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NUCLEAR REGULATORY COMMISSION

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Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
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Gregory P. Jaczko¹
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SERVED 02/02/2006

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository:)
Pre-Application Matters))
_____)

Docket No. PAPO-00

CLI-06-05

MEMORANDUM AND ORDER

This matter comes before the Commission on appeal from an order granting the State of Nevada's motion to compel production of a draft license application of the U.S. Department of Energy. In LBP-05-27, the Pre-License Application Presiding Officer ("PAPO") Board granted Nevada's motion to compel, and ordered DOE to place the draft license application on the Licensing Support Network ("LSN").² Both DOE³ and the NRC Staff⁴ appealed the PAPO

¹Commissioner Jaczko has recused himself from this matter, and did not participate in today's decision.

²62 NRC 478 (2005). "*Licensing Support Network* means the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to a proceeding for a construction authorization for a high-level radioactive waste repository at a geologic repository operations area" 10 C.F.R. § 2.1001. The LSN is housed at the Commission within a separate organization that is independent of the NRC Staff. Responsibility for maintaining the LSN is assigned to the LSN Administrator. "*LSN Administrator* means the person within the U.S. Nuclear Regulatory Commission responsible for coordinating access to and the integrity of data available on the Licensing Support Network. The LSN Administrator shall not be in any organizational unit that either represents the U.S.

(continued...)

Board's ruling. The NRC Staff's filing also included a motion for a stay pending a final Commission decision on these appeals. The Commission denied the motion for a stay.⁵ Nevada filed briefs in opposition to both appeals.⁶ The Nuclear Energy Institute ("NEI") filed a brief in support of DOE's appeal (and of certain legal arguments in the NRC Staff's appeal).⁷

The Commission finds that DOE's draft license application is not "documentary material" under applicable regulations, and consequently there is no requirement to place it on the LSN. The Commission reverses the PAPO Board's ruling on this basis.

I. BACKGROUND

A. *Regulatory Scheme*

This appeal requires an interpretation of NRC regulations establishing a process under which DOE may apply for a license to construct a high-level radioactive waste repository. The purpose of the regulations is to enable the Commission to meet its statutory obligation to

²(...continued)

Nuclear Regulatory Commission staff as a party to the high-level waste repository licensing proceeding or is a part of the management chain reporting to the Director, Office of Nuclear Material Safety and Safeguards. For the purposes of this subpart, the organizational unit within the NRC selected to be the LSN Administrator shall not be considered to be a party to the proceeding." 10 C.F.R. § 2.1001.

³DOE Notice of Appeal from the PAPO Board's September 22, 2005 Order (Oct. 3, 2005); DOE Brief on Appeal from the PAPO Board's September 22, 2005 Order (Oct. 3, 2005) ("DOE Brief").

⁴NRC Staff Notice of Appeal (Oct. 3, 2005); NRC Staff Appeal of LBP-05-27 and Application for Stay (Oct. 3, 2005).

⁵CLI-05-27, 62 NRC ____ (Nov. 21, 2005).

⁶State of Nevada's Brief in Response to Department of Energy's Appeal from the Board's September 22, 2005 Order (October 13, 2005); State of Nevada's Response to NRC Staff's Appeal of the PAPO's September 22 Order and its Request for a Stay (Oct. 13, 2005).

⁷NEI Brief in Support of the Appeal of the Department of Energy from the PAPO Board's September 22, 2005 Memorandum and Order (Oct. 13, 2005) ("NEI Brief"). The Commission grants NEI's motion to file its brief.

complete its examination of the application within three years of its filing.⁸ To this end, the regulations establish a “pre-license application” process for efficiently accomplishing the extensive discovery required in a proceeding of this type. The process is intended to establish a complete on-line record that is easily accessible to the Licensing Board and to all parties to the proceeding.

