

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-892-HLW-CAB04 Thomas S. Moore, Chairman Paul S. Ryerson Richard E. Wardwell
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In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	August 26, 2009

**STATE OF NEVADA’S ANSWER IN OPPOSITION TO
NRC STAFF'S MOTION FOR LEAVE TO CORRECT ITS
JULY 30, 2009 DELIBERATIVE-PROCESS PRIVILEGE LOG SUPPLEMENT**

Honorable Catherine Cortez Masto
Nevada Attorney General
Marta Adams
Chief, Bureau of Government Affairs
100 North Carson Street
Carson City, Nevada 89701
Tel: 775-684-1237
madams@ag.nv.gov

Egan, Fitzpatrick, Malsch & Lawrence, PLLC
Martin G. Malsch *
Charles J. Fitzpatrick *
John W. Lawrence *
12500 San Pedro Avenue, Suite 555
San Antonio, TX 78216
Tel: 210.496.5001
Fax: 210.496.5011
mmalsch@nuclearlawyer.com
cfitzpatrick@nuclearlawyer.com
jlawrence@nuclearlawyer.com

*Special Deputy Attorneys General

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The State of Nevada ("Nevada") files this Answer in Opposition to NRC Staff's ("Staff") Motion for Leave to Correct Its July 30, 2009 Deliberative-Process Privilege Log Supplement (Motion for Leave) and urges that it be denied for the multiple reasons detailed below. In what was not Staff's most forthright fortnight, Staff began by filing a deficient privilege log on July 30, 2009 (fraught with the inadequacies detailed in Nevada's pending Motion to Compel filed August 10, 2009). Staff ended the period filing its Motion for Leave on August 19, 2009 (which is the subject of this Answer in Opposition), asking for concurrence by the parties and leave of the Board, while concealing the proposed privilege log corrections from both. Staff spent the intervening 20 days contradicting itself, reversing its field, repeatedly violating the Licensing Board's orders regarding privilege logs, and repeatedly violating the Commission's regulations requiring pre-motion consultation. In summary form, with details thereafter, the circumstances which constrain denial of Staff's Motion for Leave include:

I. RELEVANT ACTIONS – JULY 30 TO AUGUST 19, 2009

1. **Staff's July 30 filing:** Previously, the PAPO Board had required privilege logs to be accompanied by the signer's certification that **both** the information in the log **and** the privilege claim asserted are correct. The July 30 filing included no certification whatsoever.
2. **August 5 Consultation:**

Nevada – All 29 log entries are untimely; and 17 of 29 are inadequate to assert privilege.

Staff – All 29 are timely; and all 17 are properly asserted; no reason to change a thing.

3. **Nevada Motion to Compel** (August 10): All 29 log entries are untimely; and 17 of 29 are inadequate to assert privilege.
4. **Staff Answer** (August 17): All 29 are timely; and all 17 are properly asserted; no reason to change a thing.
5. **Staff email** sent to all parties (August 17): Staff wants to file a motion to correct "potential ambiguities" in its privilege log; requests non-objection to the motion.
[Nevada observation: **What** changes?]
6. **August 19 Consultation:**
Nevada – May we see the proposed corrected log?
Staff – No.
Nevada – Will you tell us what the changes are?
Staff – No. [Nevada observation: Just trust us?]
7. **Staff files this Motion for Leave** (August 19, 2009): tells CAB the purpose is to correct "minor mistakes"; does not provide either the proposed privilege log or a list of changes to CAB either. [Nevada observation: CAB, **you** trust us, too?]
8. **Staff Motion for Leave:** in addition, Staff asks CAB to act on Staff's Motion **first** – to allow its secret corrections to be filed **before** the CAB looks at Nevada's Motion to Compel. In support of this proposition, Staff cites a case which supports Nevada's position, not its own.
9. **Staff admits its true motive** for its desperate concealment of unprivileged documents: "Disclosure of pre-License Application discussions may lead to the mistaken belief that the Staff had already reached its regulatory decision." (Staff Answer to Motion to Compel at 11-12.)

