

**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))	June 18, 2010

**JOINT REPORT CONCERNING CONDITIONS
REGARDING DOE LSN DOCUMENT COLLECTION**

The parties, interested governmental participants, and petitioners for intervention¹ (hereafter "the parties") have conferred² and sought to reach agreement upon a complete set of conditions³ regarding DOE's LSN document collection. The product of the parties' efforts follows, with Part I enumerating the conditions agreed upon, and Part II articulating the disparate positions of the parties with respect to proposed conditions on which agreement was not reached.

¹ The CAB's June 7, 2010 Order requires the filing of an agreement by the parties, including the Petitioners for intervention regarding conditions for DOE's LSN document collection; such agreement is being filed without prejudice to, or waiving, the objections of any party to the admission in this proceeding of the five Petitioners for intervention.

² Florida Public Service Commission only sought leave to participate as *amicus curiae* and submit an *amicus curiae* memorandum, which it has done; it is not a participant in this filing.

³ The CAB's June 7, 2010 Order requires the filing of an agreement by the parties regarding conditions for DOE's LSN document collection; such agreement is being filed without prejudice to, or waiving, the position of any party that advocates either that no condition be attached to the CAB's disposition of DOE's Motion to Withdraw, or alternatively, that terms or conditions should be attached to the CAB's disposition of DOE's Motion to Withdraw or that the Motion be denied.

INTRODUCTION

On December 17, 2009, the LSN Administrator, Mr. Dan Graser, sent a memorandum to the CAB in which he expressed concerns regarding the impact which might result should the NRC LSN portal fall into disuse, including the possible loss of valuable information presently included in DOE's LSN document collection. On January 27, 2010, the CAB held a Case Management Conference, during which was discussed, *inter alia*, the preservation of DOE's LSN document collection.

Subsequently, on February 4, February 19, and May 24, 2010, DOE made written submissions to the CAB regarding its LSN document collection. The May 24 submission consisted of responses to the myriad questions posed to DOE in an April 21 CAB Order. On May 18, 2010, CAB issued an Order in which it stated that the purpose of a planned June 4 Case Management Conference to be held at the NRC's Las Vegas Hearing Facility would be "to discuss DOE's plans for preserving its LSN document collection."

Following that conference the CAB issued an Order on June 7, 2010, requiring the parties to confer, to endeavor to reach agreement on "a complete set of proposed conditions regarding DOE's Licensing Support Network (LSN) document collection." The Order further required Nevada to take the lead and file such proposed conditions by June 18. Finally, the Order prescribed that if there were any proposed conditions with respect to which agreement could not be reached, Nevada would report those as well, specifying the alternative positions of the parties on the point of disagreement. Each of Parts I and II is divided into three sections, reflecting the time period to which the associated conditions would apply, with proposed conditions identified as follows:

Part I – Agreed Conditions –

A-1 – apply to the period before termination of this proceeding;

B-1 – apply to the period after termination of this proceeding;

C-1 – apply to a hypothetical future time, should DOE seek to renew its LA, or file a new LA for a nuclear waste storage facility at Yucca Mountain, Nevada.

Part II – Conditions Proposed But Not Agreed To –

AA-1 – apply to the period before termination of this proceeding;

BB-1 – apply to the period after termination of this proceeding;

CC-1 – apply to a hypothetical future time, should DOE seek to renew its LA, or file a new LA for a nuclear waste storage facility at Yucca Mountain, Nevada.

Note: in each instance, the proponents of the alternative statement of "not agreed to" conditions are identified. White Pine County takes no position on any of the proposed conditions, and so is not a party to any of the following proposed conditions. The following is the information requested by the CAB's June 7, 2010 Order:

PART I: AGREED-UPON CONDITIONS REGARDING DOE'S LSN DOCUMENT COLLECTION:

A. Conditions Applicable Until Final Termination of this Proceeding (*i.e.*, until a final Order granting or denying DOE's Motion to Withdraw its Yucca Mountain License Application (LA) is no longer appealable at any level through petitions for certiorari to the U.S. Supreme Court):

1. DOE will not take its LSN document collection offline until there is Final Termination of this proceeding. DOE will maintain its LSN document collection

("LSNdc") such that the public will continuously have access to the DOE LSNdc through the NRC's LSN web portal with its current functionality until Final Termination of this proceeding.

