

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD**

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
)	
(High Level Waste Repository:)	
Pre-Application Matters))	July 23, 2007

**THE STATE OF NEVADA’S MOTION FOR A DECLARATORY RULING TO
DEFINE AND TO COMPEL COMPLIANCE BY DOE WITH 10 C.F.R. § 2.1003(a)**

EGAN, FITZPATRICK & MALSCH, PLLC
Charles J. Fitzpatrick
Joseph R. Egan
Martin G. Malsch
1777 N.E. Loop 410, Suite 600
San Antonio, TX 78217
Telephone: 210.820.2667
Facsimile: 210.820.2668

Ross, Dixon & Bell, L.L.P.
Merril Hirsh
William H. Briggs
2001 K Street, N.W., 4th Floor
Washington, DC 20006-1040
202.662.2063 – Office
202.662.2190 – Fax

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INTRODUCTION

This is a dispute over the electronic availability of documents. The State of Nevada respectfully files this Motion to ask the Pre-License Application Presiding Officer ("PAPO") Board to exercise its authority under 10 C.F.R. §§2.1010(a)(1), 2.1010(e), and 2.319 to require the U.S. Department of Energy ("DOE") to comply with the Licensing Support Network ("LSN") certification requirements set forth in 10 C.F.R. §§2.1003 and 2.1009(b) and to declare the nature of those requirements. Section 2.1003(a) requires that, subject to certain exclusions irrelevant here, DOE "shall make available, no later than six months in advance of submitting its license application for a geologic repository, . . . *all* documentary material" to be relied on in its License Application ("LA") (emphasis added). Section 2.1009(b) requires at the same time that a "responsible official" designated by DOE certify to the PAPO that DOE has, among other things, "Established procedures to implement the requirements of §2.1003" (*see* §2.1009(a)(2)), that those procedures "have been implemented, and that to the best of his or her knowledge, the documentary material specified in §2.1003 has been identified and made electronically available." Section 2.1009(b).

DOE, however, has recently announced both publicly and privately that it has no intention of meeting this regulatory requirement to make all of the key Documentary Material specified in §2.1003 available six months before DOE files its LA. What it intends to do instead is to make available most of such documents (those available at initial certification) and then to supplement its Licensing Support Network ("LSN") collection over the next few months (or more) with the remaining ones. It says it will certify the LSN well before it has obtained, completed, or even created many of the most important technical documents on which its LA will heavily depend – including the very model being used to determine whether the LA meets

the basic requirements of law. As explained below, DOE's plan is contrary to law and flies in the face of the LSN and its history.

This is not a dispute over inconsequential technical tidbits among the millions of documents and computer models with which DOE will populate its LSN. Nevada hardly expects perfection in any party's document collection, including its own. Here, DOE has confirmed that its initial LSN certification, planned for some time between September and December 2007, will be missing numerous critical documents, not yet completed, that go to the very heart of the LA. For example, DOE has confirmed its certification will omit *the entire* Total System Performance Assessment ("TSPA") and many of its inputs for the LA – *the* key calculation which will determine whether the repository meets post-closure legal and regulatory standards.¹ It will exclude key Analysis and Model Reports ("AMRs"), technical products that form the backbone of DOE's TSPA. It will exclude an accounting of how nearly 100 of the so-called Key Technical Issues ("KTIs"), (products identified by DOE and negotiated with NRC Staff as the most essential questions remaining in the repository's performance) will be resolved. It will exclude the latest net infiltration models for the repository, the latest volcanism analyses, and other technical models essential to licensing that are not expected to be completed until well into 2008. DOE maintains an "LA Products Baseline," a document which specifies some 1500 technical products DOE itself believes are essential to licensing, but many of which may be unavailable on initial LSN certification under its own projections (*see infra*).

In short, departing from years of its own interpretations and directives, what DOE proposes, and now relies on for its schedule push, is that the PAPO will come to accept a radical redefinition of 10 C.F.R. § 2.1003(a), one which lets participants satisfy LSN requirements in dribs and drabs instead of in the manner specified by regulations and prescribed by NRC and

¹ Nevada has engaged over 20 experts to study and evaluate the various substantive components of the TSPA and their associated input parameters when it finally becomes available.

DOE for over 18 years. Nevada respectfully urges the PAPO Board to reject this redefinition as a matter of law and to do so now.

