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11/25/98

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Initials

## RULEMAKING ISSUE

(Affirmation)

October 19, 1998

SECY-98-237

FOR: The Commissioners

FROM: The LSS Senior Management Team

SUBJECT: FINAL RULE, PART 2, SUBPART J, "PROCEDURES APPLICABLE TO PROCEEDINGS FOR THE ISSUANCE OF LICENSES FOR THE RECEIPT OF HIGH-LEVEL RADIOACTIVE WASTE AT A GEOLOGIC REPOSITORY"

### PURPOSE:

To seek Commission approval of publication of a Federal Register notice announcing the final rule, 10 C.F.R. Part 2, Subpart J, "Procedures Applicable to Proceedings For The Issuance of Licenses For The Receipt of High-level Radioactive Waste at a Geologic Repository", including the following actions: (1) retention and renaming of the LSS Advisory Review Panel (LSSARP) to become the Licensing Support Network Advisory Review Panel (LSNARP); (2) restoring a Licensing Support Network Administrator, (3) adding an item to the Rulemaking Activity Plan, and (4) other substantive changes to the proposed rule.

This paper also serves as the LSS Semi-annual Report for the period ending June 30, 1998, because all activities related to the LSS during that six month period were associated with resolving the issues covered in this paper.

### BACKGROUND:

In the Staff Requirements Memorandum for SECY-97-154, *Resolution of Licensing Support System (LSS) Issues and Draft Proposed Rule, 10 CFR Part 2, Subpart J*, the Commission approved publication of a proposed rule amending 10 CFR Part 2, Subpart J. The proposed rule was published for comment in the Federal Register on November 13, 1997 (62 FR 60789). In response to the request of a representative of Clark County, Nevada, the NRC extended the comment period which would have expired on January 27, 1998, until March 30, 1998 (63 FR 5315, February 2, 1998).

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## DISCUSSION:

The Commission received six comment letters on the proposed rule. Written comments were received from Clark County, Nevada; the Department of Energy (DOE); Nye County, Nevada; the Nuclear Energy Institute (NEI); the City of Las Vegas; and the National Congress of American Indians (NCAI). Copies of the comments are attached in Attachment 2. All of these commenters are represented on the LSSARP. In addition, the Senior Management Team (SMT) conducted a meeting of the LSSARP in Las Vegas, Nevada, on February 24, 1998, to receive comments of the LSSARP members on the proposed rule.

## MAJOR ISSUES IN THE FINAL RULE:

### Definition of "documentary material" § 2.1001

In response to comments the phrase "or is likely to lead to the discovery of relevant material" which is included in the current definition of "documentary material" has been restored to the definition in the final rule because it states one of the generally accepted parameters for discovery. To address a DOE concern that the definition would capture reports and studies which are irrelevant to the license application, such as reports and studies made for other potential sites and for predecessor agencies, the final rule has been revised to make clear that these reports and studies must be somehow relevant to the license application for the particular site. To address a concern that the term being defined, "documentary material" and the text of the proposed definition both contain the word "material", leading to some confusion about the intended meaning, the final rule has eliminated the words "material or other" from the definition, leaving the definition to read: "Documentary material means any information upon which a party, potential party . . ."

### Name of System § 2.1001

Several commenters observed that it would be more convenient to continue to have a name, like the current Licensing Support System (LSS), to use to refer to the combined system to provide electronic access to documentary material in both the pre-license application phase and during the licensing proceeding, including the pre-license application electronic docket and the electronic docket. The participants in the LSSARP meeting generally agreed that "Licensing Support Network (LSN)" would be an appropriate name. The final rule has adopted the suggestion. Because the proposed rule had used the term integrated electronic information generally for this purpose, the final rule substitutes Licensing Support Network (LSN) for integrated electronic information, and amends the definition accordingly to refer to the system, rather than the information.

### Timing and availability of documentary material and the pre-license application phase §§ 2.1003, 2.1008, 2.1012(d).

Many of the participants at the LSSARP meeting observed that because the Licensing Support Network appears more likely to be a World Wide Web-based system easily accessible by office and home personal computers rather than a specially designed stand-alone system like the former LSS concept, there is little reason to continue the practice of limiting access to documentary material in the pre-license application phase

to potential parties to the licensing proceeding. Instead, this information could be made available to any member of the public. The final rule has been revised to be consistent with allowing public access to the LSN, although the discussion notes that in implementation of the rule, it may be necessary to give priority access to potential parties.

At the LSSARP meeting, the State of Nevada was concerned that using the date of the President's recommendation to Congress as the date when all potential parties and interested governmental participants must make documentary information available electronically had the appearance of a presumption that the State of Nevada's objection to the Yucca Mountain site decision would be overridden by Congress. Furthermore, other LSSARP discussion established that the critical sets of documents that should be available as early as possible are those of the NRC and, particularly, the DOE. Because the DOE and NRC documentary material will constitute the overwhelming majority of the information to be made available in the LSN, it is important that it be accessible as soon as possible to allow preparation for the licensing proceeding. The final rule addresses these suggestions and to allow time for compliance with dates that may be hard to predict in advance has allowed 30 days after the selected milestones before requiring compliance. Therefore, the definition of Pre-license application phase has been revised to state that the phase begins 30 days after the date DOE submits its site recommendation decision to the President, a date which is earlier than the date originally specified in the proposed rule. DOE's latest Program Plan, *Civilian Radioactive Waste Management Program Plan, Rev. 2*, DOE/RW-0504 (July 1998) has scheduled sending the Site Suitability Recommendation to the President in July 2001. Section 2.1003(a) has been revised to require NRC and DOE to make their documentary material available beginning in the pre-license application phase. The final rule requires all other potential parties or interested governmental participants to make their documentary material available no later than 30 days after the date the repository site selection decision becomes final after review by Congress.

#### Retention of the "LSS Administrator" function § 2.1011

The consensus of the LSSARP meeting participants and three of the written comments strongly supported retention of the LSS Administrator function. One comment asserted that the "LSS Administrator" was needed to contribute to the design and management of the system, to be a "traffic cop", to balance priorities for data input, to organize data, to resolve conflicts, to audit the system, and to add credibility. Another comment stated that the LSS Administrator should be retained and should review participants' readiness to allow access to their documentary material, receive and resolve complaints regarding network problems, perform periodic audits or compliance reviews, assist participants in achieving and maintaining compliance, and coordinate resolution of technical issues.

There are many details of implementation of the final rule that will require solutions coordinated among all the participants in order for the LSN to fulfill the purposes for which it was created. The LSN Administrator could serve an important role to identify key issues and focus the efforts to identify and implement solutions. Therefore, the final rule contains a new term in § 2.1001, LSN Administrator. Section 2.1011(c) provides for the designation of an LSN Administrator before the start of the pre-license application

phase and describes the responsibilities of the position. The LSN Administrator will coordinate the functioning of the Licensing Support Network by identifying technical and policy issues related to implementation of the LSN for LSSARP and Commission consideration. The LSN Administrator will coordinate addressing the consensus advice of the LSN Advisory Review Panel and resolving problems regarding LSN availability and the integrity of the LSN data base. The LSN Administrator will also provide periodic reports to the Commission on the status of LSN functionality and operability.

At this time, the optimal placement of the LSN Administrator within the NRC (i.e., within which NRC organization) has not been identified. Among the places under consideration for the LSN Administrator are the Office of the Chief Information Officer and the Office of the Secretary. Because the Office of Nuclear Material Safety and Safeguards will be a party in the HLW licensing proceeding, it is unlikely that NMSS or another Office reporting to the EDO would be the recommended placement for the LSN Administrator. The LSS Senior Management Team is pursuing this subject and associated resource issues and will provide a recommended plan to the Commission at a later date.

#### Maintaining an Advisory Review Panel § 2.1011(c)

All those who submitted written comments and who commented at the LSSARP meeting preferred continuing to have an advisory review panel, rather than substituting an informal users group. The DOE stated that it was premature to replace the advisory review panel with an informal users group and that the formality of the panel would ensure that each member's concerns about the structure of the electronic docket will be addressed in a documented manner. Two commenters stated that a more informal group would tend to be less effective, with higher turnover in participants and less commitment to the objectives of the program.

Therefore, the final rule retains an advisory review panel that has been renamed the LSN Advisory Review Panel (LSNARP). In view of the many complex implementation issues that must be coordinated among the participants, the continued use of an advisory committee appears to offer the best means to ensure that these issues will be efficiently considered and resolved. However, the discussion in the Federal Register notice directs that LSNARP meetings should be conducted with the most efficient possible use of resources. Meetings should be conducted taking advantage of teleconference, video conference, or other electronic communication capabilities to the greatest extent practicable. The existing charter for the Licensing Support System Advisory Review Panel (LSSARP) will need to be amended to reflect the new name and any new duties of the LSN Advisory Review Panel.

#### Membership on the LSNARP § 2.1011(c)(2)

Two commenters, who are affected units of local government, stated that the proposed rule should be modified to give a separate seat on the LSNARP to each affected unit of local government, rather than specifying one seat for "a coalition of affected units of local government." The National Congress of American Indians stated that individual affected tribes from the Yucca Mountain area should be members of the LSNARP. The response in the draft Federal Register notice says that in order to keep the functioning of the

LSNARP manageable, including numbers of participants required for quorums and other operating requirements, NRC believes that it is necessary to continue to treat entities with similar interests as coalitions (e.g., affected units of local government, tribal groups). However, it is noted that this does not need to affect recognition of the unique status of individual members of the coalition, nor their opportunity to attend and participate at LSN meetings.

#### Funding for participants in the LSN

Several participants at the LSSARP meeting stated that there was an urgent need for funding to enable small entities to participate fully in the HLW licensing proceeding and the LSNARP, and to fulfill their responsibilities to provide electronic access to documentary material under this rule. The LSSARP participants did not suggest, and the draft Federal Register notice does not contain any revisions to the rule to address this problem. As noted at the LSSARP meeting, NRC is prohibited from paying expenses for participants in licensing proceedings by a provision from the Fiscal Year 1993 Energy and Water Development Appropriations Act, which has been codified at 5 U.S.C. 504 note. A Comptroller General's opinion issued December 3, 1980, Opinion No. B-200585, interpreting identical language previously contained in the Energy and Water Development Appropriation Act, 1981 (Pub. Law No. 96-367, 94 Stat. 1331), concluded that NRC could not provide to intervenors free copies of transcripts or free copying and service of intervenors' documents.

Therefore, the draft Federal Register notice refers to two previously identified methods for addressing this problem. First, Affected Units of Local Governments (AULG) and other parties and potential parties could utilize a portion of grant funds typically provided to the AULGs by DOE in the past. Although in FY 1997 no grants were forthcoming from DOE and many of the county governments had to cancel or severely curtail their activities for the year, some funding was available in FY 1996. A second approach was suggested in the proposed rule notice where NRC stated that participants may elect to provide their documents to NRC or to DOE for either agency to develop and maintain electronic access to them. Because the codified prohibition on paying intervenor expenses applies to all funds appropriated under all Energy and Water Development Appropriations Acts, the prohibition applies to DOE also (although DOE generally does receive appropriated funds to provide funding to Affected Units of Local Government). Therefore, on further consideration of the intervenor funding prohibition, this approach, standing alone, may not be sufficient to address this matter. However, if DOE were specifically to identify an amount in its budget request for assisting potential parties in providing electronic access to their documents, specific congressional approval of this line item would allow this use of appropriated funds for this purpose in spite of the general prohibition on paying the expenses of intervenors. In order for NRC to receive authorized funding, NRC and DOE could then enter into a memorandum of Agreement (MOA) that would arrange the transfer of these funds from the DOE appropriation to NRC for assistance to small entities in providing electronic access to their documents. NRC could use the funds to maintain a web site for small participants which would be managed by the LSN Administrator. Thus, the NRC could offer to host web sites for the collections of the smaller participants or potential participants, who have difficulty making their documents available electronically.

