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NUCLEAR REGULATORY COMMISSION
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NOTE TO: File

FROM: Eileen T. Tana, Licensing Assistant
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SUBJECT: NOTICE OF FINAL RULEMAKING

Attached for the file is a copy of the Notice of Final Rulemaking on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 10 CFR Part 2. It is being sent to Distribution Codes CH, WD, WN, WF, and WA by IRM.

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NUCLEAR REGULATORY COMMISSION

10 CFR Part 2

RIN 3150-AC44

Submission and Management of
Records and Documents Related to
the Licensing of a Geologic
Repository for the Disposal of High-
Level Radioactive Waste

AGENCY: Nuclear Regulatory
Commission.

ACTION: Final rulemaking.

SUMMARY: The Nuclear Regulatory Commission is amending the Commission's Rules of Practice in 10 CFR Part 2 for the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to 10 CFR Part 60. The revisions establish the basic procedures for the licensing proceeding, including procedures for the use of the Licensing Support System, an electronic information management system, in the proceeding. The revisions are based on the deliberations of the Commission's High-Level Waste Licensing Support System Advisory Committee. The Advisory Committee was composed of organizations representing the major interests likely to be affected by the rulemaking, and was established by the Commission pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 1, in September 1987.

EFFECTIVE DATE: May 15, 1989.

FOR FURTHER INFORMATION CONTACT: Francis X. Cameron, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Telephone: 301-492-1623.

SUPPLEMENTARY INFORMATION:**Background**

On August 5, 1987, the Commission announced (52 FR 29024) the formation of the High-level Waste Licensing Support System Advisory Committee ("negotiating committee") to develop recommendations for revising the Commission's Rules of Practice in 10 CFR Part 2 for the adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste ("HLW") at a geologic repository operations area ("HLW licensing proceeding").¹ The negotiating committee sought consensus on the procedures that would govern the HLW licensing proceeding, focusing primarily on the use of an electronic information management system known as the Licensing Support System ("LSS"), in the HLW licensing proceeding. The objective of the negotiated rulemaking was to develop the essential features of the procedural rules for effective Commission review of the U.S. Department of Energy (DOE) license application within the three-year time period required by section 114(d) of the Nuclear Waste Policy Act of 1982, as

amended ("NWPA"). The negotiating committee completed its deliberations in July 1988. Based on the committee deliberations, the Commission approved a proposed rule that would revise 10 CFR Part 2 to establish the procedures for the HLW proceeding. The proposed rule was published on November 3, 1988. The comment period closed on December 5, 1988. After consideration of the public comments, the Commission is promulgating this final rule.

The LSS is intended to provide for the entry of, and access to, potentially relevant licensing information as early as practicable before DOE submits the license application for the repository to the Commission. The LSS would contain the documentary material generated by DOE, NRC and other parties to the licensing proceeding, which are relevant to licensing of the repository. All parties would then have access to this system well before the proceeding begins. Access to these documents will be provided through electronic full text search capability. This provides the flexibility of searching on any word or word combinations within a document and thus facilitates the rapid identification of relevant documents and issues. Because the relevant information would be readily available through access to the LSS, the initial time-consuming discovery process, including the physical production and on-site review of documents by parties to the HLW licensing proceeding, will be substantially reduced.

The use of the LSS in the HLW licensing proceeding is to provide for timely review of the DOE license application by—

- Eliminating the most burdensome and time-consuming aspect of the current system of document discovery—i.e., the physical production of documents after the license application has been filed—because the LSS will provide for the identification and submission of discoverable documents before the license application is submitted;
- Eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed if the LSS does not become a reality;

- Enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability which will allow the quick identification of relevant documents and issues;

- Enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding;

- Providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Negotiating Committee. The Commission used the process of negotiated rulemaking to develop the proposed rule. In negotiated rulemaking, the representatives of parties who may be affected by a proposed rule, including the Commission, convene as a group over a period of time to attempt to reach consensus on the proposed rule.

The first meeting of the negotiating committee was held in September 1987. The negotiating committee completed its deliberations in July 1988.

The members of the negotiating committee are—

- DOE
- NRC
- State of Nevada
- A coalition of Nevada local governments
- A coalition of industry groups (Edison Electric Institute/Utility Nuclear Waste Management Group/U.S. Council for Energy Awareness)
- National Congress of American Indians
- A coalition of national environmental groups (Environmental Defense Fund/Sierra Club/Friends of the Earth).

All members of the negotiating committee, with the exception of the industry coalition, agreed to the draft text of the proposed rule that was discussed by the committee at its final meeting ("final negotiating text"). Under the committee protocols, the dissenting vote by the industry precluded committee consensus on the proposed rule.²

¹ In the August 5, 1987, Federal Register Notice that initiated the negotiated rulemaking, the Commission clearly indicated that the LSS was only one of the mechanisms that the Commission was considering to streamline the licensing process. However, all participants on the negotiating committee, including the industry, initially agreed that a significant contributor to licensing delay was document discovery and motions practice—issues that the LSS was intended to address. In this regard, the industry, later stated that the LSS would result in little change in the length of the licensing proceeding without further procedural changes.

² See Agreement in Principle Between the Department of Energy (DOE) and the Nuclear Regulatory Commission (NRC) on the Development of a Licensing Support System (LSS), February 27, 1987.

Those participants who approved the final negotiating text are DOE, the State of Nevada, the coalition of Nevada local governments, the National Congress of American Indians, the coalition of national environmental groups, and the NRC staff. The final negotiating text was carefully drafted with the full participation of people with strong experience and background in NRC practice. It reflected the concerns of the major interests affected by the rulemaking. In fact, the industry coalition, although dissenting on the final negotiating text, fully participated in the drafting of the final text, and had considerable influence on the wording of the final text.³

The proposed rule was issued for a thirty-day comment period. The participants on the negotiating committee who approved the final negotiating text agreed to refrain from commenting negatively on the final negotiating text, if that text was published by the Commission as a proposed rule. The industry coalition, as well as any nonparticipants in the negotiation, were free to comment critically on any aspect of the proposed rule, including cost aspects of the LSS. Consistent with the negotiating committee's function advise the Commission on the LSS rulemaking, the staff submitted the comments on the proposed rule to the negotiating committee for review and comment. The public comments on the proposed rule, and any comments from the negotiating committee (the Commission received comments from the State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada), are summarized below.

The comment period on the proposed LSS rule closed on December 5, 1988. The Commission received nine comments. Seven of these comments were from various segments of the Nuclear industry, one was from DOE expressing support for the LSS rulemaking and recommending several clarifications, and one was from formal trial counsel in the Commission's Office of the General Counsel, now with the firm of Hopkins, Sutter, Hamel & Park. Most of the industry comments consisted of an endorsement of the recommendations contained in the comment letter submitted by the Edison Electric Institute and the Utility Nuclear Waste Management Group ("EEI/UNWNG"). As noted earlier, EEI/

UNWNG, along with the U.S. Council on Energy Awareness, represented the industry on the HLW LSS Advisory Committee. The industry comments will be discussed in the context of the EEI/UNWNG comments, except where there is a significant difference in an individual comment letter. The discussion of the public comments will focus on the issues of cost-benefit, the topical guidelines for the submission of documents of the LSS, and the non-LSS aspects of the rule.

Benefit-cost. The industry argues that the LSS is a "gigantic, highly complicated, and extraordinarily expensive system" that will not significantly assist Commission decision-making on the construction authorization for the repository within the NWPA timeframe. Rather than leading to a reduction of the time for licensing, the industry believes that the LSS would lead to an extension of the licensing time. Therefore, the industry does not believe that the benefits of the LSS justify the costs (estimated by DOE to be \$200 million over a ten year period), and consequently, does not support the LSS.

The industry argument against the LSS has two basic components: (1) The LSS would not enable the Commission to meet the three-year schedule for the issuance of the construction authorization mandated by the NWPA; and (2) the costs of the LSS have been underestimated. As an alternative to the LSS, the industry has proposed a microfiche-based system in which relevant documents would be stored on microfiche but would not be captured in electronic searchable full text. However, the indexes to the documents and the bibliographic headers for the documents would be "computerized", presumably in electronic searchable full text. Parties could request a copy of a document from the LSS Administrator, and receive it by overnight mail.

According to the industry, the LSS would lengthen the licensing process for the following reasons:

- The industry argues that the LSS will create new procedural issues over which litigation is likely—for example, the LSS Administrator's certification that DOE is in substantial and timely compliance with the document submission requirements in the rule. In response, the Commission notes that, although the LSS rule does establish some new procedural requirements, these requirements are necessary to ensure that the parties subject to the rule are in substantial and timely compliance with its provisions, and thereby facilitate compliance with the

NWPA's three-year time frame. In particular, the certification of DOE compliance is necessary to assure that relevant documents are in the LSS as soon as possible, so as to allow for early, pre-license application discovery. Any disputes over compliance with the rule will be resolved by the Pre-License Application Licensing Board established in § 2.1010 *before* the license application is submitted.

- The industry argues that the actual performance of the LSS is unlikely to live up to the expectations of the parties because documents that should be in the data base will be missed entirely, and that some of the documents captured could easily be incomplete in their electronic form. This will lead to attacks on the accuracy and completeness of the data base. The Commission notes that the final rule contains several provisions intended to minimize and correct inaccuracies and incompleteness. Section 2.1009 requires each party to establish procedures to capture the required documents. This section also establishes an early and continuous certification process, in which a party's designated official must certify that the party is in compliance with document submission requirements of the rule. Section 2.1003(h)(2)(i) requires the LSS Administrator to begin monitoring DOE compliance with the document submission requirements well before the license application is submitted. Section 2.1004 provides a mechanism for amendments and additions to be made to the data base. In addition, the LSS will be operational before the license application is submitted, allowing time for any errors or omissions to be corrected. Furthermore, an image of all documents will be available as a backup for the electronic text. Finally, as noted above, the rule establishes a Pre-License Application Licensing Board to resolve any disputes over accuracy and completeness of documents before the license application is submitted.

- The industry argues that the vast quantities of data available in electronic full text will provide parties with the opportunity to generate even greater amounts of discovery. The Commission notes that the LSS rule establishes requirements for the submission of relevant documents in advance of the license application. Because of the substantial amount of information that will be provided, the Commission does not anticipate continual discovery requests for large amounts of additional documents. Furthermore, the Hearing Licensing Board is authorized to limit discovery, specifically taking into account the early availability of

³ The Commission notes that the industry coalition's dissent on the final negotiating text was based on the same rationale—the cost of the LSS—that it had set forth at the initial meeting of the negotiating committee some ten months earlier.

information provided by the LSS, and compliance with the NWPA's three-year schedule. See §§ 2.1018(c), 2.1021(a)(5), 2.1022(a)(6).

- The industry argues that disputes over the use of written interrogatories are certain to "plague the licensing board and discovery master." Section 2.1018(a)(2) provides for the use of written interrogatories only if authorized by the discovery master or Hearing Licensing Board upon a showing that informal discovery, which, as indicated below, is limited to such matters as the names of witnesses, has failed. Furthermore, in ruling upon a motion to authorize written interrogatories, the discovery master, or the Hearing Licensing Board may consider whether the request creates the potential for unreasonably interfering with meeting the three-year schedule in the NWPA. For these reasons, the Commission does not believe that disputes over written interrogatories will "plague" the boards, or lengthen the licensing process.

- The industry argues that system failures will trigger action to bring the entire licensing process to a halt. The Commission does not anticipate that the LSS will be unavailable for critical periods or lengths of time. DOE will design and develop the LSS well in advance of the license application. This period also includes development of a prototype system, as well as testing of the LSS before it becomes operational. Furthermore, the DOE design, development, and testing program will be conducted with input from NRC and other affected parties. The Commission believes that the design, testing, and development process will eliminate the major causes of system failure before the hearing process begins.

In summary, the Commission does not agree with the industry opinion that the LSS would add time to the licensing process. The staff continues to believe that the LSS is the best alternative for providing a high quality and efficient review of the DOE license application within the schedule mandated by the NWPA. As noted above, this will be accomplished through—

- Eliminating the most burdensome and time-consuming aspect of the current system of document discovery—i.e., the physical production of documents after the license application has been filed—because the LSS will provide for the identification and submission of discoverable documents before the license application is submitted;

- Eliminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after

the application is filed if the LSS does not become a reality;

- Enabling the comprehensive and early technical review of the millions of pages of relevant licensing material by the DOE and NRC staff, through the provision of electronic full text search capability, which will allow the quick identification of relevant documents and issues;

- Enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions, resulting in a substantial saving of time during the proceeding;

- Providing for the electronic transmission of all filings during the hearing, thereby eliminating a significant amount of delay.

The Commission believes that any document management system for the HLW proceeding must meet all of these objectives in order for the Commission to meet the NWPA schedule, while still providing for a high quality review of the license application. No other alternative, including the industry microfiche proposal, will accomplish this.

As stated by the National Congress of American Indians (NCAI) in its review of the benefits of the LSS—

The LSS benefit which is vitally important to potential intervenors—and of no interest to the industry—is its potential to facilitate the thoroughness of program reviews. Unlike the nuclear industry, Indian tribes, states and other potential intervenors view the NRC licensing for a repository to be more than a troublesome procedural hoop through which DOE must jump on its way to repository waste acceptance.

Indian tribes, states, local governments and citizens' organizations that might become intervenors in that process have a responsibility to their respective constituents to see that the resolution of those questions is done as meaningfully and correctly as possible. In other words, these entities' primary interest in this entire program—one which is manifestly consistent with the general public interest—is to make sure that the Commission's final determinations in this matter are as nearly correct as possible.

To discharge this responsibility, which is also mandated by the Nuclear Waste Policy Act ("NWPA") with respect to the host state and any affected Indian tribe, they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. They do not now have even marginally adequate access to that information. The LSS—even a flawed, incomplete LSS—promises to vastly improve that access.

NCAI concluded that—

the proposed LSS passes the cost/benefit analysis because the key benefit of improved access to program information will certainly be served by the LSS and the costs of the LSS are not a significant fraction of the overall waste program costs. We also support DOE's and NRC's conclusion that the LSS would shorten the licensing period for a repository and, in that respect, would be likely to reduce overall program costs rather than increase them.

One public commenter, the former NRC trial counsel, endorses the benefits of the LSS and agrees with the staff belief that "the LSS will facilitate greatly the objective of realizing an initial decision within 3 years of the filing of the application." This commenter goes on to state that "the HLW license hearings will be delayed substantially" without the LSS. This is due to the fact that the LSS rulemaking will remove document discovery as an obstacle to timely completion of the HLW proceeding by providing relevant documents well in advance of the license application. As further stated by this commenter—

Potential parties will have access to the LSS well in advance of the time for submitting requests for a hearing. Thus, the time needed for prospective parties to digest pertinent information will not become a critical path matter because it should be largely completed before the prehearing process begins. Moreover, all hearing requesters should be better informed with respect to the subject matter, and they should be able to frame meaningful and material issues for litigation. . . . Finally, the establishment of the Pre-License Application Licensing Board to hear and rule on document production controversies should assure that the delay attendant to legal posturing over document production will not impact the hearing schedule. In sum, the proposed regulations would . . . remove one of the greatest causes of delay from the NRC adjudicatory hearing process.

The DOE benefit-cost analysis indicates that approximately \$200 million would be saved for *each year* of licensing delay eliminated due to the LSS. The final rule establishes procedures for the HLW, including a model hearing schedule, that will allow the Commission to reach a decision on the construction authorization within the timeframe specified in section 114(d) of the NWPA. However, even if the process were to take up to one-third longer than the final rule envisions, the LSS would still result in eliminating substantial time from current licensing practice. Under these circumstances, the benefits of the final rule would exceed the costs of implementing the LSS. Moreover, the Commission is pursuing still other methods for streamlining the licensing process, such as using

rulemaking to resolve substantive licensing issues before the license application is submitted.

The second part of the industry comments on the costs and benefits of the LSS is the adequacy of the DOE benefit-cost analysis. The industry does not believe that the DOE analysis is adequate for a number of reasons, primarily because the DOE analysis did not consider alternatives to the LSS such as the industry microfiche system. In addition, the industry notes that the estimated \$200 million cost is only projected over a ten year period, and the cost is only presented in 1988 dollars. Finally, the industry claims that the size, complexity, and "revolutionary" nature of the LSS will significantly escalate the costs of the system.

In response, the Commission notes that the scope of the DOE benefit-cost analysis was determined in reference to the objectives of the LSS identified earlier—facilitating the discovery and review of relevant documents. The staff, DOE, and other participants on the negotiating committee did not believe that any alternative other than an electronic full text search system could satisfy these objectives, and thereby allow the Commission to meet the NWSA schedule, while still providing for a high quality review of the relevant licensing information. Therefore, the DOE did not evaluate the benefits and cost of alternatives that did not include an electronic full text search capability of the documents in the system.

Although the industry microfiche alternative might provide for the collection of relevant documents in advance of licensing, it does not provide for the electronic full text search *within* those documents, such as the 7000-page Site Characterization Plan. The Commission does not believe that the mere *availability* of documents in hard copy or microfiche without electronic full text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWSA timeframe. For example, in the 18-month period following submission of the license application, the current schedule calls for the NRC staff to review the application, to prepare its Safety Evaluation Report, and to evaluate and respond to contentions proffered by the parties in the hearing. The LSS furnishes an important tool for the staff to use to ensure that its review is both timely and comprehensive, and will enable the Staff to complete its review of both contested and uncontested issues without having

an impact on the schedule of the adjudication.

NCAL, commenting on the full text search capability of the LSS, stated—

The most important aspect of that access is the proposed full-text search capability of the LSS. That is where the nuclear industry's alternative, a microfiche-based system, falls far short of what is needed. The nuclear industry would implement an electronic index only to the relevant information, which would be stored and provided in microfiche form. Unfortunately, the usefulness of such systems is far too sensitive to the quality of the indexing. Particularly with respect to subject descriptors or abstracts, there needs to be near-perfect correspondence between the thought processes of the indexer and those of the subsequent searcher in order for the latter to find materials in an index-only system.

Full-text search, on the other hand, provides much greater power and flexibility in accessing relevant information. Surveys cited by the NRC staff in support of the LSS rulemaking consistently showed greater accuracy and efficiency of searching in full-text plus header systems—such as is envisioned for the LSS—relative to other alternatives.

As noted by the State of Nevada in its review of the industry proposal, the system the industry recommends—

would not more greatly assist the Commission in meeting its congressional time goals, and would not provide the parties with effective and efficient document discovery. Most importantly, it would not give the Commission the commensurate higher level of confidence that all issues have been fully explored and that the public health and safety will be protected before the Commission arrives at its construction authorization decision.