2. As stated in ¶ A-1 above, DOE will maintain the existing functionalities of its LSN document collection via the NRC portal until Final Termination of this proceeding. Maintenance of existing functionalities includes: (1) adding documents to the LSN document collection as any relevant documents are generated or discovered; (2) modifying documents currently on the DOE LSN document collection by changing their status from full text to header only or vice versa if a privilege is claimed or waived; (3) adding redacted documents, as appropriate; (4) producing privilege logs, as appropriate; and (5) producing documents when requested in accordance with Subpart J and applicable case management orders. This commitment is independent of which office within DOE is assigned responsibility for overseeing these responsibilities.
3. At present, DOE's Team Leader, Archives and Information Management Team at DOE's Office of Legacy Management ("LM") (presently John V. Montgomery) will serve as LM's relevant point of contact for specific questions about problems with DOE documents or images that may be reported by other parties to the proceeding. The person in this position will likewise serve as LM's point of contact for persons who wish to acquire specific documents or categories of documents from the DOE LSNdc (according to current protocol) or copies of the entire DOE LSNdc (in accordance with ¶ B-10 below). Should DOE designate a different organization or person to serve as the point of contact for these tasks,

DOE will notify this Board of the replacement. The transfer of DOE's institutional knowledge of the program activities, its records, and HLW issues will be facilitated by the continuing involvement of the DOE OGC in LM's response to requests for DOE LSNdc documents.

4. Before Final Termination of this proceeding, to ensure the electronic availability of DOE's Documentary Material, and to resolve any disputes in respect thereto during the period prior to Final Termination of this licensing proceeding, the CAB, or such other presiding officer as the Commission may designate, will maintain continuing jurisdiction to enforce the terms of these obligations.

B. Conditions Applicable After Final Termination:

1. The use of the phrase DOE's "LSNdc" means the entire collection of documentary material (whether in full text or header only) currently available on its LSN participant website.
2. After there is Final Termination of this proceeding, the text, image and bibliographic header files that comprise the DOE LSNc will be archived by LM. The archiving of the DOE LSNdc to the LM facility would not commence until Final Termination of this proceeding. At present, it is planned that LM will archive the DOE LSNdc at its facility in Morgantown, West Virginia. Should DOE designate a different organization to archive the DOE LSNdc, DOE will notify the parties to this proceeding of the replacement organization.
3. The files that comprise the DOE LSN document collection will be on magnetic tapes that will be maintained by DOE's LM. LM will archive the following files that comprise each document in the DOE LSNdc: (a) text files (HTML format);

- (b) image files (TIFF or JPEG formats); and (c) bibliographic header files (XML formats). LM will also create a single PDF file for each complete document in the DOE LSNdc. The tapes will be stored in a facility in Morgantown, West Virginia, and the data, including a PDF image of each document, will be loaded onto a storage area network which can be electronically searched and retrieved.
4. As stated in ¶ B-3, when LM loads the DOE LSN document collection onto its storage area network, it will create a compiled PDF image of each imageable document in the LSN document collection and thereafter will preserve those PDF image files.
 5. After Final Termination of this proceeding, DOE will preserve its LSNdc for 100 years (this commitment will be met regardless of whether the DOE LSNdc will be deemed temporary or permanent). Upon request, the public will be entitled to receive copies of the DOE LSNdc through DOE's LM during that period. Such requests must comply with ¶ B-10. DOE will likewise comply with the Federal Records Act and any requirements of the National Archives and Records Administration.
 6. The archived DOE LSNdc will be compiled into documents at the directory level. Each directory contains the bibliographic header file, the text file, and all of the image files comprising a document. The directory name corresponds to the participant accession number of the document. Thus, even without a document management software system, the directory structure defines where one document ends and another begins. LM will compile a PDF image of each imageable document in the LSN document collection and preserve those images.