Subpart J⁹ of the Commission’s procedural regulations governs the pre-license application discovery process, including the creation of the LSN, an electronically accessible database. Under Subpart J, the participants in the pre-license application process must make “documentary material” in their possession available on the LSN. The term “documentary material,” as defined in 10 C.F.R. § 2.1001, includes three “classes” of information:

- (1) Any information upon which a party, potential party, or interested governmental participant intends to rely and/or to cite in support of its position in the proceeding . . . ;
- (2) Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party’s position; and
- (3) All reports and studies, prepared by or on behalf of the potential party, interested governmental participant, or party, including all related “circulated drafts,” relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.¹⁰

As indicated in the regulation, Class 3 information includes “circulated drafts” of reports and studies. 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-

⁸Nuclear Waste Policy Act (“NWPA”) of 1982, § 114(d), 42 U.S.C. § 10134(d) (2000). The statute allows the Commission to extend the deadline by an additional year. *Id.*

⁹10 C.F.R. § 2.1000 *et seq.*

¹⁰10 C.F.R. § 2.1001.

concluded.”¹¹ To be included on the LSN, a Class 3 “report” or “study,” in draft or otherwise, must be relevant to both the license application and to the “Topical Guidelines” contained in Regulatory Guide 3.69 (“Reg. Guide 3.69”).¹²

Participants must make their documentary materials available in accordance with the schedule and requirements set out in 10 C.F.R. § 2.1003. In particular, 10 C.F.R. § 2.1003(a) requires DOE to make its documentary material available at least six months prior to the date on which DOE files its license application. Pursuant to 10 C.F.R. § 2.1009(b), each participant, starting with DOE, must certify to the completeness of the documentary material it has placed on the LSN.¹³ Pursuant to the same section, DOE also must update its certification at the time it submits its license application.

The LSN will continue to be used for document storage and access after the pre-license application phase closes and the actual proceeding commences. To this end, 10 C.F.R. § 2.1003(b) spells out the responsibility for placing certain items, including the license application, on the LSN:

Basic licensing documents generated by DOE, such as the Site Characterization Plan, the Environmental Impact Statement, and the license application, or by NRC, such as the Site Characterization Analysis, and the Safety Evaluation Report, shall be made available in electronic form by the respective agency that generated the document.¹⁴

B. *PAPO Board Decision*

¹¹CLI-05-27, 62 NRC at ____, slip op. at 2, citing 10 C.F.R. § 2.1001.

¹²“*Topical Guidelines* means the set of topics set forth in Regulatory Guide 3.69, Topical Guidelines for the Licensing Support System, which are intended to serve as guidance on the scope of ‘documentary material’.” *Id.*

¹³ DOE certified its LSN collection on June 30, 2004. That certification was challenged and subsequently struck. See LBP-04-20, 60 NRC at 300. The NRC Staff certified its collection on July 30, 2004. The NRC Staff’s certification was not challenged.

¹⁴10 C.F.R. § 2.1003(b).

Nevada asked DOE to place a draft of its license application on the LSN. Nevada argued that DOE is obligated to make drafts of the license application available since these drafts are “circulated drafts” of “documentary material.” DOE refused, asserting that license applications are basic licensing documents under 10 C.F.R § 2.1003(b), not documentary material required to be produced under 10 C.F.R. § 2.1003(a), that a draft license application is a “preliminary draft” excluded from 10 C.F.R. § 2.1003(a) disclosure, and that drafts are protected from disclosure by the litigation work product privilege and the deliberative process privilege.¹⁵ In response, Nevada filed with the PAPO Board a motion to compel production of DOE’s July 2004 draft license application. DOE, the NRC Staff, and NEI filed briefs in opposition to Nevada’s motion to compel.

After hearing oral argument and receiving DOE’s responses to certain informational requests,¹⁶ the PAPO Board concluded that the draft license application¹⁷ was “documentary material” for purposes of 10 C.F.R. § 2.1001, that the draft license application was a “circulated draft” that must be placed on the LSN, and that the draft license application was not protected by either the litigation work product privilege or the deliberative process privilege.¹⁸ In concluding that the draft license application was documentary material under the Commission’s regulations, the PAPO Board reasoned that the draft license application fell within both Class 2 and Class 3 of the 10 C.F.R. § 2.1001 definition of documentary material. As a consequence of

¹⁵May 23, 2005 Refusal Letter, attached to Nevada’s Initial Brief in Support of its Motion to Compel Production of DOE’s Draft Yucca License Application, or in the Alternative, for a Declaratory Order (“Nevada Brief on Motion to Compel”) before the PAPO Board, as Exhibit 2.

¹⁶The PAPO Board sets out the details of this procedural history in LBP-05-27, 62 NRC 478 at 483-86.

