

July 29, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER 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))	

DEPARTMENT OF ENERGY'S RESPONSE TO THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD'S JULY 18, 2005 ORDER

On July 18, 2005, the Pre-License Application Presiding Officer (PAPO) Board entered an Order directing the U.S. Department of Energy (DOE) to provide certain documents and information in connection with the State of Nevada's motion to compel production of the July, 26, 2004 version of the draft license application. This is DOE's response to the July 18, 2005 Order.

Preliminary Statement

As explained in the Declaration of Joseph Ziegler (DOE Brief in Opposition to Nevada's Motion to Compel, June 20, 2005, Exhibit B), the draft license application that BSC delivered to DOE on July 26, 2004 was not a "circulated draft." The draft did not undergo concurrence review at DOE and, therefore, received no non-concurrences. The draft sections comprising the July 26, 2004 draft license application instead underwent an additional round of drafting that was a step in the process--and not the last step either--to ready the document for finalization and eventual concurrence review. Simply put, the July 26, 2004 draft license application does not meet the narrow regulatory definition of "circulated draft."

The wide-ranging questions posed in the July 18, 2005 Order go far beyond what is necessary and appropriate to apply that regulatory definition. The State's motion to compel is limited to the version of the draft license application that BSC delivered to DOE on July 26, 2004. The July 18, 2005 Order, however, is not so limited and seeks information about all versions of draft license application sections between July and November, 2004, including edits, mark-ups, and other comments on those subsequent drafts. Whether or not the July 26, 2004 draft license application is a "circulated draft" does not depend on the reviews that subsequent versions of the draft underwent.

The July 18, 2005 Order also requests information that is irrelevant even with respect to the particular draft that is the subject of the State's motion. A draft does not become a "circulated draft" by being distributed for any purpose to anyone who manages or supervises any person, as Question 6 implies. Nor does it become a "circulated draft" because a manager or supervisor comments on the draft, as Question 9 implies. Persons with managerial and supervisory responsibilities are surely permitted (and expected) to participate in the drafting process without transforming into a "circulated draft" every draft they see. Moreover, a comment is not the same as a non-concurrence. This is true even in a concurrence review. *See, e.g.,* DOE Concurrence Policy, § VI.2 at p. VI-2 (Exhibit A) (distinguishing between non-concurrences and concurrences with comments).

In sum, the overbroad questions in the July 18, 2005 Order do not illuminate the issue for decision posed by the State's motion. They serve only to elicit irrelevant information and obscure the straightforward, and undeniable, fact that disposes of the State's motion, namely, the July 26, 2004 draft license application did not undergo concurrence review; it did not receive a non-concurrence; and it is not a "circulated draft."

Moreover, the implications of the July 18, 2005 Order extend well beyond the State's motion to compel. The Board's questions suggest an intent to expand the definition of "circulated draft" to encompass any draft, and any comment on a draft, made by anyone who supervises or manages anyone. Under such a definition, virtually every draft of each participant's documentary material will have to be collected and made available on the Licensing Support Network (LSN). That, DOE respectfully submits, is simply irreconcilable with the Commission's express intent to require generally only the production of "final documents" on the LSN. *See* 53 Fed. Reg. 44411, 44415 (Nov. 3, 1988). Such recasting of the definition of "circulated draft" would effectively repeal the exclusion for preliminary drafts in 10 C.F.R. § 2.1003, with fundamental implications for the ability of participants to meet their LSN obligations and deadlines.

Answers to Questions¹

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. 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 form) for the Yucca Mountain license application.**

RESPONSE: A copy of DOE's concurrence procedure in effect in 1988 is attached as Exhibit A. That procedure was contained in Chapter VI of DOE's Correspondence Manual. *See* Exhibit A, § I.26(b) at p. I-18 (referring to Chapter VI for concurrence policies and

¹ The July 18, 2005 Order did not direct DOE to file verified answers. It is also impossible for any single person to verify the answers. The Board's questions required DOE to obtain input from many people from multiple entities and organizations, in some instances requiring information as far back as 1988. No one person possesses the requisite knowledge to answer the questions. DOE has exercised good faith and due diligence to assemble the requested documents and information in the time permitted and believes its answers to be truthful.

procedures). There was no separate or different concurrence process for the Yucca Mountain license application in 1988.

