Contemporaneous with its initial unsuccessful attempt to certify its LSN in June 2004, DOE published on its website a lengthy Frequently Asked Questions list (Ex. 21). There, DOE explained that 10 C.F.R. 2, Subpart J requires DOE "to provide the general public and parties to the licensing hearing with electronic access to all documentary material relevant to the licensing proceeding." *Id*. at 1. DOE emphasized, "The NRC regulations require that the relevant documents be loaded in the LSN and be available electronically six months prior to DOE's submittal of the Yucca Mountain license application." *Id*. Providing more significant detail, DOE went on, "The Nuclear Waste Policy Act directs the NRC to issue its licensing decision within 3 years after the DOE license application is submitted. Given the short period of time, the LSN will provide access to *all documents that are relevant to the Yucca Mountain licensing proceeding in advance of the license application submittal* and will be used instead of the traditional NRC document discovery process." *Id*. at 3 (emphasis added). Addressing in detail the type of documents which meet the description of "all documents that are relevant to the Yucca Mountain license proceeding" and which must therefore be on the LSN in advance, DOE explained:

> The two main reports that DOE must produce to demonstrate compliance with NRC performance objectives are a Preclosure Safety Analysis and a post-closure performance assessment. Any document bearing on information contained in these reports – including description and technical basis of the repository design; identification of structures, systems, and components, equipment, and process activities; description of the geologic setting and natural features, events, and processes; technical basis for including or excluding degradation, deterioration, and alteration processes of engineered barriers; technical basis for the identification of hazards, event sequences, and consequences; and choice of supporting date, analytical methods, models, treatment of uncertainties, and assignment of probabilities . . . and must be included in the LSN.

Id. at 30-31.

In addition, DOE prescribed:

> Q. Are modeling and uncertainty and sensitivity analyses required to be included in the LSN?

A. Yes. DOE will be required to develop complex predictive models of repository performance. Models will be used to analyze natural features, events, and processes; to develop the design of engineered systems, to assess repository performance; to evaluate the expected impact of the repository on reference biosphere; and to demonstrate compliance with performance objectives.

Id. at 29.

DOE went on to enumerate other required contents of the initial LSN certification, including documents related to the validation and verification of software used in support of the TSPA, all documents bearing on the design of structures, systems, and components of equipment important to safety and to waste isolation, documents related to engineering activities such as identification and resolution of safety questions, and the design, procurement, fabrication, manufacture and construction of barrier systems, surface facilities, underground facilities, monitoring equipment, post-closure monuments, and other structures, systems, and components important to safety and to waste isolation, all of which "must be included in the LSN," according to DOE. *Id*. at 32-33.

V. The PAPO Board's Construction of the Six-Month Rule in 10 C.F.R. §2.1003

The PAPO Board has consistently interpreted the Six-Month Rule under 10 C.F.R. Section 2.1003 to require DOE to make available *all* its Documentary Material *at the time of its initial LSN certification*. Both in its August 31, 2004 Order (vacating DOE's initial LSN certification of June 30, 2004) and in the course of the hearing preceding that Order, the Board made observations that both clarify DOE's LSN obligation and appear strongly to compel the outcome of this Motion.

Nevada's challenge as to the completeness of DOE's LSN was notably different in 2004 than it is today: In 2004, having the benefit of a scant few days' exposure to DOE's proposed LSN certified on June 30, 2004, Nevada filed a motion asserting multiple challenges, including

that the LSN was incomplete because there were millions of relevant documents already in existence that DOE had failed to include in its LSN (and indeed, failed to even consider or review for potential inclusion). The outcome of that challenge is well known. Nevada's current motion, aimed again at the admitted incompleteness of DOE's promised LSN certification, comes at a time when certification has not yet taken place, and the documents that are the source of Nevada's concern are in preparation, are known by DOE to be essential to licensing, but are not yet complete. At conference, DOE maintained that the completion of the required Documentary Material will take only about a few extra months,[3] and therefore, little prejudice would result. The PAPO Board's construction of NRC's regulations has provided further guidance in confirming DOE's duty with respect to the content of its initial LSN certification. In its August 31, 2004 Order:

- Restating the most compelling and basic premise for the existence of the LSN in the first place, PAPO said:

> The purpose and importance of DOE's obligation to produce all documents are also factors in applying the good-faith standard. The Yucca Mountain licensing proceeding is of critical importance. As the applicant, DOE bears the burden to support all points required for a license, and DOE's certification initiates the entire licensing process. *A full and fair six-month document*

