

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

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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 16, 2007

DISSENT

(Regarding Additional Safeguards Questions and
the Proposed Third Case Management Order)

On July 6, 2007, the majority of the Pre-License Application Presiding Officer (PAPO) Board ordered certain of the potential parties in this proceeding to answer approximately 65 additional questions concerning what it refers to as “sensitive unclassified information” (SUI) and, more particularly, “safeguards information” (SGI) claimed to be privileged under the Atomic Energy Act Section 147.¹ Order (Questions to the NRC Staff and other Potential Parties Regarding Access to Safeguards Information in the HLW Proceeding) (July 6, 2007) (unpublished) (Order Posing 65 Additional SGI Questions). On July 10, 2007, the majority of the PAPO Board issued another order, circulating for comment its proposed third case management order governing the withholding, production, redaction, protection, and dispute resolution procedures for three categories of SUI. Order (July 10, 2007) (unpublished) (Proposed TCMO). The three categories of SUI covered by the Proposed TCMO are (a) “Naval Nuclear Propulsion

¹ Although the order included approximately 65 additional questions, including subparts, they were directed at different potential parties and therefore no person is required to answer all 65 questions.

Information” (NNPI), (b) Unclassified Controlled Nuclear Information” (UCNI), and (c) “Official Use Only Information” (OUOI).

I respectfully dissent from the Order Posing 65 Additional SGI Questions and the Proposed TCMO. First, I believe it is unwise for the PAPO Board to decide such important and difficult legal issues regarding the withholding of government documents from the public and the parties in the high level waste (HLW) licensing proceeding in the absence of a concrete case or controversy litigated by representative adversarial parties. In this regard, I believe that further pursuit of these numerous speculative issues, given the very small number of SUI documents and the absence of any real dispute, is a disproportionate and futile allocation of time and resources. Second, I believe that, in the absence of an actual or imminent dispute, the PAPO Board lacks jurisdiction to ask more SUI questions or issue the Proposed TCMO. The following is a brief explanation of these two concerns.

A. Avoidance of Premature Adjudication

In my opinion, the multiple legal issues associated with the attempts by the Federal government to withhold SGI, NNPI, UCNI, and OUOI from the public in the HLW proceeding concerning Yucca Mountain are sufficiently complex, unusual, and important to require that the PAPO Board decide them only in the context of a concrete case or controversy. In a concrete controversy, there would be a specific factual context for our decision, rather than asking the Board to speculate and anticipate all of the possible issues. Likewise, a specific disagreement over specific documents claimed to be SUI would involve real adversarial parties motivated to brief the legal issues in a way that would substantially assist the Board in making better and more focused decisions. The legal doctrine of “ripeness” captures some of these concerns:

[The] basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over

administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs. v. Gardner, 387 U.S. 136, 148-49 (1967).

Although the Board started its pursuit of SUI issues with sound intentions, it is clear to me that we have now become “entangled” in remote and “abstract disagreements.” The issues are “remote” because, inter alia, the number of SUI documents (although originally thought to be substantial) is now estimated to be infinitesimal. For example, although there are over 3 million documents already on the Licensing Support Network, at this point there are only 21 SGI documents involved in the entire HLW proceeding. Tr. at 1200. Likewise, there are only 8 UCNI documents. Tr. at 1119. Even if these numbers later increase, they are still minuscule. The current estimate of the number of NNPI documents is a bit larger – 744 – but has dropped from 4,600 (in 2005) to 744 today. Tr. at 692, 1089. The estimated number of OUOI documents is 500. Tr. 693, 850, 1107. No one is currently pursuing those documents. Indeed, given that the parties have already committed to make redacted versions of all of these SUI documents available to any potential party, it is highly questionable whether any dispute will ever arise concerning SUI.

Meanwhile, the Board has substantially increased its inquiries concerning SUI, posing hundreds of more and more detailed questions. The Board has spent two years and held six case management conferences (including conference calls) discussing and pursuing SUI.² Two of these lengthy conferences were devoted solely to SUI and involved probably hundreds of oral questions by the Board.³ At our request, the Commission appointed a special SGI expert to

² SUI was discussed at the case management conferences (including telephone conferences) of May 4, 2005, May 18, 2005, October 13, 2005, October 19, 2005, March 5, 2007, and May 23, 2007. See, e.g., Tr. at 290, 313, 688, 1068.

