

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

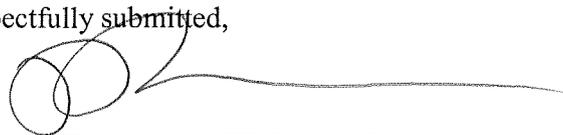
In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
)	
(High Level Waste Repository: Pre-Application Matters))	June 6, 2005

**NEVADA’S MOTION TO COMPEL PRODUCTION OF
DOE’S DRAFT YUCCA LICENSING APPLICATION, OR
IN THE ALTERNATIVE, FOR A DECLARATORY ORDER**

In accordance with the discussions at the May 18, 2005 PAPO Board case management hearing, Nevada respectfully moves for an order compelling DOE to produce (and make available on the LSN) a copy of its July 2004 draft license application [Draft LA] on or before the date of its initial certification of LSN compliance. In the alternative, a declaratory order to the same effect is requested. The grounds for the motion are that the Draft LA falls within the definitions of “documentary material” and “circulated draft,” that no litigation work product or deliberative process privileges apply, and that disclosure is required by the public interest. A brief in support of this motion is also being filed.

In accordance with 10 C.F.R. § 2.323, I certify that a sincere effort was made to resolve this matter with the Department of Energy [“DOE”] and that this effort was unsuccessful.

Respectfully submitted,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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ITS MOTION TO COMPEL PRODUCTION OF
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IN THE ALTERNATIVE, FOR A DECLARATORY ORDER**

TABLE OF CONTENTS

I. INTRODUCTION1

II. STATEMENT OF FACTS1

III. SUMMARY OF ARGUMENT3

IV. ARGUMENT4

 A. The Draft LA is “Documentary Material”4

 B. The Draft LA is a “Circulated Draft”7

 C. The Draft LA is Not Privileged16

 i. Deliberative-Process Privilege Does Not
 Apply to the Draft LA.....16

 ii. Litigation Work-Product Privilege Does
 Not Apply to the Draft LA.....16

 D. DOE's Refusal to Produce Any Part of the Draft LA is
 Violative of Basic FOIA Principles, Even if It Were
 Privileged (Which It is Not).....21

 i. DOE Failed to Conduct the Public-Interest
 Test Mandated by Its Own Regulations.....21

 ii. DOE Failed to Implement Segregation of
 Non-Privileged Information, as Mandated by FOIA23

V. CONCLUSION.....25

TABLE OF AUTHORITIES

CASES

Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109 (7th Cir. 1983).....17

Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)
LBP-86-76, 23 NRC 177 (1986).....18

Grand Jury Proceedings, 604 F.2d 798, (3d Cir. 1979).....17

Mead Data Central, Inc. v. U.S. Department of Air Force,
566 F.2d 242, 261 (D.C. Cir. 1977).....22, 24

Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968).....18

National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.,
967 F.2d 980 (4th Cir. 1992)17

Senate of Puerto Rico v. United States Dep't of Justice,
823 F.2d 574 (D.C. Cir. 1987).....17

Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir.), *cert. denied*,
484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987).....17

U.S. v. Adlman, 134 F.3d 1194 (2d Cir. 1998)16

U.S. v. Frederick, 182 F.3d 496 (7th Cir. 1999).....17

STATUTES AND RULES

Fed. R. Civ. P. 26(b)(3)17

5 U.S.C. § 554(e).....1

5 U.S.C. § 552.....21

10 C.F.R. Part 2.....5

10 C.F.R. § 2.1001.....4, 7

10 C.F.R. § 2.1003.....5

10 C.F.R. § 2.1006(a).....21

10 C.F.R. § 2.1006(c).....7, 16

10 C.F.R. § 2.1018.....1

10 C.F.R. § 2.319.....1

10 C.F.R. § 2.390.....21

10 C.F. R. Part 63.....20

10 C.F.R. § 63.1.....19

10 C.F.R. § 63.21.....20
10 C.F.R. § 63.22(a).....20
10 C.F.R. § 1004.1.....21

OTHER AUTHORITIES

Regulatory Guide 3.69.....passim
Yucca Mountain Review Plan, NUREG 1804.....passim
Webster’s New College Dictionary (10th Ed.).....8

I. INTRODUCTION

In its hearing on May 18, 2005, the PAPO Board instructed Nevada to request from the Department of Energy (“DOE”) production of its July 2004 Draft License Application (hereinafter, the “Draft LA”). The Board further instructed DOE's counsel to respond promptly, indicating whether DOE would or would not agree to produce the Draft LA, and if not, to state the reasons why not. On May 19, 2005, Nevada complied by delivering the appropriate written request. *See* Exhibit No. 1. On May 23, 2005, DOE delivered correspondence to Nevada declining to produce the Draft LA and stating its rationale for that refusal (*See* Exhibit No. 2; hereinafter, the “Refusal Letter”).

In view of that Refusal Letter, Nevada respectfully makes this Motion to Compel production of the Draft LA. In the alternative, Nevada seeks a declaratory ruling from the Board that the Draft LA is “Documentary Material” under NRC regulations not entitled to privilege and subject to disclosure on or before the date of initial certification.¹

II. STATEMENT OF FACTS

As early as 1989, in creating what was then called the Licensing Support System (“LSS”), and often thereafter, NRC exhorted DOE to make its Yucca documentation publicly available as early as possible. NRC admonished DOE not to wait until the moment of certifying its Licensing Support Network (“LSN”) database, then dumping a massive collection of Documentary Material on NRC and the public for rush review. Such a tactic, which runs counter to the very purpose of the LSN, was appropriately characterized by the Board at its May 18 hearing: “All parties should make every effort to get their material out as soon as it's available

¹ The alternative of a declaratory order is always available under 5 U.S.C. § 554(e) and 10 C.F.R. § 2.319, while it is not clear whether discovery under 10 C.F.R. § 2.1018 is available before DOE’s initial LSN certification. However, whether discovery is or is not available under Section 2.1018, DOE has agreed to early resolution of this dispute in the manner suggested by the Board.

and not wait for certification to get it onto the LSN, because this was not supposed to be a game of gotcha.” (Tr. 396). But avoiding or delaying information release was precisely the tactic employed by DOE a year ago, when it forbade the LSN Administrator from making public a single page of some two million documents until the moment of its June 30, 2004 certification.

DOE uses that same tactic today. The backdrop for this Motion was orchestrated at the May 18, 2005 hearing in this proceeding, when the PAPO Board recognized the importance of early resolution of the issue of whether DOE must produce to Nevada its Draft LA, particularly in view of the fact that the parties’ positions on such disclosure were well-developed and unlikely to change. Tr. 378 to 387. To make the dispute appropriate for the Board’s resolution now, the Board ordered that Nevada should request, and DOE should deny (if it chose to persist in doing so) access to the Draft LA. Consistent with its strategy in this proceeding, DOE did refuse to produce the document when asked. In so doing, DOE flouted specific instructions of the Board in an apparent effort to weaken Nevada's anticipated arguments for production. It was recognized at the May 18 hearing that all the facts with respect to DOE's handling and processing of the Draft LA were uniquely within the possession of DOE and that Nevada was essentially being asked to attack or discredit the predicate for DOE's refusal to disclose – without even knowing what that predicate was. For example, the Board asked “How does the State of Nevada or anyone else know to whom it [the Draft LA] was circulated, and whether it exceeds whatever the criteria of the definition of circulated draft?” Tr. 385.

Accordingly, the Board required that DOE detail the rationale for its non-disclosure and that it not merely state, by name, some privilege or exemption or exception. For example, the Board directed that if DOE were to claim the document was privileged, then DOE must provide an explanation why it believed the document met the requirements for the privilege claimed. In

this regard, the Board specifically required that, if DOE were to assert any of the privileges addressed in the Board's "Appendices" A through C, which were attached to the Board's April 19, 2005 memorandum in this proceeding, then DOE should provide at least the information required by those Appendices for the assertion of those privileges: "I think when the DOE responds to the initial request, they need to provide a summary and some support for what they're saying that would be akin to what they might otherwise see in a privilege log. So, yes, we think this is deliberative-process privilege and here's why we think it meets these elements." Tr. 412. DOE's counsel committed to do so: "I will. I will." Tr. 413.

III. SUMMARY OF ARGUMENT

DOE's Refusal Letter gives four separate reasons for refusing production. Two of the four are the privileges addressed by Appendices B and C of the Board's April 19 memorandum: deliberative-process privilege and litigation work-product privilege. Despite DOE's commitment to the Board, the letter provided nothing more than the conclusory statement that "the draft is protected against disclosure by the litigation work-product and deliberative-process privileges." *See* DOE's Refusal Letter. DOE did not address a single element of the Board's Appendix B (work-product privilege) or Appendix C (deliberative-process privilege).

Despite DOE's failure to comply with the Board's instructions and the paucity of information provided by the Refusal Letter, Nevada will address, *seriatim*, each of the excuses given by DOE for non-disclosure of the Draft LA and will establish that each is without merit. Specifically, Nevada will show that the Draft LA is "documentary material" and is a "circulated draft" for which the deliberative process privilege has been waived. Nevada will also show that the Draft LA is not subject to withholding on the basis of any litigation work product privilege and that disclosure is required in the public interest.

IV. ARGUMENT

A. The Draft LA is “Documentary Material”

The definition of Documentary Material is itself extremely broad. The NRC has provided in 10 C.F.R. § 2.1001 that:

Documentary material means:

- (1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area pursuant to parts 60 or 63 of this chapter, or a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to parts 60 or 63 of this chapter;
- (2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; and
- (3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related “circulated drafts,” relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, *regardless of whether they will be relied upon and/or cited by a party*. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide. [Emphasis added.]

A draft of the LA, and specifically, differences between the draft and final LA, would be something that a litigant would likely use to support its position and oppose DOE’s position under paragraphs (1) and (2) of the definition. Moreover, the massive Draft LA, completed after years of work by DOE's prime contractor in July 2004, is unquestionably a “report” or a “study” prepared on behalf of DOE within the meaning of paragraph (3). Obviously, the Draft LA is also “relevant” to the LA, and is its actual predecessor. The Draft LA is also clearly “relevant” to “the issues set forth” in Reg. Guide 3.69, attached as Exhibit No. 13. That Reg. Guide states as its purpose “to provide a list of the topics (in Section C) of documentary material that LSN

participants should identify (by bibliographic header only) or make available (by image or searchable full text) via the LSN under 10 CFR 2.1003.” Reg. Guide 3.69, at 2. After providing an exhaustive list of *topics* for which documents must be considered as Documentary Material (all of them pertinent sections of the LA), Reg. Guide 3.69 provides a further “Appendix A” enumerating the specific *types* of documents to be included, including circulated drafts and final documents, on a list characterized as “a non-exhaustive.” *Id.* Section 7.6 of the Appendix specifically identifies the LA, thus including the LA and, by definition, any circulated draft thereof, as Documentary Material that must be on the LSN. NRC confirms that “[t]his regulatory guide provides the detailed topical index for LSN documentary material,” *id.*, “consistent with requirements for the content of a license application in 10 CFR 63.21 and with licensing information specified in the Yucca Mountain Review Plan (NUREG–1804).” *Id.* at 3.

On June 14, 2004, the NRC promulgated an amended Final Rule 10 C.F.R. Part 2 (69 Fed. Reg. 32836) in which it undertook a lengthy discussion of Documentary Material in order to clarify its scope for potential participants. The manner in which NRC addresses the third prong of the Documentary Material definition is instructive as to its breadth and its close tie to the subjects of the LA: “The third class of material, 'reports and studies prepared for or on behalf of the potential party' has meaning independent of any contentions that might be offered. The material in this class must be available on the LSN regardless of whether it has any relation to a contention offered at the hearing. It is also a likely source of the material that a party would use to develop its contentions. 'Reports' and 'studies' will also include the basic documents relevant to licensing . . .” *Id.* at 32843.

NRC added that the dual requirement of Subsection (3) is designed to ensure that LSN participants do not have to identify, and include as Documentary Material, reports or studies that

have no bearing on the DOE LA for a geologic repository at the Yucca Mountain site.

Presumably, even DOE will not contend that the Draft LA, a document that is in fact the predecessor document of the LA, “has no bearing on the DOE License Application.”

Amplifying its explanation of what is encompassed within Documentary Material, NRC stated that,

“[t]o assist participants in identifying documentary material that may be relevant to the license application in the time period before it is submitted, the Commission is recommending that LSN participants use the NRC Yucca Mountain Review Plan (NUREG–1804, Rev. 2, July, 2003) as a guide. The Yucca Mountain Review Plan provides guidance to the NRC staff on evaluating the DOE license application. As such, *it anticipates the form and substance of the DOE license application and can be used as a reliable guide for identifying documentary material.*”

Id. at 32843. Given that clear standard, there can be no question that DOE's Draft LA likewise “anticipates the form and substance of the DOE license application” and is therefore critical Documentary Material.