**Tribal Government participation - § 2.715.**

The National Congress of American Indians (NCAI) expressed a concern that tribal governments do not appear to be included in the provisions of § 2.715 which allow representatives of State or local governments to participate in a proceeding without being required to take a position on the issues. NCAI recognizes that this matter may not be within the purview of this rulemaking but requests that it be addressed in the appropriate forum.

The issue regarding § 2.715 is outside the scope of the current rulemaking. However, in accordance with a Presidential Memorandum issued by President Clinton on April 24, 1994, "Memorandum for the Heads of Executive Departments and Agencies on Government to Government Relations with Native American Tribal Governments," (59 FR 22951) it would appear that federally recognized Native American tribal governments should have the same status as State and local governments. By this paper, the staff is requesting Commission approval to announce that the Commission intends to undertake a separate rulemaking to amend § 2.715 to include federally recognized Native American tribal governments and that this task has been added to the Commission's Rulemaking Activity Plan which is currently under consideration by the Commission in SECY 98-168. The simple, straightforward, and procedural nature of such a rule change may make it possible to proceed using a direct final rule, which should not require much time or many resources.

**§ 2.1007(a)(3) and (c) Access**

The DOE noted that proposed § 2.1007(a)(3) retains the current rule's requirement to make available systems to provide electronic access for members of the public at any NRC and DOE Local Public Document Rooms to be located in Nevada, with specified locations at Las Vegas, Reno, Carson City, Nye County, and Lincoln County. DOE requested that the rule be clarified to specify which of these locations are the responsibility of DOE and which are NRC's. The attached draft Federal Register notice declines to resolve this question now and proposes to consult with DOE and the Advisory Review Panel in the future regarding facilities which could provide access.

The Commission has recently approved the phase out of funding for the Local Public Document Rooms by late Fiscal Year 1999. Therefore, the requirements of § 2.1007(a) may need to be considered at the time of devising the plan to implement the budget decision.

Finally, the Senior Management Team notes that the Commission has under consideration SECY-98-225, *Proposed Rule: 10 CFR Part 63--"Disposal of High-Level Radioactive Wastes in a Proposed Geologic Repository at Yucca Mountain, Nevada"*. In addition to setting forth a new draft Part 63 to apply only to the Yucca Mountain licensing proceeding, the Commission paper points out the fact that there is an ongoing study of the NRC licensing processes, and there may be recommendations for changes in the hearing process for repository licensing. If the Commission were to approve the new Part 63 or changes in the hearing process, the regulations that are the subject of this rulemaking would need to be amended or new procedural regulations would need to be drafted to reflect the changes.

RESOURCES:

The resources currently budgeted for implementing this rulemaking include 1.3 FTEs and \$361K in FY 1999, 2.3 FTEs and \$535K in FY 2000, and 2.3 FTEs and \$535K in FY 2001.

RECOMMENDATION:

The Senior Management Team recommends that the Commission approve publication of the attached draft Federal Register notice which includes reference to the following actions: (1) retention and renaming of the LSS Advisory Review Panel (LSSARP) to become the Licensing Support Network Advisory Review Panel (LSNARP); (2) restoring a Licensing Support Network Administrator, (3) adding an item to the Rulemaking Activity Plan, and (4) other substantive changes to the proposed rule.

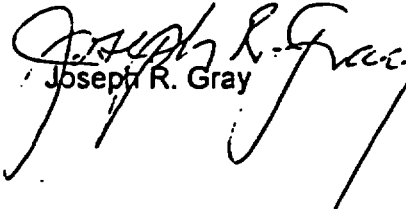
COORDINATION:

The Office of the General Counsel has no legal objection. The Chief Information Officer and the Executive Director for Operations concur in this paper. The Chief Financial Officer has reviewed this paper for resource implications, has no objections, and concurs in this paper.

LSS Senior Management Team

  
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- Attachments: 1. Draft Federal Register Notice  
2. Comments on proposed rule  
3. Congressional Letters  
4. SBREFA Letters  
5. Press Release

DISTRIBUTION

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Commissioners' completed vote sheets/comments should be provided directly to the Office of the Secretary by COB November 3, 1998.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT October 27, 1998, with information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of November 12, 1998. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.



## ATTACHMENT 1

**NUCLEAR REGULATORY COMMISSION**

**10 CFR PART 2**

**RIN 3150-AF88**

**Procedures Applicable to Proceedings for the Issuance of Licenses  
for the Receipt of High-Level Radioactive Waste at a Geologic Repository**

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Final rule.

**SUMMARY:** The Nuclear Regulatory Commission (NRC) is amending its Rules of Practice for the licensing proceeding on the disposal of high-level radioactive waste at a geologic repository (HLW proceeding). The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, and providing for a thorough technical review of the license application and equitable access to information for the parties to the hearing.

**EFFECTIVE DATE:** [30 DAYS AFTER PUBLICATION].

**FOR FURTHER INFORMATION CONTACT:** Kathryn L. Winsberg, U.S. Nuclear Regulatory Commission, Washington, DC 20555, telephone (301) 415-1641, e-mail KLW@nrc.gov.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On November 13, 1997 (62 FR 60789), the NRC published a proposed rule in the Federal Register that would have amended NRC's regulations in 10 CFR Part 2, Subpart J. In response to the request of a representative of Clark County, Nevada, the NRC extended the comment period which would have expired on January 27, 1998, until March 30, 1998 (63 FR

5315, February 2, 1998). The proposed rule was intended to maintain the primary functions of the Licensing Support System (LSS) which are:

- (1) Discovery of documents before the license application is filed;
- (2) Electronic transmission of filings by the parties during the proceeding;
- (3) Electronic transmission of orders and decisions related to the proceeding; and
- (4) Access to an electronic version of the docket.

The proposed rule would have eliminated the current requirement in 10 CFR Part 2, Subpart J, for a centralized "Licensing Support System" administered by the NRC and therefore also would have eliminated the requirement for an LSS Administrator to ensure the viability of the central database. To replace these features of the existing rule, the proposed rule would have required that each potential party, including the NRC and the Department of Energy (DOE), make its documentary material available in electronic form to all other participants beginning in the pre-license application phase. For the purposes of this rule, the pre-application phase would have begun on the date that the President submits the site recommendation to Congress. Although the mechanism to implement this requirement is not stated in the proposed rule, the availability of the Internet to link geographically dispersed sites appears to have the potential to satisfy the proposed rule.

Also under the proposed rules, documentary material would have been defined as the material upon which a party intends to rely in support of its position in the licensing proceeding; any material which is relevant to, but does not support, that material or that party's position; and 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 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.

A Pre-License Application Presiding Officer would resolve any disputes over electronic access to documents during the pre-license application phase. Potential parties would be required to certify to the Pre-License Application Presiding Officer that they have complied with the requirement to provide electronic access to their documentary material.

The NRC requested comments on two alternatives regarding the LSS Advisory Review Panel. In the proposed rule, because the concept of the LSS would be replaced, the requirement for an LSS Advisory Review Panel would have been modified so the panel could advise the Secretary of the Commission regarding standards and procedures for electronic access to documents and for maintenance of the electronic docket. This would have required renaming of the advisory committee and redrafting of the committee charter. However, the NRC also requested comments, particularly from potential parties to the HLW repository licensing proceeding, on the alternative of replacing the Advisory Review Panel with a more informal users group.

## II. Comments on the Proposed Rule

The Commission received six comment letters on the proposed rule. Copies of the letters are available for public inspection and copying for a fee at the Commission's Public Document Room located at 2120 L Street, NW (Lower Level), Washington, D.C. The comments on the proposed rule came from the DOE and five other entities which are represented on the LSS Advisory Review Panel. The NRC conducted a meeting of the LSS Advisory Review Panel (LSSARP) in Las Vegas, Nevada, on February 24, 1998, to receive comments of the LSSARP members on the proposed rule. The transcript of this meeting is also available for inspection and copying for a fee at the Commission's Public Document Room as described above. The comment letters and LSSARP meeting comments were generally supportive of the NRC's effort to update Part 2, Subpart J; however, several areas of concern were raised.

Definition of "documentary material" § 2.1001

*Comment:* One commenter requested that the phrase "or is likely to lead to the discovery of relevant material," which is included in the current definition of "documentary material" be included in the new definition.

*Response:* This phrase has been restored in the definition in the final rule because it states one of the generally accepted parameters for discovery, and this rule is designed to augment the traditional discovery process for the HLW licensing proceeding.

*Comment:* The DOE commented that NRC should remove from the definition of documentary material the clause:

and 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 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 DOE is concerned that this clause would capture reports and studies that are irrelevant to the license application, such as reports and studies made for other potential sites and for predecessor agencies.

*Response:* Although it seems implicit, the NRC is willing to clarify that this clause applies only to information that is relevant to the license application or, consistent with the addition described above, information which is likely to lead to the discovery of relevant information. To make this clear in the final rule, the phrase "both the license application and" has been inserted after the words "relevant to" in the phrase cited by DOE.

*Comment :* Participants in the LSSARP meeting raised the issue that the term being defined, "documentary material," and the text of the proposed definition, both contain the word "material," leading to some confusion about the intended meaning.

*Response:* The final rule has eliminated the words "material or other" from the proposed definition, leaving the definition to read: "Documentary material means any information upon which a party, potential party . . ."

Name of System § 2.1001

*Comment:* Several commenters observed that it would be more convenient to continue to have a name, like the current Licensing Support System ( LSS), to use to refer to the combined system to provide electronic access to documentary material in both the pre-license application phase and during the licensing proceeding, including the pre-license application electronic docket and the electronic docket. The participants in the LSSARP meeting generally agreed that "Licensing Support Network (LSN)" would be an appropriate name.

*Response:* The final rule has adopted the suggestion. Because the proposed rule had used the term integrated electronic information generally for this purpose, the final rule substitutes Licensing Support Network (LSN) for integrated electronic information and amends the definition accordingly to refer to the system, rather than the information.

Timing and availability of documentary material and the pre-license application phase

§§ 2.1003, 2.1008, 2.1012(d).

*Comment:* Many of the participants at the LSSARP meeting observed that because the Licensing Support Network appears more likely to be a World Wide Web-based system, easily accessible by office and home personal computers, rather than a specially designed stand-alone system like the former LSS concept, there is little reason to continue the practice of limiting access to documentary material in the pre-license application phase to potential parties to the licensing proceeding. Instead, this information could be made available to any member of the public. The State of Nevada representative commented that it would be an uncomfortable position for the State, as a potential party, to have more access to information than its citizens.

The DOE also points out an internal inconsistency in the proposed rule in that proposed § 2.1012(d), which states that the Pre-License Application Presiding Officer may suspend or terminate access to the pre-license application electronic docket for non-compliance, is not consistent with the public access in proposed § 2.1007(a), which says that DOE and NRC must maintain systems to provide electronic access to the integrated electronic information for the public.

*Response:* NRC agrees that under the final rule, information can be made available to all members of the public, even in the pre-license application phase. Practical considerations, including the operating capacities of the systems, may require that priority be given to potential parties, however these matters may be worked out in consultation with the Advisory Review Panel in the implementation of the final rule. Proposed § 2.1003(a) has been modified to delete the list of individuals to whom electronic information must be made available beginning in the pre-license application phase, because this information must be made generally available electronically. Proposed § 2.1008 purported to give electronic access to the integrated electronic information to persons who comply with the regulations in Part 2 Subpart J and with the orders of the Pre-license Application Presiding Officer. Therefore, proposed § 2.1008 has not been adopted because it is by implication not consistent with allowing public access to the electronic information and the pre-license application electronic docket. Proposed § 2.1012(d), which concerned suspending or terminating access, has not been adopted in the final rule, because, as noted by the DOE comment, it implies controlled and limited access, rather than open public access to documentary material and to the pre-license application electronic docket and to the electronic docket.

