\_vanderpuy@ymp.gov](mailto: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](mailto:george.hellstrom@ymp.gov)

**Yucca Mountain Project, Licensing Group,**

**DOE/BSC**

**Jeffrey Kriner\***

E-mail: [jeffrey\\_kriner@ymp.gov](mailto:jeffrey_kriner@ymp.gov)

**Nuclear Waste Technical Review Board**

**Victoria Reich**

E-mail: [reich@nwtrb.gov](mailto:reich@nwtrb.gov)

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(Pre-License Application Phase Document  
Discovery and Dispute Resolution)

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

**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](mailto:ssteve@nuc.state.nv.us)

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

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

**Churchill County (NV)**  
155 North Taylor Street, Suite 182  
Fallon, NV 89406  
**Alan Kall**  
E-mail: [comptroller@churchillcounty.org](mailto: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](mailto:iln@co.clark.nv.us)  
**Engelbrecht von Tiesenhausen**  
E-mail: [evt@co.clark.nv.us](mailto: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: [ecmarshall@eurekanv.org](mailto: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](mailto:bigboff@aol.com)

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

**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](mailto:mineral@oem.hawthorne.nv.us)

**Nye County (NV) Department of Natural  
Resources & Federal Facilities**  
1210 E. Basin Road, Suite 6  
Pahrump, NV 89048  
**David Swanson**  
E-mail: [dswanson@nyecounty.net](mailto:dswanson@nyecounty.net)

**Nye County (NV) Regulatory/Licensing Adv.**  
18160 Cottonwood Rd. #265  
Sunriver, OR 97707  
**Malachy Murphy**  
E-mail: [mrmurphy@cmc.net](mailto: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](mailto: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](mailto:aremus@gnet.com)  
**Abby Johnson**  
617 Terrace St.  
Carson City, NV 89703  
E-mail: [abbyj@gbis.com](mailto: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](mailto:robert_holden@ncai.org)

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(Pre-License Application Phase Document  
Discovery and Dispute Resolution)

**Public Citizen**

215 Pennsylvania Ave, SE  
Washington, DC 20003

**Michele Boyd, Legislative Representative\***  
**Critical Mass Energy and Environment**

E-mail: [mboyd@citizen.org](mailto:mboyd@citizen.org)

**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](mailto:mab@nei.org)

**Robert W. Bishop, Esq.**

E-mail: [rwb@nei.org](mailto:rwb@nei.org)

**Ellen C. Ginsberg, Esq.**

E-mail: [ecg@nei.org](mailto:ecg@nei.org)

**Rod McCullum**

E-mail: [rxm@nei.org](mailto:rxm@nei.org)

**Steven P. Kraft**

E-mail: [spk@nei.org](mailto:spk@nei.org)

**White Pine County**

**City of Caliente**

**Lincoln County**

**Jason Pitts\***

E-mail: [idt@idtservices.com](mailto:idt@idtservices.com)

**U.S. Nuclear Regulatory Commission  
Office of Nuclear Material Safety and  
Safeguards**

Mail Stop - T-7 F3

Washington, DC 20555-0001

**Jeffrey A. Ciocco\***

Email: [jac3@nrc.gov](mailto:jac3@nrc.gov)

**Lander County Nuclear Waste Oversight  
Program**

315 South Humboldt St.

Battle Mountain, NV 89820

**Deborah Teske, \* Administrator**

E-mail: [dteske@landercounty.com](mailto:dteske@landercounty.com)

**Lander, Churchill and Mineral County**

3888 Snow Valley Dr.

Reno, NV 89506

**Loren Pitchford, \* LNS Administrator for  
Lander**

E-mail: [qb4@charter.net](mailto:qb4@charter.net)

**Talisman International, LLC**

**Patricia Larimore\***

1000 Potomac St., NW

Suite 300

Washington, D.C. 20007

E-mail: [plarimore@talisman-intl.com](mailto:plarimore@talisman-intl.com)

**U.S. Nuclear Regulatory Commission  
Office of Public Affairs**

Mail Stop - O-2A13

**Sue F. Gagner\***

E-mail: [sfg@nrc.gov](mailto:sfg@nrc.gov)

**Ross, Dixon & Bell**

2001 K Street N.W.

Washington D.C. 20006-1040

**William H. Briggs**

E-mail: [wbriggs@rdblaw.com](mailto:wbriggs@rdblaw.com)

[Original signed by Rebecca L. Giitter]

---

Office of the Secretary of the Commission

Dated at Rockville, Maryland  
this 8<sup>th</sup> day of July 2005