The 1988 concurrence procedure contains the following features that are pertinent to showing that the July 26, 2004 draft license application is not a “circulated draft”:

- The procedure specified that non-concurrences “are directed to the entire concept of the response and not to how the response is written. Nonconcurrences may not be for editorial reasons.” Exhibit A, § VI.2(a) at p. VI-2.
- The procedure distinguished non-concurrences from “concurrences with comments.” This latter concept included requests that the document “should be revised to avoid an incorrect, unresponsive, or misleading statement.” Exhibit A, § VI.2(c) at p. VI-2.
- The procedure encouraged “predrafting conferences.” The purpose of these conferences was to discuss the proposed document with representatives of the signing organizations to “[g]et their ideas, answer their questions, and resolve their doubts.” The objective was to address their concerns *before submitting the concurrence copy in order to avoid a non-concurrence*. Exhibit A, § VI.3(a) at p. VI-2.
- The procedure contemplates the distribution of something denominated a concurrence version of the document. Examples of such distribution memoranda from 1988 are attached as Exhibit B. The documents transmitting the July 26, 2004 draft license application stand in stark contrast. *See Exhibits F & G.*
- The time normally allowed for concurrence review was 2 days, corroborating that a concurrence version was presumptively a final document ready for signature. Exhibit A, § VI.3(d) at p. VI-3. For any document of consequence, this necessitates

involvement, review and knowledge by the signing official prior to receiving the concurrence version.

- The procedure specified a formal manner for making non-concurrences. A non-concurrence was to be indicated on the concurrence copy of the document, and it was to be returned to the action office along with a memorandum stating the differences and reasons for those differences. Exhibit A, § VI.4(d) at p. VI-4.

Measured against this procedure, the July 26, 2004 draft license application, as well as the subsequent versions of the draft license application addressed in the July 18, 2005 Order, did not undergo a concurrence review. They were all drafts that at most, in the vernacular of the 1988 procedure, were undergoing predrafting conferences.

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]?**

RESPONSE: The referenced “DOE License Application Management Plan” is the Management Plan for Development of the Yucca Mountain License Application (LA Management Plan). It was first issued in March, 2004, and was revised in July, 2004 and again in September, 2004. It was subsequently revised in February, 2005 and various times thereafter. Copies of the July and September, 2004 versions are attached as Exhibits C and D, respectively.

The LA Management Plan is not the same as the referenced BSC Management Plan for Development of the Yucca Mountain License Application (BSC Plan). The BSC Plan was an earlier document authored solely by BSC (unlike the LA Management Plan that is a joint DOE-BSC document). The BSC Plan was superseded by the LA Management Plan and was not in effect after March, 2004.

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.

RESPONSE: To the extent such documents exist, the responsive documents are the July and September, 2004 versions of the LA Management Plan, attached as Exhibits C and D. These documents provide only a generalized, conceptual framework for the review process and do not have the rigor of a project procedure. Nor do they purport to reflect the extensive working communications and interactions that occur every day on a project of this size.

Also significant is that the review process, and the schedule for reviews, evolved between July and November, 2004 in reaction to events such as the court of appeals decision in *NEI v. EPA*, 373 F.3d 1251 (D.C. Cir. 2004), and the invalidation of DOE's initial LSN certification. *See* State Motion to Compel, June 6, 2005, Exhibit 10 at p. 17. As a result, neither version of the LA Management Plan purports to prescribe in detail, nor fully or accurately recounts, the actual review process that occurred between July and November, 2004 and the actual schedule of these events. There is no document that does that.