³ These two conferences were held on October 13, 2005 and May 23, 2007. Tr. at 670-922; 1052-1213.

assist the PAPO Board.⁴ Prior to July 2007, the PAPO Board issued six orders addressing SUI.⁵ Prior to the Order Posing 65 Additional SGI Questions, the Board had posed over 160 written questions concerning SUI.⁶ In response, the U.S. Department of Energy (DOE), the State of Nevada, and the NRC Staff, among others, spent substantial time and effort attempting to develop a SUI case management order and answering our questions related to SUI.⁷ In my opinion, we have reached the point of disproportionate effort and diminishing returns.⁸

⁴ [Commission] Order (September 15, 2005) (unpublished).

⁵ See Memorandum and Order (Scheduling Second Case Management Conference and Issues to be Briefed) (May 11, 2005) (unpublished); Request to the Commission for the Appointment of Advisors on Safeguards Procedures and Information (Sept. 2, 2005) (unpublished); Memorandum and Order (Matters to be Addressed at September 29, 2005 Case Management Conference) (Sept. 19, 2005) (unpublished); Order (Schedule for Filings) (Oct. 25, 2005) (unpublished); Order (Feb. 9, 2007) (unpublished) and Order (Scheduling Case Management Conference) (Apr. 19, 2007) (unpublished).

⁶ These questions appeared in our orders of September 19, 2005 (74 questions, including subparts) and April 19, 2007 (88 questions, including subparts).

⁷ DOE, the State of Nevada, and the NRC Staff submitted proposed case management orders concerning SUI on July 8, 2005 and December 19, 2005. See The Department of Energy's Submission of a Joint Proposed Order Regarding Retention Procedures for Documentary Material (July 8, 2005); Joint Proposed Third Case Management Order for Sensitive Unclassified Information (Dec. 19, 2005).

⁸ The quest of the PAPO Board to resolve SUI can be summarized as follows. On May 11, 2005, the Board instructed DOE, the NRC Staff, the State of Nevada, and any other interested potential party to submit a joint proposed protective order concerning information that DOE and NRC claimed to be especially sensitive (SGI, UCNI, OUO, and NNPI). Memorandum and Order (Scheduling Second Case Management Conference and Issues to be Briefed) (May 11, 2005) (unpublished). On July 8, 2005, DOE, the NRC Staff, and the State of Nevada submitted such a proposed joint protective order. The Department of Energy's Submission of a Joint Proposed Order Regarding Retention Procedures for Documentary Material (July 8, 2005). On September 2, 2005, we requested that the Commission appoint an SGI expert to serve as an advisor to the Board. See Request to the Commission for the Appointment of Advisors on Safeguards Procedures and Information (Sept. 2, 2005) (unpublished). The SGI advisor was appointed on September 15, 2005. On September 19, 2005, the Board issued a memorandum and order directing the DOE, NRC, and the State to answer approximately 74 questions (including subparts) regarding SUI. Memorandum and Order (Matters to be Addressed at September 29, 2005 Case Management Conference) (Sept. 19, 2005) (unpublished). On October 13, 2005, the Board held a day-long case management conference to address the handling of SUI, where we asked numerous additional questions. See Tr. at

Our numerous questions reveal that “SUI” involves many complex, difficult, and unfamiliar practical and legal issues, making it particularly unsuitable for premature adjudication. The situation is not improved by the fact that “the Staff’s answers, such as they were, lacked precision and provided little useful information or reason to be encouraged that the process could be expedited.” Order Posing 65 Additional SGI Questions at 2. But the same could be said of the answers by DOE (and the associated representatives of the Naval Nuclear Propulsion Program) who, for example, could not provide us with a definition of NNPI that would allow the Board or the public to distinguish between documents that are claimed to be NNPI and those that are not. Tr. at 1071. In essence, DOE and the Navy take the position that the