The Commission stated its expectation that the LSN would provide potential participants with the opportunity to frame focused and meaningful contentions. Indeed, if the NRC checklist of LA topics is a guidepost for “Documentary Material,” and if it was the Commission's expectation that the LSN would provide participants with the opportunity to frame focused and meaningful contentions, then the Draft LA – so long as it is a circulated draft, *see infra* – would necessarily be among the most essential items of Documentary Material. This is particularly true in view of the fact that the final LA will not be submitted until at least six months after DOE certifies that its LSN is complete. Application of elemental logic compels the conclusion that DOE's Draft LA is Documentary Material: NRC recommends that the participants use NUREG-

1804 as a guide to identifying Documentary Material,² and since DOE's final LA will only be submitted many months after certification of its LSN, the *only* document in existence which might include all of the hundreds of subjects set out in NUREG-1804 would be a circulated draft of the LA. Such a circulated Draft LA should be the single most prominent document in DOE's LSN collection. To suggest it may be excluded from the definition of documentary material defies common sense and flouts the regulations and Reg. Guide 3.69.

B. The Draft LA is a “Circulated Draft”

Under 10 C.F.R. § 2.1006 (c), though DOE may withhold certain documents on grounds of the deliberative process privilege, it may not withhold on this basis “circulated drafts” of information that would otherwise be documentary material. A circulated draft is defined in § 2.1001 as follows:

Circulated draft means a nonfinal document circulated for supervisory concurrence of 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 or not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

Handicapped by DOE's withholding of relevant documents (*see* “gotcha” discussion, *supra*), Nevada is forced to rely upon publicly available admissions by DOE personnel which conclusively establish that the July 2004 Draft LA is indeed a “circulated” draft.” At the May 18 hearing, DOE counsel advocated DOE's litigation position that “the draft wasn't circulated.” Tr.

² NUREG-1804 provides: “The Yucca Mountain Review Plan is guidance to [NRC] staff for review of any License Application from [DOE] for a geologic repository for disposal of high-level radioactive waste at Yucca Mountain, Nevada. The [NRC] has directed the staff to carry out risk-informed, performance-based regulatory programs. 10 C.F.R. Part 63 is risk-informed and performance-based, because risk of health effects to the reasonably maximally exposed individual is the basis for its performance objectives. [NRC] will base its licensing decision on whether [DOE] has demonstrated compliance with the performance objectives.” NUREG-1804, at XV.

407. But Chairman Moore astutely observed, “I would be shocked to learn that it's locked up in a closet, so somebody had to see it, and at least under some circumstances, those somebodies would be considered it would have been circulated to them, I would think.” Tr. 409. DOE's response was, once again, “But it wasn't circulated within DOE.” *Id.* As discussed below, these assertions by DOE counsel are demonstrably incorrect.

Given the likelihood that DOE will produce an affiant to swear to the proposition that no one at DOE “non-concurred” in the Draft LA, the Board must look beyond the self-serving litigation posture taken by DOE and focus on DOE’s public acknowledgments of the treatment actually given internally to the Draft LA. Surely a party in this proceeding could avoid the characterization of *any* document in its possession as a “circulated draft” by the simple expedient of avoiding the use of the words “concurrence” or “non-concurrence” in discussing it. Obviously, semantic hairsplitting was not the intent of NRC when it defined Documentary Material.³ More relevant would be the simple definition of “concur” found in Webster's *New College Dictionary*: “to have or express the same opinion: agree.” The focus, then, must be upon the conduct of the actors: Was the Draft LA, when delivered by the contractor (Bechtel/SAIC) to its client (DOE) in July 2004 reviewed by DOE? Did DOE management make comments, including comments which did not *agree*, or which *disagreed*, with any material aspect of what had been delivered? Were changes made in the document in recognition of those *non-agreements* or *disagreements*? The answer to each of these questions is resoundingly affirmative.

³ Mr. Graser previously opined that when a document cannot proceed through internal review without resolution of comments it is a circulated draft even though no formal concurrence process is identified because “what you have here, effectively, is something that is quacking just like the duck that HQ and the rule calls a “circulated draft.” DEN 001005468, Exhibit No. 3.

As early as May 13, 2003, OCRWM Director Margaret Chu addressed the Nuclear Waste Technical Review Board (“TRB”) and advised it that DOE was “focused on the preparation of the License Application” and that DOE's top priority was to submit a high-quality, final LA by December 2004. *See* TRB 5/13/2003 transcript, at 16 (Exhibit No. 4). Ms. Chu went on to state, “Our assessment is 16 per cent complete on the License Application that we're targeting for December of '04.” *Id.* at 33.

At the TRB meeting on September 16, 2003, Ms. Chu reconfirmed the December 2004 target date, but observed that there remained technical and scientific work to be completed, validation of that work through quality assurance, and “compilation of the application itself.” *See* TRB 9/16/2003 transcript, at 15 (Exhibit No. 5). At the same meeting, OCRWM's Deputy Director for Repository Development, W. John Arthur III, focused on completion of the Total System Performance Assessment (“TSPA”), a critical component of the LA, stating, “The actual schedule for developing the TSPA goes from now through essentially the end of this calendar year [i.e., 2003].” *Id.* at 57. Mr. Arthur concluded that the TSPA would be “documented then in April and May [i.e., 2004]. So, the documentation of the TSPA/LA for the license is completed in the end of May of next year [2004].” *Id.* The forecast for completion by Mr. Arthur was accordingly about two months before production of the Draft LA (in July 2004) which is the subject of this motion to compel.

At the January 20, 2004 meeting of the TRB, Mr. Arthur confirmed that plans were still on target, including “critical areas coming up would be license design complete, and the preclosure safety analysis in the spring time frame.” *See* TRB 1/20/2004 transcript at p. 16 (Exhibit No. 6). Mr. Arthur predicted completing the necessary documentation of all the technical bases for submittal of the LA (as well as certifying the LSN) in June 2004, *id.* at 24,

and explained, “One of the key areas that I should have stated earlier is we're in the process right now of developing the internal management plan for the approval and review of the actual license. That's going to be a very detailed document with a lot of supporting documentations.”

Id. Referring specifically to the Draft LA, which is the subject of this motion to compel, Mr. Arthur concluded, “*Bechtel SAIC will provide a Draft License Application to the Department of Energy in July of this year, and then we allow that, again, remaining six months to do the necessary reviews and changes.*” *Id.* at 27 (emphasis added). Mr. Arthur went on to promise that “neither Margaret [Chu] or myself will allow that license to leave the Department of Energy until we are satisfied we've met the necessary quality requirements.” *Id.* at 28.

On May 18, 2004, drawing close to the July 2004 completion date for the Draft LA, Mr. Arthur again addressed the TRB, stating, “every day I'm seeing new chapters, sections of the license coming through in varying levels of detail. *The goal is by the end of July, to have all those chapters internal to the whole review process within the Department of Energy.*” See TRB 5/18/2004 transcript at 59 (Exhibit No. 7)(emphasis added). Mr. Arthur announced, “I might state that the subsurface, as well as the waste package design, for the License Application is fully complete, and the surface, as I'll talk about a little bit later, is proceeding real well.” *Id.* at 59-60. Mr. Arthur detailed the extensive effort to accumulate into one composite document the various aspects of the Draft LA:

This is what we've called our Regulatory Integration Team, the centralized production of the license as it relates to analysis and modeling reports. We'll all go through this team. It brings together nine different teams of some of our best throughout the national labs, as well as Bechtel SAIC and other offices from Quality, Engineering, Project Controls, and Operations under a single project manager to make sure each analysis and modeling report goes through the same level of review. Some of the areas we're looking at in this team is [sic] the technical accuracy and validity of models and analysis, traceability of inputs and outputs among the models and analysis, considering the integration across and among AMRs, taking a look at each one for the appropriateness of assumptions

and consistency between each AMR. So, it's a very detailed look to ensure that all of those are done consistently. Some are data models and software utilization. It's a very intensive effort. *The four step process will be completed by the end of May* [i.e., 2004, two months before Bechtel's delivery of the Draft LA].

Id. at 64-65 (emphasis added).

After the submission to DOE management of the July 2004 Draft LA, DOE's focus on submission of the final LA to NRC by December 2004 proceeded apace. Ms. Chu advised the TRB on September 20, 2004, "Yes, we continue to prepare our license application at full speed; you can hear from John Arthur later on, according to our current schedule." *See* TRB 9/20/2004 transcript at 31 (Exhibit No. 8). She reassured the Board, "The schedule is still on." *Id.* at 32. That same day, Mr. Arthur spoke, confirming that the LA version now in hand "pretty well tracks right against the Yucca Mountain Review Plan prepared by the Nuclear Regulatory Commission." *Id.* at 40. He observed that "myself and a number of our senior managers have been spending [sic] continuously over the last three weeks, and it will complete in the next week and a half, the full review, integrated review of every section of that license of the 70 subsections. With that, there will still need to be a lot of editing, cross-references, all the necessary integration to bring that together. Consistency reviews are underway right now." *Id.* at 41-42. It should be noted that Mr. Arthur's recounting of this intensive review of the Draft LA came two months after its submission by Bechtel to DOE.

Just prior to the long anticipated December 2004 delivery date for DOE's final LA to NRC, DOE announced at the November 22, 2004 DOE/NRC Quarterly Management Meeting a postponement of that delivery date. *Las Vegas Review Journal, November 23, 2004* (Exhibit No. 9). Later updating the TRB on the status of the draft and the final LA, Ms. Chu spoke at the February 9, 2005 TRB Winter Board Meeting, detailing the procedure DOE had employed to circulate, review, and modify the July 2004 Draft LA. By the time of her presentation, the

revised Draft LA, long intended to be finished in November 2004 and delivered to NRC in December 2004 as the final LA, was now recharacterized as a new draft. (Obviously, such an 11th-hour, after-the-fact change of plans regarding the date of final submission cannot serve to change the character of that which was prepared, delivered in July 2004, and then reviewed, commented upon, and revised by DOE over the course of many months for anticipated submission to NRC in December 2004.) As Ms. Chu detailed: “You may remember that our Management and Operating contractor, BSC, delivered the first draft of the license application in July of 2004, *and we reviewed the draft intensively, and made many comments and which were incorporated* into our second draft, which was delivered to us in November of 2004. Shortly after that, we announced that we will be revising our original goal of submitting the license application in December of 2004.” *See* TRB 2/9/2005 transcript, at 16 (Exhibit No. 10) (emphasis added). Ms. Chu then explained the reasons for the postponement, including the D.C. Circuit Court of Appeals decision invalidating the 10,000-year compliance period and the decision of the PAPO Board to strike the Department's June 2004 LSN certification. *Id.* at 17. She explained that DOE was hard at work reviewing and processing additional documents in response to the PAPO Board's direction regarding the LSN. She went on: “Now, while these activities are ongoing, and we're performing additional work to our draft license application, and largely to enhance and refine the technical work, we believe we have a draft license application that after thorough cross-referencing, we believe that it complies with the current requirements of 10 CFR 63, and the guidance in the Yucca Mountain Review Plan.” *Id.* at 17-18.

Obviously, from the foregoing presentations, the Draft LA submitted in July 2004 represented the first time that all of the numerous and complex topics required by the NRC's License Application Review Plan to be incorporated in DOE's LA had ever been brought

together in a single document. Just as obviously, the document was subjected to intensive review by DOE, with substantial comments and revisions in accordance with those comments. While the final LA delivered to NRC may be somewhat different from the July 2004 Draft LA, it is obvious that the earlier document will form the substantial basis for the later document, but for those areas of Bechtel's work that were subjected to revision by DOE. The fact that the July 2004 Draft LA submitted by Bechtel was modified in accordance with changes ordered by DOE does not *detract* from its status as a circulated draft, but rather *defines* it as such. If DOE's litigation contention that the Draft LA was not a circulated draft were to be believed, then *there would never be a circulated draft of the LA*. The DOE LA schedule from its inception contemplated the submission of the Draft LA in July 2004 and the delivery of the final LA in December 2004. If the July 2004 draft were not "circulated" for concurrence or suggested changes, then the incredible conclusion would follow that whatever Bechtel submitted in July was intended to simply flow through the hands of DOE and be delivered, wholly unreviewed and unchanged, to NRC in December. Such a scenario was never intended, nor is it credible.

There are other publicly available indicators establishing that the July 2004 Draft LA was neither a mere preliminary draft, nor was it one of a number of routine "drafts of the LA" as characterized in DOE's Refusal Letter. One example is the Bechtel contract with DOE (excerpt attached as Exhibit 2 to Nevada's May 12, 2005 Memorandum submitted to the PAPO) which provides for a sequence of performance-based incentive ("PBI") awards.

The schedule shows:

	PBI	Completion Date	Fee Amount
1.	Submission of a Complete Draft LA	Jul. 26, 2004	\$11,043,476
2.	Final LA Document Ready for DOE Tender to NRC	Nov. 30, 2004	\$15,290,967
3.	LA Docketed by the NRC	Mar. 2005	\$22,086,954

These first three PBIs appear to be dispositive with respect to the “circulated draft” status of the Draft LA: The first task is precisely what Bechtel accomplished with delivery of the Draft LA, ostensibly meeting the July 26, 2004 target. According to the August 4, 2004 *Pahrump Valley Times* (Exhibit No. 11), DOE spokesman Allen Benson publicly stated that Bechtel-SAIC Co., LLC, “qualified for an \$11,043,476 fee by meeting a July 26 target.” The article likewise confirmed the availability of the second and third PBIs authorized by Bechtel's contract. Accordingly, DOE may not be heard to trivialize the July 2004 submission, which was a monumental production and a momentous benchmark in the history of the project, and was intended to be, at the time of its submission and through many months of DOE review following its submission, the *only* Draft LA prior to delivery of the final LA to the NRC.