*Comment:* Definition of pre-license application phase and § 2.1003. The State of Nevada commented that the proposed rule's use of the date of the President's recommendation

to Congress as the date when all potential parties and interested governmental participants must make documentary information available electronically had the appearance of a presumption that the State of Nevada's objection to the Yucca Mountain site decision would be overridden by Congress. This participant stated that it would be more reasonable to select the date of Congress' resolution of any objection from the State of Nevada in order to be certain that this particular license application is going forward. Other LSSARP participants pointed out that the critical sets of documents that should be available as early as possible are those of the NRC and, particularly, the DOE. The LSSARP meeting discussion suggested that it would not matter if other potential parties did not make their documentary material available until a later time when the Yucca Mountain license application was a certainty. LSSARP meeting participants suggested that DOE and NRC be required to make their documentary material available at an earlier date. Because the DOE and NRC documentary material will constitute the overwhelming majority of the information to be made available in the LSN, it is important that it be accessible as soon as possible to allow preparation for the licensing proceeding. They suggested that other potential parties and interested governmental participants should be required to make their documentary material available electronically no later than the date that the site selection decision becomes final after review by Congress.

*Response:* NRC has adopted the suggestion developed at the LSSARP meeting, that NRC and DOE documents should be made available at the earliest practical time, and that all other participants' documents should be made available later. However, in order to allow time for compliance with dates that may be hard to predict in advance, the final rule allows 30 days after the selected milestones before requiring compliance. Therefore, the definition of Pre-license application phase has been revised to state that phase begins 30 days after the date on which DOE submits its site recommendation decision to the President, a date earlier than the



date specified in the proposed rule. DOE's latest Program Plan, *Civilian Radioactive Waste Management Program Plan, Rev. 2*, DOE/RW-0504 (July 1998) has scheduled sending the Site Suitability Recommendation to the President in July 2001.

Section 2.1003(a) has been revised to require NRC and DOE to make their documentary material available beginning in the pre-license application phase. The final rule requires all other potential parties or interested governmental participants to make their documentary material available no later than 30 days after the date the repository site selection decision becomes final after review by Congress. Section 2.1003 has also been rearranged slightly from the proposed version in order to clarify and improve the parallel structure of the subsections.

Time period for inspection and copying documents §§ 2.1004, 2.1010(c)

*Comment:* The DOE commented that the two days allowed in both §§ 2.1004 and 2.1010(c) for making documents available for inspection and copying should be extended to ten working days, because reasonable and expeditious efforts to reproduce and make large documents available could easily consume two days. DOE points out that lengthening the time limit would also relieve the Presiding Officer of the burden of reviewing requests for minor extensions of these deadlines.

*Response:* NRC acknowledges that two days may be too brief a period of time to search for and reproduce some large documents. Nevertheless, ten working days is much more time than is needed, or can be spared routinely in the schedule for this licensing proceeding. Therefore, the deadlines in these two sections have been extended from two to five days.

§2.1007(f)(3) and (c) Access

*Comment:* The DOE notes that proposed § 2.1007(a)(3) retains the current requirement to make available systems to provide electronic access for members of the public at any NRC and DOE Local Public Document Rooms to be located in Nevada, with specified locations at Las

Vegas, Reno, Carson City, Nye County, and Lincoln County. DOE requests that the rule be clarified to specify which of these locations are the responsibility of DOE and which are NRC's.

*Response:* The best options for providing the required public access to the LSN will need to be explored by DOE and NRC in consultation with the Advisory Review Panel in the implementation phase. The NRC position on maintaining Local Public Document Rooms will be changing because of the future planned availability of all agency documents via the Internet accessible from a personal computer from home, office, or a public library. NRC does not believe that it is necessary or practical to add further detail to this portion of the rule at this time.

*Comment:* The DOE states that § 2.1007(c) appears to require both NRC and DOE to treat docketed documents as agency documents under the Freedom of Information Act.(FOIA). DOE finds the phrase "if these documents remain under the custody and control of the agency or organization that identified the documents" to be confusing. DOE proposes a clarification that all documents entered into the docket, other than those submitted by another agency, are NRC documents for FOIA purposes.

*Response:* NRC agrees that the text of § 2.1007(c) is confusing. Furthermore, that text appears to be unnecessary, because § 2.1007(b) states that the regulations of NRC and DOE regarding availability of copies apply to the respective agencies' records. Therefore, proposed § 2.1007(c) has not been adopted.

Certification of compliance § 2.1009(b)

*Comment:* The DOE noted that the proposed rule replaces the six month interval for certifying that the procedural requirements have been met with an unspecified interval "upon order of a duly appointed presiding officer." DOE suggests that a regular and prescribed interval for certification would facilitate the success of the system and proposes a twelve-month period as appropriate.

*Response:* NRC agrees that a regular interval for updating the certification may be beneficial. Therefore, the final rule adopts the suggestion of a twelve month interval for updating the certification of compliance. The DOE will also be required to update its certification at the time it submits its license application to the NRC.

#### Compliance § 2.1012

*Comment.* One commenter and participant in the LSSARP meeting stated that the Director of NRC's Office of Nuclear Materials Safety and Safeguards (NMSS) should have the responsibility and authority to reject the DOE license application, not only if it is not able to be accessed through the electronic docket but also, if the DOE is not in compliance with all of the requirements of the rule when the license application is submitted. This commenter suggested that the current language of § 2.1011(d)(6) and (7) be moved to § 2.1012.

*Response:* Section 2.1009(b) has been revised in response to the previously discussed comment to require an updated certification from the DOE at twelve month intervals and at the time of submission of the license application. This final rule also adds a clause to §2.1012 to authorize the Director, NMSS, to find the license application unacceptable for docketing if it is not accompanied by a certification from DOE pursuant to § 2.1009(b).

#### Copies of documents for deposition § 2.1019(i)

*Comment:* The DOE observes that it may be burdensome to provide paper copies of large documents that are not identical (because of subsequent modification or added notations) to those documents that have been made available electronically, as required by proposed § 2.1019(i). DOE suggests that the requirement be clarified to require submission of copies only of the parts of the documents that have been modified.

*Response:* NRC believes that this suggestion might prove difficult to implement. It would

seem especially difficult to isolate and identify changes from the previous documents if the subsequent modifications have been inserted electronically, thereby altering the pagination of the pre-existing text. Isolating the modified sections as separate documents could obscure the overall context and meaning of the changed portion. NRC has not adopted this suggestion.

**Retention of the "LSS Administrator" function § 2.1011**

*Comment:* The consensus of the LSSARP meeting participants and three of the written comments supported retention of the LSS Administrator function. One comment asserted that the "LSS Administrator" was needed to contribute to the design and management of the system, to be a "traffic cop", to balance priorities for data input, to organize data, to resolve conflicts, to audit the system, and to add credibility. Another comment stated that the LSS Administrator should be retained and should review participants' readiness to allow access to their documentary material, receive and resolve complaints regarding network problems, perform periodic audits or compliance reviews, assist participants in achieving and maintaining compliance, and coordinate resolution of technical issues.

*Response:* The Commission agrees that the "LSS Administrator" function may be useful for the smooth functioning of the LSN to identify and help implement solutions to implementation problems. The final rule contains a new term in § 2.1001, LSN Administrator. Section 2.1011(c) provides for the designation of an LSN Administrator before the start of the pre-license application phase. The LSN Administrator will be responsible to coordinate the functioning of the Licensing Support Network by identifying technical and policy issues related to implementation of the LSN for Advisory Review Panel and NRC consideration. The LSN Administrator will coordinate addressing the consensus advice of the LSN Advisory Review Panel and resolving problems regarding LSN availability and the integrity of the LSN data. The LSN Administrator will also provide periodic reports to the NRC on the status of LSN

functionality and operability.

Maintaining an Advisory Review Panel § 2.1011(c)

*Comment:* All those who submitted written comments and who commented at the LSSARP meeting preferred continuing to have an advisory review panel, rather than substituting an informal users group. The DOE stated that it was premature to replace the advisory review panel with an informal users group and that the formality of the panel would ensure that each member's concerns about the structure of the electronic docket will be addressed in a documented manner. Two commenters stated that a more informal group would tend to be less effective with higher turnover in participants and less commitment to the objectives of the program.

*Response:* The final rule requires the Secretary of the Commission to reconstitute the LSS Advisory Review Panel as the LSN Advisory Review Panel (LSNARP). In view of the many complex implementation issues that must be coordinated among the participants, the continued use of an advisory committee appears to offer the best means to ensure that these issues will be considered and resolved effectively. However, the NRC directs that LSNARP meetings be conducted with the most efficient possible use of resources. Meetings should be conducted taking advantage of teleconference, video conference, or other electronic communication capabilities to the greatest extent practicable. Because the current membership will be retained, proposed § 2.1011(d)(2) that specifies the initial membership of the Advisory Review Panel has not been adopted.

Membership on the LSNARP § 2.1011(c)(2)

*Comment:* Two commenters, who are affected units of local government, stated that the proposed rule should be modified to give a separate seat on the LSNARP to each affected unit of local government, rather than specifying one seat for "a coalition of affected units of local

government." One commenter stated that there are now 10 counties designated by DOE as "affected" and that the different interests of this group could not be represented by one seat. One commenter, Nye County, Nevada, stated that its status as the "situs jurisdiction" is significantly different from that of the other counties and requires separate representation. The National Congress of American Indians stated that individual affected tribes from the Yucca Mountain area should be members of the LSNARP.

*Response:* In order to keep the functioning of the LSNARP manageable, including numbers of participants required for quorums and other operating requirements, NRC believes that it is necessary to continue to treat entities with similar interests as coalitions (e.g., affected units of local government, tribal groups). However, this does not need to affect recognition of the unique status of individual members of the coalition, nor their opportunity to attend and participate at LSN meetings.

#### Funding for participants in the LSN

*Comment:* Several participants at the LSSARP meeting stated that there was an urgent need for funding to enable small entities to participate fully in the HLW licensing proceeding and the LSNARP, and to fulfill their responsibilities to provide electronic access to documentary material under this rule.

*Response:* The LSSARP participants did not suggest and NRC has not devised any revisions to the rule to address this problem. As noted at the LSSARP meeting, NRC is prohibited from paying expenses for participants in licensing proceedings by a provision from the Fiscal Year 1993 Energy and Water Development Appropriations Act, which has been codified at 5 U.S.C. 504 note. A Comptroller General's opinion issued December 3, 1980, Opinion No. B-200585, interpreting identical language previously contained in the Energy and Water Development Appropriation Act, 1981 (Pub. Law No. 96-367, 94 Stat. 1331), concluded that

NRC could not provide to intervenors free copies of transcripts or free copying and service of intervenors' documents.

NRC recognizes that this revised rule places responsibility for document conversion, loading, and maintaining and operating a web server on each of the individual parties or potential parties. NRC believes there are two possible approaches to help the smaller parties and potential parties mitigate the funding requirements of participation under this rule.

In the first approach, Affected Units of Local Governments (AULG) and other parties and potential parties could utilize a portion of grant funds typically provided to the AULGs by DOE in the past. Although in FY 1997 no grants were forthcoming from DOE and many of the county governments had to cancel or severely curtail their activities for the year, funding was available in FY 1998.