II. ARGUMENT AND AUTHORITIES

1. Belying the cavalier attitude displayed by Staff both in filing the Motion for Leave and in attempting to correct its July 30 privilege log, the PAPO Board has long required something much more:

Each time a log is submitted (or supplemented or corrected), it must be accompanied by a certification from the attorney or other representative 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 document is correct."

11/1/2007 Case Management Order No. 5 (CMO#5) at 4. The PAPO Board went on to admonish "this certification is a serious matter . . . mistakes are strongly disfavored and should be rare." *Id.*

2. Staff's July 30 privilege log was invalid from its inception, since it was accompanied by **no** certification whatsoever.

3. On Wednesday, August 5, after requesting a day and time convenient to Staff, Nevada consulted telephonically with Staff, seeking to avoid the necessity for filing a motion to compel, discussing possible resolution of differences, and offering a compromise, which was not accepted. Nevada explained that all 29 entries in Staff's privilege log were untimely, and that as to 17 of 29 entries, Staff's purported articulation of its deliberative-process privilege claims was improper and not in accordance with the requirements of the PAPO Board, found in its July 6, 2007 Revised Case Management Order No. 2 (Revised CMO#2) and Appendix C of that Order (setting out the specific requirements for the assertion of deliberative-process privilege claims).

4. Staff refused to make any change whatsoever in its privilege log, asserting that all entries were timely and that its articulation of the deliberative-process privilege was proper and in accordance with the Revised CMO#2 and its Appendix C.

5. On August 10, Nevada filed its Motion to Compel, alleging the failure of Staff to assert the deliberate-process privilege in accordance with Revised CMO#2 as to 17 of its 29 entries and the failure of Staff to make the privilege assertion in a timely fashion as to all 29 (the precise issues it had raised in the consultation on August 5).

6. On August 17, Staff filed its Answer to Nevada's Motion to Compel repeating its refrain that its assertion of the deliberative-process privilege was proper and in accordance with Revised CMO#2 as to the 17 entries whose assertion was questioned by Nevada, and that its submission was timely as to all 29 entries in its privilege log.

7. On August 17 (the same day Staff filed the foregoing Answer to Nevada's Motion to Compel), its counsel sent an email to **all** parties stating that the Staff had "**noticed** some **potentially ambiguous** entries in our most recent privilege log that **may benefit** from correction" (8/17/2009 Email attached hereto as Exhibit A) (emphasis added). Staff stated its intention to file a motion for leave to file a corrected privilege log, and asked the other parties whether they would object to such a motion. Staff did **not**, however, send either its proposed motion or its proposed corrected privilege log to the parties.

8. On August 19, Nevada engaged once again in a telephone consultation with Staff, this time regarding its proposed Motion for Leave (the subject of this Answer). Nevada requested a copy of the proposed changes to the privilege log. Staff refused. Nevada asked Staff to identify the changes Staff proposed to make. Staff refused. Finally, Nevada asked if Staff would at least represent that the proposed changes it intended were not aimed at revising the very same matters Nevada had raised in its pending Motion to Compel (the matters with respect to which Staff had refused to make any changes, during the consultation preceding Nevada's filing of its Motion to Compel). Again, Staff refused. Accordingly, Nevada asked Staff to recite

Nevada's objection to the Staff Motion. (Query: How can one consult in good faith if it refuses to disclose its proposed action? Answer: It cannot.)

9. On August 19, Staff filed its pending Motion for Leave. Again, it did not favor **either** the parties **or** the CAB with a copy of its proposed new privilege log. Likewise, it did not list or explain the revisions it was seeking leave to make. (Staff did give three "examples" of proposed changes; but there is no way of knowing if those examples are typical, or if they are 3 examples out of 30, or 3 examples out of 300 changes.)

10. The PAPO Board had announced its strict standard for the limited circumstances under which leave would be given to a party to correct an erroneous privilege log, consistent with its instruction that such logs were a "serious matter" and that mistakes should be "rare." Thus, the PAPO Board's CMO#5 provides: "If a potential party realizes that one of its privilege logs contains **materially incorrect or misleading** information . . ." (emphasis added), then it may move for leave to correct.