7. Because the compiled PDF images that will be created and stored by LM themselves would not be in a searchable PDF format, DOE shall maintain with the PDFs its existing text files that have the OCR optical character recognition searchability. DOE will maintain its text files created for the LSNdc because they have superior quality and searchability standards than that which is generated through a standard PDF creation of a document.
8. After the Final Termination of this proceeding, LM will use a replacement search index that will allow LM to search for documents in the archived DOE LSNdc in order to conduct word searches or search for a particular document using its OCR text files, identify the document, and then electronically produce the corresponding document.
9. DOE shall ensure that the integrity and content of the LSNdc remain intact following any change in format or storage location of the LSNdc. If a problem or issue is identified with respect to the integrity or content of the LSNdc, the issue shall be brought to the attention of LM, who will work with the requester in a good faith effort to resolve the issue.
10. LM will make and provide a copy on electronic media of the entire DOE LSNdc, or those documents that are responsive to specific search requests, which documents were previously publicly available on the DOE LSNdc, provided the requests are submitted in writing and the requester reimburses DOE for all of the costs of copying, including all labor costs associated with such response. DOE will provide an itemized statement for reimbursement to the requester. Only those documents which were previously publicly available on the LSNdc will be

provided. DOE will provide such copies after the transition of the LSNdc to LM, and LM has created its replacement search index, activated its new search engine, and compiled PDF files. After a requester receives a copy of the DOE LSNdc, or specific documents in the DOE LSNdc, and LM notifies the requester that the requested material contains privacy-protected information and identifies those documents that contain such information, DOE will work with the requester to redact the identified privacy-protected information, or otherwise delete the copy of the document that contains such information, and provide the requester with a replacement copy of the document with the privacy information redacted. LM will also provide copies of non-imageable material to the extent such information can be readily copied, the requester identifies the information with specificity, and the requester complies with the terms of this paragraph. Unless DOE and the requester agree otherwise, the requester will receive the entire DOE LSNdc, or particular documents from the DOE LSNdc that are responsive to the requester's specific document request, in bibliographic header (XML file), text (HTML file), and image (PDF file) form.

11. To the extent possible, DOE redacted unclassified but sensitive security information (*e.g.*, unclassified Naval Nuclear Propulsion Information and Safeguards Information), proprietary information, and privacy information from documents containing such information. If such information could not be redacted from documents in the DOE LSNdc, then a bibliographic header file for such documents, but not a text or image file, will be contained in the LM tapes of the DOE LSNdc. The "documentary material" represented only by bibliographic

headers in the LSN will be transferred to LM for archiving with the DOE LSNdc and unredacted copies will also be retained in accordance with the same records schedule as the rest of the DOE LSNdc.

12. Following Final Termination of this proceeding, DOE's LSN vendor, CACI, will submit its then-current copy of the DOE LSNdc to LM. Such information provided by CACI will be preserved for 100 years following Final Termination.
13. The expertise and the mission of DOE's LM is the maintenance and preservation of archived records, which will include the maintenance of DOE's LSN document collection, its preservation, and its public availability as stated herein.
14. While there is currently no search engine for the DOE LSN collection outside the LSN, such a search engine will be developed by LM (loading the data onto servers and creating a search engine for that collection). The search engine will function in a manner consistent with the way the LSN is currently managing in regard to being able to search for and retrieve documents.
15. The header and text files in DOE's LSN document collection are currently in a searchable format. LM will use a replacement index utility to search for documents using those same files; no files will need to be converted for that purpose. The existing header files and the existing text files of the DOE LSN collection are presently in a searchable format, and LM will create an index or spidering-type function to replace what the NRC's LSN portal now does.
16. Because DOE cannot represent how the National Archives and Records Administration ("NARA") would make the DOE LSNdc available, LM will create a search function for DOE's LSNdc and maintain it for the 100-year period

following Final Termination of this proceeding regardless of whether the documents are deemed to be temporary or permanent.

17. DOE confirms that, in using the copy which a requesting party would receive from DOE of its complete LSNdc, no unique proprietary DOE software will be involved and that presumably off-the-shelf software will work. The complete copy to be provided by DOE will include any existing LM index of materials.