Further, the LA Management Plan is oriented to the project level review processes and does not detail the concurrence processes at DOE's headquarters. For that there was in the September/October, 2004 time period the draft Plan of Action and Milestones. *See* Exhibit E; *see also* Exhibit D at p. 3 (referring to the Plan of Action and Milestones for final license application review). This document outlined steps for a number of headquarters tasks and shows that the activities for final review never started. This is documented by the fact that none of the start dates for the license application review was put in bold. *Compare* Exhibit E at p. 3 (start dates in bold for project director certification, a matter unrelated to final license application review).

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.

RESPONSE: No version of the draft license application has undergone the concurrence review process identified in Exhibit A.

The July 26, 2004 draft license application underwent the “joint chapter review” identified in § 4.4.3 of the September 2004 LA Management Plan (Exhibit D). As set forth generally in that plan, that process consisted of review teams providing consolidated comments to the author or production teams followed by comment resolution meetings. That process was complete in August, 2004. Ziegler Declaration at ¶ 5. (The July 26, 2004 draft was actually a compilation of draft chapter groups that BSC delivered on a rolling basis starting in June, 2004. *See* Exhibit F. After delivering the last of these draft groups, BSC essentially re-delivered them in a single package on July 26, 2004. *See* Exhibit G. The “joint chapter review” was technically performed on the draft chapter groups that BSC separately provided, but together the individual submittals were substantively identical to the combined deliverable on July 26, 2004.)²

Following the conclusion of the “joint chapter review,” the “joint management review” contemplated in § 4.4.4.3 of the September 2004 LA Management Plan commenced in September, 2004. This review did not address the draft license application that BSC delivered on July 26, 2004, but the revised draft sections as edited following the comment resolution meetings in August. This review was concluded in September.

² As written, the July 2004 LA Management Plan contemplated a further round of review by the “joint chapter review” teams following the comment resolution meetings, *see* Exhibit C at § 4.4.4.5 (p.16), and then submittal of the license application to DOE headquarters for concurrence review. *See* Exhibit C at § 4.4.6 (p. 17). That process was revised as reflected in the September 2004 LA Management Plan. The further round of reviews by the “joint chapter review” teams did not occur and additional review activities were added as a prerequisite to DOE concurrence review.

After September, work continued to complete the documents supporting the license application as well as to address open items identified by the “joint chapter” and “joint management” reviews. *See* Exhibit D at § 4.4.4.4 (p. 17). BSC also performed various validation activities. *See* Exhibit D at § 4.4.4.4 (p. 17). These activities continued into November. In light of the delay occasioned by invalidation of EPA’s post-10,000 year standard and invalidation of DOE’s LSN certification, DOE also directed additional work regarding the license application that was still ongoing when the November 2004 draft was generated. *See* Exhibit P at p. 4 (comments of John Arthur describing ongoing work).

In this regard, the license application was *not* submitted to DOE in October, 2004 for concurrence review as estimated in Figure 6 of the September 2004 LA Management Plan. *See* Exhibit E. As the September 2004 LA Management Plan itself notes, Figure 6 was only a working schedule, and changes in the schedule were not to be updated in the plan. *See* Exhibit D at § 4.4.4 (p. 16).

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 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).**

RESPONSE: As explained in response to Question 2, the referenced BSC Plan was superseded by the LA Management Plan and did not apply to the July 26, 2004 draft license application or to subsequent drafts. DOE instead answers this question with respect to the September 2004 LA Management Plan.

DOE announced that it would not file the license application in December, 2004 at the November 22, 2004 NRC Quarterly Management meeting. *See* Exhibit P at pp. 3, 4. The “technical team review” called for in the September 2004 LA Management Plan preceded the

“joint chapter review” and thus was complete by November, 2004. *See* Exhibit D at § 4.4.2 (p. 13). There was no “integrated team review” in the September 2004 LA Management Plan. The DOE completeness and concurrence” review identified in the September 2004 LA Management Plan had not occurred as work was ongoing. *See* Exhibit D at § 4.4.4.7; Exhibit E; Exhibit P at pp. 4, 8.