670-922. On October 25, 2005, the Board ordered the DOE, the NRC Staff, and the State to draft a proposed third case management order concerning SUI and to submit it in December. Order (Schedule for Filings) (Oc. 25, 2005) (unpublished). Pursuant to that order, DOE, NRC, and the State developed a draft SUI order, circulated it to the public, and held several conference calls and/or meetings. Joint Proposed Third Case Management Order for Sensitive Unclassified Information (Dec. 19, 2005) at 1-2. On December 19, 2005, DOE, the NRC Staff, and the State submitted a proposed third case management order covering SUI. *Id.* In the meantime, DOE advised the Board that its plans to certify its LSN collection and to submit its application were substantially delayed and uncertain. *See* The Department of Energy’s Eleventh Monthly Status Report Regarding LSN Certification and License Application Submittal (Apr. 3, 2006). Accordingly, the Board put the proposed TCMO and SUI issue on hold. Meanwhile, on October 31, 2006, the Commission proposed major revisions to its regulations governing SGI. 71 Fed. Reg. 64,004-68 (Oct. 31, 2007). Then, on February 6, 2007, the Board scheduled the first case management conference since 2005, to address, *inter alia*, the proposed TCMO and SUI issues. *See* Order (Feb. 6, 2007) (unpublished); Order (Feb. 9, 2007) (unpublished). On March 5, 2007, the Board held a case management conference covering, *inter alia*, SUI and the proposed TCMO. Tr. at 946-1051. On April 19, 2007, the Board issued another order scheduling a case management conference to cover SUI and the proposed TCMO Order (Scheduling Case Management Conference) (Apr. 19, 2007) (unpublished). In this order, the Board posed approximately 30 questions (including subparts) to be answered in writing and 49 questions (including subparts) to be answered orally. *Id.* at 4-13. Pursuant to our order, DOE, the NRC Staff, and the State of Nevada, respectively, filed written answers to our questions. [DOE] Response to the [PAPO] Board’s April 19, 2007 Order (May 16, 2007); NRC Staff Answers to April 19, 2007 Order Regarding Access to Safeguards Information (May 16, 2007); State of Nevada’s Memorandum Providing Answers to Questions in the PAPO’s April 19 Order (May 16, 2007). On May 23, 2007, the Board held another long case management conference where we probed DOE, the NRC Staff, and the State of Nevada concerning SUI issues. Tr. at 1052-1213. Now the Board has asked an additional 65 questions, issued a proposed TCMO covering some SUI issues, and is contemplating a separate case management order regarding SGI.

definition is irrelevant, because NNPI is whatever they say it is. Tr. at 1075-76. When the Board asked DOE and the Navy to provide a specific citation supporting its definition of NNPI, they referred us to hundreds of pages of regulations. Tr. at 1105.

Complexity and confusion are increased by the fact that DOE and NRC have asked the Board to use a category they call OUOI, even though it is an artificial construct that has no legal basis or foundation. Joint Proposed Third Case Management Order for Sensitive Unclassified Information (Dec. 19, 2005) at 1. SGI, UCNI, and NNPI at least have their own statutory basis – 42 U.S.C. §§ 2167 and 2168, and 10 U.S.C. § 130, respectively. But, there is no statute, law, or regulation that creates or establishes a privileged or exempt category for “Official Use Only Information.” Instead, DOE and NRC use “OUO” as a label to cover a miscellany of exemptions under the Freedom of Information Act (FOIA). 5 U.S.C. § 552(b). Unfortunately, the majority adopts this broad and vague concept of OUOI, defining it as follows:

‘Official Use Only Information’ . . . is DOE or NRC information to which FOIA disclosure obligations do not apply because, under FOIA Exemption 2, the information is related solely to the internal personnel rules and practices of an agency, or under FOIA Exemption 3, the information is specifically exempted from disclosure by statute. See 5 U.S.C. § 552(b)(2), (3).

Proposed TCMO at 2.

Although DOE and NRC may, for administrative purposes, cobble together whatever FOIA exemptions they wish, and invent whatever labels they desire, I believe that this Board, should focus solely on exemptions with a specific statutory and legal basis. The OUOI concept confuses the legal situation. For example, when “OUOI” incorporates any information exempted by FOIA Exemption 3, it creates an open ended category, because Exemption 3 itself covers a vast amount of material exempted by various other Federal statutes.⁹ It is much better simply to

⁹ FOIA Exemption 3 covers information “specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be

examine each claim of privilege or exemption based on the specific statutory and regulatory elements that define it. In addition, including OUOI in the same case management order as SGI, UCNI, and NNPI, inappropriately creates the aura that OUOI somehow enjoys the same higher and greater legal deference and status that DOE and NRC claim for SGI, UCNI and NNPI. OUOI, if the concept is to be used at all, belongs in the Second Case Management Order, as a mundane FOIA exemption, such as attorney-client communications and deliberative process privileges. Indeed the recently revised SCMO already covers some OUOI/FOIA Exemption 3 material (e.g., archeological privilege documents). See Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 6, 2007) at App. G [SCMO]. When a government agency is withholding documents from the public, I prefer to ground my analysis on concrete and legally-founded bases (e.g., FOIA Exemption 2 or a specific statute incorporated under FOIA Exemption 3), rather than the withholder's invented category - OUOI - that has no legal meaning.