I. The PAPO Board's Authority to Grant Nevada's Requested Relief

The PAPO Board has broad plenary authority to declare what DOE must do to certify compliance with the LSN requirements of 10 C.F.R. §2.1003. *See generally*, the PAPO Board's Majority Response to the July 16, 2007 Dissent of Judge Karlin (July 19, 2007), which stressed both the power and the need of the Board to resolve disputes early in the pre-licensing review process, stating: "If there is anything that seems totally settled in the realm of adjudication, it is that the authority to render decisions on matters in dispute carries with it the inherent power to issue orders in advance concerned with how, when they arise, those disputes will be managed." Response at 6. The Commission's regulations define the PAPO's authority using the same broad terms that apply to all presiding officers. Under 10 C.F.R. §2.1010(e), the PAPO "possesses all the general powers specified in §§2.319 and 2.321(c)." Section 2.319 (the relevant provision here) prescribes that "[a] presiding officer has the duty to conduct a fair and impartial hearing according to law, to take appropriate action to control the prehearing and hearing process, to avoid delay and to maintain order" and confers upon the presiding officer "*all* the powers necessary to those ends, including" (emphasis added) among other powers, "the powers to":

* * *

- (g) Regulate the course of the hearing and the conduct of participants;
- (h) Dispose of procedural requests or similar matters;

* * *

- (k) Set reasonable schedules for the conduct of the proceeding and take actions reasonably calculated to maintain overall schedules;

* * *

(q) Issue orders necessary to carry out the presiding officer's duties and responsibilities under this part; and

(r) *Take any other action consistent with the Act, this chapter, and 5 U.S.C. [§§] 551-558.*

10 C.F.R. §2.319 (emphasis added).

This Board, like adjudicatory agencies in general, has inherent authority to issue declarations of the law that affect its proceedings. In the words of Section 2.319(r), such declarations are not only "consistent with," but are expressly contemplated by the adjudication provision of the Administrative Procedure Act, 5 U.S.C. §554(e), which §2.319(r) incorporates by reference. Section 554(e) specifies that an "agency . . . in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. §554(e). *See, e.g., Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 627, 625-26 (1973) (applying §554(e) flexibly to permit the Food and Drug Administration to declare principles of law applicable to numerous proceedings even outside of individual adjudications); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984) (upholding FCC's use of declaratory ruling).

This Board has previously exercised its discretion to issue declarations and make determinations on a number of issues that the parties face in these proceedings. When, for example, the parties disagreed over whether DOE would be required to place a draft LA on the LSN, both the parties and the Board recognized the common sense of obtaining an advance ruling rather than delaying the proceedings to resolve this issue at some later point. *See* Memorandum and Order Ruling on State of Nevada's June 6, 2005 Motion to Compel, Order LBP-05-27 (Sept. 22, 2005), at 2-4. The procedure Nevada has followed here – of raising the issue with DOE, discussing the competing viewpoints, and confirming a disagreement at the point of impasse – mirrors that used on the draft LA issue. *See also* PAPO Board Hearing of

May 18, 2005, Transcript at 281-97 (discussing this procedure and the logic for it). Similarly, the Board recently issued a draft Third Case Management Order that contemplates instructing the parties on the protection and disclosure of sensitive unclassified information. Order of July 10, 2007; *see also* Order of July 19, 2007.

Deciding whether DOE can meet an arbitrary, self-imposed deadline by "certifying" its LSN collection before it has made available numerous key documents upon which its LA will depend reflects not only the considerations expressed by the Board Majority in its July 19, 2007 Order, but appears also to respect the considerations Judge Karlin expressed in his Dissent Regarding Additional Safeguards Questions and the Proposed Third Case Management Order, Docketed July 16, 2007 ("Judge Karlin's Dissent"). As Judge Karlin notes, in *judicial* proceedings:

The basic rationale [of the ripeness] doctrine is to prevent the courts, through avoidance of premature adjudications, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties.

Dissent at 2-3 (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967)).

As the Supreme Court explained earlier this year – the ripeness requirement in evaluating a declaratory judgment involves four basic requirements. These requirements are "that the dispute [1] be 'definite and concrete, [2] touching the legal relations of parties having adverse legal interests'; and that it be [3] 'real and substantial' and [4] 'admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *MedImmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 771 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). "Basically, the question in each case is whether the facts alleged, under the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy

and reality to warrant the issuance of a declaratory judgment." *Id.* (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Although these judicial standards might in a particular case be instructive, they are in fact *not* requirements for administrative agencies in general. The Administrative Procedure Act leaves the issue of when an agency should issue a declaratory ruling merely to "its sound discretion." 5 U.S.C. §554(e), *New York State Comm'n*, 749 F.2d at 815. Nor do the rules that apply to the PAPO Board necessarily require the Board to meet the standard that applies to federal courts. Judge Karlin is correct (Dissent at 9) that Section 2.1010(a)(1) specifies that the Board is granted authority "for the purpose of ruling on disputes over the electronic availability of documents, including disputes relating to the claims of privilege." *See also, id.*, quoting Order, CLI-04-20, 60 NRC 15, 18 (2004) (referring to the Board's authority as being "*solely*" for this purpose) (emphasis in original). But the requirement that there be a "dispute" does not, by itself, necessarily require the four *further* findings that "the dispute be" sufficiently concrete, touch legal relations, be real and substantial, and admit of a specific remedy that are required for a *federal court* to act. *MedImmune*, 127 S. Ct. at 771.

