

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Thomas S. Moore, Chairman
Paul S. Ryerson
Richard E. Wardwell

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository)

Docket No. 63-001-HLW

ASLBP No. 09-892-HLW-CAB04

June 9, 2011

ORDER

(Granting in Part and Denying in Part Reconsideration Motion)

The NRC Staff moves for (1) reconsideration of CAB-04's April 11, 2011 order¹ addressing, inter alia, the preservation of the parties' Licensing Support Network (LSN) document collections;² and (2) a stay of that order pending the Board's resolution of its reconsideration motion.³ Under 10 C.F.R. § 2.323(e), reconsideration requires a showing of "compelling circumstances, such as the existence of a clear and material error in a decision."

¹ See CAB Order (Concerning LSNA Memorandum and Parties' LSN Document Collections) (Apr. 11, 2011) (unpublished) [hereinafter April 11 Order].

² See NRC Staff Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board's April 11, 2011 Order, or Petition for Certification (Apr. 21, 2011) [hereinafter Staff Reconsideration Motion]. As evident from its title and required by 10 C.F.R. § 2.323(e), the Staff's motion also seeks leave to file the reconsideration motion. The Staff motion for leave to file, in contrast to the motion itself, is granted.

³ NRC Staff Motion for Stay of April 11, 2011 Board Order (Apr. 21, 2011) [hereinafter Staff Stay Motion].

Only the State of Nevada filed an answer to the Staff's motions.⁴ Nevada stated that it did not object to the Board's reconsideration or to a temporary stay, but took no position on whether, upon reconsideration, the April 11 order should be modified.⁵ According to the Staff's Section 2.323(b) certification, the State of California, the State of South Carolina, the Nuclear Energy Institute (NEI), Inyo County, California, Clark County, Nevada, Nye County, Nevada, Eureka County, Nevada, Aiken County, South Carolina, the Prairie Island Indian Community, the Native Community Action Council, the National Association of Regulatory Utility Commissioners (NARUC), and the Florida Public Service Commission, an amicus curiae, took no position on the Staff's motions, while the Department of Energy (DOE) did not object.⁶

The Board's April 11 order was the most recent directive in a series of case management conferences, party submissions and Board orders aimed at preserving the electronic document discovery database residing on the LSN—a system mandated by 10 C.F.R. Part 2, Subpart J, and over which CAB-04 was established to preside. The Board's efforts, as catalogued in the April 11 order,⁷ have been necessitated by the technological design of the LSN, the uncertain fiscal environment surrounding this unique proceeding, and the importance of preserving the decades of history and extensive research underlying DOE's application for authorization to construct the proposed Yucca Mountain geologic repository that resides on the LSN.

⁴ See Nevada Answers to (1) NRC Staff Request for Leave to File Motion for Reconsideration and Motion for Reconsideration of the Board's April 11, 2011 Order, or Petition for Certification, and (2) NRC Staff Motion for Stay of April 11, 2011 Board Order (May 2, 2011).

⁵ See id. at 1-2.

⁶ Staff Reconsideration Motion at 1-2 n.1; Staff Stay Motion at 8.

⁷ See April 11 Order at 2 n.4.

Specifically, our April 11 order was triggered by a memorandum from the LSN Administrator (LSNA) addressing the likely end of funding for the LSN.⁸ The LSNA's memorandum noted that the Administration's proposed fiscal year 2012 budget had not allocated to the NRC any Nuclear Waste Fund resources—either dollars or staffing—for the Yucca Mountain licensing proceeding.⁹ Therefore, the LSNA concluded, should Congress acquiesce in the Administration's budget proposal, he must complete the shutdown (and disposition) of the LSN by September 30, 2011, regardless of the status of the ongoing adjudicatory proceeding or the provisions of 10 C.F.R. Part 2, Subpart J, mandating operation of the LSN.¹⁰ As the LSNA's memorandum pointed out, the Board's earlier efforts to preserve the LSN document collections of the parties presumed that the LSN website would be in operation and that there would be an LSNA to accept custody of the parties' LSN documentary materials.¹¹

Because these underlying assumptions were no longer valid, the Board's April 11 order directed each party to submit its LSN document collection, along with the associated bibliographic files, in portable document format (PDF), to the NRC Office of the Secretary on approved optical storage media by August 31, 2011.¹² The Board's order also instructed the Secretary to install the submitted document collections into a separate LSN docket library of

⁸ Memorandum from Daniel J. Graser, Licensing Support Network Administrator, to Administrative Judges, Construction Authorization Board 4 (Feb. 18, 2011) [hereinafter LSNA Memorandum].