¹⁷The PAPO Board included DOE’s September 2004 revisions to the July 2004 draft in its usage of “draft license application” as a collective term in its ruling. *Id.* at 504, 520-21. We do the same in today’s order.

¹⁸*Id.* at 483, 520-21.

its conclusions, the PAPO Board directed DOE to make the draft license application available on the LSN.

The PAPO Board rejected DOE's argument (also made before us) that the license application is not "documentary material" under 10 C.F.R. § 2.1001, but simply a "basic licensing document" under 10 C.F.R. § 2.1003(b). The PAPO Board reasoned that the "basic licensing documents" category is not separate from documentary material, but a subset of it. The PAPO Board relied on the following language from the Commission's Statements of Consideration on the Subpart J regulations: "'reports' and 'studies' will also include the basic documents relevant to licensing such as the DOE EIS [Environmental Impact Statement], the NRC Yucca Mountain Review Plan, as well as other reports or studies prepared by an LSN participant or its contractor."¹⁹ The PAPO Board also relied on Appendix A of Reg. Guide 3.69, which provides examples of documents – such as the EIS – that belong on the LSN. According to the PAPO Board, these examples show that "basic licensing documents" and "documentary materials" are not mutually exclusive categories.²⁰

The PAPO Board then turned to the various classes of documentary material. The PAPO Board first explained that Class 1 documentary materials are "reliance" documentary material.²¹ The PAPO Board found that a draft license application would be Class 1 documentary material only if the producing party, here DOE, intended to rely upon or to cite to the draft to support its position. The PAPO Board found irrelevant Nevada's assertion that *Nevada* intended to rely on differences between the draft and the final versions of the license

¹⁹*Id.* at 497, citing *Licensing Proceeding for a High-Level Radioactive Waste Geologic Repository; Licensing Support Network, Submissions to the Electronic Docket*, 69 Fed. Reg. 32,836, 32,843 (June 14, 2004).

²⁰LBP-05-27, 62 NRC at 496-97.

²¹*Id.* at 498.

application, holding that it was the producing party's intent (here, DOE's), not a non-producing party's intent, that counts. Nevada also argued that DOE would "rely" on the draft license application because drafts are used as a basis for preparing final versions and because there will be some continuity between drafts. The PAPO Board found that this "reliance" was not the type contemplated by the regulations, and therefore the draft license application was not Class 1 documentary material.

With respect to Class 2, the PAPO Board used "basic logic," and Nevada's stated intention of using the draft to oppose DOE's position, to conclude that likely differences between the draft and the final license application will make the draft version "non-supporting" from the perspective of the producing party (DOE).²² Therefore, according to the PAPO Board, the draft belongs on the LSN as Class 2 documentary material. The PAPO Board rejected DOE's argument that Nevada failed to show evidence of differences between the draft and final version of the license application. The PAPO Board reasoned that only DOE was in a position to provide such evidence, so Nevada could not be faulted.

The PAPO Board also concluded that the draft license application fell within the Class 3 category of documentary material as a relevant report or study.²³ The PAPO Board noted that the Yucca Mountain Review Plan provides for detailed NRC Staff evaluation of the Safety Analysis Report, which the PAPO Board characterized as "[t]he heart of any license application."²⁴ From this, the PAPO Board reasoned that the Safety Analysis Report is an exceptionally important part of the license application, and that its importance makes the Safety Analysis Report Class 3 documentary material. As an additional rationale for its finding, the

²²*Id.* at 500.

²³*Id.* at 501-2.

²⁴*Id.* at 501.

PAPO Board again pointed to language (quoted above) in the NRC's Statements of Consideration indicating that "reports and studies" includes "the basic documents relevant to licensing."²⁵

The PAPO Board rejected DOE's argument that substituting "license application" for "reports and studies" in the Class 3 definition yields a nonsensical result, asserting that DOE made the wrong substitution. To make a valid substitution, the PAPO Board said, either "draft license application" or "Safety Analysis Report" should be substituted for "reports and studies."²⁶ The PAPO Board found that either of these substitutions achieved a sensible result.