Furthermore, the State of Nevada believes that the industry microfiche alternative "fail[s] to take into account the fact that any other system, either hard copy or the microfiche based system which they [the industry] espouse, would be as labor intensive, potentially more time consuming, probably unwieldy, and more likely than not would involve as much cost as the proposed LSS." For example, a microfiche data base would have to be duplicated for each potential party as well as for each public document room. The latter, in particular, would require substantial additional physical space and personnel to oversee the microfiche library.

The DOE benefit-cost analysis was only projected over a ten year period because that period corresponds to the period where the major costs of system design and development, and document entry, as well as the benefits of the LSS, will be realized, i.e., from the pre-license application phase to the decision on the construction authorization. Although,

the projected costs were expressed in 1986 dollars, so were the expected benefits. Therefore, the conclusions of the analysis would be the same whether in constant or adjusted dollars. Finally, the Commission does not agree with the industry statement that the LSS is a "revolutionary" system. There are many successful commercial information management systems such as Dialog, LEXIS, and Westlaw that provide full text search and retrieval of millions of pages. The U.S. Congress also has a data base (SCORPIO) that contains substantial legislative material in searchable full text.

Seventy percent of the \$200 million cost for the LSS is for the labor associated with assembling and organizing the documents, converting them to electronic format, and preparing bibliographic headers. However, much of the cost associated with these activities will be incurred, in any event, as part of the records management function for the repository, including the costs for checking the document conversion for completeness and accuracy. Therefore, the Commission does not believe that the \$200 million cost accurately represents the incremental cost attributable to the full text search capability of the LSS. Rather, the \$200 million includes costs that would be incurred in any system of records selected by the agency for storing and retrieving documents pertinent to the HLW proceeding.

In addition, the LSS cost projections are sensitive to the actual volume of information to be entered and to the processing costs per page. Significant cost reductions may be achieved through competitive procurement of data entry services. Cost reductions may also be realized by scaling down the universe of documents to be entered into the LSS, as discussed below. In light of the fact that the elimination of even one year of licensing delay by use of the LSS would result in a savings of approximately \$200 million, the cost of the LSS is reasonable. In addition, the projected \$200 million cost over ten years is less than three percent of the total annual DOE budget for the high-level waste program.

Topical Guidelines. Several of the comments, explicitly or implicitly, addressed the size of the data base that would result from the use of the topical guidelines for determining what documents must go into the LSS. One commenter, the former NRC trial counsel, recommended that reasonable limits be established on the scope of document production, for example, excluding documents concerning

alternative sites or limiting the documents to those produced after the 1982 enactment of the NWPA, or to an earlier date when the primary research and development work being relied on by DOE was completed. According to this commenter, meaningful limits on document production should reduce the cost of, and the potential for delay in the use of, the LSS; and such limits may well provide the type of alternative sought by Commissioner Roberts. Limitation of the topical guidelines to the Yucca Mountain site was also recommended by another industry commenter. This commenter also recommended that the scope of documents should be further limited to the documents supporting a license application.

The topical guidelines were partially modeled after the Environmental Assessments prepared in connection with the DOE site selection process. The topical guidelines are necessarily broad, reflecting a concern by several participants on the negotiating committee that documents related to potential licensing issues not be excluded from the LSS until the Commission determined what would be the permissible scope of substantive licensing issues. As noted by the Commission in the Supplementary Information to the proposed rule, the topical guidelines will *not* be used for the purpose of determining the scope of contentions that can be offered in the HLW proceeding under § 2.1014. Participants on the negotiating committee fully agreed with this statement. As noted, their concern was to ensure that documents on *potential* licensing issues were not *prematurely* excluded.

The Commission is sympathetic to the need for excluding material that is not relevant to the licensing of the likely candidate site for the repository. Inasmuch as the existing scope of the topical guidelines (many of which are specifically limited to the Yucca Mountain site) was developed as part of the consensus process on the entire rulemaking, the staff believes that a reduction in scope should be discussed by the negotiating committee or its successor. The Topical Guidelines are not cast in stone. They are to be set forth as a Regulatory Guide developed by the NRC staff, rather than as part of the regulations themselves, and thus are to be accorded lesser status and legal effect. The Topical Guidelines set forth later in this Supplementary Information are interim guidelines to be used until a more precise set is issued in an NRC Regulatory Guide. In either case, the Commission would again emphasize

that the topical guidelines will not be used for determining the scope of admissible contentions in the HLW licensing proceeding.

Moreover, there are other possibilities for ensuring that the document production requirements do not become unwieldy. The rulemaking on the Commission's NEPA responsibilities will specify many of the areas that will be outside the scope of the hearing. After this rulemaking is finalized, the Commission could amend the topical guidelines accordingly. Until these issues are resolved, the identification and loading of selected categories of documents could be postponed. In effect, priority would be given to the identification and loading of documents directly relevant to the Yucca Mountain site, DOE contractor reports, or documents generated after DOE began investigations at Yucca Mountain. The Supplementary Information to the proposed LSS rule stated that the LSS Advisory Review Panel may develop recommendations to the Commission on whether particular categories of documentary material (e.g., those limited by date or subject) should still be included within the topical guidelines. The NRC LSS Internal Steering Committee will develop a list of priorities, as well as potential amendments to the topical guidelines, in preparation for discussion with the other affected participants.

On a final point, the Commission disagrees with the commenter that recommended limiting the data base to only documents supporting the license application. This would eliminate many of the documents available through the existing discovery process, thereby depriving parties of documents that they would normally have access to under the Commission's current rules. More important, it would deny DOE and the NRC staff comparable electronic access to the expected numerous technical documents prepared by Nevada's contractors on which the state will base its case.

Non-LSS Provisions. In addition to the provisions in the proposed rule that concerned the development and implementation of the LSS, the final rule also contains several revisions to the rules of practice that are not directly related to the LSS, but which should also provide for a more streamlined licensing process than the current licensing procedures. However, the Commission is committed to do everything it can to streamline its licensing process and at the same time conduct a thorough safety review of the Department of Energy's application to

construct a high-level waste repository. The negotiators to this rulemaking have made a number of improvements to our existing procedures. However, more improvements may be necessary if the Commission is to meet the tight licensing deadline established by the Nuclear Waste Policy Act of 1982, as amended. By publishing this rule, the Commission is not ruling out further changes to its rules of practice, including further changes to the rules contained in the negotiated rulemaking.

The industry comments on the proposed rule contained several additional recommendations in this area. These same recommendations were also included in a memorandum that the industry originally presented to the negotiating committee on the LSS rule. Many of these recommendations were addressed by the negotiating committee and incorporated into the proposed LSS rule, although not always in the exact form proposed by the industry. The revisions to the rules of practice proposed in the industry comments on the LSS rule are those revisions that were not fully adopted by the negotiating committee. The industry recommendations are as follows—

- Establish a new threshold for contentions. According to the industry "NRC adjudicatory decisions have allowed the admission of contentions with no foundation and no semblance of factual support." Accordingly, the industry recommends that the NRC require that a party demonstrate that there is a genuine and substantial issue of disputed fact requiring a hearing for its resolution. This issue received extensive consideration by the negotiating committee. Many of the participants on the committee did not agree that the industry position reflected NRC practice since 1980, nor did they believe that a higher standard for contentions was necessary to exclude "frivolous issues," particularly in light of the early availability of information through the LSS. Furthermore, although the final LSS rule does not include the standard proposed by the industry, the final rule does require that the petition for intervention include a party's contentions, which must refer with particularity to the specific documentary material or absence thereof that provides the basis for the contention, and the specific regulatory or statutory requirement to which the contention is relevant. This provides a basis on which to reject clearly frivolous contentions. Moreover, contentions which rely on incorrect facts can be tested through existing summary disposition procedures at the outset of the hearing.

As part of its efforts on regulatory reform, the Commission issued a proposed rule on July 3, 1988, that would amend certain provisions of its rules of practice, 51 FR 24365. The draft final rule on regulatory reform addresses standards for the admission of contentions, the elimination of unnecessary discovery against the NRC staff, the use of cross-examination plans, and the timing of motions for summary disposition. Section 2.1000 of the LSS rule cross-references any sections of general applicability in subpart G of Part 2 that will continue to apply to the HLW licensing proceeding. As such, all but one of the provisions in the draft final regulatory reform rule (Section 2.714, which requires contentions to show that a genuine dispute exists on an issue of law, fact, or policy), if adopted, will automatically apply to the HLW proceeding. The LSS rule contains a new provision on contentions, Section 2.1014, and consequently Section 2.714 would no longer apply to the HLW proceeding. The Commission intends to further evaluate the need to extend the "genuine issue of fact" standard to the HLW proceeding after its review of this provision in the draft final regulatory reform rule.

- **Late contentions.** The industry comments state that current NRC practice is "overly liberal in admitting contentions filed after the period for initial definition of contentions." The industry recommends that a new standard be established which would require an evidentiary showing that: (1) There is significant new information which would require a modification in facility design/construction to protect the public health and safety; and (2) such modification would substantially enhance such protection by improving overall safety.

The industry fails to substantiate its charge that the adjudicatory boards are too liberal in admitting late contentions. A review of all such decisions since 1980 reveals that less than 25 percent of late contentions have been admitted. Of those, the great majority were based on very special circumstances and thus understandably admitted (e.g., new TMI-accident-related regulatory requirements, prior unavailability of emergency plans, discovery of potentially serious safety and quality assurance problems.) Thus, the industry's premise is unsupported. Nonetheless, the negotiating committee deliberations on this issue resulted in new standards for certain types of late contentions. Any petitions to amend or add contentions made more than forty

days after the issuance of the NRC Staff Safety Evaluation Report (SER) must include, in addition to the usual factors for late-filed contentions, a showing that the contention involves a significant safety or environmental issue or raises a material issue related to the performance evaluation anticipated by 10 CFR 60.112 or 60.113.

- **Discovery.** Citing as an example the local rules of only one federal district court (out of 101) the industry proposed that limitations be placed on the number of depositions and the time period during which those depositions may be taken. Section 2.1018 of the final rule, and the model schedule in the Supplementary Information of the final rule already limit deposition discovery to approximately 21-months. The Board is also authorized by the rules to prevent abuse of the discovery process. Further restrictions on deposition discovery were given extensive consideration during the negotiation. The magnitude of this proceeding and the need for meaningful public review of health and safety issues, however, make arbitrary limits on depositions, imposed by rule, inappropriate and unwarranted.

The industry also states that the informal discovery provisions contained in § 2.1018(a)(1) of the final rule will enable a party to "deluge DOE with informal requests for information not available in the LSS." The informal discovery procedures represent a method to allow parties to the hearing to obtain the type of information normally gathered through interrogatories (names of witnesses, nature of testimony, etc.) through a less onerous and less time-consuming method than the use of written interrogatories. As such, it will be confined to a narrower band of information than implied in the industry comment. Abuse of the informal discovery process can also be prevented by the Pre-License Application Licensing Board or the Hearing Licensing Board under § 2.1018(c) of the final rule. However, in order to minimize the potential for abuse of the informal discovery process, § 2.1018(a)(1) has been revised to include examples of the type of material that will be available through informal discovery.

- **Intervention.** According to the industry, the Commission "has allowed its licensing boards to grant intervention status to parties that failed to meet judicial standing requirements." According to the industry this "discretionary intervention" tends to "add additional parties to the proceeding, does not serve the public interest, complicates pre-hearing procedures, and should be removed."

The Commission does not agree that discretionary intervention "does not serve the public interest" or "complicates pre-hearing procedures," and recommends against removing such discretion from the licensing boards. The Commission's licensing boards do follow judicial standards for intervention. However, the Commission does allow discretionary intervention under certain circumstances, and has established specific factors to guide a licensing board's determination on whether discretionary intervention should be permitted. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 616 (1976). Since *Pebble Springs*, discretionary intervention has been authorized only four times, and in one of those instances, the grant of intervention was later vacated as moot. It is also worth noting that, because the industry's interest in the HLW proceeding is economic, it may not satisfy the Commission's traditional, judicial test for standing and thus might well have to rely on the *Pebble Springs* doctrine to participate in the proceeding.

- **Affirmative case on contentions.** The industry recommends that the Commission require that a party sponsoring a contention present an affirmative evidentiary case for that contention. Under NRC case law, an intervenor does have the burden of going forward, but may do so by either direct evidence or by cross-examination, as to the issues raised by the intervenor's contentions. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 NRC 163, 191 (1975). The Commission believes that this more substantive proposal, which is beyond the scope of the instant rulemaking, warrants further consideration later, at the same time the Commission addresses the related issue of whether the threshold of contentions should be raised.

- **Seriatim hearings.** The industry recommends that the Commission direct the licensing board to resolve contentions on an ongoing basis and that internal agency appeals for these decisions need not await resolution of the last group of issues. As noted above, the proposed LSS rule already dramatically alters existing practice by *requiring* (rather than prohibiting) appeals from certain types of interlocutory orders, such as rulings on the admissibility and amendment of contentions and motions for summary disposition, to be filed within ten days (rather than at the conclusion of the proceeding). See § 2.1015. Further, under long established agency precedent,

rulings disposing of a major segment of a case are immediately appealable.

Negotiating Committee Review. The State of Nevada, the National Congress of American Indians, and Lincoln County, Nevada submitted written comments on the public comment letters. The State of Nevada supports the LSS rule as proposed. According to the State, "[t]he rule is the product of a very successful negotiation process, during which all major interests, except the utilities, engaged in significant compromises. The give and take resulted in a proposed electronic discovery and motions practice system which will enhance the parties' ability to fully inform the hearing panel, and thus the Commission, on the difficult issues involved in licensing a repository. It will therefore assist in meeting the Commission's ultimate health and safety responsibility." Furthermore, the State is convinced that the proposed rule will provide a greater possibility that the Commission can meet its congressional time goals, or at least reduce the time which would be necessary to reach a construction authorization decision than by using either traditional hard-copy discovery, or the industry's proposed microfiche based system. The State also emphasized that it had "agreed to relinquish traditional hard copy discovery rights, and in return received what we are confident is a vehicle which will allow for a more enhanced use of discovery, and thus a more effective means of participating in the licensing process, and assisting the Commission in fulfilling it[s] ultimate responsibility; that is, a construction authorization decision based on a full and complete airing of all of the complex and novel technical issues

The National Congress of American Indians continues to support the LSS, because the benefits to be derived—primarily in the form of improved access to program information—will greatly facilitate effective participation in the program on the part of Indian tribes and other potential intervenors. The cost of the system, while high, is justified by the benefits and is an insignificant fraction of overall nuclear waste program costs. NCAI supports the conclusion of the Department of Energy and the NRC Staff that the LSS will significantly shorten the time required to license a repository.

Furthermore, NCAI—reaffirmed its commendation of the Commission for undertaking this rulemaking by negotiation and for including NCAI to represent national Indian interests in that negotiation. The result of the lengthy negotiation process necessarily represents a great deal of compromise on the part of all

the parties. We do not like every aspect of the draft rule, but we certainly understand the rule and its derivation infinitely better than we would had we not been able to participate so thoroughly in its initial drafting. All those representing intervenor interests yielded on many points in the negotiations to accommodate the positions of the nuclear industry. We would not have done so in any case if we had known that the industry ultimately would not yield to accommodate the LSS concept as a whole.

The same considerations which led the Commission to undertake this rulemaking by negotiation—that the results of more thorough participation would yield a better and more acceptable draft rule—should similarly lead the Commission to reject the nuclear industry's position in promulgating the final rule. The proposed system is admittedly elaborate and costly, but it promises to lead to more efficient and effective management of the vast quantity of information required for repository licensing and more meaningful participation in this important government process. The Commission should not be overly reluctant to engage in a bit of information age pioneering, as this is unquestionably the direction in which information management in complex government regulation and litigation is going. The costs are not out of line relative to overall program costs.

Lincoln County, one of the members of the Nevada local government coalition on the negotiating committee noted that—

The utilities appear to be requesting rulemaking and other administrative relief to expedite licensing in a manner which may jeopardize the full and effective participating rights of potentially affected parties. The NWPA provision calling for a three-year licensing period was enough of a time concession for the utilities. Any further concessions for the sake of expediency may cause harm to the balance of affected parties.

Coordination. On January 11, 1989, the Commission voted to establish an independent Office of the LSS Administrator reporting to the Commission for policy direction, and to the Chairman for day-to-day management supervision. In addition, the Commission renamed the current NRC LSS Negotiating Team as the NRC LSS Internal Steering Committee effective immediately. The Steering Committee is to serve as the focal point within the Commission to identify, develop, and coordinate internal requirements and procedures, and to represent NRC's interests in the LSS. In order to carry out these responsibilities, and to prepare for coordination with DOE on the design and development of the LSS, the Steering Committee has begun the preparation of a draft LSS implementation plan. The plan will address the following—

- Identification and prioritization of the LSS design and development issues that need to be addressed with DOE;

- Identification and prioritization of the issues that need to be addressed for implementation of the LSS within the NRC, including a delineation of the role of the LSS Administrator vis-a-vis the Steering Committee and the affected NRC Offices;

- Preparation of a draft Memorandum of Understanding between NRC and DOE that would delineate the responsibilities of the respective agencies in regard to the LSS;

- Preparation of a draft charter for the LSS Advisory Committee;

- A schedule for implementation of the plan;

- Proposed amendments to the topical guidelines.

The Commission would emphasize that, in order to accomplish the LSS objectives, DOE must have the LSS operational as far in advance of the submission of the license application as feasible. The Commission is somewhat concerned over the DOE statement in its comment on the proposed rule that—

The January 1991 date cited for availability of the Licensing Support System . . . is no longer a realistic date. Based on the findings of the preliminary design effort to date and on the best available estimates of an anticipated schedule of procurement for system hardware and software components, elements of the system will be available in late 1992, with comprehensive capabilities now estimated to be available in early 1993.

The Commission realizes that the schedule for submission of the DOE license application may also be delayed beyond the 1995 date now anticipated by DOE. However, until such a schedule adjustment is an actuality, DOE, with the assistance of NRC and the other affected parties, must make their best efforts to see that the LSS is operational as soon as practicable before the license application is submitted. In this regard, DOE, NRC, and other parties subject to the rule must now begin preparation for compliance with the document submission requirements in § 2.1003. Furthermore, the LSS Administrator's evaluation of DOE compliance, pursuant to § 2.1003(h)(2), begins six months after his or her appointment.

Additional Views of Commissioner Curtiss

For a number of reasons, discussed in more detail below, I have significant reservations about proceeding at this point with the so-called "non-LSS" portion of this rule, wherein the Negotiating Committee has recommended extensive changes to our Part 2 procedures, as those procedures will apply to the Department of Energy's application for a

construction authorization for the high-level waste repository.