⁹ Id. at 1.

¹⁰ Id.

¹¹ Id. at 2.

¹² April 11 Order at 3-4.

ADAMS for public access via the agency's public website.¹³ The order did not specify a deadline for the Secretary's actions.

The Board's April 11 order imposed no significant new burden on most of the parties. Previously, all parties and interested governmental participants, except NARUC,¹⁴ the Staff, and DOE, committed to provide the LSNA a copy of their LSN document collections in a data format and via a transfer medium as mutually agreed upon by the party and the LSNA.¹⁵ For its part, the Staff had represented to the Board that its LSN document collection, in PDF, already resides on ADAMS so the Board did not seek the same commitment from the Staff as it had from the other parties.¹⁶ DOE, which has the largest LSN document collection, variously represented to the Board, inter alia, that portions of its LSN document collection were already in PDF, that it was investigating whether to convert the remainder of its collection into PDF, and that ultimately

¹³ Id.

¹⁴ NARUC did not participate in the last, June 4, 2010, case management conference and, as a new petitioner, the Board thereafter failed to follow up with questions to NARUC as to whether it would make the same commitment as the other parties regarding its LSN document collection should it be admitted as a party to the proceeding. NARUC's intervention petition was granted by the Board in LBP-10-11, 71 NRC __, __ (slip op. at 47) (June 29, 2010), and NARUC has not filed any objection to the Board's April 11, 2011 order.

¹⁵ See White Pine County, Nevada, Tr. at 357 (Jan. 27, 2010); Inyo County, California, Tr. at 358 (Jan. 27, 2010); Churchill, Esmeralda, Lander, and Mineral Counties, Nevada, Tr. at 359-60 (Jan. 27, 2010); Eureka County, Nevada, Tr. at 360 (Jan. 27, 2010); Nye County, Nevada, Tr. at 361 (Jan. 27, 2010); Clark County, Nevada, Tr. at 361-62 (Jan. 27, 2010); Joint Timbisha Shoshone Tribal Group, Tr. at 362 (Jan. 27, 2010); Native Community Action Council, Tr. at 363 (Jan. 27, 2010); NEI, Tr. at 363-64 (Jan. 27, 2010); State of Nevada, Tr. at 364-65 (Jan. 27, 2010); State of California, Tr. at 394 (Jan. 27, 2010); State of South Carolina, Tr. at 325 (June 4, 2010); Aiken County, South Carolina, Tr. at 326 (June 4, 2010); State of Washington, Tr. at 326-27 (June 4, 2010); Prairie Island Indian Community, Tr. at 327 (June 4, 2010); Lincoln County, Nevada's Response to ASLB's April 21, 2010, Order (May 14, 2010) at 1-2.

¹⁶ See NRC Staff Comments Concerning LSNA Memorandum (Jan. 21, 2010) at 1-2; Tr. at 354-55 (Jan. 27, 2010); NRC Staff Answers to Board's Questions Regarding the Staff's LSN Collection (May 24, 2010) at 3-4.

its collection would be rendered into PDF image files.¹⁷ After the Board's April 11 order, DOE filed a motion for clarification of that order,¹⁸ which the Board granted.¹⁹ In its motion, DOE noted that it had conferred and reached agreement with the LSNA and the Secretary's technical staff on various technical requirements, that DOE believed it would be able to complete the conversion of all its LSN document collection to PDF/A format (an agency-accepted form of PDF) by August 31, 2011, and that it sought permission to submit its LSN document collection to the Secretary on high capacity external hard drives.²⁰