The complexity and difficulty with dealing with SUI in the abstract are further demonstrated by the fact that, in stark contrast to the Revised SCMO, the privilege log format in the Proposed TCMO is content-less. The Revised SCMO includes privilege log formats for seven types of legal privileges and exclusions from FOIA, and in each case the privilege log lists the specific sub-elements that are deemed to meet the regulatory requirement to provide "sufficient information for assessing the claim of privilege or protected status of the document." 10 C.F.R. § 2.336(a)(3) and (b)(5). See Revised SCMO at App. A to G. The majority has abandoned this wise approach in the Proposed TCMO, because it simply does not know (and no one has proffered) the elements sufficient for "assessing the claim" that a document is UCNI, OUOI and/or NNPI.

withheld." 5 U.S.C. §552(b)(3). Under this definition, UCNI and SGI are Exemption 3 material and thus a subset of OUOI.

The difficulty of addressing SUI now is compounded by the fact that the law governing SGI is in flux. During the 3 years since the PAPO Board was created, the NRC has proposed two sets of significant amendments to its SGI regulations. See 70 Fed. Reg. 7,196 (Feb. 11, 2005); 71 Fed. Reg. 64,004 (Oct. 31, 2007). In addition, Congress passed the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594, which modified the SGI criminal background check process. See 42 U.S.C. § 2169. We do not know what the final regulations will specify, or when they will be issued. Given that these impending changes in law will presumably disrupt and/or displace any PAPO case management order on the subject, it seems prudent not to attempt to resolve these issues now.

My final reason for concluding that the Board must defer decisions relating to SUI until there is a concrete case or controversy is that no one is representing the non-governmental potential parties in this discussion. The major players in the drafting and analysis of SUI issues have been three large governmental agencies that clearly do not represent the public or the “normal” potential parties who may seek SGI, UCNI, OUOI, or NNPI. DOE and the NRC Staff are the major federal governmental entities that will be withholding documents based on their claims of SUI and thus they can not represent the interests of persons who might challenge such claims. The third entity that has been active in the SUI drafting and discussions is the State of Nevada. But the State is a large governmental entity, is relatively well funded, and has a special statutory and regulatory status in the HLW proceeding. The State presumably will have little or no problem in dealing with issues such as trustworthiness, reliability, information security protocols (e.g., a safe), need-to-know, the \$172.50 fee for each background check and/or in satisfying the numerous other hurdles (and associated delays) built into the DOE and NRC proposals concerning SUI. While it is not the fault of DOE, the NRC Staff, the State of Nevada or this Board, the reality seems to be that there has been virtually no meaningful participation in the SUI proposals by anyone else. This may be because, after 20+ years, the public and

various local governmental and private entities remain skeptical that DOE will ever file an application for the Yucca Mountain HLW geologic repository and they wish to conserve their resources until it is clear that the application will be filed. Whatever the reason, given the lack of fair representation of the general public's interests, I conclude that it is not prudent for this Board to address SUI issues now, especially if it would bar later litigants from raising serious and legitimate issues if and when a concrete case or controversy arises. Since it is not necessary for us to address SUI now, it is necessary that we not address SUI now.¹⁰

B. Lack of Jurisdiction

My second basis for dissenting is that, in the absence of an actual or imminent dispute, the PAPO Board lacks jurisdiction to issue the Order Posing 65 Additional Questions and the Proposed TCMO. Our jurisdiction is limited and controlled by the Commission, which specified at the outset that our authority is solely for the purpose of ruling on disputes.

Pursuant to 10 C.F.R. § 2.1010(e), the PAPO possesses all the general powers specified in § 2.319 and § 2.321(c) that the PAPO requires to carry out its responsibilities. As provided by 10 C.F.R. § 2.1010(a)(1) and (b), the PAPO is granted this authority solely for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to the claims of privilege.

Order, CLI-04-20, 60 NRC 15, 18 (2004) (emphasis in original). The Commission went on to state that its "interest is in assuring the availability of information and not in dissipating resources on meaningless disputes." Id.

