

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

**Before Administrative Judges:**

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

<b>In the Matter of</b>	<b>Docket No. PAPO-00</b>
<b>U.S. DEPARTMENT OF ENERGY</b>	<b>ASLBP No. 04-829-01 PAPO</b>
<b>(High Level Waste Repository: Pre-Application Matters)</b>	<b>August 11, 2005</b>

**NEVADA'S REPLY TO DEPARTMENT OF ENERGY'S RESPONSE  
TO THE BOARD'S JULY 18, 2005 ORDER**

On July 18, 2005, the Pre-License Application Presiding Officer (PAPO) entered an order directing the Department of Energy (DOE) to provide certain documents and information in connection with Nevada's Motion to Compel Production of the July 26, 2004 draft License Application (the "DLA"). This is Nevada's reply to DOE's response to the PAPO.

**PRELIMINARY STATEMENT**

Despite the PAPO's July 18 order requesting substantial documentation, and DOE's response, DOE's position and documentary support on the subject of the "circulated draft" character of the DLA remain elusive. DOE picks and chooses documents and portions of documents to support its ever-changing position. Given an opportunity to fully flesh out the issue, by virtue of the PAPO's request, DOE responds by (1) accusing the PAPO of making "overbroad" requests that "serve only to elicit irrelevant information," and which "obscure the straightforward facts," Response p. 2; (2) selecting as the linchpin for its response and argument to the PAPO a clearly irrelevant 25-year-old "correspondence manual," *id.* at p. 3; (3) grudgingly

providing its License Application Management Plan (LAMP) which, in contrast to the Correspondence Manual, is clearly applicable and describes a concurrence process which supports Nevada's interpretation of the DLA as a circulated draft; and (4) providing non-responsive answers or irrelevant information in response to various of the PAPO requests.

## **DISCUSSION**

### **1. OCRWM Concurrence Process**

Because the definition of a "circulated draft" requires its circulation for supervisory concurrence, with at least one non-concurrence being registered by someone in the review process, it was logical that the PAPO requested DOE to provide a copy of its applicable written concurrence process. Indeed, DOE had volunteered at the July 12, 2005 PAPO hearing the existence of certain purported components of that concurrence process: "There were procedures. In general, what was anticipated is any document of any consequence, and I think the Commission recognized this and would demand it, would go through an iterative process, a very heavy iterative process; whether it's the License Application, whether it's a report or study being developed by scientists on some technical issue; that, of course, there's going to be back-and-forth." Tr. 495.

DOE went on: "I believe the Commission's intent is perhaps most revealed by a statement of what it thought a non concurrence meant, which was a formal unresolved objection. I think that phrase, 'formal unresolved objections,' dovetails with the formalized concurrence processes that NRC and DOE had in 1989. . . ." Tr. 509. Having thus led PAPO to expect to see a DOE policy or procedure which would definitively clarify the applicable "non-concurrence" definition, DOE instead offered in response to PAPO Request No. 1 an excerpt from a 1988 "Department of Energy Correspondence Manual." A cursory reading makes clear that the cited document was intended only to provide prerequisites for dispatching routine correspondence. It

provided, for example, that "Coordination of outgoing correspondence shall be held to a minimum." VI-1, Exhibit A. It also provided for a quick, two-day turnaround time for review and concurrence, absent which "concurrence will be assumed." *Id.* No one could seriously suggest that those rules, taken from a 25-year-old *Correspondence* Manual, had any applicability to the 5,000-plus-page DLA, a draft version of what is likely the single most complex and important document ever prepared by DOE for filing with another federal agency. The ultimate illustration of the irrelevancy of DOE's Exhibit A is its definition of "non-concurrence," the term whose meaning was central to this PAPO request. The 1988 Correspondence Manual recites: "Nonconcurrences are directed to the *entire concept* of the response and not to how the response is written." *Id.* at VI-2 (emphasis added). By contrast, it defines the situation where one indicates agreement with the concept of the response but believes it should be revised to avoid an incorrect, unresponsive, or misleading statement as a "concurrence with comment." *Id.* Again, given the requirement in the definition of circulated draft, 10 C.F.R. §2.1001, that someone in the review process must have "non-concurred," a totally nonsensical outcome would emerge if the 1988 Correspondence Manual were applicable to the DLA: a comment by a DOE official that important parts of the DLA were incorrect and misleading would be a "concurrence" that would never see the light of day; rather, someone in the review process would have to *veto* the entire License Application *concept* as the prerequisite for a circulated draft to exist. Obviously, NRC had no such ridiculous concept in mind.<sup>1</sup>