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;**
 - 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).**

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

RESPONSE: Few people received the entire draft license application. Rather, pertinent sections were made available to reviewers, and not all reviewers reviewed all sections. Further, the broad phrase “for whatever purpose” is not necessarily limited to distribution for formal review and comment. The concept of distribution also is broad. Accordingly, DOE interprets this question as calling for the identification of persons meeting the specified criteria who received all or part of any version of the draft license application between July and November, 2004, regardless of why they received it, regardless of how they got it, and regardless of what they did with it.

Subpart a. DOE has been able to identify the following persons who supervised or managed any person and who received part of the draft license application to the subject period, regardless of their organizational affiliation; whether they were functioning in a supervisory or managerial capacity when they received and/or reviewed parts of the draft license application; how they got copies; why they got copies; whether they actually reviewed the section or were even expected to review it in any detail. DOE has endeavored to identify all such people with due diligence in the time permitted. They may be a few persons who have been inadvertently missed.

There are many names on this list; however, the phrase “distributed for any purpose” is broad. The Board’s definition of “manager” and “supervisor” also is expansive and does not limit the question to whether they were acting in a managerial or supervising capacity for whatever they did with the draft. The sheer number of persons involved, and the different organizations still working on the drafts is fundamentally inconsistent with these drafts being concurrence copies. They confirm that the license application was still being drafted and not finalized.

OCRWM

Margaret Chu	Director, OCRWM
James Owendoff	Associate Director of Integration
Theodore Garrish	Deputy Director, Office of Strategy and Program Development
John Arthur	OCRWM Deputy Director, ORD
Russell Dyer	Assistant Deputy Director for Technical and Regulatory Programs, ORD
Joseph Ziegler	Director, Office of License Application Strategy
Richard Craun	Director, Office of Project Management and Engineering
William Boyle	Director, Post Closure and License Acquisition Division
Dean Stucker	OFO, Lead General Engineer (7-10/04)
Kirk Lachman	OPM&E, Program Manager (Acting) (7/04)
R. Dennis Brown	OQA, Director
Scott Wade	OFO, Program Manager (Acting) (7/04)
	8/04 – N/A
	9/04 – Program Manager
	10/04 - Director (Acting)

Jeffrey Williams 11/04 – Director (Acting)
Acting Director, Office of Science & Technology and
International

DOE Office of General Counsel

Lee Liberman Otis	General Counsel
Gary Lavine	Deputy General Counsel, Environment & Nuclear Programs
James Bennett McRae	Assistant General Counsel, Civilian Nuclear Programs
Anita Capoferri	Deputy Assistant General Counsel
Matt Urie	Deputy Assistant General Counsel

DOE's outside counsel, Hunton & Williams, also received certain copies, but DOE does not interpret them as responsive to this question.

Other DOE Offices³

Eric Cohen	Supervisory Environmental Protection Specialist, Office of NEPA Policy & Compliance
Tony Eng	Director, Office of Facility Authorization Bases
Joseph Pruitt	Manager, technical working group, Idaho National Engineering & Environmental Laboratory (INEEL)
Philip Wheatley	Manager, Nuclear Materials Disposition & Engineering working group, INEEL
Mark Gardner	Manager, Idaho field office

Naval Nuclear Propulsion Program

Robert G. Gisch	Senior Technical Director for Spent Fuel, Regulatory Affairs Division
Storm R. Kauffman	Director, Reactor Safety and Analysis Division
Barry K. Miles	Deputy Director, Reactor Refueling Division
Jeffrey M. Steele	Group Head, Radioactive Waste, Shielding and Environmental Monitoring; Nuclear Technology Division
Charles H. Davis	Group Head, Quality Assurance, Reactor Materials Division
Mary E. Resnik	Group Head, Plant Structural Materials, Reactor Materials Division
John D. Yoxtheimer	Group Head, Naval Core Materials and Advanced Materials Development, Reactor Materials Division
John M. McKenzie	Director, Regulatory Affairs Division

³ There may be persons from other DOE offices, such as the Office of Security, or within even the designated offices. There may also be additional responsive persons from DOE's MTS contractor, Booz-Hamilton. DOE will continue to investigate these matters if the Board desires.