[3] DOE's efforts to avoid a few months' delay should be weighed against the fact that, when it makes its initial certification, no EPA or NRC Yucca licensing rules are likely to be in place even to prescribe what is required for licensing. While this may create new legal and practical issues, it is hardly irrelevant to gauging whether "all Documentary Material" is available at the time of certification. For example, DOE's 1996 Probabilistic Volcanic Hazard Analysis ("PVHA") specifically precluded any consideration by an expert elicitation panel of volcanic activity affecting Yucca after the first 10,000 years. DOE has asserted that its PVHA-U (Update), to be completed sometime in 2008, addresses volcanism out to one million years. However, DOE has also stated it will not rely on the PVHA-U in its LA because the analysis will not be ready. Depending on the final EPA and NRC standards, DOE could be precluded from filing LA-supporting documentation which considers only 10,000-year impacts. DOE could be forced to wait until its PVHA-U is complete, its results are incorporated into AMRs and the TSPA, and only *then* file the LA. In short, DOE already risks certifying its LSN as "complete" at a time when it does not even know the regulations to whose adherence its LA is directed. A few months' delay while the final rules are actually promulgated would ameliorate this and other similar situations.

> *discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well-articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within three years*. These important objectives cannot be met unless we require DOE to make every reasonable effort to make *all* its Documentary Material available at the start.

(pp. 17-18) (emphasis added).

- Confirming that the only true deadline for DOE to announce its initial LSN certification is one of DOE's own choice – namely, the day on which all Documentary Material is made available – PAPO stated:

> If on the day of DOE's self-imposed document production deadline, DOE was not quite finished, that deadline, not compliance with 10 C.F.R. Section 2.1003, is what now must yield.

(p. 17).

- DOE's current protestations that it will repeatedly "supplement" its incomplete LSN "as quickly as possible" avails DOE nothing, where all it needs to do is wait a few months and certify its LSN when it is complete in the first place. As PAPO stated:

> DOE's failure to make all of its Documentary Material available on June 30, 2004, is not excused by its indicated intent to supplement its initial production at a later time. To accept such a proposition would destroy the six-month document discovery period that is critical to the entire licensing proceeding.

(p. 35).

- Again refusing to authorize DOE to predicate an incomplete LSN certification on its own arbitrary deadlines, PAPO observed:

> In this context, the good faith standard applied to DOE's duty to produce all documents is a rigorous one, requiring DOE to make every reasonable effort to gather, to assess for privilege, and to produce all Documentary Material at the outset, without regard to artificial or self-imposed deadlines.

(p. 18).

Where, as here, the only lawful deadline for DOE's LSN certification is simply when its LSN collection is complete[4], the Board should not abide an incomplete LSN, certified on an arbitrary deadline, for no other purpose than to facilitate DOE's meeting yet *another* arbitrary self-imposed deadline, that for filing its LA.

- An unchanging principle, as applicable in 2007 as it was in 2004, was confirmed by the PAPO Board:

> The timing of DOE's document production is substantially within its control. As far as Subpart J is concerned, DOE can produce its documents whenever it is ready.

(p. 5).

- DOE proposes now to certify a knowingly incomplete LSN and then supplement its contents in dribs and drabs later. A similar suggestion in 2004, that the PAPO Board simply order DOE to supplement with additional responsive documents, was rejected by PAPO:

> The short answer, however, is that any documents produced in response to a Board order would not have been available for the entire six-month discovery period – which availability, as we have seen, is a central feature of the regulatory scheme.

(p. 35).

- While the crux of Nevada's complaint this time is DOE's intent to certify an LSN that is admittedly incomplete because of key documents that are in development or not even prepared yet, the Board's 2004 observation (where the issue was documents already in existence yet omitted from the LSN) is equally valid in either circumstance:

> In light of the substantial disruption, delay, and confusion that such incompleteness will cause to the pre-License Application six-month document discovery process, we must conclude that DOE's June 30, 2004 document production did not meet the requirement that it, in good faith, make all of its Documentary Material available as of the date of its initial certification as required by 10 C.F.R. Section 2.1003.

(p. 36).

[4] DOE was legally required to submit its LA within 90 days after its Site Recommendation, with its LSN certification to predate that LA filing. Having missed its legal LA deadline by more than four and one-half years at this point, there ought be no benchmark triggering DOE's LA filing and LSN certification other than DOE's actual *readiness*.