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<sup>1</sup> At any rate, it can be presumed that DOE's General Counsel's office, upon issuance of the mandate by the D.C. Circuit to vacate EPA's and NRC's Yucca rules, would in fact have non-concurred in the "entire concept" of filing the License Application, even under DOE's draconian interpretation arising from the Correspondence Manual.

## 2. DOE License Application Management Plans

Pressed by PAPO Request No. 3 to provide a copy of the documents that established the process "whereby DOE plans to review, finalize, and file the draft License Application," DOE's response strains credulity, given the \$60 billion or more price tag on the Yucca Mountain project and the critical role of the License Application to its success. DOE states that "there is no document" which clearly meets the request, then offers that "to the extent such documents exist," they would be DOE's July and September 2004 LAMPs (attached as Exhibits C and D to DOE's response). Tellingly, since DOE's LAMPs do indeed prescribe the process for the *concurrence* review of the DLA (and repeatedly use that term), DOE had never attached these exhibits, either to its response to Nevada's motion to compel nor to any other of its filings which addressed the issues of DLA/circulated draft. Yet, DOE's LAMP is dispositive, establishing the DLA's status as a circulated draft, routed up the DOE chain of command for review and concurrence.

A study of DOE's LAMPs establishes that, as Nevada has argued, the DLA delivered by BSC to DOE on July 26, 2004, was a critical project benchmark; that it was intended to and did trigger a multi-step series of reviews by DOE officials, with the opportunity for disagreements to be registered, analyzed, and resolved at each level; that this review and concurrence process was expected to occupy the entire period from delivery of the DLA in July 2004 through delivery of the final signed License Application to NRC in December 2004; that the July 2004 DLA was the first and only complete and comprehensive draft of the License Application; and finally, that it was the *only* document ever intended and scheduled by DOE to be put through the review and concurrence process delineated in the LAMP, absent which we would be expected to believe that by November 22, 2004, DOE was within days of filing an LA which had never undergone a review and concurrence process in DOE.

DOE repeatedly suggests that there is nothing particularly distinctive about the DLA, because during the review process, revisions were made in response to non-concurrences which effectively established a new draft, and therefore, there were hundreds of draft License Applications. The fallacy in the suggestion that a modification constitutes a new draft is exposed by the fact that no document other than the July 2004 DLA was ever intended to be subject to the sequential review process set out in the DOE LAMP. If the DLA were viewed as a new and different document each time a revision was made, then it would be necessary to return to the beginning of the review and concurrence process and apply it to each such "new draft." The LAMPs establish this was never intended and that the DLA, as revised, was intended to be signed and submitted to NRC in December 2004 (all the way up until November 22, 2004, when that filing was put on hold).

DOE's LAMP articulates the sequence of reviews to which the DLA would be subjected, including technical team reviews and joint chapter reviews, DOE Exhibit C p. 12, a technical team concurrence review, *id.* at 14, and a final concurrence review. *Id.* at 16. Next, the Office of Repository Development "will submit the Draft LA to DOE headquarters for review and concurrence. Any final comments resulting from this review will be resolved. The director of OCRWM will approve the printing of the LA for submission to NRC." *Id.* at 17. Figure 2 in both the July and September 2004 LAMPs sets out the anticipated five-month schedule for the application of this sequential review and concurrence process to the July 2004 DLA, culminating in submittal of the LA to NRC on 12/23/04. The DOE schedules illustrate that the DLA was in fact placed into a concurrence pipeline from which it was expected to emerge five months later as a final product. Moreover, it is impossible to define the concurrence process as something that occurs only within the DOE management chain because, under NRC's definition of circulated draft, the concurrence process begins with the original author of the document.