A second approach was suggested in the proposed rule notice where NRC stated that participants may elect to provide their documents to NRC or to DOE for either agency to develop and maintain electronic access to them. Because the codified prohibition on paying intervenor expenses applies to all funds appropriated under all Energy and Water Development Appropriations Acts, the prohibition applies to DOE also (although DOE generally does receive appropriated funds to provide funding to Affected Units of Local Government). Therefore, on further consideration of the intervenor funding prohibition, this approach, standing alone, may not be sufficient to address this matter. However, if DOE were specifically to identify an amount in its budget request for assisting potential parties in providing electronic access to their documents, specific congressional approval of this line item would allow this use of appropriated funds for this purpose in spite of the general prohibition on paying the expenses of intervenors. In order for NRC to receive authorized funding, NRC and DOE could then enter into a memorandum of agreement (MOA) that would arrange the transfer of these funds from the DOE

appropriation to NRC for assistance to small entities in providing electronic access to their documents. NRC could use the funds to maintain a web site for small participants that would be managed by the LSN Administrator. Thus, the NRC could offer to host web sites for the collections of the smaller participants or potential participants, who have difficulty making their documents available electronically.

Tribal Government participation - definition of "party" and § 2.715.

*Comment:* The National Congress of American Indians (NCAI) stated that NRC should set up a process to determine which tribes are interested in representation in the licensing proceeding to ensure that all interested federally recognized tribes are included as parties to the licensing proceeding. The NCAI also expressed a concern that tribal governments do not appear to be included in the provisions of § 2.715 which allow representatives of State or local governments to participate in a proceeding without being required to take a position on the issues. NCAI recognizes that this matter may not be within the purview of this rulemaking but requests that it be addressed in the appropriate forum.

*Response:* The definition of "party" includes "affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982." If a tribe which did not meet that definition wished to participate as a party, it would still be able to seek intervention under § 2.1014.

With regard to § 2.715, because this issue is outside the scope of the current rulemaking, the NRC intends to undertake a separate rulemaking to amend that section to include federally recognized Native American tribal governments. This task has been added to the NRC's Rulemaking Activity Plan (SECY 98-168). However, the straightforward and procedural nature of such a rule change should make it possible to proceed without undue delay.

Additional matters regarding "documentary material" and electronic availability § 2.1003

The definition of "documentary material" has been amended to make clear that the duty



to identify "information that is relevant to, but does not support, that information or that party's position" is limited to information "that is known to, and in the possession of, or developed by the party."

The NRC staff has become aware through informal discussions with commenters on this rulemaking that the proposed rule language did not clearly retain the requirement for an electronic bibliographic header to be made available with each item of documentary material made available under § 2.1003. An electronic bibliographic header is necessary to allow effective and efficient use of an electronic full text search capability. Therefore, § 2.1003(a)(1) has been amended to clarify the requirement to submit an electronic bibliographic header along with each item of documentary material.

### III. Section-by-Section Description of Final Rule

In § 2.1000, the reference to § 2.709 is removed because it requires compliance with § 2.708 which does not apply to this subpart.

In § 2.1001, the following definitions are added, amended, or removed:

ASCII File. This definition is removed and no longer used in the rule. Prescriptive references to specific technical standards have been removed to allow flexible implementation consistent with developing technology.

Documentary material. The definition of documentary material is revised to cover information upon which a party, potential party, or interested governmental participant intends to rely and/or cite in support of its position in the licensing proceeding; any information known to, and in the possession of, or developed by the party which is relevant to, but does not support, that information or that party's position; and 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, and any information that is likely to lead to the discovery of relevant information. This definition is used in the rule in § 2.1003 to define what material must be provided in electronic form for access beginning in the pre-license application phase. Therefore, the term "documentary material" is intended to describe the most important body of material and would be defined clearly to require that all parties include electronic access to any relevant information in their possession that does not support their position in the licensing proceeding, as well as providing access to the information that does support their position, and any reports and studies prepared by the party relevant to the application on issues described in the Topical Guidelines, regardless of whether or not they would be relied upon or cited by the party. Access must also be provided to information which is likely to lead to the discovery of relevant information. The scope of the documentary material is still governed by the topical guidelines.

Electronic docket. A new definition is added to describe NRC's electronic information system to receive, distribute, store, and maintain NRC adjudicatory docket materials in the licensing proceeding.

Licensing Support Network (LSN). A new definition would be added to describe the combined system to make documentary material and the NRC pre-license application docket and licensing docket available in electronic form to potential parties, parties, interested governmental participants, or the public for the licensing proceeding of the high-level waste geologic repository, either as part of the NRC's pre-license application electronic docket or electronic docket or pursuant to electronic access to documentary material made available by individual potential parties, parties, and interested governmental participants. This is a term that replaces the LSS in this rule.

LSS Administrator. This term is eliminated from the rule because the concept of the LSS

is also removed. The Pre-license Application Presiding Officer will resolve disputes about electronic access to documents in the pre-license application phase. This rule creates a new term "LSN Administrator" which is described below.

LSN Administrator. This new term describes the individual who will coordinate access to, and the functioning of, the Licensing Support Network, as well as the resolution of problems regarding the functionality and availability of the system.

Party. This definition is revised to add "affected unit of local government", as that term is defined in the Nuclear Waste Policy Act of 1982, as amended, and also to refer to that statute for the definition of affected Indian Tribe. In addition, any affected unit of local government, the host State, and any affected Indian Tribe would be required to file a list of contentions.

Potential party. This definition is revised to remove the reference to the LSS and to substitute the term Licensing Support Network to describe the material to which the potential party will be given access.

Pre-license application electronic docket. A new definition is added to describe NRC's electronic information system to receive, distribute, store, and maintain NRC pre-license application docket materials during the pre-license application phase.

Pre-license application phase. This definition is being specified for the purposes of this rule to begin 30 days after the date the DOE submits its site suitability decision to the President. This term is used in § 2.1003 to specify the date by which the DOE and the NRC must make their documentary material available electronically. This date has been chosen to allow access to the largest body of the most important NRC and DOE documentary material sufficiently in advance of the filing of the license application to allow advance preparation of contentions and discovery requests before the application is filed but late enough in the repository development process to provide meaningful information.

Searchable full text. This definition is revised to remove references to ASCII and to the LSS.

Topical Guidelines. A new definition is added to describe the set of topics set forth in Regulatory Guide 3.69 that are intended to guide the scope of documentary material under this subpart.

Section 2.1002 is removed because creation of the LSS is no longer required. Access to the Licensing Support Network will provide the major functions which the LSS was designed to provide. Paragraphs (c) and (d), which state that participation by the host State in the pre-application phase will not affect its disapproval rights and that this subpart shall not affect any participant's independent right to receive information, are now incorporated in the revised § 2.1003 as paragraphs (c) and (d).

Section 2.1003 is revised to describe information that is required to be made available electronically by all potential parties, parties, and interested governmental participants (including the NRC and DOE). This information must be made electronically available by NRC and DOE beginning in the pre-license application phase, which starts 30 days after the date the DOE submits its site recommendation to the President. Other potential parties and interested governmental participants would be required to make their documentary material available no later than 30 days after the date the repository site selection decision becomes final after review by Congress. The requirements of the rule are simplified to require only that access to an electronic file and bibliographic header be provided. All references to specific formats are removed to allow flexibility in implementation. The NRC intends that a potential party, party, or interested governmental participant might offer electronic access to its documentary material in a number of different ways, including (if authorized funding is provided by Congress) by providing its documents in electronic form either to the NRC or to the DOE, to have the NRC or

the DOE maintain the documents for electronic access.

Although the rule sets deadlines for requiring all potential parties and interested governmental participants to make their documentary material available electronically, the NRC would encourage the earliest feasible availability of documentary material in order to enhance the future smooth operation of the licensing proceeding. The paragraphs relating to evaluations and certifications by the LSS Administrator are removed because the LSS (and LSSA) concept is removed. Section 2.1010 states that the Pre-License Application Presiding Officer will resolve any disputes relating to electronic access to documents in the pre-license application phase. Accordingly, the paragraphs which stated that the application would have to be docketed under Subpart G if the LSSA did not certify compliance have been removed. Subpart J (including specifically referenced sections of Subpart G) unconditionally presents the rules of procedure applicable for the HLW licensing proceeding.

Section 2.1004 is revised to provide procedures for providing access to a document that has not previously been provided in electronic form, to delete previous references to the LSS and the LSSA, and to extend the period of time for providing access to a document from two days to five days.

Section 2.1005 is revised to delete reference to the LSS and to add an exclusion of readily available references, such as journal articles or proceedings, which may be subject to copyright.

Section 2.1006 is revised to refer to providing a document in electronic form and to delete references to the LSS and the LSSA.

Section 2.1007 is revised to refer to providing systems for access to the Licensing Support Network rather than providing terminals for access to the LSS. Paragraph (c) is deleted because the text was confusing and not needed.

Section 2.1008 is removed and reserved. The requirements for petitioning for access during the pre-license application phase are not consistent with allowing public access to the electronic information.

Section 2.1009 is revised to delete references to the LSS and the LSSA, and to refer instead to the responsibility to provide electronic files. The responsible official for each potential party is required to certify to the Pre-License Presiding Officer that procedures to comply with § 2.1003 have been implemented and that its documentary material has been made electronically available. A requirement for all participants to update the certification at twelve month intervals and for DOE to update its certification at the time of submission of the license application replaces a previous requirement to provide this certification at six month intervals.

Section 2.1010 is revised to delete references to the LSS and the LSSA and to refer instead to electronic access. The reference to petitions for access is removed to conform to removal of this requirement. The time period for providing access to documents is extended from two days to five days.

Section 2.1011 is revised to reflect that the electronic availability of documentary material that is specified in this rule no longer requires special equipment. The Secretary of the Commission is directed to reconstitute the LSS Advisory Review Panel as the LSN Advisory Review Panel. The functions of the panel have been amended to delete the reference to the LSS and to substitute the purpose of arriving at standards and procedures to facilitate the electronic access to documentary material and to the electronic docket established for the HLW geologic repository licensing proceeding. Because of the broad and non-prescriptive requirements regarding providing electronic files in this rule, the LSN Advisory Review Panel will be very useful in discussing standards and procedures to ensure that all participants are able to access the electronic information. Because the LSS concept is replaced, the name and

functions of the LSS Administrator have been changed to "LSN Administrator" and to include coordinating the functions of the Licensing Support Network. The LSN Administrator will be responsible for identifying technical and policy issues related to implementation of the LSN for LSSARP and NRC consideration, addressing the consensus advice of the LSN Advisory Review Panel, and for coordinating the resolution of problems experienced by participants regarding LSN availability and the integrity of the LSN data. The LSN Administrator will also provide periodic reports to the NRC on the status of LSN functionality and operability. Similarly, the name and functions of the LSS Advisory Review Panel have been modified in the final rule to accommodate a new purpose.

Section 2.1012(a) is revised to allow the Director of the NRC Office of Nuclear Material Safety and Safeguards (NMSS) to determine that the application would not be acceptable if it is not able to be accessed through the electronic docket or if it is not accompanied by a certification of compliance with the rule pursuant to § 2.1009(b). Section 2.1012(b)(1) is revised to substitute Licensing Support Network for Licensing Support System so that a person who has had access to the Licensing Support Network would not be granted party status in the licensing proceeding if it cannot demonstrate compliance with the requirements of § 2.1003. Section 2.1012 (d) has been removed because the provision for suspending or terminating access to the pre-license application electronic docket or the electronic docket is inconsistent with allowing public access to the LSN.

Section 2.1013 is revised to delete references to the LSS and LSSA and refers to the provision of information in electronic form. The requirement in § 2.1013(c)(5) to file one signed paper copy of each filing with the Secretary, NRC, is removed because the electronic docket will not require signed paper copies. However, use of the electronic docket will require the development of electronic signature procedures, which will be devised in the implementation of

the rule.

Section 2.1014(c)(4) has been revised to delete a reference to the LSS and make the failure of a petitioner to participate in the pre-license application phase a criterion in considering whether to grant a petition to intervene.