First, it does not appear to me that the original charge to the Negotiating Committee envisioned that the Committee would address, in a wide-ranging manner, the so-called Part 2 procedural provisions that will govern the high-level waste proceeding, except to the extent that changes in these provisions proved to be necessary for the purpose of implementing the Licensing Support System (LSS). The rule before us includes a number of provisions that are necessary to implement the LSS; but it also includes a number of "non-LSS" provisions that are unrelated to the LSS and that, in my judgment, go far beyond the scope of the Committee's charge.

Second, we have not had a sufficient opportunity to reflect upon the "non-LSS" procedural changes that have been proposed—to ensure that the procedures are clear and ambiguous and to reach a decision as to whether, as a matter of policy, the approach reflected in the proposed procedures should be endorsed. My own view is that there is considerable ambiguity, reflected in part by the apparent lack of consensus on key issues that emerged in the February 7, 1989 Commission meeting, about the meaning of certain important provisions.

Third, my concerns in this regard have been heightened by the responses that we recently received from the Negotiating Committee members to the questions that I posed on February 24, 1989. In short, with the exception of the Industry Coalition, the Negotiating Committee members and the lead convenor and facilitator have individually declined to answer the questions, suggesting that inquiries about the purpose and intent of this rule somehow threaten the integrity of the negotiating process and will lead to the collapse of whatever consensus has been achieved.

In posing these questions, it was not my intent to plow new ground or raise new issues that go beyond the topics that are addressed in the proposed rule recommended by the Negotiating Committee in SECY-89-027. Indeed, in every instance, the questions concern the purpose, the intent, and the meaning of the procedural provisions contained *within the four corners of this rulemaking package* and involve matters that, in my judgment, need to be clarified if our objective here is to have a rational, well-understood set of procedures to govern the high-level waste adjudicatory proceeding. If these matters were discussed and addressed by the Negotiating Committee—and a consensus achieved—then the response should require no further negotiation. A simple reference to the text of the rule or to the minutes of the negotiations would suffice. On the other hand, if these matters did not receive the attention of the Negotiating Committee—or a consensus does not exist—then in my judgment that should give us pause about proceeding with changes that are not clearly understood. If we have any hope of meeting the three-year statutory schedule for the high-level waste proceeding, I think we should clear up these ambiguities now.

Whether a consensus was achieved or not, we are nevertheless entitled to a response

from the Negotiating Committee about the purpose and intent of the rule that has been proposed for our consideration. We are ill-served by the Negotiating Committee's inability or unwillingness to respond to reasonable questions about the meaning and purpose of key provisions in this rule.¹

Fourth and finally, there are a number of procedural changes that go beyond, or involve changes in, what the Negotiating Committee has proposed that warrant consideration (see, e.g., Memorandum from Christine N. Kohl to William C. Parler, January 19, 1989; SECY-89-023, "Consideration of Revisions to the Commission's Rules of Practice in Order to Further Streamline the High-Level Waste Licensing Process", January 26, 1989). I am pleased that these additional changes will be coming to the Commission shortly for our consideration and I hope that we can move forward expeditiously with our deliberations on these additional changes. But it seems to me that it would be far preferable to make these changes all at one time and in a single package, where we can consider the policy matters related to our HLW procedures in a comprehensive and coordinated way, rather than through the bifurcated approach that we are now taking.

For the foregoing reasons, I would disapprove the "non-LSS" provisions of the rule (sections 2.1014–2.1023, 2.714, 2.722, 2.743, and 2.764, as well as the topical guidelines and the model timeline). I would approve those provisions of the rule that are directly related to implementation of the LSS (2.1000–2.1013).

The Final Rule

The final rule adds a new Subpart J to 10 CFR Part 2 setting forth the procedures that govern the Commission's HLW licensing proceeding, including the use of the LSS for the submission and management of documents in the proceeding. The final rule applies only to the HLW proceeding, and does not apply to licensing involving any other type of facility or activity licensed by the Commission. The rule will be applicable to all parties to the HLW licensing proceeding regardless of whether a particular party was a member of the negotiating committee. No substantive changes have been made to the rule as proposed.

Section 2.1000 Scope of Subpart

The final rule establishes a new Subpart J in 10 CFR Part 2 setting forth the procedures that govern the Commission's HLW licensing proceeding, including the use of the LSS for the submission and management of

documents in the proceeding. Generally, the procedures in the new Subpart take precedence over the provisions of general applicability in 10 CFR Subpart G. However, § 2.1000 cross-references any sections of general applicability in Subpart G that will continue to apply to the HLW licensing proceeding. The final rule applies only to the HLW proceeding, and does not apply to licensing proceedings for any other type of facility or activity licensed by the Commission. The rule will be applicable to all parties to the HLW licensing proceeding regardless of whether a particular party was a member of the negotiating committee.

Section 2.1001 Definitions

Section 2.1001 sets forth the definitions of terms used throughout Subpart J. These definitions will be discussed with the relevant sections of the final rule.

Section 2.1002 High-Level Waste Licensing Support System

Section 2.1002 describes the purpose and scope of the LSS. The LSS is intended to provide full text search capability of, or easy access to, the "documentary material" of DOE, NRC, other parties to the HLW licensing proceeding; government entities participating in the HLW proceeding as "interested governmental participants" under 10 CFR 2.715(c); persons who qualify as "potential parties" under § 2.1008; and their contractors ("parties," "interested governmental participants," and "potential parties," will be collectively referred to hereinafter as "LSS participants"). LSS participants must ensure that their contractors, consultants, grantees, or other agents, comply with the applicable requirements of Subpart J.

For the purposes of the information that will in the LSS, "documentary material" means any material or other information generated by or in the possession of an LSS participant that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. The identification of material that is within the universe of "relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository" will be determined by the topical guidelines set forth in this Supplementary Information. In determining which documents must be placed in the LSS by a LSS participant, the document must fall within the definition of "documentary material" in

¹ Indeed, the position taken by the Negotiating Committee in response to the questions that have been posed about the purpose and intent of the rule leads me to question the wisdom of relying on the negotiated rulemaking process for future rulemaking initiatives.

§ 2.1001, i.e., it must be relevant to, or likely to lead to information that is relevant to, the licensing of the likely candidate for a geologic repository. Therefore, a document must not only fall within the topical guidelines, but also have a nexus to a geologic repository. It is also the Commission's intent to issue these topical guidelines as an NRC Regulatory Guide. The topical guidelines set forth later in this supplementary information are interim guidelines to be used until a more precise set is issued in an NRC regulatory guide. The Commission expects all LSS participants to make a good faith effort to identify the documentary material within the scope of § 2.1003. However, a rule of reason must be applied to an LSS participant's obligation to identify all documentary material within the scope of the topical guidelines. For example, DOE will not be expected to make an exhaustive search of its archival material that conceivable might be within the topical guidelines but has not been reviewed or consulted in any way in connection with DOE's work on its license application. It is also anticipated that the LSS Advisory Review Panel established pursuant to § 2.1011(e), in evaluating the implementation of the LSS, may make occasional recommendations to the Commission on whether particular categories of documentary material (e.g., those limited by date or subject) should be included within the topical guidelines.

Although the topical guidelines will guide the selection of relevant information for entry into the LSS, they will not be used for the purpose of determining the scope of contentions that can be offered in the HLW proceeding under proposed § 2.1014. The scope of contentions will be governed by the Commission's authority under relevant statutes and regulations.

Section 2.1002(d) specifies that Subpart J is not intended to affect any independent right of a potential party, interested governmental participant, or party to receive information or documents. These independent rights consists of statutory rights under such statutes as the Freedom of Information Act (FOIA), or the Nuclear Waste Policy Act, as amended, or rights derived from grant requirements such as those between DOE and the State of Nevada.

Section 2.1003 Submission of Material to the LSS

Section 2.1003 sets forth the requirements for the submission of documentary material by LSS participants to the LSS Administrator for entry into the LSS. LSS participants, excluding DOE and NRC, must submit

an ASCII file, a bibliographic header, and an image for all documents generated by the LSS participant or its contractor after the LSS participant gains access to the LSS pursuant to either § 2.1008 or § 2.1014. Submission of these documents must be made reasonably contemporaneous with their creation. For documents generated or acquired before the LSS participant gains access to the LSS, the LSS participant need only submit a header and an image for each document. The LSS Administrator will be responsible for entering these documents into the LSS in searchable full text. DOE and NRC, the generators of the largest volumes of documentary material, will be responsible for submitting to the LSS Administrator ASCII files, bibliographic headers and images of documents within the scope of the topical guidelines. The format criteria for the submission and acceptance of ASCII, images, and headers will be initially established by DOE in concert with the LSS Advisory Committee established pursuant to proposed § 2.1011(c)(2), to be later supplemented as necessary by the LSS Administrator in concert with the LSS Advisory Review Panel.

The submission requirements of § 2.1003 generally apply only to final documents, e.g., a document bearing the signature of an employee of an LSS participant or its contractors. However, paragraphs (a) and (b) of § 2.1003 also require the submission of "circulated drafts" for entry into the LSS. A "circulated draft" means a nonfinal document circulated for supervisory concurrence or signature and in which the original author or others in the concurrence process have non-concurred. The intent of this exception to the general rule or final documents is to capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process (the concurrence process) of an LSS participant or its contractor. In effect, the Commission and other government agencies who are LSS participants are waiving their deliberative process privilege for these circulated drafts. The objection or non-concurrence must be unresolved. Any draft documents to which such a formal, unresolved objection exists must be submitted for entry into the LSS. Although many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their document approval process.

The requirement applies regardless of whether any final document ultimately emerges from the LSS participant's decision-making process. A determination not to issue a final document, or allowing a substantial period of time to elapse with no action being taken to issue a final document, shall be deemed to be the completion of the decision-making process. If a decision is made not to finalize a document to which there has been an objection, the draft of that document must be entered into the LSS after the decision-making process on the document has been completed, i.e., the requirements of § 2.1003 do not require a LSS participant to submit a circulated draft to the LSS while the internal decision-making process is ongoing. In addition, under § 2.1006(c), circulated drafts that are subject to withholding under a privilege or exception other than the deliberative process privilege (e.g., attorney work product), are not required to be submitted for entry in searchable full text to the LSS under § 2.1003.

As a general rule, all documentary material is to be in the LSS in searchable full text. However, the rule provides for exceptions to this general rule. Section 2.1003(c) addresses graphic-oriented documentary material that is not appropriate for entry into the Licensing Support System in searchable full text. Graphic-oriented documentary material is material that is printed, scripted, handwritten, or otherwise displayed in hard copy form, and is capable of being captured in electronic image by a digital scanning device. Graphic-oriented material includes raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, and photographs which have been printed, scripted, handwritten or otherwise displayed in any hard copy form and which, while capable of being captured in electronic image by a digital scanning device, may be captured and submitted to the LSS Administrator in any form of image, along with a bibliographic header. Section 2.1003(c) also addresses documentary material that is not suitable for entry into the Licensing Support System in either image or searchable full text. Such material shall be described in the Licensing Support System by a sufficiently descriptive bibliographic header. The timeframe for entry of graphic-oriented material, or material that is not suitable for entry in either image or searchable full text, will be established pursuant to the access protocols in § 2.1011(d)(10). In addition, submission of images will be determined by the protocols on digitizing equipment

established by the LSS Advisory Review Panel. However, in any case, this type of documentary material must be entered into the LSS after the principal investigator decides that the data are in a usable form, including the completion of quality assurance procedures. The access protocol should ensure that any collection or "package" of documentary material, as the term is used in § 2.1003(c)(5), which relates to a study, should be submitted reasonably contemporaneous with the completion of such a "package," including any quality assurance that may be required.

Section 2.1005 sets forth categories of documents that are to be completely excluded from the LSS, and § 2.1006 sets forth the categories of documents that may be withheld from entry into the LSS on the basis of a privilege or exception. The details of these provisions will be discussed below.

To ensure that progress is made in designing, developing and loading the LSS, § 2.1003(h) provides for evaluations of DOE compliance with the requirements of § 2.1003 at six month intervals. The DOE license application cannot be docketed under Subpart J, thus losing the benefits of Subpart J, unless the LSS Administrator certifies at least six months before the license application is submitted that DOE is in substantial compliance with the provisions of the Subpart. Although § 2.1003(h)(1) requires the certification decision six months before submission of the DOE license application, the Commission anticipates that the LSS participants will have access to the LSS well before the license application is submitted. The LSS Administrator's decision on DOE compliance may be reviewed by the Pre-License Application Licensing Board established pursuant to § 2.1010, if the Board receives a properly filed petition. Under § 2.1003 (a)(2) and (b)(2), LSS participants are required to submit any documentary material generated or acquired before the LSS participant is given access to the LSS ("backlog"), no later than six months before the license application for the repository is submitted. However, the Commission encourages LSS participants to submit this material for entry as soon as possible after they have been given access to the LSS.

In the event that the LSS Administrator cannot certify DOE compliance with Subpart J, DOE may either postpone the filing of the application until compliance is certified, or can file the license application for docketing under 10 CFR Part 2, Subpart G. In the latter event, the Commission would note that it will be unlikely to

meet the three year NWSA timeframe for a decision on the issuance of a construction authorization, in the event of a contested adjudicatory proceeding. Although DOE may ultimately come into compliance with the provisions of Subpart J at some point after the license application has been docketed under Subpart G, the Commission may still not be able to certify that the statutory timeframe will be met. However, § 2.1003(h)(3)(ii) does authorize the Commission to specify the extent to which Subpart J will apply if DOE later comes into compliance. The Commission is optimistic that the effective implementation of the rule proposed in this notice will allow the Commission to meet the schedule set forth in section 114(d) of the NWSA.

Section 2.1004 Amendments and Additions

This section provides for the addition to, and amendment of, records submitted by the LSS participants. The submitter has sixty days to verify whether a document has been entered correctly in the pre-license application phase, and five days to verify correct entry after the license application has been submitted. Any errors in entry discovered during the sixty and five day periods may be corrected by the submitter. After the time period for verification has run, any errors may not be corrected by revising the original document. Rather, the submitter must submit a corrected version to the LSS Administrator, with a separate bibliographic header. Both the bibliographic header for the revised document and the original document must note that two versions of the document are in the LSS.

Section 2.1004 also addresses the issue of updates of documents that are already in the LSS. Updated pages must be submitted to the LSS Administrator for entry as a separate document with a separate bibliographic header. The bibliographic header of the original document must specify that an update is available. All the pages in a particular update will be entered as a single document.

Section 2.1004 addresses amendments and additions to the documentary material in the LSS. This section does not preclude the LSS Administrator from making revisions to headers necessary to maintain and enhance the usefulness of the header information. Such revisions would include the following—

- Updating assigned subject index terms as the thesaurus is enhanced and expanded,
- Where a field containing pointers to cross-reference related documents

subsequently added to the database must be updated.

- Where the ability to annotate a document record to show later use(s) as exhibits to depositions and testimony may be required at a later time.

Section 2.1004(e) requires that any document that has been incorrectly excluded from the LSS must be submitted to the LSS Administrator for entry within two days of its identification by the LSS participant who is responsible for the submission of the document.

Section 2.1005 Exclusions

Section 2.1005 establishes several categories of documents that do not have to be entered into the LSS, either under the requirements of § 2.1003 or under the derivative discovery requirements of § 2.1019. These exclusions include documents typically referred to as official notice material; reference books and text books; administrative materials such as general distribution cover memoranda, budget, finance, personnel, and procurement materials; press clippings and press releases; junk mail; and classified material. The scope of work on a procurement related to repository siting, construction, or operation, or the transportation of spent nuclear fuel or high-level waste is not within the scope of these exclusions.

Section 2.1006 Privilege

The submission of documents to the LSS is subject to the traditional privileges from discovery recognized in NRC adjudicatory proceedings, as well as all the exceptions from disclosure contained in 10 CFR 2.790 of the Commission's regulations. These privileges and exceptions include the attorney-client privilege, the attorney work product privilege, the government's deliberative process exemption, protection for privileged or confidential commercial or financial information, and the protection of safeguards information. The Pre-License Application Licensing Board, pursuant to § 2.1010(b), will rule on any claims of withholding based on these privileges or exceptions. As in any NRC adjudicatory proceeding, the Board may rule that the release of privileged or excepted material is necessary to a proper decision in the proceeding, or may order the disclosure of a document under a protective order. Section 2.1006(a) extends the deliberative process privilege normally available to federal government agencies to state and local governments and Indian Tribes. Safeguards information is to be

protected under the provisions of 10 CFR 73.21. Subpart I of 10 CFR Part 2 will govern the protection and disclosure of any Restricted Data and National Security Information during the proceeding. The existence of any material of this type should be identified to the Licensing Board and the parties pursuant to 10 CFR 2.907 and is not subject to the requirements of § 2.1003. Accordingly, no headers need be submitted for Subpart I information.

Section 2.1007 Access

Section 2.1007 establishes the provisions for access to the LSS by the public and by LSS participants. In terms of public access, the NRC and DOE will provide public access terminals at their respective Public Document Rooms at headquarters in Washington, DC, at NRC regional offices, and at various locations in the vicinity of the likely candidate site for the repository. In the pre-license application phase, access to the LSS through these public access terminals will consist of full text search capability of the full headers for documents in the LSS. The NRC and DOE Public Document Rooms will provide access, consistent with current practice, to the paper copy or microfiche of the documents of that agency before access to the LSS is available (currently projected for January 1992). Once the LSS is operational, public access to the LSS headers will be available within the same timeframe that the headers and LSS documents are available to LSS participants. In addition, copies of specific DOE or NRC documents may be requested under the procedures of the agencies' Public Document Rooms and the FOIA regulations of the NRC, 10 CFR Part 9, or DOE, 10 CFR Part 1004. These regulations provide for a ten day response time to requests, 10 CFR 9.25(e) and 10 CFR 1004.5(d)(1), and the waiver of copying fees to qualified persons, 10 CFR 9.39 and 10 CFR 1004.9(a). Public access to the full text of all documents in the LSS, except for documents withheld from disclosure under section 2.1006, shall be provided after the notice of hearing is issued for the HLW licensing proceeding. DOE and NRC will ensure that adequate terminal access facilities are provided at the public document rooms.

Remote access to the LSS from individual computer facilities will be available to LSS participants both during the pre-license application phase and after the notice of hearing has been issued. The cost of the computer facility and the telephone connect charge must be borne by the LSS participant. However, they will not be assessed a central processing unit (CPU) charge for

access to the LSS. LSS participants will be able to file an electronic request for paper copies of LSS documents from their individual computer facilities, and also will be able to file an electronic request for a fee waiver when requesting paper copies of documents in the LSS. This waiver is currently available to qualified persons or groups seeking a fee waiver for copies of NRC documents who submit a written request to the Commission under the Commission's Freedom of Information Act (FOIA) regulations in 10 CFR Part 9. The criteria in 10 CFR 9.39 would be used to determine if the requestor should be granted a fee waiver. Section 2.1007(c)(4) would authorize the Commission to grant a generic fee waiver to a qualifying LSS participant after the initial request for a fee waiver has been made.