Nonetheless, this dispute does not appear to invite the concerns expressed by either the PAPO Majority or by Judge Karlin in his Dissent because it *does* in fact meet all the requirements a federal court would apply to itself. *First*, this dispute is definite and concrete. DOE maintains it can certify that the Documentary Material specified in §2.1003 has been identified and made electronically available under §2.1009(b), even when the Documentary Material upon which it intends to cite and rely does not exist and will not exist (even in the fantasyland of DOE) for months. Nevada disagrees.

Second, the dispute "touch[es] the legal relations of parties having adverse legal interests." DOE maintains that it can wait – until the last minute or in theory even until *after* it

submits the LA – to provide documents upon which it intends to cite or rely in support of its LA. If it does, Nevada will be denied the six months review time required by §2.1003.

Third, the dispute is "real and substantial." This Board has stressed the critical importance of both the adequacy and timing of the LSN. The Board has already stricken DOE's first LSN certification, LBP-04-20 (August 31, 2004), as failing to meet its obligations; and it has emphasized the obvious importance of knowing when DOE will truly be able to make a certification that complies with the regulations. *See* February 9, 2007 Order (requiring DOE to report on the most likely date upon which DOE would certify the LSN); PAPO Board Hearing of March 7, 2007 Tr. at 965-82 (questioning Mr. Shebelskie at length on the need for an understanding of when the certification will actually be complete). If, in fact, as Nevada argues below, the certification that DOE aims to make between September and December 2007 will not meet the requirements of Subpart J, the problem is both "real and substantial."

Finally, this dispute admits of very "specific relief." DOE can be required to make electronically available on the LSN, at the time of its initial certification, all Documentary Material which it knows or expects it will cite or rely on in its LA.

II. Background and Nature of Dispute

In order to meet its self-imposed, arbitrary, political deadline of June 2008 to submit its Yucca Mountain LA to NRC, DOE will continue work, after its initial LSN certification, on completing many of the most important technical documents that it will cite and rely on to support its LA in *parallel* with its final drafting of the LA itself. This, DOE contends, will result in much of the critical technical Documentary Material DOE intends to rely on being completed just prior to the submission (or even after submission) of the LA. While this strategy may facilitate DOE's political and schedule goals, it emasculates and renders worthless the LSN, a program designed largely to benefit DOE which NRC has developed over the last 18 years.

As it did in June 2004, DOE is planning this fall (between September 21, 2007 and December 31, 2007) to certify its LSN *knowing* that its collection is materially incomplete and inadequate. As it did then, DOE is again planning to select an arbitrary "cutoff" date and (instead of the certification required by NRC's regulation) will certify that all its Documentary Material "in existence as of a chosen cutoff date" is included in the LSN. But DOE's obligation is to refrain from certifying its LSN until it is *materially complete* and not to certify it when it simply contains *whatever* documents happen to be complete and in existence when an arbitrary cutoff date arrives. With DOE's irrational formula, it could just as easily have certified its LSN five or ten years ago, even if it only contained a handful of documents, and then gone on to repeatedly "supplement" its LSN as all of its Documentary Material eventually became complete. Neither NRC nor DOE historically intended any such result. Rather, as will be seen, both NRC and DOE were committed to the public availability of all material LA-supporting documentation a full six months prior to DOE's submission of the LA.

DOE's LSN certification is far from a perfunctory maneuver in the Yucca licensing proceeding. It triggers substantive rights and obligations for all parties, including NRC. It is the starting point in a statutory scheme intended to facilitate completion of licensing in three to four years. Because the licensing proceeding will follow a precise, truncated schedule from the time of LA submission to conclusion, the LSN was crafted to benefit DOE and the parties as a discovery tool, to be available to NRC, Nevada, and all other potential parties, to make available to them all of the critical Documentary Material DOE would cite and rely on in the licensing proceeding for a *full six months* prior to DOE's submission of its LA. The history and purpose of the LSN, a tool designed to mitigate endless discovery, are detailed below. Suffice it to say, to impose on the parties to the proceeding the *duties* of their participation (*e.g.*, certification of their own document collections and preparation and documentation of contentions, etc.) without the

concomitant *benefit* of LSN's timely discovery-type documentary disclosure by DOE, would be to eviscerate the discovery rights created by NRC and to undermine the central purpose of the LSN. Yet, that is precisely DOE's new plan.