The Staff seeks reconsideration of our April 11 order, however, on the ground that the order imposes fiscal burdens on the NRC without addressing budgetary and administrative issues, funding limitations, Commission policy and principles of appropriations law.²¹ Accompanying the Staff's Reconsideration Motion is the affidavit of the Director of the NRC Office of Information Services (OIS).²² That affidavit sets out the steps purportedly needed to be taken and estimated costs the Director believes the NRC would incur in complying with the Board's order.²³

The Board's April 11 order directed "each party"—a term that necessarily included the Staff—to submit its LSN document collection to the NRC Office of the Secretary on optical

¹⁷ See Tr. at 372-74 (Jan. 27, 2010); The Department of Energy's Answers to the Board's Questions at the January 27, 2010 Case Management Conference (Feb. 4, 2010) at 4-5, Attachment A; U.S. Department of Energy Answers to ASLB Questions from Order (Questions for Several Parties and LSNA) dated April 21, 2010 (May 24, 2010) at 31, 33-34.

¹⁸ See U.S. Department of Energy's Motion for Clarification and Status Report Regarding the Board's Order dated April 11, 2011 (Apr. 21, 2011) [hereinafter DOE Clarification Motion].

¹⁹ See CAB Order (Granting DOE's Motion for Clarification) (May 13, 2011) (unpublished).

²⁰ See DOE Clarification Motion at 2-4.

²¹ See Staff Reconsideration Motion at 6-9.

²² See id., Affidavit of Thomas M. Boyce Regarding the April 21, [sic] 2011 Board Order (Apr. 20, 2011) [hereinafter Boyce Affidavit].

²³ See Boyce Affidavit at 2-3.

storage media as specified in Guidance for Electronic Submissions to the Commission.²⁴ The Board failed to take into account, however, the fact that the Staff LSN document collection already resides on ADAMS.²⁵ It would be unnecessary and repetitious to require the Staff to provide its LSN document collection to the Secretary on optical storage media. Thus, the Board's April 11 order is amended to exclude the Staff from that requirement, and the Staff need not submit its LSN document collection to the Secretary on optical storage media by August 31, 2011.²⁶ To that extent, the Staff's motion for reconsideration is granted. In all other respects, the Staff's reconsideration motion is denied.

The remainder of the Staff's arguments for reconsideration seemingly emanates from a misapprehension of the Board's order. The April 11 order did not specify a deadline for the Secretary to initiate or complete any actions. The order requires each party (now with the exception of the Staff) to submit its LSN document collection to the Secretary by August 31, 2011, and then to notify "all other parties when the submission has been completed."²⁷ The parties' August 31 deadline does not apply to the Secretary. Once each party's LSN document collection on optical storage media (or in the case of DOE on external hard drives) is received by the Secretary, initially those physical objects need only be placed by the Secretary in the docket for this proceeding just as physical objects are placed in the docket for any other proceeding in the ordinary course of business.

The Board's April 11 order further instructed the Secretary to install the documents in a separate LSN library docket of ADAMS for public access via the agency's website. The Board

²⁴ April 11 Order at 3. To ensure there is no misunderstanding, in using the term "party," the Board intended that term to include Eureka County, Nevada and Lincoln County, Nevada that are participating as interested governmental bodies pursuant to 10 C.F.R. § 2.315(c). See LBP-09-6, 69 NRC 367, 484 (2009).

²⁵ See supra text accompanying note 14.

²⁶ The NRC Staff shall not, however, remove its LSN document collection from ADAMS.

²⁷ April 11 Order at 3.

set no deadline. In so doing, the Board fully recognized that the Secretary can comply with the Board's instructions only by starting, in good faith, the administrative, budgetary, and financial processes and procedures necessary to accomplish that end.²⁸ As we would have thought was obvious, the Board cannot order the impossible any more than the Secretary can perform the impossible. The Secretary need only comply with that portion of the April 11 order creating a separate LSN docket library on ADAMS to the extent it is successful in completing the necessary procedures and to the extent funding is available.