Section 2.1017 has been revised to use the unavailability of the electronic docket instead of the LSS as a justification for extending the computation of time in the proceeding.

Sections 2.1018 and 2.1019 are revised to delete references to the LSS and instead to refer to providing documents electronically.

In addition, minor editorial changes have been made throughout the final rule to improve readability.

#### Environmental Impact: Categorical Exclusion

The NRC has determined that this proposed regulation is the type of action described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed regulation.

#### Paperwork Reduction Act Statement

This proposed rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.).

#### Regulatory Analysis

To address the regulatory problem of adapting the existing rule to technological developments that have occurred, several alternative approaches to amending the regulations in Subpart J of Part 2 were considered.

#### Option 1: Existing rule.

This approach would not take advantage of current and future technology. It would require an enormously expensive custom designed system to be developed using old



assumptions about technological standards and the universe of "relevant" material. At the time of the development of the existing rule, the cost of the LSS was estimated by DOE to be in the \$200 million range. Furthermore, because the large backlog contains many documents that may no longer be relevant due to the unanticipated delay in developing the LSS as initially designed in 1988, there is a substantial chance that it would be impossible for the DOE to achieve and for the LSSA to certify compliance with the provisions of the current rule. In this case, under the current rules, the proceeding would have to be conducted under 10 CFR Part 2, Subpart G, and could result in a protracted discovery phase. The additional costs of using this approach are difficult to quantify. However, the lengthened discovery phase could prevent the NRC from meeting the statutory deadline for decision on the application for a geologic repository license.

Option 2: 10 CFR Part 2, Subpart G.

Because the NRC is developing a new system called the Agency-wide Documents Access and Management System (ADAMS), that will provide an agency-wide electronic docket, it would be possible to rely on existing adjudicatory procedure rules in 10 CFR Part 2, Subpart G, which will have to be updated to reflect the electronic docket to conduct the licensing proceeding. This approach would not provide pre-license application access to documents and could result in a protracted discovery phase. The costs of using this approach are difficult to quantify. However, the lengthened discovery phase could prevent the NRC from meeting the statutory deadline for decision on the application.

Option 3: Existing rule using a distributed system.

This approach would allow using linked individual Internet sites to serve as the LSS. However, this approach does not solve the problem discussed in Option 1 concerning the requirement to capture a huge backlog of material that may not have been maintained in a

manner that would ever permit compliance with the rule and may not all be relevant to the future license application. Therefore, the costs of this approach, as in Option 1, would include the possibility that the LSS rule compliance finding could not be made and the proceeding would have to be conducted under 10 CFR Part 2, Subpart G. A lengthened discovery phase could prevent the NRC from meeting the statutory deadline for decision on the application.

Option 4: Revised rule with more realistic document discovery approach.

This approach will remove the requirement for a central LSS system and LSS Administrator, but will require each potential party to provide for the electronic availability of both the material it intends to rely upon to support its position, any material which does not support that material or that position, and any reports or studies prepared by or for the party, beginning in the pre-application phase (presided over by a Pre-License Application Presiding Officer). This definition of documentary material will provide pre-application access to a more focused set of the materials most important to the licensing proceeding. It will not require electronic access to the entire backlog of DOE and other parties' material, some of which may no longer be relevant to the licensing proceeding. The electronic docket functionality of the LSS will be provided by the NRC agency-wide system with supervision of the Presiding Officer. Participation in the pre-license application phase will be one criterion for participating in the hearing. After the application is filed, in addition to the electronically available material, discovery will be limited to interrogatories and depositions as in the current rule. The specific method of providing electronic access to documentary material will not be specified, which will allow flexibility to accommodate current and future technology advances. If Congressionally authorized funding is provided, individual parties may be able to give their documents in electronic form to NRC or DOE in order to provide electronic access. Because this rule will unconditionally provide the procedural rules for document management for the HLW licensing

proceeding, there would be no last minute danger that discovery would have to be conducted under 10 CFR Part 2, Subpart G.

The NRC believes that Option 4 provides the most effective solution for maintaining the basic functionality of the LSS conceptual design and accommodates current and future technological developments. This constitutes the final regulatory analysis for this rule.

#### Regulatory Flexibility Certification

The amendments will modify the NRC's rules of practice and procedures. The rule is amended to allow more widely available electronic access to information before the license application is filed. Participants will be required to make their own documentary material available electronically. This final rule will not have a significant economic impact upon a substantial number of small entities. The license applicant for the HLW repository will be the Department of Energy. DOE does not fall within the definition of a "small entity" in the NRC's size standards (10 CFR 2.810). Although a few of the intervenors in the HLW proceeding would likely qualify as small entities, the impact on intervenors or potential intervenors will not be significant. The requirement for participants to make their own documentary material available electronically is stated in a manner that will allow flexibility in implementation. Furthermore, it is consistent with current business practice to create documents electronically. Although the exact additional costs to small entities involved in making the documentary materials available electronically are difficult to quantify, to avoid those costs, if congressionally authorized funding is provided, participants will have the option of providing their documents to NRC or DOE to maintain electronic availability. Thus, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), the NRC hereby certifies that this final rule will not have a significant economic impact upon a substantial number of small entities.

### **Backfit Analysis**

The NRC has determined that a backfit analysis is not required for this final rule because these amendments do not include any provisions that would require backfits as defined in 10 CFR Chapter I.

### **Small Business Regulatory Enforcement Fairness Act**

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

### **List of Subjects in 10 CFR Part 2**

Administrative practice and procedure, Antitrust, Byproduct material, Classified information. Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954; as amended, the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the Nuclear Regulatory Commission is adopting the following amendments to 10 CFR Part 2.

### **PART 2-RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND ISSUANCE OF ORDERS**

1. The authority citation for Part 2 continues to read as follows:

**AUTHORITY:** Secs. 161, 181, 68 Stat. 948, 953, as amended (42 U.S.C. 2201, 2231); sec. 191, as amended, Pub. L. 87-615, 76 Stat. 409 (42 U.S.C. 2241); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841); 5 U.S.C. 552.

Section 2.101 also issued under secs. 53, 62, 63, 81, 103, 104, 105, 68 Stat. 930, 932, 933, 935, 936, 937, 938, as amended (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135);

sec. 114(f), Pub. L. 97-425, 96 Stat. 2213, as amended (42 U.S.C. 10134(f)); sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332); sec. 301, 88 Stat. 1248 (42 U.S.C. 5871). Sections 2.102, 2.103, 2.104, 2.105, 2.721 also issued under secs. 102, 103, 104, 105, 183, 189, 68 Stat. 936, 937, 938, 954, 955, as amended (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Section 2.105 also issued under Pub. L. 97-415, 96 Stat. 2073 (42 U.S.C. 2239). Sections 2.200-2.206 also issued under secs. 161b, i, o, 182, 186, 234, 68 Stat. 948-951, 955, 83 Stat. 444, as amended (42 U.S.C. 2201 (b), (i), (o), 2236, 2282); sec. 206, 88 Stat. 1246 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101-410, 104 Stat. 890, as amended by Section 31001(s), Pub. L. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note.) Sections 2.600-2.606 also issued under sec. 102, Pub. L. 91-190, 83 Stat. 853, as amended (42 U.S.C. 4332). Sections 2.700a, 2.719 also issued under 5 U.S.C. 554. Sections 2.754, 2.760, 2.770, 2.780 also issued under 5 U.S.C. 557. Section 2.764 also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.790 also issued under sec. 103, 68 Stat. 936, as amended (42 U.S.C. 2133) and 5 U.S.C. 552. Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553 and sec. 29, Pub. L. 85-256, 71 Stat. 579, as amended (42 U.S.C. 2039). Subpart K also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97-425, 96 Stat. 2230 (42 U.S.C. 10154). Subpart L also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239). Appendix A also issued under sec. 6, Pub. L. 91-560, 84 Stat. 1473 (42 U.S.C. 2135).

2. Section 2.1000 is revised to read as follows:

§ 2.1000 Scope of subpart.

The rules in this subpart govern the procedure for applications for a license to receive and possess high-level radioactive waste at a geologic repository operations area noticed pursuant to § 2.101(f)(8) or § 2.105(a)(5). The procedures in this subpart take precedence over

the 10 CFR Part 2, subpart G, rules of general applicability, except for the following provisions:  
 §§ 2.702, 2.703, 2.704, 2.707, 2.711, 2.713, 2.715, 2.715a, 2.717, 2.718, 2.720, 2.721, 2.722,  
 2.732, 2.733, 2.734, 2.742, 2.743, 2.750, 2.751, 2.753, 2.754, 2.755, 2.756, 2.757, 2.758, 2.759,  
 2.760, 2.761, 2.763, 2.770, 2.771, 2.772, 2.780, 2.781, 2.786, 2.788, and 2.790.

3. Section 2.1001 is amended by removing the definitions of ASCII File and LSS Administrator; adding definitions of Electronic docket, Licensing Support Network, LSN Administrator, Pre-license application electronic docket, and Topical Guidelines; and revising the definitions of Documentary material, Party, Potential party, Pre-license application phase, and Searchable full text, to read as follows:

§ 2.1001 Definitions.

\* \* \* \* \*

Documentary material means (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 for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter; (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; (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; and (4) any information that is likely to lead to the discovery of relevant information. The scope of documentary material shall be guided by the topical guidelines in the applicable NRC Regulatory Guide.

\* \* \* \* \*

Electronic docket means the NRC information system that receives, distributes, stores, and retrieves the Commission's adjudicatory docket materials.

\* \* \* \* \*

Licensing Support Network means the combined system that makes documentary material available electronically to parties, potential parties, and interested governmental participants to the proceeding for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter, as part of the electronic docket or electronic access to documentary material, beginning in the pre-license application phase.

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. 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.

\* \* \* \* \*

Party for the purpose of this subpart means the DOE, the NRC staff, the host State, any affected unit of local government as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), any affected Indian Tribe as defined in section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101), and a person admitted under § 2.1014 to the proceeding on an application for a license to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter;

provided that a host State, affected unit of local government, or affected Indian Tribe shall file a list of contentions in accordance with the provisions of §§ 2.1014(a)(2) (ii) and (iii).

\* \* \* \* \*

Potential party means any person who, during the period before the issuance of the first pre-hearing conference order under § 2.1021(d), is given access to the Licensing Support Network and who consents to comply with the regulations set forth in subpart J of this part, including the authority of the Pre-License Application Presiding Officer designated pursuant to § 2.1010.

Pre-license application electronic docket means the NRC's electronic information system that receives, distributes, stores, and maintains NRC pre-license application docket materials during the pre-license application phase.

Pre-license application phase means the time period before the license application to receive and possess high-level radioactive waste at a geologic repository operations area is docketed under § 2.101(f)(3). For the purpose of this subpart, this period begins 30 days after the date the DOE submits the site recommendation to the President pursuant to section 114(a) of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10134(a)). .

\* \* \* \* \*

Searchable full text means the electronic indexed entry of a document that allows the identification of specific words or groups of words within a text file.

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".

4. Section 2.1002 is removed and reserved.

§2.1002 [Removed]



5. Section 2.1003 is revised to read as follows:

**§ 2.1003 Availability of material.**

(a) Subject to the exclusions in § 2.1005 and paragraphs (b) and (c) of this section, NRC and DOE shall make available, beginning in the pre-license application phase, and each other potential party, interested governmental participant or party shall make available no later than 30 days after the date the repository site selection decision becomes final after review by Congress--

(1) An electronic file including bibliographic header for all documentary material (including circulated drafts but excluding preliminary drafts) generated by, or at the direction of, or acquired by, a potential party, interested governmental participant, or party. Concurrent with the production of the electronic file will be an authentication statement that indicates where an authenticated image copy of the document can be obtained.