11. In its desire to persuade the parties to consent to its **unseen** corrected privilege log, and to persuade the CAB to grant it leave to file its **unseen** corrected privilege log, Staff sought to trivialize the nature and scope of the changes. Thus, its email message to the parties characterized the proposed changes as only "potentially ambiguous" entries in its privilege log that "may benefit from correction." Likewise, its Motion for Leave to CAB characterizes its changes as only "minor mistakes" and "ambiguities." The Staff further tried to burn its candle at both ends by **still** insisting (even as it moved for leave to make corrections!) "its privilege log properly asserts the deliberative-process privilege and satisfies the requirements of the PAPO Board's Revised Case Management Order No. 2." In its zeal to minimize the significance of its hidden privilege log amendments, the Staff accordingly went the wrong direction, apparently

forgetting the PAPO Board's mandate that motions for leave to correct privilege logs would be entertained only where the document was "materially incorrect or misleading" (and **not** where it involved merely "minor mistakes" or "potential ambiguities").

12. Despite serving up its Motion for Leave to both the parties and to the CAB with the contents of its corrected privilege log concealed, the Staff's Motion for Leave goes yet a step further and brazenly suggests that its Motion be acted upon **first** ("it would be appropriate to rule on the instant motion prior to ruling on the Motion to Compel," Motion for Leave at 3 n.3). Thus, after repeatedly urging in pre-motion consultation and in filings, that its original privilege log was timely and correct, Staff now urges that its mystery changes be allowed and be allowed **now**, before the CAB even looks at Nevada's Motion to Compel. Facing waiver and disclosure, this ploy may be Staff's last resort, but it should not be tolerated.

13. In support of this novel argument, Staff recites a case which does not support the proposition claimed, but which **does** illustrate the value of a sincere pre-motion consultation, something which Staff had just avoided, **twice** in the space of two weeks in this case. The case of *Vermont Yankee LLC and Entergy Nuclear Operations, Inc.*, LBP-05-33, 62 NRC 828 (2005) did **not** involve a motion for leave to correct an inadequate privilege log. It **did** involve a privilege log; it **did** involve a sincere effort by the privilege log challenger to consult in good faith with the privilege claimant; and most importantly, it **did** involve a sincere, good faith, lengthy, and successful consultation between the privilege claimant and challenger. During the consultation, the challenger disclosed its objections to the privilege log, and the claimant discussed those changes it would make in an honest effort to resolve as many issues as possible, and avoid or reduce the scope of the challenger's motion to compel. In *Vermont Yankee*, the Board pointed out the purpose of the consultation between parties required by 10 C.F.R. §

2.323(b) stating that it "seeks to avoid unnecessary litigation by requiring the movant to make a reasonable effort to discuss and perhaps resolve the problem or misunderstanding before involving the Board." *Id.* at 837. In *Vermont Yankee*, the Board explained the procedure agreed to between the privilege challenger and claimant. Specifically, the challenger would register its informal objections with the Staff within ten days of the issuance of the privilege log, and the Staff would respond, indicating what changes it would make. If the challenger remained unsatisfied, it could file its motion to compel. While the Board criticized the parties for one aspect of their agreement – it abrogated the ten-day requirement for the filing of a motion prescribed by 10 C.F.R. § 2.323(a) without permission of the Board – yet it praised the parties for their good faith effort to consult and resolve issues. The Board finally concluded that it would excuse the parties' delay with respect to the belated filing of the motion to compel, because of its beneficial goal: "We also recognize that the agreement of the parties here . . . allowing the party claiming the privilege to supplement the privilege log information at some later time and attempt to substantiate the privilege, is not an atypical approach . . . and the supplementation dialog engaged in by the parties here may be a good use of the consultation process." *Id.* at 839. Of course, prerequisite to the conduct of a dialog between privilege challenger and privilege claimant, such as that which took place in *Vermont Yankee*, is something which Staff adamantly refused in this case: the disclosure of its position and discussion of the possible resolution of differences.

