UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

U.S. DEPARTMENT OF ENERGY (High-Level Waste Repository)

Docket No. 63-001

ASLBP Nos. 09-876-HLW-CAB01
ASLBP Nos. 09-877-HLW-CAB02
ASLBP Nos. 09-878-HLW-CAB03

May 31, 2009

CALIFORNIA’S OPPOSITION TO NRC STAFF APPEAL OF LBP-09-06

Susan Durbin
Deputy Attorney General
California Department of Justice
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 324-5475
Susan.Durbin@doj.ca.gov

Brian W. Hembacher
Deputy Attorney General
California Department of Justice
300 South Spring Street
Los Angeles, CA 90013
(213) 897-2638
Brian.Hembacher@doj.ca.gov

Timothy E. Sullivan
Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 622-4038
Timothy.Sullivan@doj.ca.gov

Kevin W. Bell
Senior Staff Counsel
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814
(916) 654-3855
kwbell@energy.state.ca.us
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The State of California opposes the appeal by the NRC Staff to the May 11, 2009, order of the Construction Authorization Boards admitting contention CAL-NEPA-5 in this proceeding. CAL-NEPA-5 alleges that the Department of Energy’s (DOE) National Environmental Policy Act (NEPA) documents cannot be adopted by NRC because they are based on an incomplete and inaccurate project description, in that a doubling or tripling of Yucca Mountain’s capacity is reasonably foreseeable due to DOE’s request to Congress to authorize such a capacity increase.

The Staff has appealed the Boards’ decision to admit a number of what the Boards designated as “legal” contentions, of which CAL-NEPA-5 is one. The Staff argues that the Boards erred by admitting these legal contentions, including CAL-NEPA-5, when the contentions are beyond the scope of this proceeding and are not supported by facts. Neither of these arguments is valid as to CAL-NEPA-5.

I. EXPANSION OF THE CAPACITY OF THE REPOSITORY IS REASONABLY FORESEEABLE AND MUST BE ANALYZED NOW IN ORDER FOR THE NEPA ANALYSIS TO BE MEANINGFUL.

A. Because of the Overwhelming Momentum That Will Urge Expansion of the Repository at Yucca Mountain, the Full Cumulative Effects of an Expanded Repository Should Be Examined Now.

The Staff argues that only the Repository capacity that is currently authorized under the Nuclear Waste Policy Act (NWPA) need be looked at in any DOE or NRC NEPA documents. Staff Appeal at 11-12. However, it is well established NEPA law that, to be meaningful, a full NEPA analysis must be done early enough in the agency approval process that bureaucratic momentum does not make the decision inevitable and make the consideration of alternatives hollow. Arlington Coalition on Transportation, et al. v. Volpe, 458 F.2d 1323 (4th Cir. 1972); Colorado Wild v. U.S. Forest Service, 523 F. Supp. 2d 1213, 1221 (D. Colo. 2007); In the Matter of U.S. Dept. of Energy Project Mgm’t Corp. Tennessee Valley Authority (Clinch River Breeder
Reactors Plant), 15 N.R.C. 362, 372 nt. 22 (Bradford, concurring) (“As the economic commitment grows, the safety and environmental reviews are inevitably subject to increasing economic pressure. For all of the Commission's past protestations to the effect that the work is done at the risk of the applicant, this has rarely been completely true and is in any case unpersuasive when the applicant is government funded to so great an extent.”)

