

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
U.S. DEPARTMENT OF ENERGY	)	Docket No. PAPO-00
	)	
(High-Level Waste Repository: Pre-Application Matters)	)	ASLBP No. 04-829-01-PAPO
	)	
	)	NEV-03

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NRC STAFF NOTICE OF APPEAL

AND

NRC STAFF APPEAL OF LBP-05-27 AND APPLICATION FOR A STAY

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Marian L. Zabler  
Counsel for the NRC Staff

October 3, 2005

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NRC STAFF NOTICE OF APPEAL

Pursuant to 10 C.F.R. § 2.1015(b), the Staff of the Nuclear Regulatory Commission hereby provides notice of appeal from “Memorandum and Order (Ruling on State of Nevada’s June 6, 2005 Motion to Compel),” issued on September 22, 2005 by the Pre-Application Presiding Officer Board (PAPO Board). *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-05-27, slip op. (Sept. 22, 2005). For the reasons discussed in the Staff’s accompanying brief, the PAPO Board’s ruling with respect to the definition of “circulated draft” is erroneous. Accordingly, the ruling should be reversed.

Respectfully submitted,

**/RA/**

Marian Zabler  
Counsel for the NRC Staff

Dated at Rockville, Maryland  
this 3<sup>rd</sup> day of October, 2005

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NRC STAFF APPEAL OF LBP-05-27 AND APPLICATION FOR A STAY

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1015(b), the Staff of the Nuclear Regulatory Commission (Staff) hereby files its brief in support of its appeal from the “Memorandum and Order (Ruling on State of Nevada’s June 6, 2005 Motion to Compel)” (Order) issued by the Pre-Application Presiding Officer Board (PAPO Board) on September 22, 2005. *U.S. Dep’t of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-05-27, slip op. (Sept. 22, 2005). For the reasons discussed below, the PAPO Board’s ruling with respect to the definition of “circulated draft” is erroneous and, thus, should be reversed. In addition, pursuant to 10 C.F.R. § 2.342, the Staff requests a stay of the effectiveness of the PAPO Board’s Order pending review.

BACKGROUND

In response to the Department of Energy’s (DOE) denial of its request for a copy of a draft of the license application (LA), the State of Nevada, on June 6, 2005, filed “Nevada’s Motion to Compel Production of DOE’s Draft Yucca Licensing Application, or in the Alternative,

for a Declaratory Order” (Motion to Compel).<sup>1</sup> In its Motion to Compel, the State argued that the Draft LA must be made available on the Licensing Support Network (LSN) because, among other things, it meets the definition of a circulated draft under 10 C.F.R. § 2.1001.<sup>2</sup> Motion to Compel at 7-16.

On June 20, 2005, DOE, the Staff, and the Nuclear Energy Institute each filed a response to the State’s Motion to Compel. “Department of Energy’s Brief in Opposition to Nevada’s Motion to Compel Production of the Draft Yucca License Application, or, in the Alternative, for a Declaratory Order” (DOE Brief); “NRC Staff Response to Nevada’s Motion to Compel Production or Issue a Declaratory Order” (Staff Response); “Brief of the Nuclear Energy Institute Opposing the State of Nevada’s Motion to Compel Production of the July 2004 Draft Yucca Mountain License Application.” In its Response, the Staff did not take a position on the factual questions of whether the Draft LA is documentary material, a circulated draft or whether it is privileged. Staff Response at 1, 3. The Staff did disagree with the State on certain legal issues, including the definition of a circulated draft and when a circulated draft must be made

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<sup>1</sup> During a May 18, 2005, Case Management Conference, the State and DOE agreed that the issue of whether a copy of the July 2004 Draft License Application (Draft LA) must be made available on the LSN should be resolved at this time. Transcript of Case Management Conference, May 18, 2005, (“May 18 Transcript”) at 379, 384. At that conference, the PAPO Board directed the State and DOE to take steps to bring the issue before it and set a schedule for briefing the issue. *Id.* at 413-414. Pursuant to the PAPO Board’s direction, the State sent a letter to DOE requesting a copy of the Draft LA. See Letter from Martin G. Malsch to Donald P. Irwin, dated May 19, 2005, attached as Exhibit 1 to the Motion to Compel. DOE denied the State’s request in a letter dated May 23, 2005. See Letter from Donald P. Irwin to Martin G. Malsch, dated May 23, 2005, (“DOE Denial”), attached as Exhibit 2 to the Motion to Compel.