Bechtel Bettis Inc.

Don Dei	Chief Physicist
Bruce J. Schramm	Manager, Component Technology Activity
David G. Franklin	Manager, Bettis Yucca Mountain Resident Office
James N. Follin	Manager, Environmental Affairs Section, Component Technology Activity
Ronald J. Pavlik	Manager, Quality and Manufacturing Development Section, Quality Manufacturing Assurance Activity
Mike L. Doyle	Program Director, Naval Environmental Analysis Section, Component Technology Activity
Robert G. Daniels	Manager, Quality Assurance Operations Section, Quality Manufacturing and Assurance Activity
Stasia D. Twarowska	Program Director, Naval Environmental Analysis Section, Component Technology Activity
Donald L. Lawson	Manager, Reactor Safety Section, Mechanical Electrical and Reactor Activity
Clarence R. Willis	Manager, Nuclear Engineering, Mechanical Electrical and Reactor Activity
Keith M. Bussey	Manager, Fluids Lab and Thermal and Hydraulics Lab Engineering Section, Site Operations Activity

KAPL Inc.

Andy M. Carey	Manager, Advanced Reactor Nuclear Design, Fleet Support Operation
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BSC (including other Yucca Mountain Project personnel)

John Mitchell	General Manager
Margaret McCullough	Deputy General Manager
Richard Profant Jr.	Transportation and Integration
David Siefken	Program Integration
Del Bunch	Transportation and Integration Deputy
Larry Saraka	Regulatory Coordination Lead
Ed Benz	Waste Acceptance Lead
Steve Ruffin	Safeguards and Security Lead
Scott Gillespie	Systems Integration Lead
Robert Brock	Pre Closure Safety
Robert Morgan	N/A
Nancy Williams	Repository Development Manager
Stephen Cereghino	Licensing Manager
Marty Bryan	License Application
William Hutchins	Criticality
Dan Thomas	Criticality Deputy
Halim Alsaed	Criticality Supervisor
Dennis Richardson	Preclosure Safety Analysis

Martha Pendleton	Science Regulatory Integration
George Pannell	Design Regulatory Integration
Rob Howard	Integration Team Lead
Jim Blink	Parameter Team Lead
Goeff Freeze	FEPs Team Lead
Ming Zhu	Natural System Team Lead
Ernie Hardin	Near Field Environment/Transport Team Lead
Neil Brown	Engineered System Team Lead
Mike Cline	Igneous Team Lead
Mark Board	Seismic Team Lead
Chris Forbes	RIT Project Administration Lead
	Process Development
Don Beckman	KTI Completion Team Lead
Dennis Thomas	Engineered System Team Deputy
Bill Arnold	Natural System Team Deputy
Thomas Mulkey	Design Engineering
Barbara Rusinko	Engineering Production and Project Engineering (Acting)
Robert Slovic	DTF/Remediation
Robert Boutin	Subsurface
Robert Holt	Site Infrastructure and Facilities
Mark Prytherch	Emplacement and Retrieval
David Tooker	Fuel Handling Facility
Carl Chagnon	Waste Package and Components
Colin Cochrane	Canister Handling Facility/Aging/Cask Receipt
Michael Anderson	Waste Package Design; Thermal Structural Analysis
Richard Pernisi	Civil Structural Architectural
William Carl	Nuclear and Radiological
Norman Kahler	Canister Handling Facility Assistant Project Engineer
Thomas Frankert	Cask Receipt and Aging Facility Assistant Project Engineer
Tony Diperna	Electrical and Control Systems
Preston McDaniel	Mechanical
Christine Drummond	Business Management Training
James Harding	Records Management and Document Control
Fred Walden	Records Control
Douglas Weaver	Test Coordination Office
Frank Hansen	Performance Confirmation Lead
Jerry McNeish	TSPA Deputy
Palmer Vaughn	TSPA Model Analysis Lead
Donald Kalinich	TSPA Model Calculations Lead
Ralph Rogers	TSPA Documentation Lead
Charles B. Thom	TSPA-LA Configuration Management Lead
Ed McCann	Environmental Compliance
Thomas Bastian	Radiation Program Lead
Jack Bailey	System Integration
	System Engineering and Integratrimon
Peter Swift	Total System Performance Assessment