Another publicly available document type, which illustrates the unique position of the Draft LA in the Yucca licensing sequence, is a series of pages from the “Yucca Mountain Project Summary Schedule Milestone Description and Supporting Information,” showing anticipated schedule dates that are now obsolete, but whose sequence of actions clearly echo the “circulated” status of the Draft LA. The format of each of the Project Summary Schedules (Exhibit No. 12) is the same, stating the particular activity called for, explaining it in detail, and then identifying the key actions which will precede and succeed, respectively, the action identified in the particular

Project Summary Schedule. A simple review of some of these schedules identifies the concurrence trail followed by the Draft LA as follows:

PSS Title	Scheduled Date
YMSCO Initiates Review of Draft LA by OCRWM/DOE Offices	03/01/01
DOE Completes Staff Review of Draft LA	11/15/01
Complete OCRWM Project and Office Managers' Concurrence of LA	01/10/02
OCRWM Submits Draft LA to DOE Offices for Concurrence	01/11/02
Complete DOE and Navy Concurrence of Draft LA	01/31/02
YMSCO Submits LA to RW-1 for Acceptance	02/07/02
DOE Submits License Application to NRC	03/01/02

A reading of the second item (DOE Completes Staff Review of Draft LA) gives this further explanation:

The Draft LA will be consistent with applicable NRC requirements, the technical guidance document, and any applicable DOE guidance. The review will include: a chapter review; interactive comment resolution; a revised document; verification of comment resolution; and consistency check. The milestone will be complete when the review comments have been resolved and revised Draft LA has been prepared and accepted by the reviewers.

The schedule entitled “Complete OCRWM Project and Office Managers' Concurrence of LA” further explains:

Resolve comments by OCRWM office and project managers and obtain their concurrence. This milestone will be complete when all concurrence comments by OCRWM offices and project managers have been resolved and their concurrence on the Draft LA has been documented.

The schedule entitled “OCRWM Submits Draft LA to DOE Offices for Concurrence” amplifies as follows:

Following OCRWM project and office managers' concurrence, OCRWM will submit the Draft LA to the appropriate DOE offices and the Navy for concurrence. This milestone will be complete when the Draft LA has been provided to the appropriate DOE offices and the Navy for their concurrence.

Also, the contract document (discussed *supra*) which referred to the bonuses also stated:

The Draft LA must satisfy the following attributes: the draft must address all applicable requirements of 10 C.F.R. 63 and the NUREG-1804 Rev. 2; it must have all technical team reviews, as defined in the DOE License Application Management Plan, completed; and all DOE mandatory comments and applicable technical direction letters must be resolved.

In sum, the internal processing, review, and revision of the Draft LA within DOE establishes conclusively that the Draft LA was very much a “circulated draft.”

C. The Draft LA is Not Privileged

i. Deliberative-Process Privilege Does Not Apply to the Draft LA

As discussed above, 10 C.F.R. § 2.1006(c) makes clear that DOE waives deliberative-process privilege for circulated drafts. This provision defeats DOE's assertion of the deliberative-process privilege with respect to the July 2004 Draft LA, so long as it is (and it has been shown to be) a circulated draft.

ii. Litigation Work-Product Privilege Does Not Apply to the Draft LA

There is general agreement that Documentary Material prepared “in anticipation of litigation” may be privileged under the litigation work-product privilege. In addition, there is general agreement with respect to an exception to the applicability of that general rule. As precisely stated by NRC counsel at the May 4, 2005 Board hearing (Tr. 86), “*but materials prepared in the ordinary course of business or pursuant to regulatory requirements or for other non-litigation purposes would not be covered.*” (Emphasis added.)

The key exception to the general rule is set out in *U.S. v. Adlman*, 134 F.3d 1194 (2d Cir. 1998):

The formulation of the work-product rule used by the Wright & Miller treatise, and cited by the Third, Fourth, Seventh, Eighth and D.C. Circuits, is that documents should be deemed prepared “in anticipation of litigation,” and thus within the scope of the Rule, if “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” Charles Alan

Wright, Arthur R. Miller, and Richard L. Marcus, 8 FEDERAL PRACTICE & PROCEDURE § 2024, at 343 (1994) (emphasis added). See *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917, 108 S. Ct. 268, 98 L. Ed. 2d 225 (1987); *Senate of Puerto Rico v. United States Dep't of Justice*, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987).

* * * *

Conversely, it should be emphasized that the “because of” formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation. It is well established that work-product privilege does not apply to such documents. See FED. R. CIV. P. 26(b)(3), Advisory Committee's note (“Materials assembled in the ordinary course of business . . . are not under the qualified immunity provided by this subdivision.”); see, e.g., *National Union Fire*, 967 F.2d at 984. Even if such documents might also help in preparation for litigation, they do not qualify for protection because it could not fairly be said that they were created “because of” actual or impending litigation. See WRIGHT & MILLER § 2024, at 346 (“even though litigation is already in prospect, there is no work-product immunity for documents prepared in the regular course of business rather than for purposes of the litigation”).

The court in *U.S. v. Frederick*, 182 F.3d 496, 501-02 (7th Cir. 1999) dealt with both the rule and the exception in a case relating to tax documents prepared for use in meeting Internal Revenue Service requirements. Cautioning against any expectation on the part of the taxpayer that such documents, required to meet IRS regulatory mandates, could be categorized as privileged (even if prepared by an attorney), the court opined:

. . . [A] dual-purpose document – a document prepared for use in preparing tax returns and for use in litigation – is not privileged; otherwise, people in or contemplating litigation would be able to invoke, in effect, an accountant's privilege, provided that they used their lawyer to fill out their tax returns. Likewise, if the taxpayer involved in or contemplating litigation sat down with his lawyer (who was also his tax preparer) to discuss both legal strategy and the preparation of his tax returns, and in the course of the discussion bandied about numbers related to both consultations, the taxpayer could not shield these numbers from the Internal Revenue Service. This would not be because they were numbers, but because, being intended (*though that was not the only*

intention) for use in connection with the preparation of tax returns, they were an unprivileged category of numbers.

(Emphasis added).

Likewise, in a matter involving documentary materials required to be submitted to the U.S. Patent Office, the court easily dismissed the suggestion of their privilege: “We shall not prolong this opinion by any lengthy discussion of contested documents. Many relate to tests and experiments. Phillips has a duty to disclose to the Patent Office all facts relating to the possible equities of the patent application. It cannot hide behind the work product doctrine the research, tests, and experiments which are pertinent to the patent application.” *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968).

A case directly on-point for this proceeding, dealing with documents prepared in accordance with NRC regulatory requirements, is *Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-7, 23 NRC 177 (1986). The issues there were various quality assurance and corrective action reports, as to which the applicant sought to assert work-product privilege on two grounds – that, the documents were prepared in anticipation of litigation, and that attorneys had played a substantial role in their preparation. The ASLB rejected the applicant's argument, holding:

. . . [T]hese programs and reports were assumed by Applicant under its obligations to NRC Staff and the Commission's regulations. That the drafts may have been prepared with an eye towards litigation and by Applicant's attorneys, rather than its technical staff and consultants, should be of more interest to NRC's technical staff than to the Licensing Board. The input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize these documents from discovery. Counsel in this case were assisting in a management function that is outside the scope of both attorney-client and work product privilege.

Applying the above principles to this proceeding, it is clear that DOE's Draft LA is not entitled to the work product privilege. DOE's mischaracterization of its Draft LA“” as litigation

work product is an ominous harbinger of what could become literally hundreds of privilege challenges in this proceeding, as DOE could conceal vast amounts of other critical licensing information under the misapplied work-product rubric, information nevertheless vital to the license application and review process regardless of anticipated “litigation.”

With respect to the Draft LA, Judge Karlin correctly suggested at the May 4, 2005 hearing (Tr. 89-90) that, “I don't think it is being prepared for the adjudicatory process. . . . It's required in the normal regulatory process. It's got nothing to do with an administrative hearing or litigation. You've got to file an application. So in the ordinary course, that document is prepared because of the normal process for getting a license, not because of a hearing.” Nonetheless, DOE counsel persists in mischaracterizing the Draft LA as litigation work product, arguing, astonishingly, that “it is not being prepared for *some independent regulatory reason.*” Tr. 90 (emphasis added).

But regulations adopted by the NRC solely in connection with the potential licensing of the candidate Yucca repository dispositively set out the independent regulatory reason for DOE's preparation of an LA. In 10 C.F.R. Section 63.1, NRC provides:

This part prescribes rules governing the licensing (including issuance of a construction authorization) of the U.S. Department of Energy to receive and possess source, special nuclear, and byproduct material at a geologic repository operations area sited, constructed, or operated at Yucca Mountain, Nevada, in accordance with the Nuclear Waste Policy Act of 1982, as amended, and the Energy Policy Act of 1992.

Making even clearer the prerequisite of DOE's LA, the regulation goes on at Section 63.3 to provide:

(a) DOE may not receive nor possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site except as authorized by a license issued by the Commission under this part.

(b) DOE may not begin construction of a geologic repository operations area at the Yucca Mountain site unless it has filed an application with the Commission and has obtained construction authorization as provided in this part. *Failure to comply with this requirement is grounds for denial of a license.*

(Emphasis added.)

In Section 63.21, NRC's regulations set out 24 separate paragraphs covering numerous pages specifically detailing the information which must be included in the DOE LA and adding that it must be accompanied by an Environmental Impact Statement prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended.

Finally, NRC mandates, at Section 63.22(a):

An application for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area at Yucca Mountain, and an application for a license to receive and possess source, special nuclear, or byproduct material at a geologic repository operations area at the Yucca Mountain site that has been characterized, any amendments to the application, and an accompanying environmental impact statement and any supplements, must be signed by the Secretary of Energy or the Secretary's authorized representative and must be filed with the Director in triplicate on paper and optical storage media.

Aside from 10 C.F.R. Part 63, NRC has provided substantial additional guidance (both the Topical Guidelines of Reg. Guide 3.69 and the License Application Review Plan, NUREG-1804, each discussed *supra*). Both make clear the close nexus between DOE's articulation of all the many component parts of the LA and its meeting its regulatory obligations. Clearly, documents created by DOE to establish its adherence to the criteria of the Topical Guidelines of Reg. Guide 3.69, to those of the License Application Review Plan (NUREG-1804), and to the provisions of 10 C.F.R. 63, are all documents prepared by DOE in the normal course of its business to meet regulatory requirements and are not subject to protection under a claim of work-product privilege. The only document which DOE might create in connection with Yucca which could qualify for that privilege would be one which *would not have been* created in response to

regulatory requirements. That characterization cannot credibly be asserted with respect to the Draft LA.

D. DOE's Refusal to Produce Any Part of the Draft LA is Violative of Basic FOIA Principles, Even if It Were Privileged (Which It is Not)

As the Board made clear in its January 25, 2005 First Case Management Order (p. 3), the scope of privileges and exemptions from disclosure to be observed in this proceeding are those mandated by NRC regulation 10 C.F.R. §§ 2.1006(a) and 2.390 and derived from the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552. At the same time, the Board observed that, even if claims of privilege and disagreements with those assertions would inevitably occur in this proceeding, they must not be permitted to delay it because “A full and fair 6-month document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within three years.” *See* Apr. 19, 2005 Memorandum, at 2.

i. DOE Failed to Conduct the Public-Interest Test Mandated by Its Own Regulations

Even if a document requested from DOE in discovery *were* privileged, it would not automatically be withheld from the requestor, under DOE's own regulations. Pursuant to 10 C.F.R. § 1004.1, “To the extent permitted by other laws, the DOE will make records available *which it is authorized to withhold* under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.” (Emphasis added.) This is in accord with judicial interpretation of FOIA. FOIA has been uniformly interpreted by courts, including the D.C. Circuit, to require a balancing test between the public interest weighing in favor of disclosure on the one hand, and possible harm to the agency resulting from its disclosure on the other. DOE

has failed even to consider the public interest or perform such a balancing test in its Refusal Letter.

In *Mead Data Central, Inc. v. U.S. Department of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977), the rationale for requiring agencies to conduct this balancing test in a FOIA response was aptly explained:

Congress has encouraged the agencies to disclose exempt material which there is no compelling reason for withholding, and an agency's own balancing of the resource costs of justifying non-disclosure against the value of secrecy may provide a rough estimate of how compelling is its reason for withholding.

Were DOE to entertain a balancing between the interest of Nevada and the public in having access to its Draft LA, on the one hand, and the putative harm to the agency threatened by such disclosure, there would be no serious contest. Indeed, there is no conceivable harm that could come to DOE from disclosing its Draft LA. But substantial prejudice will occur to Nevada and other participants, and the general public, if the first glance they see of DOE's LA is the final product, which, under DOE's strategy, would not be made available until more than six months after DOE's LSN certification.

The Yucca Mountain Repository is a monumental, first-of-its-kind undertaking, potentially impacting the health and safety of millions of citizens, both in Nevada and along transportation routes throughout the United States. DOE's analyses of the Yucca site, and its complex scientific studies and policy decisions, should be open for all to see. The entire process should be transparent, to borrow a word DOE uses frequently in public relations but declines to implement in practice.