### 3. Unresolved Non-Concurrences

Nevada has previously noted that the language of NRC's regulation, 10 C.F.R. §2.1001, requires only that the draft document be "circulated for supervisory concurrence or signature." There is no requirement that the concurrence process be completed. The requirement is that the "original author or others *have* non-concurred," *not* that they *still* non-concur. DOE's position on this topic has likewise been elusive. Mr. Ziegler's affidavit affirmed that there were no unresolved non-concurrences with respect to the DLA. And yet, in its recent Response addressing PAPO's Request No. 10 concerning unresolved non-concurrences, DOE acknowledges that "not all of those items were resolved." Response p. 17. DOE pleads impossibility to Request No. 9 that it identify commenters who requested substantial changes in the DLA, offering that "virtually everyone identified in response to Question 6 (more than 100 DOE reviewers) had some kind of comment," and yet DOE said it is not feasible to "unscramble the egg" as to the systematic tracking of comments to individuals. This position is inconsistent with DOE's own LAMP, *supra*, which provides for the creation of "storyboards" which DOE calls electronic tools that "provide timely access to text for authors and reviewers. They also serve as a mechanism by which reviews of the documents are performed and as a place where comments and resolutions are documented." DOE Exhibit C p. 11.

In response to PAPO's requests, DOE has not supplied a single storyboard excerpt or a single comment, whether resolved or unresolved. However, its concession that there remain unresolved items establishes the applicability of the NRC definition of circulated draft to the DLA: it was circulated for supervisory concurrence by the clear terms of the LAMP, at least some individuals did not agree or had some disagreement with it, and some of those disagreements were unresolved.

#### **4. Bechtel's Transmittal of the DLA to DOE (7/26/2004)**

The PAPO's Request No. 7 asked for copies of the letters used to transmit the DLA to its recipients. In response, DOE provided a plethora of documents, all but one of which are non-responsive, and most of which predate the July 26, 2004 transmittal of the DLA. DOE's Exhibit G is in fact the transmittal from Bechtel's president to DOE's John Arthur and others of the DLA on July 26, 2004. In spite of DOE's self-serving arguments in this matter that each modification of the DLA results in a new and different draft (so that one can never pin down and identify a single draft as a "circulated draft"), Bechtel's formal delivery of the DLA ("this letter transmits a complete draft License Application") establishes the contrary. The letter reflects that Bechtel well understood the import of the DLA and the specific review and concurrence process it would undergo over ensuing months, as called for in DOE's LAMP. As stated by Bechtel, the LAMP "defines the process by which the LA will proceed through the requisite development and approvals involving BSC, the ORD, and other affected government organizations, up to and including the final submission to the U.S. Nuclear Regulatory Commission. . . . The defined process is an integrated and incremental one of development and approval, which is designed to provide the highest level of confidence in the overall quality and suitability for docketing and defense of the LA at the time of submission." DOE Exhibit G p. 1.

Bechtel's articulation is consistent with the multi-step, incremental review and concurrence process delineated in the DOE LAMP, *supra*, a treatment never accorded or intended to be accorded to any document but the DLA.

#### **5. DLA Decision-Making Process**

In response to Request Nos. 11-12, DOE suggests the DLA does not qualify as a circulated draft because the decision-making process with respect to that document is ongoing. DOE's position is inconsistent with other DOE arguments. DOE suggests that "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." Response p. 2 (emphasis added). Since DOE has taken the position that subsequent revisions of the DLA caused the creation of new and different documents, DOE would logically be required to admit that what will eventually be filed with the NRC will be some subsequent and *different* document, and *not* the DLA, with the result that a decision has been made by DOE not to finalize the DLA. A circulated draft under 10 C.F.R. §2.1001 includes "a draft of a document that does not become final due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken. . . ."