Documents in the LSS will not be considered NRC agency records solely by virtue of the NRC being the LSS Administrator. However, any of those documents that were generated by or submitted to the NRC as part of the NRC's licensing responsibility for the repository will be NRC agency records. As noted above, documents considered agency records may be requested under a FOIA request to the NRC. Similarly, DOE records may be requested from DOE under a FOIA request, and the records of any other governmental entity that may be obligated to provide documents by virtue of a freedom of information statute (e.g., a State agency) may be requested. It is anticipated that the public availability of headers for LSS documents will facilitate freedom of information requests and responses.

Section 2.1008 Potential Parties

Section 2.1008 establishes the procedures for a person becoming a potential party during the pre-license application phase, thereby gaining access to the LSS during this period. Upon a petition from an interested person, the Pre-License Application Licensing Board, established pursuant to § 2.1010, will determine in accordance with § 2.1008(c) if the person meets the criteria in § 2.1008(b). These criteria consist of the factors for determining intervention status under § 2.1014(c) or the criteria in 10 CFR 2.715 for interested governmental participation, both as evaluated in reference to the topical guidelines set forth below.

A grant of access to the LSS pursuant to § 2.1008 before an application is filed does not carry a presumption that a potential party will be admitted as a party after an application is filed under § 2.1014 or as an interested governmental participant under 10 CFR

2.715. Although § 2.1014(c)(4) of the proposed rule provided that the Hearing Licensing Board would consider pre-license application access to the LSS as one factor in ruling on petitions for intervention, this provision has been deleted. Under § 2.1014(c), the Board must still consider the nature of the petitioner's right under the Atomic Energy Act; the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and the possible effect of any order that may be entered in the proceeding on the petitioner's interest. Therefore, the Commission did not believe that pre-license application access would have any meaningful effect on the Board's determination on intervention petitions. It should be emphasized that a petitioner must also satisfy § 2.1014(a)(2) in regard to an admissible contention in order to participate in the proceeding. An LSS participant's access to the LSS obligates it to comply with the regulations in Subpart J, including compliance with all orders of the Pre-License Application Licensing Board.

Section 2.1009 Procedures

Section 2.1009 specifies the procedures each LSS participant must follow to ensure implementation of the requirements in Subpart J, including establishing procedures to ensure that documentary material is identified and submitted for entry into the LSS. Each LSS participant must identify a specific individual as the LSS point-of-contact. This individual must certify, at six month intervals, that all documentary material for which the LSS participant is responsible under this subpart has been identified and submitted to the LSS.

Section 2.1010 Pre-License Application Licensing Board

Section 2.1010 establishes an NRC Pre-License Application Licensing Board to rule on requests for access to the LSS during the pre-license application phase, and to resolve disputes over the entry of documents and the development and implementation of the LSS by DOE and the LSS Administrator. The Board will be appointed six months before access to the LSS is scheduled to become available. The Board possesses the same general power as other NRC Licensing Boards possess under 10 CFR 2.718 and 10 CFR 2.721(d). In order to gain access to the LSS during the pre-license application phase, an LSS participant must agree to comply with all orders of the Pre-License Application Licensing Board, and all LSS regulations. Practice before the PALB is essentially a motions practice, akin to

that during the normal discovery, pre-hearing phase in a Part 50 proceeding before a licensing board. Oral presentations are not precluded, but rather will be left to the discretion of the board (as is now the case), depending on the nature of the dispute. See, for example, §§ 2.1010 (d) and (e), 2.1015, and 2.1016.

Section 2.1011 LSS Management and Administration

Section 2.1011 establishes an LSS Administrator who will be responsible for managing, operating, and maintaining the LSS. Because the LSS will contain in electronic form, the documentary material constituting the Commission's docket and official record for the repository licensing proceeding, and because use of the LSS will be an integral part of the Commission's adjudicatory hearing on the license application, the NRC will serve as the LSS Administrator. In order to avoid any conflict-of-interest problems, the LSS Administrator cannot be any person or organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste licensing proceeding or a part of the management chain reporting to the Director of the Office of Nuclear Material Safety and Safeguards. The Commission has decided to establish an independent Office of the LSS Administrator reporting to the Commission for policy direction and to the Chairman for day-to-day management supervision. The LSS Administrator (like other Commission-level offices) will report to the Commission for overall policy direction on all LSS matters *except* the certification of DOE compliance required by § 2.1033(h)(1). The LSS Administrator will make that determination *on his/her own*, subject to formal adjudicatory review (upon request) by the Pre-License Application Licensing Board (§ 2.1010(a)(1)), the Appeal Board (§ 2.1015(b)(i)), and, finally, the Commission itself (§ 2.1015(e)).

On a related issue, with the exception of the Commission in its role as LSS Administrator (see the definition of "LSS Administrator in § 2.1001), the LSS cannot reside in any computer system that is controlled by any LSS participant, including its contractors, and cannot be physically located on the premises of any LSS participant or its contractors.

The LSS is to be designed and developed by DOE consistent with the requirements in Subpart J. This responsibility includes all procurement of hardware and software. However, the

design and development of the LSS by DOE must be undertaken in consultation with the LSS Administrator. After the LSS has been designed and becomes operational, all redesign and procurement by DOE must be with the concurrence of the LSS Administrator.

Section 2.1011(e) provides for the establishment of an LSS Advisory Review Panel, which will be chartered under the Federal Advisory Committee Act, to advise DOE on the design and development of the LSS, and to advise the LSS Administrator on the implementation of the LSS. The LSS Administrator appoints the members of the Advisory Review Panel from members of the Licensing Support System Advisory Committee established pursuant to § 2.1011(e)(2) within sixty days after the LSS Administrator has been designated. The Licensing Support System Advisory Committee will be composed of the State of Nevada, the coalition of affected units of local government in Nevada that served on the negotiating committee, DOE, NRC, the National Congress of American Indians, the coalition of national environmental groups that served on the negotiating committee, and other members as the Commission may designate pursuant to the balanced membership requirements of FACA. Because DOE is now in the process of designing the LSS, the Advisory Review Panel is not yet available to provide advice and recommendations to DOE. In the interim period between publication of the final rule and appointment of the Advisory Review Panel by the LSS Administrator, the LSS Advisory Committee will perform the functions of the Advisory Review Panel set forth in § 2.1011(e).

It is the Commission's intent that, after the commencement of the hearing, the primary focus of the Advisory Review Panel will be on broad, long-term, technical issues. Any immediate problems with the functioning of the LSS during the hearing will be addressed by the LSS Administrator or the Hearing Licensing Board.

It is anticipated that the DOE and NRC will enter into a Memorandum of Understanding (MOU), consistent with the requirements of the rule, on the design and development of the LSS.

Section 2.1011(d) sets forth the responsibilities of the LSS Administrator including providing the necessary personnel, materials, and services for the operation and maintenance of the LSS, and entering the documentary material submitted pursuant to section 2.1033 in searchable full text, as appropriate.

Section 2.1012 Compliance

Section 2.1012 establishes provisions to ensure compliance with the requirements of Subpart J, particularly the document submission requirements of § 2.1003. DOE may not submit the license application for docketing under Subpart J unless the LSS Administrator certifies that DOE is in substantial and timely compliance with § 2.1003. In addition, under § 2.1012(b)(1), no person may be granted party or interested governmental participant status in the hearing if it is not in substantial and timely compliance with the requirements of § 2.1003. A person who is not in substantial and timely compliance at the time specified for the submission of petitions to intervene or to become an interested governmental participant, may later come into compliance and be admitted to the hearing, assuming they meet all the other requirements in § 2.1014 or 10 CFR 2.715(c) for admission. However, persons admitted to the hearing under this provision must take the proceeding as they find it. The Hearing Licensing Board will not entertain any requests from such a person to delay the proceeding in order for that person to compensate for time missed in the hearing. Section 2.1012(d) provides for the termination or suspension of an LSS participant's access rights if it is in noncompliance with any applicable order of the Pre-License Application Licensing Board or the Hearing Licensing Board. However, any loss of access under this section does not relieve an LSS participant of its responsibilities in connection with the service of pleadings under § 2.1013 of this subpart.

Section 2.1013 Use of LSS During Adjudicatory Proceeding

Section 2.1013 establishes procedures for the electronic submission of pleadings during the hearing, or during the pre-license application phase for practice before the Pre-License Application Licensing Board under § 2.1010, for the electronic transmission of Board and Commission issuances and orders, as well as for on-line access to the LSS during the hearing. Under § 2.1013(a) the Secretary of the Commission maintains the official docket pursuant to the requirements of 10 CFR 2.702. In this regard, each potential party, party, or interested governmental participant must submit a signed paper copy of each electronic adjudicatory filing to the Secretary. The staff would emphasize that section 2.1003 also applies to the submission of pleadings during the hearing. Therefore,

an ASC II file, a header, and an image of the pleading must also be submitted to the LSS Administrator. The final rule gives the Secretary the flexibility to establish the official docket in either hard copy or electronic form depending on the details of LSS design and the records management requirements of the Federal Archives. Absent good cause, all exhibits tendered during the hearing must have already been entered into the LSS prior to the commencement of that portion of the hearing where the exhibit is to be offered.

Section 2.1014 Intervention

Section 2.1014 establishes the standards for intervention in the HLW proceeding. Section 2.1014 incorporates several of the provisions currently in the 10 CFR 2.714 general standards for intervention. Accordingly, any provisions of § 2.1014 that remain unchanged from the 10 CFR 2.714 provisions are to be interpreted according to the existing practice. Section 2.1014(a) requires petitions for intervention and proposed contentions to be filed at the same time, as well as petitions to participate under § 2.715(c)—both within thirty days after the notice of hearing. In addition to the factors now in 10 CFR 2.714(a)(2), § 2.1014(a)(2) requires the petition to reference with particularity the specific documentary material, or absence thereof, that provides the basis for the contention, and the specific regulatory or statutory requirement to which the contention is relevant. This codifies existing Commission practice in regard to contentions.

Section 2.1014(a)(4) allows the adding or amending of contentions, including contentions based on the NRC Staff Safety Evaluation Report (SER). Contentions added or amended before the issuance of the SER will be evaluated according to the factors for nontimely filings in § 2.1014(a)(1). Contentions based on information or issues raised in the SER must be made within forty days after the issuance of the SER and will be evaluated according to the factors in § 2.1014(a)(1). The SER is to be issued within eighteen months after the license application is docketed. Any petitions to amend or add contentions made more than forty days after the issuance of the SER, in addition to the factors for nontimely filing in § 2.1014(a)(1), must include a showing that the contention involves a significant safety or environmental issue or raises a material issue related to the performance evaluation anticipated by 10 CFR 60.112 or 10 CFR 60.113. In this context, "material" may involve items that are material to demonstrating

compliance with §§ 60.112 or 60.113 but which in and of themselves may not constitute a significant safety or environmental issue.

Although § 2.1014(a)(4) places some added restrictions on the amending or adding of contentions compared to 10 CFR 2.714, the Commission believes that the early availability of documents through access to the LSS will facilitate the preparation of timely and better based contentions at the outset of the proceeding, as compared to the traditional NRC licensing proceeding where contentions must be prepared without the benefit of prior discovery.

Section 2.1014(c) establishes the standards for permitting intervention in the HLW proceeding. Intervention is permitted as a matter of right by an affected unit of local government as defined in section 2(31) of the NWSA or by any affected Indian Tribe as defined in 10 CFR Part 60 of the Commission's regulations. The State of Nevada, like DOE or the NRC, is automatically a party to the HLW proceeding, assuming that a Nevada site is the subject of the DOE license application. All other petitions to intervene will be evaluated according to the factors in § 2.1014(c)(1) through (3).

Section 2.1015 Appeals

Section 2.1015 sets forth the procedures for appealing decisions of the Pre-License Application Licensing Board or of the Hearing Licensing Board. Unlike the existing appeals process, appeals from certain types of interlocutory orders, such as rulings or the admissibility of contentions, must be filed within ten days, rather than at the conclusion of the proceeding.

Section 2.1016 Motions

Section 2.1016 establishes the procedures for motions practice in the HLW proceeding. The final rule does not contain a provision similar to 10 CFR 2.730(d) in regard to oral arguments on motions. However, this omission is not intended to change existing practice, i.e., requests for oral argument on substantive motions are liberally granted. It is within the discretion of the Board to allow arguments on motions under 10 CFR 2.755.

Section 2.1017 Computation of Time

Section 2.1017 specifies the computation of time for an act or an event for the HLW licensing proceeding. Because of the availability of the electronic transmission of pleadings through the LSS, one day instead of five days is allowed for the transmission of documents in response to the service of a notice or other document. This will

save substantial time during the hearing. The use of electronic transmission is addressed in § 2.1013. If the LSS is unavailable for more than four access hours of any day that would normally be counted in the computation of the time for filing, that day will not be counted in the computation of time. However, this would not include periods of LSS unavailability due to a malfunction of the LSS participant's equipment or to the operation of that equipment.

Section 2.1018 Discovery

Section 2.1018 specifies the scope and timing of discovery in the HLW Licensing proceeding. The LSS provides the document discovery in the HLW licensing proceeding, supplemented by the derivative discovery in § 2.1019. Discovery is limited to access to the documentary material in the LSS; entry upon land for inspection and access to raw data; oral depositions; requests for admissions; and informal requests for information. These informal requests would be for the type of information normally gathered through the use of written interrogatories, such as the names of all party's witnesses and the subjects they will address. Therefore, the final rule does not generally provide for the use of written interrogatories or depositions upon written questions. However, if the informal discovery process does not satisfy a request for information, § 2.1018(a)(2) provides a mechanism for the use of written interrogatories or depositions upon written questions, by order of a Discovery Master appointed under § 2.1018(g). If no Discovery Master has been appointed, the Hearing Licensing Board itself may consider these petitions. Although informal discovery may begin in the pre-license application phase, an order compelling discovery through written interrogatories or through depositions on written questions can be issued by the Discovery Master or the Hearing Licensing Board only after the license application has been docketed.

The required showing of substantial need in regard to discovery for an LSS participant's "representatives" in § 2.1018(b)(2) does not include "consultants" to a LSS participant, unless the consultant's responsibilities are to assist in preparation for litigation.

Section 2.1018(c) empowers the Board to issue an order to protect a party from abuse of the discovery process. As noted earlier, the objective of the negotiated rulemaking is to provide for the effective review of and hearing of the DOE license application within the three year time period specified in

section 114(d) of the NWSA. Consistent with this objective, § 2.1018(c) includes criteria to prevent abuse of the discovery process from frustrating this objective. In ruling on motions to protect a party from a particular discovery request, the Board may consider any "undue delay" that would result from the discovery request, as well as the failure to respond to a discovery request. Under this criterion, the Board will review any motion for a protective order from a particular discovery request, including a request for a written deposition, to determine whether the request creates the potential for unreasonably interfering with meeting the three year schedule. When a party or an interested governmental participant reasonably believes that the Board has not ruled in accordance with this rule and its underlying policy, it may seek review pursuant to directed certification under § 2.718(i) of this part. The Commission itself may entertain such requests and will apply the criteria for granting directed certification liberally. The Hearing Licensing Board or Discovery Master may also consider undue delay as a basis for granting a petition for the use of written interrogatories or depositions on written questions under § 2.1018(a)(2).

In addition, §§ 2.1021 and 2.1022, on the first and second pre-hearing conferences respectively, provide for the establishment of discovery schedules by the Board. In establishing these discovery schedules, the Board must consider the objective of meeting the three-year schedule specified in the NWSA, as well as the early availability of information made possible by the Licensing Support System. Furthermore, the Board should exercise all due diligence to ensure that discovery is completed within two years of the notice of hearing. However, this could not prevent the Board from establishing a schedule that provided for less than a continuous two-year period of discovery, or determining whether any discovery is necessary after the second pre-hearing conference.

Section 2.1018(f) anticipates the application of the traditional sanctions by the Licensing Board for failure to respond to a discovery request, including the issuance of an order for a response or answer to a discovery request.

Section 2.1019 Depositions

Section 2.1019 provides for discovery through the taking of depositions. Section 2.1019 basically follows the content of the general deposition rule in 10 CFR 2.740a. However, § 2.1019(i) provides for the derivative discovery of

documents during the deposition. This provision establishes requirements for the disclosure, and entry into the LSS, of material in a deponent's possession that would not be required to be initially entered into the LSS under § 2.1003. This includes personal records, travel vouchers, speeches, preliminary drafts, and marginalia. "Preliminary drafts" means any nonfinal document that is not a circulated draft, i.e., on which no formal, unresolved objection or nonconcurrence has been made. "Marginalia" means handwritten, printed, or other types of notations added to a document, excluding underlining and highlighting.

Section 2.1020 Entry Upon Land for Inspection

Section 2.1020 establishes the procedures for parties to gain access to the land or property in the possession or control of another party or its contractor for the purpose of inspection and access to raw data. However, this provision should not be construed as expanding any of the rights contained in section 116 or section 118 of the NWSA, or any other applicable statutory or regulatory restrictions, related to site investigation.

Section 2.1021 First Prehearing Conference

Section 2.1021 establishes a first pre-hearing conference in the HLW proceeding. The first pre-hearing conference will identify the key issues in the proceeding, and consider petitions for intervention.

Section 2.1022 Second Prehearing Conference

Section 2.1022 establishes a second pre-hearing conference in the HLW licensing proceeding. The second pre-hearing conference is to be held not later than seventy days after the NRC staff Safety Evaluation Report is issued. The second pre-hearing conference will consider new or amended contentions, stipulations and admissions of fact, identification of witnesses, and the setting of a hearing schedule.

Section 2.1023 Immediate Effectiveness

Section 2.1023 provides for an immediate effectiveness review of the Licensing Board's initial decision on the issuance of a construction authorization. The Commission's existing regulations in 10 CFR 2.764 do not provide for an immediate effectiveness review. Rather 10 CFR 2.764 requires a Commission decision on the substantive merits of the Licensing Board decision before a construction authorization decision can be final. Section 2.1023 would authorize

the Director of the NRC Office of Nuclear Material Safety and Safeguards to allow DOE to proceed with construction, assuming a favorable Licensing Board decision, if the Commission did not suspend the Licensing Board decision after its supervisory immediate effectiveness review, or the Appeal Board did not stay the effectiveness of the initial decision under 10 CFR 2.788. The Appeal Board and the Commission would then undertake a review of the substantive merits of the initial Licensing Board decision. Issuance of the construction authorization under these circumstances would be the event that tolls the time period for determining whether the NWSA three year time frame for the decision on the construction authorization had been satisfied.