While the final LA may contain some differences, the overwhelming majority of information contained in the Draft LA, the product of 15 years of DOE's site characterization and scientific analysis, will likely remain the same. Or, in cases where it does not, there is great

public interest in knowing why not.⁴ On the other hand, there is no conceivable public interest attached to DOE's withholding the Draft LA from the repository's host state and the general public. Indeed, Nevada's wishes to provide that key document to its team of highly-qualified scientific and technical experts so they may begin the lengthy process of studying and analyzing the LA, enabling Nevada to participate competently in the Yucca licensing proceeding. This activity is squarely in the public interest.

Had DOE been doing its job up to now, and living up to the letter and spirit of the NWPA, it would have applauded and encouraged the goal of a public, transparent, *credible* proceeding, including independent, expert scrutiny of its proposal for nuclear waste disposal. This proceeding is not a civil suit for money damages, where two commercial enterprises may employ any legal tactic at their disposal with the sole objective of winning. No party to this proceeding will win or lose. Rather, this proceeding is, in the purest sense, a search for the truth regarding a complex scientific undertaking, a quest to assure the health and safety of American citizens. *Each* of the parties to this proceeding ought to embrace those goals. Yet, DOE has devoted the bulk of its effort in this proceeding to refusing, limiting, or delaying public access to information about the Yucca project.

ii. DOE Failed to Implement Segregation of Non-Privileged Information, as Mandated by FOIA

⁴ EPA has announced that it will commence rulemaking this summer to develop a new primary radiation protection standard for the repository, responding to the D.C. Circuit's invalidation of EPA's original standard in 40 C.F.R. Part 197. EPA has informed Nevada that it is unlikely to adopt a new standard in which the previous dose limit, 15 millirems/year, is simply extended out to the time of peak dose, whenever that may occur. EPA claims it cannot adopt that simple resolution, which would conform in all respects to the D.C. Circuit's instructions and to the National Academy of Sciences' recommendations, because DOE has apprised EPA that "uncertainty" in performance modeling beyond 10,000 years makes it impossible or impracticable to model compliance to such a limit over longer time periods. DOE's Draft LA would answer the question as to whether DOE's representation in this regard is credible. Thus, the Draft LA is critical to the public interest for EPA's proceeding as well as for NRC's. Given EPA's anticipated accelerated rulemaking schedule, the timing of such production is also critical.

Even if the Draft LA is exempt from disclosure under FOIA, and even if a balancing test were appropriately conducted and DOE had concluded that disclosure would be harmful to the agency, there is yet another provision that DOE has ignored in its blanket denial of the requested Draft LA. Specifically, FOIA Section 552(b) provides that, “Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” By the very nature of the 5,000-page Draft LA, and the component technical topics addressed therein (presumably in accordance with NUREG-1804 and Reg. Guide 3.69), the vast majority of the Draft LA would set out the factual information and details of the analysis and tests done over a period of 15 years of site characterization and repository design activities at Yucca, all of it *non-privileged*, and all of it *segregable and producible* by DOE. It would strain credulity for DOE to suggest that, in more than 5,000 pages it refuses to produce, there is contained no nonexempt information. DOE should have considered any withheld material in the Draft LA under the standard set forth in FOIA Section 552(b). There is no indication that DOE has done so.

In *Mead*, the agency at least made a weak effort at explaining its non-segregation, an effort DOE has not even attempted here. Yet, the court concluded, “We also hold that the Air Force did not adequately justify its claim that there was no non-exempt information which was reasonably segregable, and direct that agency segregability decisions be accompanied by adequate descriptions of the documents' content and articulate the reasons behind the agency's conclusion.” 566 F.2d at 248. The court added, “The focus of the FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material. It has long been a rule in this Circuit that non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.

In 1974, Congress expressly incorporated that requirement into the FOIA, which now states that 'Any reasonably segregable portion of a record shall be provided . . . after deletion of the portions which are exempt.' 5 U.S.C. § 552(b) (Supp. V 1975)." *Id.* at 259-60.

V. **CONCLUSION**

The PAPO Board should order DOE to disclose the Draft LA on or before the date of its initial LSN certification.

Respectfully submitted,



Martin G. Malsch
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Attorneys for the State of Nevada

June 6, 2005

EXHIBIT

NO. 1

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May 19, 2005

VIA FACSIMILE (804) 788-8218

Donald P. Irwin, Esq.
Hunton & Williams
Riverfront Plaza / East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Re: Draft License Application

Dear Don:

In accordance with the discussions at the hearing before the PAPO yesterday, May 18, 2005, I request DOE to provide the State of Nevada with a copy of the 2004 draft license application ("LA") for the Yucca Mountain geologic repository. As indicated at the hearing, the draft LA being requested is the one provided by BSC to OCRWM in July of 2004.

Sincerely,



Martin G. Malsch

EXHIBIT
NO. 2



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FILE NO: 65007.000002

May 23, 2005

Via Fax and First Class Mail

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Egan, Fitzpatrick, Malsch & Cynkar, PLLC
The American Center at Tysons Corner
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Vienna, Virginia 22182

Fax: 703/891-4055

Request for draft License Application

Dear Marty:

This responds to your letter of May 19, 2005, requesting a copy of a draft Yucca Mountain License Application ("LA"), provided to the Department of Energy (DOE) by its contractor, BSC, in July 2004. Per the discussion at the May 18, 2005 hearing before the PAPO Board, DOE understands that the State of Nevada contends that production of this draft to the LSN is required as part of a valid LSN certification. DOE disagrees with Nevada's contention and, for the reasons outlined below, denies the request. DOE believes that NRC regulations do not require DOE to produce drafts of the LA on the Licensing Support Network (LSN), either at the time of DOE's initial certification under 10 C.F.R. §§ 2.1003 and 2.1009 or at any other time, for the fundamental reason that drafts of the LA are not documentary material. They also are privileged documents not required to be included on the LSN even if the LA draft were determined to be documentary material. The following four points provide the main bases for DOE's position, in response to the State's May 19 request.

First, DOE's production obligation with respect to "basic licensing documents," which includes the LA, is governed by 10 C.F.R. § 2.1003(b). That regulation distinguishes certain "basic licensing documents" DOE (and NRC) eventually must produce on the LSN, and treats them distinctly from "documentary material," which is treated under § 2.1003(a). Absent from the treatment of "basic licensing documents" is any reference to drafts. The absence of any obligation to produce such drafts makes sense since it is the license application as filed "that is at issue in [NRC] adjudications." *In re Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), 1999 NRC LEXIS 52 *20-21 (April 15, 1999) (quoting *In re Baltimore Gas & Electric Co.* (Calvert

HUNTON WILLIAMS

Martin G. Malsch, Esq.

May 23, 2005

Page 2

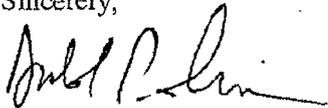
Cliffs Nuclear Power Plant, Units 1 and 2), 428 N.R.C. 325, 350, 1998 NRC LEXIS 93 (Dec. 23, 1998)).

Second, LA drafts do not constitute "documentary material" required to be produced under 10 C.F.R. § 2.1003(a). The "documentary material" required to be made available on the LSN is the underlying "information" that DOE intends to cite or rely on in support of its positions or that does not support those positions. 10 C.F.R. § 2.1001 (definition of "documentary material"). The LA does not fit that bill. The LA cites and relies on the "information" that constitutes the documentary material, but the application itself is not documentary material.

Third, § 2.1003(a) expressly excludes preliminary drafts from the LSN even if such drafts otherwise would constitute documentary material. The requested draft was a preliminary draft. In fact, it was the first complete draft of the license application. It was intended for, and received, working-level review at DOE before being sent back, as anticipated, for revision. It was not being circulated at DOE for management concurrence or signature and, perforce, it received no non-concurrences. DOE, therefore, would not have to produce the draft as a circulated draft even if it otherwise constituted documentary material.

Finally, the draft is protected against disclosure by the litigation work product and deliberative process privileges. Under 10 C.F.R. § 2.1003(a)(3), DOE is not required to produce copies of privileged documents even if they constitute documentary material. Indeed, DOE is entitled to protect drafts of litigation work product that constitute a "circulated draft." The obligation to produce "circulated drafts" is limited to documentary material within the scope of the deliberative process privilege only. If documentary material is protected by a privilege other than the deliberative process privilege, such as the work-product privilege, it remains privileged.

Sincerely,



Donald P. Irwin

EXHIBIT
NO. 3

INTEROFFICEMEMORANDUM Date: 08-Jan-1993 01:25pm PDT
 From: DAN GRASER GRASERD@A1@OCRWM Dept: DOE Tel No: (202)586-4589 TO:
 See Below Subject: RE: DRAFTS VS PRELIMINARY DRAFTS Linda, et al:

(Well, my mother never told me that life was going to be easy...
 You have described for us a situation where a "draft" with a comment
 sheet is distributed to each reviewer.

I'm presuming that these reviewers are all internal to your
 organization, right?

Unless there is some sort of written, procedural explanation of how you
 are treating this, in reality, as a preliminary draft, I think what you
 have here, effectively, is something that is quacking just like the
 duck that HQ and the rule calls a circulated draft.

What you have is a situation where a "draft" cannot be moved forward
 unless and until all comments from the comment sheets have been
 resolved.

This has the exact effect of being a non-concurrence.

Without resolution, the document goes nowhere and begins to resemble "a
 document that does not become a final document due to [effectively) a
 decision not to finalize." The inability to resolve the comment
 (non-concurring) has the true effect of killing its release, doesn't
 it?

Since you don't have what we consider to be a formal concurrence chop
 chain, your current procedure is doing exactly the same job as our
 formal-review-for concurrence chain is doing.

Furthermore, since you don't have a formal concurrence, you have
 inverted the formal concurrence process.

By this, we mean that this review sheet is your only concurrence
 vehicle or environment -- otherwise it looks like you are always
 jumping right from "preliminary draft" into a final,
 by-definition-fully-concurred, product.

Additionally, the comment sheets you do have look like they are really
 at risk, as it is.

In your description of the process, you say that the resolved comment
 sheets are attached to the author's draft document and filed (manually,
 I presume) in the document control center until the document is
 superceded in total.

Then what?

I suspect that the answer is that they are trashed? (Per RIDS? that we
 don't have now, or is still yet to be?) To answer your question about
 whether we have been screwing up or not by not submitting these drafts,
 I can only suggest that TIMA has it's work cut out.

In your own self-assessment, do you think it is quacking or not?

I think there needs to be more discussion, because as you say, there is
 a lot of grey area out there.

Barbara's comment is "yeah, now what do we do with it?" Like I said at
 the start, maybe your procedures cover it somewhat, because procedures
 are what we

10EH 001005 468



get audited against, but the procedure, if wrong, becomes a weak
 defense and leaves us unable to recover what was lost while following
 it.

Have a nice weekend.

Records.

Distribution: TO: Kristina L. Limon CC: DAN GRASER CC: Jan Statler CC:
 Carol A. Rixford CC: Linda J. Lee CC: gandij@am@ymvc CC: Peggy Warner I
 hope to be phone connected Monday & Tues into the (LIMON AT AI AT YMVC
) (GRASER AT AI AT HQV1) (STATLER AT AI AT YMVC) (RIXFORDC AT AI
 AT YMVC) (LEEL AT AI AT YMVC) (WARNER AT AI AT YMVC)

EXHIBIT
NO. 4

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

SPRING MEETING

May 13, 2003

The Watergate Hotel
2650 Virginia Avenue, N.W.
Washington, DC 20037

1 there will still be questions after today's presentations,
2 but I'm hoping this integrated approach will begin to provide
3 the logic, explanations, and the assumptions for the
4 evolution of the near field environment.

5 As I said previously, our priority is to submit a
6 high quality license application by December '04. I want to
7 emphasize the importance also on the ongoing science in our
8 program. Mark Peters will provide an update on the ongoing
9 testing program tomorrow. The performance confirmation
10 program will continue throughout the preclosure period, and
11 it will be a condition of the NRC license. Detailed planning
12 for this program is ongoing, and we stand ready to provide
13 updates to the Board in the future meetings.

14 You are well aware of my commitment to a long-term
15 science and technology program. We're making good progress
16 in developing the science and technology program. You will
17 hear more on this topic from Bob Budnitz tomorrow. The Board
18 has previously noted the challenges we face in working within
19 a very constrained budget environment, in which trade-offs
20 and reductions must be made somewhere.

21 While we are focused on the preparation of the
22 license application, I recognize, and in my congressional
23 testimony, I have stressed the importance of providing
24 adequate support for all of the pieces of the puzzle that we
25 need to come together, including transportation, science,

1 In each of these areas when we say complete, it includes not
2 just the technical assumptions and the planning, but also the
3 appropriate level of quality required. And then, also, we
4 have a weighting for each of those areas, anywhere from 10 to
5 30 per cent. And, right now, our assessment is 16 per cent
6 complete on the license application that we're targeting for
7 December of '04.