(2) In electronic image form, subject to the claims of privilege in § 2.1006, graphic-oriented documentary material that includes raw data, computer runs, computer programs and codes, field notes, laboratory notes, maps, diagrams and photographs which have been printed, scripted, or hand written. Text embedded within these documents need not be separately entered in searchable full text. Graphic-oriented documents may include-

- (i) Calibration procedures, logs, guidelines, data and discrepancies;
- (ii) Gauge, meter and computer settings;
- (iii) Probe locations;
- (iv) Logging intervals and rates;
- (v) Data logs in whatever form captured;
- (vi) Text data sheets;
- (vii) Equations and sampling rates;

- (viii) Sensor data and procedures;
- (ix) Data Descriptions;
- (x) Field and laboratory notebooks;
- (xi) Analog computer, meter or other device print-outs;
- (xii) Digital computer print-outs;
- (xiii) Photographs;
- (xiv) Graphs, plots, strip charts, sketches;
- (xv) Descriptive material related to the information identified in paragraph (b)(1) of this

section.

(3) In an electronic file, subject to the claims of privilege in § 2.1006, only a bibliographic header for each item of documentary material that is not suitable for image or searchable full text.

- (4) An electronic bibliographic header for each documentary material--
  - (i) For which a claim of privilege is asserted;
  - (ii) Which constitutes confidential financial or commercial information; or
  - (iii) Which constitutes safeguards information under § 73.21 of this chapter.

(b) 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.

(c) The participation of the host State in the pre-license application phase shall not affect the State's ability to exercise its disapproval rights under section 116(b)(2) of the Nuclear Waste Policy Act, as amended, 42 U.S.C. 10136(b)(2).

(d) This subpart shall not affect any independent right of a potential party, interested

governmental participant or party to receive information.

6. Section 2.1004 is revised to read as follows:

**§ 2.1004 Amendments and additions.**

Any document that has not been provided to other parties in electronic form must be identified in an electronic notice and made available for inspection and copying by the potential party, interested governmental participant, or party responsible for the submission of the document within five days after it has been requested unless some other time is approved by the Pre-License Application Presiding Officer or the Presiding Officer designated for the high-level waste proceeding. The time allowed under this paragraph will be stayed pending Officer action on a motion to extend the time.

7. Section 2.1005 is revised to read as follows:

**§ 2.1005 Exclusions.**

The following material is excluded from the requirement to provide electronic access, either pursuant to § 2.1003, or through derivative discovery pursuant to § 2.1019(i)—

- (a) Official notice materials;
- (b) Reference books and text books;
- (c) Material pertaining exclusively to administration, such as material related to budgets, financial management, personnel, office space, general distribution memoranda, or procurement, except for the scope of work on a procurement related to repository siting, construction, or operation, or to the transportation of spent nuclear fuel or high-level waste;
- (d) Press clippings and press releases;
- (e) Junk mail;
- (f) References cited in contractor reports that are readily available;
- (g) Classified material subject to Subpart I of this part;

(h) Readily available references, such as journal articles and proceedings, which may be subject to copyright.

8. Section 2.1006 is revised to read as follows:

§ 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(c), the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.790 may be asserted by potential parties, interested governmental participants, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by State and local government entities and Indian Tribes.

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be provided in electronic form by the party, interested governmental participant, or potential party that asserted the claim to-

(1) The other participants; or

(2) To the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under §§ 2.1010(b) or 2.1018(c).

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be provided for electronic access pursuant to § 2.1003(a).

9. Section 2.1007 is revised to read as follows:

§ 2.1007 Access.

(a)(1) A system to provide electronic access to the Licensing Support Network shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms

established in the vicinity of the likely candidate site for a geologic repository, beginning in the pre-license application phase.

(2) A system to provide electronic access to the Licensing Support Network shall be provided at the headquarters Public Document Room of NRC, and at all NRC Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, and at the NRC Regional Offices beginning in the pre-license application phase.

(3) The systems for electronic access specified in paragraphs (a)(1) and (a)(2) of this section shall include locations at Las Vegas, Nevada; Reno, Nevada; Carson City, Nevada; Nye County, Nevada; and Lincoln County, Nevada.

(b) Public availability of paper and electronic copies of the records of NRC and DOE, as well as duplication fees, and fee waiver for those records, is governed by the regulations of the respective agencies.

10. Section 2.1008 is removed and reserved:

§ 2.1008 [Removed]

11. Section 2.1009 is revised to read as follows:

§ 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall-

(1) Designate an official who will be responsible for administration of its responsibility to provide electronic files of documentary material ;

(2) Establish procedures to implement the requirements in § 2.1003;

(3) Provide training to its staff on the procedures for implementation of the responsibility to provide electronic files of documentary material;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the NRC under

§ 2.1011(d).

(b) The responsible official designated pursuant to paragraph (a)(1) of this section shall certify to the Pre-License Application Presiding Officer that the procedures specified in paragraph (a)(2) of this section 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. The responsible official shall update this certification at twelve month intervals. The responsible official for the DOE shall also update this certification at the time of submission of the license application.

12. Section 2.1010 is revised to read as follows:

§ 2.1010 Pre-License Application Presiding Officer.

(a)(1) The Commission may designate one or more members of the Commission, or an atomic safety and licensing board, or a named officer who has been delegated final authority on the matter to serve as the Pre-License Application Presiding Officer to rule on disputes over the electronic availability of documents during the pre-license application phase, including disputes relating to privilege, and disputes relating to the implementation of the recommendations of the Advisory Review Panel established under § 2.1011(d).

(2) The Pre-License Application Presiding Officer shall be designated before the Licensing Support Network is scheduled to be available.

(b) The Pre-License Application Presiding Officer shall rule on any claim of document withholding to determine-

(1) Whether it is documentary material within the scope of this subpart;

(2) Whether the material is excluded under §2.1005;

(3) Whether the material is privileged or otherwise excepted from disclosure under

§ 2.1006;

(4) If privileged, whether it is an absolute or qualified privilege;

(5) If qualified, whether the document should be disclosed because it is necessary to a proper decision in the proceeding;

(6) Whether the material should be disclosed under a protective order containing such protective terms and conditions (including affidavits of nondisclosure) as may be necessary and appropriate to limit the disclosure to potential participants, interested governmental participants and parties in the proceeding, or to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act of 1954, as amended, is received and possessed by a potential party, interested governmental participant, or party, other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The Pre-License Application Presiding Officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the Pre-License Application Presiding Officer for violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act of 1954, as amended, the entity in violation may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act of 1954, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed to be an order issued under section 161b of the Atomic Energy Act of 1954, as amended.

(c) Upon a final determination that the material is relevant, and not privileged<sup>d</sup> exempt from disclosure, or otherwise exempt from production under § 2.1005, the potential party,

interested governmental participant, or party who asserted the claim of withholding must make the document available in accordance with the provisions of this subpart within five days.

(d) The service of all pleadings and answers, orders, and decisions during the pre-license application phase shall be made according to the procedures specified in § 2.1013(c) and entered into the pre-license application electronic docket.

(e) The Pre-License Application Presiding Officer shall possess all the general powers specified in §§ 2.721(c) and 2.718.

(f) The Commission, in designating the Pre-License Application Presiding Officer in accordance with paragraphs (a) (1) and (2) of this section, shall specify the jurisdiction of the Officer.

13. Section 2.1011 is revised to read as follows:

§ 2.1011 Management of electronic information.

(a) Electronic document production and the electronic docket are subject to the provisions of this subpart.

(b) The NRC, DOE, parties, and potential parties participating in accordance with the provisions of this subpart shall be responsible for obtaining the computer system necessary to comply with the requirements for electronic document production and service.

(c) The Licensing Support Network shall be coordinated by the LSN Administrator, who shall be designated before the start of the pre-license application phase. The LSN Administrator shall have the responsibility to--

(1) Identify technical and policy issues related to implementation of the LSN for LSN Advisory Review Panel and Commission consideration;

(2) Address the consensus advice of the LSN Advisory Review Panel under paragraph (e)(1) of this section that is consistent with the requirements of this subpart;



(3) Coordinate the resolution of problems experienced by participants regarding LSN availability, including the availability of individual participants' data;

(4) Coordinate the resolution of problems regarding the integrity of the documentary material certified in accordance with § 2.1009(b) by the participants to be in the LSN; and

(5) Provide periodic reports to the Commission on the status of LSN functionality and operability.

(d) The Secretary of the Commission shall reconstitute the LSS Advisory Review Panel as the LSN Advisory Review Panel, composed of the interests currently represented on the LSS Advisory Review Panel. The Secretary of the Commission shall have the authority to appoint additional representatives to the LSN Advisory Review Panel consistent with the requirements of the Federal Advisory Committee Act, 5 U.S.C. app. I, giving particular consideration to potential parties, parties, and interested governmental participants who were not members of the NRC HLW Licensing Support System Advisory Review Panel.

(e)(1) The LSN Advisory Review Panel shall provide advice to--

(i) NRC on the fundamental issues of the type of computer system necessary to access the Licensing Support Network effectively under paragraph (b) of this section; and

(ii) The Secretary of the Commission on the operation and maintenance of the electronic docket established for the HLW geologic repository licensing proceeding under the Commission's Rules of Practice (10 CFR Part 2).

(iii) The LSN Administrator on solutions to improve the functioning of the LSN;

(2) The responsibilities of the LSN Advisory Review Panel shall include advice on--

(i) Format standards for providing electronic access to the documentary material certified by each participant to be made available in the LSN to the other parties, interested governmental participants, or potential parties;

(ii) The procedures and standards for the electronic transmission of filings, orders, and decisions during both the pre-license application phase and the high-level waste licensing proceeding;

(iii) Other duties as specified in this subpart or as directed by the Secretary of the Commission.

14. In § 2.1012, paragraphs (a) and (b)(1) are revised to read as follows, and paragraph (d) is removed:

**§ 2.1012 Compliance.**

(a) In addition to the requirements of § 2.101(f), the Director of the NRC's Office of Nuclear Materials Safety and Safeguards may determine that the tendered application is not acceptable for docketing under this subpart if the Secretary of the Commission determines that it cannot be effectively accessed through the Commission's electronic docket system or if the application is not accompanied by an updated certification pursuant to § 2.1009(b).

(b)(1) A person, including a potential party given access to the Licensing Support Network under this subpart, shall not be granted party status under § 2.1014, or status as an interested governmental participant under § 2.715(c), if it cannot demonstrate substantial and timely compliance with the requirements of § 2.1003 at the time it requests participation in the high-level waste licensing proceeding under § 2.1014 or § 2.715(c).

. . . . .

15. Section 2.1013 is revised to read as follows:

**§ 2.1013 Use of the electronic docket during the proceeding.**

(a)(1) Pursuant to § 2.702, the Secretary of the Commission will maintain the official docket of the proceeding on the application for a license to receive and possess waste at a geologic repository operations area.

(2) Commencing with the docketing in an electronic form of the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter, the Secretary of the Commission, upon determining that the application can be properly accessed under the Commission's electronic docket rules, will establish an electronic docket to contain the official record materials of the high-level radioactive waste licensing proceeding in searchable full text, or, for material that is not suitable for entry in searchable full text, by header and image, as appropriate.

(b) Absent good cause, all exhibits tendered during the hearing must have been made available to the parties in electronic form before the commencement of that portion of the hearing in which the exhibit will be offered. The electronic docket will contain a list of all exhibits, showing where in the transcript each was marked for identification and where it was received into evidence or rejected. Transcripts will be entered into the electronic docket on a daily basis in order to provide next-day availability at the hearing.

(c)(1) All filings in the adjudicatory proceeding on the license application to receive and possess high-level radioactive waste at a geologic repository operations area pursuant to part 60 of this chapter shall be transmitted electronically by the submitter to the Presiding Officer, parties, and the Secretary of the Commission, according to established format requirements. Parties and interested governmental participants will be required to use a password security code for the electronic transmission of these documents.