Schedule

In order to assist the Hearing Licensing Board in establishing a schedule for the HLW proceeding that will facilitate meeting the timeframe specified in the NWSA for a Commission decision on construction authorization, the Commission has prepared the following model timeline. This timeline is intended for general guidance only, and is not intended to suggest any predisposition by the Commission on the merits of DOE's future license application.

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5)	FR Notice of Hearing.
30	2.1014(a)(1)	Pet. to intervene/request for hearing, w. contentions.
	2.715(c)	Pet. for status as interested govt. participant (IGP).
50	2.1014(b)	Answers to intervention & IGP petitions.
70	2.1021	1st Prehearing Conference.
100		1st Prehearing Conference Order: identifies participants in proceeding, admits contentions, and sets discovery and other schedules.
	2.1018(b)(1), 2.1019	Deposition discovery begins.
110	2.1015(b)	Appeals from 1st Prehearing Conference Order, w/ briefs.
120	2.1015(b)	Briefs in opposition to appeals.
150		AB order ruling on appeals from 1st Prehearing Conference Order.
548		NRC staff issues SER.
588	2.1014(a)(4)	Petitions to amend contentions based on SER.
608	2.1014(b)	Answers to petitions to amend SER-related contentions.
618	2.1022	2nd Prehearing Conference.

Day	Regulation (10 CFR)	Action
645		2nd Prehearing Conference Order: rules on amended contentions, sets any further discovery schedule, and sets schedule for prefiled testimony and hearing.
654	2.1015(b)	Appeals from 2nd Prehearing Conference Order, w/ briefs.
663	2.1015(b)	Briefs in opposition to appeals.
693		AB order ruling on appeals from 2nd Prehearing Conference Order.
700	2.743 (set by LE)	Final motions for summary disposition.
720	2.743	Replies to final motions for summary disposition.
730	Supp. Info.	Discovery complete.
740		LB order on final motions for summary disposition.
750	2.1015(b)	Appeals from final summary disposition order, w/ briefs.
760	2.1015(b)	Evidentiary hearing begins. Briefs in opposition to appeals from final summary disposition orders.
790		AB order on appeals from final summary disposition orders.
850		Evidentiary hearing ends.
860	2.754(a)(1)	Applicant's proposed findings.
890	2.754(a)(2)	Other parties' (except NRC staff's) proposed findings.
900	2.754(a)(2)	NRC staff's proposed findings.
905	2.754(a)(3)	Applicant's reply to proposed findings.
935	2.760	Initial decision.
1005	2.763(a), 2.762(a), 2.1015(c)	Stay motions to AS Notices of Appeal.
1015	2.762(d)	Replies to stay motions.
1035		AB ruling on stay motion.
	2.762(b)	Appellant's briefs.
1045	2.763(a)	Stay motions to Commission.
1055	2.763(d)	Replies to stay motions.
1065	2.762(c)	Appellee's brief.
1075	2.762(c)	NRC staff brief.
1095	2.1023, Supp. Info.	Completion of NMSS and Commission supervisory review; Commission ruling on any stay motions; issuance of construction authorization; NWP 3-year period tolled.
1105	2.763	Oral argument on appeals.
1165		Appeal Board decision.
1180	2.1015(e), 2.766(b)(1)	Petitions for Commission review.
1190	2.765(b)(3)	Replies to petitions.
1250		Commission decision.

Topical Guidelines

The following topical guidelines are to be used for identifying the documentary material that should be submitted by LSS participants for entry into the LSS under section 2.1003. The topical guidelines will also be used by the Pre-License Application Licensing Board for evaluating petitions for access to the

LSS during the pre-license application phase under § 2.1003.

I. Categories of Documents

- Technical reports and analyses including those developed by contractors
- QA/QC records including qualification and training records
- External correspondence
- Internal memoranda
- Meeting minutes, including DOE/NRC meetings, Commission meetings
- Drafts (i.e., those submitted for decision beyond the first level of management or similar criterion)
- Congressional Q's & A's
- "Regulatory" documents related to HLW site selection and licensing, such as:
 - Draft and final environmental assessments
 - Site characterization plans
 - Site characterization study plans
 - Site characterization progress reports
 - Issue resolution reports
 - Rulemakings
 - Public and agency comments on documents
 - Response to public comments
 - Environmental Impact Statement, Comment Response Document, and related references
 - License Application (LA), LA data base, and related references
 - Topical reports, data, and data analysis
 - Recommendation Report to President
 - Notice of Disapproval, if submitted

II. General Topics

1. Any document pertaining to the location and potential of valuable natural resources, hydrology, geophysics, tectonics (including volcanism), geomorphology, seismic activity, atomic energy defense activities, proximity to water supplies, proximity to populations, the effect upon the rights of users of water, proximity to components of the National Park System, the National Wildlife Refuge System, the National Wildlife and Scenic River System, the National Wilderness Preservation System, or National Forest Lands, proximity to sites where high-level radioactive waste and spent nuclear fuel is generated or temporarily stored, spent fuel and nuclear waste transportation, safety factors involved in moving spent fuel or nuclear waste to a repository, the cost and impact of transporting spent fuel and nuclear waste to a repository site, the advantages of regional distribution in siting of repositories, and various

geologic media in which sites for repositories may be located.

2. Any document related to repository design, siting, construction, or operation, or the transportation of spent nuclear fuel and high-level nuclear waste, not categorized as an "excluded document", generated by or in the possession of any contractor of the Department of Energy, the Nuclear Regulatory Commission, or any other party to the HLW licensing proceeding.

3. All documents related to the physical attributes of the Basin and Range Province of the continental United States.

4. Any document listing and/or considering any site or location other than Yucca Mountain as a possible location for a high level nuclear waste repository, or any alternative technology to deep geologic disposal.

5. Any document analyzing the effect of the development of a repository at Yucca Mountain on the rights of users of water in the Armagosa ground-water basin in Nevada.

6. Any document analyzing the health and safety implications to the people and environment of the transportation of spent fuel between locations where spent fuel is generated or stored and Yucca Mountain, Nevada, or any other site nominated for repository characterization on May 28, 1986, including, but not limited to:

- a. Any analysis of possible human error in the manufacture of spent fuel casks;
- b. Any analysis of the actual population density along all of any specific projected routes of travel;
- c. Any analysis of releases from any actual radioactive material transportation incidents;
- d. Any analysis of the emergency response time in any actual radioactive materials transportation incident;
- e. Any actual accident data on any specific projected routes of travel;
- f. Any calculations or projections on the probabilities of accidents on any specific projected routes of travel;
- g. Any data on the physical properties or containment capabilities of spent fuel casks which have been used or which are projected to be used at any hypothetical or actual projected repository;
- h. Any analysis of modeling of the containment capabilities of spent fuel casks under a stress scenario;
- i. Any analysis or comparison of spent fuel casks projected to be used against the spent fuel cask certification standards of the Nuclear Regulatory Commission;

j. Any analysis of the containment capabilities of spent fuel casks containing spent fuel which has been burned up over an extended period.

7. Any document analyzing or comparing Yucca Mountain, Nevada, with any other site in the same geohydrologic setting.

8. Any document relating to potential interference or incompatibility between a Yucca Mountain, Nevada, high-level nuclear waste repository and atomic energy activities at the Nevada Test Site and Nellis Airforce base.

9. Any document related to the land status, use or ownership of Yucca Mountain, Nevada.

10. Any document considering or analyzing the attributes or detriments of any engineered barrier upon the radionuclide isolation capability of Yucca Mountain, Nevada, or any other site considered.

11. Any document evaluating the effect of extended fuel burn-up on Yucca Mountain, Nevada's adequacy as a repository site for disposal of spent fuel or upon the design of any such theoretical repository.

12. Any document analyzing or investigating the potential for discharge or radionuclides into the Death Valley National Monument.

13. Any document analyzing the recharge of the underlying saturated zone or the hydroconductivity of the unsaturated zone at Yucca Mountain.

14. Any document containing any data or analysis of volcanism in the geologic setting of which Yucca Mountain is a part.

15. Any document containing any data or analysis of tectonic events at Yucca Mountain, or pertaining to the tectonic framework of the Yucca Mountain area or any document containing any data or analysis of faults with or without surface expression in the area of Yucca Mountain.

16. Any document containing instructions or other limitations on the scope of work to be performed by Department of Energy personnel or contractor's personnel.

17. Any document pertaining to prevention or control of human intrusion at the Yucca Mountain site.

III. Specific Topics

1. The Site

A. Location, General Appearance and Terrain, and Present Use

B. Geologic Conditions

1. Stratigraphy and volcanic history of the Yucca Mountain area

a. Caldera evolution and genesis of ash flows

b. Timber Mountain Tuff

c. Paintbrush Tuff

d. Tuffaceous beds of Calico Hills

e. Crater Flat Tuff

f. Older tuffs

g. Sedimentary units

h. Basalts

2. Structure

3. Seismicity

4. Energy and mineral resources

a. Energy resources

b. Metals

c. Nonmetals

5. Paleontology

6. Mineralogy

7. Geomorphology

8. Tectonics

a. Faulting

b. Stress

c. Uplift/subsidence

d. Volcanism

C. Hydrologic Conditions

1. Surface water

2. Ground water

a. Ground water movement

b. Ground water quality

3. Present and projected water use in the area

4. Groundwater resources

5. Climatology

6. Meteorology

D. Geochemistry

1. Rock chemistry of the overlying and underlying host units

2. Water chemistry of unsaturated or saturated zones

3. Alteration

4. Retardation and transport

E. Environmental Setting

1. Land use

a. Federal use

b. Agricultural

i. Grazing land

ii. Cropland

c. Mining

d. Recreation

e. Private and commercial development

2. Terrestrial and aquatic ecosystems

a. Terrestrial vegetation

i. Larrea-Ambrosia

ii. Larrea-Ephedra or Larrea-Lycium

iii. Coleogyne

iv. Mixed transition

v. Grassland-burn site

b. Terrestrial wildlife

i. Mammals

ii. Birds

iii. Reptiles

c. Special-interest species

d. Aquatic ecosystems

3. Air quality and weather conditions: Air quality

4. Noise

5. Aesthetic resources

6. Archaeological, cultural, and historical resources

7. Radiological background

a. Monitoring program

b. Dose assessment

F. Transportation

1. Highway infrastructure and current use

2. Railroad infrastructure and current use

G. Socioeconomic Conditions

1. Economic conditions

a. Nye County

b. Clark County

c. Lincoln County

d. Methodology

2. Population density and distribution

a. Populations of the State of Nevada

b. Population of Nye County

c. Population of Clark County

d. Population of Lincoln County

3. Community services

a. Housing

b. Education

c. Water supply

d. Waste-water treatment

e. Solid waste

f. Energy utilities

g. Public safety services

h. Medical and social services

i. Library facilities

j. Parks and recreation

4. Social conditions

a. Existing social organization and structure

i. Rural social organization and social structure

ii. Social organization and structure in urban Clark County

b. Culture and lifestyle

i. Rural culture

ii. Urban culture

c. Community attributes

d. Attitudes and perceptions toward the repository

5. Fiscal and governmental structure

2. Expected Effects of the Site Characterization Activities

A. Site Characterization Activities

1. Field studies

a. Exploratory drilling

b. Geophysical surveys

c. Geologic mapping

d. Standard operating practices for reclamation of areas disturbed by field studies

e. trenching

2. Exploratory shaft facility

a. Surface facilities

b. Exploratory shaft and underground workings

c. Secondary egress shaft

d. Exploratory shaft testing program

e. Final disposition

f. Standard operating practices that would minimize potential environmental damage

3. Other studies

a. Geodetic surveys

b. Horizontal core drilling

c. Studies of past hydrologic conditions

d. Studies of tectonics, seismicity, and volcanism

e. Studies of seismicity induced by weapons testing

f. Field experiments in G-Tunnel facilities

g. Laboratory studies

h. Waste package design, testing, and analysis

B. Expected Effects of Site Characterization

1. Expected effects on the environment

a. Geology, hydrology, land use and surface soils

i. Geology

ii. Hydrology

iii. Land use

iv. Surface soils

b. Ecosystems

c. Air quality

d. Noise

e. Aesthetics

- f. Archaeological, cultural, and historical resources
2. Socioeconomic and transportation conditions
 - a. Economic conditions
 - i. Employment
 - ii. Materials
 - b. Population density and distribution
 - c. Community services
 - d. Social conditions
 - e. Fiscal and governmental structure
 - f. Transportation
3. Worker safety
4. Irreversible and irretrievable commitment of resources
- C. Alternative Site Characterization Activities
3. Regional and Local Effects of Locating a Repository at the Site
- A. The Repository
 1. Construction
 - a. The surface facilities
 - b. Access to the subsurface
 - c. The subsurface facilities
 - d. Other construction
 - i. Access route
 - ii. Railroad
 - iii. Mined rock handling and storage facilities
 - iv. Shafts and other facilities
 - e. Utilities
2. Operations
 - a. Emplacement phase
 - i. Waste receipt
 - ii. Waste emplacement
 - b. Caretaker phase
 3. Retrievability
 4. Decommissioning and closure
 5. Schedule and labor force
 6. Material and resource requirements
- B. Expected Effects on the Physical Environment
 1. Geologic impacts
 2. Hydrologic impacts
 3. Land use
 4. Ecosystems
 5. Air quality
 - a. Ambient air-quality regulations
 - b. Construction
 - c. Operations
 - d. Decommissioning and closure
 6. Noise
 - a. Construction
 - b. Operations
 - c. Decommissioning and closure
 7. Aesthetic resources
 8. Archaeological, cultural, and historical resources
 9. Radiological effects
 - a. Construction
 - b. Operation
 - i. Worker exposure during normal operation
 - ii. Public exposure during normal operation
 - iii. Accidental exposure during operation
 - C. Expected Effects of Transportation Activities
 1. Transportation of people and materials
 - a. Highway impacts
 - i. Construction
 - ii. Operations
 - iii. Decommissioning
 - b. Railroad impacts
 2. Transportation of nuclear wastes
 - a. Shipment and routing nuclear waste shipments

- i. National shipment and routing
 - ii. Regional shipment and routing
 - b. Radiological impacts
 - i. National impacts
 - ii. Regional impacts
 - iii. Maximally exposed individual impacts
 - c. Nonradiological impacts
 - i. National impacts
 - ii. Regional impacts
 - d. Risk summary
 - i. National risk summary
 - ii. Regional risk summary
 - e. Costs of nuclear waste transportation
 - f. Emergency response
 - D. Expected Effects on Socioeconomic Conditions
 - 1. Economic conditions
 - a. Labor
 - b. Materials and resources
 - c. Cost
 - d. Income
 - e. Land use
 - f. Tourism
 - 2. Population density and distribution
 - 3. Community services
 - a. Housing
 - b. Education
 - c. Water supply
 - d. Waste-water treatment
 - e. Public safety services
 - f. Medical services
 - g. Transportation
 - 4. Social conditions
 - a. Social structure and social organization
 - i. Standard effects on social structure and social organization
 - ii. Special effects on social structure and social organization
 - b. Culture and lifestyle
 - c. Attitudes and perceptions
 - 5. Fiscal conditions and government structure
4. Suitability of the Yucca Mountain Site for Site Characterization and for Development as a Repository
- A. Suitability of the Yucca Mountain Site for Development as a Repository: Evaluation Against the Guidelines That Do Not Require Site Characterization
 - 1. Technical guidelines
 - a. Postclosure site ownership and control
 - i. Data relevant to the evaluation
 - ii. Favorable condition
 - iii. Potentially adverse condition
 - iv. Evaluation and conclusion for the qualifying condition on the postclosure site ownership and control guidelines
 - b. Population density and distribution
 - i. Data relevant to the evaluation
 - ii. Favorable condition
 - iii. Potentially adverse condition
 - iv. Disqualifying condition
 - v. Evaluation and conclusion for the qualifying condition on the population density and distribution guideline
 - c. Preclosure site ownership and control
 - i. Data relevant to the evaluation
 - ii. Favorable condition
 - iii. Potentially adverse condition
 - iv. Evaluation and conclusion for the qualifying condition on the preclosure site ownership and control guideline
 - d. Meteorology
 - i. Data relevant to the evaluation
 - ii. Favorable conditions

- iii. Potentially adverse conditions
- iv. Evaluation and conclusion for the qualifying condition on the meteorology guideline
- e. Offsite installations and operations
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Disqualifying conditions
- v. Evaluation and conclusion for the qualifying condition on the offsite installations operations guideline
- f. Environmental quality
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the environmental quality guidelines
- g. Socioeconomic impacts
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the socioeconomic guideline
- h. Transportation
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Evaluation and conclusion for the qualifying condition on the transportation guideline
- 2. Preclosure System
 - a. Preclosure system: radiological safety
 - i. Data relevant to the evaluation
 - ii. Evaluation of the Yucca Mountain site
 - iii. Conclusion for the qualifying condition on the preclosure system guideline radiological safety
 - b. Preclosure system: environment, socioeconomics, and transportation
 - i. Data relevant to the evaluation
 - ii. Evaluation of the Yucca Mountain site
 - iii. Conclusion for the qualifying condition on the preclosure system guideline: environment, socioeconomics, and transportation
- 3. Postclosure technical
 - a. Geohydrology
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Disqualifying condition
 - v. Evaluation and conclusion for the qualifying condition on the postclosure geohydrology guideline
 - b. Geochemistry
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Evaluation and conclusion for the qualifying condition on the postclosure geochemistry guideline
 - v. Plans for site characterization
 - c. Rock characteristics
 - i. Data relevant to the evaluation
 - ii. Favorable conditions
 - iii. Potentially adverse conditions
 - iv. Evaluation and conclusion for the qualifying conditions on the postclosure rock characteristics guideline
 - d. Climatic changes
 - i. Data relevant to the evaluation
 - ii. Favorable conditions

- iii. Potentially adverse conditions
- iv. Evaluation and conclusion for the climate changes qualifying condition
- e. Erosion
- i. Data relevant to the evaluation
- ii. Favorable conditions
- iii. Potentially adverse conditions
- iv. Disqualifying conditions
- f. Dissolution
- i. Data relevant to the evaluation
- ii. Favorable condition
- iii. Potentially adverse condition
- iv. Disqualifying condition
- v. Evaluation and Conclusion for the qualifying condition on the postclosure and dissolution guideline
- g. Tectonics
- i. Data relevant to the evaluation
- ii. Favorable condition
- iii. Potentially adverse condition
- iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the postclosure tectonics guideline
- h. Human interference: natural resources and site ownership and control
- i. Data relevant to the evaluation
- ii. Favorable conditions
- iii. Potentially adverse conditions
- iv. Disqualifying conditions
- v. Evaluation and conclusion for the qualifying condition on the postclosure human interference and natural resources technical guideline
- 4. Postclosure system
- a. Evaluation of the Yucca Mountain Site
- i. Quantitative analysis
- ii. Qualitative analysis
- b. Summary and conclusion for the qualifying condition on the postclosure system guideline
- 5. Preclosure technical
- a. Surface characteristics
- i. Data relevant to the evaluation
- ii. Favorable conditions
- iii. Potentially adverse conditions
- iv. Evaluation and conclusion for the qualifying condition on the postclosure surface characteristics guideline
- b. Rock characteristics
- i. Data relevant to the evaluation
- ii. Favorable conditions
- iii. Potentially adverse conditions
- iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the postclosure rock characteristics guideline
- c. Hydrology
- i. Data relevant to the evaluation
- ii. Favorable conditions
- iii. Potentially adverse condition
- iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the postclosure hydrology guideline
- g. Tectonics
- i. Data relevant to the evaluation
- ii. Favorable condition
- iii. Potentially adverse conditions
- iv. Disqualifying condition
- v. Evaluation and conclusion for the qualifying condition on the postclosure tectonics guideline
- 6. Ease and cost of siting, construction, operation, and closure