Representatives of Nevada conferred with representatives of DOE prior to the filing of this Motion. In accordance with 10 C.F.R. Section 2.323(b), Nevada certifies that it has made a sincere effort to resolve the issues in this Motion, but this effort was unsuccessful. In their conference with DOE, Nevada representatives expressed their concern that, based on recent information published by DOE, including statements made at public meetings and correspondence from DOE's Ward Sproat (*infra*), it appeared that DOE's published estimates for an initial LSN certification date (including those contained in its monthly reports to the PAPO Board) indicated that, unless DOE agreed to forestall its LSN certification until its completion of critical and well-known LA-supporting documentation, its LSN would be incomplete at the time of certification and would deny Nevada and the other parties to the licensing proceeding the full and fair six months' advance access to DOE's Documentary Material guaranteed by 10 C.F.R. Section 2.1003.

During the conference, DOE's representatives did not deny that DOE intended to initially certify an incomplete LSN; nor did they offer to defer initial certification of the LSN until it was materially complete. Rather, DOE's representatives argued that "most" of the important documents would be available at initial certification, or that the additional required documents would be supplied in a "reasonable time" after initial certification, and that the other parties to the licensing proceeding would not be substantially "prejudiced" by a premature DOE LSN certification because NRC would not immediately docket the LA. DOE's premises for many of its suggestions were its "projections" and "expectations" of when various LA-supportive technical documentation (such as the all-important TSPA) will actually be completed. Nevada's

position remained as set out in this Motion. Anyone familiar with the Yucca project would concede that to rely on DOE's schedule expectations or projections is an unwise gamble (even when made in Las Vegas).

The LA Products Baseline is one enumeration by DOE of tasks (and documentary products) whose completion is prerequisite to LA. Movant has requested an updated (June 12, 2007) version of this baseline from DOE on numerous occasions, beginning even before its June 12 issuance, but has yet to receive it. A review of the January 12, 2007 version Movant does have (Ex. 1) discloses a listing of over 1,500 specific "LA Products," or documents, to be completed. (Whether its dates have already slipped can only be determined upon receipt of the updated version.) But one can observe: as of January 2007, some documents were not expected to be finished until 2008; a very large number of documents were projected to be completed in October, November, or December 2007, thus making their presence on the LSN problematical, if certified according to DOE's predictions; and finally, literally hundreds of documents on which work had not yet begun by January 12, 2007 (many of which had already missed their previously projected start dates). DOE does not deny that it now intends to certify its LSN this fall as "complete" at a time when it lacks numerous significant and admittedly material technical documents it knows it will cite and rely on in its LA and which are therefore Documentary Material required by 10 C.F.R. Section 2.1003 to be on the LSN at initial certification. But these documents are apparently still "works in progress" and will be completed after LSN certification by DOE.

Nevada respectfully seeks a declaration from the PAPO Board that DOE is prohibited from certifying its LSN database as complete until such time as it has complied with its

obligation under 10 C.F.R. 2.1003 to make all² its Documentary Material publicly available on the LSN, including those material technical studies and reports it plans to and *knows* it will rely on in the licensing proceeding and has therefore been preparing, in some cases, for years.

Nevada will show that:

- (a) NRC and the PAPO Board have made clear that a basic purpose of the LSN is to provide a full and fair six months' access to all DOE's Documentary Material which DOE intends to cite and rely on in the licensing proceeding *before* DOE tenders its LA to NRC;
- (b) DOE specifically urged NRC to change its proposed Rulemaking, requesting NRC to adopt a rule under which all of DOE's Documentary Material would be required to be made available to the parties and the public at least six months before DOE's LA (the so-called "Six-Month Rule");
- (c) NRC adopted DOE's recommendation and embraced its rationale in this regard; therefore, Nevada now defends the principle advocated in the first instance by DOE;
- (d) Until it was beset with new schedule-completion and public-relations problems, DOE had planned continually to complete all the key technical Documentary Material on which it would rely in its LA at least six months before it would tender its LA to NRC and prior to certifying its LSN; and
- (e) Having now published and repeatedly promised submission of its LA to NRC by June 2008, yet mindful that much of the Documentary Material it will cite and rely on therein will *not* be complete until *less than six months* before June 2008, DOE abandoned its prior position and will now certify its LSN prematurely, well before it is complete, in violation of NRC's requirements and DOE's own longstanding promises. In short, rather than do the right and sensible thing, DOE has chosen to set in motion what promises to be another LSN "train wreck."