<sup>2</sup> In denying the State’s initial request for the Draft LA, DOE asserted that: (1) the license application is a basic licensing document, not documentary material, and there is no obligation to provide drafts of basic licensing documents; (2) the Draft LA is not otherwise documentary material; (3) the Draft LA, even if documentary material, is a “preliminary draft” not required to be produced on the LSN; and (4) the Draft LA is protected by the litigation work product and deliberative process privileges. DOE Denial. The State in its Motion to Compel addressed all four of DOE’s assertions and also asserted DOE’s denial violated the Freedom of Information Act. Motion to Compel at 4-25.

available on the LSN.<sup>3</sup> *Id.* at 3-5. On June 28, 2005, Nevada filed its reply. “Nevada’s Reply Brief in Support of Motion to Compel Production of Draft License Application.”

On July 12, 2005, the PAPO Board heard oral argument on the Motion to Compel.<sup>4</sup> See “Order (Scheduling Motion Argument and Tentatively Scheduling Case Management Conference),” June 16, 2005. Subsequently, on July 18, 2005, the PAPO Board ordered DOE to file certain documents and answer several questions. See “Order (Regarding State of Nevada’s June 6, 2005 Motion).” DOE responded on July 29, 2005, and on August 11, 2005, Nevada filed a response to DOE’s filing. “Department of Energy’s Response to the Pre-License Application Presiding Officer Board’s July 18, 2005 Order;” “Nevada’s Reply to Department of Energy’s Response to the Board’s July 18, 2005 Order.” On September 22, 2005, the PAPO Board issued its Order.

For the reasons set forth below, the PAPO Board’s decision concerning the definition of “circulated draft” is erroneous and should be reversed.

### DISCUSSION

#### A. Summary of LBP-05-27

On September 22, 2005, the PAPO Board issued its Order, holding that the Draft LA is documentary material, is a circulated draft, and is not protected by the litigation work product or deliberative process privileges. LBP-05-27 at 2. The PAPO Board held that the term “circulated draft” is composed of five “essential elements”: (1) a nonfinal document; (2) that has been

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<sup>3</sup> The Staff also disagreed with the State’s assertion that FOIA and DOE regulations are controlling. *Id.* at 6-7.

<sup>4</sup> In an order dated June 30, 2005, the PAPO Board limited the oral argument to the State and DOE; no other potential party was permitted to be heard absent assent from either the State or DOE to share a portion of their respective time allotment. “Order (Setting Terms of Oral Argument),” June 30, 2005. Because of this limitation and because the Staff did not need to add anything more than what it asserted in its Response, the Staff did not seek leave to participate in the oral argument.

circulated; (3) to supervisors; (4) for the purposes of concurrence or signature; and (5) in which the original author or others in the concurrence process have non-concurred. *Id.* at 28-29 *citing* 10 C.F.R. § 2.1001.

In discussing these “essential elements,” the PAPO Board held that “[a] document that is circulated for ‘concurrence’ is circulated for substantive agreement or approval.” *Id.* at 35. The PAPO Board defined the “concurrence process” as involving a “serious management review of a document perceived to be approaching final form,” and specifically rejected the notion “that the concurrence process can refer only to the bureaucracy’s final sign-off sheet, must take a special narrow form, or must be expressly labeled as a ‘concurrence process.’” *Id.* at 35-36. A “non-concurrence,” according to the PAPO Board, is “a concern, comment, or objection seeking a substantive change.” *Id.* at 35, 39. Applying the five elements of the regulation, the PAPO Board found that the Draft LA at issue met each of these elements. *Id.* at 40.