(2) Filings required to be served shall be served upon either the parties and interested governmental participants, or their designated representatives. When a party or interested governmental participant has appeared by attorney, service must be made upon the attorney of record.

(3) Service upon a party or interested governmental participant is completed when the

sender receives electronic acknowledgment ("delivery receipt") that the electronic submission has been placed in the recipient's electronic mailbox.

(4) Proof of service, stating the name and address of the person on whom served and the manner and date of service, shall be shown for each document filed, by-

- (i) Electronic acknowledgment ("delivery receipt");
- (ii) The affidavit of the person making the service; or
- (iii) The certificate of counsel.

(5) All Presiding Officer and Commission issuances and orders will be transmitted electronically to the parties and interested governmental participants.

(d) Online access to the electronic docket, including a Protective Order File if authorized by a Presiding Officer, shall be provided to the Presiding Officer, the representatives of the parties and interested governmental participants, and the witnesses while testifying, for use during the hearing. Use of paper copy and other images will also be permitted at the hearing.

16. In § 2.1014, paragraph (c)(4) is revised to read as follows:

§ 2.1014 Intervention.

\* \* \* \* \*

(c) \* \* \*

(4) The failure of the petitioner to participate as a potential party in the pre-license application phase.

\* \* \* \* \*

17. Section 2.1017 is revised to read as follows:

§ 2.1017 Computation of time.

In computing any period of time, the day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period so computed

is included unless it is a Saturday, Sunday, or legal holiday at the place where the action or event is to occur, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. Whenever a party, potential party, or interested governmental participant, has the right or is required to do some act within a prescribed period after the service of a notice or other document upon it, one day shall be added to the prescribed period. If the electronic docket is unavailable for more than four access hours of any day that would be counted in the computation of time, that day will not be counted in the computation of time.

18. In § 2.1018, paragraph (a)(1) and the introductory text of paragraph (e) are revised to read as follows:

**§ 2.1018 Discovery.**

(a)(1) Parties, potential parties, and interested governmental participants in the high-level waste licensing proceeding may obtain discovery by one or more of the following methods:

- (i) Access to the documentary material made available pursuant to § 2.1003 ;
- (ii) Entry upon land for inspection, access to raw data, or other purposes pursuant to § 2.1020;
- (iii) Access to, or the production of, copies of documentary material for which bibliographic headers only have been submitted pursuant to § 2.1003(a);
- (iv) Depositions upon oral examination pursuant to § 2.1019;
- (v) Requests for admission pursuant to § 2.742;
- (vi) Informal requests for information not made electronically available, such as the names of witnesses and the subjects they plan to address; and
- (vii) Interrogatories and depositions upon written questions, as provided in paragraph (a)(2) of this section.

\* \* \* \* \*

(e) A party, potential party, or interested governmental participant who has made available in electronic form all material relevant to any discovery request or who has responded to a request for discovery with a response that was complete when made is under no duty to supplement its response to include information thereafter acquired, except as follows:

\* \* \* \* \*

19. In § 2.1019, paragraphs (d), (e), and (i) are revised to read as follows:

§ 2.1019 Depositions.

\* \* \* \* \*

(d) When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature unless the deponent is ill or cannot be found or refuses to sign. The officer shall certify the deposition or, if the deposition is not signed by the deponent, shall certify the reasons for the failure to sign, and shall promptly transmit an electronic copy of the deposition to the Secretary of the Commission for entry into the electronic docket.

(e) Where the deposition is to be taken on written questions as authorized under § 2.1018(a)(2), the party or interested governmental participant taking the deposition shall electronically serve a copy of the questions, showing each question separately and consecutively numbered, on every other party and interested governmental participant with a notice stating the name and address of the person who is to answer them, and the name, description, title, and address of the officer before whom they are to be asked. Within ten days after service, any other party or interested governmental participant may serve cross-questions. The questions, cross-questions, and answers shall be recorded and signed, and the deposition certified, returned, and transmitted in electronic form to the Secretary of the Commission for entry into the electronic docket as in the case of a deposition on oral examination.

\* \* \* \* \*

(i)(1) After receiving written notice of the deposition under paragraph (a) or paragraph (e) of this section, and ten days before the scheduled date of the deposition, the deponent shall submit an electronic index of all documents in his or her possession, relevant to the subject matter of the deposition, including the categories of documents set forth in paragraph (i)(2) of this section, to all parties and interested governmental participants. The index shall identify those records which have already been made available electronically. All documents that are not identical to documents already made available electronically, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents.

(2) The following material is excluded from the initial requirements of § 2.1003 to be made available electronically, but is subject to derivative discovery under paragraph (i)(1) of this section-

- (i) Personal records;
- (ii) Travel vouchers;
- (iii) Speeches;
- (iv) Preliminary drafts;
- (v) Marginalia.

(3) Subject to paragraph (i)(6) of this section, any party or interested governmental participant may request from the deponent a paper copy of any or all of the documents on the index that have not already been provided electronically.

(4) Subject to paragraph (i)(6) of this section, the deponent shall bring a paper copy of all documents on the index that the deposing party or interested governmental participant requests that have not already been provided electronically to an oral deposition conducted

pursuant to paragraph (a) of this section, or in the case of a deposition taken on written questions pursuant to paragraph (e) of this section, shall submit such documents with the certified deposition.

(5) Subject to paragraph (i)(6) of this section, a party or interested governmental participant may request that any or all documents on the index that have not already been provided electronically, and on which it intends to rely at hearing, be made electronically available by the deponent.

(6) The deposing party or interested governmental participant shall assume the responsibility for the obligations set forth in paragraphs (i)(1), (i)(3), (i)(4), and (i)(5) of this section when deposing someone other than a party or interested governmental participant.

\* \* \* \* \*

Dated at Rockville, MD, this \_\_\_\_ day of \_\_\_\_\_, 1998.

For the Nuclear Regulatory Commission.

John C. Hoyle,  
Secretary of the Commission.



## **ATTACHMENT 2**

# Department of Comprehensive Planning

Mission Statement "To serve and protect the community by guiding development, enhancing the living environment, and promoting innovative ways to conserve natural resources."

USNRC



98 MAR 25 P3:50

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Director  
Richard S. Helms

March 25, 1998

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

Secretary  
U.S. Nuclear Regulatory Commission  
Mail Stop 016G15  
Washington, D.C. 20555-0001

DOCKET NUMBER  
PROPOSED RULE PR 2  
(62FR60789)

①

Attention: Rulemakings and Adjudications Staff

Subject: COMMENTS BY THE CLARK COUNTY DEPARTMENT OF  
COMPREHENSIVE PLANNING, NUCLEAR WASTE DIVISION TO  
REVISED 10 CFR PART 2 SUBPART J (THE "LICENSING SUPPORT  
SYSTEM") RULE

To whom it may concern:

Clark County appreciates the opportunity to comment on the proposed revisions to 10 CFR Part 2 Subpart J (The "Licensing Support System") Rule. Clark County also welcomed the opportunity to discuss the proposed revisions at the February 24, 1998 meeting of the Licensing Support System Advisory Review Panel (LSSARP) in Las Vegas. The meeting provided for some excellent interactions on issues associated with the proposed changes.

The following are our comments to the proposed Rule:

**The Proposed "Licensing Support System"**

We support the NRC proposal to utilize the Internet to facilitate the review of information that will be used to support the licensing application. It is important to take advantage of the advances in technology that have transpired since the original Rule was promulgated in the late 1980's. The increased sophistication of Internet and the reduced cost of high-speed computers can facilitate access to relevant documents and information. While we are supportive of this change in the Rule, several issues related to the use of the Internet still need to be addressed.

Provision must be made, for example, to enable the public and other stakeholders without computers to have access to the information. The use of Department of Energy (DOE) and NRC reading rooms, along with Internet availability at local libraries, will assist interested residents in the Las Vegas area. In the smaller towns and rural locations of the affected units of local government (AULG), however, other

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provisions may need to be made to enable the public involvement. The NRC should survey the AULG and other public groups to determine if there will be problems and to discuss how potential information retrieval issues can be resolved.

Also, thought needs to be given to ensuring that the information available on the Internet is organized and indexed to facilitate access. Having a Home Page, perhaps using the existing LSS Homepage, with a descriptive *tutorial* explaining how data and information could be retrieved would be one way to assist reviewers in initiating search queries.

**The Licensing Support System Advisory Review Panel (LSSARP)**

Clark County supports a LSSARP organized under the provisions of the Federal Advisory Committee Act (Public Law 92-463), and applicable regulations (DOE Order 1130.6, with Change 1). Retaining formal designation will assist in providing a more *stable* committee to advise DOE and NRC on licensing issues. Continuity is needed and desirable due to the complexity of the issues associated with licensing.

It is also important for the parties potentially impacted by the Yucca Mountain Program to have an advisory committee with the authority to provide needed recommendations to the NRC.

Informal, *ad hoc* committees without a strong entitlement or basis for existence have a tendency over time to become ineffective. Turnover in participants is often high and there may be less commitment to the objectives of the program.

A second issue has to do with representation on the LSSARP. When the LSSARP was first organized there were two seats for affected governments. Nye County and a *Coalition of affected governments* both had seats. At the time, however, Clark, Lincoln and Nye counties were the only the three *affected units of local government* (AULG). Since that time seven additional counties, for a total of ten counties, have been designated as *affected* by DOE.

Since each AULG has an official mission defined in The Nuclear Waste Act and amendments, it is important that each be allowed a seat on an LSSARP. Each county has a different perspective on Yucca Mountain issues and each should be afforded an

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opportunity to bring their perspective to the table. A coalition of AULG would not be able to provide one consensus viewpoint.

**Topical Guidelines**

Reference is made in the Proposed Rules to Topical Guidelines in Regulatory Guide 3.69. Having reviewed the Topical Guidelines subsequent to the February 24, 1998 meeting I believe that those concerns expressed by Clark County and others at earlier meetings have been resolved.

For the record, we have expressed concern that the version of the Topical Guidelines had excluded a category of information important to Clark County and others during the pre-licensing phase of the program. Socioeconomics, or in the case of the Yucca Mountain Program the effects of Yucca Mountain program activities on the communities potentially impacted, had been eliminated as a topic of concern. Socioeconomics had been included as a result of the negotiations that transpired during the development of the original Rule. We're pleased that the current version has once again has included Socioeconomics.

We have also strongly supported the NRC inclusion of Transportation and Environment as topical issues as well as the reference to the Environmental Impact Statement in the Guidelines.

**Licensing Support Systems Administrator**

The need for organization and management of the large amounts of information considered during the licensing application review phase provides a strong rationale for retaining the position of Systems Administrator. The revised Rule, however, proposes to eliminate the NRC Systems Administrator (LSSA) position. What remains is a Pre-Licensing Application Presiding Officer. While the Presiding Officer can, undoubtedly, perform some of the functions intended for a LSSA (e.g., acting as an arbitrator for debates about what known information can be incorporated into the system) other duties envisioned for the LSSA would not be served.

An important role for the LSSA, for example, was to contribute to the design and management of the LSS. The LSSA would also act as a "traffic cop" to ensure that the interests of all parties in licensing would be accommodated (including, significantly, the public). The LSSA, in this case, could serve to balance the priorities

Clark County, Nevada  
Comments to Revised Subpart J  
March 20, 1998  
Page 4

for data input into the system.

Another function of a LSSA would be to assist in organizing the universe of documents important for licensing to facilitate review by all parties. The *small entities*, as the AULG and public are termed in the text of the Rule, will not have the time nor the resources to determine whether all information important to their specific licensing interests has been captured. Having an LSSA would be particularly important to facilitate the review of the many small entities that may be involved in reviewing particular aspects of the license application.