Statements made both by counsel for the respective parties and by members of the Board at the time of the July 27, 2004 hearing on Nevada's Motion to Vacate DOE's LSN certification are equally revealing, giving a strong sense of *déjà vu*. At that hearing, DOE counsel admitted that DOE's LSN certification in June 2004 was driven by DOE's predetermined goal of filing an LA in December 2004 rather than by any strategy to certify the LSN when it was actually *ready*. Asked by Judge Moore whether DOE chose the date June 30, 2004, to certify, DOE counsel replied, "Sure. The department has a schedule, a working schedule to file this application at the end of December 2004. And you back up six months from that. There is nothing wrong with that." PAPO Tr. 130. Judge Moore inquired, "Was that working schedule created with any relationship to the document production and identification process?" DOE counsel replied, "Every project has to have a schedule for completion. Selecting December of 2004 as the schedule for completion dictates that the obvious consequence of the department, they have to make their certification in June." PAPO Tr. 130-131.

Now, having publicly and repetitively proclaimed June 2008 as its drop-dead date for filing its LA, DOE has similarly bound itself to certify its LSN at least six months prior to that time, *whether it is complete or not.* The most obvious shortcoming of DOE's scheduling and planning, both in 2004 and in 2007, remains the same: DOE ought to work to complete the collection of technical documents it plans to cite and rely on in support of its LA, and *then* certify with its LSN that those documents are available to the public, and then, six months later, file its LA. Instead, on its second occasion now, DOE has boxed itself into a corner by electing that its schedule be driven *not* by completion of its key technical documents and their certification, but by a blind focus on meeting a well-publicized LA submission date, with LSN certification relegated to an afterthought whose timing, in DOE's own words, is "dictated" by the

LA commitment date or "the obvious consequence of" the LA commitment date, rather than constituting an independent achievement that would satisfy NRC's regulations.

The PAPO Board was mindful that there exists no regulatory or statutory obligation requiring DOE to certify its LSN document collection even one minute before it is "complete," *i.e.*, contains all the Documentary Material DOE intends to cite and rely on in support of its position at the licensing hearing. As Judge Karlin commented, "But you weren't reacting to any external deadline for this making the documents available on certification. There's not a statute or regulation that imposes June 30 or April 15 on you." PAPO Tr. 86. Likewise, Judge Moore focused on the matter of how an incomplete LSN runs counter to its purpose of providing the parties six months' access to all DOE Documentary Material: "So your unfairness process is difficult for me to understand if the goal of this whole process, as I perhaps mistakenly thought it was, was to give all participants six months from the date of certification to do their document discovery. And yet, what you're doing is taking away more than the six months. You are taking away from their six months' time. . . . Under your system, there are certainly a lot of hiccups, if not something worse, in the road. And it comes out of the hide of the participants trying to use the system. Is that fair to them?" PAPO Tr. 126-127. Judge Moore concluded that "DOE has had a seemingly great period of time in which to pick a date on which they are going to certify, a date not required by any regulation, a date solely within their purview." PAPO Tr. 162.

VI. DOE will Certify Its LSN *Knowing* that Key Documentary Material It Will Cite and Rely on in Its LA is Neither Complete Nor Available on the LSN

The sequence of steps required of DOE is clear: After having conducted the necessary tests and analyses, DOE is to create the Documentary Material which DOE will cite and rely on in its LA; DOE is to make that Documentary Material publicly available on the LSN and certify that it has done so; and then, DOE is to tender its LA to NRC at least six months after LSN certification.

From the recent conference with DOE counsel and public statements made recently by DOE, it is now clear that DOE intends to follow a much different course of action, one that will knowingly and intentionally deprive the other parties to these proceedings of the access to DOE's Documentary Material that was guaranteed by 10 C.F.R. Section 2.1003. Specifically, DOE knows precisely the key component parts that will comprise its LA (*see, e.g.*, the "LA Products Baseline"), and it has made projections estimating the earliest date on which those essential documents will be completed. Some, like the all-important TSPA, and certain key AMRs, will not be complete until well into 2008. Some, like the PVHA-U, *supra*, will not be ready until *after* the LA. Yet, DOE has published a schedule which cavalierly calls for its LSN certification to take place well *before* those documents are completed and has now declined to change it. DOE has done so for precisely the same reason that DOE unsuccessfully attempted to certify an incomplete LSN database on June 30, 2004: DOE has vowed to meet an unrealistic LA date, and it must certify its LSN prematurely to put off its breach of that vow. The timing of DOE's LSN certification and the timing of DOE's LA are wholly under the control of DOE. There is no regulation or statute which requires that DOE complete either action by any specific date. (See footnote 4, *supra*).