The NRC has often stated that this proceeding is *sui generis*, and this is one of the ways in which it truly is so. The Yucca Mountain licensing proceeding could be one of the most extreme examples of the potential for the phenomenon of “momentum” in the history of NEPA. It has been well over 20 years since the NWPA designated Yucca Mountain as the proposed site for the Repository, and longer than that since the search for a repository site began. If the Repository is built at Yucca Mountain, the momentum to keep it there, to avoid restarting another potentially decades-long search process, will inevitably weaken or compromise attempts to meaningfully consider alternative sites. If the Repository is approved and constructed, there will inevitably be enormous, overwhelming pressure to approve the relatively simple process of constructing additional emplacement tunnels in an already permitted site, rather than to begin again the lengthy and technically and politically contentious process of locating, characterizing, permitting, and building a second site. It is for this reason that the analysis of the environmental impacts of both the Repository at 70,000 MMT capacity *and* the Repository at the 130,000 MMT capacity -- which is only briefly and inadequately discussed in the cumulative impacts section of the Repository SEIS -- must occur now, before bureaucratic momentum becomes insuperable. *Wetlands Action Network v. U.S. Army Corps of Eng'rs*, 222 F.3d 1105, 1108 (9th Cir. 2000).
B. **NEPA Requires Examination of Feasible Alternatives, Even If They Are Not Currently Within the Legal Power of the Applicant to Carry Out.**

The only way a meaningful environmental examination of the expansion of Yucca Mountain can be done is if it is done now. The Council on Environmental Quality makes clear that a meaningful analysis of alternatives in the EIS should include options that are beyond the applicant’s capabilities, and even options that conflict with current federal law, although the discussion can take current law into account. CEQ, “Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations,” Question 2, available at http://ceq.hss.doe.gov/NEPA/regs/40/40p1.htm. Here, DOE clearly believes that even though the federal law currently constrains the capacity of Yucca Mountain, Congress may change that law to put the ability to expand the Repository within DOE’s capabilities in the future. DOE has recommended and is actively trying to bring about such a change in the law. Accordingly, it is reasonably foreseeable that the law may indeed change to allow expanded capacity at Yucca Mountain. As a reasonably foreseeable connected action, expansion of the Repository can and should be analyzed now.

II. **CAL-NEPA-5 IS MATERIAL TO AND WITHIN THE SCOPE OF THIS PROCEEDING**

The central ground on which the Staff appeals the admission of CAL-NEPA-5 is that it is purportedly outside the scope of this proceeding, because the licensing proceeding is limited to assessing the compliance by DOE with the NRC regulations in Part 63 as to a Repository limited to the 70,000 MMT capacity specified in the NWPA. Staff Appeal at 11-12. This is simply incorrect as a matter of law.
A. A Challenge to DOE’s NEPA Compliance, Including a Challenge to the Project Definition, Is Within the Scope of This Proceeding.

This licensing proceeding has already been held by the District of Columbia Court of Appeals to be the appropriate proceeding for any challenge to DOE’s NEPA documents. That court ruled in Nuclear Energy Inst. v. U.S. Environmental Protection Agency, 373 F.3d 1251, 1314 (D.C. Cir. 2004), as the Boards correctly point out, that any “substantive challenges to” DOE’s EISs could be raised “in any NRC proceeding to decide whether to adopt the [EIS]” for Yucca Mountain. (NEI v. EPA, 373 F.3d at 1313; Order at 29.) This is that proceeding, and will be California’s only opportunity to contest the deficiency alleged in CAL-NEPA-5. It is also the proceeding in which the Staff has recommended that the NRC adopt DOE’s NEPA compliance as NRC’s own NEPA compliance. This California’s only opportunity to raise and litigate the deficiencies California believes the documents have in front of the NRC in the context of licensing the facility.

A project description that is inadequate because it fails to include all aspects of the project is certainly a substantive deficiency. See Council on Environmental Quality NEPA regulations at 40 C.F.R. §1502.4 (“Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined.”) CAL-NEPA-5 challenges the project description and is therefore a substantive challenge to DOE’s NEPA documents that can be raised in this proceeding.

B. The Practicability of NRC’s Adoption of DOE’s NEPA Documents as NRC’s Own NEPA Compliance Is Within the Scope of This Proceeding.