III. NRC's Adoption of the "Six-Month Rule"

More than 18 years ago, NRC adopted rules aimed at ensuring the complete availability of all relevant Documentary Materials to the parties and the public long before the commencement of any licensing proceeding for a Yucca repository. Specifically, the NRC plan,

² In construing the meaning of "all" Documentary Material in gauging what must be on the LSN, the LA Products Baseline, a list of some 1500 technical products that DOE itself believes are essential to licensing, is as good a place to start as any. Nevada would argue that "all" must have some materiality requirement, and the LA Products Baseline appears conveniently to offer one logical definition.

initially denominated Licensing Support System, but later changed to LSN, moved the substantial and time-consuming task of document discovery by all parties from its usual position *after* the filing of an LA and before the commencement of hearings, to a time well before the filing by DOE of its LA. NRC's goal was to ensure that all parties and potential parties had thorough access and a substantial period of time to review the documents of the other parties and to enable the potential parties to prepare high quality contentions at the outset of the licensing proceeding. In 1989, NRC published a Final Rulemaking (54 Fed. Reg. 14925, 14926) establishing the basic procedures for the licensing proceedings, providing for the identification and submission of discovery documents before the LA would be tendered by DOE, and explaining its purpose as "[e]nabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding."

Twelve years later, in 2001, NRC promulgated amendments to clarify the timing of participant compliance certifications. During the comment period preceding issuance by NRC of its final rulemaking, six entities filed comments. The most prominent of these were DOE's (Ex. 2), which, NRC noted, urged NRC *not* to follow its plan to utilize DOE's Site Recommendation as the trigger for its obligation to certify its LSN document collection: "While DOE stated its support for early access to information, DOE believed that there is a better way to facilitate focused contentions for the licensing proceeding and to ensure an efficient licensing process than tying DOE's certification of its Documentary Material to the Site Recommendation. DOE recommended that the initial certification of compliance be linked to the submission of the License Application." 66 Fed. Reg. 29453, 29459 (May 31, 2001). NRC focused on DOE's stated rationale for "ensuring that interested members of the public have a full six months in

advance of its submission of the License Application to review the Department's Documentary Material." *Id.* Paraphrasing DOE's words, NRC stated, "If certification were tied to the Site Recommendation, as it is in the proposed rule, it would be 'virtually impossible' to predict how much time would be available for review of the Documentary Material before the License Application is submitted. In contrast, tying the certification to the License Application would ensure a defined period of time for review." *Id.*

Accordingly, NRC balanced competing goals between the need to provide an adequate amount of time for participants to review the Documentary Material in advance of the LA on the one hand and the need to be as efficient as practicable in providing this information on the other. The Commission was concerned that if certification were required too far ahead of the LA, it would include documents that might later become irrelevant or obsolete or come at a time when there was no certainty there would even be a licensing proceeding. On the other hand, if the certification came too late, it would not provide the parties a sufficient amount of time to review, assimilate, and analyze the Documentary Material DOE intended to cite and rely on in its LA. NRC struck a balance between these competing considerations. It adopted DOE's proposal *in toto*, both as to the benchmark or trigger that would prompt DOE's obligation to certify its LSN and as to the appropriate lead time. As to the first, the Commission said it "[a]grees that tying availability and certification to the date DOE submits (tenders) the License Application is a relatively simple and straightforward approach to this issue." *Id.* With respect to the appropriate lead time, NRC ruled, "The Commission believes that providing for a six-month period of DOE Documentary Material availability before DOE submits (tenders) the License Application reflects an appropriate amount of pre-license application review time for participants to prepare for the licensing proceeding." *Id.* NRC realized that there was no statutorily or regulatory mandated time on which DOE would be required to initiate the "pre-license application phase"

by certifying its LSN document collection. It would be up to DOE to determine when the Documentary Material to support its LA was complete and ready to be certified. Accordingly, NRC prescribed a 30-day period after DOE's LSN certification to require NRC's LSN certification (those two requirements had previously been simultaneous). In so doing, NRC observed, "Although the current regulations require NRC compliance at the same time as DOE compliance, under the 'six months before DOE submits the License Application' approach in the Final Rulemaking, the NRC, like other participants, will have no certainty as to when the DOE certification will be made until it actually happens." *Id.* at 29480.