Nevertheless, DOE has been predicting for almost two years that its LA will be filed by June 2008 at the latest. Ward Sproat, DOE's new OCRWM director, has made it clear that the singular focus of his hiring, and his chief marching order, is the submission of DOE's LA by that date. Mr. Sproat has spoken to myriad entities, including NRC, the Nuclear Waste Technical Review Board, and the U.S. Congress, and has repeated in virtually every presentation he makes, with ever increasing passion and certainty, that he guarantees the June 2008 LA filing, "if not sooner."

In June 2004, DOE certified its LSN database not because it was complete, but because June 2004 was six months before the LA-filing date that was the subject of the same kind of public assurances and guarantees as are now accompanying the June 2008 target; and just as in 2004, DOE promises to certify its LSN at least six months or more before June 2008 – again, not for the reason that it will be ready or complete, but because it "must" in order to permit its proceeding with a June 2008 LA.

Nevada's concerns in this regard are not hypothetical. If DOE were to forecast that it *expected* to have a complete LSN collection ready in December 2007, and it *expected* to be able to submit its LA in June 2008, but nevertheless gave assurance that the LSN will not be certified until complete, and the June 2008 LA projection will yield if necessary, then Nevada would not be filing this Motion. However, DOE has made its contrary position in this regard very clear: It *will* certify its LSN in December 2007 or earlier because it "must" to permit the June 2008 LA filing. There are a number of critical LA-supporting documents, documents like the TSPA which DOE *knows* it will cite and rely on in the licensing proceeding, which have *long been understood* to be critical components of repository licensing, that will *not* be complete or on the LSN at the time of its initial certification; and DOE's admission of these facts is accompanied by the incorrect assertion that it is not required to have all Documentary Material it will cite and rely on in licensing available on the LSN at initial certification; rather, DOE now says it can initially certify any time it pleases, without regard to whether the LSN contains all of the Documentary Material DOE intends to cite and rely on in the licensing proceeding or whether it does not. In DOE's view, it can simply certify "whatever documents it has ready at the time" in its initial certification, and then "supplement" with the remainder whenever they finally become complete.

By order of the PAPO Board, DOE began reporting its best estimate of its LSN certification date and its LA filing date in June 2005. Beginning July 19, 2006, DOE began

reporting specifically that it anticipated filing its LA in June 2008 and certifying its LSN database six months before that, in December 2007. In April 2007, DOE modified its prediction, still holding to the June 2008 LA date, but suggesting a possible earlier LSN certification date, as early as October 1, 2007. Most recently, on June 29, 2007, DOE (still forecasting a June 2008 LA) now suggests that LSN certification could come as early as September 21, 2007, but certainly before December 2007.

One might assume that since DOE's stated expectation date for LSN certification has moved forward, this would indicate it has accelerated its anticipated completion dates for the incomplete Documentary Material it intends to cite and rely on in the licensing proceeding. One would be wrong. On the contrary, DOE's forecasts make clear that there will be critical documentation incomplete well into 2008. DOE's LSN/LA planning in 2007 suffers from the identical vice as did its 2004 LSN/LA planning: DOE does not regard the certification of a *complete LSN database* (one containing all the Documentary Material DOE intends to cite and rely on licensing proceeding) to be an independent goal or legal requirement; rather, DOE places all focus on meeting an arbitrary LA filing date. Recent DOE statements make this clear.

On March 23, 2007, in a presentation to the so-called Affected Units of Local Government ("AULG"), DOE's Ward Sproat reported that DOE had not run the complete TSPA yet because many AMRs are still being revised and checked. He confirmed that the LSN will be incomplete at initial certification, and that important technical information will go into the LSN after certification. On March 28, 2007, Mr. Sproat spoke at a Quarterly Management Meeting among representatives of DOE and NRC. When asked about the completeness of the LSN at the time of certification, Mr. Sproat responded that DOE would be revising AMRs and other technical documents after the LSN certification, but assured that DOE would put those documents on the LSN whenever they became final. On June 26, 2007, in a Technical Exchange

meeting between DOE and NRC on quality assurance, presentations were made by DOE's Warther and McMahon. At slide 12 of Warther's presentation and slide 1 of McMahon's, both presented a schedule of events leading up to and including delivery of the LA to NRC in June 2008. One of the key completion dates in anticipation of the LA was for DOE to "approve LA supporting products," but this is not expected to occur until "February 2008" (Ex. 22).