This proceeding is California’s opportunity to challenge NRC’s compliance with NEPA, through NRC’s possible adoption of DOE’s NEPA documents. The Staff has recommended that NRC adopt DOE’s NEPA documents, and NRC presumably will determine whether DOE’s
NEPA documents are adequate to serve as the NRC’s own NEPA compliance. 10 C.F.R. §51.109(c), 10 C.F.R. §63.31(c) and section II, paragraph 1 of Notice of Hearing, 73 Fed. Reg. 63,031 (Oct. 22, 2008).

As part of its recommendation that NRC adopt DOE’s NEPA documents as the NRC’s own NEPA compliance, the Staff evaluated the cumulative analysis and declared that it meets the requirements of NEPA and the NRC’s regulations. Staff Adoption Report at 3-4, 5-1. The cumulative impact analysis contains the analysis of a Repository with a capacity of 130,000 MMT, whose adequacy CAL-NEPA-5 challenges. The Staff explicitly stated its opinion that the treatment of cumulative impacts in DOE’s NEPA documents “addresses the intent of Section 101 of NEPA,” Staff Adoption Report at p. 3-4, and this cumulative impacts discussion is included in DOE’s NEPA documentation that the Staff recommends for adoption by the NRC. Staff Adoption Report at p. 3-5 and 5-1 (stating that DOE’s EISs comply with NRC NEPA requirements except as to certain aspects of the groundwater analysis).

In its Adoption Report, the Staff itself has explicitly vouched for the adequacy of DOE’s cumulative impacts analysis, and has recommended inclusion of that cumulative analysis in NRC’s NEPA compliance. The Staff should not now be allowed to say that the cumulative impacts analysis cannot be challenged in this proceeding, unless the Staff is willing and legally able to retract its recommendation. The NEPA documents that the Commission adopts must fully analyze and disclose the possible environmental consequences of the Commission’s decision, including the cumulative impacts. California believes that DOE’s NEPA documents do not do so adequately; its challenge is relevant and material to this proceeding.

As part of the proposed NRC NEPA compliance, the cumulative analysis must be within the range of what a party may challenge in the licensing proceeding. This proceeding is the
appropriate time and place to challenge the adoption of the DOE NEPA documents that the Staff has proposed.

Further, since NEPA is a process-oriented statute, the actual occurrence of that process is a materially different result for purposes of Part 63. NEPA carries out the Congressional mandate of ensuring that federal agencies make decisions with environmental impacts in mind through the “action-forcing” mechanism of the full analysis and full disclosure by such federal agencies of the environmental consequences of their proposed actions. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). Compliance with this mandate through an adequate NEPA process and adequate NEPA documents constitutes a materially different result under NEPA.

**III. CAL-NEPA-5 COMPLIES WITH NRC PLEADING REQUIREMENTS**

The Staff also claims that the Boards admitted contentions that did not comply with the contention admissibility requirements of 10 C.F.R. § 2.309(f)(1), but the Staff fails to point to any portion of the Boards’ order that shows that CAL-NEPA-5 was admitted on this basis. See Staff Appeal at 8. The Boards never made any finding or statement that CAL-NEPA-5 was being admitted despite a defect in pleading. That is merely an unsupported assumption by the Staff. Staff Appeal at 8 (“Although the basis for the admission of the legal contentions is not addressed with respect to each contention . . . it appears that the Board admitted these contentions notwithstanding the fact that not all of the admissibility standards were met.”) Moreover, the Staff Appeal itself does not even claim that California failed to support CAL-NEPA-5 with facts.