The NRC Commissioners' votes and comments on the Final Rulemaking (10 C.F.R. Part 2, Subpart J) were recorded on April 24, 2001. Referring to the persuasive concurrence of three of the public commenters, Commissioner Dicus observed: "NEI, DOE, and the State of Nevada have all agreed that six months is an adequate time period for review of DOE documents prior to DOE's submittal of a repository application. I believe we should accept the proposed time frame on which all three of these commenters seem to agree. My approval, therefore, is contingent on changing the Final Rulemaking to reflect that DOE's certification related to document availability must occur six months prior to submittal of a repository application" (Ex. 3). Commissioner McGaffigan added, "I vote to approve publication of the Federal Register notice subject to the attached specific marked-up edits and subject to the Final Rulemaking containing the requirement that DOE certify that it has made all its documents available at least six months before 'submitting' (i.e., tendering) the application. I agree with the DOE, State of Nevada, and NEI comments that six months before DOE submits its License Application appears to be an adequate amount of time for advance availability of DOE documents" (Ex. 4).

In addition to adopting the Six-Month Rule in 10 C.F.R. Section 2.1003(a) (*i.e.*, "DOE shall make available, no later than six months in advance of submitting its License Application

for a geologic repository. . . ."), NRC also specified numerous examples of what is to be included in the "Documentary Material" required by DOE to be certified on the LSN database. It included, in electronic image format, computer runs, computer codes, computer programs, raw data, field notes, laboratory notes, maps, diagrams, and photographs. § 2.1003(a)(2). Also included, in at least bibliographic header form, were calibration procedures, logs, guidelines, data and discrepancies, gauge, meter and computer settings, probe locations, logging intervals and rates, data logs in whatever form captured, text data sheets, equations and sampling rates, sensor data and procedures, data descriptions, field and laboratory notebooks, analog computer, meter or other printouts, digital computer printouts, and so on. *Id.* Importantly, the lengthy list of information required to be in DOE's initial LSN certification by Subsection (a)(2) of § 2.1003 is *not* subject to the exclusion for "preliminary drafts," and so *all* information must be included by DOE in its LSN at the time of initial certification.

NRC also soon thereafter promulgated Regulatory Guide 3.69, prescribing in greater detail the types of Documentary Material required to be included in the LSN. By its own terms, Reg. Guide 3.69 (Ex. 5) is consistent with the requirements for the content of an LA in 10 C.F.R. §63.21, and with the licensing information specified in NRC's Yucca Mountain Review Plan, NUREG-1804. Among the types of information required by Reg. Guide 3.69 to be included on the LSN are design of structures, systems, and components important to safety; design criteria and design bases; design methodologies; repository design and design analyses; performance assessment; system description and demonstration of multiple barriers; scenario analysis and event probability; and model abstractions with respect to numerous areas including climate and infiltration, flow paths in the unsaturated zone, radionuclide transport, volcanic disruption, airborne transport, quantity and chemistry of water, *etc.* *Id.* at 3.69-4. The Reg. Guide makes clear that "[m]uch of the information that supports the licensing proceeding will be based on the

use of *methodologies, computer codes, and models*. Such information should be available via the LSN." *Id.* at 3.69-3 (emphasis added). More generally, all technical reports and analyses by all parties are required to be on the LSN. *Id.* at 3.69-7.

In 2004, NRC fine-tuned 10 C.F.R. Part 2 with a further amendment reaffirming the basic obligation adopted by NRC in 2001: "The Commission also notes that the history of the LSN and its predecessor, the Licensing Support System, makes it apparent it was the Commission's expectation that the LSN would, among other things, provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make *all* their Subpart J-defined Documentary Material available through the LSN prior to the submission of the DOE application." 69 Fed. Reg. 32836, 32843 (June 14, 2004) (emphasis added).

IV. DOE's Planning and Scheduling in Adherence to the Six-Month Rule

After having successfully urged NRC to adopt a rule requiring all LA-supporting Documentary Material to be on the LSN at the time of its initial certification, DOE undertook in apparent good faith to implement adherence to that rule. In schedule after schedule, and statement after statement, both public and in private, DOE reconfirmed (*infra*) its own commitment to abide by the Six-Month Rule and to make publicly available *all* of its key licensing documents at least six months before it tendered its LA to NRC. Indeed, DOE believed (*infra*) that an internal target should be *eight months'* lead time, just to be doubly sure of not compromising the six-month window.

In early 2001, DOE published a "Strategic Decision Support Team Issues List and Description" (Ex. 6) in which it described licensing strategy policy and strategic assumptions. Anticipating that the completion of its technical work would predate the submission of its LA by

a substantial time, DOE assumed that "[d]uring the six month period prior to LSN certification, the schedule will accommodate early and phased review by NRC of completed programmatic, design, and science & analysis documentation." *Id.* at 37. DOE specified that "*documentation supporting the license application will be 'frozen' at the time of LSN certification*" (*id.*), and "LSN certification will occur six months prior to the License Application submittal. There will be no safety related changes between certification of the LSN and License Application submittal (documentation supporting the LSN will be 'frozen')." *Id.* (emphasis added).