8 If you move into the next graphic, and this will
9 have some colors. Across the whole business, everybody has a
10 different way to grade this. But, green means everything is
11 on schedule, within the right cost categories, no major
12 variances, and also technical aspects are working very well.
13 Yellow means that there are some concerns, but they are
14 resolvable, and you can get back into the green with proper
15 management emphasis. Red is not a failure mode. It means a
16 lot of management attention is required. There's either a
17 significant cost schedule, and most of these cases I'm
18 presenting, it's a combination of cost and technical issues.

19 I just want to talk on a few of these here. Time
20 won't permit me to cover all these, but I just want you to
21 know that I applaud our Department of Energy and Bechtel
22 managers, because I think they've done an honest assessment
23 of what's working well and what's not working well right now.
24 And I just want to cover a few areas. On your left there,
25 if you go into Commitment Management at the bottom of the

EXHIBIT
NO. 5

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

FALL 2003 BOARD MEETING

September 16, 2003

Longstreet Inn
Amargosa Valley, Nevada 89020

1 full Senate has not voted yet--I heard they're supposed to be
2 voting this week--the committee mark is only \$425 million. I
3 hope that the House and the Senate will go to conference very
4 soon so we will know what the budget will be.

5 After this fiscal year, 03's, \$134 million
6 shortfall, it is extremely critical that we secure sufficient
7 funding FY04 to complete the technical work required for the
8 license application and perform other essential work.

9 Our key goal for our Program remains the same, that
10 is, to begin receiving waste at a licensed Yucca Mountain
11 repository in 2010. To achieve this goal, the program must
12 apply for a license, secure a construction authorization,
13 build the repository and the surface facilities for initial
14 operations, receive a license to operate a repository, and
15 develop a transportation system to ship waste from civilian
16 and defense storage sites to Yucca Mountain. The timeline
17 for all these actions is very, very tight, as you know, but I
18 believe it is achievable, given sufficient funding.

19 We are working toward our near-term target:
20 production of a high-quality license application in December
21 2004. This depends on completion of the remaining technical,
22 scientific, and design work, validation of that work through
23 quality assurance, and compilation of the application itself.
24 We plan to submit a license application that meets not only
25 NRC's regulatory requirements, but also our own high

1 be better described or presented within the context of the
2 analysis or model.

3 The actual schedule for developing the TSPA goes
4 from now through essentially the end of this calendar year.
5 It then goes through its own check and review process before
6 the actual TSPA calculations are conducted, which is next
7 February and March, and documented then in April and May.
8 So, the documentation of the TSPA/LA for the license is
9 completed in the end of May of next year.

10 And, going back to the quality issue, if anything
11 changes with respect to any of those inputs between now and
12 then, it is always possible to re-evaluate and rechange and
13 rerun the actual calculations.

14 ABKOWITZ: Abkowitz, Board.

15 So, is it fair to say that the quality issue is
16 essentially subservient to the TSPA schedule as opposed to
17 the other way around?

18 ARTHUR: Absolutely not. I mean, the quality issue is
19 an equal priority to the schedule.

20 ABKOWITZ: So, then on the record, you are committed to
21 running your final TSPA only when you are totally satisfied
22 that the quality in all of the components to the TSPA have
23 passed, you know, a reasonable standard?

24 ARTHUR: That's the same commitment made to NRC in our
25 letter of May, that we're not going to submit a license

EXHIBIT
NO. 6

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

REPOSITORY DESIGN UPDATE
PANEL ON THE ENGINEERED SYSTEM

January 20, 2004

Crowne Plaza Hotel
4255 South Paradise Road
Las Vegas, Nevada 89109

1 Administration, and other DOE offices, as well as strong
2 contract management experience. His most recent position was
3 Deputy Manager of Nevada Operation Office here at Las Vegas.

4 Also, Dr. Russ Dyer was appointed as my Assistant
5 Deputy Director of Technical and Regulatory Programs. This
6 now allows Russ to focus on the critical defense in depth of
7 our license application; key scientific programs, and other
8 expertise required for a defensible license.

9 In the areas of program management, we were very
10 pleased, Margaret, myself, and all of our program members, of
11 the appropriations for this year, the \$580 million allocated
12 from Congress, of which \$404 million is associated with the
13 repository project. That's the design, the various
14 experimental programs, and the license activities, very
15 adequate funds available still to maintain our December '04
16 license submittal.

17 Areas of goals for this year with the license, we
18 have critical areas coming up would be license design
19 complete, and the preclosure safety analysis in the spring
20 time frame. And, then, if you move, this is on the upper
21 right, the total systems performance assessment, as well as
22 the license support network initial certification, and that's
23 a major goal. All the necessary documentation would be
24 certified in the June time frame, which would be six months
25 prior to license application submittal to NRC.

1 activities. The role of the S&T is not to fill in real or
2 perceived gaps or weaknesses in the technical basis for
3 licensing, but to look ahead and allow us better technologies
4 for the future.

5 I know I've had many discussions with Bob on areas
6 such as future technologies for underground mining. Various
7 types of technical areas, if it can apply, ultimately it will
8 be more efficient as we operate.

9 I'd like to now summarize. We've had a very busy
10 last year as we transitioned from over 20 years of science
11 and characterization with the repository in towards setting
12 the criteria for a license application, and trying to develop
13 the proper internal program culture to be conducive of an NRC
14 licensee.

15 2004 is going to be a very busy year. Again, we'll
16 continue our current emphasis on the programmatic and also
17 organizational improvements, continue to complete the
18 necessary documentation of all of our technical basis for
19 submittal of the license application, as well as certifying
20 the license support network in June of this year.

21 One of the key areas that I should have stated
22 earlier is we're in the process right now of developing the
23 internal management plan for the approval and review of the
24 actual license. That's going to be a very detailed document
25 with a lot of supporting documentations. I want to make sure

1 March/April time frame of this year.

2 As we set out the schedules, I always do look
3 ahead, and always felt that about March or April of this
4 year, once we look at where we are on the actual design and
5 preclosure safety analysis, and a few other data points, I'd
6 have a better estimate on the 12/04, and where we actually
7 stand. In fact, I think I mentioned that to the Board at one
8 of the earlier meetings.

9 Right now, I feel very comfortable. One of the
10 areas we're going to talk about a little, later we've been
11 looking at what our first phase of actual construction with
12 the repository would be. In fact, we had an independent team
13 in actually assisting us in a review last week on that. That
14 could cause some slight slippage in the surface design and
15 completion, but in talking with John Mitchell, my counterpart
16 at Bechtel, we feel we can still, because a lot of that is
17 bounded by previous work we've done, have that in the
18 license.

19 When you look at the actual license itself, and let
20 me try to frame it a different way. Right now, I'd say we're
21 in the preliminary draft stages. We're continuing to review
22 and make sure the quality is in as we go. Bechtel SAIC will
23 provide a draft license application to the Department of
24 Energy in July of this year, and then we allow that, again,
25 remaining six months to do the necessary reviews and changes.

1 And, finally, the commitment is that neither Margaret or
2 myself will allow that license to leave the Department of
3 Energy until we're satisfied we've met the necessary quality
4 requirements, and the legal and regulatory basis to submit it
5 to NRC.

6 LATANISION: Dan Bullen?

7 BULLEN: Bullen, Board.

8 Actually, just two quick questions. The first one
9 may well be out of your control, but you didn't comment at
10 all about the recent court rulings, or the recent court case,
11 it's not a ruling yet until maybe early summer, with respect
12 to the Regulatory time period of 10,000 years versus peak
13 dose, and how that might impact the license application
14 process.

15 ARTHUR: Well, first of all, I probably won't comment
16 because you will hear a lot of--there's many different
17 interpretations as we have people in this room as to what
18 might come out of that. But last week was a very busy day in
19 court for the appeals court. They heard the consolidated
20 cases. It's anybody's guess on when that ruling might occur.

21 Obviously, there would be impacts to the project
22 should standards be remanded, or other changes. It's clear
23 to me that the license would have to change in a number of
24 other areas. So, again, I would just as soon wait and see
25 what comes out before we try to make guesses. But, it

EXHIBIT
NO. 7

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

2004 SPRING MEETING

Tuesday, May 18, 2004

Embassy Suites Hotel
1250 22nd Street, NW
Washington, DC 20037

1 meetings. This is out of our April monthly operating review.
2 Again, the license is being prepared in accordance with 10
3 CFR 63, as well as the Yucca Mountain Review Plan. Right
4 now, we estimate that we're at 68 per cent, and that's the
5 progress at the time we reported out in the meeting. It also
6 shows what I reported to you at the last meeting in January,
7 54 per cent weighted. I talked about before, so I'm not
8 going to repeat it today. I just want to emphasize a few
9 areas.

10 I'll talk in a few minutes about KTIs, Key
11 Technical Issues, but as far as the physical development of
12 the document, the license at 33 per cent, every day I'm
13 seeing new chapters, sections of the license coming through
14 in varying levels of detail. The goal is by the end of July,
15 to have all those chapters internal to the whole review
16 process within the Department of Energy.

17 The Preclosure Safety Assessment has advanced to 62
18 per cent, daily interface with the design, going back and
19 forth actually hourly, not just daily.

20 The design itself has progressed significantly to
21 79 per cent complete. And, again, when I say that, that's
22 not 79 per cent of the final design. That's the amount
23 that's necessary to support a license application.

24 I might state that the subsurface, as well as the
25 waste package design, for the license application is fully

1 complete, and the surface, as I'll talk about a little bit
2 later, is proceeding real well.

3 Current plans, we've talked in the past, the waste
4 package prototype, the procurement was awarded earlier this
5 year. We hope to have that prototype developed in June of
6 '05, and then integrate that in with the welding processes in
7 2006. So, that's moving along very well.

8 I want to next move to Key Technical Issues, since
9 that's an area of discussion. This is a summary chart right
10 out of our monthly operating review. Just at the bottom, a
11 summary that shows where they are in various stages as of the
12 end of April. Of the 293 Key Technical Issue agreements, 214
13 have been submitted to NRC, and 99, as of this time, have
14 been deemed complete by NRC. There's another 124, they're
15 either in review by NRC, or we've got to provide to them for
16 review.

17 The next area shows a little bit more of the
18 workloads ahead of us. This shows for March to the end of
19 August, our commitment is we would have all the Key Technical
20 Issues addressed prior to the license application submittal.
21 But, internally, we're trying to work that by September 1.
22 What this provides is a color coding that shows high, medium
23 and low risk as done by an NRC risk ranking. So, it shows
24 the workloads we've got to complete. We've submitted I
25 believe seven out of the eight, and we're trying to actually

1 documents.

2 As we relayed back to the NRC in a meeting just two
3 weeks ago, we take their findings very seriously. We have
4 since March, started an integrated effort in Las Vegas to
5 actually take a look at all of the AMRs prior to putting them
6 into TSPA. And, this really shows some of the challenges,
7 because out of about 188 documents, we had well over 90
8 different authors located at five different institutions in
9 different geographical locations around the U.S. For the
10 final production of this license, that's all being done by a
11 team in Las Vegas.

12 If I could move to the next slide, please? This is
13 what we've called our Regulatory Integration Team, the
14 centralized production of the license as it relates to
15 analysis and modeling reports. We'll all go through this
16 team. It brings together nine different teams of some of our
17 best throughout the national labs, as well as Bechtel SAIC
18 and other offices from Quality, Engineering, Project Controls
19 and Operations under a single project manager to make sure
20 each analysis and modeling report goes through the same level
21 of review.

22 Some of the areas we're looking at in this team is
23 the technical accuracy and validity of models and analysis,
24 traceability of inputs and outputs among the models and
25 analysis, considering the integration across and among AMRs,

1 taking a look at each one for the appropriateness of
2 assumptions and consistency between each AMR. So, it's a
3 very detailed look to ensure that all of those are done
4 consistently. Some are data models and software utilization.
5 It's a very intensive effort.

6 The four step process will be completed by the end
7 of May. Our teams have been working on this since late
8 March, and I'm pleased to say that they're finding some of
9 the similar areas that the Nuclear Regulatory Commission
10 found. They'll come up with an action plan, and then what
11 will happen, we've already started on that, the analysis and
12 modeling reports will be revised between now and the middle
13 of August, and then fully utilized for the TSPA.

14 So, that's just a summary. We are going to respond
15 back to the Nuclear Regulatory Commission within two weeks
16 with our response to their report. It reflects some of these
17 processes, and I have high confidence it just won't be
18 technically sufficient, each of those AMRs, but it will have
19 the same level of quality and transparency on each one.

20 I want to now transition into another phase. Many
21 meetings before, I know Mark and others have asked me about
22 my confidence in the Quality Assurance, is there competition
23 between schedule and quality, and where do we stand in the
24 project. And, I feel we've made very good strides. We still
25 have issues, challenges ahead, which I'll talk about. But,

EXHIBIT
NO. 8

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

FALL MEETING

September 20, 2004

Atrium Suites Hotel
4255 South Paradise
Las Vegas, Nevada 89109

1 HORNBERGER: Margaret, I notice you didn't say anything
2 about some recent developments, such as the court's decision.
3 Could you comment on how that might influence your program
4 schedule?

5 CHU: I'm sure you're aware that, you know, EPA recently
6 announced that they're not going to appeal to the 10,000 year
7 ruling, and they are developing regulatory approach to
8 address that ruling. And, then, our role here, you know,
9 we're here to follow, our job is to follow the applicable
10 laws and regulations. And, so, we have to wait and see
11 what's coming down.