The PAPO Board went on to discuss two additional elements of the term “circulated draft” that were raised by DOE and the Staff. Based on the Statement of Considerations (SOC)<sup>5</sup> for the regulation, DOE and the Staff argued that in order for a document to be a circulated draft any objections to it must be unresolved and that the decision-making process to which the draft related must be completed. *Id.* at 40, *citing* DOE Brief at 8-9, 12; NRC Response at 4, 5. The PAPO Board rejected these arguments, finding that the plain meanings of the regulatory terms “concurrence” and “non-concur,” although undefined in the regulations, were sufficiently clear “to

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<sup>5</sup> Specifically, the Staff and DOE cited to *Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 54 Fed. Reg. 14925, 14934 (April 14, 1989). This rule set out the requirements for the LSS - Licensing Support System - which was the predecessor to the current, web-based document management system now referred to as the LSN. While the LSS regulations were revised in 1998, there is no indication that the Commission intended to change the meaning of “circulated draft” at that time. *See Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71729 (Dec. 30, 1998).

resolve fully the questions of interpretation.” *Id.* at 40-41. The PAPO Board further found that the SOC provide no clarification of these terms but “merely” add two new requirements onto the definition of circulated draft.<sup>6</sup> *Id.* at 41. Moreover, the PAPO Board found that the statements in the SOC were “inconsistent with the regulation, mutually contradictory, and difficult, if not impractical, to administer realistically.”<sup>7</sup> *Id.* Accordingly, the PAPO Board concluded that the statements in the SOC should not be considered.<sup>8</sup>

B. LBP-05-27 Impacts the Staff

Although the Draft LA at issue in LBP-05-27 is a DOE document and the Staff took no position on whether, as a factual matter, it is or is not a circulated draft, the PAPO Board’s ruling defining what a circulated draft is has a direct impact on the Staff, as well as other participants. Because nothing in LBP-05-27 limits its holding only to the question of whether the Draft LA is a circulated draft, the PAPO Board’s definition is applicable to the Staff’s document collection as well. The PAPO Board’s ruling, therefore, may have an impact on the Staff’s LSN activities.

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<sup>6</sup> The PAPO Board also stated that even if the two requirements were appropriate for consideration, the Draft LA met them. *Id.* at 42-44.

<sup>7</sup> As a final matter, the PAPO Board attempted to limit the breadth of its holding by stating that “[r]uling that this unique and enormously significant draft is a ‘circulated draft’ does not render every draft a ‘circulated draft’ and, thus, will have no deleterious effect on the scheme underlying the LSN.” *Id.* at 46. Although the PAPO Board may say this in *dicta*, it provides no guidance on how to distinguish the Draft LA from any other draft document that meets the definition set out by the PAPO Board. Thus, the PAPO Board’s decision affects all LSN participants.

<sup>8</sup> The PAPO further justified its decision by noting that release of the Draft LA will promote the “best and most efficient management of the HLW license application adjudicatory process.” *Id.* at 47. This is uniquely so, according to the PAPO Board, because the Commission’s regulations only provide for 30 days after docketing of the application for the submission of contentions. *Id.* This further justification has no bearing on the legal issue concerning the proper interpretation of “circulated draft” and is in any event, inappropriate. The PAPO Board appeared to be taking issue with the Commission’s regulation providing for 30 days from the date of docketing to submit contentions. *See id.* The PAPO Board further failed to recognize that there could be up to 120 days between the time the LA is submitted, and made publicly available, and the time contentions would be due, because of the time the Staff intends to take to perform an acceptance review of the LA. *See Yucca Mountain Review Plan, NUREG-1804, Rev. 2, Final Report at xv; 68 Fed. Reg. 45086, 45115 (July 31, 2003).*

During the pre-application phase, the Staff has, and will continue to have, Yucca Mountain-related documents under review. As the Staff has a current obligation to supplement its LSN collection on a monthly basis during the pre-application phase, the PAPO Board's ruling will have an immediate impact on the Staff's LSN activities.<sup>9</sup> See "Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution)," dated July 8, 2005, at 21-22 (Second Case Management Order). Thus, although the Staff has no position on whether, as a matter of fact, the Draft LA is a circulated draft, it is appealing the PAPO Board's interpretation of the definition of "circulated draft."