The PAPO Board next offered an elaborate analysis concluding that, for purposes of Class 3, the draft license application at issue here was a "circulated draft," as opposed to a "preliminary draft" that does not need to be placed on the LSN.²⁷ Finally, the PAPO Board held that the deliberative process privilege is waived under the regulations for circulated drafts, and that the litigation work product privilege does not apply because the license application is prepared principally for regulatory purposes, not litigation, even though it is also subject to an adjudicatory process.²⁸

II. ANALYSIS

A. *Documentary Material*

As the PAPO Board correctly understood, the threshold question in determining if certain items must be made available on the LSN is whether the particular items are "documentary material." For a draft license application to qualify as documentary material, it

²⁵*Id.* at 501, citing 69 Fed. Reg. at 32,843.

²⁶LBP-05-27, 62 NRC at 502.

²⁷*Id.* at 503-17.

²⁸*Id.* at 517-20.

must either fall within Class 1 or Class 2, or it must be a “circulated draft” of an item that falls within Class 3 (“reports and studies”). We agree with the PAPO Board that draft license applications do not fall within Class 1. However, we disagree with the PAPO Board’s conclusion that draft license applications fit the Class 2 and Class 3 categories. We see nothing in the text or history of Subpart J suggesting an expectation that *draft* license applications would be made available on the LSN.

1. *Class 1 and Class 2 Materials*

Both Class 1 and Class 2 are tied to a “reliance” criterion.²⁹ Class 1 covers information a party intends to rely upon in support of its position. In response to the appeals here, Nevada reasserts the argument, made before the PAPO Board, that draft license applications are Class 1 reliance materials. Nevada reasons that the information contained in the draft will be “relied” on by DOE during the proceeding since the information contained in the final and draft license applications will overlap. This argument is no more persuasive here than it was before the PAPO Board. Even though language in a draft license application may be carried over into the final license application, should DOE seek to introduce that material in evidence, DOE will “rely” on the *final* document, not on earlier versions, to set out its position on the issues.

Class 2 documentary material is material that the party in possession knows does not support its position. The purpose of disclosing Class 2 material is to force the party in possession of the adverse information to place it on the LSN, where it can be viewed by opposing parties. DOE observes that the record before the PAPO Board contained no evidence that any information in the draft version will fail to support the license application that will eventually be submitted to the NRC. DOE notes that it will be impossible to determine if

²⁹“The first two classes of documentary material are tied to a ‘reliance’ criterion. Reliance is fundamentally related to a position that a party in the HLW repository proceeding will take in regard to compliance with the Commission regulations on the issuance of a construction authorization for the repository.” 69 Fed. Reg. at 32,843.

there are any differences between versions until the license application is finalized. We agree. At this juncture, and until the final license application is filed, it is pure conjecture to suppose that there will be substantive differences between drafts of a kind that could undermine DOE's position in the final license application. It is equally likely (and equally speculative) that the final document will differ from earlier drafts only because existing positions will have been strengthened.

In any case, any radical shift in position between the draft and final versions will be based upon information that DOE has in its possession *independent* of the text of any version. This *independent* information is documentary material and belongs on the LSN. Both the old information initially relied upon and the new information supporting the revised position *will* be available on the LSN. Thus, the information needed by participants intending to challenge the license application will be readily available during the six-month post-certification period, during the period for NRC Staff review of the DOE application to determine whether to docket the application, and during the 30-day contention preparation period that follows docketing of the license application.

DOE also points out that the notion that differences between drafts and final versions of documents automatically make drafts non-supporting documents is inconsistent with Subpart J's explicit exclusion of "preliminary drafts" from the LSN,³⁰ and is contrary to the rulemaking history.³¹ In fact, as DOE argues, the Commission rejected requests during the rulemaking process to broadly include material "likely to lead to the discovery of relevant material" in the

³⁰See 10 C.F.R. § 2.1001 (definition of "preliminary draft").

³¹DOE Brief at 13, citing *Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71,729, 71,730 (Dec. 30, 1998).

definition of documentary material.³² We agree with DOE that the PAPO Board ruling improperly injects this rejected concept into the definition of documentary material.

Further, since both Class 1 and Class 2 materials are subject to a “reliance” criterion, it is not reasonable for any participant to be expected to anticipate all documents that will qualify as either Class 1 or Class 2 documentary material prior to the filing of contentions. In fact, the Commission’s stated expectation is that Class 1 and Class 2 documentary material will not be completely identified until *after* contentions are accepted.³³ Thus, it is premature to expect any participant to file a complete set of Class 1 or Class 2 documentary material in the pre-application phase, and the sense of urgency Nevada conveys through its efforts to compel production of the draft license application is misplaced.