¹⁰ My colleagues may assert that it is crucial for the Board to resolve all SUI issues now, given that the statute requires that NRC issue its final decision on DOE's application within 3 years. Nuclear Waste Policy Act § 114(d), 42 U.S.C. § 10134(d). I agree that the Board should do everything it can to comply with the statutory deadline. But this does not include making unnecessary legal errors and/or binding future parties to case management orders that have not been discussed and debated by representative parties or fully understood by the Board. I think that the history of our SUI quest demonstrates the difficulties and lack of wisdom of attempting to adjudicate these issues in the absence of a concrete case or controversy.

We have no jurisdiction because there is no actual or imminent dispute concerning SUI. The numbers of SUI documents are infinitesimal (for example, the 21 SGI documents represent 0.000007% of the LSN documents, the 8 UCNI documents represent 0.0000026%). Given that the parties have committed to make redacted versions available to all potential parties, it is highly uncertain that there will ever be a dispute concerning them. Thus, the PAPO Board has no jurisdiction to reach out and entangle itself in abstract SUI issues that will likely never arise. In this respect, I submit that the SUI, SGI, and Proposed TCMO issues are quite different and distinguishable from our Revised SCMO, which dealt with common legal privilege issues (e.g., attorney-client communications, attorney work product, Privacy Act issues, deliberative process privilege claims), which will certainly be asserted by many parties, over thousands or tens of thousands of documents in this proceeding; some of which have already been raised in the context of the State of Nevada's original motion to strike the DOE's LSN certification of June 30, 2004. See LBP-04-20, 60 NRC 300, 318 (2004) (DOE withheld "several hundred thousand" documents on claims of such privileges). While the Revised SCMO is within the letter and spirit of our limited jurisdiction, I believe that the Order Posing 65 Additional Questions and the Proposed TCMO are not.

C. Conclusion

In conclusion, I respectfully dissent from the Board's July 6, 2007, Order Posing 65 Additional SGI Questions and July 10, 2007, Proposed TCMO. In my opinion it is not prudent for the PAPO Board to decide such important and difficult legal issues in the absence of a concrete case or controversy litigated by representative adversarial parties. I would urge that we simply order the parties to make redacted versions of all SUI documents available to all potential

participants, and reiterate that, if any specific dispute arises, any potential party may file a motion to compel or otherwise bring it to us for specific briefing and prompt resolution.

/Original signed by/

Alex S. Karlin
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 16, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing DISSENT OF PAPO BOARD JUDGE KARLIN (REGARDING ADDITIONAL SAFEGUARDS QUESTIONS AND THE PROPOSED THIRD CASE MANAGEMENT ORDER) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

**U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel**

Mail Stop - T-3 F23
Washington, DC 20555-0001

**Thomas S. Moore, Chair
Administrative Judge**

E-mail: PAPO@nrc.gov

**Alex S. Karlin
Administrative Judge**

E-mail: PAPO@nrc.gov

**Alan S. Rosenthal
Administrative Judge**
E-mail: PAPO@nrc.gov & rsnthl@comcast.net

**G. Paul Bollwerk, III
Administrative Judge**

E-mail: PAPO@nrc.gov

**Anthony C. Eitreim, Esq.
Chief Counsel**

E-mail: PAPO@nrc.gov

James M. Cutchin
E-mail: PAPO@nrc.gov

Joseph Deucher
E-mail: jhd@nrc.gov

Jered Lindsay
E-mail: PAPO@nrc.gov

Marcia Carpentier*
E-mail: PAPO@nrc.gov

Margaret Parish
E-mail: PAPO@nrc.gov

Debra Wolf
E-mail: PAPO@nrc.gov

Bradley S. Baxter*
E-mail: bxh@nrc.gov

**Daniel J. Graser
LSN Administrator**
E-mail: djg2@nrc.gov

ASLBP HLW Adjudication
E-mail: ASLBP_HLW_Adjudication@nrc.gov

DISSENT OF PAPO BOARD JUDGE KARLIN
(REGARDING ADDITIONAL SAFEGUARDS QUESTIONS
AND THE PROPOSED THIRD CASE MANAGEMENT ORDER)

**U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission**

Mail Stop - O-16 C1
Washington, DC 20555-0001

Hearing Docket

E-mail: hearingdocket@nrc.gov

Andrew L. Bates

E-mail: alb@nrc.gov

Adria T. Byrdsong

E-mail: atb1@nrc.gov

Emile L. Julian, Esq.