Paul Dixon	Post Closure Activities (Acting)
Robert Andrews	Post-Closure Safety
David Powell	N/A
Jean Younker	Regulatory Integration Team, Deputy Chief Science Officer
T. Dunn	Postclosure Safety Analysis
Andrew Orell	Sandia National Laboratory (Lab Lead)

Subpart b. The terms “OCRWM Office Manager” and “OCRWM Project Manager” are not directly applicable to OCRWM’s organizational structure in 2004. The documents from which those terms are taken are milestone definition sheets that were used for planning in the FY 1997 - FY 2000 timeframe. The milestone sheets were used for general planning and scheduling purposes only, and were modified or deleted in subsequent planning cycles and are no longer used. While there were and are "Office Directors" (e.g., Director OLAS, Director OQA, Director ORD), there are no “Office Managers.” The only “Project Managers” are John Arthur in his role of Yucca Mountain Project Manager, and Gary Lanthrum who is the Transportation Project Manager. Subject to this qualification, the persons who would be considered Office Directors or Project Managers between July and November, 2004 who received any part of the draft license application for any purpose in that time period are John Arthur, Denny Brown, Joseph Ziegler, and Richard Craun.

Subpart c. The persons responsive to this subpart for DOE are John Arthur (senior), Russell Dyer (equal), Denny Brown (equal), and Richard Craun (equal). The persons responsive to this request for the Naval Nuclear Propulsion Program are Robert G. Gisch (equal), Storm R. Kauffman (senior), John M. McKenzie (senior), Barry K. Miles (equal), Jeffrey M. Steele (equal), Charles H. Davis (equal), Mary E. Resnik (equal), and John D. Yoxtheimer (equal). There are no person responsive to this subpart from USGS.

Subpart d. As explained in response to Question 2, the referenced BSC Plan was superseded by the time of the July 26, 2004 draft license application. The referenced integration team was never constituted, and its membership was never identified.

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.**

RESPONSE: Copies of the letters by which BSC transmitted the various draft chapters to DOE in June and July, 2004 are attached collectively as Exhibit F. A copy of the July 26, 2004 letter from BSC to DOE transmitting the combined draft is attached as Exhibit G. These letters all describe the transmitted documents as drafts.

The draft chapter groups were made available to points of contact for the “joint chapter review” teams via a notification email with a link to the draft. Copies of those email notifications are attached as Exhibit H. These emails notifications were then forwarded to other team members as appropriate. These emails make clear this was not a concurrence review.

An email announcement preceded the “joint management” review. A copy of that email is attached as Exhibit I. This email makes clear that any concurrence review might occur *after* the joint management review. Hard copies of pertinent draft sections were subsequently delivered to persons participating in this review, as appropriate.

Not everyone identified in response to question 6 received draft sections by a transmittal document.

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.**

RESPONSE: Copies of relevant organization charts, to the extent they could be found, are attached as Exhibits J through M.

9. **For each person identified in response to item 6, specify those who submitted a mandatory comment or comment requesting or requiring that the Draft License Application be substantively changed in any way.**

RESPONSE: It is not possible to answer this question in the terms posed. The process for development of the draft license application is extremely interactive and characterized by extensive working level communications among the participants. Comments are not confined to the review cycles denominated in the LA Management Plan or through specified formal channels. Even comments in the “joint chapter” and “joint management” reviews were not systematically tracked to individuals. As explained in the LA Management Plan, comments from reviewers in the “joint chapter review” were consolidated into a unified set of comments from each organization. *See Exhibit D, § 4.4.3.2 at p. 15.* The same is true for the “joint management review.” Meetings were held with these reviewers to discuss their questions and other comments, and collective action items were identified as a result. These reviewers also submitted a common interlinear mark-up of draft sections without attribution of specific comments to individuals.