14. Finally, Staff admits in its Answer to the Motion to Compel (at 11-12) that the disclosure of the pre-License Application discussions (identified in 17 of 29 privilege log entries) "may lead to the mistaken belief that the Staff has already reached its regulatory decision." That,

while true, is not a ground for privilege, nor is it a justification to withhold unprivileged documents.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Nevada respectfully prays that, upon hearing, the Board deny NRC Staff's Motion for Leave to Amend its Privilege Log.

Respectfully submitted,

(signed electronically)

Charles J. Fitzpatrick *

Martin G. Malsch *

John W. Lawrence *

Egan, Fitzpatrick, Malsch & Lawrence, PLLC

12500 San Pedro Avenue, Suite 555

San Antonio, TX 78216

Tel: 210.496.5001

Fax: 210.496.5011

cfitzpatrick@nuclearlawyer.com

mmalsch@nuclearlawyer.com

jlawrence@nuclearlawyer.com

*Special Deputy Attorneys General

Dated: August 26, 2009

Exhibit A

Charles Fitzpatrick

From: Bupp, Margaret [Margaret.Bupp@nrc.gov]
Sent: Monday, August 17, 2009 5:30 PM
To: Gendelman, Adam; Bupp, Margaret
Cc: george.hellstrom@ymp.gov; frank.putzu@navy.mil; Schmutz, Thomas Alan; Polonsky, Alex S.; Zaffuts, Paul J.; Silverman, Donald J.; nick.dinunzio@rw.doe.gov; kfraglioni@hunton.com; martha.crosland@hq.doe.gov; dirwin@hunton.com; mshebelskie@hunton.com; ben.mcrae@hq.doe.gov; 'aharrington@gklaw.com'; Arobbins@jsslw.com; 'awc@nei.org'; 'bloveland@jsslw.com'; robert.andersen@akerman.com; 'bretwhipple@nomademail.com'; Brian.Hembacher@doj.ca.gov; cberkey@abwwlaw.com; 'cfitzpatrick@nuclearlawyer.com'; 'dcurran@harmoncurran.com'; dhouck@ndnlaw.com; 'dpoland@gklaw.com'; 'drepka@winston.com'; 'droby@jsslw.com'; 'ecg@nei.org'; Gendelman, Adam; 'gljames@earthlink.net'; 'hrenfro@gklaw.com'; 'jay.silberg@pillsburylaw.com'; 'jgores@armstrongteasdale.com'; 'jlawrence@nuclearlawyer.com'; jpeebles@ndnlaw.com; 'kwbell@energy.state.ca.us'; 'lcda@lcturbonet.com'; 'mab@nei.org'; 'mberger@bsglaw.net'; 'MMalsch@nuclearlawyer.com'; 'mmurphy@chamberscable.com'; 'nbrjdv@gmail.com'; RLeigh@abwwlaw.com; 'rlist@armstrongteasdale.com'; 'robert.andersen@akerman.com'; 'rwilson@winston.com'; 'rwsears@wpcda.org'; 'sheinzen@gklaw.com'; Susan.Durbin@doj.ca.gov; swilliams@abwwlaw.com; Timothy.Sullivan@doj.ca.gov; 'timothy.walsh@pillsburylaw.com'; WHorin@winston.com
Subject: Request for Leave to File Motion
Sensitivity: Confidential

Dear Counsel:

In preparing our response to Nevada's Motion to Compel, the NRC staff noticed some potentially ambiguous entries in our most recent privilege log that may benefit from correction. Therefore, tomorrow, in accordance with the Fifth Case Management Order, the Staff intends to file a motion for leave to file a correction to the privilege log. Pursuant to 10 C.F.R. 2.323, we are requesting whether the other parties to the proceeding would object to such a motion. I will be out of the office in training most of the day tomorrow and unavailable by phone. However, if you have questions, please contact Adam Gendelman at 301-415-8445. By the way, the Staff intends to file its response to Nevada's Motion this evening, after the EIE maintenance has concluded.