E-mail: elj@nrc.gov

Evangeline S. Ngbea

E-mail: esn@nrc.gov

Rebecca L. Giitter

E-mail: rl@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

Gwendolyn D. Hawkins

E-mail: gxh2@nrc.gov

Janice E. Moore, Esq.

E-mail: jem@nrc.gov

Trip Rothschild, Esq.*

E-mail: tbr@nrc.gov

Mitzi A. Young, Esq.

E-mail: may@nrc.gov

Marian L. Zabler, Esq.

E-mail: mlz@nrc.gov

Andrea Curatola, Esq.

E-mail: alc1@nrc.gov

David Roth, Esq.

E-mail: der@nrc.gov

OGCMailCenter

E-mail: OGCMailCenter@nrc.gov

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

Mail Stop -O-17A3

E-mail:

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

Mail Stop - O-2A13

David McIntyre

E-mail: dtm@nrc.gov

**Hunton & Williams LLP
Counsel for the U.S. Department of Energy**

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

W. Jeffery Edwards, Esq.

E-mail: jedwards@hunton.com

Kelly L. Faglioni, Esq.

E-mail: kfaglioni@hunton.com

Melissa Grier

E-mail: mgrrier@hunton.com

Donald P. Irwin, Esq.

E-mail: dirwin@hunton.com

Stephanie Meharg

E-mail: smeharg@hunton.com

Edward P. Noonan, Esq.

E-mail: enoonan@hunton.com

Audrey B. Rusteau

E-mail: arusteau@hunton.com

Michael R. Shebelskie, Esq.

E-mail: mshebelskie@hunton.com

Pat Slayton

E-mail: pslayton@hunton.com

Belinda A. Wright

E-mail: bwright@hunton.com

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(REGARDING ADDITIONAL SAFEGUARDS QUESTIONS
AND THE PROPOSED THIRD CASE MANAGEMENT ORDER)

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

2001 K Street
Washington, DC 20006

Robert J. Cynkar, Esq.*

E-mail: rcynkar@cuneolaw.com

Joseph R. Egan, Esq.

E-mail: eganpc@aol.com

Charles J. Fitzpatrick, Esq.

E-mail: cfitzpatrick@nuclearlawyer.com

Martin G. Malsch, Esq.

E-mail: mmalsch@nuclearlawyer.com

Susan Montesi

E-mail: smontesi@nuclearlawyer.com

U.S. Department of Energy
Office of General Counsel

1000 Independence Avenue, S.W.
Washington, DC 20585

Martha S. Crosland, Esq.

E-mail: martha.crosland@hq.doe.gov

Angela M. Kordyak, Esq.

E-mail: angela.kordyak@hq.doe.gov

Mary B. Neumayr, Esq.*

E-mail: mary.neumayr@hq.doe.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

Carter Ledyard & Milburn, LLP
Counsel for Lincoln County

1401 Eye Street, N.W.
Suite 300

Washington, DC 20005

Barry S. Neuman, Esq.

E-mail: neuman@clm.com

U.S. Department of Energy

1000 Independence Avenue, S.W.
Washington, DC 20585

**Eric Knox, Associate Director, Systems
Operations and External Relations, OCRWM***

E-mail: eric.knox@hq.doe.gov

Dong Kim, LSN Project Manager, OCRWM*

E-mail: dong.kim@rw.doe.gov

**Churchill, Esmeralda, Eureka, Mineral and
Lander County's**

1705 Wildcat Lane
Ogden, UT 84403

**Loreen Pitchford, LSN Coordinator
for Lander County**

E-mail: lpitchford@comcast.net

U.S. Department of Energy
Office of Civilian Radioactive Waste Mgmt
Office of Repository Development

1551 Hillshire Drive
Las Vegas, NV 89134-6321

Director*

E-mail:

Timothy C. Gunter

E-mail: timothy_gunter@ymp.gov

City of Las Vegas

400 Stewart Ave.
Las Vegas, NV 89101

Margaret Plaster, Management Analyst

E-mail: mplaster@LasVegasNevada.gov

DISSENT OF PAPO BOARD JUDGE KARLIN
(REGARDING ADDITIONAL SAFEGUARDS QUESTIONS
AND THE PROPOSED THIRD CASE MANAGEMENT ORDER)