C. PAPO Board's Interpretation of the Term "Circulated Draft" Is Erroneous

The PAPO Board's Order is in error in defining the term "circulated draft" in two material respects. Pursuant to 10 C.F.R. § 2.1001, a "circulated draft" is:

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

10 C.F.R. § 2.1001. In ruling on the meaning of "circulated draft," the PAPO Board incorrectly defined the term "non-concurred." Further, the PAPO Board ignored guidance from the Commission regarding the term "circulated draft." Accordingly, the PAPO Board's ruling with respect to the definition of "circulated draft" is erroneous and, thus, should be reversed.

1. PAPO Board's Interpretation of the Term "Non-Concurrence" Is in Error

The definition of "non-concurrence" in LBP-05-27 is erroneous and should be reversed. In response to Nevada's Motion to Compel, the Staff argued that the State's definition of

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<sup>9</sup> As part of this Appeal, the Staff is also requesting a stay of the effectiveness of LBP-05-27.

“circulated draft” was overly broad. Staff Response at 4. Specifically, the Staff disagreed with the criteria established by the questions posed by the State in arguing that the Draft LA was a circulated draft. *Id.* at 3-4. These questions were: (1) was the Draft LA reviewed by DOE; (2) did DOE management make comments, including comments which did not agree, or which disagreed, with any material aspect of what had been delivered; and (3) were changes made in the document in recognition of those non-agreements or disagreements. *Id. citing* Motion to Compel at 8. The Staff argued that “a mere disagreeing comment is insufficient to make a draft a circulated draft where it does not rise to the level of a *formal* objection that is not resolved in the course of the decision-making process.” *Id.* at 4-5 (emphasis added).

In reaching its definition of “non-concurrence”, the PAPO Board first defined the term “concurrence process.” See LBP-05-27 at 35-36, 38. According to the PAPO Board, the term “concurrence process” is “a process whereby management reviews [a] document for substantive agreement or disagreement.” *Id.* at 35. The PAPO Board also ruled that a concurrence process need not be a formal process, rejecting any suggestion that a concurrence process can only refer to “the bureaucracy’s final sign-off sheet, must take a special narrow form, or must be expressly labeled as a ‘concurrence process.’” *Id.* at 35-36. Rather, the PAPO Board concluded that a “concurrence process” is a process that is based on such objective criteria as “whether the document is a significant, well-developed, mostly complete draft; the nature and extent of management review devoted to the document; and whether the management review was for the purpose of agreement on the substance of the draft.” *Id.* at 36.

The PAPO Board then went on to define a “non-concurrence” as a “concern, comment, or objection seeking a substantive change.” *Id.* at 35. *See also id.* at 36, 39.<sup>10</sup> The PAPO Board held that a non-concurrence need not be labeled as such to in fact be deemed a “non-concurrence.” *Id.* at 36. Rather, it must be “substantive” and “serious.” *Id.* at 39. In order to decide whether a comment meets this definition, the PAPO Board stated, it will look at whether a “supervisor or manager, or the original authors or others in the concurrence process, whose approval would be requested before the documents could be finalized, provide comments that seek substantive . . . changes in the document.” *Id.* at 36.