Thank you,
Molly

Margaret J. Bupp
Senior Attorney
U.S. Nuclear Regulatory Commission
Office of the General Counsel
11555 Rockville Pike
Mail Stop: O15D21
Rockville, MD 20852-2738

margaret.bupp@nrc.gov
301-415-3722 (ph.)
301-415-3725 (fax)

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	August 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Answer in Opposition to NRC Staff's Motion for Leave to Correct Its July 30, 2009 Deliberative-Process Privilege Log Supplement has been served upon the following persons by the Electronic Information Exchange:

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001

CAB 01

William J. Froehlich, Chair
Administrative Judge
E-mail: wjfl@nrc.gov
Thomas S. Moore
Administrative Judge
E-mail: tsm2@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

CAB 02

Michael M. Gibson, Chair
Administrative Judge
E-mail: mmg3@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: axr@nrc.gov
Nicholas G. Trikouros
Administrative Judge
E-mail: NGT@NRC.GOV

CAB 03

Paul S. Ryerson, Chair
Administrative Judge
E-mail: psr1@nrc.gov
Michael C. Farrar
Administrative Judge
E-mail: mcf@nrc.gov
Mark O. Barnett
Administrative Judge
E-mail: mob1@nrc.gov
mark.barnett@nrc.gov

CAB 04

Thomas S. Moore, Chair
Administrative Judge
E-mail: tsm2@nrc.gov
Paul S. Ryerson
Administrative Judge
E-mail: psr1@nrc.gov
Richard E. Wardwell
Administrative Judge
E-mail: rew@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
Email: ace1@nrc.gov
Daniel J. Graser, LSN Administrator
Email: djg2@nrc.gov
Lauren Bregman
Email: lrb1@nrc.gov

Sara Culler
 Email: sara.culler@nrc.gov
 Joseph Deucher
 Email: jhd@nrc.gov
 Patricia Harich
 Email: patricia.harich@nrc.gov
 Zachary Kahn
 Email: zxk1@nrc.gov
 Erica LaPlante
 Email: eal1@nrc.gov
 Matthew Rotman
 Email: matthew.rotman@nrc.gov
 Andrew Welkie
 Email: axw5@nrc.gov
 Jack Whetstine
 Email: jgw@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
 Email: hearingdocket@nrc.gov
 Andrew L. Bates
 Email: alb@nrc.gov
 Adria T. Byrdsong
 Email: atb1@nrc.gov
 Emile L. Julian, Esq.
 Email: elj@nrc.gov
 Evangeline S. Ngbea
 Email: esn@nrc.gov
 Rebecca L. Giitter
 Email: rll@nrc.gov

U.S. Nuclear Regulatory Commission
 Office of Comm Appellate Adjudication
 Mail Stop - O-16C1
 Washington, DC 20555-0001
 OCAA Mail Center
 Email: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
 Office of the General Counsel
 Mail Stop - O-15 D21
 Washington, DC 20555-0001
 Mitzi A. Young, Esq.
 Email: may@nrc.gov

Marian L. Zobler, Esq.
 Email: mlz@nrc.gov
 Andrea L. Silvia, Esq.
 Email: alc1@nrc.gov
 Daniel Lenehan, Esq.
 Email: dwl2@nrc.gov
 Margaret J. Bupp, Esq.
 Email: mjb5@nrc.gov
 Adam S. Gendelman
 Email: Adam.Gendelman@nrc.gov
 Joseph S. Gilman, Paralegal
 Email: jsg1@nrc.gov
 Karin Francis, Paralegal
 Email: kfx4@nrc.gov
 OGCMailCenter
 Email: 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
 Kelly L. Faglioni, Esq.
 Email: kfaglioni@hunton.com
 Donald P. Irwin, Esq.
 Email: dirwin@hunton.com
 Michael R. Shebelskie, Esq.
 Email: mshebelskie@hunton.com
 Pat Slayton
 Email: pslayton@hunton.com

U.S. Department Of Energy
 Office of General Counsel
 1551 Hillshire Drive
 Las Vegas, NV 89134-6321
 George W. Hellstrom
 Email: george.hellstrom@ymp.gov