In short, Subpart J does not treat drafts of the license application as either Class 1 or Class 2 documentary material. The material that falls within Class 1 or Class 2 is the underlying *independent* documentary material used (or not used if non-supporting) by DOE in formulating its license application. As NEI argues, the pre-license application discovery process is not intended to yield advance copies of the license application.³⁴

2. *Class 3 Reports and Studies*

The license application and draft versions of the license application also are not Class 3 documentary materials. Class 3 documentary materials are “reports and studies” prepared on

³²*Id.*

³³ “[W]hile it is not possible to say there are no special circumstances that would necessitate a ruling by the PAPO on the availability of a particular document in the pre-license application stage based on its Class 1 or Class 2 status, disputes over Class 1 and Class 2 documentary material generally would be of a type that would be more appropriately raised before the Presiding Officer designated during the time following the admission of contentions when the NRC staff is working to complete the Safety Evaluation Report in its entirety.” 69 Fed. Reg. at 32,843-44.

³⁴ See NEI Brief at 5.

behalf of potential parties to the proceeding. Unlike Class 1 and Class 2 materials, Class 3 documentary materials are not tied to any “reliance” criterion. Class 3 documentary material is also the class where the question whether a draft is a “circulated” or a “preliminary” draft can arise.

The Commission agrees with the PAPO Board that 10 C.F.R. § 2.1003(b) assigns responsibility – for example, to DOE or to the NRC Staff – for the placement of certain items on the LSN. But this is not the same as classifying all such items as “documentary material.” It also does not mean that an item that is a “basic licensing document” can never simultaneously be documentary material. The purpose of 10 C.F.R. § 2.1003 is to define the *availability* of material, not to provide *definitions* of types of materials; definitions are contained in 10 C.F.R. § 2.1001.

DOE continues to argue that a license application is a “basic licensing document” that must be placed on the LSN pursuant to 10 C.F.R. § 2.1003(b) rather than “documentary material” that must be produced in accordance with 10 C.F.R. § 2.1003(a). To the extent that DOE argues that the license application is not documentary material, DOE is correct. “Basic licensing documents” are not automatically considered “documentary material” (although some may qualify as such if they meet the definition of any of the three classes of documentary material). Had we considered “basic licensing documents” to equate to “documentary material,” we would have included a fourth class of documentary materials in the 10 C.F.R. § 2.1001 definition.

It is true, as the PAPO Board noted, that in the Subpart J rulemaking, the Commission commented that “‘reports’ and ‘studies’ will also include the basic documents relevant to licensing such as the DOE EIS and the NRC Yucca Mountain Review Plan, as well as other

reports or studies prepared by an LSN participant or its contractor.”³⁵ But even though the Commission has identified the EIS and the Yucca Mountain Review Plan as reports or studies, and even though the EIS is listed in 10 C.F.R. § 2.1003(b), it does not follow that every single item listed in that section (or otherwise considered a basic licensing document) will qualify as a report or study within Class 3. Documents referred to in 10 C.F.R. § 2.1003(b) must still meet the criteria for Class 3 documentary material before they properly can be so categorized.

Under the 10 C.F.R. § 2.1001 definition, Class 3 documentary material must satisfy two conditions deriving from two separate items: the Topical Guidelines in Reg. Guide 3.69 and the license application. First, Class 3 documentary materials must be “reports and studies” that are relevant to the issues listed in the Topical Guidelines. Second, the reports and studies must be relevant to the license application.

While the PAPO Board is correct in its understanding that the relevant issues listed in the Topical Guidelines must be addressed in the license application, the PAPO Board errs in reasoning that this requirement necessitates placing the draft license application on the LSN. The only drafts of any document that must be placed on the LSN are circulated drafts of reports and studies. In other words, the underlying document, for which a draft is sought, must be a report or a study under the Class 3 definition. The PAPO Board’s reasoning effectively transforms the license application into a report or a study. We do not think that a license application may fairly be characterized as a “report” or a “study.”