12 GARRICK: Mark?

13 ABKOWITZ: I'm Abkowitz, Board. If I could follow up,
14 Margaret, on George's question and your answer? Is it still
15 your intention, DOE's intention, to submit the license
16 application in December? And, if so, what target are you
17 shooting your Performance Assessment around, since we don't
18 know what the target is at this point in time?

19 CHU: Yes, we continue to prepare our license
20 application at full speed, you can hear from John Arthur
21 later on, according to our current schedule. This is what
22 we're doing right now, and we believe this will provide the
23 public information, address questions on the safety of the
24 repository. And, of course, our job is to follow the
25 applicable laws and regulations.

1 So, while we're doing that, and I believe it's best
2 for us to put everything down, you know, because there's 20
3 years of scientific work, that's what we're doing, and
4 preparing a high quality license application according to
5 what we have right now. And, we will submit when it's time
6 to submit, let me put it this way. But, the schedule is
7 still on.

8 GARRICK: Richard?

9 PARIZEK: Parizek, Board, Margaret. Let me ask with
10 regard to the long-term option that maybe the 10,000 year
11 standard wouldn't apply, and then, of course, you don't know
12 what the outcome of this will be. But, meantime, to sort of
13 prepare for the alternatives, obviously, water is a key to
14 this whole performance question, and I'm not sure where DOE
15 stands now with regard to ventilation, that is, the passive
16 post-closure ventilation, whether to enhance it or to
17 engineer it in such a way that you have a passive ventilation
18 as a way to control moisture. And, as a citizen/consultant,
19 I would say that the long-term future, if the mountain is
20 dry, then all of the analog examples that the U.S. Geological
21 Survey and others have shown over the years of the stability,
22 long-term survivability of artifacts that are delicate by
23 comparison to waste packages, would apply. So, it seems to
24 me that the passive ventilation upgrade is something that
25 could appear in the science technology area, if it isn't in

1 standard. There's been a lot of good work. A lot of our
2 emphasis right now is drawing that work to conclusions. We
3 think it's very important, because even though the standard
4 is vacated, there was work geared towards that. But, in
5 doing those reviews, we're looking out past the 10,000 year
6 period.

7 Now, this is a chart I believe I've shown in the
8 past. Again, it's not June of '04, it's June of '03. So, on
9 the right there, you have June of '03, where we were on
10 performance and where we are right now in our planning. Key
11 Technical Issue Agreements, I'm going to talk a little bit
12 more specifically about their purpose later, but it's through
13 July, and this date is through right out of my monthly
14 operating reviews, through July of this year, we were at 94
15 percent complete. However, we addressed and transmitted to
16 NRC the last of those agreements on August 31st, therefore,
17 it was a major accomplishment. We're now 100 percent
18 complete, at least on addressing those Key Technical Issues
19 over to the Nuclear Regulatory Commission. More later on
20 those.

21 The document itself is the physical preparation of
22 the license, it's the chapters, and as I'll talk later, it
23 includes sections and subsections, it pretty well tracks
24 right against the Yucca Mountain Review Plan prepared by the
25 Nuclear Regulatory Commission. So, there's about 70

1 sections, or subsections in the license. So, as far as
2 percent complete, we're at 76 percent right now.

3 Preclosure Safety Assessment, lagged behind
4 significantly for a while because of design. We made some
5 changes in our design back about eight months ago. Rick
6 Craun, I think we briefed some of that at the Amargosa Valley
7 meeting some time ago, but we'll talk more on that today.
8 Right now in Preclosure Safety Assessment, we're about 89
9 percent.

10 The Long-Term Safety Assessment, Total System
11 Performance Assessment, right now at 81 percent. Now, that's
12 being held flat for a critical reason. As I'll talk a little
13 bit later, below the TSPA, and really the foundation of the
14 license application are analysis and model reports. That's
15 where a lot of the science is concluded. There's 90 of those
16 key documents which will all be completed during the month of
17 October. So, at the time those are completed, you'll see
18 TSPA go to 100 percent, and that's the runs against the
19 compliance cases.

20 Design itself now, and, again, that's 90 percent of
21 that amount we feel is required to support the safety
22 analysis and the license. Overall design space would be
23 about 10 percent to 12 percent of final design.

24 Overall total weight complete at the end of July
25 was about 85 percent. One of the areas I've mentioned,

1 myself and a number of our senior managers have been spending
2 continuously over the last three weeks, and it will complete
3 in the next week and a half, the full review, integrated
4 review of every section of that license of the 70
5 subsections. With that, there will still need to be a lot of
6 editing, cross-references, all the necessary integration to
7 bring that together. Consistency reviews are underway right
8 now.

9 A couple other areas that go along with this,
10 though, is a lot more than just the license. A lot of
11 agreements are needed to support that. We're in the process
12 of discussions with the Air Force here on the Nevada Test
13 Range to make sure in time, we have the necessary
14 requirements and restrictions for air flight in the direct
15 area of the repository, which would have to be in place prior
16 to construction authorization and license by NRC.

17 Also, another major effort underway right now is
18 the environmental analysis in order that the time the license
19 goes over, we can submit our environmental analysis so that
20 the Nuclear Regulatory Commission can adopt our final EIS
21 that we did at the time of site recommendation. So, there's
22 a lot of parallel activities going on in addition to the
23 license.

24 Let me talk now, if I can, on the next one. Key
25 Technical Issues, this is a summary our people maintained in

EXHIBIT
NO. 9

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DOE revises Yucca schedule

Application won't be submitted by Dec. 31

By STEVE TETREULT
STEPHENS WASHINGTON BUREAU

WASHINGTON -- Still working out segments of an elaborate licensing plan, the Energy Department said Monday it will not meet its schedule to apply by the end of the year for approval to build a Nevada nuclear waste repository.

"We are revising our original goals," said Margaret Chu, director of DOE's Office of Civilian Radioactive Waste Management.

Chu did not specify when the department would complete a 5,800-page license application to be judged by the Nuclear Regulatory Commission for the Yucca Mountain Project. But she and other DOE executives indicated at a meeting with NRC officials it could be mid-2005 or later.

The NRC might begin a multi-year review late in 2005, but that could change as well depending on government progress to set new radiation safety standards for the nuclear waste burial complex.

John Arthur, Yucca Mountain deputy director, said he could not say whether the licensing delay will cause DOE to push back its 2010 goal ultimately to have a repository operating and accepting nuclear waste.

"We do not anticipate significant delays," Chu said. "We remain focused on implementing the nation's policy for nuclear waste management."

DOE's announcement had been anticipated for weeks by industry and state officials and members of Congress. Officials had been reassessing the schedule since legal and administrative rulings this summer set back the program.

"We're disappointed but at the same time we understand why they made the decision," said Mitch Singer, a Nuclear Energy Institute spokesman. "They want to file the best license application they can and they want to take a little more time to do that."

Sen. Harry Reid, D-Nev., believes the delay illustrates DOE disorganization, spokeswoman Tessa Hafen said. "It comes as no surprise to anyone the project is fraught with mistakes," Hafen said.

The schedule change carries ramifications for Bechtel-SAIC, the project's managing contractor that employs 1,444 workers, mostly in Southern Nevada. It throws into question a \$15.2 million DOE payment to Bechtel tied to finalizing a license application by Nov. 30, and a \$22 million award the

company would receive if NRC docketed an application by March 2005.

Arthur said the Bechtel-SAIC contract was being reviewed.

"With the changes that have happened and other factors, some of them external, we are having to sit down and look at the fee structure," Arthur said. Bechtel "will get paid, it is just how much and in what time frame."

Bob Loux, executive director of Nevada's Agency for Nuclear Projects, said it would be wrong if Bechtel-SAIC were to profit from Yucca Mountain slippage. "It doesn't make any difference if there were external factors to DOE or not," Loux said.

DOE officials also are weighing 2005 spending for Yucca Mountain that Congress passed over the weekend. The \$577 million budget is \$303 million less than what DOE requested for repository designs, to ramp up work on transportation segments and to begin preparing power plants to move spent fuel by the end of the decade.

Arthur said an undetermined number of workers will face layoffs as managers look to rebalance resources to focus on repository licensing and design issues.

Explaining the schedule change, Arthur said a September review of the 5,800 page license draft written by Bechtel-SAIC turned up areas that project managers want to strengthen before handing over to the Nuclear Regulatory Commission.

"To be blunt, we saw some things that we did that should have been done differently," said Joseph Ziegler, the project licensing director.

Arthur said uncertainty over radiation safety rules contributed to the delay. The Environmental Protection Agency is setting out to reformulate a radiation standard that was voided by a federal appeals court in July, but has not said when a new one would be proposed.

Michele Boyd, energy legislative director for the Public Citizen watchdog group, said "it is quite astonishing that DOE considers itself close to a high quality license application when the fundamental health regulations remain in flux."

Find this article at:

http://www.reviewjournal.com/lvrj_home/2004/Nov-23-Tue-2004/news/25329272.html

Check the box to include the list of links referenced in the article.

EXHIBIT
NO. 10

UNITED STATES

NUCLEAR WASTE TECHNICAL REVIEW BOARD

WINTER BOARD MEETING

February 9, 2005

Alexis Park Resort
Room Parthenon 2
375 E. Harmon Avenue
Las Vegas, Nevada 89109

1 the Department of Energy has a new Secretary, Dr. Sam Bodman,
2 a former Deputy Secretary of Treasury and previously, Deputy
3 Secretary of the Commerce. Was also formerly an Associate
4 Professor of Chemical Engineering at the MIT. And, of
5 course, he also has some very successful private experience.

6 Dr. Bodman was confirmed in the Senate on January
7 31st. Although he has been very busy in the first week or
8 two as the Secretary of Energy, he has taken an active
9 interest in the information that he received from our office
10 on the repository program. And, our office really looks
11 forward to working with him.

12 I'm personally especially excited about his
13 technical background, and I believe Dr. Bodman will be very
14 helpful to our program.

15 Now, let me turn to some of the key issues our
16 program is currently facing. You may remember that our
17 Management and Operating contractor, BSC, delivered the first
18 draft of the license application in July of 2004, and we
19 reviewed the draft intensively, and made many comments and
20 which were incorporated into our second draft, which was
21 delivered to us in November of 2004.

22 Shortly after that, we announced that we will be
23 revising our original goal of submitting the license
24 application in December of 2004. That's because several
25 events and circumstances necessitated this change in

1 schedule.

2 First, last July, the Court of Appeals, you know,
3 issued a decision invalidating the compliance period, that's
4 the 10,000 year period, in EPA's Yucca Mountain Radiation
5 Standard. And, in the second consideration, and, in fact, in
6 our time table, was a decision of the Nuclear Regulatory
7 Commission's Prelicensing Application Presiding Officer
8 Board, we call that the PAPO Board, to strike our
9 Department's certification from June of 2004 of the
10 availability of the documents through the Licensing Support
11 Network, that's the electronic web-based data base, millions
12 of documents.

13 So, since then, we have been reviewing and
14 processing additional documents in responding to the Board's
15 direction on the License Support Network. As you know, the
16 significance of that certification was that LSN must be
17 certified six months in advance of license application
18 submittal. We anticipated we'll be ready to certify again
19 somewhere in the middle of this year, in mid year, 2005.

20 Now, while these activities are ongoing, and we're
21 performing additional work to our draft license application,
22 and largely to enhance and refine the technical work, we
23 believe we have a draft license application that after
24 thorough cross-referencing, we believe that it complies with
25 the current requirements of 10 CFR 63, and the guidance in

1 the Yucca Mountain Review Plan.

2 One of the refinements that we're making is to
3 enhance some of our analysis by developing more realistic
4 models, input and technical basis. For example, we are
5 factoring in in the latest dosimetry signs from ICRP 72.
6 That's the latest, those conversion factors.

7 Similarly, we are refining some of the seismic
8 analysis, deliquescence and Neptunium solubilities, these are
9 examples, and John Arthur will provide more detailed
10 information on our ongoing license application work. Also, I
11 believe, one of the presentations will talk more in this
12 topic.

13 Now, our draft license application provides the
14 safety analysis from the preclosure period through 10,000
15 years after permanent closure. It is clear that any proposed
16 EPA rule will include a radiation standard for a period
17 beyond 10,000 years. That was the Board's decision. So,
18 now, we are also using this time to ensure that we will be
19 ready to perform analysis over extended time period beyond
20 10,000 years. And, we do not anticipate significant
21 scheduled delays for the license application, and we are
22 working very hard to complete a high quality license
23 application this calendar year, and we're committed to
24 submitting as soon as possible after we complete it. Of
25 course, some of the things are not totally up to me.

EXHIBIT
NO. 11



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August 4, 2004

Yucca Mountain contractor qualifies for \$11 million payment

By STEVE TETREULT
PVT WASHINGTON BUREAU

WASHINGTON - The management contractor for the Yucca Mountain nuclear waste repository qualified for an \$11 million incentive fee after handing over a draft license application last week, an Energy Department spokesman said.

Examiners must verify 5,000 pages of material submitted by Bechtel-SAIC Co., LLC before payment can be certified, said Allen Benson, spokesman for the Office of Repository Development.