CAL-NEPA-5 plainly is supported by facts. CAL-NEPA-5 cites the presentation by DOE to the Congress of a document entitled “The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository.” (DOE/RW-0595, 2008) An LSN
number was provided for that report: LSN CEC000000613. The contention cites to the content of that Report, in which DOE recommends to Congress that the current capacity limit for the Repository, contained in the Nuclear Waste Policy Act (NWPA), be removed (Report at 1, 8), and advises Congress of DOE’s opinion that Yucca Mountain is physically capable of holding at least three times the amount of waste to which the NWPA currently limits it. (Id. at 8). The contention also cites to the portion of DOE’s NEPA documents, found in the cumulative impacts analysis section (principally section 8 of the Repository SEIS), that discusses the possibility of an expanded Repository, and alleges that DOE’s discussion of the potential environmental impacts of that expanded facility is inadequate. (California’s Petition to Intervene, at 37-41.) Further, CAL-NEPA-5 is supported by an affidavit by Dr. Fred Dilger, presented in a form that the Boards found complied with NRC regulations. (California’s Petition to Intervene, at Supporting Attachment 1.)

CONCLUSION

CAL-NEPA-5 is within the legal scope of this proceeding, alleges a substantive deficiency in DOE’s NEPA compliance, complies with NRC pleading requirements, and was properly admitted by the Boards. That decision should be affirmed by the Commission.

Dated: May 31, 2009

Respectfully submitted,

[Signed electronically]
TIMOTHY E. SULLIVAN
Deputy Attorney General
California Department of Justice
1515 Clay St., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
Tel: (510) 622-4038
Fax: (510) 622-2270
timothy.sullivan@doj.ca.gov
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing “California’s Opposition to NRC Staff Appeal of LBP-09-06,” dated May 31, 2009, has been served via the Nuclear Regulatory Commission’s Electronic Information Exchange (“EIE”) upon those on the Service List maintained by the EIE for the above-captioned proceeding, as listed below:

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

CAB 01
William J. Froehlich, Chair
Administrative Judge
wjf1@nrc.gov
Thomas S. Moore
Administrative Judge
 tsml@nrc.gov
Richard E. Wardwell
Administrative Judge
rew@nrc.gov

CAB 02
Michael M. Gibson, Chair
Administrative Judge

mmg3@nrc.gov
Alan S. Rosenthal
Administrative Judge axr@nrc.gov or rsnthl@verizon.net
Nicholas G. Trikouros
Administrative Judge
ngt@nrc.gov

CAB 03
Paul S. Ryerson, Chair
Administrative Judge
psrl@nrc.gov
Michael C. Farrar
Administrative Judge
mcf@nrc.gov
Mark O. Barnett
Jeffrey Kriner, Regulatory Programs
jeffrey_kriner@ymp.gov
Stephen J. Cereghino, Licensing/Nucl Safety
stephen_cereghino@ymp.gov

For U.S. Department of Energy Talisman
International, LLC 1000 Potomac St., NW, Suite 300
Washington, DC 20007
Patricia Larimore, Senior Paralegal
plarimore@talisman-intl.com

For the Department of Energy
Bechtel-SAIC Yucca Mountain Project
Licensing Group 1251 Center Crossing
Road, M/S 423
Las Vegas, NV 89144

Jeffrey Kriner, Regulatory Programs
jeffrey_kriner@ymp.gov
Stephen J. Cereghino, Licensing/Nucl Safety
stephen_cereghino@ymp.gov

For the 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.
frank.putzu@navy.mil

For U.S. Department of Energy
USA-Repository Services
Yucca Mountain Project Licensing Group
6000 Executive Boulevard, Suite 608
North Bethesda, MD 20852
Edward Borella, Sr Staff,
Licensing/Nuclear Safety
edward_borella@ymp.gov
Danny R. Howard, Sr. Licensing Engineer
danny_howard@ymp.gov

Counsel for U.S. Department of Energy Morgan,
Lewis & Bockius LLP 1111 Pennsylvania Ave.,
NW Washington, DC 20004 Clifford W.
Cooper, Paralegal
ccooper@morganlewis.com

