

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 07/18/2005

ATOMIC SAFETY AND LICENSING BOARD

SERVED 07/18/2005

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

July 18, 2005

ORDER

(Regarding State of Nevada's June 6, 2005 Motion)

On May 12, 2005 the United States Department of Energy (DOE) filed a memorandum that, inter alia, requested that we set a briefing schedule on the issue of whether DOE must produce its draft license application on the Licensing Support Network (LSN).¹ In the interest of resolving the dispute in a timely manner, the Pre-License Application Presiding Officer (PAPO) Board established procedures and a briefing schedule on this issue.² Pursuant to that schedule, on June 6, 2005, the State filed a motion to compel production of DOE's July 2004 Draft License

¹ [DOE's] Memorandum in Response to May 11, 2005 Memorandum and Order Regarding Second Case Management Conference (May 12, 2005) at 27-29; Tr. at 383-84. The dispute arose from a footnote that DOE placed in its Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges (Apr. 25, 2005) at 8 n.2, asserting that its draft license application qualified for the litigation work product privilege. This issue was also discussed during the May 4 and 18, 2005 case management conferences. Tr. at 89-100, 379-93.

² Tr. at 411-14.

Application, or in the alternative, for a declaratory order.³ On June 20, 2005 DOE, the NRC Staff, and the Nuclear Energy Institute (NEI) filed responses.⁴ The State filed its reply brief on June 28, 2005.⁵

On July 12, 2005 we held oral argument on the State's motion, during which it became clear that there are several matters that DOE did not sufficiently address in its response or argument. So we may properly rule on the issues before us, DOE is directed to file the following documents and answer the following questions by July 29, 2005.

For purposes of this order, the following definitions apply:

The term "Draft License Application" means the draft license application submitted to DOE by Bechtel-SAIC Company LLC (BSC) in July 2004, including any iterations, amendments, or modifications thereto until the "second draft" of the license application was prepared in November 2004.⁶

³ Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the Alternative, for a Declaratory Order (June 6, 2005) [hereinafter Nevada's Motion to Compel].

⁴ [DOE's] Brief in Opposition to Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the Alternative, for a Declaratory Order (June 20, 2005) [hereinafter DOE's Brief in Opposition]; Brief of the [NEI] Opposing the State of Nevada's Motion to Compel Production of the July 2004 Draft Yucca Mountain Licensing Application (June 20, 2005). The NRC Staff filed its response on June 20, 2005 but inadvertently omitted the Table of Contents and Table of Authorities. A complete copy of their response was filed on June 21, 2005. Correction to the NRC Staff Response to Nevada's Motion to Compel Production or Issue a Declaratory Order (June 21, 2005).

⁵ Nevada's Reply Brief in Support of Motion to Compel Production of Draft License Application [Nevada's Reply Brief] (June 28, 2005).

⁶ During the February 9, 2005 Winter Board Meeting of the United States Nuclear Waste Technical Review Board, Dr. Margaret Chu, the Director of DOE's Office of Civilian Radioactive Waste Management [OCRWM], stated, "[O]ur 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 [sic] which were incorporated into our second draft, which was delivered to us in November of 2004." Nevada's Motion to Compel, Exh. 10 at 16.

The term “supervisor or manager” means any person who supervises or manages other persons.⁷

1. In the Statement of Considerations accompanying the proposed rule concerning circulated drafts, the Commission referred to the “type of concurrence process” used by DOE.⁸ Please provide a copy of the documents that establish or describe DOE’s OCRWM general concurrence process as it existed at the time of the proposed rule in 1988. If different, please provide a copy of the documents that establish or describe DOE’s OCRWM 1988 concurrence process (including the non-concurrence form⁹) for the Yucca Mountain license application.
2. Provide a copy of the version(s) of the “DOE License Application Management Plan,” referred to in DOE’s Brief in Opposition, Attachment A at B-7, that applied to the Draft License Application. Is this the BSC Management Plan for Development of the Yucca Mountain License Application (Apr. 2003) [LSN # DEN001315478]?
3. Provide a copy of the documents that establish or describe the process whereby DOE planned to review, finalize, and file the Draft License Application.
4. State whether, and the extent to which, DOE and its contractors and subcontractors followed the applicable concurrence and review processes specified in response to items 1 and 3 with respect to the draft license application.
5. With reference to section 4.4 of the BSC Management Plan for Development of the Yucca Mountain License Application (Apr. 2003), specify and describe, as of the date

⁷ See *Webster’s Third New International Dictionary* at 1372 & 2296 (1976) (defining “manager” as “one that manages” and “supervisor” as “one that supervises a person, group, department, organization, or operation”).

⁸ 53 Fed. Reg. 44,411, 44,415 (Nov. 3, 1988).

⁹ Tr. at 510.