In a recent exchange between representatives of Nevada and DOE, DOE rejected Nevada's assertion that "LSN regulations clearly require production of the TSPA at the time of certification." Addressing what is clearly the most important single piece of Documentary Material on which DOE intends to rely in the licensing proceeding, DOE's OCRWM Director Ward Sproat responded, "we disagree with your assertion that the Licensing Support Network (LSN) regulation requires DOE to make available the TSPA and its associated computer code at the time of DOE's initial certification" (Ex. 23). As discussed in Section IV, *supra,* this contradicts years of DOE assurances to the contrary. It also lead to Nevada's prompt request for a conference with DOE counsel to confer on the issue of documentation to be on DOE's LSN at the time of initial certification, in an effort to avoid the necessity for this Motion. That conference was unsuccessful.

In the recent conference among counsel for DOE and Nevada, DOE counsel admitted that not all Documentary Material to be cited and relied upon by DOE would be complete by the time of LSN certification (for example, the TSPA is anticipated to be complete only around February 2008), but argued that LA-supporting Documentary Material not on the LSN at certification would be available within a reasonably short time after certification, "in a matter of months." DOE counsel had no answer to the question: If the anticipated delay is really so short, why does DOE not simply wait until the Documentary Material it intends to cite and rely on in the licensing proceeding is *complete* and *on the LSN* before certifying it? The answer is obvious:

That would require some slippage, though modest, in the anticipated DOE LA filing date of June 2008 – a possibility DOE is apparently prohibited from considering.

There have been a number of other indicators of significant critical Documentary Material that will not be complete until at least sometime in 2008. Shortly after DOE's June 30, 2004 LSN certification was vacated, DOE developed the February 2005 OCRWM "Management Licensing Support Network Certification Plan" (Ex. 24). This new LSN certification plan by DOE provides that DOE will "Produce all LSN-relevant documents in existence *as of a reasonable cut-off date*." *Id*. at 2 (emphasis added). The PAPO Board was harsh in its criticism of DOE for picking an arbitrary April 15, 2004 cutoff date and instructing its personnel to produce all LSN-relevant documents as of that date. The Board made clear its disagreement with DOE's intentional and arbitrary selection of a cutoff date when Section 2.1003 requires DOE to put on its initial LSN "*all* Documentary Material." The 2005 Plan is not materially different, except that it fails to specify the cutoff date, leaving that for further instruction.

DOE made a presentation at a DOE/NRC Quarterly Management Meeting on March 27, 2007 (Ex. 25) in which DOE's slide 4 depicted a DOE schedule for completion of pre-LA filing activities. It specified "Preclosure Safety Analysis Technical Activities" to continue through February 2008. Interestingly, DOE went so far as to depict its LSN certification date on the same calendar as December 2007, their juxtaposition proving that DOE's certification is intended to predate the completion of relevant licensing documentation. In slide 11, DOE remarked, "Remaining key technical items will be addressed in the license application." This refers to the remainder to some 293 KTI agreements DOE made with NRC prior to 2002.

In November 2001, NRC sent a "sufficiency letter" (Ex. 26) to Congress regarding the status of DOE's work on the proposed repository, conditioning its sufficiency finding on DOE's completion of the work promised in the 293 KTI agreements. *Id*. at 5. On July 23, 2004,

however, DOE informed NRC it would no longer continue the process of working through the KTIs with exchanges of information until resolution was reached (Ex. 27). DOE told NRC that with respect to the remaining KTIs not yet closed (of which there were approximately 188), DOE would simply provide resolution-type information in the LA when it was filed. Accordingly, this constitutes an additional universe of key technical documents that will not be produced on the LSN at certification but will be relied on by DOE in the LA.

DOE's Russ Dyer provided Nevada with a schedule of anticipated completion dates for a list of DOE AMRs at the end of March 2007 (Ex. 28). Among the predicted completion dates for these critical documents were drift degradation analysis (2/25/08) and magma dynamics at Yucca Mountain (3/10/08). Even assuming that all the other AMRs on the list were completed on the timeline anticipated (many very close to the end of 2007), these two would be incomplete and obviously not available on DOE's LSN should it be certified any time before 2008.