- a. Data relevant to the evaluation
- b. Evaluation
- c. Conclusions for the qualifying condition on the ease and cost of siting, construction, operation, and closure guideline
- 7. Conclusion regarding suitability of the Yucca Mountain Site for site characterization
- B. Performance Analyses
- 1. Preclosure radiological safety assessments
- a. Preclosure radiation protection standards
- b. Methods for preclosure radiological assessment
- i. Radiological assessment of construction activities
- ii. Radiological assessment of normal operations
- iii. Radiological assessment of accidental releases
- 2. Preliminary analysis of postclosure performance
- a. Subsystem description
- i. Engineered barrier subsystem
- ii. The natural barrier subsystem
- b. Preliminary performance analyses of the major components of the system
- i. The waste package lifetime
- ii. Release rate from the engineered barrier subsystem
- c. Preliminary system performance description and analysis
- d. Comparisons with regulatory performance objectives
- e. Preliminary evaluation of disruptive events: disruptive natural processes
- f. Conclusions
- 5. Transportation
- A. Regulations Related to Safeguards
- 1. Safeguards
- 2. Conclusion
- B. Packagings
- 1. Packaging design, testing, and analysis
- 2. Types of packaging
- a. Spent fuel
- b. Casks for defense high-level waste and West Valley high-level waste
- c. Casks for use from an MRS to the repository
- 3. Possible future developments
- a. Mode-specific regulations
- b. Overweight truck casks
- c. Rod consolidation
- d. Advanced handling concepts
- e. Combination storage/shipping casks
- C. Potential Hazards of Transportation
- 1. Potential consequences to an individual exposed to a maximum extent
- a. Normal transport
- b. Accidents
- 2. Potential consequences to a large population from very severe transportation accidents
- 3. Risk assessment
- a. Outline of method for estimating population risks
- b. Computational models and methods for population risks
- c. Changes to the analytical models and methods for population risks
- d. Transportation scenarios evaluated for risk analysis
- e. Assumption about wastes
- f. Operational considerations for use in risk analysis

- g. Values for factors needed to calculate population risks
- h. Results of population risk analyses
- j. Uncertainties
- 4. Risks associated with defective cask construction, lack of quality assurance, inadequate maintenance and human error
- D. Cost Analysis
- 1. Outline method
- 2. Assumptions
- 3. Models
- 4. Cost estimates
- 5. Limitations of results
- E. Barge Transport to Repositories
- F. Effect of a Monitored Retrievable Storage Facility on Transportation Estimates
- G. Effect of At-Reactor Rod Consolidation on Transportation Estimates
- H. Criteria for Applying Transportation Guideline
- I. DOE Responsibilities for Transportation Safety
- 1. Prenotification
- 2. Emergency response
- 3. Insurance coverage for transportation accidents
- J. Modal Mix
- 1. Train shipments
- a. Ordinary
- b. Dedicated train
- 2. Truck shipments
- a. Legal weight
- b. Overweight

Environmental Impact: Categorical Exclusion

The NRC has determined that this final rule is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this final rule.

Paperwork Reduction Act Statement

This rule does not contain information collection requirements that are subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The DOE analysis of the costs and benefits of the LSS (U.S. Department of Energy, "Licensing Support System Benefit-Cost Analysis" July, 1988) and companion DOE reports ("Preliminary Needs Analysis;" "Preliminary Data Scope Analysis;" and "Conceptual Design Analysis;") are available for inspection in the NRC Public Document Room, 2120 L Street NW., Washington, DC. Single copies may be obtained from Francis X. Cameron, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington DC, 20555; Telephone: (301) 492-1623.

Regulatory Flexibility Analysis

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)),

the Commission certifies that this rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. The final rule affects participants in the Commission's HLW licensing proceeding. The substantial majority of these participants do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR Part 121.

Backfit Analysis

The NRC has determined that the backfit rule, 10 CFR 50.109, does not apply to this rule and, therefore, that a backfit analysis is not required for this rule because these amendments do not involve any provisions which would impose backfits as defined in 10 CFR 50.109(a)(1).

List of Subjects in 10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalty, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 552 and 553, the NRC is adopting the following amendments to 10 CFR Part 2.

PART 2—RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS

1. The authority citation for Part 2 continues to read as follows:

Authority: Secs. 161, 161, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 186, 234, 68 Stat. 955, 83 Stat. 444, as amended (42 U.S.C. 2235, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554.

Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 and Table 1A of Appendix C also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135). Appendix B also issued under sec. 10, Pub. L. 99-240, 99 Stat. 1842 (42 U.S.C. 2021b et seq.).

2. Section 2.700 is revised to read as follows:

§ 2.700 Scope of subpart.

The general rules of this subpart govern procedure in all adjudications initiated by the issuance of an order to show cause, an order pursuant to § 2.205(e), a notice of hearing, a notice of proposed action pursuant to section 2.105, or a notice issued pursuant to § 2.102(d)(3). The procedure applicable to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area are set forth in Subpart J.

3. A new paragraph (i) is added to § 2.714 to read as follows:

§ 2.714 Intervention

(1) The provisions of this section do not apply to license applications docketed under subpart J of this part.

4. In § 2.722, paragraph (a)(4) is added to read as follows:

§ 2.722 Special assistants to the presiding officer.

(a) * * *

(4) Discovery Master to rule on the matters specified in § 2.1018(a)(2) of this part.

5. In § 2.743, paragraph (f) is revised to read as follows:

§ 2.743 Evidence.

(f) *Exhibits.* A written exhibit will not be received in evidence unless the original and two copies are offered and a copy is furnished to each party, or the parties have been previously furnished with copies or the presiding officer directs otherwise. The presiding officer may permit a party to replace with a true copy an original document admitted in evidence. Exhibits in the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository

operations area are governed by § 2.1013 of this part.

§ 2.764 [Amended]

6. In § 2.764, paragraph (d) is removed.

7. In Part 2, a new Subpart J is added to read as follows:

Subpart J—Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

Sec.

- 2.1000 Scope of subpart.
- 2.1001 Definitions.
- 2.1002 High-level Waste Licensing Support System.
- 2.1003 Submission of material to the LSS.
- 2.1004 Amendments and additions.
- 2.1005 Exclusions.
- 2.1006 Privilege.
- 2.1007 Access.
- 2.1008 Potential parties.
- 2.1009 Procedures.
- 2.1010 Pre-License Application Licensing Board.
- 2.1011 LSS management and administration.
- 2.1012 Compliance.
- 2.1013 Use of LSS during adjudicatory proceeding.
- 2.1014 Intervention.
- 2.1015 Appeals.
- 2.1016 Motions.
- 2.1017 Computation of time.
- 2.1018 Discovery.
- 2.1019 Depositions.
- 2.1020 Entry upon land for inspection.
- 2.1021 First prehearing conference.
- 2.1022 Second prehearing conference.
- 2.1023 Immediate effectiveness.

Subpart J—Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository

§ 2.1000 Scope of subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5) of this part. The procedures in this subpart take precedence over the 10 CFR Subpart G, rules of general applicability, except for the following provisions: §§ 2.702, 2.703, 2.704, 2.707, 2.709, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722, 2.732, 2.733, 2.734, 2.742, 2.743, 2.749, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759, 2.760, 2.761, 2.762, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.785, 2.786, 2.787, 2.788, and 2.790.

§ 2.1001 Definitions.

"ASCII File" means a computerized text file conforming to the American Standard Code for Information

Interchange which represent characters and symbols.

"Bibliographic header" means the minimum series of descriptive fields that a potential party, interested governmental participant, or party must submit with a document or other material. The bibliographic header fields are a subset of the fields in the full header.

"Circulated draft" means a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A "circulated draft" meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

"Document" means any written, printed, recorded, magnetic, graphic matter, or other documentary material, regardless of form or characteristic.

"Documentary material" means any material or other information that is relevant to, or likely to lead to the discovery of information that is relevant to, the licensing of the likely candidate site for a geologic repository. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

"DOE" means the U.S. Department of Energy or its duly authorized representatives.

"Full header" means the series of descriptive fields and subject terms given to a document or other material.

"Image" means a visual likeness of a document, presented on a paper copy, microform, or a bit-map on optical or magnetic media.

"Interested governmental participant" means any person admitted under § 2.715(c) of this part to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter.

"LSS Administrator" means the person within the U.S. Nuclear Regulatory Commission responsible for administration, management, and operation of the Licensing Support System. The LSS Administrator shall not be in any organizational unit that either represents the U.S. Nuclear Regulatory Commission staff as a party to the high-level waste licensing proceeding or is a part of the management chain reporting to the Director of the Office of Nuclear Material Safety and Safeguards. For purposes of this subpart the

organizational unit within the NRC selected to be the LSS Administrator shall not be considered to be a party to the proceeding.

"Marginalia" means handwritten, printed, or other types of notations added to a document excluding underlining and highlighting.

"NRC" means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

"Party" for purposes of this subpart means the DOE, the NRC staff, the host State and any affected Indian Tribe in accordance with § 60.63(a) of this chapter, and a person admitted under § 2.1014 of this subpart to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter; provided that a host State or affected Indian Tribe shall file a list of contentions in accordance with the provisions of § 2.1014(a)(2) (ii), (iii), and (iv) of this subpart.

"Personal record" means a document in the possession of an individual associated with a party, interested governmental participant, or potential party that was not required to be created or retained by the party, interested governmental participant, or potential party, and can be retained or discarded at the possessor's sole discretion, or documents of a personal nature that are not associated with any business of the party, interested governmental participant, or potential party.

"Potential party" means any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d) of this subpart, is granted access to the Licensing Support System and who consents to comply with the regulations set forth in Subpart J of this part, including the authority of the Pre-License Application Licensing Board established pursuant to § 2.1010 of this subpart.

"Pre-license application phase" means the time period before the license application to receive and possess high-level radioactive waste at a geologic repository operations area is docketed under section 2.101(f)(3) of this part.

"Preliminary draft" means any nonfinal document that is not a circulated draft.

"Searchable full text" means the electronic indexed entry of a document in ASCII into the Licensing Support System that allows the identification of specific words or groups of words within a text file.

§ 2.1002 High-level waste Licensing Support System.

(a) The Licensing Support System is an electronic information management system containing the documentary material of the DOE and its contractors, and the documentary material of all other parties, interested governmental participants and potential parties and their contractors. Access to the Licensing Support System by the parties, interested governmental participants, and potential parties provides the document discovery in the proceeding. The Licensing Support System provides for the electronic transmission of filings by the parties during the high-level waste proceeding, and orders and decisions of the Commission and Commission adjudicatory boards related to the proceeding.

(b) The Licensing Support System shall include documentary material not privileged under § 2.1005 or excluded under § 2.1005 of this subpart.

(c) The participation of the host State in the Licensing Support System during the pre-license application phase shall not have any effect on the State's exercise of its disapproval rights under section 116(b)(2) of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10136(b)(2).

(d) This subpart shall not affect any independent right of a potential party, interested governmental participant or party to receive information.

§ 2.1003 Submission of material to the LSS.

(a) Subject to the exclusions in § 2.1005 of this subpart and paragraphs (c) and (d) of this section, each potential party, interested governmental participant or party, with the exception of the DOE and the NRC, shall submit to the LSS Administrator—

(1) Subject to paragraph (a)(3) of this section, an ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party after the date on which such potential party, interested governmental participant or party is given access to the Licensing Support System.

(2) An image, a bibliographic header, and, if available, an ASCII file, no later than six months before the license application is submitted under § 60.22 of this chapter, for all documentary material (including circulated drafts but excluding preliminary drafts), generated

by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party, on or before the date on which such potential party, interested governmental participant, or party was given access to the Licensing Support System.

(3) An image and bibliographic header for documentary material included under paragraphs (a)(1) of this section that were acquired from a person that is not a potential party, party, or interested governmental participant.

(b) Subject to the exclusions in § 2.1005 of this subpart, and subject to paragraphs (c) and (d) of this section, the DOE and the NRC shall submit to the LSS Administrator—

(1) An ASCII file, an image, and a bibliographic header, reasonably contemporaneous with its creation or acquisition, for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC after the date on which the Licensing Support System is available for access.

(2) An ASCII file, an image, and a bibliographic header no later than six months before the license application is submitted under § 60.22 of this chapter for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, the DOE or the NRC on or before the date on which the Licensing Support System is available for access.

(c)(1) Each potential party, interested governmental participant, or party shall submit, subject to the claims of privilege in § 2.1006, an image and a bibliographic header, in a time frame to be established by the access protocols under § 2.1011(d)(10) of this subpart, for all graphic-oriented documentary material. Graphic-oriented documentary material includes, raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs which have been printed, scripted, hand written or otherwise displayed in any hard copy form and which, while capable of being captured in electronic image by a digital scanning device, may be captured and submitted to the LSS Administrator in any form of image. Text embedded within these documents need not be separately entered in searchable full text. Such graphic-oriented documents may include: Calibration procedures, logs, guidelines, data and discrepancies; Gauge, meter and computer settings; Probe locations; Logging intervals and rates; Data logs in whatever form captured; Text data sheets; Equations and sampling rates; Sensor data and

procedures; Data Descriptions; Field and laboratory notebooks; Analog computer, meter or other device print-outs; Digital computer print-outs; Photographs; Graphs, plots, strip charts, sketches; Descriptive material related to the information above.

(2) Each potential party, interested governmental participant, or party, in a time frame to be established by the access protocols under § 2.1011(d)(10) of this subpart, shall submit, subject to the claims of privilege in § 2.1006, only a bibliographic header for each item of documentary material that is not suitable for entry into the Licensing Support System in image or searchable full text. The header shall include all required fields and shall sufficiently describe the information and references to related information and access protocols. Whenever any documentary material is transferred to some other media, a new header shall be supplied. Any documentary material for which a header only has been supplied to the system shall be made available to any other party, potential party or interested governmental participant through the access protocols determined by the LSS Administrator under § 2.1011(d)(10) or through entry upon land for inspection and other purposes pursuant to § 2.1020.

(3) Whenever documentary material described in paragraphs (c)(1) or (c)(2) of this section has been collected or used in conjunction with other such information to analyze, critique, support or justify any particular technical or scientific conclusion, or relates to other documentary material as part of the same scope of technical work or investigation, then an appropriate bibliographic header shall be submitted for a table of contents describing that package of information, and documentary material contained within that package shall be named and identified.

(d) Each potential party, interested governmental participant, or party shall submit a bibliographic header for each documentary material—

(1) For which a claim of privilege is asserted; or

(2) Which constitutes confidential financial or commercial information; or

(3) Which constitutes safeguards information under § 73.21 of this Chapter.

(e) In addition to the submission of documentary material under paragraphs (a) and (b) of this section, potential parties, interested governmental participants, or parties may request that another potential party's, interested governmental participant's, party's, or third party's documentary material be entered into the Licensing Support

System in searchable full text if they or the other potential party, interested governmental participant, or party intend to rely on such documentary material during the licensing proceeding.

(f) Submission of ASCII files, images, and bibliographic headers shall be in accordance with established criteria.

(g) Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be submitted to the LSS Administrator by the respective agency that generated the document.

(h)(1) Docketing of the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall not be permitted under Subpart J of this part unless the LSS Administrator has certified, at least six months in advance of the submission of the license application, that the DOE has substantially complied with its obligations under this section.

(2)(i) The LSS Administrator shall evaluate the extent of the DOE's compliance with the provisions of this section at six month intervals beginning six months after his or her appointment under § 2.1011 of this subpart.

(ii) The LSS Administrator shall issue a written report of his or her evaluation of DOE compliance under paragraph (h)(1) of this section. The report shall include recommendations to the DOE on any actions necessary to achieve substantial compliance pursuant to paragraph (h)(1) of this section.

(iii) Potential parties may submit comments on the report prepared pursuant to paragraph (h)(2)(ii) of this section to the LSS Administrator.

(3)(i) In the event that the LSS Administrator does not certify substantial compliance under paragraph (h)(1) of this section, the proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall be governed by Subpart G of this part.

(ii) If, subsequent to the submission of such application under Subpart G of this part, the LSS Administrator issues the certification described in paragraph (h)(1) of this section, the Commission may, upon request by any party or interested governmental participant to the proceeding, specify the extent to which the provisions of Subpart J of this part may be used in the proceeding.

§ 2.1004 Amendments and additions.

(a) Within sixty days after a document has been entered into the Licensing Support System by the LSS Administrator during the pre-license application phase, and within five days after a document has been entered into the Licensing Support System by the LSS Administrator after the license application has been docketed, the submitter shall make reasonable efforts to verify that the document has been entered correctly, and shall notify the LSS Administrator of any errors in entry.

(b) After the time period specified for verification in paragraph (a) of this section has expired, a submitter who desires to amend an incorrect document shall—

(1) Submit the corrected version to the LSS Administrator for entry as a separate document; and

(2) Submit a bibliographic header for the corrected version that identifies all revisions to the corrected version.

(3) The LSS Administrator shall ensure that the bibliographic header for the original document specifies that a corrected version is also in the Licensing Support System.

(c)(1) A submitter shall submit any revised pages of a document in the Licensing Support System to the LSS Administrator for entry into the Licensing Support System as a separate document.

(2) The LSS Administrator shall ensure that the bibliographic header for the original document specifies that revisions have been entered into the Licensing Support System.

(d) Any document that has been incorrectly excluded from the Licensing Support System must be submitted to the LSS Administrator by the potential party, interested governmental participant, or party responsible for the submission of the document within two days after its exclusion has been identified unless some other time is approved by the Pre-License Application Licensing Board or the Licensing Board established for the high-level waste proceeding, hereinafter the "Hearing Licensing Board"; provided, however, that the time for submittal under this paragraph will be stayed pending Board action on a motion to extend the time of submittal.

§ 2.1005 Exclusions.

