



Department of Energy
 Office of Civilian Radioactive Waste Management
 Office of Repository Development
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QA: N/A

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PROPOSED RULE **PR 2**
(68FR 66372)

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 USNRC

January 8, 2004 (4:05PM)

OVERNIGHT MAIL

OFFICE OF SECRETARY
 RULEMAKINGS AND
 ADJUDICATIONS STAFF

Secretary, U.S. Nuclear Regulatory Commission
 ATTN: Rulemakings and Adjudications Staff
 11555 Rockville Pike
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RESPONSE TO REQUEST FOR COMMENTS ON *FEDERAL REGISTER*, VOL. 68, NO. 228, NOVEMBER 26, 2003 – 10 CFR PART 2, LICENSING PROCEEDING FOR THE RECEIPT OF HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLOGIC REPOSITORY: LICENSING SUPPORT NETWORK (LSN), SUBMISSIONS TO THE ELECTRONIC DOCKET (RIN 3150-AH31)

In the subject Federal Register, the U.S. Nuclear Regulatory Commission (NRC) proposed rule changes to 10 CFR Part 2, *Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders, Subpart J, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, and requested comments on the proposed rule changes. The proposed changes pertain to rules involving the use of the LSN and the electronic hearing docket for a licensing proceeding on the disposal of high-level radioactive waste at a geologic repository (i.e., the Yucca Mountain Repository). In response to the NRC request for comments, the U.S. Department of Energy (DOE) is providing comments on the proposed rule changes in this letter. The enclosure to this letter contains the DOE comments.

There are no new regulatory commitments in the body of, or enclosure to, this letter. Please direct any questions regarding this letter to Harry E. Leake at (702) 794-1457 or April V. Gil at (702) 794-5578.


 Joseph D. Ziegler, Director
 Office of License Application and Strategy

OLA&S:AVG-0463

Enclosure:
 U.S. Department of Energy Comments on Proposed
 Rule *Licensing Proceeding for the Receipt of
 High-Level Radioactive Waste at a Geologic
 Repository: Licensing Support Network,
 Submissions to the Electronic Docket*
 (RIN 3150-AH31, 68 FR 66372)

Template = SECY-067

SECY-02

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ENCLOSURE

**U. S. Department of Energy
Comments on Proposed Rule
*Licensing Proceeding For The Receipt Of High-Level Radioactive
Waste At A Geologic Repository: Licensing Support Network,
Submissions To The Electronic Docket*
(RIN 3150-AH31, 68 FR 66372)**

The U. S. Department of Energy submits the following comments on the proposed rule:

1. *The Standard For Electronic Accessibility For Docketing Purposes Should Be Clarified And Should Not Be Based On Accessibility Through ADAMS*

NRC has proposed a change to §2.1012 (a) requiring that the license application can be “effectively accessed” through ADAMS to be acceptable for docketing. This change would establish a requirement for which the ability to comply would be outside the DOE’s control. Entering documents into ADAMS is strictly a NRC function and ADAMS is under the sole control of the NRC. Any accessibility problems resulting from entering the license application into ADAMS would be the responsibility of NRC. In preparing its electronic license application, the DOE is responsible for meeting the guidance that has been issued by the NRC, and transmitting the license application document to the proper address and in the proper format(s) specified by the NRC for such actions. If the DOE meets clearly defined specifications for such transmittals, the Secretary of the Commission should have no cause to find the DOE responsible for any lack of effective accessibility through ADAMS. At this time, the DOE believes that this technical guidance is the “Guidance for Submission of Electronic Docket materials under 10 CFR Part 2, Subpart J” published by the NRC September 9, 2003. If there are any problems encountered in accessing the electronic license application using the ADAMS system, the DOE can work with the NRC to address these problems. Such a situation, however, should not delay the docketing of the license application once it has been submitted.

The DOE recommends that Part 2.1012(a) be revised to read: “...The Director may determine that the tendered application is not acceptable for docketing under this subpart if the application is not accompanied by an updated certification pursuant to Section 2.1009(b) or if the application is not submitted on optical storage media in a format consistent with the detailed guidance for electronic hearing docket submittals dated September 9, 2003, that can be found on NRC’s website at <http://www.nrc.gov/waste/hlw-disposal/guidanc.pdf>.”

2. *A Termination Point For The Obligation Of The Parties To Supplement Documentary Material In The LSN Should Be Specified*

In its discussion of proposed changes to the documentary material requirements of §2.1003 (at 68 FR 66375), the NRC describes a change to its requirements that LSN participants must supplement the documentary material provided in the initial certification of the LSN. The NRC noted that it is reasonable to expect that additional material will be created after the certification specified in §2.1003(a), citing as one example the ongoing Performance Confirmation Program (PCP) required of the DOE by §63.131. The DOE request the NRC make clear that the requirements of the LSN do not extend until the completion of the PCP, i.e., until permanent closure of the repository, as is suggested by the example. In addition, the DOE also requests that the NRC identify the termination point for the parties' obligation to supplement the documentary material in their LSN.