The interpretation of a regulation, like the interpretation of a statute, begins “with the language and structure of the provision itself. Further, the entirety of the provision must be given effect. Although administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its

³⁵69 Fed. Reg. at 32,843.

interpretation may not conflict with the plain meaning of the wording used in that regulation.”³⁶

As commonly understood, “reports and studies” are documents that collect and analyze information or data, reach conclusions regarding that information or data, and present it in an accessible format; reports and studies are not, in common parlance, “applications.”³⁷ The drafters of a license application use reports and studies as a foundation for preparing the license application. Thus, the license application is not a report or a study within the plain meaning of those terms; it is a document that is built upon information in reports and studies on topics, listed in the Topical Guidelines, that are relevant to a proposed high-level waste repository.³⁸ This “plain meaning” interpretation also is consistent with the history of the

³⁶*Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) [citations omitted], *review denied*, CLI-88-11, 28 NRC 603 (1988). See also *Connecticut Yankee Atomic Power Company* (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

³⁷A sample definition of a “report” is “a usu[ally] formal and sometimes official statement giving the conclusions and recommendations of a person or group authorized or delegated to consider a proposal ... [A] usu[ally] formal account of the results of an investigation given by a person or group authorized or delegated to make the investigation.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1925 (1993). A “study” is “a careful examination or analysis of a phenomenon, development, or question usu[ally] within a limited area of investigation ... [A] paper or monograph in which such a study is published.” *Id.* at 2268. In contrast, an “application” is “the act of applying,” where “apply” means “to make an appeal or a request esp[ecially] formally and often in writing and usu[ally] for something of benefit to oneself.” *Id.* at 105.

³⁸In a footnote, the PAPO Board asserts that “[n]othing in the definition of documentary material prevents a document that *compiles* other reports and studies into a single document from also being a report or study.” 62 NRC at 502, n.104 [emphasis added]. The license application (and the portion of the license application that is referred to as the Safety Analysis Report) goes beyond “compiling” reports and studies into a single document; drafters of the license application do not simply stack the reports and studies prepared to provide an informational foundation for the license application one after another behind a table of contents. In the same footnote, the PAPO Board states that DOE “has apparently abandoned” the argument that the draft license application is not a report or study because the license application cites and relies on reports and studies. *Id.* The PAPO Board reverses the emphasis of DOE’s argument. DOE did observe that the license application cites and relies on documentary material when it initially denied Nevada’s request for the draft license application (prior to Nevada’s motion to compel). See May 23, 2005 Refusal Letter, attached to Nevada’s

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regulations in Subpart J. As NEI rightly asserts, the Commission has repeatedly described “documentary material” as material that supports or underlies the license application.³⁹

We also observe that our regulation links the definition of Class 3 documentary material to the Topical Guidelines in Reg. Guide 3.69, not to Appendix A of Reg. Guide 3.69.

Consequently, the PAPO Board’s reliance on Appendix A as justification for requiring draft license applications to be submitted to the LSN is misplaced. The list of examples of LSN documents provided in Appendix A is a useful aid for participants, but does not supplement or alter the definition of Class 3 documentary material and does not control the content either of the license application or of the LSN.

As noted earlier, the PAPO Board stated that DOE made the wrong substitution when DOE attempted to argue that “license applications” could not be “reports and studies.” On appeal, DOE counters that the alternative substitutions proposed by the PAPO Board in its order do not work. The Commission agrees. Substituting either “draft license application” or “Safety Analysis Report” for “reports and studies,” as the PAPO Board proposed, renders portions of the definition of Class 3 documentary material meaningless or superfluous.

Using the PAPO Board’s first substitution, “All reports and studies . . . including all

³⁸(...continued)

Brief on Motion to Compel before the PAPO Board, as Exhibit 2. But the thrust of DOE’s argument was that the license application *is not documentary material*. DOE has not “abandoned” this argument, and, in our view, the concept that reports and studies provide a foundation for the license application is implicit in the argument that the license application is not documentary material.