DOE's contractor supervisor Michael Denlinger made a presentation at a May 30, 2007 NRC/DOE Technical Exchange Meeting on Yucca Repository layout and operations (Ex. 29). He explained the DOE/Bechtel approach to seismic analysis and reported that DOE's Tier 1 analysis would not be completed until February 2008, and its Tier 2 analysis (aimed at confirming Tier 1 analysis results and providing the basis for detailed design calculations) would not be available until at least *May 2008*. *Id*. at 3. Needless to say, neither the Tier 1 nor the Tier 2 seismic analyses will be available for an LSN certified in 2007.

In January 2007, the Center for Nuclear Waste Regulatory Analyses (CNWRA), an NRC contractor assisting with NRC's work examining the Yucca repository, published a report, "Summary of Current Understanding of Drift Degradation and Its Effects on Performance at a Potential Yucca Mountain Repository" (Ex. 30). In its report, CNWRA found that DOE's analysis of the impacts of drift degradation and rock fall in the Yucca tunnels is woefully

inadequate. CNWRA stated: "If the drip shield collapses, then seepage water may contact the waste package during the thermal period, possibly leading to the formation of evaporative brines on the waste package and inducing localized corrosion. . . . A collapsed drip shield may transfer accumulated rubble loads to the waste package, possibly resulting in mechanical breaching of the waste package." *Id*. at 45. CNWRA concluded that the "apparent DOE approach for accounting for the potential effects of drift degradation in Total System Performance Assessment does not include a complete range of credible failure modes for the engineered barriers. Independent analysis by Center for Nuclear Waste Regulatory Analysis (CNWRA) suggest (i) repository thermal loading . . . alone could cause degradation of the emplacement drifts and significant accumulations of rock rubble within approximately 1,000 years after closure and (ii) the drip shield . . . could collapse onto the waste package as a result of . . . accumulated rock rubble." CNWRA found: "The central concern, however, is that *potentially significant failure modes of the engineered barriers are not being appropriately considered by DOE*." *Id*. at 46 (emphasis added). This highly critical report is significant in that it was produced by the entity which provides technical analysis assistance to NRC, the agency that will consider the completeness and accuracy of DOE's LA. Suffice it to say, this new report from CNWRA must surely lead to substantial reanalysis by DOE of the impact on the proposed waste container and its contents by either, or both, rock fall within the Yucca drift tunnel and collapse of the drip shield upon the waste container. These analyses would necessarily take months to complete, more months to revise the AMRs or other technical documents into which they would feed, and ultimately substantially delay the finalizing of DOE's TSPA-LA, the most critical document DOE is generating in support it its LA. This significant information cannot possibly be available on an LSN certified during 2007.

In another area of apparent incomplete DOE preparation, DOE is currently conducting an expert elicitation on the subject of PVHA. In short, this topic involves the risk of volcanic activity in the Yucca region, including the likely frequency and potential consequences thereof. In 1996, DOE produced an initial expert elicitation on this subject. Subsequent to its publication, as recently reported (Ex. 31) by DOE contractor Kevin Coppersmith on May 15, 2007, "new aeromagnetic and ground magnetic data became available suggesting possible buried volcanic centers in Crater Flat." *Id*. at 12. This new evidence found by DOE "indicated a modest increase in the mean annual frequency of intersection of the repository" by a volcano. *Id*. In response to this new information, DOE reconvened a panel of experts, comprised mostly of the 1996 group, to conduct an updated expert elicitation. According to Mr. Coppersmith, DOE will not use the outcome of this new work in its LA because it will not be completed and available in time. *Id*. at 25, 32. Instead, DOE will rely on information that is 11 years old which has been proven to be inaccurate and incomplete. Presumably, this critical new information and the analysis of the new expert panel will be unavailable on an LSN certified in 2007.

At a March 27, 2007 presentation to the NRC (Ex. 32), DOE's OCRWM Director Ward Sproat discussed DOE's actions in investigating the so-called United States Geological Survey ("USGS") email scandal. At slide 5 of his presentation, Sproat reported the existence of some *14 million* email records in the OCRWM email warehouse. Mr. Sproat did not clarify whether these emails were the complete collection or whether they included only emails contemporaneous with the USGS email scandal, which would be only a fraction of the relevant period of DOE's work at Yucca. Even the 14 million OCRWM emails acknowledged by Sproat *exceeds by millions* the highest number of emails ever previously acknowledged by DOE to exist relating to the Yucca Mountain project. It appears that there may be a vast number of emails which have not even been reviewed for potential LSN-worthiness by DOE.