C. Conditions applicable in the future, should DOE ever attempt to renew its LA or file a new LA seeking authority to establish a facility at Yucca Mountain for the disposal or storage of nuclear waste (SNF or HLW):

1. In the event the LSN needs to be re-established for whatever purpose, DOE will work with the NRC to make all the documents presently in its LSNdc electronically available on the LSN, or whatever successor system is established.

PART II: PROPOSED CONDITIONS REGARDING DOE'S LSN DOCUMENT COLLECTION WITH RESPECT TO WHICH AGREEMENT WAS NOT REACHED:

AA. Proposed Conditions Applicable Until Final Termination.

AA-1. Funding of Legacy Management Duties Regarding the LSNdc

Wording proposed by all parties except DOE and NRC Staff:

At present, DOE's Office of Legacy Management ("LM") will be the DOE organization responsible to maintain the LSN document collection until a Final Termination Order has been entered. Should DOE designate a different responsible organization for these tasks, DOE will notify this Board of that replacement organization. DOE will fund the continuation of the existing functionality of the DOE LSNdc until Final Termination of this licensing proceeding and beyond, **at least** until LM has created its replacement search

index, activated its new search engine, compiled its LSNdc into PDF files, and provided an opportunity, to those who may request it, to obtain a complete copy of DOE's LSNdc from LM after its implementation of its system. DOE will seek appropriations for funding the maintenance of its LSNdc after that time, to meet its LSNdc commitments for the remainder of a 100-year period following Final Termination.

Wording proposed by DOE and supported by NRC Staff:

At present, DOE's Office of Legacy Management ("LM") will be the DOE organization responsible to maintain the LSN document collection until a Final Termination Order has been entered. Should DOE designate a different responsible organization for these tasks, DOE will notify this Board of that replacement organization. DOE will apply previously appropriated funds and seek the necessary additional appropriations to maintain the existing functionality of the DOE LSNdc until Final Termination of this licensing proceeding and to thereafter preserve the documents. No provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

BB. Proposed Conditions Applicable After Final Termination.

BB-1. Physical Items:

Wording proposed by all parties except DOE and NRC Staff:

Physical items, such as rock cores or samples, metallurgic specimens, or the like, which qualify as documentary material are represented on the LSN by bibliographic headers, since rock samples, metallurgic specimens, and the like

cannot be physically produced in imageable form on the LSN. DOE will preserve the physical samples and specimens that are represented by the headers in the LSN and will retain those items for the same duration as the LSN collection. If DOE has physical samples and specimens in its or its agents' possession that currently have no LSN headers, DOE will work with Nye County or other interested participants to verify whether such sample or specimen should have been represented by a header. If the physical samples and/or specimens should have been represented by a header, DOE will produce a header and insert it into the LSN in the next monthly LSN update cycle. DOE will preserve the physical samples and specimens that are not represented by the headers in the LSN and will retain those items for the same duration as a Project Record, under DOE's Standard Project Records timeframe of 25 years. If someone in the future requests through LM a particular rock sample or metallurgic specimen represented by a header, then they could make a request for it, and access would be arranged. If any issue is raised with respect to physical samples, core samples, or the like in the possession of DOE which were produced by Nye County, DOE will consult and work out Nye County access to any such materials. Where DOE's LSN collection has a header for identifying a medium (such as a CD or DVD) on which textual material is contained (not in full text on the LSN), DOE has on request provided the underlying data. DOE will continue to do so before and after Final Termination of this proceeding. To the extent that preservation of the aforementioned samples and specimens is dependent on the availability of funds for such purposes, DOE shall include funding for such preservation its

annual budget request.

Wording proposed by DOE and supported by NRC Staff:

The text and image files that comprise DOE's LSNdc and that will be loaded onto the magnetic tapes and LM's storage area network will not include text and image files of the following: (a) non-imageable "documentary material" (as that term is defined by 10 C.F.R. §§ 2.1000 and 2.1003); (b) documents upon which DOE has asserted a legal privilege as represented on DOE's privilege log; (c) copyright documents; and (d) documents from DOE's employee concerns program. Bibliographic headers, however, will be contained in the LM tapes of the DOE LSNdc for each of these categories of information. "Non-imageable" material may include things such as data currently stored on DVDs or CDs that could not be scanned and made available on the LSN in text or image format, digital computer printouts, over-sized drawings, physical items (*e.g.*, core samples), and strip charts. LM will provide copies of "non-imageable" materials in accordance with ¶ B.10. The "documentary material" represented only by bibliographic headers in the LSNdc will be archived and retained in accordance with the same records schedule as the rest of the DOE LSNdc. Physical items, which are represented on the DOE LSNdc by bibliographic headers and which cannot be copied, will be preserved. Upon request, DOE will work with a requester to provide access to such items. If such physical items were produced by another party to this proceeding, but were represented on the DOE LSNdc as a bibliographic header only, DOE will consult with that party about the physical items' storage. Nothing herein shall be interpreted to require DOE to add or

archive materials to the DOE LSNdc, including but not limited to, non-imageable core samples, that are not "documentary material" under 10 C.F.R. §§ 2.1000 and 2.1003.

BB-2. Funding of DOE LSNdc tasks assigned to LM

Wording proposed by all parties except DOE and NRC Staff:

While DOE does not know the specific cost of the tasks to be performed by LM since they are still being developed, DOE will fund those tasks at least until LM has created its replacement search index, activated its new search engine, compiled its LSNdc into PDF files, and provided an opportunity, to those who may request it, to obtain a complete copy of DOE's LSNdc from LM after its implementation of its system ("DOE has made this commitment, and intends to honor it."). DOE will seek appropriations for funding the maintenance of its LSNdc after that time, to meet its LSNdc commitments for the remainder of a 100-year period following Final Termination.

Wording proposed by DOE and supported by NRC Staff:

While DOE does not know the specific cost of the tasks to be performed by LM since they are still being developed and funding of such costs are subject to Congressional appropriations, nonetheless, DOE will apply existing resources and seek the necessary appropriations to meet the commitments stated herein. No provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

CC. Proposed Conditions Applicable to a Hypothetical Future Time, Should DOE Seek to Renew its LA, or File a New LA for a Nuclear Waste Storage or Disposal Facility at Yucca Mountain, Nevada.

- CC-1. DOE's failure to maintain its LSNdc and the resulting impact to any future application to NRC for a nuclear waste storage facility or disposal at Yucca Mountain, Nevada

State of Nevada (joined by Clark County, NCAC, Inyo County, State of California, JTS, Eureka County and Lincoln County) proposes:

Because any order entered by CAB granting DOE's Motion to Withdraw its License Application (with respect to which these or similar conditions are imposed) will presume a continuation of access to DOE's LSN document collection for a period of 100 years following Final Termination (and its ruling is premised on this presumption), should DOE fail to adhere to and meet every condition of this order: then should DOE in the future file an application with the NRC for a license or construction authorization for a storage or disposal facility for nuclear waste at Yucca Mountain, Nevada, such application shall not be docketed or heard by the NRC; and a motion by any party to such proceeding, to deny or disapprove such application, shall be granted.

NEI and NARUC propose:

NEI and NARUC propose that the condition be excluded, and that any DOE conduct with respect to documentary material be dealt with at the time of any future application.

Aiken County and Nye County propose:

Aiken County and Nye County propose that the condition be excluded.

NRC Staff proposes:

The NRC Staff does not think this condition is necessary. If DOE were ever to resubmit an application, the Commission's procedures applicable to

proceedings for the issuance of licenses for the receipt of high-level radioactive waste at a geologic repository in 10 CFR Subpart J would apply.

State of Washington and State of South Carolina propose:

The State of Washington and the State of South Carolina propose that the condition be excluded, and that any DOE conduct with respect to documentary material be dealt with at the time of any future application.

Four Nevada Counties and Prairie Island Indian Community propose:

The Four Nevada Counties (Churchill, Esmeralda, Lander and Mineral) and Prairie Island Indian Community believe any non-compliance with the LSN conditions should be addressed by the appropriate authority at the time the issue is raised or an application is filed.