³⁹NEI Brief at 3, citing *Proposed Rule, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 62 Fed. Reg. 60,789, 60,789 (Nov. 13, 1997), and referencing: *Notice of Proposed Rulemaking, Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste*, 53 Fed. Reg. 44,411, 44,412 (Nov. 3, 1988); *Final Rule, Licensing Proceedings for the Receipt of High-Level Radioactive Waste at a Geologic Repository: Licensing Support Network, Design Standards for Participating Websites*, 66 Fed. Reg. 29,453, 29,459 (May 31, 2001); and 69 Fed. Reg. at 32,841.

related ‘circulated drafts’” becomes “All *draft license applications* . . . including all related ‘circulated drafts.’” Logically, “circulated drafts” is a subset of “all draft license applications.” If the Commission had intended to require all drafts of Class 3 material to be available on the LSN, there would be no “circulated draft” subset and “circulated draft” certainly would not have merited a separate definition in 10 C.F.R. § 2.1001. A separate definition of “preliminary drafts” (another subset of “all drafts”) also would be unnecessary. This PAPO Board substitution thus makes significant portions of 10 C.F.R. § 2.1001 superfluous. Additionally, the Commission has consistently referred to the Topical Guidelines and the license application in terms that stress the distinct nature of these two items: “To fall within the definition of ‘documentary material’, reports or studies must have a nexus to both the license application . . . and the Topical Guidelines . . . ”⁴⁰ It is nonsensical to speak of the “license application” or of a “draft license application” as required to have a “nexus” to the “license application.”

Using the PAPO Board’s second substitution yields an equally unsatisfactory requirement that “all Safety Analysis Reports . . . relevant to . . . the license application” must be included on the LSN. This substitution makes the phrase “relevant to . . . the license application” meaningless. If we examine the applicable regulation, the status of the Safety Analysis Report as an integral part of the license application is clear. 10 C.F.R. § 63.21(a) specifies the required content of a license application for a high-level waste repository, providing as follows:

An application *consists of* general information and a Safety Analysis Report. An Environmental impact statement must be prepared in accordance with the Nuclear Waste Policy Act of 1982, as amended, and *must accompany* the application. Any Restricted Data or National Security Information must be separated from unclassified information. The application must be as complete as possible in the light of information that is reasonably available at the time of

⁴⁰69 Fed. Reg. at 32,843.

docketing. [Emphasis added.]⁴¹

Thus, the applicable regulation specifies that the license application *consists of* two parts, one of which *is* the Safety Analysis Report. In contrast, the regulation specifies that the Environmental Impact Statement, a separate document, *must accompany* the license application. Since the Safety Analysis Report is an integral part of the license application, it is by definition “relevant” to the license application, so imposing an additional requirement (as in the definition of Class 3 documentary materials) that the Safety Analysis Report be “relevant to the license application” is surplus. If the Commission had intended to require separate LSN submission of parts of the license application, it would have stated that intention unambiguously, with no surplus language.

Nevada argues that the dispute over whether draft license applications must be placed on the LSN is like an earlier dispute over DOE archival e-mails.⁴² Nevada argues that cost and inconvenience to DOE are immaterial, and that the two disputes should be handled in the same way: the draft license application, like archival e-mails, should be placed on the LSN. However, the facts of the current appeals differ markedly from the facts addressed in the earlier dispute. In the earlier decision, DOE was ordered to determine, based upon relevance, *which* archival e-mails (and other documents) were documentary material and to produce those that were relevant on the LSN.⁴³ There was no question that at least some of the archival e-mails (and other documents) would fall within the definition of documentary material, thus satisfying the threshold “documentary material” requirement. Here, the materials sought are not documentary

⁴¹10 C.F.R. § 63.21(a).

⁴²See *U.S. Dep’t. Of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300 (2004).

⁴³*Id.* at 324. DOE also was ordered to complete its privilege review of certain documents (*Id.* at 321), and to produce relevant late-gathered documents (*Id.* at 326) and other documents that had not been supplied for various reasons (*Id.* at 327).

material to begin with, so, unlike archival e-mails, no relevance analysis is needed.

For all of these reasons, the Commission finds that the license application is not a Class 3 report or study, although the final application ultimately must be made available on the LSN as a basic licensing document.⁴⁴ Since the license application is not a report or a study, a *draft* license application, whether or not circulated internally at DOE, cannot be a circulated draft of a report or a study. As a result, draft license applications do not belong on the LSN.

B. *Other Issues*

Because we have concluded that draft license applications do not constitute “documentary material,” we need not reach the other issues appealed by NRC Staff and DOE. The PAPO Board devoted much attention to the concept of “circulated drafts,” and so do the parties’ appellate briefs. We do not address the subject at length in today’s decision, but we do want to stress that our regulations expressly *distinguish* between “preliminary” and “circulated” drafts. This is a significant distinction. The NRC Staff expressed concern that participants in the proceeding would be forced to undertake the difficult task of measuring every draft produced against various “objective” factors outlined by the PAPO Board. The NRC Staff argued that this would lead participants to take the easier route of simply putting all drafts of all documents on the LSN, potentially “flooding” the system.