A March 7, 2001 DOE Position Paper explained the importance of a document then under development by DOE, its LSN Strategic Approach ("LSNSA"), which established DOE's policy for implementing the LSN and providing guidance for DOE and its contractors in developing implementation plans and procedures. It says, "The LSNSA addresses all of the known requirements as of this date" (Ex. 7). The LSNSA draft of October 5, 2001 (Ex. 8) confirmed that "The Commission (NRC) believed that the LSN could facilitate timely NRC technical review and timely Petitioner 'discovery-type' review of DOE's License Application by providing access to relevant documents before DOE submits the License Application. . . . The Commission believed that early provision of these documents would allow for a thorough, comprehensive technical review of the License Application by all parties and potential parties to the HLW licensing proceeding, resulting in better-focused contentions in the proceeding." *Id.* at 14.

The LSNSA draft of October 31, 2001 (Ex. 9) focused both on the type of documents required to be on the LSN at the time of initial certification and when those documents needed to be LSN-ready: "Upon the initial implementation of the OCRWM LSN, the following Documentary Material and associated first level reference material will be made electronically available: AMRs and associated first level references; PMRs [Process Model Reports] and

associated first level references; site description documents and associated first level references; all correspondence and electronic mail relevant to the license application; etc." *Id.* at 12. DOE concluded that "if the Nuclear Regulatory Commission accepts DOE's October 6, 2000 comments [as it did], the OCRWM LSN would need to be operational and certified six months prior to the submission of the License Application." *Id.* at 13.

On December 10, 2001, DOE published "Technical Guidance for License Application Planning" (Ex. 10), which was even more specific in setting out the schedule for completion of technical documents supporting the LA and in providing sufficient margin to ensure the job was done correctly:

*The technical basis for the LA, which will support LA preparation and any eventual NRC review, must be essentially complete **eight months** prior to LA submittal to support BSC's initial LSN certification process. BSC will complete the initial certification of the LSN to the DOE seven months prior to LA submittal so that DOE has one month to prepare their initial certification to the NRC six months prior to LA submittal as required by 10 C.F.R. 2, Subpart J" (id. at 3) (emphasis added).*

Repeating the point, DOE stated, "Documentation supporting the License Application should be completed in time to support the initial certification process for the LSN. LSN certification will occur six months prior to License Application submittal. This means *technical products should be completed **eight months** prior to the scheduled LA date.*" *Id.* at 18 (emphasis added).

In its technical guidance, DOE described the types of documents that support the LA and which therefore must be on the LSN at initial certification: "The primary focus will be on development of the appropriate level of design documentation and analysis needed for the LA submittal (*e.g.*, system design documents ["SDDs"], design analyses, materials lists and specifications, general arrangement drawings, process and flow diagrams). Each system will be

considered against the requirements of 10 C.F.R. Part 63 and the products developed such that they meet these requirements." *Id.* at 6.

Around April 22, 2002, in a PowerPoint presentation entitled "Licensing Support Network: A New Path Forward (Ex. 11)," DOE gave examples of the Documentary Material it needed to make available on the LSN to include "AMR/PMR, detailed data, models, computer codes, methodologies, QA pedigree (*id.* at slide 7)," and it observed what the PAPO Board knows all too well: "An incomplete LSN has the potential to draw the licensing proceedings beyond the 3-year window mandated in the NWPA." *Id.* at slide 11.

In early 2002, DOE produced yet another strategy document entitled "Strategic Basis for License Application Planning for a Potential Yucca Mountain Repository" (Ex. 12). Focusing on the content of the initial LSN certification, DOE explained, "*The technical basis for the LA, which will support LA preparation and any eventual NRC review, must be essentially complete at the time of initial certification of the LSN, six months prior to LA submittal as required by 10 CFR Part 2, Subpart J.*" *Id.* at 2 (emphasis added). Speaking to the necessity to prepare and review draft chapters of the LA, DOE added, "The review of draft [LA] chapters must be complete *along with essential supporting technical basis documents* before initial LSN certification, six months prior to LA submittal." *Id.* at 8 (emphasis added).