In sum, Nevada is confronted by the prospect of an LSN certified at a time when DOE still has unfinished AMRs, unfinished Preclosure Safety Analysis technical activities, a large number of unfinished technical areas reflected in KTIs not to be resolved until LA, unfinished seismic analyses, unfinished work involving drift degradation and vulnerability of the drip shields and waste containers, unfinished analysis of potential volcanic activity at Yucca, and an unfinished TSPA, the most important document to be cited and relied on by DOE in its LA. Nevada has engaged teams of experts to review and analyze these very issues so as to be in a position to frame well-designed contentions. This triggered Nevada's recent, unsuccessful conference with DOE counsel to address Nevada's concern that DOE intends to certify an LSN database that, from the standpoint of what is really important to licensing, will be largely "empty." DOE's position is unsupported by NRC's regulatory architecture, by this Board's prior interpretations of that architecture, and it would preclude the "full and fair six months access" assured to the other parties not only by NRC but by DOE itself at the time of adoption of the Six-Month Rule.

VII. DOE's Misconstruction of Provisions to "Supplement" the LSN

In a recent letter to Nevada, DOE adopted the position that, because 10 C.F.R. §2.1009(b) requires DOE to provide an updated certification of its LSN at the time it files its LA, it is therefore authorized to defer completion of many of its key technical work products until after its initial LSN certification (Ex. 23, *supra*) so long as those technical documents are completed in time to submit them with the LA. DOE cites no authority for this proposition. This proposition contradicts the plain language of 10 C.F.R. §2.1003, which requires "all" Documentary Material to be made available with DOE's initial certification. This proposition directly contradicts DOE's own prior planning and scheduling (before schedule problems forced DOE to redefine NRC's regulations), which provided for the completion of all technical work products that would be

cited and relied upon in the LA a full *eight months* before filing, in order that DOE would have two months' time in which to load the documents onto the LSN database, giving plenty of margin to adhere to the Six-Month Rule. DOE now suggests that the NRC regulation does not mean what it says, and that LSN is nothing more than a "trail marker" *en route* to the LA – a point in time in which DOE gives notice of its plan to file the LA six months hence. DOE claims it may make available a collection of *whatever it happens to have complete* at the preselected time, regardless of how much or how little that is. Mr. Sproat's position suggests that DOE must be free to work on and complete the Documentary Material it will cite and rely on in the licensing proceeding during the time after its initial LSN certification and before LA, because "Why else would there be a requirement to update the certification?"

In fact, there are many reasons why NRC's regulations would require *all* parties to supplement their initial LSN certifications (Section 2.1003(e)) and DOE to update its LSN certification at LA. First, there are many types of Documentary Material required to be made available by DOE and the other parties, separate and apart from the technical documents supporting DOE's LA. One need only browse through DOE's current 3.4-million-plus LSN document collection to realize that, in actuality, the vast majority of documents which will ultimately populate DOE's LSN are documents *other than* technical documents supporting its LA. Of the three categories of Documentary Material defined in Section 2.1001, only the first type is information that a party will cite or rely on in the licensing proceeding. The second type of Documentary Material embraces documents which do not support the parties' positions. By way of example, after the PAPO Board's August 31, 2004 decision forced DOE to go back and survey millions of emails for possible inclusion in its LSN, the result was a huge quantity of such emails being added. One discrete type of email which made headlines were emails among certain USGS personnel working at Yucca that raised profound questions about the level of

quality assurance implementation at Yucca and even the possibility of fabrication of documents. This controversy led to DOE's complete reworking of its net infiltration analysis and technical documentation, at a cost approximating $25 million. Suffice it to say, email traffic between and among DOE and its contractors will continue on a daily basis, between the time of LSN certification and LA submittal. To the extent these emails criticize DOE positions (for instance positions to be put forth in its LA), DOE would be required to include such emails in its LSN database, after its initial certification, and subject to its recertification at the time of LA. That is only one example of Documentary Material which will obviously be generated after LSN certification and before the LA. By way of another example, NRC long ago reported to the PAPO Board that its LSN collection had passed the 25,000-document mark. Presumably, since NRC has not yet "taken a position" with respect to the licensing of a Yucca repository, few if any of the documents in NRC's LSN are documents which NRC plans to "cite or rely on" in the licensing proceeding. Yet, NRC has deemed the documents relevant Documentary Material. In short, there are many rational reasons why the LSN document collections of every party will continue to accrue documents on a routine basis. That is the reason for NRC's requirement for "supplementation" (Section 2.1003(e)) and LSN recertification by DOE at LA (Section 2.1009(b)). This does not in any way justify DOE's deferring the completion of critical technical documents on which it *will* base its LA and on which it *will* cite and rely during the licensing proceeding to beyond initial certification.