DOE announced that it would not file the license application in December 2004, the status of the review of the Draft License Application, including the status of the technical team review and comment resolution (4.4.2), integrated team review and comment resolution (4.4.3), and DOE final review and comment resolution (4.4.4).

6. Provide the title and organization of the persons to whom the Draft License Application was distributed, for whatever purpose, in 2004 and who meet one of the following criteria:
 - a. supervisors or managers;
 - b. OCRWM Office and Project Managers;¹⁰
 - c. Each person within DOE, the Nuclear Naval Propulsion Program, and the United States Geological Survey, who was senior or equal to, the Director, Office of License Application and Strategy, Office of Repository Development, DOE; or
 - d. Each person who was, or would have been, a member of the “integrated team,” or involved in the integrated team review, referred to in section 4.4.3 of the BSC Management Plan for Development of the Yucca Mountain License Application (regardless of whether step 4.4.3 had formally begun).¹¹

Those persons who meet criterion b, c, or d should be named and designated as such.

7. Provide a copy of the cover letters, memoranda, or documents used to transmit the Draft License Application to the persons identified in response to item 6 together with any other documents or memoranda describing the purpose for which the document was distributed to that person.

¹⁰ See Nevada’s Motion to Compel, Exh. 12 at 3 (“Milestone Description: Resolve comments by OCRWM Office and Project Managers and obtain their concurrence.”).

¹¹ “The integrated team review will be a joint BSC, DOE (including RW and EM), NNPP, and USGS review; however it will be performed by a small group of key personnel, primarily to ensure that the document is complete, internally consistent, and ready for DOE final review.” BSC Management Plan for Development of the Yucca Mountain License Application § 4.4.3 (Apr. 2003).

8. Provide organization charts for the period of July - December 2004, showing the position of each of the persons identified in response to item 6.
9. For each person identified in response to item 6, specify those who submitted a mandatory comment¹² or comment requesting or requiring that the Draft License Application be substantively changed in any way.
10. For each person who submitted a comment as specified in item 9, state whether that comment was resolved as of November 2004, and if not, whether it is currently resolved.¹³ Identify any such instances where a comment was “resolved” by means of a supervisor or manager overruling a subordinate.¹⁴
11. In its Statement of Considerations accompanying the final rule, the Commission stated that participants are not required to submit a circulated draft “while the internal decision-making process is ongoing.”¹⁵ With regard to the Draft License Application, is it DOE’s interpretation that the term “decision-making process” refers to the decision-making on the specific comment in question, or does it refer to the decision-making on the entire license application?
12. With regard to each instance specified in item 9, state whether the decision making process is still ongoing.

¹² The term “mandatory comment” means a comment to which the author or transmitter of that section of the Draft License Application was required to respond, regardless of whether the comment is denominated or labeled as “mandatory.” See DOE’s Brief in Opposition, Attachment B, Declaration of Joseph D. Zeigler (June 20, 2005) ¶ 8.

¹³ The term “resolved” means that the person who registered the comment has affirmatively withdrawn it, the author has affirmatively agreed to the change requested or required by the comment, or the commenter and the author have affirmatively agreed to an alternative modification to the Draft License Application.

¹⁴ See Tr. at 516.

¹⁵ 54 Fed. Reg. 14,925, 14,934 (Apr. 14, 1989).

13. State whether DOE has a process or procedure analogous to the NRC's Differing Professional Opinion¹⁶ process and the date it was initiated. If DOE has such a process or procedure, provide a copy of it.
14. State whether the DOE process referred to in item 13 applied to (a) DOE or (b) its contractors and subcontractors, with reference to the preparation and review of the Draft License Application. If so, state whether it was followed.

The State and any other potential party may file a response by August 4, 2005 to DOE's responses to the foregoing items. All such responses shall be strictly limited to amendments, supplements, and challenges to DOE's factual responses.¹⁷

It is so ORDERED.

For the Pre-license Application
Presiding Officer Board

[Original signed by]

Thomas S. Moore, Chairman
Administrative Judge

Rockville, Maryland

July 18, 2005

¹⁶ See NRC Management Directive 10.159: The NRC Differing Professional Opinions Program (2004).

¹⁷ Item 11 calls for DOE to provide an interpretation and such responses also may respond to DOE's answer to item 11.

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Pre-Application Matters)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (REGARDING STATE OF NEVADA'S JUNE 6, 2005 MOTION) have been served upon the following persons by electronic mail and/or Electronic Information Exchange as denoted by an asterisk (*).

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Docket No. PAPO-00
LB ORDER (REGARDING STATE OF
NEVADA'S JUNE 6, 2005 MOTION)

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Docket No. PAPO-00
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Docket No. PAPO-00
LB ORDER (REGARDING STATE OF
NEVADA'S JUNE 6, 2005 MOTION)

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Office of the Secretary of the Commission

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