Lewis M. Csedrik, Associate
lcisedrik@morganlewis.com
Jay M. Gutierrez, Esq.
jgutierrez@morganlewis.com
Charles B. Moldenhauer, Associate
cmoldenhauer@morganlewis.com
Brian P. Oldham, Associate
boldham@morganlewis.com
Thomas D. Poindexter, Esq.
tpoindexter@morganlewis.com
Alex S. Polonsky, Esq.
apolonsky@morganlewis.com
Thomas A. Schmutz, Esq.
tschmutz@morganlewis.com
Donald J. Silverman, Esq.
djsilverman@morganlewis.com
Shannon Staton, Legal Secretary
sstaton@morganlewis.com
Annette M. White, Associate
Annette.white@morganlewis.com
Paul J. Zaffuts, Esq.
pzaffuts@morganlewis.com

Counsel for U.S. Department of Energy
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219
Kelly L. Faglioni, Esq.
kfaglioni@hunton.com
Donald P. Irwin, Esq.
dirwin@hunton.com
Michael R. Shebelskie, Esq.
mshebelskie@hunton.com
Stephanie Meharg, Paralegal
smeharg@hunton.com
Belinda A. Wright, Sr. Professional Assistant
bwright@hunton.com

Counsel for State of Nevada Egan, Fitzpatrick &
Malsch, PLLC 1750 K Street, NW, Suite 350
Washington, DC 20006
Martin G. Malsch, Esq.
mmlalsch@nuclearlawyer.com
Susan Montesi:
smontesi@nuclearlawyer.com

Nevada Agency for Nuclear Projects Nuclear
Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706 Steve Frishman, Tech.
Policy Coordinator
steve.frishman@gmail.com
Susan Lynch, Administrator of Technical Prgms
szeee@nuc.state.nv.us

Counsel for Lincoln County, Nevada
1100 S. Tenth Street
Las Vegas, NV 89017
Bret Whipple, Esq.
bretwhipple@nomademail.com
Annie Bailey, Legal Assistant
baileys@lcturbonet.com

Lincoln County Nuclear Oversight Program
P.O. Box 1068
Caliente, NV 89008
Connie Simkins, Coordinator
jcciac@co.lincoln.nv.us

Counsel for Nye County, Nevada
Ackerman Senterfitt
801 Pennsylvania Avenue, NW, #600
Washington, DC 20004
Robert Andersen, Esq.
robert.andersen@akerman.com

Malachy Murphy, Esq.
mrmurphy@chamberscable.com

Bureau of Government Affairs
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

Clark County, Nevada
500 S. Grand Central Parkway
Las Vegas, NV 98155

Elizabeth A. Vibert, Deputy District Attorney
VibertE@co.clark.nv.us
Phil Klevorick, Sr. Mgmt Analyst
klevorick@co.clark.nv.us

Counsel for Clark County, Nevada
Jennings, Strouss & Salmon
1700 Pennsylvania Avenue, NW, Suite 500
Washington, DC 20006-4725
Elene Belte, Legal Secretary
ebellete@jssslaw.com
Alan I. Robbins, Esq.
arobbins@jssslaw.com
Debra D. Roby, Esq.
droby@jssslaw.com

Counsel for Nye County, Nevada
530 Farrington Court
Las Vegas, NV 89123
Jeffrey VanNiel, Esq.
nbrjdvn@gmail.com

Nye County Nuclear Waste Repository Project
Office (NWRPO)
1210 E. Basin Road, #6
Pahrump, NV 89060
Sherry Dudley, Admin. Technical Coordinator
sdudley@co.nye.nv.us
Zoie Choate, Secretary
zchoate@co.nye.nv.us

Counsel for Clark County, Nevada
Jennings, Strouss & Salmon
8330 W. Sahara Avenue, #290
Las Vegas, NV 89117

Bryce Loveland, Esq.
bloveland@jsslaw.com

Eureka County, Nevada
Office of the District Attorney
701 S. Main Street, Box 190
Eureka, NV 89316-0190

Theodore Beutel, District Attorney
tbeutel.ecda@eurekanv.org

Counsel for Eureka County, Nevada
Harmon, Curran, Speilberg & Eisenberg, LLP
1726 M. Street N.W., Suite 600
Washington, DC 20036