Read in this light, the Staff's motion for reconsideration of the Board's April 11 order clearly fails to satisfy the standard for granting such a motion under 10 C.F.R. § 2.323(e). As the Commission stated in the 2004 Statement of Considerations, this standard "is a higher standard than the existing case law, [and] is intended to permit reconsideration only where manifest injustice would occur in the absence of reconsideration."²⁹ No injustice of any kind will result from our April 11 order, which was designed to preserve the LSN electronic discovery database representing decades of research and history. The April 11 order imposes no deadline on the Secretary and requires no actions for which funding is not available. Accordingly, the Staff's motion for reconsideration of that portion of the order concerning ADAMS is denied.³⁰

²⁸ In the April 11 order, the Board suggested that the Secretary consult with the LSNA regarding surplus computer equipment suitable for this purpose that may be available to assist the Secretary. See April 11 Order at 3 n.9. The Board again urges the Secretary's technical staff and OIS to consult with the LSNA regarding computer equipment (i.e., new servers), which would help offset a tiny portion of the enormous waste from the dismantlement of the LSN due to fiscal constraints forced upon the Atomic Safety and Licensing Board Panel and beyond the Panel's control.

²⁹ Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2207 (Jan. 14, 2004).

³⁰ In its Reconsideration Motion, the Staff also requests that, in the event its motion is denied, the Board certify its April 11 order to the Commission. See Staff Reconsideration Motion at 9-10. Under the Commission's Rules of Practice, 10 C.F.R. § 2.323(f)(1), the Staff should have requested the alternative relief of referral of the April 11 order because rulings are referred to the Commission and issues are certified to the Commission. See 10 C.F.R. § 2.323(f)(2). Nonetheless, the Staff's request for alternative relief is denied, and we decline to refer our April

The Staff's motion for a stay of our April 11 order pending the Board's reconsideration is denied as moot.³¹

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD
/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Paul S. Ryerson
ADMINISTRATIVE JUDGE

/RA/

Richard E. Wardwell
ADMINISTRATIVE JUDGE

Rockville, Maryland
June 9, 2011

11 order to the Commission. Suffice it to note that the Commission has before it, as the Staff should be well aware, a number of long pending motions and rulings in this proceeding. In the current circumstances, the Board sees no utility in lengthening that list as the Staff requests.

³¹ Moreover, even if the motion were not moot, the stay must be denied for failing to meet the well-known standards for granting a stay. See 10 C.F.R. § 2.342(e). For example, as the Commission stated in Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237 (2006) (internal citations omitted), “[i]rreparable harm is the most important of the four standards—the sine qua non of obtaining a stay. A party seeking a stay must show it faces imminent, irreparable harm that is both ‘certain and great.’” The Board’s April 11 order, as amended, causes no harm, much less irreparable harm, to the Staff because it does not require the Staff to take any action regarding its LSN collection. With respect to the Secretary, the Board’s order initially only instructs the Secretary to receive the parties’ LSN collections on storage media and treat those physical objects in the same manner it handles physical objects in any other proceedings. With respect to ADAMS, the Board’s order, without any deadline, only directs the Secretary to begin the administrative, budgetary and financial procedures for placing the parties’ LSN collections on ADAMS, as funding allows. Thus, any conjectured harm is not irreparable and cannot possibly be imminent.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
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(High-Level Waste Repository))
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Docket No. 63-001-HLW
ASLBP No. 09-892-HLW-CAB04

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (Granting in Part and Denying in Part Reconsideration Motion), dated June 9, 2011, have been served upon the following persons by Electronic Information Exchange.

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

Construction Authorization Board 04 (CAB04)

Thomas S. Moore, Chair
Administrative Judge
thomas.moore@nrc.gov

Paul S. Ryerson
Administrative Judge
paul.ryerson@nrc.gov

Richard E. Wardwell
Administrative Judge
richard.wardwell@nrc.gov

Anthony C. Eitreim, Esq., Chief Counsel
ace1@nrc.gov
Katherine Tucker, Law Clerk
katie.tucker@nrc.gov
Daniel J. Graser, LSN Administrator
djg2@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555-0001
Michelle D. Albert, Esq.
michelle.albert@nrc.gov
Jessica Bielecki, Esq.
jessica.bielecki@nrc.gov
Elva Bowden Berry, Esq.
elva.bowdenberry@nrc.gov
Joseph S. Gilman, Paralegal
joseph.gilman@nrc.gov
Christopher Hair, Esq.
christopher.hair@nrc.gov
Daniel W. Lenehan, Esq.
daniel.lenehan@nrc.gov
Megan A. Wright, Esq.
megan.wright@nrc.gov
Mitzi A. Young, Esq.
may@nrc.gov
OGC Mail Center
OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop O-7H4M
Washington, DC 20555-0001
OCAA Mail Center
ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
hearingdocket@nrc.gov