The LSN is intended as a substitute for the normal document discovery process to support proceedings for the issuance of a license under 10 CFR 2, Subpart J. The purpose of the LSN is to make the document discovery process and the formulation of contentions more efficient by providing access to relevant documents before the License Application is submitted – far earlier than would normally occur in an NRC licensing proceeding. Other forms of discovery may commence after the issuance of the first pre-hearing conference order under §2.1021 (10 CFR §2.1018(b)(1)), and derivative discovery of material not required to be made available in the LSN, may be obtained in connection with deposition discovery (10 CFR §2.1019(i)(2)). Accordingly, the obligation of the parties to continue to update the LSN should be terminated at an appropriate time. The DOE recommends that an appropriate termination point could be as soon as the Presiding Officer's ruling on the admission of contentions for the construction authorization hearing have been made, or as late as the close of all discovery in connection with the construction authorization. Beyond the close of the discovery period, there is no apparent purpose or need for updating of the LSN and any documentary material that is generated that is needed for any regulatory decisions should be made available to the parties through the NRC licensing docket.

3. *Clarification of the Definition of Documentary Material*

The DOE agrees with the clarification that each party would not identify in the LSN which documentary material is supportive or not supportive of its position.

4. *Duplication of Documentary Material on the Licensing Support Network*

The DOE agrees with the clarification proposed in §2.1003(a)(1) that, if a party that prepared documentary material has made it available in its Licensing Support Network (LSN) collection, other participants who possess that documentary material should not be required to also make it available in their LSN collections.

5. *The DOE Agrees With the Exclusion Of Congressional Documents From The LSN*

The DOE agrees that the addition of paragraph i to §2.1005, *Exclusions*, is consistent with the language of the House Committee on Appropriations report of July 2003 regarding Congressional communications and the DOE supports this change.

6. *Technical Requirements*

A. *Rule vs. Guidance* – The DOE recommends that technical specifications for submittals to the Electronic Hearing Docket should be in the guidance only and not in the rule. The rationale for this approach is that technical capabilities can change significantly over the period of time that the adjudicatory proceedings are expected to take place, and changes can be handled more efficiently in guidance than in a rule. Also, the guidance can be made comprehensive more easily than the rule (e.g., the guidance provides an exception for transmittal of safeguards information but the proposed rule does not, which makes the rule incomplete). This recommended approach would be like that used by NRC for the Electronic Information Exchange rulemaking of October 10, 2003, where the technical specifications are only in the guidance, which is referenced in the rules. The DOE recommends that Part 2.1013(c)(1) be revised to read “All filings ... shall be transmitted ... according to detailed guidance for electronic hearing docket submittals dated September 9, 2003, that can be found on NRC’s website at <http://www.nrc.gov/waste/hlw-disposal/guidanc.pdf>.”

B. *File Size* – The DOE agrees with the concept of different requirements for simple documents 50 megabytes (MB) or less in size, large documents that can be segmented into parts of 50 MB or less each, and complex documents that cannot feasibly be segmented into parts of 50 MB or less each.

However, the DOE questions the advantage of transmitting only some portions of a complex document. If a complex document is not amenable to submittal in its entirety via EIE, the advantage of submitting portions of it that can be submitted via EIE is unclear since those portions may not be useful by themselves. For documents submitted on optical storage media, DOE recommends that only a transmittal letter via EIE providing notification of the submittal of that document should be required.

C. *Image Resolution* – The image resolution requirements in the proposed rule would establish requirements for the EHD that are inconsistent with those for the LSN. The proposed rule requires 300 dots per inch (dpi) minimum resolution for gray-scale and color, whereas the LSN requirements, finalized on May 5, 2001 in §2.1011(b)(2)(iv), require 150 dpi minimum resolution for gray-scale and color. The LSN resolution requirements are currently being used by the DOE for the LSN. The DOE suggests making the image resolution requirements for the EHD the same as those for the LSN. Converting images in the LSN that are readable at 150 dpi to 300 dpi for the EHD would not be an efficient use of resources.

Also, the LSN resolution requirements guidance notes that the submitter may use flexibility with respect to the minimum resolution as long as the integrity and quality of the document results in readable copies. The DOE suggests that this flexibility should be added to the rule, if technical requirements are retained in the rule.

D. Image Format – The general requirement in the proposed rule requiring images to be in Adobe Acrobat Portable Document Format (PDF) also would establish requirements for the EHD that are inconsistent with the LSN requirement that allows Tagged Image File Format (TIFF) (§2.1011(b)(2)(iv)). The DOE suggests that files in the LSN be allowed for use in the EHD without format changes. Converting images in the LSN that are usable in TIFF format to PDF format for the EHD would not be an efficient use of resources.

E. Hyperlinks - The proposed rule requires that documents be free of hyperlinks to other documents or websites other than within a single PDF file. Some documents may have embedded hyperlinks that are difficult to remove. The DOE suggests that the requirement be revised to state that use of the document in the EHD should not depend on hyperlinks to other documents or websites.

F. Definitions - The definition of complex documents in the proposed rule is inconsistent with that in the supplementary information and guidance. The rule definition states that a complex document has substantial portions that are neither textual nor image. However, the supplementary information (68 FR 66374) and guidance state that one type of complex document is a textual or graphic file that cannot be segmented into 50 MB files. The DOE suggests that the description in the supplementary information and guidance be used in the rule definition.

7. Editorial

- In existing §2.1011(a), “electronic docket” should be replaced with “LSN,” as the requirements in this subsection are specific to the LSN and not the docket. Also, the title of §2.1011 would be more correct and descriptive with the addition of “for the LSN” at the end.
- In §2.1013(c)(1)(ii), “or less” should be added after “50 megabytes.” This change would allow logical breakdowns of large documents and would be consistent with the guidance.
- In §2.1013(c)(1)(iii), “via EIE” should be added at the end of the first sentence for clarity and consistency with the other sections.