DOE itself considered, and commented on, the tasks it would undertake during the period between initial LSN certification and LA submittal, tasks which might generate additional Documentary Material, but tasks which *did not* include the completion of the basic LA-supporting technical documentation. At one point, DOE's John Arthur discussed with NRC (Ex.

33) the way in which DOE planned to use its time between initial LSN certification and LA submittal, specifically, in packaging the LA. He explained:

> DOE needs to refine the presentation of this technical work for licensing. Also, DOE needs to assure the transparency, traceability, and the self-sufficiency of the LA; and if necessary, clarify the presentation of technical, analytical, and compliance information; improve the readability of the document; provide more details, particularly in distinguishing structures, systems, and components that are important to safety or important to waste isolation; verify document-to-document consistency between the LA and underlying technical documents that were in revision during the development of the draft LA (principally analysis and model reports, system design description documents, facility description documents, and the Preclosure Safety Analysis;) and documents of additional preclosure and design detail, consistent with the discussions between DOE and NRC.

Id. at 4.

Accordingly, the period between initial LSN certification and LA was to be used for packaging and fine tuning the LA into a final product. The period was definitely not intended to be devoted to the continuation of work on unfinished basic technical documents supporting the LA. As DOE itself put it, "Documentation supporting the License Application will be 'frozen' at the time of LSN certification." This principle is consistent with DOE's original plan to have completed all the AMRs and other supporting technical documents, and indeed to have completed the TSPA-LA itself, *prior to* certifying the LSN. DOE's plan was clearly articulated in its LSN strategic approach (Ex. 9): "Upon the *initial implementation* of the OCRWM LSN, the following Documentary Material and associated first level reference material will be made available electronically:

- AMRs and associated first level references;
- PMRs and associated first level references;
- Site description documents;
- All correspondence and electronic mail relevant to the License Application;
- System design documents (SDDs) and associated first level references, etc."

Id. at 12 (emphasis added).

DOE summed up this point with another strategy memorandum ("Technical Guidance for License Application Planning") (Ex. 34) which provided: "The technical basis for the LA, which will support LA preparation and any eventual NRC review, must be essentially complete eight months before LA submittal to support BSC's initial LSN certification process." *Id*. at 3. The same strategy document answered the question as to what would occupy DOE in the gap between LSN certification and LA submittal, explaining "The review of draft [LA] sections must be sufficiently complete along with the essential supporting technical basis documents *before* the initial BSC LSN certification process begins, eight months before LA submittal. DOE management review of and concurrence on the integrated LA, and production of the final document, will take place during the six months following initial LSN certification." *Id*. at 5 (emphasis added).

VIII. Conclusion and Prayer for Relief

The PAPO Board should not permit DOE to (again) certify a knowingly incomplete LSN collection, sacrificing the entire purpose of LSN and trampling the discovery rights of all the other parties, due to its politically motivated commitment to a premature LSN deadline, itself predicated on a premature LA deadline.

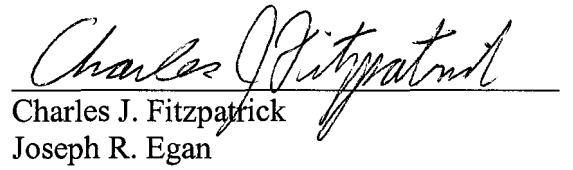
Nevada respectfully requests the PAPO Board to issue an Order declaring and mandating the following:

1) That 10 C.F.R. § 2.1003(a) requires DOE to make electronically available on the LSN, at the time of its initial LSN certification, all Documentary Material which it knows or expects it will cite or rely on in the Yucca licensing proceeding*;*

2) That the duties specified in 10 C.F.R. §§ 2.1009(b) and 2.1003(e) to "update" or "supplement," respectively, initial LSN certifications do not lessen or otherwise

alter the requirement of 10 C.F.R. §2.1003(a) regarding the content of initial certifications.

Respectfully submitted,



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