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Granting in Part and Denying in Part Reconsideration Motion)

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue S.W.
Washington, DC 20585
Martha S. Crosland, Esq.
martha.crosland@hq.doe.gov
Nicholas P. DiNunzio, Esq.
nick.dinunzio@rw.doe.gov
Sean A. Lev, Esq.
sean.lev@hq.doe.gov
James Bennett McRae
ben.mcrae@hq.doe.gov
Cyrus Nezhad, Esq.
cyrus.nezhad@hq.doe.gov
Christina C. Pak, Esq.
christina.pak@hq.doe.gov

Office of Counsel, Naval Sea Systems Command
Nuclear Propulsion Program
1333 Isaac Hull Avenue, SE, Building 197
Washington, DC 20376
Frank A. Putzu, Esq.
frank.putzu@navy.mil

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

Counsel for U.S. Department of Energy
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004
Lewis M. Csedrik, Esq.
lcshedrik@morganlewis.com
Raphael P. Kuyler, Esq.
rkuyler@morganlewis.com
Charles B. Moldenhauer, Esq.
cmoldenhauer@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.
dsilverman@morganlewis.com
Shannon Staton, Legal Secretary
sstaton@morganlewis.com
Annette M. White, Esq.
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
Stephanie Meharg, Paralegal
smeharg@hunton.com
Edward P. Noonan, Esq.
enoonan@hunton.com
Michael R. Shebelskie, Esq.
mshebelskie@hunton.com
Jason Wool, Esq.
jwool@hunton.com
Belinda A. Wright, Sr. Professional Assistant
bwright@hunton.com

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Granting in Part and Denying in Part Reconsideration Motion)

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

Counsel for State of Nevada
Egan, Fitzpatrick, Malsch & Lawrence, PLLC
1777 N.E. Loop 410, Suite 600
San Antonio, TX 78217
Charles J. Fitzpatrick, Esq.
cfitzpatrick@nuclearlawyer.com
John W. Lawrence, Esq.
jlawrence@nuclearlawyer.com
Laurie Borski, Paralegal
lborski@nuclearlawyer.com

Bureau of Government Affairs
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701
Marta Adams, Chief Deputy Attorney General
madams@ag.nv.gov

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
szeeee@nuc.state.nv.us

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

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

Nye Co. Nuclear Waste Repository Project Office
2101 E. Calvada Boulevard, Suite 100
Pahrump, NV 89048
Zoie Choate, Administrative Technical Coordinator
zchoate@co.nye.nv.us
Celeste Sandoval, Quality Assurance Records Spec.
csandoval@co.nye.nv.us

Counsel for Lincoln County, Nevada
Whipple Law Firm
1100 S. Tenth Street
Las Vegas, NV 89017
Annie Bailey, Legal Assistant
baileys@lcturbonet.com
Adam L. Gill, Esq.
adam.whipplelaw@yahoo.com
Eric Hinckley, Law Clerk
erichinckley@yahoo.com
Bret Whipple, Esq.
bretwhipple@nomademail.com

Lincoln County District Attorney
P. O. Box 60
Pioche, NV 89403
Gregory Barlow, Esq.
lcdal@lcturbonet.com

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

For Lincoln County, Nevada
Intertech Services Corporation
PO Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
mikebaughman@charter.net

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Granting in Part and Denying in Part Reconsideration Motion)

Clark County, Nevada
500 S. Grand Central Parkway
Las Vegas, NV 98155
Phil Klevatorick, Sr. Mgmt Analyst
klevatorick@co.clark.nv.us
Elizabeth A. Vibert, Deputy District Attorney
Elizabeth.Vibert@ccdavn.com

Counsel for Clark County, Nevada
Jennings, Strouss & Salmon
1350 I Street, N.W., Suite 810
Washington, DC 20005-3305
Alan I. Robbins, Esq.
arobbins@jsslaw.com
Debra D. Roby, Esq.
droby@jsslaw.com