DOE proposes:

DOE proposes that Nevada's condition be struck. As DOE has explained, it does not ever intend to submit an application for a permanent repository for spent nuclear fuel and high-level waste at Yucca Mountain. Alternatively, DOE proposes the following language:

If DOE fails to materially comply with the terms of this Order, and if DOE files a future application with the NRC for a license or construction authorization for the disposal of spent nuclear fuel and high-level waste at Yucca Mountain, Nevada, then any party to that future proceeding may move for a dismissal of such application in accordance with applicable NRC rules and regulations based on DOE's failure to materially comply with this Order.

CONCLUSION

The foregoing are the proposed DOE LSNdc conditions agreed upon by all parties (Part I) and the proposed alternative wording of conditions which were not agreed upon, reflecting which proponents support each of those conditions (Part II). These are offered for the CAB's consideration in the event it concludes that **any** conditions are appropriate to its disposition of DOE's Motion to Withdraw.

Respectfully submitted,

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
Email: madams@ag.nv.gov

(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: June 18, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Report Concerning Conditions Regarding DOE LSN Document Collection has been served upon the following persons by the Electronic Information Exchange:

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

CAB 01

wjf1@nrc.gov

tsm2@nrc.gov

rew@nrc.gov

CAB 02

mmg3@nrc.gov

axr@nrc.gov

NGT@NRC.GOV

CAB 03

psr1@nrc.gov

mcf@nrc.gov

mob1@nrc.gov

mark.barnett@nrc.gov

CAB 04

tsm2@nrc.gov

psr1@nrc.gov

rew@nrc.gov

ace1@nrc.gov

djg2@nrc.gov

lrb1@nrc.gov

sara.culler@nrc.gov

jhd@nrc.gov

patricia.harich@nrc.gov

zxk1@nrc.gov

eal1@nrc.gov

matthew.rotman@nrc.gov

axw5@nrc.gov

jgw@nrc.gov

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

hearingdocket@nrc.gov

alb@nrc.gov

atb1@nrc.gov

elj@nrc.gov

esn@nrc.gov

rll@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Comm Appellate Adjudication

ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel

may@nrc.gov

mlz@nrc.gov

alc1@nrc.gov

dwl2@nrc.gov

Adam.Gendelman@nrc.gov

jsg1@nrc.gov

kfx4@nrc.gov

Michael.dreher@nrc.gov

Jessica.Bielecki@nrc.gov

Elva.BowdenBerry@nrc.gov

OGCMailCenter@nrc.gov

Hunton & Williams LLP

kfaglioni@hunton.com

dirwin@hunton.com

mshebelskie@hunton.com

pslayton@hunton.com

U.S. Department Of Energy
Office of General Counsel
george.hellstrom@ymp.gov
martha.crosland@hq.doe.gov
nick.dinunziok@rw.doe.gov
ben.mcrae@hq.doe.gov
christina.pak@hq.doe.gov
scott.harris@hq.doe.gov
sean.lev@hq.doe.gov

U.S. Department of Energy
Office of Counsel
Naval Sea Systems Command
frank.putzu@navy.mil

U.S. Department of Energy
USA Repository Services LLC
Yucca Mountain Project Licensing Group
jeffrey_kriner@ymp.gov
stephen_cereghino@ymp.gov

U.S. Department of Energy
USA Repository Services LLC
Yucca Mountain Project Licensing Group
edward_borella@ymp.gov

U.S. Department of Energy
Office of Civilian Radioactive Waste Mgmt
Office of Repository Development
timothy_gunter@ymp.gov

U.S. Department of Energy
OCRWM
eric.knox@hq.doe.gov
dong.kim@rw.doe.gov

Morgan, Lewis, Bockius LLP
lcsedrik@morganlewis.com
jguiterrez@morganlewis.com
cmoldenhauer@morganlewis.com
boldham@morganlewis.com
tpoindexter@morganlewis.com
apolonsky@morganlewis.com
tschmutz@morganlewis.com
dsilverman@morganlewis.com

c@morganlewis.com
pzaffuts@morganlewis.com
ccooper@morganlewis.com
sstaton@morganlewis.com
rkuyler@morganlewis.com

Carter Ledyard & Milburn, LLP
Counsel for Lincoln County
neuman@clm.com

Churchill, Esmeralda, Eureka, Mineral
and Lander Counties
lpitchford@comcast.net

Armstrong Teasdale LLP
rlist@armstrongteasdale.com

City of Las Vegas
mplaster@LasVegasNevada.gov

Clark County Nuclear Waste Division
iln@co.clark.nv.us
evt@co.clark.nv.us
klevorick@co.clark.nv.us