The company qualified for an \$11,043,476 fee by meeting a July 26 target, Benson said. Incentives were negotiated within the firm's \$1.88 billion contract to manage the department's repository program.

In preparing its licensing draft, Bechtel-SAIC assumed a 10,000-year radiation health protections for the repository even though that standard was thrown out by a federal circuit court on July 9.

Benson said the Energy Department considers the standard still applicable until the court's mandate is finalized following an appeal period.

DOE officials say they want to file an application at the end of the year and retain the 10,000-year standard at least during initial license reviews by the Nuclear Regulatory Commission, although the NRC has not decided whether that will be allowed.

Bob Loux, executive director of the Nevada Agency for Nuclear Projects, criticized the Energy Department for authorizing a big contractor payout when the Yucca Mountain Project faces such uncertainties.

Loux, who coordinates the state's opposition to the repository, said the Yucca program is being driven by the promise of financial bonuses rather than by science.

"I think they shouldn't have gotten the money," Loux said of Bechtel-SAIC. "It's clear these folks will do anything for money. The idea they would hand in a draft with a standard they know will not stand just says it all."

A number of incentives were written into the Bechtel-SAIC contract, including a \$15.3 million fee for finalizing a repository application by Nov. 30 and a \$22 million payment if the NRC accepts the licensing package for formal review within 91 days after submittal.

Loux asked the Energy Department inspector general in May to examine the Yucca management contract for possible legal or ethical violations. A spokeswoman for inspector general Gregory

Friedman, contacted late Wednesday, said she could not immediately get information about the status of the request.

The draft licensing package contains the results of studies and technical analyses to detail the Energy Department's claim that 77,000 tons of highly radioactive nuclear waste can be secured within the mountain in close proximity to Pahrump, Amargosa Valley and Beatty.

Benson said the package will be reviewed to ensure it conforms to licensing guidelines set by the Nuclear Regulatory Commission before the payment is authorized.

Find this article at:

<http://www.pahrumpvalleytimes.com/2004/08/04/news/ymp.html>

Check the box to include the list of links referenced in the article.

EXHIBIT
NO. 12

**Yucca Mountain Project Summary Schedule
Milestone Description and Supporting Information**

PSS ID No: M2NE
PSS Title: YMSCO Initiates Review of Draft LA by OCRWM/DOE Offices

WBS Number: 1.2.5 **DECISION DOCUMENTATION REQUIRED - YES__NO__X_**
Product: License Application
Sub-Product:
Scheduled Date: 03/01/01
Milestone Level: M2

Milestone Description:

Submit the Draft LA to OCRWM and other DOE Offices for a QAP 6.2 staff review. This milestone will initiate the QAP 6.2 review by OCRWM/DOE Office staff (including: YMSCO, OCRWM, GC, CP, EM, etc.). The Draft LA will be prepared to be consistent with the then current revision of the Annotated Outline and guidance for the LA contained in the Technical Guidance Document for the Preparation of the LA and any additional guidance, as appropriate. The Draft LA will reflect resolution of comments received on the Working Draft LA.

Acceptance Method:

The milestone will be complete when the QAP 6.2 review by OCRWM/DOE has been initiated.

Key Predecessor Milestones:

M2NF – DOE Completes Review of WDLA

Key Successor Milestones:

M2NV – DOE Completes Staff Review of Draft LA

Supporting Level 3 Milestones:

- STR22M3 M&O submits site and programmatic chapters for OCRWM/DOE Review
- STR22AM3 M&O submits engineering and design chapters for OCRWM/DOE Review
- STR22BM3 M&O submits performance chapters for OCRWM/DOE Review

Additional Remarks:

The draft LA will consist of individual chapters, submitted for DOE review as completed. This will allow early DOE review as chapters are completed.

Author: A. Gil
Functional Manager: S.J. Brocoun
Functional Organization: OLARC
Change Request Date:
Change Request Number:

Functional Manager: _____ **Date:** _____

**Yucca Mountain Project Summary Schedule
Milestone Description and Supporting Information**

PSS ID No: M2NV
PSS Title: DOE Completes Staff Review of Draft LA

WBS Number: 1.2.5

DECISION DOCUMENTATION REQUIRED -

YES NO

Product: License Application

Scheduled Date: 11/15/01

Milestone Level: M2

Milestone Description:

The Draft LA will be consistent with applicable NRC requirements, the Technical Guidance Document, and any applicable DOE guidance. The review will include: a chapter review; interactive comment resolution; a revised document; verification of comment resolution; and consistency check. The milestone will be complete when the review comments have been resolved and a revised Draft LA has been prepared and accepted by the reviewers.

Acceptance Method:

Complete the QAP 6.2 staff review of the Draft LA by YMSCO, OCRWM, other DOE Offices, and the Navy.

Key Predecessor Milestones:

M2NE -- YMSCO Initiates Review of Draft LA by OCRWM/DOE Offices

Key Successor Milestones:

M2ND -- YMSCO Submits Draft LA for OCRWM Concurrence

Supporting Level 3 Milestones:

None

Additional Remarks:

Author: A. Gil

Functional Manager: S.J. Brocoum

Functional Organization: OLARC

Change Request Date: 2/25/98

Change Request Number:

**Functional
Manager:** _____

Date: _____

**Yucca Mountain Project Summary Schedule
Milestone Description and Supporting Information**

PSS ID No: M2NC
PSS Title: Complete OCRWM Project and Office Managers' Concurrence of LA

WBS Number: 1.2.5 **DECISION DOCUMENTATION REQUIRED -**
YES NO
Product: License Application
Scheduled Date: 01/10/02
Milestone Level: M2

Milestone Description:

Resolve comments by OCRWM Office and Project Managers and obtain their concurrence.

Acceptance Method:

This milestone will be complete when all concurrence comments by OCRWM Offices and Project Managers have been resolved and their concurrence on the draft LA has been documented.

Key Predecessor Milestones:

M2ND – YMSCO Submits Draft LA for OCRWM Concurrence

Key Successor Milestones:

M1KX – OCRWM Submits LA to DOE Offices for Concurrence

Supporting Level 3 Milestones:

N/A

Additional Remarks:

This milestone represents acceptance by YM Project Manager and other OCRWM Office Managers.

Author: A. Gil
Functional Manager: S.J. Brocoun
Functional Organization: OLARC
Change Request Date:
Change Request Number:

Functional Manager: _____ **Date:** _____

**Yucca Mountain Project Summary Schedule
Milestone Description and Supporting Information**

PSS ID No: M1NR
PSS Title: Complete DOE and Navy Concurrence of Draft LA

WBS Number: 1.2.5 **DECISION DOCUMENTATION REQUIRED -**
YES NO
Product: License Application
Scheduled Date: 01/31/02
Milestone Level: M1

Milestone Description:

Resolve comments by DOE offices and the Navy on Draft LA and obtain their concurrence.

Acceptance Method:

This milestone will be complete when all concurrence comments by appropriate DOE offices and the Navy have been resolved and their concurrence on the draft LA has been documented.

Key Predecessor Milestones:

M1KX – OCRWM Submits Draft LA to DOE Offices for Concurrence

Key Successor Milestones:

M2NA – YMSCO Submits LA to RW-1 for Acceptance

Supporting Level 3 Milestones:

N/A

Additional Remarks:

Author: A. Gil
Functional Manager: S.J. Brocoun
Functional Organization: OLARC
Change Request Date:
Change Request Number:

**Functional
Manager:** _____

Date: _____

**Yucca Mountain Project Summary Schedule
Milestone Description and Supporting Information**

PSS ID No: M2NA
PSS Title: YMSCO Submits LA to RW-1 for Acceptance

WBS Number: 1.2.5 **DECISION DOCUMENTATION REQUIRED -**
YES **NO** **X**
Product: License Application
Scheduled Date: 02/07/02
Milestone Level: M2

Milestone Description:

The LA is sent to RW-1 with required DOE concurrence for acceptance as complete and ready for transmittal to the Secretary.

Acceptance Method:

This milestone is complete when the final LA is submitted to RW-1 with required DOE concurrence for acceptance as complete and ready for submittal to the Secretary

Key Predecessor Milestones:

M1NR – Complete DOE and Navy Concurrence of Draft LA

Key Successor Milestones:

M1NB – Complete RW-1 Acceptance of LA

Supporting Level 3 Milestones:

None

Additional Remarks:

Author: A. Gil
Functional Manager: S.J. Brocum
Functional Organization: OLARC
Change Request Date:
Change Request Number:

Functional Manager: _____ **Date:** _____

Yucca Mountain Project Summary Schedule Milestone Description and Supporting Information

PSS ID No: MOAM
PSS Title: DOE Submits License Application to NRC

WBS Number: 1.2.5

DECISION DOCUMENTATION REQUIRED -

YES ___ NO ___ X ___

Product: License Application

Scheduled Date: 03/01/02

Milestone Level: M0

Milestone Description:

This Level 0 milestone will be complete when DOE provides 3 complete copies to the NRC Director of Nuclear Material Safety and Safeguards. DOE will retain 120 copies for distribution at the direction of the NRC Director, and will provide public access local to the proposed repository. This milestone will be complete when the required number of copies of the License Application and EIS have been delivered to the NRC as required by 10 CFR 60.22 (or 10 CFR 63.22 as appropriate) and NWPA.

Acceptance Method:

Return receipt verification of delivery of LA and EIS copies.

Key Predecessor Milestones:

MOAW - DOE Signs the LA

Key Successor Milestones:

TBD

Additional Remarks:

Old PSS ID No. R5182MD - 10/97

Author: A. Gil

Functional Manager: S.J. Brocoun

Functional Organization: OLARC

Change Request Date: 2/25/98

Change Request Number:

**Functional
Manager:** _____

Date: _____

EXHIBIT
NO. 13



REGULATORY GUIDE

OFFICE OF NUCLEAR REGULATORY RESEARCH

REGULATORY GUIDE 3.69

(Draft was issued as DG-3022)

TOPICAL GUIDELINES FOR THE LICENSING SUPPORT NETWORK

A. INTRODUCTION

Subpart J, "Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository" (10 CFR 2.1000 to 2.1027), of 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," sets forth procedures for an adjudicatory proceeding on the application for a license to receive and possess high-level radioactive waste at a geologic repository under 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories," or Part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada." Pursuant to these regulations, the Licensing Support Network (LSN), an electronic information management system, is being designed and implemented to provide for the entry of and access to relevant documentary material.

The requirements in 10 CFR 63.21 for a license application and the structure and content of the Yucca Mountain Review Plan (NUREG-1804), were considered in developing this regulatory guide. The principal purpose of the Yucca Mountain Review Plan is to ensure the quality, uniformity, and consistency of NRC staff reviews of the license application and any amendments. This regulatory guide defines the scope of documentary material that should be identified in or made available via the LSN. Topical guidelines were adopted by the U.S. Nuclear Regulatory Commission (NRC) as Regulatory Guide 3.69 in September 1996. This revision to the regulatory guide updates the topical guidelines consistent with the license application content specified in 10 CFR 63.21 and the content and structure of the Yucca Mountain Review Plan (NUREG-1804) and Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (NUREG-1748), and the U.S. Department of Energy Final Environmental Impact Statement for a Yucca Mountain repository.

Document is defined in 10 CFR 2.1001 as "any written, printed, recorded, magnetic, graphic matter, or other documentary material, regardless of form or characteristic." In addition, 10 CFR 2.1001 defines documentary material as:

Regulatory guides are issued to describe and make available to the public such information as methods acceptable to the NRC staff for implementing specific parts of the NRC's regulations, techniques used by the staff in evaluating specific problems or postulated accidents, and data needed by the NRC staff in its review of applications for permits and licenses. Regulatory guides are not substitutes for regulations, and compliance with them is not required. Methods and solutions different from those set out in the guides will be acceptable if they provide a basis for the findings requisite to the issuance or continuance of a permit or license by the Commission.

This guide was issued after consideration of comments received from the public. Comments and suggestions for improvements in these guides are encouraged at all times, and guides will be revised, as appropriate, to accommodate comments and to reflect new information or experience. Written comments may be submitted to the Rules and Directives Branch, ADM, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001.

Regulatory guides are issued in ten broad divisions: 1, Power Reactors; 2, Research and Test Reactors; 3, Fuels and Materials Facilities; 4, Environmental and Siting; 5, Materials and Plant Protection; 6, Products; 7, Transportation; 8, Occupational Health; 9, Antitrust and Financial Review; and 10, General.

Single copies of regulatory guides (which may be reproduced) may be obtained free of charge by writing the Distribution Services Section, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by fax to (301)415-2289, or by email to DISTRIBUTION@NRC.GOV. Electronic copies of this guide and other recently issued guides are available at NRC's home page at WWW.NRC.GOV through the Electronic Reading Room, Accession Number ML041770135.

(1) any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 or 63 of this chapter; (2) any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position; and (3) all reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related 'circulated drafts,' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

The forms of these materials are listed in Appendix A to this guide, a nonexhaustive list of types of documents that may be included in the LSN.