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

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

Nuclear Waste Advisory for Eureka
County, Nevada
1983 Maison Way
Carson City, NV 89703
Abigail Johnson, Consultant
eurekanrc@gmail.com

For White Pine County, Nevada
Intertech Services Corporation
PO Box 2008
Carson City, NV 89702
Mike Baughman, Consultant
mikebaughman@charter.net

For Eureka County, Nevada
NWOP Consulting, Inc.
1705 Wildcat Lane
Ogden, UT 84403
Loreen Pitchford, Consultant
lpitchford@comcast.net

Eureka County Public Works
PO Box 714
Eureka, NV 89316
Ronald Damele, Director
rdamele@eurekanv.org

Counsel for Churchill, Esmeralda, Lander,
and Mineral Counties, Nevada

Armstrong Teasdale, LLP
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237
Jennifer A. Gores, Esq.
jgores@armstrongteasdale.com

Kolesar & Leatham
1975 Village Center Circle, Suite 140
Las Vegas, NV 89134
Robert F. List, Esq.
rlist@klnevada.com

Esmeralda County Repository Oversight Program-
Yucca Mountain Project
PO Box 490
Goldfield, NV 89013
Edwin Mueller, Director
muellered@msn.com

Mineral County Nuclear Projects Office
P.O. Box 1600
Hawthorne, NV 89415
Linda Mathias, Director
yuccainfo@mineralcountynv.org

For Lincoln and White Pine County, Nevada
Jason Pitts, LSN Administrator
P.O. Box 126
Caliente, NV 89008
jayson@idtservices.com

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Granting in Part and Denying in Part Reconsideration Motion)

For White Pine County, Nevada
Kelly Brown, District Attorney
801 Clark Street
Ely, NV 89301
kbrown@mwpower.net

White Pine Co. Nuclear Waste Project Ofc
959 Campton Street
Ely, NV 89301
Mike Simon, Director
wpnucwst1@mwpower.net
Melanie Martinez, Sr. Mgmt. Asst.
wpnucwst2@mwpower.net

Counsel for Inyo County, California
Gregory L. James, Attorney at Law
712 Owens Gorge Road
HC 79, Box
Mammoth Lakes, CA 93546
E-Mail: gljames@earthlink.net

Counsel for Inyo County, California
Law Office of Michael Berger
479 El Sueno Road
Santa Barbara, CA 93110
Michael Berger, Esq.
michael@lawofficeofmichaelberger.com
Robert Hanna, Esq.
robert@lawofficeofmichaelberger.com

Inyo Co Yucca Mtn Repository Assessment Ofc
P. O. Box 367
Independence, CA 93526-0367
Cathreen Richards, Associate Planner
crichards@inyocounty.us

Counsel for State of Washington
Office of the Attorney General
P. O. Box 40117
Olympia, WA 98504-0117
Todd R. Bowers, Esq.
toddb@atg.wa.gov
Andrew A. Fitz, Esq.
andyf@atg.wa.gov
Michael L. Dunning, Esq.
michaeld@atg.wa.gov
H. Lee Overton, Esq.
leo1@atg.wa.gov
Diana MacDonald
dianam@atg.wa.gov
Sharon Nelson
sharonn@atg.wa.gov

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

California Department of Justice
Office of the Attorney General
1300 I Street, PO 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
Office of the Attorney General
1515 Clay Street, 20th Fl, PO Box 70550
Oakland, CA 94612-0550
Timothy E. Sullivan, Deputy Attorney General
timothy.Sullivan@doj.ca.gov

California Department of Justice
Office of the Attorney General
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Brian Hembacher, Deputy Attorney General
brian.hembacher@doj.ca.gov

Counsel for State of South Carolina
Davidson & Lindemann, P.A.
1611 Devonshire Drive
P.O. Box 8568
Columbia, SC 29202
Kenneth P. Woodington, Esq.
kwoodington@dml-law.com