An even more substantial indication of DOE's decision not to finalize the July 2004 DLA was cited by DOE counsel at the July 12, 2005 PAPO hearing: "The State has made a very specific particular request for a particular draft at a point in time that will ultimately be a year and a half stale by the time that we submit our LA; that Draft LA, in part, addresses a regulatory standard that has been, in part, vacated by the Court of Appeals." Tr. 488. DOE counsel was accordingly suggesting that the July 2004 vacation of the EPA compliance standard for the Yucca Mountain project was a fundamental and drastic change that would require DOE to go back to the drawing board and prepare an entirely new Draft LA, since a key standard on which the DLA was predicated no longer exists. Put in other terms, if the DOE decision made public on November 22, 2004, not to file the LA in December 2004 was based upon the obsolescence of the DLA (referenced by DOE's counsel) then, it is fair to conclude that the DLA is "a draft of a document that does not become a final document due to . . . a decision not to finalize the document."

Since the passage of a substantial time in which no action has been taken to finalize a document is an independent basis for regarding the decision-making process as concluded, it is

fair to suggest that since nine months have passed since DOE "pulled the plug" on the DLA which had undergone concurrence review from July through November 2004, the definition of a substantial period of time has been met.

## **6. DOE Inconsistency**

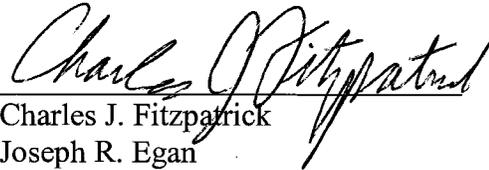
For whatever reasons, DOE has spent substantial time, effort, and resources attempting to conceal its DLA from disclosure. In the course of so doing, DOE has repeatedly made statements or arguments it later contradicted. Thus, Mr. Ziegler's assertion of no unresolved non-concurrences has been contradicted by DOE's current Response; Mr. Ziegler's suggestion that DOE management gave only cursory consideration to the DLA simply to ascertain its status was contradicted by Mr. Arthur's NWTRB presentation in which he described senior DOE officials spending weeks conducting an detailed review; DOE counsel's suggestions that "the draft wasn't circulated," Tr. 407, and "it wasn't circulated within DOE," Tr. 409, were contradicted both by Mr. Arthur's statements and those of Ms. Chu, who spoke of the intensity of DOE's review of the DLA. *See Nevada Initial Brief in Support of Motion to Compel* p. 12. Mr. Arthur's explanation of the review and concurrence process to be accorded the DLA is, however, totally consistent with that anticipated by Bechtel's DLA transmittal letter and with DOE's LAMP: "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 10. Stunningly, DOE now attempts to turn one of its most blatant self-contradictions into an asset: Having told the PAPO, Tr. 407-09, that the draft was not circulated within DOE, DOE now takes the position, after owning up to circulating the document to over 100 employees, that "the sheer number of persons" who received the DLA is "fundamentally inconsistent" with it being a draft circulated for supervisory concurrence. Response p. 10. On the contrary, it is hardly surprising, where over 70 different sections of

technical material needed to be reviewed, that more than 100 individuals would receive a copy. What *is* surprising is that DOE has asserted in this proceeding (and has not, as yet, withdrawn the assertion) that the DLA is *privileged*, subject to litigation work-product protection, in spite of the fact that not a single one of the documents now finally revealed by DOE, transmitting parts or all of the DLA to over 100 reviewers, gives the slightest hint of its being afforded privileged treatment by DOE.

### CONCLUSION

The information provided by DOE in response to the PAPO's July 18, 2005 order, while incomplete and inconsistent, nonetheless decisively confirms the status of the July 2004 DLA as a circulated draft document which DOE should be required to include in its LSN database at the time of certification.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing has been served upon the following persons by electronic mail:

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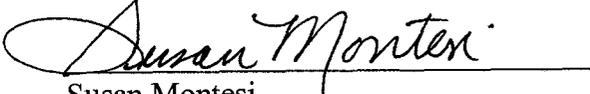
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