The PAPO Board’s ruling in this regard, however, inappropriately imposes a new standard on when a document is in a concurrence process and, consequently, what a non-concurrence is. Although not specifically defined in the regulations, it is clear that the terms “concurrence process” and a “non-concurrence” were intended to have some formality with the purpose of taking a non-final document through a process in order to make it final. Further, the PAPO Board’s rejection of the suggestion that a concurrence process can only refer to the “bureaucracy’s final sign-off sheet” is in error to the extent that the PAPO Board is holding that whatever the process used by a participant is, it need not be a formal, recognized process.<sup>11</sup> It appears from the SOC that the Commission believed that entry into a “concurrence process”

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<sup>10</sup> “[W]e interpret the word ‘non-concurrence’ in a practical way to mean a comment or objection indicating significant, substantive non-agreement with the draft in question, *i.e.*, a non-agreement requiring a substantive change in the document before the individual in question agrees with or will approve it.” *Id.* at 39.

<sup>11</sup> The PAPO Board did not explain its basis for its rejection of the “initialing step” as a basis for demonstrating that a particular draft was circulated for supervisory approval. It appears that the PAPO Board simply reached this conclusion from the fact that the term “concurrence” does not mean “signature.” See LBP-05-27 at 33. Neither the SOC nor the meeting minutes from the HLW Licensing Support System Advisory Committee Meetings discuss this specific issue. However, the more correct interpretation of the use of these two terms is that the Commission meant to capture the “initialing step,” which does not necessarily include a signature.

would be necessary for a document to have been “circulated.” The Commission stated in the SOC that “[a]lthough many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their *document approval process*.” 54 Fed. Reg. at 14934 (emphasis added). The Commission, thus, recognized that entities should have some kind of process, whether it is labeled as a concurrence process or an internal review process.<sup>12</sup>

Similarly, in order for a comment to be considered a “non-concurrence” there should be some recognized designation within a participant’s internal review process that indicates that an author or reviewer objects to a statement, assertion, conclusion or position in the document in question and, accordingly will not concur in it.<sup>13</sup> Again, the SOC make the Commission’s intent clear: “[a]ny draft documents to which such a *formal*, unresolved objection exists must be submitted for entry into the LSS.” 54 Fed. Reg. at 14934 (emphasis added). The Staff agrees it need not necessarily be labeled a “non-concurrence,” but some designation that the author or reviewer will not concur in the document if the changes are not made is required.

Moreover, it is not clear how a participant is supposed to implement the PAPO Board’s new standard. Based on the PAPO Board’s holding that it will look at “objective” factors, a participant will be obligated to review every draft document that an author produces and shows

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<sup>12</sup> It appeared that the PAPO Board was concerned that the participants will act in bad faith to establish an “artificial ‘final’ concurrence step that would avoid the production of any circulated drafts.” *Id.* at 35-36. The PAPO Board has no basis to assume such will be the case. And, in any event, there is nothing to prevent an LSN participant from circumventing the new standard articulated by the PAPO Board.

<sup>13</sup> The PAPO Board has no basis for its assumption that acceptance of any substantive management comment is a necessary condition of approval. *See id.* at 38.

to others in the organization to determine whether (1) the document is significant,<sup>14</sup> well-developed, mostly complete, (2) the nature and extent of management review devoted to the document and (3) whether the management review was for the purpose of agreement on the substance of the draft. Once those determinations are made, a participant then will have to determine whether any managers, supervisors, the author of the document, or others in the “concurrence process” whose approval would be requested<sup>15</sup> before the document becomes final provided any changes to the document that were “substantive.” See LBP-05-27 at 36. The PAPO Board offered no guidance on what it would consider a “substantive” change or how to determine which documents are “significant.” Rather than expend resources on making such determinations, a participant will likely simply “flood” the LSN with all drafts.<sup>16</sup> For these reasons, the PAPO Board’s holding with respect to a “non-concurrence” is erroneous and should be reversed. In order for a change, comment or concern to be considered a “non-concurrence,” it should have been provided as part of a formal review process of the document in question and should clearly indicate that the author or reviewing party will not concur in the document absent the change being made.

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<sup>14</sup> It is not clear by what criteria a participant is supposed to determine that a document is “significant” for purposes of determining whether it is in a concurrence process. Nor is it clear that the significance of the document is relevant to any consideration under the LSN rule. Documentary material is not defined in terms of “significance.”