It is not feasible to try to “unscramble the egg” in a project of this size and complexity, with as much drafting and iterative development as has occurred. Nor is it necessary to try to reconstruct artificially a year after the fact who made what comments for purposes of resolving the State’s motion. None of the persons identified in response to Question 6 has been tendered the concurrence version of the license application; therefore, none of their comments can be a non-concurrence, much less an unresolved non-concurrence. The July 26, 2004 draft license application simply is not a “circulated draft” regardless of the comments given.

That said, it fair to say that virtually everyone identified in response to Question 6 had some kind of comment--whether written or oral--at least requesting that the draft license application be changed “in some way.” Such vigorous interaction and commentary is natural,

expected and indicates a healthy and robust drafting process. It belies any suggestion that the draft license application is a “circulated draft.”

- 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. Identify any such instances where a comment was “resolved” by means of a supervisor or manager overruling a subordinate.**

RESPONSE: It is not possible to answer this question in the terms posed. As explained in response to Question 9, the review processes at issue did not track comments as attributable to individuals. To the extent the question pertains more generally to action or open items identified through the “joint chapter” and “joint management” reviews, not all of those items were resolved by November, 2004. Current open items cannot be fully correlated to those in 2004 because of the ongoing iterative nature of the drafting process. There have been subsequent technical direction letters between DOE and BSC that have redirected remaining work on the draft license application. However, there are ongoing refinements to the draft license application sections for issues that pre-date November, 2004. Until the license application ultimately is finalized, it is impossible to know if and how open issues will be resolved.

- 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.” 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?**

RESPONSE: The comment applies to the entire license application in this context. Consistent with the 1988 DOE concurrence policy, a non-concurrence addresses the entire concept of a document. Assuming there were a true non-concurrence to the draft license application, the decision making process with respect to the document would not be concluded

until DOE made a final decision whether or not to file the license application and in what form. Further, resolution of open items in one area of the application may necessitate changes in other areas. Indeed, until DOE approves the final version of the license application, all aspects of the license application remain subject to modification. Such modifications may moot prior comments as a result of changes in design, engineering, or myriad other features of the license application. Assuming there were any non-concurrences, it would not be known whether they were unresolved until this entire process is complete.

12. With regard to each instance specified in item 9, state whether the decision making process is still ongoing.

RESPONSE: Yes, with respect to open items as well as the final approval of the license application.

13. State whether DOE has a process or procedure analogous to the NRC's Differing Professional Opinion process and the date it was initiated. If DOE has such a process or procedure, provide a copy of it.

RESPONSE: A copy of DOE's Differing Professional Opinion (DPO) process for OCRWM, as in effect from October 2003 to the beginning of November 2004, is attached as Exhibit N. That procedure was modified effective November 3, 2004. A copy of the modified procedure is attached as Exhibit O.⁴

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 DPO procedure states that it "applies to Office of Civilian Radioactive Waste Management (OCRWM) Office of Repository Development (ORD) federal staff and direct

⁴ The modification of the DPO procedure in November, 2004 was unrelated to the draft license application. As explained in the preamble of the new version, the procedure was modified to allow greater participation by the initiating employee and to improve generally the DPO process. See Exhibit O at Attachment 5.

support contractors who wish to express a DPO and have the DPO heard and impartially reviewed and resolved by management.” Procedure Resolution of Differing Professional Opinions, LP-REG-005-OCRWM (October 20, 2003) at page 2 (Exhibit N). Persons participating in the preparation and review of the draft license application between July and November, 2004 could raise issues regarding the draft license application through the DPO procedure, as well as through the conventional comment processes described above. All comments and issues concerning the draft license application in that period were dispositioned during the review meetings or through other working level communications. There was no initiation of a DPO regarding the drafts of the license application in this period.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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Dated: July 29, 2005