The following material is excluded from entry into the Licensing Support System, either through initial entry pursuant to § 2.1003 of this subpart, or through derivative discovery pursuant to § 2.1019(i) of this subpart—

(a) Official notice materials;

(b) Reference books and text books;

(c) Material pertaining exclusively to administration, such as material related to budgets, financial management, personnel, office space, general distribution memoranda, or procurement, except for the scope of work on a procurement related to repository siting, construction, or operation, or to the transportation of spent nuclear fuel or high-level waste;

(d) Press clippings and press releases;

(e) Junk mail;

(f) Preferences cited in contractor reports that are readily available;

(g) Classified material subject to Subpart I of this Part.

§ 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(d) of this subpart, the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.790 of this part may be asserted by potential parties, interested governmental participants, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by State and local government entities and Indian Tribes.

(b) Any document for which a claim of privilege is asserted but is denied in whole or in part by the Pre-license Application Licensing Board or the Hearing Licensing Board shall be submitted by the party, interested governmental participant, or potential party that asserted the claim to—

(1) The LSS Administrator for entry into the Licensing Support System into an open access file; or

(2) To the LSS Administrator or to the Board, for entry into a Protective Order file, if the Board so directs under § 2.1010(b) or § 2.1018(c) of this subpart.

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be submitted for entry into the Licensing Support System pursuant to §§ 2.1003(a) and 2.1003(b) of this subpart.

§ 2.1007 Access.

(a)(1) Terminals for access to full headers for all documents in the Licensing Support System during the pre-license application phase, and images of the non-privileged documents of DOE, shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository.

(2) Terminals for access to full headers for all documents in the Licensing Support System during the

pre-license application phase, and images of the non-privileged documents of NRC, shall be provided at the headquarters Public Document Room of NRC, and at all NRC Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, and at the NRC Regional Offices, including the Uranium Recovery Field Office in Denver, Colorado.

(3) The access terminals specified in paragraphs (a)(1) and (a)(2) of this section shall include terminals at Las Vegas, Nevada; Reno, Nevada; Carson City, Nevada; Nye County, Nevada; and Lincoln County, Nevada.

(4) The headers specified in paragraphs (a)(1) and (a)(2) of this section shall be available at the same time that those headers are made available to the potential parties, parties, and interested governmental participants.

(5) Public access to the searchable full text and images of all the documents in the Licensing Support System, not privileged under section 2.1006, shall be provided by the LSS Administrator at all the locations specified in paragraphs (a)(1) and (a)(2) of this section after a notice of hearing has been issued pursuant to § 2.101(f)(8) or § 2.105(a)(5) on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area.

(b) Public availability of paper copies of the records specified in paragraph (a) of this section, as well as duplication fees, and fee waiver for those records, will be governed by the Freedom of Information Act regulations of the respective agencies.

(c) Access to the Licensing Support System for potential parties, interested governmental participants, and parties will be provided in the following manner—

(1) Full text search capability through dial-up access from remote locations at the requestor's expense;

(2) Image access at remote locations at the requestor's expense;

(3) The capability to electronically request a paper copy of a document at the time of search;

(4) Generic fee waiver for the paper copy requested under paragraph (c)(3) of this section for requestors who meet the criteria in § 9.41 of this chapter.

(d) Documents submitted to the LSS Administrator for entry into the Licensing Support System shall not be considered as agency records of the LSS Administrator for purposes of the Freedom of Information Act (FOIA), 5 U.S.C. 552, and shall remain under the

custody and control of the agency or organization that submitted the documents to the LSS Administrator. Requests for access pursuant to the FOIA to documents submitted by a Federal agency shall be transmitted to that Federal agency.

§ 2.1008 Potential parties.

(a) A person may petition the Pre-License Application Licensing Board established pursuant to § 2.1010 of this subpart for access to the Licensing Support System.

(b) A petition must set forth with particularity the interest of the petitioner in gaining access to the Licensing Support System with particular reference to—

(1) The factors set out in § 2.1014(c) (1), (2), and (3) of this subpart as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide; or

(2) The criteria in § 2.715(c) of this part as determined in reference to the topical guidelines in the applicable NRC Regulatory Guide.

(c) The Pre-License Application Licensing Board shall, in ruling on a petition for access, consider the factors set forth in paragraph (b) of this section.

(d) Any person whose petition for access is approved pursuant to paragraph (c) of this section shall comply with the regulations set forth in this subpart, including § 2.1003, and agree to comply with the orders of the Pre-License Application Licensing Board established pursuant to § 2.1010 of this subpart.

§ 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall—

(1) Designate an official who will be responsible for administration of its Licensing Support System responsibilities;

(2) Establish procedures to implement the requirements in § 2.1003 of this subpart;

(3) Provide training to its staff on the procedures for implementation of Licensing Support System responsibilities;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the LSS Administrator pursuant to § 2.1011(e) of this subpart.

(b) The responsible official designated pursuant to paragraph (a)(1) of this section shall certify to the LSS Administrator, at six month intervals designated by the LSS Administrator,

that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 of this subpart has been identified and submitted to the Licensing Support System.

§ 2.1010 Pre-License Application Licensing Board.

(a)(1) A Pre-License Application Licensing Board designated by the Commission shall rule on all petitions for access to the Licensing Support System submitted under § 2.1008 of this subpart; disputes over the entry of documents during the pre-license application phase, including disputes relating to relevance and privilege; disputes relating to the LSS Administrator's decision on substantial compliance pursuant to § 2.1003(h) of this subpart; discovery disputes; disputes relating to access to the Licensing Support System; disputes relating to the design and development of the Licensing Support System by DOE or the operation of the Licensing Support System by the LSS Administrator under § 2.1011 of this subpart, including disputes relating to the implementation of the recommendations of the LSS Advisory Review Panel established under § 2.1011(e) of this subpart.

(2) The Pre-License Application Licensing Board shall be designated six months before access to the Licensing Support System is scheduled to be available.

(b) The Board shall rule on any claim of document withholding to determine—

(1) Whether it is documentary material within the scope of this subpart;

(2) Whether the material is excluded from entry into the Licensing Support System under § 2.1005 of this subpart;

(3) Whether the material is privileged or otherwise excused from disclosure under section 2.1006 of this subpart;

(4) If privileged, whether it is an absolute or qualified privilege;

(5) If qualified, whether the document should be disclosed because it is necessary to a proper decision in the proceeding;

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the

Atomic Energy Act, as amended, is received and possessed by a potential party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The Board may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Board for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205 of this part. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

(c) Upon a final determination that the material is relevant, and not privileged, exempt from disclosure, or otherwise exempt from entry into the Licensing Support System under § 2.1005 of this subpart, the potential party, interested governmental participant, or party who asserted the claim of withholding must submit the document to the LSS Administrator within two days for entry into the Licensing Support System.

(d) The service of all pleadings, discovery requests and answers, orders, and decisions during the pre-license application phase shall be made according to the procedures specified in § 2.1013(c) of this subpart.

(e) The Pre-License Application Licensing Board shall possess all the general powers specified in §§ 2.721(d) and 2.718 of this part.

§ 2.1011 LSS Management and administration.

(a) The Licensing Support System shall be administered by the LSS Administrator who will be designated within sixty days after the effective date of the rule.

(b)(1) Consistent with the requirements in this subpart, and in consultation with the LSS Administrator, DOE shall be responsible for the design and development of the computer system necessary to implement the Licensing Support

System, including the procurement of computer hardware and software, and, with the concurrence of the LSS Administrator, the follow-on redesign and procurement of equipment necessary to maintain the Licensing Support System.

(2) With respect to the procurement undertaken pursuant to paragraph (b)(1) of this section, a representative of the LSS Administrator shall participate as a member of the Source Evaluation Panel for such procurement.

(3) DOE shall implement consensus advice from the LSS Advisory Review Panel under paragraph (f)(1) of this section that is consistent with the requirements of this subpart.

(c)(1) The Licensing Support System, described in § 2.1002, shall not be part of any computer system that is controlled by any party, interested governmental participant, or potential party, including DOE and its contractors, or that is physically located on the premises of any party, interested governmental participant, or potential party, including DOE and that of its contractors.

(2) Nothing in this subpart shall preclude DOE, NRC, or any other party, potential party, or interested governmental participant, from using the Licensing Support System computer facility for a records management system for documentary material independent of the Licensing Support System.

(d) The LSS Administrator shall be responsible for the management and administration of the Licensing Support System, including the responsibility to—

(1) Implement the consensus advice of the LSS Advisory Review Panel under paragraph (f) of this section that is consistent with the requirements of this subpart;

(2) Provide the necessary personnel, materials, and services for operation and maintenance of the Licensing Support System;

(3) Identify and recommend to DOE any redesign or procurement actions necessary to ensure that the design and operation of the Licensing Support System meets the objectives of this subpart;

(4) Make a concurrence decision, within thirty days of a request from DOE, on any redesign and related procurement performed by DOE under paragraph (b) of this section;

(5) Consult with DOE on the design and development of the Licensing Support System under paragraph (b) of this section;

(6) Evaluate and certify compliance with the requirements of this subpart under § 2.1003(h);

(7) Ensure LSS availability and the integrity of the LSS data base;

(8) Receive and enter the documentary material specified in § 2.1003 of this subpart into the Licensing Support System in the appropriate format;

(9) Maintain security for the Licensing Support System data base, including assigning user password security codes;

(10) Establish access protocols for raw data, field notes, and other items covered by § 2.1003(c) of this subpart;

(11) Maintain the thesaurus and authority tables for the Licensing Support System;

(12) Establish and implement a training program for Licensing Support System users;

(13) Provide support staff to assist users of the Licensing Support System;

(14) Other duties as specified in this subpart or necessary for Licensing Support System operation and maintenance.

(e)(1) The LSS Administrator shall establish an LSS Advisory Review Panel composed of the LSS Advisory Committee members identified in paragraph (e)(2) of this section who wish to serve within sixty days after designation of the LSS Administrator pursuant to paragraph (a) of this section. The LSS Administrator shall have the authority to appoint additional representatives to the Advisory Review Panel consistent with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. I, giving particular consideration to potential parties, parties, and interested governmental participants who were not members of the NRC HLW Licensing Support System Advisory Committee.

(2) Pending the establishment of the LSS Advisory Review Panel under paragraph (e)(1) of this section, the NRC will establish a Licensing Support System Advisory Committee whose membership will initially include the State of Nevada, a coalition of affected units of local government in Nevada who were on the NRC High-Level Waste Licensing Support System Advisory Committee, DOE, NRC, the National Congress of American Indians, the coalition of national environmental groups who were on the NRC High-Level Waste Licensing Support System Advisory Committee and such other members as the Commission may from time to time designate to perform the responsibilities in paragraph (f) of this section.

(f)(1) The LSS Advisory Review Panel shall provide advice to—(i) DOE on the fundamental issues of the design and development of the computer system necessary to implement the Licensing

Support System under paragraph (b) of this section; and

(ii) The LSS Administrator or the operation and maintenance of the Licensing Support System under paragraph (d) of this section.

(2) The responsibilities of the LSS Advisory Review Panel shall include advice on—(i) Format standards for the submission of documentary material to the Licensing Support System by the parties, interested governmental participants, or potential parties, such as ASCII files, bibliographic headers, and images;

(ii) The procedures and standards for the electronic transmission of filings, orders, and decisions during both the pre-license application phase and the high-level waste licensing proceeding;

(iii) Access protocols for raw data, field notes, and other items covered by § 2.1003(c) of this subpart;

(iv) A thesaurus and authority tables;

(v) Reasonable requirements for headers, the control of duplication, retrieval, display, image delivery, query response, and "user friendly" design;

(vi) Other duties as specified in this subpart or as directed by the LSS Administrator.

§ 2.1012 Compliance.

(a) In addition to the requirements of § 2.101(f) of this part, the Director of the NPC Office of Nuclear Materials Safety and Safeguards may determine that the tendered application is not acceptable for docketing under this subpart, if the LSS Administrator has not issued the certification described in § 2.1003(h)(1) of this part.

(b)(1) A person, including a potential party granted access to the Licensing Support System under § 2.1003 of this subpart, shall not be granted party status under § 2.1014 of this part, or status as an interested governmental participant under § 2.715(c) of this part, if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 of this subpart at the time it requests participation in the high-level waste licensing proceeding under either § 2.1014 or § 2.715(c) of this part.

(2) A person denied party status or interested governmental participant status under paragraph (b)(1) of this section may request party status or interested governmental participant status upon a showing of subsequent compliance with the requirements of § 2.1003 of this subpart. Admission of such a party or interested governmental participant under § 2.1014 of this subpart or § 2.715(c) of this part, respectively, shall be conditioned on

accepting the status of the proceeding at the time of admission.

(c) The Hearing Licensing Board shall not make a finding of substantial and timely compliance pursuant to paragraph (b) of this subpart for any person who is not in compliance with all applicable orders of the Pre-License Application Licensing Board established pursuant to § 2.1010 of this subpart.

(d) Access to the Licensing Support System may be suspended or terminated by the Pre-license Application Licensing Board or the Hearing Licensing Board for any potential party, interested governmental participant or party who is in noncompliance with any applicable order of the Pre-license Application Licensing Board or the Hearing Licensing Board or the requirements of this subpart.

§ 2.1013 Use of LSS during the adjudicatory proceeding.

(a)(1) Pursuant to § 2.702, the Secretary of the NRC will maintain the official docket of the proceeding on the application for a license to receive and possess waste at a geologic repository operations area.

(2) Commencing with the docketing of the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter, the LSS Administrator shall establish a file within the Licensing Support System to contain the official record materials of the high-level radioactive waste licensing proceeding in searchable full text, or for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been entered into the Licensing Support System before the commencement of that portion of the hearing in which the exhibit will be offered. The official record file in the Licensing Support System will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. Transcripts will be entered into the Licensing Support System by the LSS Administrator on a daily basis in order to provide next-day availability at the hearing.

(c)(1) All filings in the adjudicatory proceeding on the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter shall be transmitted electronically by the submitter to the board(s), parties, the LSS Administrator, and the Secretary, according to established format

requirements. Parties and interested governmental participants will be required to use a password security code for the electronic transmission of these documents.

(2) Filings required to be served shall be served upon either the parties and interested governmental participants, or their designated representatives. When a party or interested governmental participant has appeared by attorney, service must be made upon the attorney of record.

(3) Service upon a party or interested governmental participant is completed when the sender receives electronic acknowledgment ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox.

(4) Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, by—

(i) Electronic acknowledgment ("delivery receipt"); or

(ii) The affidavit of the person making the service; or

(iii) The certificate of counsel.

(5) One signed paper copy of each filing shall be served promptly on the Secretary by regular mail pursuant to the requirements of § 2.708 and 2.701 of this part.

(6) All Board and Commission issuances and orders will be transmitted electronically to the parties, interested governmental participants, and the LSS Administration.

(d) Online access to the Licensing Support System, including a Protective Order File if authorized by a Board, shall be provided to the board(s), the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use during the hearing. Use of paper copy and other images will also be permitted at the hearing.

§ 2.1014 Intervention.

(a)(1) Any person whose interest may be affected by a proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105 of this part, any person whose interest may be affected may also request a hearing. The petition and/or request, and any request to participate under § 2.715(c) of this part, shall be filed within thirty days after the publication of the notice of hearing in the Federal Register. Nontimely filings

will not be entertained absent a determination by the Commission, or the Hearing Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors, in addition to satisfying those set out in paragraphs (a)(2) and (c) of this section:

(i) Good cause, if any, for failure to file on time;

(ii) The availability of other means whereby the petitioner's interest will be protected;

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;

(iv) The extent to which the petitioner's interest will be represented by existing parties;

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

(2) The petition shall set forth with particularity—

(i) The interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (c) of this section;

(ii) A list of the contentions that petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity;

(iii) Reference to the specific documentary material, or the absence thereof that provides a basis for each contention; and

(iv) As to each contention, the specific regulatory or statutory requirement to which the contention is relevant.

(3) Any petitioner who fails to satisfy paragraphs (a)(2) (i), (iii), and (iv) of this section with respect to at least one contention shall not be permitted to participate as a party.

(4) Any party may amend its contentions specified in paragraph (a)(2)(ii) of this section. The Hearing Licensing Board shall rule on any petition to amend such contentions based on the balancing of the factors specified in paragraph (a)(1) of this section. Petitions to amend that are based on information or issues raised in the Safety Evaluation Report (SER) issued by the NRC staff shall be made no later than forty days after the issuance of the SER. Any petition to amend contentions that is filed after this time shall include, in addition to the factors specified in paragraph (a)(1) of this section, a showing that a significant

safety or environmental issue is involved or that the amended contention raises a material issue related to the performance evaluation anticipated by §§ 60.112 and 60.113 of this chapter.

(b) Any party or interested governmental participant may file an answer to a petition for leave to intervene or a petition to amend contentions within twenty days after service of the petition.

(c) Subject to paragraph (a)(3) of this section, the Commission, or the Hearing Licensing Board designated to rule on petitions to intervene and/or requests for hearing shall permit intervention, in any hearing on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area, by an affected unit of local government as defined in section 2(31) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10101. In all other circumstances, the Commission or Board shall, in ruling on a petition for leave to intervene, consider the following factors, among other things:

(1) The nature of the petitioner's right under the Atomic Energy Act to be made a party to the proceeding;

(2) The nature and extent of the petitioner's property, financial, or other interest in the proceeding;

(3) The possible effect of any order that may be entered in the proceeding on the petitioner's interest;

(d) An order permitting intervention and/or directing a hearing may be conditioned on such terms as the Commission, or the designated Hearing Licensing Board may direct in the interests of:

(1) Restricting irrelevant, duplicative, or repetitive evidence and argument,

(2) Having common interests represented by a spokesman, and

(3) Retaining authority to determine priorities and control the compass of the hearing.

(e) In any case in which, after consideration of the factors set forth in paragraph (c) of this section, the Commission or the Hearing Licensing Board finds that the petitioner's interest is limited to one or more of the issues involved in the proceeding, any order allowing intervention shall limit the petitioner's participation accordingly.

(f) A person permitted to intervene becomes a party to the proceeding, subject to any limitations imposed pursuant to paragraph (e) of this section.

(g) Unless otherwise expressly provided in the order allowing intervention, the granting of a petition for leave to intervene does not change or enlarge the issues specified in the notice of hearing.

§ 2.1015 Appeals.

(a) No appeals from any Board order or decision issued under this subpart are permitted, except as prescribed in paragraphs (b), (c), (d), and (e) of this section.