<sup>15</sup> Without some kind of recognized review process (such as a “sign-off” sheet), it is unclear how a participant would be able to identify all the relevant people whose approval would be necessary.

<sup>16</sup> It was precisely this concern, bombarding the LSN with unnecessary documents and limiting its effectiveness, that led the Commission in the past to reject an analogous attempt to expand the scope of documentary material. The Commission’s reasoning was instructive: “this enlargement of the scope of documentary material might only serve to impede electronic access to the relevant material by cluttering the system with extraneous material.” 63 Fed. Reg. at 71730. See also *Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket*, 69 Fed. Reg. 32836, 32842 (June 14, 2004). Similarly, here, by expanding the definition of what a circulated draft is, the PAPO Board risks cluttering the LSN with extraneous material.

2. The PAPO Board Erroneously Dismissed the Regulatory History of the Term “Circulated Draft”

In opposing Nevada’s Motion to Compel, the Staff also argued that a non-concurrence must be unresolved and that a final determination that a document is a circulated draft cannot be made until the end of the decision-making process. Staff Response at 4-5. In making this argument, the Staff cited to the SOC that “explicitly state that the requirements of § 2.1003 do not require a [LSN] participant to submit a circulated draft to the [LSN] while the internal decision-making process is ongoing.” *Id.* at 5 *citing* 54 Fed. Reg. at 14934. Further, the Staff argued the SOC made clear that the intent of requiring that circulated drafts be made available on the LSN was to “capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process.” *Id.* at 4, *citing* 54 Fed. Reg. at 14934. The PAPO Board, however, dismissed consideration of the Commission’s intent as articulated in the SOC because the language of the regulation is “clear” and it would be “improper” to change the regulation by “resorting to entirely extraneous statements in the Statement of Considerations.” LBP-05-27 at 40. Reference to these statements “merely” add two new requirements, an “unresolved” requirement and a “decision-making is complete” requirement. *Id.* at 40-41.

The PAPO Board incorrectly characterized the Commission’s statements as “extraneous,” narrowly reading the SOC language as only pertaining to the definition of the terms “concur” and “non-concur.” Rather, the SOC language explains generally why the Commission was departing from the general rule that only final documents be placed on the LSN. The SOC also explains when such non-final documents need to be placed on the LSN.<sup>17</sup> See 54 Fed.

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<sup>17</sup> The Staff notes that the language quoted from the SOC pertains not to section 2.1001, definitions, but rather to section 2.1003 regarding what material is required to be placed on the LSN. See 54 Fed. Reg. at 14934.

Reg. at 14934. As such, these statements do provide guidance that should be considered. By narrowly focusing only on the question of whether these statements help in defining certain terms, the PAPO Board incorrectly dismissed clear statements concerning Commission intent with respect to what should be placed on the LSN.<sup>18</sup>

In addition, the PAPO Board held that in any event, these two new requirements are inconsistent with the regulation, “mutually contradictory,” and “difficult” to administer. LBP-05-27 at 41. The PAPO Board concluded that the statement in the SOC indicating that the non-concurrence “be unresolved” is inconsistent with the language in the regulation which provides that a person “have non-concurred.” *Id.* The PAPO Board interpreted the use of the past tense in the rule language as indicating that it is sufficient that at some point a person did not concur whereas the use of the present tense in the SOC requires that the non-concurrence be ongoing. *Id.* However, the two statements are not inconsistent. Under the rule, in order for a document to be a circulated draft there must have been a non-concurrence. That non-concurrence, which could have occurred anytime during the review process, must be unresolved at the time of a final decision.