Counsel for Aiken County, SC
Haynsworth Sinkler Boyd, PA
1201 Main Street, Suite 2200
P. O. Box 11889
Columbia, SC 29211-1889
Thomas R. Gottshall, Esq.
tgottshall@hsblawfirm.com
Ross Shealy, Esq.
rshealy@hsblawfirm.com

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
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Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32303
Cynthia Miller, Esq.
cmiller@psc.state.fl.us

Counsel for Native Community Action Council
Alexander, Berkey, Williams & Weathers LLP
2030 Addison Street, Suite 410
Berkeley, CA 94704
Curtis G. Berkey, Esq.
cberkey@abwwlaw.com
Rovianne A. Leigh, Esq.
rleigh@abwwlaw.com
Scott W. Williams, Esq.
swilliams@abwwlaw.com

Native Community Action Council
P.O. Box 140
Baker, NV 89311
Ian Zabarte, Member of Board of Directors
mrizabarte@gmail.com

Counsel for Prairie Island Indian Community
Public Law Resource Center PLLC
505 N. Capitol Avenue
Lansing, MI 48933
Don L. Keskey, Esq.
donkeskey@publiclawresourcecenter.com

Prairie Island Indian Community Legal Department
5636 Sturgeon Lake Road
Welch, MN 55089
Philip R. Mahowald, Esq.
pmahowald@piic.org

Nuclear Energy Institute
Office of the General Counsel
1776 I Street, NW Suite 400
Washington, DC 20006-3708
Jerry Bonanno, Esq.
jxb@nei.org
Anne W. Cottingham, Esq.
awc@nei.org
Ellen C. Ginsberg, Esq.
ecg@nei.org

Counsel for 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

Counsel for Nuclear Energy Institute
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006-3817
William A. Horin, Esq.
whorin@winston.com
Rachel Miras-Wilson, Esq.
rwilson@winston.com
David A. Repka, Esq.
drepka@winston.com
Carlos L. Sisco, Senior Paralegal
csisco@winston.com

Counsel for National Association of Regulatory
Utility Commissioners (NARUC)
1101 Vermont Avenue, Suite 200
Washington, DC 20005
James Ramsay, Esq.
jramsay@naruc.org
Robin Lunt, Esq.
rlunt@naruc.org
Deana Dennis, Legal Assistant
ddennis@naruc.org

U.S. DEPARTMENT OF ENERGY (High Level Waste Repository) Docket No. 63-001-HLW
ORDER (Granting in Part and Denying in Part Reconsideration Motion)

Counsel for Joint Timbisha Shoshone Tribal Group
Fredericks, Peebles, & Morgan LLP
1001 Second St.
Sacramento, CA 95814
Felicia M. Brooks, Data Administrator
fbrooks@ndnlaw.com
Ross D. Colburn, Law Clerk
rcolburn@ndnlaw.com
Sally Eredia, Legal Secretary
seredia@ndnlaw.com
Darcie L. Houck, Esq.
dhouck@ndnlaw.com
Brian Niegemann, Office Manager
bniegemann@ndnlaw.com
John M. Peebles, Esq.
jpeebles@ndnlaw.com
Robert Rhoan, Esq.
rrhoan@ndnlaw.com

Fredericks, Peebles, & Morgan LLP
3610 North 163rd Plaza
Omaha, NE 68116
Shane Thin Elk, Esq.
sthinelk@ndnlaw.com

Counsel for Joint Timbisha Shoshone Tribal Group
Godfrey & Kahn, S.C.
One East Main Street, Suite 500
P. O. Box 2719
Madison, WI 53701-2719
Julie Dobie, Legal Secretary
jdobie@gklaw.com
Steven A. Heinzen, Esq.
sheinzen@gklaw.com
Douglas M. Poland, Esq.
dpoland@gklaw.com
Hannah L. Renfro, Esq.
hrenfro@gklaw.com
Jacqueline Schwartz, Paralegal
jschwartz@gklaw.com

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

For Joint Timbisha Shoshone Tribal Group
Indian Village Road, P.O. Box 206
Death Valley, CA 92328-0206
Joe Kennedy, Executive Director
joekennedy08@live.com
Tameka Vazquez, Bookkeeper
purpose_driven12@yahoo.com

[Original Signed by Christine M. Pierpoint]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 9th day of June 2011