(b) A notice of appeal from (1) a Pre-License Application Licensing Board order issued pursuant to § 2.1010 of this subpart, (2) a Hearing Licensing Board First or Second Prehearing Conference Order issued pursuant to § 2.1021 or § 2.1022 of this subpart, (3) a Hearing Licensing Board order granting or denying a motion for summary disposition issued in accordance with § 2.749 of this part, or (4) a Hearing Licensing Board order granting or denying a petition to amend one or more contentions pursuant to § 2.1014(a)(4) of this subpart, shall be filed with the Atomic Safety and Licensing Appeal Board no later than ten (10) days after service of the order. A supporting brief shall accompany the notice of appeal. Any other party, interested governmental participant, or potential party may file a brief in opposition to the appeal no later than ten days after service of the appeal.

(c) Appeals from a Hearing Licensing Board's initial decision or partial initial decision shall be filed and briefed before the Atomic Safety and Licensing Appeal Board in accordance with the requirements of § 2.762 of this part.

(d) When, in the judgment of a Board, prompt appellate review of an order not immediately appealable under paragraph (b) of this section is necessary to prevent detriment to the public interest or unusual delay or expense, the Board may refer the ruling promptly to the Appeal Board or Commission, as appropriate, and shall provide notice of this referral to the parties, interested governmental participants, or potential parties. The parties, interested governmental participants, or potential parties may also request that the Board certify, pursuant to § 2.718(i) of this part, rulings not immediately appealable under paragraph (b) of this section.

(e) A party, interested governmental participant, or potential party may seek Commission review of any Appeal Board decision or order issued under this section in accordance with the procedures in § 2.766(b) of this part.

(f) Unless otherwise ordered, the filing of an appeal, petition for review, referral, or request for certification of a ruling shall not stay the proceeding or extend the time for the performance of any act.

§ 2.1016 Motions.

(a) All motions shall be addressed to the Commission or, when a proceeding is pending before a Board, to the Board. All motions, unless made orally on the record, shall be filed according to the provisions of § 2.1013(c) of this subpart.

(b) A motion shall state with particularity the grounds and the relief sought, and shall be accompanied by any affidavits or other evidence relied on, and, as appropriate, a proposed form of order.

(c) Within ten days after service of a motion a party, potential party, or interested governmental participant may file an answer in support of or in opposition to the motion, accompanied by affidavits or other evidence. The moving party shall have no right to reply, except as permitted by the Board or the Secretary or the Assistant Secretary.

(d) The Board may dispose of motions either by order or by ruling orally during the course of a prehearing conference or hearing.

(e) Where the motion in question is a motion to compel discovery under § 2.720(h)(2) of this part or § 2.1018(f) of this subpart, parties, potential parties, and interested governmental participants may file answers to the motion pursuant to paragraph (c) of this section. The Board in its discretion, may order that the answer be given orally during a telephone conference or other prehearing conference, rather than filed electronically. If responses are given over the telephone the Board shall issue a written order on the motion which summarizes the views presented by the parties, potential parties, and interested governmental participants unless the conference has been transcribed. This does not preclude the Board from issuing a prior oral ruling on the matter which is effective at the time of its issuance, provided that the terms of the ruling are incorporated in the subsequent written order.

§ 2.1017 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party, potential party, or interested governmental participant, has the right or is required to do some act within a prescribed period after the service of a

notice or other document upon it, one day shall be added to the prescribed period. If the Licensing Support System is unavailable for more than four access hours of any day that would be counted in the computation of time, that day will not be counted in the computation of time.

§ 2.1018 Discovery.

(a)(1) Parties, potential parties, and interested governmental participants in the high-level waste licensing proceeding may obtain discovery by one or more of the following methods: Access to the documentary material in the Licensing Support System submitted pursuant to § 2.1003 of this subpart; entry upon land for inspection, access to raw data, or other purposes pursuant to § 2.1020 of this subpart; access to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to § 2.1003 (c) and (d) of this subpart; depositions upon oral examination pursuant to § 2.1019 of this subpart; requests for admission pursuant to § 2.742 of this subpart; informal requests for information not available in the Licensing Support System, such as the names of witnesses and the subjects they plan to address; and interrogatories and depositions upon written questions, as provided in paragraph (e)(2) of this section.

(2) Interrogatories and depositions upon written questions may be authorized by order of the discovery master appointed under paragraph (g) of this section, or if no discovery master has been appointed, by order of the Hearing Licensing Board, in the event that the parties are unable, after informal good faith efforts, to resolve a dispute in a timely fashion concerning the production of information.

(b)(1) Parties, potential parties, and interested governmental participants, pursuant to the methods set forth in paragraph (a) of this section, may obtain discovery regarding any matter, not privileged, which is relevant to the licensing of the likely candidate site for a geologic repository, whether it relates to the claim or defense of the person seeking discovery or to the claim or defense of any other person. Except for discovery pursuant to §§ 2.1018(a)(2) and 2.1019 of this subpart, all other discovery shall begin during the pre-license application phase. Discovery pursuant to §§ 2.1018(a)(2) and 2.1019 of this subpart shall begin after the issuance of the first pre-hearing conference order under § 2.1021 of this subpart, and shall be limited to the issues defined in that order or subsequent amendments to the order. It

is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A party, potential party, or interested governmental participant may obtain discovery of documentary material otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of, or for the hearing by, or for another party's, potential party's, or interested governmental participant's representative (including its attorney, surety, indemnitor, insurer, or similar agent) only upon a showing that the party, potential party, or interested governmental participant seeking discovery has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of these materials when the required showing has been made, the Board shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party, potential party, or interested governmental participant concerning the proceeding.

(c) Upon motion by a party, potential party, interested governmental participant, or the person from whom discovery is sought, and for good cause shown, the Board may make any order that justice requires to protect a party, potential party, interested governmental participant, or other person from annoyance, embarrassment, oppression, or undue burden, delay, or expense, including one or more of the following: (1) That the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party, potential party, or interested governmental participant seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the Board; (6) that, subject to the provisions of § 2.790 of this part, a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (7) that studies and evaluations not be prepared. If the motion for a protective order is denied in whole or in part, the Board may, on such terms and conditions as are just, order that any

party, potential party, interested governmental participant or other person provide or permit discovery.

(d) Except as provided in paragraph (b) of this section, and unless the Board upon motion, for the convenience of parties, potential parties, interested governmental participants, and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party, potential party, or interested governmental participant is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's, potential party's, or interested governmental participant's discovery.

(e) A party, potential party, or interested governmental participant who has included all documentary material relevant to any discovery request in the Licensing Support System or who has responded to a request for discovery with a response that was complete when made is under no duty to supplement its response to include information thereafter acquired, except as follows:

(1) To the extent that written interrogatories are authorized pursuant to paragraph (a)(2) of this section, a party or interested governmental participant is under a duty to seasonably supplement its response to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the witness is expected to testify, and the substance of the witness's testimony.

(2) A party, potential party, or interested governmental participant is under a duty seasonably to amend a prior response if it obtains information upon the basis of which (i) it knows that the response was incorrect when made, or (ii) it knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the Board of agreement to the parties, potential parties, and interested governmental participants.

(f)(1) If a deponent of a party, potential party, or interested governmental participant upon whom a request for discovery is served fails to respond or objects to the request, or any part thereof, the party, potential party, or interested governmental participant submitting the request or taking the

deposition may move the Board, within five days after the date of the response or after failure to respond to the request, for an order compelling a response in accordance with the request. The motion shall set forth the nature of the questions or the request, the response or objection of the party, potential party, interested governmental participant, or other person upon whom the request was served, and arguments in support of the motion. For purposes of this paragraph, an evasive or incomplete answer or response shall be treated as a failure to answer or respond. Failure to answer or respond shall not be excused on the ground that the discovery sought is objectionable unless the person, party, potential party, or interested governmental participant failing to answer or respond has applied for a protective order pursuant to paragraph (c) of this section.

(2) In ruling on a motion made pursuant to this section, the Board may make such a protective order as it is authorized to make on a motion made pursuant to paragraph (c) of this section.

(3) An independent request for issuance of a subpoena may be directed to a nonparty for production of documents. This section does not apply to requests for the testimony of the NRC regulatory staff pursuant to § 2.720(h)(2)(i) of this part.

(g) The Hearing Licensing Board pursuant to § 2.722 of this part may appoint a discovery master to resolve disputes between parties concerning informal requests for information as provided in paragraphs (a)(1) and (a)(2) of this section.

§ 2.1019 Depositions.

(a) Any party or interested governmental participant desiring to take the testimony of any person by deposition on oral examination shall, without leave of the Commission or the Hearing Licensing Board, give reasonable notice in writing to every other party and interested governmental participant, to the person to be examined, and to the Hearing Licensing Board of the proposed time and place of taking the deposition; the name and address of each person to be examined, if known, or if the name is not known, a general description sufficient to identify him or her or the class or group to which he or she belongs, the matters upon which each person will be examined and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(b) Within the United States, a deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the

place where the examination is held. Outside of the United States, a deposition may be taken before a secretary of an embassy or legation, a consul general, vice consul or consular agent of the United States, or a person authorized to administer oaths designated by the Commission. Depositions may be conducted by telephone or by video teleconference at the option of the party or interested governmental participant taking the deposition.

(c) The deponent shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination shall proceed as at a hearing. Each question propounded shall be recorded and the answer taken down in the words of the witness. Objections on questions of evidence shall be noted in short form without the arguments. The officer shall not decide on the competency, materiality, or relevancy of evidence but shall record the evidence subject to objection. Objections on questions of evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless the deponent is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly transmit the deposition to the LSS Administrator for submission into the Licensing Support System.

(e) Where the deposition is to be taken on written questions as authorized under § 2.1018(a)(2) of this subpart, the party or interested governmental participant taking the deposition shall serve a copy of the questions, showing each question separately and consecutively numbered, on every other party and interested governmental participant with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be asked. Within ten days after service, any other party or interested governmental participant may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, returned, and transmitted to the LSS Administrator as in the case of a deposition on oral examination.

(f) A deposition will not become a part of the evidentiary record in the hearing unless received in evidence. If

only part of a deposition is offered in evidence by a party or interested governmental participant, any other party or interested governmental participant may introduce any other parts. A party or interested governmental participant shall not be deemed to make a person its own witness for any purpose by taking his or her deposition.

(g) A deponent whose deposition is taken and the officer taking a deposition shall be entitled to the same fees as are paid for like services in the district courts of the United States, to be paid by the party or interested governmental participant at whose instance the deposition is taken.

(h) The deponent may be accompanied, represented, and advised by legal counsel.

(i)(1) After receiving written notice of the deposition under paragraph (a) or paragraph (e) of this section, and ten days before the scheduled date of the deposition, the deponent shall submit an index of all documents in his or her possession, relevant to the subject matter of the deposition, including the categories of documents set forth in paragraph (i)(2) of this section, to all parties and interested governmental participants. The index shall identify those records which have already been entered into the Licensing Support System. All documents that are not identical to documents already in the Licensing Support System, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents.

(2) The following material is excluded from initial entry into the Licensing Support System, but is subject to derivative discovery under paragraph (i)(1) of this section—

- (i) Personal records;
- (ii) Travel vouchers;
- (iii) Speeches;
- (iv) Preliminary drafts;
- (v) Marginalia.

(3) Subject to paragraph (i)(6) of this section, any party or interested governmental participant may request from the deponent a paper copy of any or all of the documents on the index that have not already been entered into the Licensing Support System.

(4) Subject to paragraph (i)(6) of this section, the deponent shall bring a paper copy of all documents on the index that the deposing party or interested governmental participant requests that have not already been entered into the Licensing Support System to an oral deposition conducted pursuant to paragraph (a) of this section, or in the case of a deposition taken on written

questions pursuant to paragraph (e) of this section, shall submit such documents with the certified deposition.

(5) Subject to paragraph (i)(6) of this section, a party or interested governmental participant may request that any or all documents on the index that have not already been entered into the Licensing Support System, and on which it intends to rely at hearing, be entered into the LSS by the deponent.

(6) The deposing party or interested governmental participant shall assume the responsibility for the obligations set forth in paragraphs (i)(1), (i)(3), (i)(4), and (i)(5) of this section when deposing someone other than a party or interested governmental participant.

(j) In a proceeding in which the NRC is a party, the NRC staff will make available one or more witnesses designated by the Executive Director for Operations, for oral examination at the hearing or on deposition regarding any matter, not privileged, which is relevant to the issues in the proceeding. The attendance and testimony of the Commissioners and named NRC personnel at a hearing or on deposition may not be required by the Board, by subpoena or otherwise: Provided, That the Board may, upon a showing of exceptional circumstances, such as a case in which a particular named NRC employee has direct personal knowledge of a material fact not known to the witnesses made available by the Executive Director for Operations, require the attendance and testimony of named NRC personnel.

§ 2.1020 Entry upon land for inspection.

(a) Any party, potential party, or interested governmental participant may serve on any other party, potential party, or interested governmental participant a request to permit entry upon designated land or other property in the possession or control of the party, potential party, or interested governmental participant upon whom the request is served for the purpose of access to raw data, inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 2.1018 of this subpart.

(b) The request may be served on any party, potential party, or interested governmental participant without leave of the Commission or the Board.

(c) The request shall describe with reasonable particularity the land or other property to be inspected either by individual item or by category. The

request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party, potential party, or interested governmental participant upon whom the request is served shall serve on the party, potential party, or interested governmental participant submitting the request a written response within ten days after the service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which case the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

§ 2.1021 First prehearing conference.

(a) In any proceeding involving an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to Part 60 of this chapter the Commission or the Hearing Licensing Board will direct the parties, interested governmental participants and any petitioners for intervention, or their counsel, to appear at a specified time and place, within seventy days after the notice of hearing is published, or such other time as the Commission or the Hearing Licensing Board may deem appropriate, for a conference to:

(1) Permit identification of the key issues in the proceeding;

(2) Take any steps necessary for further identification of the issues;

(3) Consider all intervention petitions to allow the Hearing Licensing Board to make such preliminary or final determination as to the parties and interested governmental participants, as may be appropriate;

(4) Establish a schedule for further actions in the proceeding; and

(5) Establish a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d).

(b) The Board may order any further formal and informal conferences among the parties and interested governmental participants including teleconferences, to the extent that it considers that such a conference would expedite the proceeding.

(c) A prehearing conference held pursuant to this section shall be stenographically reported.

(d) The Board shall enter an order which recites the action taken at the

conference, the schedule for further actions in the proceeding, and any agreements by the parties, and which identifies the key issues in the proceeding, makes a preliminary or final determination as to the parties and interested governmental participants in the proceeding, and provides for the submission of status reports on discovery.

§ 2.1022 Second prehearing conference.

(a) The Commission or the Hearing Licensing Board in a proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area shall direct the parties, interested governmental participants, or their counsel to appear at a specified time and place not later than seventy days after the Safety Evaluation Report is issued by the NRC staff for a conference to consider:

(1) Any amended contentions submitted under § 2.1014(a)(4) of this subpart;

(2) Simplification, clarification, and specification of the issues;

(3) The obtaining of stipulations and admissions of fact and of the contents and authenticity of documents to avoid unnecessary proof;

(4) Identification of witnesses and the limitation of the number of expert witnesses, and other steps to expedite the presentation of evidence;

(5) The setting of a hearing schedule;

(6) Establishing a discovery schedule for the proceeding taking into account the objective of meeting the three year time schedule specified in section 114(d) of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. 10134(d); and

(7) Such other matters as may aid in the orderly disposition of the proceeding.

(b) A prehearing conference held pursuant to this section shall be stenographically reported.

(c) The Board shall enter an order which recites the action taken at the conference and the agreements by the parties, limits the issues or defines the matters in controversy to be determined in the proceeding, sets a discovery schedule, and sets the hearing schedule.

§ 2.1023 Immediate effectiveness.

(a) Pending review and final decision by the Commission, an initial decision resolving all issues before the Hearing Licensing Board in favor of issuance or amendment of a construction authorization pursuant to § 60.31 of this

chapter or a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to § 60.41 of this chapter, will be immediately effective upon issuance except—

(1) As provided in any order issued in accordance with § 2.788 of this part that stays the effectiveness of an initial decision; or

(2) As otherwise provided by the Commission in special circumstances.

(b) The Director of Nuclear Material Safety and Safeguards, notwithstanding the filing or pendency of an appeal or a petition for review pursuant to § 2.1015 of this subpart, promptly shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area, or amendments thereto, following an initial decision resolving all issues before the Hearing Licensing Board in favor of the licensing action, upon making the appropriate licensing findings, except—

(1) As provided in paragraph (c) of this section; or

(2) As provided in any order issued in accordance with § 2.788 of this part that stays the effectiveness of an initial decision; or

(3) As otherwise provided by the Commission in special circumstances.

(c)(1) Before the Director of Nuclear Material Safety and Safeguards may issue a construction authorization or a license to receive and possess waste at a geologic repository operations area in accordance with paragraph (b) of this section, the Commission, in the exercise of its supervisory authority over agency proceedings, shall undertake and complete a supervisory examination of those issues contested in the proceeding before the Hearing Licensing Board to consider whether there is any significant basis for doubting that the facility will be constructed or operated with adequate protection of the public health and safety, and whether the Commission should take action to suspend or to otherwise condition the effectiveness of a Hearing Licensing Board decision that resolves contested issues in a proceeding in favor of issuing a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area. This supervisory examination is not part of the adjudicatory proceeding. The Commission shall notify the Director in writing when its supervisory examination conducted in accordance with this paragraph has been completed.

(2) Before the Director of Nuclear Material Safety and Safeguards issues a construction authorization or a license

to receive and possess high-level radioactive waste at a geologic repository operations area, the Commission shall review those issues that have not been contested in the proceeding before the Hearing Licensing Board but about which the Director must make appropriate findings prior to the issuance of such a license. The Director shall issue a construction authorization or a license to receive and possess high-level radioactive waste at a geologic repository operations area only after written notification from the Commission of its completion of its review under this paragraph and of its determination that it is appropriate for the Director to issue such a construction authorization or license. This Commission review of uncontested issues is not part of the adjudicatory proceeding.

(3) No suspension of the effectiveness of a Hearing Licensing Board's initial decision or postponement of the Director's issuance of a construction authorization or license that results from a Commission supervisory examination of contested issues under paragraph (c)(1) of this section or a review of uncontested issues under paragraph (c)(2) of this section will be entered except in writing with a statement of the reasons. Such suspension or postponement will be limited to such period as is necessary for the Commission to resolve the matters at issue. If the supervisory examination results in a suspension of the effectiveness of the Hearing Licensing Board's initial decision under paragraph (c)(1) of this section, the Commission will take review of the decision *sua sponte* and further proceedings relative to the contested matters at issue will be in accordance with procedures for participation by the DOE, the NRC staff, or other parties and interested governmental participants to the Hearing Licensing Board proceeding established by the Commission in its written statement of reasons. If a postponement results from a review under paragraph (c)(2) of this section, comments on the uncontested matters at issue may be filed by the DOE within ten days of service of the Commission's written statement.

Dated at Rockville, MD this 7th day of April, 1989.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

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