Regulatory guides are issued to describe to the public methods acceptable to the NRC staff for implementing specific parts of the NRC's regulations, to explain techniques used by the staff in evaluating specific problems or postulated accidents, and to provide guidance to applicants. Regulatory guides are not substitutes for regulations, and compliance with regulatory guides is not required. Regulatory guides are issued in draft form for public comment to involve the public in developing the regulatory positions. Draft regulatory guides have not received complete staff review; they therefore do not represent official NRC staff positions.

The information collections contained in this draft regulatory guide are covered by the requirements of 10 CFR Part 50, which were approved by the Office of Management and Budget (OMB), approval number 3150-3011. The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

B. DISCUSSION

PURPOSE OF THE REGULATORY GUIDE

The purpose of this regulatory guide is to provide a list of the topics (in Section C) of documentary material that LSN participants should identify (by bibliographic header only) or make available (by image or searchable full text) via the LSN under 10 CFR 2.1003. Participants in proceedings regarding the proposed issuance of construction authorizations and licenses for the receipt and possession of high-level radioactive waste at a geologic repository include parties, potential parties, and interested governmental participants. The topical guidelines are designed to be broad enough to encompass all potential licensing issues.

This regulatory guide provides the detailed topical index for LSN documentary material. It is not to be used to establish standing in the high-level waste licensing proceeding or to define the scope of contentions that may be proffered under 10 CFR 2.1014.

USE OF THE REGULATORY GUIDE

The regulatory guide is consistent with requirements for the content of a license application in 10 CFR 63.21 and with licensing information specified in the Yucca Mountain Review Plan (NUREG–1804). It is also consistent with Environmental Review Guidance for Licensing Actions Associated with NMSS Programs (NUREG–1748). The actual format of the documents submitted is not specified in this regulatory guide. Requirements regarding electronic formats of LSN documents are defined in 10 CFR 2.1011.

Section C of this regulatory guide lists the topics of documents to be identified in or made available via the LSN. Appendix A to this guide contains a nonexhaustive list of the types of documents to which the topical guidelines in Section C should be applied. Types of documents not included in Appendix A should also be identified in or made available via the LSN if they are relevant to a topic in Section C of this regulatory guide.

Because the topical guidelines of Section C have been kept broad and at a fairly high level of detail, the user should consider each topic to be inclusive rather than exclusive with regard to documents germane to that topic for the site. For example, much of the information that supports the licensing proceeding will be based on the use of methodologies, computer codes, and models. Such information should be made available via the LSN. The Yucca Mountain Review Plan (NUREG–1804), provides guidelines on, and 10 CFR 63.21 sets the requirements for, information that should be submitted in the license application. Section C of this regulatory guide is based, in part, on these provisions.

The topical guidelines also include subcategories for the “Information for a Geologic Repository Environmental Impact Statement.” This information should be made available via the LSN pursuant to 10 CFR 2.1003(b).

C. TOPICAL GUIDELINES

1. GENERAL INFORMATION
 - 1.1 General Description
 - 1.2 Proposed Schedules for Construction, Receipt, and Emplacement of Waste
 - 1.3 Physical Protection Plan
 - 1.4 Material Control and Accounting Program
 - 1.5 Description of Site Characterization Work

2. SAFETY ANALYSIS REPORT
 - 2.1 Repository Safety Before Permanent Closure
 - 2.1.1 Preclosure Safety Analysis
 - 2.1.1.1 Site Description as it Pertains to Preclosure Safety Analysis
 - 2.1.1.2 Description of Structures, Systems, Components, Equipment, and Operational Process Activities
 - 2.1.1.3 Identification of Hazards and Initiating Events
 - 2.1.1.4 Identification of Event Sequences
 - 2.1.1.5 Consequence Analyses
 - 2.1.1.5.1 Consequence Analysis Methodology and Demonstration that the Design Meets 10 CFR Parts 20 and 63 Numerical

- 2.2.1.4.3 Analysis of Repository Performance that Demonstrates Compliance with Separate Ground-Water Protection Standards
- 2.3 Research and Development Program To Resolve Safety Questions
- 2.4 Performance Confirmation Program
- 2.5 Administrative and Programmatic Requirements
 - 2.5.1 Quality Assurance Program
 - 2.5.2 Records, Reports, Tests, and Inspections
 - 2.5.3 Training and Certification of Personnel
 - 2.5.3.1 U.S. Department of Energy Organizational Structure as it Pertains to Construction and Operation of Geologic Repository Operations Area
 - 2.5.3.2 Key Positions Assigned Responsibility for Safety and Operations of Geologic Repository Operations Area
 - 2.5.3.3 Personnel Qualifications and Training Requirements
 - 2.5.4 Expert Elicitation
 - 2.5.5 Plans for Startup Activities and Testing
 - 2.5.6 Plans for Conduct of Normal Activities, Including Maintenance, Surveillance, and Periodic Testing
 - 2.5.7 Emergency Planning
 - 2.5.8 Controls To Restrict Access and Regulate Land Uses
 - 2.5.9 Uses of Geologic Repository Operations Area for Purposes Other Than Disposal of Radioactive Wastes
 - 2.5.10 License Specifications
- 3 INFORMATION FOR A GEOLOGIC REPOSITORY ENVIRONMENTAL IMPACT STATEMENT
 - 3.1 Purpose and Need for Proposed Agency Action
 - 3.1.1 Potential Actions and Decisions Regarding the Proposed Repository
 - 3.1.2 Radioactive Materials Considered for Disposal in a Monitored Geologic Repository
 - 3.1.3 National Effort To Manage Spent Nuclear Fuel and High-Level Radioactive Waste
 - 3.1.4 Yucca Mountain Site and Proposed Repository
 - 3.1.5 Environmental Impact Analysis Process
 - 3.2 Proposed Action and No-Action Alternative
 - 3.2.1 Proposed Action
 - 3.2.2 No-Action Alternative
 - 3.2.3 Alternatives Considered but Eliminated from Detailed Study
 - 3.2.4 Summary of Findings and Comparison of the Proposed Action and the No-Action Alternative
 - 3.2.5 Collection of Information and Analyses
 - 3.2.6 Preferred Alternative
 - 3.3 Affected Environment
 - 3.3.1 Affected Environment at the Yucca Mountain Repository Site at the Conclusion of Site Characterization Activities
 - 3.3.2 Affected Environment Related to Transportation
 - 3.3.3 Affected Environment at Commercial and DOE Sites
 - 3.4 Environmental Consequences of Repository Construction, Operation and Monitoring, and Closure
 - 3.4.1 Short-Term Environmental Impacts of Performance Confirmation, Construction, Operation and Monitoring, and Closure of a Repository

- 3.4.2 Short-Term Environmental Impacts from the Implementation of a Retrieval Contingency or Receipt Prior to the Start of Emplacement
- 3.5 Environmental Consequences of Long-Term Repository Performance
 - 3.5.1 Inventory for Performance Calculations
 - 3.5.2 System Overview
 - 3.5.3 Locations for Impact Estimates
 - 3.5.4 Waterborne Radiological Consequences
 - 3.5.5 Atmospheric Radiological Consequences
 - 3.5.6 Consequences from Chemically Toxic Materials
 - 3.5.7 Consequences from Disruptive Events
 - 3.5.8 Nuclear Criticality
 - 3.5.9 Consequences to Biological Resources and Soils
- 3.6 Environmental Impacts of Transportation
 - 3.6.1 Summary of Impacts of Transportation
 - 3.6.2 National Transportation
 - 3.6.3 Nevada Transportation
- 3.7 Environmental Impacts of the No-Action Alternative
 - 3.7.1 Short-Term Impacts in the Yucca Mountain Vicinity
 - 3.7.2 Commercial and DOE Sites
 - 3.7.3 Cumulative Impacts for the No-Action Alternative
- 3.8 Cumulative Impacts
 - 3.8.1 Past, Present, and Reasonably Foreseeable Future Actions
 - 3.8.2 Cumulative Short-Term Impacts in the Proposed Yucca Mountain Repository Region
 - 3.8.3 Cumulative Long-Term Impacts in the Proposed Yucca Mountain Repository Vicinity
 - 3.8.4 Cumulative Transportation Impacts
 - 3.8.5 Cumulative Manufacturing Impacts
- 3.9 Management Actions To Mitigate Potential Adverse Environmental Impacts
 - 3.9.1 Types of Management Actions
 - 3.9.2 Yucca Mountain Repository
 - 3.9.3 Transportation
- 3.10 Unavoidable Adverse Impacts; Short-Term Uses and Long-Term Productivity; and Irreversible and Irretrievable Commitment of Resources
 - 3.10.1 Unavoidable Adverse Impacts
 - 3.10.2 Relationship Between Short-Term Uses and Long-Term Productivity
 - 3.10.3 Irreversible or Irretrievable Commitment of Resources

APPENDIX A
TYPES OF DOCUMENTS TO AVAILABLE VIA THE LICENSING SUPPORT NETWORK

This appendix contains examples of the types of documents that should be identified in or made available via the Licensing Support Network (LSN) by participants. See 10 CFR 2.1003 and the exclusions in 10 CFR 2.1005.

1. Technical reports and analyses by all participants (including those developed by contractors). Note that this applies only to final technical reports and does not include preliminary drafts (including predecisional and other internal review drafts) other than "circulated drafts," as defined in 10 CFR Part 2, Subpart J (Item 6 below). See 10 CFR 2.1019(i)(2), which states that preliminary drafts, although subject to derivative discovery, are excluded from entry in the LSN.
2. Quality assurance records
3. External correspondence
4. Internal memoranda
5. Meeting minutes/transcripts
6. Draft documents circulated for supervisor concurrence or signature on which a nonconcurrence has been registered
7. Other documents (for 7.1 and 7.9, include references to other databases)
 - 7.1 Draft and final environmental evaluations or assessments
 - 7.2 Site characterization plan
 - 7.3 Site characterization study plans
 - 7.4 Site characterization progress reports
 - 7.5 Issue-resolution reports
 - 7.6 License application
 - 7.7 DOE environmental report
 - 7.8 Topical reports, data, and data analyses
 - 7.9 Draft, supplemental, and final environmental impact statements
 - 7.10 NRC preliminary comments on the sufficiency of DOE information for inclusion in a license application for a possible geologic repository at Yucca Mountain, Nevada
 - 7.11 The DOE site recommendation to the President of the United States (e.g., transmittal letter, statutory materials supporting the recommendation)
 - 7.12 Publicly available information on rulemakings
 - 7.13 Public and agency comments on documents
 - 7.14 Responses to comments
 - 7.15 NRC technical positions
 - 7.16 NRC regulatory guides
 - 7.17 The DOE project-decision schedules
 - 7.18 DOE program-management documents

APPENDIX B EXCLUDED AND PRIVILEGED INFORMATION

In 10 CFR 2.1005, "Exclusions," the types of information excluded from the Licensing Support Network (LSN) are listed. Discovery privileges are discussed in 10 CFR 2.1006(a), (b), and (c). These sections of 10 CFR are reproduced below.

10 CFR 2.1005 Exclusions.

The following material is excluded from the requirement to provide electronic access, either pursuant to 10 CFR 2.1003, or through derivative discovery pursuant to 10 CFR 2.1019(i)—

- (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) References cited in contractor reports that are readily available;
- (g) Classified material subject to Subpart I of this part;
- (h) Readily available references, such as journal articles and proceedings, which may be subject to copyright;
- (i) Correspondence between a potential party, interested governmental participant, or party and the Congress of the United States.

10 CFR 2.1006 Privilege.

- (a) Subject to the requirements in 10 CFR 2.1003(a)(4), the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in 10 CFR 2.390 may be asserted by potential parties, interested governmental participants, and parties. In addition to Federal agencies, the deliberate 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 Presiding Officer or the Presiding Officer, must be provided in electronic form by the party, interested governmental participant, or potential party that asserted the claim to—
 - (1) The other participants; or
 - (2) The Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License application Presiding Officer or the Presiding Officer so directs under 10 CFR 2.1010(b) or 10 CFR 2.1018(c).
- (c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be provided for electronic access pursuant to 10 CFR 2.1003(a).

REGULATORY ANALYSIS

A separate regulatory analysis was not prepared for this regulatory guide. The regulatory analysis prepared for Draft Regulatory Guide DG-3003, "Format and Content for the License Application for the High-Level Waste Repository" (November 1990), provides the regulatory basis for this regulatory guide as well. A copy of the regulatory analysis is available for inspection and copying for a fee at the U.S. Nuclear Regulatory Commission Public Document Room, 11555 Rockville Pike, Washington, DC. The Public Document Room's mailing address is US NRC PDR, Washington, DC 20555; phone (800)397-4209 or (301)415-4737; fax (301)415-3548.

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
)	
(High Level Waste Repository: Pre-Application Matters))	June 6, 2005
)	

CERTIFICATE OF SERVICE

I certify that copies of the foregoing NEVADA'S INITIAL BRIEF IN SUPPORT OF ITS MOTION TO COMPEL PRODUCTION OF DOE'S DRAFT YUCCA LICENSE APPLICATION, OR, IN THE ALTERNATIVE, FOR A DECLARATORY ORDER, has been served upon the following persons by electronic mail:

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

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Washington, DC 20555-0001

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Administrative Judge

E-mail: PAPO@nrc.gov

Alex S. Karlin
Administrative Judge

E-mail: PAPO@nrc.gov

Alan S. Rosenthal
Administrative Judge

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

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