U.S. Department of Energy
 Office of General Counsel
 1000 Independence Avenue, S.W.
 Washington, DC 20585
 Martha S. Crosland, Esq.
 Email: martha.crosland@hq.doe.gov
 Nicholas P. DiNunzio, Esq.
 Email: nick.dinunziok@rw.doe.gov

James Bennett McRae
 Email: ben.mcrae@hq.doe.gov
 Mary B. Neumayr, Esq.
 Email: mary.neumayr@hq.doe.gov
 Christina C. Pak, Esq.
 Email: christina.pak@hq.doe.gov

U.S. Department of Energy
 Office of Counsel
 Naval Sea Systems Command
 Nuclear Propulsion Program
 1333 Isaac Hull Avenue, SE
 Washington Navy Yard, Building 197
 Washington, DC 20376
 Frank A. Putzu, Esq.
 Email: frank.putzu@navy.mil

Yucca Mountain Project, Licensing Group,
 DOE/BSC
 1251 Center Crossing Road, M/S 423
 Las Vegas, NV 89144
 Jeffrey Kriner, Regulatory Programs
 Email: jeffrey_kriner@ymp.gov
 Stephen J. Cereghino, Licensing/Nucl Safety
 Email: stephen_cereghino@ymp.gov

Yucca Mountain Project, Licensing Group,
 DOE/BSC
 6000 Executive Blvd., Suite 608
 North Bethesda, MD 20852
 Edward Borella, Sr Staff,
 Licensing/Nuclear Safety
 Email: edward_borella@ymp.gov
 Danny R. Howard, Sr. Licensing Engineer
 Email: danny_howard@ymp.gov

U.S. Department of Energy
 Office of Civilian Radioactive Waste Mgmt
 Office of Repository Development
 1551 Hillshire Drive
 Las Vegas, NV 89134-6321
 Timothy C. Gunter
 Email: timothy_gunter@ymp.gov

U.S. Department of Energy
 1000 Independence Avenue, S.W.
 Washington, DC 20585
 Eric Knox, Associate Director, Systems
 Operations and External Relations, OCRWM
 Email: eric.knox@hq.doe.gov
 Dong Kim, LSN Project Manager, OCRWM
 Email: dong.kim@rw.doe.gov

Morgan, Lewis, Bockius LLP
 1111 Pennsylvania Ave., NW
 Washington, DC 20004
 Lewis Csedrik, Esq.
 Email: lcshedrik@morganlewis.com
 Jay Gutierrez, Esq.
 Email: jgutterrez@morganlewis.com
 Charles B. Moldenhauer, Associate
 Email: cmoldenhauer@morganlewis.com
 Brian P. Oldham, Esq.
 Email: boldham@morganlewis.com
 Thomas Poindexter, Esq.
 Email: tpoindexter@morganlewis.com
 Alex S. Polonsky, Esq.
 Email: apolonsky@morganlewis.com
 Thomas A. Schmutz, Esq.
 Email: tschmutz@morganlewis.com
 Donald Silverman, Esq.
 Email: dsilverman@morganlewis.com
 Annette M. White, Associate
 Email: c@morganlewis.com
 Paul J. Zaffuts, Esq.
 Email: pzaffuts@morganlewis.com
 Clifford W. Cooper, Paralegal
 Email: ccooper@morganlewis.com
 Shannon Staton, Legal Secretary
 Email: sstaton@morganlewis.com

Carter Ledyard & Milburn, LLP
 Counsel for Lincoln County
 1401 Eye Street, N.W., Suite 300
 Washington, DC 20005
 Barry S. Neuman, Esq.
 Email: neuman@clm.com

Churchill, Esmeralda, Eureka, Mineral
and Lander Counties
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, LSN Coordinator
for Lander County
Email: lpitchford@comcast.net

Robert List
Armstrong Teasdale LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-62237
Email: rlist@armstrongteasdale.com

City of Las Vegas
400 Stewart Ave.
Las Vegas, NV 89101
Margaret Plaster, Management Analyst
Email: mplaster@LasVegasNevada.gov