Diane Curran, Esq.
dcurran@harmoncurran.com
Matthew Fraser, Law Clerk
mfraser@harmoncurran.com

Nuclear Waste Advisory for Eureka County, Nevada
1983 Maison Way
Carson City, NV 89703

Abigail Johnson, Consultant
eurekanrc@gmail.com

Counsel for Churchill
Esmeralda, Lander, and Mineral Counties,
Nevada Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237

Robert F. List, Esq.
rlist@armstrongteasdale.com
Jennifer A. Gores, Esq.
jgores@armstrongteasdale.com

White Pine County, Nevada
Office of the District Attorney
801 Clark Street, #3
Ely, NV 89301

Richard Sears, District Attorney
rwsears@wpcde.org

For White Pine County, Nevada
Intertech Services Corporation
PO Box 2008
Carson City, NV 89702

Mike Baughman, Consultant
BIGBOFF@aol.com

Eureka County Public Works
PO Box 714
Eureka, NV 89316

Ronald Damele, Director
rdamele@eurekanv.org

For Eureka County, Nevada
NWOP Consulting, Inc.
705 Wildcat Lane
Ogden, UT 84403

Loren Pitchford, Consultant
lpitchford@comcast.net

Esmeralda County Repository Oversight Program- Yucca Mountain Project
PO Box 490
Goldfield, NV 89013

Edwin Mueller, Director
muellered@msn.com

White Pine County Nuclear Waste Project Office
959 Campton Street
Ely, NV 89301

Mike Simon, Director
wpnuwst1@mwpower.net

Counsel for Inyo County, California
Greg James, Attorney at Law
710 Autumn Leaves Circle
Bishop, CA 93514
Greg James, Esq.
E-Mail: gljames@earthlink.net

Counsel for Caliente Hot Springs Resort LLC
John H. Huston, Attorney at Law
6772 Running Colors Avenue
Las Vegas, NV 89131
John H. Huston, Esq.
johnhhuston@gmail.com
California Department of Justice
Office of the Attorney General
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Susan Durbin, Deputy Attorney General
susan.durbin@doj.ca.gov
Michele Mercado, Analyst
michele.Mercado@doj.ca.gov
California Department of Justice
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Brian Hembacher, Deputy Attorney General
brian.hembacher@doj.ca.gov

California Department of Justice
Office of the Attorney General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan, Deputy Attorney General
timothy.sullivan@doj.ca.gov

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

Nuclear Energy Institute
Office of the General Counsel
1776 I Street, NW Suite 400

Washington, DC 20006-3708
Ellen C. Ginsberg, General Counsel
ecg@nei.org
Michael A. Bauser, Deputy General Counsel
mab@nei.org
Anne W. Cottingham, Esq.
awc@nei.org

Counsel for the U.S. Department of Energy
Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
dirwin@hunton.com
mshebelskie@hunton.com
kfaglioni@hunton.com

Counsel for the Nuclear Energy Institute
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037-1122
Jay E. Silberg, Esq.
jay.silberg@pillsburylaw.com
Timothy J.V. Walsh, Esq.
timothy.walsh@pillsburylaw.com
Maria D. Webb, Senior Energy Legal Analyst
maria.webb@pillsburylaw.com

James Bennett McRae
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, DC 20585

For Joint Timbisha Shoshone Tribal Group
3560 Savoy Boulevard
Pahrump, NV 89601
Joe Kennedy, Executive Director
joekennedy08@live.com
Tameka Vazquez, Bookkeeper
purpose_driven12@yahoo.com
Dated: May 31, 2009

Respectfully submitted,

[Signed electronically]
TIMOTHY E. SULLIVAN
Deputy Attorney General
California Department of Justice
1515 Clay St., 20th Flr.
P.O. Box 70550
Oakland, CA 94612-0550
Tel: (510) 622-4038
Fax: (510) 622-2270
timothy.sullivan@doj.ca.gov