The PAPO Board further held that the two requirements, “unresolved” and “decision-making is complete,” are contradictory. *Id.* The PAPO Board erroneously concluded that once a final decision is made, all non-concurrences have been “resolved.” *Id.* at 42. This is not necessarily the case. Although the issuance of a final document indicates that a decision has been made, it does not imply that with respect to the individual non-concurring, that individual’s concern has been resolved; it indicates only that a decision was made despite that person’s

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<sup>18</sup> The Commission’s ruling in the *Yankee Atomic* proceeding referenced by the PAPO Board is inapposite. See *id.* at 40, n.144 citing *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 373-74 (2005). There, the Commission was looking at the very specific question of the definition of certain terms used in its decommissioning regulations. CLI-05-15, 61 NRC at 373-74. Here, the SOC provide guidance on the intent of the regulation and how to apply it.

concerns. This situation was recognized by the Commission when it stated in the SOC that a document need not be placed on the LSN until the decision-making process has been completed. 54 Fed Reg. at 14934. Accordingly, as discussed above, the PAPO Board erroneously ignored the Commission's statements in the SOC. By refusing to consider the regulatory history related to the term "circulated draft," the PAPO Board's ruling that a "non-concurrence" need not be unresolved is incorrect. In addition, the PAPO Board's conclusion that a circulated draft must be placed on the LSN before the decision-making process is complete is also erroneous. These rulings in LBP-05-27 should, therefore, be reversed. In order for a document to be considered a circulated draft, the non-concurrence must be unresolved and the decision-making process must have been completed.

In summary, for the reasons set forth above, the PAPO Board's ruling with respect to the definition of "circulated draft" is erroneous and, thus, should be reversed.

D. Application for Stay Pending Review

Pursuant to 10 C.F.R. § 2.342, the Staff requests the Commission for a stay of the effectiveness of LBP-05-27 pending a ruling on the Staff's Appeal. Pursuant to this section, in deciding whether to grant a stay, the Commission will consider, (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

As discussed above in its appeal, the Staff asserts that the PAPO Board articulated an erroneous interpretation of "circulated draft." As discussed below, this interpretation, if permitted to take effect, will have an immediate and adverse impact on the Staff. Further, a stay is in the public interest and would involve no harm to other participants in this proceeding. Finally, the Staff believes it will likely prevail on the merits.

Since the Staff has certified its document collection, the Staff is under the obligation to update its LSN collection on a monthly basis. Second Case Management Order at 21-22. The PAPO Board's Order thus places the Staff under an immediate obligation to make available documents that fall within the definition of "circulated draft" under the PAPO Board's new construction. Because of this current obligation, the Staff will have to review its current process for identifying circulated drafts to determine whether it needs modification to ensure it is in compliance with the PAPO Board's Order.

Further, the requested stay would not harm any other participant. The requested stay will likely have little, if any impact on the core six-month period of LSN access between DOE initial certification and docketing of the license application. See 10 C.F.R. § 2.1003. In addition, the public interest supports granting this stay. As all participants will be equally bound by the ultimate construction of the term "circulated draft," it is in all participants' and potential participants' interest to have a clear understanding of what is a "circulated draft" before such participants begin to make their document collections available on the LSN.

The Staff is likely to prevail on the merits of its Appeal. The Staff believes that the arguments it advances in support of its Appeal are well supported and consistent with clear Commission intent. In any case, tribunals may issue stays when there is a difficult legal question and the equities in the case suggest that the *status quo* should be maintained. See *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844-45 (D.C. Cir. 1977). In this case, the proper interpretation of the term "circulated draft" is complex and a stay should be granted to maintain the *status quo*. Thus, for the foregoing reasons the Staff submits that a stay pending review is appropriate and necessary in this case.

CONCLUSION

For the reasons set forth above, the PAPO Board's ruling with respect to the definition of "circulated draft" is erroneous and, thus, should be reversed. In addition, the effectiveness of LBP-05-27 should be stayed pending review.

Respectfully submitted,

**/RA/**

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Dated at Rockville, Maryland  
this 3<sup>rd</sup> day of October, 2005

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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)	)	NEV-03
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF NOTICE OF APPEAL" and "NRC STAFF APPEAL OF LBP-05-27 AND APPLICATION FOR A STAY" in the above captioned proceeding have been served on the following persons this 3<sup>rd</sup> day of October, 2005 by Electronic Information Exchange.

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