Nuclear Waste Project Office
breslow@nuc.state.nv.us
steve.fr@hotmail.com

Eureka County and Lander County
Harmon, Curran, Speilberg & Eisenberg
dcurran@harmoncurran.com

Nevada Nuclear Waste Task Force
judyntwtf@aol.com

Talisman International, LLC
plarimore@talisman-intl.com

Nuclear Energy Institute
mab@nei.org
awc@nei.org
ecg@nei.org
rxm@nei.org
spk@nei.org
jay.silberg@pillsburylaw.com
timothy.walsh@pillsburylaw.com

White Pine County
 City of Caliente
 Lincoln County
jayson@idtservices.com

Nuclear Information and Resource Service
nirnet@nirs.org

Beyond Nuclear
kevin@beyondnuclear.org

Abigail Johnson
abbyj@gbis.com

National Congress of American Indians
robert_holden@ncai.org

Churchill County (NV)
comptroller@churchillcounty.org

Inyo County Water Department
mgaffney@inyoyucca.org

Inyo County Planning Director
pcecil@inyocounty.us

Robert S. Hanna
rshanna@bsglaw.net

Michael C. Berger
mberger@bsglaw.net

Environmental Protection Agency
clark.ray@epa.gov

Nuclear Waste Technical Review Board
dory@nwtrb.gov

Intertech Services Corporation
bigboff@aol.com

Nye County Department of Natural
 Resources & Federal Facilities
dswanson@nyecounty.net

Lincoln County Nuclear Oversight Prgm
jcciac@co.lincoln.nv.us
 Nye County Regulatory/Licensing Adv.
mrmurphy@chamberscable.com

Nye County Nuclear Waste Repository Project
 Office (NWRPO)
zchoate@co.nye.nv.us
sdudley@co.nye.nv.us

Mineral County Board of Commissioners
yuccainfo@mineralcountynv.org

State of Nevada
madams@ag.state.nv.us

White Pine County (NV) Nuclear
 Waste Project Office
wpnucwst1@mwpower.net

Fredericks & Peebles, L.L.P.
dhouck@ndnlaw.com
jpeebles@ndnlaw.com
chairman@timbisha.org
dvdurbarbara@netscape.com
sthinelk@ndnlaw.com

California Department of Justice
susan.durbin@doj.ca.gov
brian.hembacher@doj.ca.gov
timothy.sullivan@doj.ca.gov

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

California Energy Commission
kwbell@energy.state.ca.us

Jeffrey D. VanNiel
nbridvnr@gmail.com

Carter Ledyard & Milburn LLP
strell@clm.com

Jennings, Strouss & Salmon, PLC
arobbins@jsslaw.com

droby@jsslaw.com

Godfrey & Kahn, S.C.
sheinzen@gklaw.com

Godfrey & Kahn, S.C.
dpoland@gklaw.com

Godfrey & Kahn, S.C.
aharring@gklaw.com

Gregory Barlow
lca@lcturbonet.com

Connie Simkins
jcciac@co.lincoln.nv.us

Bret O. Whipple
bretwhipple@nomademail.com

Richard Sears
rwsears@wpcda.org

Alexander, Berkey, Williams & Weathers
cberkey@abwwlaw.com
swilliams@abwwlaw.com
rleigh@abwwlaw.com

Davidson & Lindemann, P.A.
kwoodington@dml-law.com

Attorney General, State of Washington
leeol@atg.wa.gov
michaeld@atg.wa.gov
andyf@atg.wa.gov
JonaT@atg.wa.gov

Haynsworth Sinkler Boyd, PA
tgottshall@hsblawfirm.com
rshealy@hsblawfirm.com

National Association of Regulatory
Utility Commissioners
jramsay@naruc.org
rlunt@naruc.org

Prairie Island Indian Community
pmahowald@piic.org

Public Law Resource Center PLLC
donkeskey@publiclawresourcecenter.com

(signed electronically)
Laurie Borski, Paralegal