A basic consideration regarding the LSN is that each party will place its final documents on the LSN. The Statements of Consideration for both the proposed and final rules concerning circulated drafts specifically note that “[t]he submission requirements of § 2.1003 generally apply only to final documents, e.g., a document bearing the signature of an employee of an [LSN] participant or its contractors.”⁴⁵ The rule does, however, contain an exception: circulated

⁴⁴10 C.F.R. § 2.1003(b).

⁴⁵ *Submission and Management of Records and Documents Related to the Licensing of*
(continued...)

drafts are required to be submitted to the LSN. The Statements of Consideration state that “[t]he intent of this exception to the general rule [with respect to] final documents is to capture those documents to which there has been an unresolved objection by the author or other person in the internal management review process (the concurrence process) of an [LSN] participant or its contractor. In effect, the Commission and the other government agencies who are [LSN] participants are waiving their deliberative process privilege for these circulated drafts.”⁴⁶

It is within this framework of an exception to the general rule on the submission of final documents that the definition of circulated draft is properly examined. The regulations define a circulated draft as “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.”⁴⁷

A draft document must be placed on the LSN when it has received a non-concurrence satisfying the regulatory definition of circulated draft. The heart of the definition of circulated draft is the meaning of non-concurrence. The Statements of Consideration make clear that in order to be considered a non-concurrence, “[t]he objection or non-concurrence must be

⁴⁵(...continued)

a Geologic Repository For the Disposal of High-Level Radioactive Waste, Final Rulemaking, 54 Fed. Reg. 14,925, 14,934 (Apr. 14, 1989); *See also, Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository For the Disposal of High-Level Radioactive Waste*, Notice of Proposed Rulemaking, 53 Fed. Reg. 44,411, 44,415 (Nov. 3, 1988).

⁴⁶ 53 Fed. Reg. at 44,415.

⁴⁷ 10 CFR § 2.1001.

unresolved. Any draft documents to which such a formal, unresolved objection exists must be submitted for entry into the [LSN].”⁴⁸ The Statements of Consideration further reflect that “the draft of that document must be entered into the [LSN] after the decision-making process on the document has been completed, *i.e.*, the requirements of § 2.1003 do not require a[n] [LSN] participant to submit a circulated draft to the [LSN] while the internal decision-making process is ongoing.”⁴⁹ From the foregoing, we glean three elements of a “non-concurrence”:

1. A non-concurrence must be part of a formalized process;
2. A non-concurrence must be unresolved, with the original author or others in the concurrence process in disagreement with the final product; and
3. The decision-making on the document must be completed.

The PAPO Board interpreted non-concurrence “in a practical way to mean a comment or objection indicating significant, substantive nonagreement with the draft in question, *i.e.*, a nonagreement requiring a substantive change in the document before the individual in question agrees with or will approve it.”⁵⁰ We disagree. Preservation of the distinction between preliminary and circulated drafts mandates that the concurrence process to which a draft of documentary material is subjected in order to convert it to a “circulated” draft must necessarily have aspects of formality and finality. To qualify as a “circulated draft,” a document must undergo a degree of formal review different from the typical comments and revisions (however substantive or serious) made during an ongoing drafting process that may involve multiple authors from a variety of disciplines.

In sum, in order for documentary material to be considered to be a “circulated draft” it

⁴⁸ 54 Fed. Reg. at 14,934; 53 Fed. Reg. at 44,415.

⁴⁹ 54 Fed. Reg. at 14,934.

⁵⁰ LBP-05-27, 62 NRC 478 at 510.

must have received a non-concurrence in a formalized process, and the decision-making on the document must be completed.

CONCLUSION

We hold that DOE's draft license application is not Class 1, Class 2, or Class 3 "documentary material" under our regulations. Since none of the classes of documentary material apply, there is no requirement to make draft license applications available on the LSN. We therefore *reverse* the PAPO Board's decision (LBP-05-27) requiring DOE to place the draft license application on the LSN.

IT IS SO ORDERED.

For the Commission,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 2nd day of February, 2006.