DOE's consistent, repetitive production of schedules articulating the technical work it considered must be completed before it could certify its initial LSN showed its commitment to the Six-Month Rule:

- In April 2002, DOE published a PowerPoint presentation on "License Application Plan Review," which (in slide 5) contained a chart depicting "LA Plan Key Milestones." The plan called for LSN certification in June 2004, but specified completion of a number of key technical products prior to the initial LSN certification. For example, milestones to be accomplished before initial LSN certification included completion of the Preclosure Safety Analysis (October 2003); confirmatory design inputs to TSPA-LA (October 2002); complete

preliminary design (January 2004); TSPA-LA models & analyses (October 2003); and the TSPA-LA itself, to be complete by May 2004, a month prior to DOE's planned initial LSN certification (Ex. 13).

- DOE's Russ Dyer presented a repository program overview to the Nuclear Waste Technical Review Board (NWTRB) on May 7, 2002. Each and every one of the technical products enumerated in the "License Application Plan & Review," discussed, *supra*, were again listed in Dyer's presentation to the NWTRB, and again, the completion of each and every one of them predated DOE's intended initial LSN certification (Ex. 14).
- In June 2002, DOE's Nancy Williams made a presentation to Under Secretary of Energy Robert Card in which (slide 10) she enumerated the completion of key technical products, reciting a somewhat different schedule than had Mr. Dyer, but consistent with his in that each and every document would be complete and available at the anticipated time of DOE's initial LSN certification, including completed preliminary design; Preclosure Safety Analysis; safety analysis report and general information; complete LA design; and complete TSPA-LA (Ex. 15).

DOE continued throughout 2003 and early 2004 to generate schedules, both internally and for presentation to third-party organizations, each having in common its correct and consistent interpretation of DOE's obligation under 10 C.F.R. 2, Subpart J: To certify and make available to the public an LSN document collection at least six months prior to submission of its LA that would contain all the key, material technical documents DOE intended to cite and rely on (*i.e.*, its "Documentary Material") in its subsequent LA:

- On January 23, 2003, DOE's Joseph Ziegler made a presentation to NRC in which (slide 3) he presented a summary project schedule to the time of LA submittal. Again, it enumerated the critical LA-supporting documentation which was scheduled to be completed prior to LSN certification, including: TSPA-LA model completion; Preclosure Safety Analysis; LA design completion; AMRs completion; and TSPA-LA completion. Only after each of those was complete would DOE's initial LSN certification be made (Ex. 16).
- DOE prepared a "Yucca Mountain Project Summary Plan to Waste Emplacement" on February 24, 2003, projecting major milestones for DOE in regard to Yucca, which contemplated LSN's certification at the end of June 2004. Slides 1 and 2 enumerate the documentation DOE planned to have completed and available prior to LSN certification, including: AMRs for the LA; Preclosure Safety Analysis; and TSPA-LA (Ex. 17).
- DOE's John Arthur made a presentation to the NWTRB on May 13, 2003 during which (slide 4) he too projected DOE's anticipated schedule through submission

of the LA. He assumed initial LSN certification in June 2004 and articulated again DOE's public commitment to meeting a schedule which provided for all key technical information to be available prior to that certification, including: complete and validate AMRs (8/03); complete site description document for LA (8/03); complete LA design (5/04); freeze design products for LA (3/04); and complete TSPA for LA (6/04) (Ex. 18).

In early 2004, DOE created a draft "Performance Assessment & Modeling Assumptions and Work Sequence" document (Ex. 19) in which it reconfirmed both the schedules and the LSN commitment it had reiterated so many times before. DOE again stated that "documents supporting the License Application will be 'frozen' at the time of LSN certification." *Id.* at 10. DOE went on to assure that "LSN certification will occur six months prior to the License Application submittal. There will be no safety related changes between certification of the LSN and License Application submittal (documentation supporting the LSN will be 'frozen')." *Id.* at 11. Finally, the document contained a bar chart representing key benchmarks. *Id.* at 12. LSN certification was indicated in the first half of 2004. More importantly, the schedule called for pre-LSN completion of all the major technical documentation. Coincident with the entry "LSN certification" on the DOE calendar is the entry "LA documentation 'freeze.'" *Id.* at 13.

DOE's Russ Dyer was now the Yucca Mountain project's chief engineer. In a memo on June 3, 2002, to then-OCRWM Director Margaret Chu (Ex. 20), he discussed the purposes of the LSN as providing "access to relevant documents before any LA is submitted, and is intended to supplant the need for the traditional document discovery process after the LA is submitted." *Id.* at 1. Importantly, he observed that "*The first objective however is to ensure all information required to fulfill the criteria in the YM Review Plan (YMRP) is available within the LSN.*" *Id.* (emphasis added). Since the Yucca Mountain Review Plan is NRC's "bible" for its analysis of every component of DOE's LA, it follows that the information Dyer cited is that which DOE intended to rely upon in support of its LA.