Clark County (NV) Nuclear Waste Division

500 S. Grand Central Parkway
Las Vegas, NV 89155

Irene Navis*

E-mail: iln@co.clark.nv.us

Engelbrecht von Tiesenhausen

E-mail: evt@co.clark.nv.us

Nuclear Waste Project Office

1761 East College Parkway, Suite 118
Carson City, NV 89706

Robert Loux

E-mail: bloux@nuc.state.nv.us

Steve Frishman, Tech. Policy Coordinator

E-mail: steve.frishman@gmail.com

**Eureka County and Lander County, Nevada
Harmon, Curran, Speilberg & Eisenberg, LLP**

1726 M. Street N.W., Suite 600
Washington, DC 20036

Diane Curran, Esq.

Email: dcurran@harmoncurran.com

Public Citizen

215 Pennsylvania Ave, SE
Washington, DC 20003

Michele Boyd, Legislative Director

Critical Mass Energy and Environment

E-mail: mboyd@citizen.org

Nevada Nuclear Waste Task Force

P.O. Box 26177
Las Vegas, NV 89126

Judy Treichel, Executive Director

E-mail: judyntwtf@aol.com

Talisman International, LLC

1000 Potomac St., NW
Suite 300

Washington, D.C. 20007

Patricia Larimore

E-mail: plarimore@talisman-intl.com

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

Anne W. Cottingham, Esq.

E-mail: awc@nei.org

Ellen C. Ginsberg, Esq.

E-mail: ecg@nei.org

Rod McCullum*

E-mail: rxm@nei.org

Steven P. Kraft*

E-mail: spk@nei.org

White Pine County

City of Caliente

Lincoln County

P.O. Box 126
Caliente, NV 89008

Jason Pitts

E-mail: jayson@idtservices.com

**Nuclear Information and Resource Service
(NIRS)**

6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912

Kevin Kamps

E-mail: kevin@nirs.org

**Yucca Mountain Project, Licensing Group,
DOE/BSC**

Regulatory Programs

1180 North Town Center Drive
Las Vegas, NV 89144

Jeffrey Kriner

E-mail: jeffrey_kriner@ymp.gov

DISSENT OF PAPO BOARD JUDGE KARLIN
(REGARDING ADDITIONAL SAFEGUARDS QUESTIONS
AND THE PROPOSED THIRD CASE MANAGEMENT ORDER)

Abigail Johnson*

612 West Telegraph Street
Carson City, NV 89703
E-mail: abbyj@gbis.com

National Congress of American Indians

1301 Connecticut Ave. NW - Second floor
Washington, DC 20036
Robert I. Holden, Director*
Nuclear Waste Program
E-mail: robert_holden@ncai.org

Churchill County (NV)

155 North Taylor Street, Suite 182
Fallon, NV 89406

Alan Kall*

E-mail: comptroller@churchillcounty.org

Inyo County Water Department

**Yucca Mtn Nuclear Waste
Repository Assessment Office**

163 May St.
Bishop, CA 93514

Matt Gaffney, Project Associate*

E-mail: mgaffney@inyoyucca.org

Environmental Protection Agency

Ray Clark*

E-mail: clark.ray@epa.gov

Nuclear Waste Technical Review Board

Joyce Dory*

E-mail: dory@nwtarb.gov

**Intertech Services Corporation
(for Lincoln County)**

P.O. Box 2008
Carson City, NV 89702-2008

Dr. Mike Baughman*

E-mail: bigboff@aol.com

**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

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

Nye County (NV) Regulatory/Licensing Adv.

18160 Cottonwood Rd. #265
Sunriver, OR 97707

Malachy Murphy*

E-mail: mrmurphy@cmc.net

**Mineral County (NV) Board of County
Commissioners**

P.O. Box 1600
Hawthorne, NV 89415

Linda Mathias, Administrator*

Office of Nuclear Projects

E-mail: yuccainfo@mineralcountynv.org

Ross, Dixon & Bell

2001 K Street N.W.
Washington D.C. 20006-1040

William H. Briggs*

E-mail: wbriggs@rdblaw.com

Merril Hirsh, Esq.*

Mhirsh@rdblaw.com

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(REGARDING ADDITIONAL SAFEGUARDS QUESTIONS
AND THE PROPOSED THIRD CASE MANAGEMENT ORDER)

**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

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

[Original signed by R. L. Giitter] _____
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day July of 2007