Clark County Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 89155
Irene Navis
Email: iln@co.clark.nv.us
Engelbrecht von Tiesenhausen
Email: evt@co.clark.nv.us
Philip Klevorick
Email: klevorick@co.clark.nv.us

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
Bruce Breslow
Email: breslow@nuc.state.nv.us
Steve Frishman, Tech. Policy Coordinator
Email: steve.frishman@gmail.com

Eureka County and Lander County
Harmon, Curran, Speilberg & Eisenberg
1726 M. Street N.W., Suite 600
Washington, DC 20036
Diane Curran, Esq.
Email: dcurran@harmoncurran.com

Nevada Nuclear Waste Task Force
P.O. Box 26177
Las Vegas, NV 89126
Judy Treichel, Executive Director
Email: judyntwf@aol.com

Talisman International, LLC
1000 Potomac St., N.W., Suite 300
Washington, D.C. 20007
Patricia Larimore
Email: plarimore@talisman-intl.com

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
Michael A. Bauser, Esq.
Associate General Counsel
Email: mab@nei.org
Anne W. Cottingham, Esq.
Email: awc@nei.org
Ellen C. Ginsberg, Esq.
Email: ecg@nei.org
Rod McCullum
Email: rxm@nei.org
Steven P. Kraft
Email: spk@nei.org
Jay E. Silberg
Email: jay.silberg@pillsburylaw.com
Timothy J.V. Walsh
Email: timothy.walsh@pillsburylaw.com

White Pine County
City of Caliente
Lincoln County
P.O. Box 126
Caliente, NV 89008
Jason Pitts
Email: jayson@idtservices.com

Nuclear Information and Resource Service
6930 Carroll Avenue, Suite 340
Takoma Park, MD 20912
Michael Mariotte, Executive Director
Email: nirsnet@nirs.org

Radioactive Waste Watchdog
 Beyond Nuclear
 6930 Carroll Avenue, Suite 400
 Takoma Park, MD 20912
 Kevin Kamps
 Email: kevin@beyondnuclear.org

Abigail Johnson
 612 West Telegraph Street
 Carson City, NV 89703
 Email: abbyj@gbis.com

National Congress of American Indians
 1301 Connecticut Ave. NW - Second floor
 Washington, DC 20036
 Robert I. Holden, Director
 Nuclear Waste Program
 Email: robert_holden@ncai.org

Churchill County (NV)
 155 North Taylor Street, Suite 182
 Fallon, NV 89406
 Alan Kalt
 Email: comptroller@churchillcounty.org

Inyo County Water Department
 Yucca Mtn Nuclear Waste
 Repository Assessment Office
 163 May St.
 Bishop, CA 93514
 Matt Gaffney, Project Associate
 Email: mgafterney@inyoyucca.org

Mr. Pat Cecil
 Inyo County Planning Director
 P.O. Box L
 Independence, CA 93526
 Email: pcecil@inyocounty.us

Robert S. Hanna
 233 E. Carrillo St., Suite B
 Santa Barbara, CA 93101
 Email: rshanna@bsglaw.net

Michael C. Berger
 233 E. Carrillo St., Suite B
 Santa Barbara, CA 93101
 Email: mberger@bsglaw.net

Environmental Protection Agency
 Ray Clark
 Email: clark.ray@epa.gov

Nuclear Waste Technical Review Board
 Joyce Dory
 Email: dory@nwtrb.gov

Intertech Services Corporation
 (for Lincoln County)
 P.O. Box 2008
 Carson City, NV 89702-2008
 Dr. Mike Baughman
 Email: bigboff@aol.com

Nye County Department of Natural
 Resources & Federal Facilities
 1210 E. Basin Road, Suite 6
 Pahrump, NV 89048
 David Swanson
 Email: dswanson@nyecounty.net

Lincoln County Nuclear Oversight Prgm
 100 Depot Ave., Suite 15; P.O. Box 1068
 Caliente, NV 89008-1068
 Lea Rasura-Alfano, Coordinator
 Email: jcciac@co.lincoln.nv.us

Nye County Regulatory/Licensing Adv.
 18160 Cottonwood Rd. #265
 Sunriver, OR 97707
 Malachy Murphy
 Email: mrmurphy@chamberscable.com

Mineral County Board of Commissioners
 P.O. Box 1600
 Hawthorne, NV 89415
 Linda Mathias, Administrator
 Office of Nuclear Projects
 Email: yuccainfo@mineralcountynv.org

State of Nevada
 100 N. Carson Street
 Carson City, NV 89710
 Marta Adams
 Email: madams@ag.state.nv.us

White Pine County (NV) Nuclear
 Waste Project Office
 959 Campton Street
 Ely, NV 89301
 Mike Simon, Director
 (Heidi Williams, Adm. Assist.)
 Email: wpnucwst1@mwpower.net

Fredericks & Peebles, L.L.P.
 1001 Second Street
 Sacramento, CA 95814
 916-441-2700
 FAX 916-441-2067
 Darcie L. Houck
 Email: dhouck@ndnlaw.com
 John M. Peebles
 Email: jpeebles@ndnlaw.com
 Joe Kennedy, Chairman
 Email: chairman@timbisha.org
 Barbara Durham
 Tribal Historic Preservation Officer
 Email: dvdurbarbara@netscape.com

Susan Durbin
 Deputy Attorney General
 California Department of Justice
 1300 I St.
 P.O. Box 944255
 Sacramento, CA, 94244-2550
 Email: susan.durbin@doj.ca.gov

Brian Hembacher
 Deputy Attorney General
 California Department of Justice
 300 S. Spring St
 Los Angeles, CA 90013
 Email: brian.hembacher@doj.ca.gov

Timothy E. Sullivan
 Deputy Attorney General
 California Department of Justice
 1515 Clay St., 20th Flr.
 P.O. Box 70550
 Oakland, CA 94612-0550
 Email: timothy.sullivan@doj.ca.gov

Brian Wolfman
 Public Citizen Litigation Group
 1600 20th Street, N.W.
 Washington, D.C. 20009

Kevin W. Bell
 Senior Staff Counsel
 California Energy Commission
 1516 9th Street
 Sacramento, CA 95814
 Email: kwbell@energy.state.ca.us

Jeffrey D. VanNiel
 530 Farrington Court
 Las Vegas, NV 89123
 Email: nbridvnr@gmail.com

Ethan I. Strell
 Carter Ledyard & Milburn LLP
 2 Wall Street
 New York, NY 10005
 Email: strell@clm.com

Jennings, Strouss & Salmon, PLC
 1700 Pennsylvania Avenue, N.W., Suite 500
 Washington DC 20006-4725
 Alan I. Robbins
 Email: arobbins@jsslw.com
 Debra D. Roby
 Email: droby@jsslw.com

Steven A. Heinzen
 Godfrey & Kahn, S.C.
 One East Main Street, Suite 500
 P.O. Box 2719
 Madison, WI 53701-2719
 Email: sheinzen@gklaw.com

Douglas M. Poland
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P.O. Box 2719
Madison, WI 53701-2719
Email: dpoland@gklaw.com

Arthur J. Harrington
Godfrey & Kahn, S.C.
780 N. Water Street
Milwaukee, WI 53202
Email: aharrington@gklaw.com

Gregory Barlow
P.O. Box 60
Pioche, NV 89043
Email: lcta@lcturbonet.com

Connie Simkins
P.O. Box 1068
Caliente, NV 89008
Email: jcciac@co.lincoln.nv.us

Bret O. Whipple
1100 South Tenth Street
Las Vegas, NV 89104
Email: bretwhipple@nomademail.com

Richard Sears
801 Clark Street, Suite 3
Ely, NV 89301
Email: rwsears@wpcda.org

Alexander, Berkey, Williams & Weathers
2030 Addison Street, Suite 410
Berkeley, CA 94704
Curtis G. Berkey
Email: cberkey@abwwlaw.com
Scott W. Williams
Email: swilliams@abwwlaw.com
Rovianne A. Leigh
Email: rleigh@abwwlaw.com

(signed electronically)
Susan Montesi