An LSSA will obviously not be able to resolve all the licensing review problems. It can, however, serve to audit the system to ensure that the review process is operating as intended and meets the needs of all parties. It can add credibility to the review process.

The statement by Mr. Cotter at the February 24, 1998 LSSARP meeting in Las Vegas provides a strong statement about the need for an Administrator. *"Now, you're taking a known system and you're replacing it with a system which is being created as we speak and with which none of us have any experience.... You need to have an LSS administrator who has a defined responsibility... whose purpose is to take care of this need full time for a period of four years."*

As a final point the LSSARP can play a strong role in defining the responsibilities of a LSSA.

#### Public Participation

There was some discussion at the February 24, 1998 meeting about the scope of the data available for the public review, particularly during the pre-licensing phase. The public and other stakeholders should have the opportunity to review all available information on licensing. It is important that all information available to groups such as the LSSARP should be made available to the public at the same time.

#### Environmental Impact Statement (EIS)

A key document for all affected governments will be the EIS. The EIS, which is to be released in the summer of 1999, must be made available in electronic format as early as. Since a 90 day review period, standard for stakeholder review of an EIS

Clark County, Nevada  
Comments to Revised Subpart J  
March 20, 1998  
Page 5

does not appear to be much time for the review of what will probably be an incredibly large document, it is important that the EIS be available for review in electronic format as individual sections are completed. Because of the importance of the document, this will facilitate review.

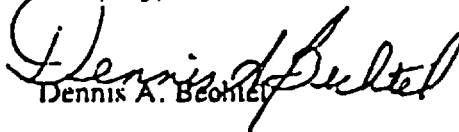
#### Summary

There are obviously many advantages to all parties, thanks to advances in technology, to the proposed revisions. The complexity of the program as well as the importance of the decisions being made, still necessitate, however, a system that must be designed and managed. Creating a totally *laissez faire* system, however, leaves much to chance. Restoring a number of the provisions of the original rule, however, the LSSA position and the LSSARP will assist in enabling all stakeholders to be actively involved in the licensing review.

Thank you again for the opportunity to comment. Clark County will continue to be an active participant on the LSSARP and in licensing review.

If there are questions please contact me at (702) 455-5175.

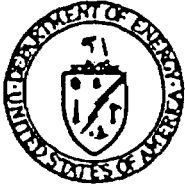
Sincerely,



Dennis A. Boehle

cc: John Hoyle, Secretary  
Richard B. Holmes  
Board of County Commissioners  
Affected Units of Local Government  
State of Nevada

lssrule8.m18



Department of Energy  
Washington, DC 20585  
March 25, 1998

DOCKETED  
USNRC

98 MAR 27 A7:58

Mr. John C. Hoyle  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001  
Attention: Rulemakings and Adjudications Staff

OFFICE OF  
RULEMAKING  
ADJUDICATION STAFF

Re: Comments on Proposed Revision to 10 CFR Part 2, Subpart J

DOCKET NUMBER  
PROPOSED RULE **PR 2**

(62FR60789)

2

Dear Mr. Hoyle:

The Department of Energy is pleased to submit comments on the Nuclear Regulatory Commission's Notice of Proposed Rulemaking for amendments to 10 CFR Part 2, Subpart J, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository.

The intent of Subpart J is to reduce the time normally spent on the discovery process by using an electronic information management system to make relevant information available to all parties during the repository prelicensing phase, as well as during any adjudicatory process. The existing rule envisions use of a stand-alone computer, the Licensing Support System (LSS). The proposed amendments address two main assumptions: (1) emerging information management technologies can accomplish this function more effectively and with less cost than the LSS, and (2) there exists a substantial backlog of irrelevant materials that may not have been identified or properly maintained, yet must be included in the LSS under the current rule. The proposed amendments would replace the LSS with an integrated electronic information system using web-based technology and modify the scope of documentary material to be included in the LSS.

The Department is highly supportive of the proposed use of new information management technologies. Our principal comment on the revision is that the scope of documentary material has not been sufficiently narrowed to exclude irrelevant material. Our detailed comments are provided in the attachment to this letter.

Should you have questions, please contact Nancy Slater at 202-586-9322 or Claudia Newbury at 702-794-1361.

Sincerely,

*Ronald A. Miller*  
for Lake H. Barrett, Acting Director  
Office of Civilian Radioactive  
Waste Management

Attachment

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~~PDR~~ PR  
2 62FR60789 ~~PDR~~

DS10

**Office of Civilian Radioactive Waste Management  
U.S. Department of Energy  
Comments on the Proposed Rule at 10 CFR Part 2, Subpart J  
Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-  
Level Radioactive Waste at a Geologic Repository**

**SUBSTANTIVE COMMENTS**

**1. § 2.1001 Definitions**

The proposed definition of "documentary material" is unnecessarily broad. One of the main reasons cited by NRC for proposing the rule change is that there exists a substantial backlog of irrelevant documents that may not have been identified or properly maintained, yet which must be included in the LSS under the current rule. NRC noted that this backlog would not allow timely certification of the LSS. DOE proposes the following modifications to the definition to more completely address this concern:

Delete the proposed third class of documentary material, "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 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 DOE believes that the first two classes of documentary material are defined broadly enough to capture all relevant materials. DOE is concerned that the NRC-proposed definition would encompass reports and studies irrelevant to the specific license application, for example, reports and studies made for other sites and for predecessor agencies.

**2. § 2.1004 Amendments and Additions, and § 2.1010 Pre-License Application Presiding Officer**

This section allows two working days to make available for inspection and copying any document that has not been provided to other parties in electronic form. The same type of two-day limit is also imposed in § 2.1010(c) regarding material determined to be relevant and not privileged or exempt. Noting that reasonable and expeditious efforts to reproduce and make documents, particularly large documents, available could easily consume two days, the DOE suggests that these time limits (in § 2.1004 and § 2.1010(c)) be changed from two working days to ten working days. Such a change in the rule would also relieve



the Presiding Officer of the burden of evaluating and granting minor extensions of time, where these are likely to result mainly from the time necessary for clerical and administrative processing.

3. **§ 2.1007(a)(3) Access**

The proposed rule retains requirements for electronic access systems in Las Vegas, Reno, Carson City, and Nye and Lincoln Counties (§ 2.1007(a)(3)). However, the proposal does not specify which locations are the responsibility of the NRC or DOE. The DOE requests that the rule be clarified to assign responsibility for the systems in each of the locations specified.

4. **§ 2.1007(c) Access**

Subsection (c) appears to require both the NRC and the DOE to treat docketed documents as agency documents under FOIA. However, it is unclear which agency must treat which documents as its own in response to requests for information. The final phrase of the first sentence "if these documents remain under the custody and control of the agency or organization that identified the documents" is confusing. The DOE proposes clarifying the responsibility under this provision by specifying that all documents entered into the docket pursuant to § 2.702, other than those submitted by another Federal agency, are NRC documents for the purposes of FOIA.

5. **§ 2.1009 Procedures**

The proposed rule replaces the six month intervals for certifying that the procedural requirements have been met with an unspecified interval "upon order of a duly appointed presiding officer." The DOE believes that regular and prescribed certification will help ensure the success of the electronic docket system and suggests that a twelve-month period would be appropriate.

6. **§ 2.1010 Pre-License Application Presiding Officer**

Subsection (a)(1) should be clarified as to who may serve as the "Pre-License Application Presiding Officer." The first sentence appears to consider only the "named officer who has been delegated final authority on the matter" as the "(Pre-License Application Presiding Officer)." As written, the other references to the Commission members and the atomic safety and licensing board are not directly connected to the referenced Officer. If the Officer is to be designated from among the Commission, the atomic safety and licensing board, or a named officer, the sentence should be revised. The DOE proposes that the introductory phrase be revised as:

"The Commission may designate one or more members of the Commission, or of an atomic safety and licensing board, or a named officer who has been delegated

final authority on the matter, to serve as the Pre-License Application Presiding Officer to rule on disputes over the electronic availability of documents during the pre-license application phase ...".

7. **§ 2.1011(c) Management of Electronic Information**

The DOE supports the proposed idea of modifying the role of the Advisor, Review Panel (ARP) that advises the NRC and the Secretary of the Commission. Regarding the alternative, discussed in 62 FR 60791, of replacing this panel with a more informal users group, the DOE believes that it is premature to replace the panel with such a users group. A more formal technical group still appears appropriate for providing the advice specified in § 2.1011(d), because the formality will ensure that each ARP member's concerns about the structure of the electronic docket will be addressed in a documented manner.

8. **§ 2.1012(d) Compliance**

The proposed rule states that the Pre-License Application Presiding Officer may suspend or terminate access to the pre-license application electronic docket for a party who is not in compliance. While control of access could be appropriate, such control contradicts the recognition that the information is publicly available, per § 2.1007(a)(1), and could be made available universally through the Internet. The notion of controlled access suggests that the NRC does not intend to require an Internet-based system with the level of public access generally associated with the Internet. The DOE suggests that the NRC clarify the purpose and method of access control.

9. **§ 2.1017 Computation of Time**

Because access to the electronic docket may be unavailable for many reasons, such as the computer being used by a party is unavailable due to routine maintenance or a power failure, etc., it may be useful to define what is meant by unavailable or to require prompt notice if the unavailability of the system is due to a local cause.

10. **§ 2.1019 Depositions**

Section 2.1019(i) requires deponents to submit an electronic index of all documents in the deponent's possession relevant to the subject matter of the deposition. This section further states that "documents that are not identical to documents already made available electronically, whether by reason of subsequent modification or by the addition of notations, shall be treated as separate documents" and that a paper copy of all documents not already made available electronically shall be brought to the oral deposition or accompany a written deposition.

The DOE recognizes that the documents potentially subject to this requirement could be

large. It may better serve the needs of those using the system if this requirement were clarified to recognize that modifications and notations could be made on only small parts of large documents, and therefore, only the affected parts of the documents would be submitted as separate documents under § 2.1019(i)(1).

#### **EDITORIAL COMMENTS**

**11. § 2.1005 Exclusions**

The word "Preferences" in § 2.1005(f) should be changed to "References."

**12. § 2.1010 Pre-License Application Presiding Officer**

The word "prvliged" in § 2.1010(b)(3) should be change to "privileged."

1014 Carlyon Avenue SE  
Olympia, WA 98501

**Malachy R. Murphy**  
Consultant in Environmental, Regulatory and Government Affairs  
DOCKETED  
USNRC

(360) 943-5610  
FAX (360) 943-5648

'98 MAR 30 P2:48

March 26, 1998

Secretary  
U.S. Nuclear Regulatory Commission  
Washington D.C. 20555-0001

OFFICE OF  
RULE  
ADJUDICATION STAFF

Attn: Rulemakings and Adjudications Staff

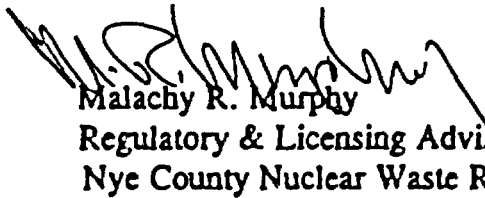
Re: 10CFR 2, Subpart J  
RIN 3150-AF 88

DOCKET NUMBER  
PROPOSED RULE **PR 2**  
(62FR60789) **(3)**

Enclosed please find the final comments of Nye County, Nevada on the proposed changes to 10 CFR 2, Subpart J (The LSS Rule). The comments have also been transmitted by E-mail to Ms. Carol Gallagher on this date.

Thank you for your assistance.

Yours very truly,

  
Malachy R. Murphy  
Regulatory & Licensing Advisor  
Nye County Nuclear Waste Repository Project Office

cc: Les Bradshaw  
Nick Stellavato

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PDR PR  
2 62FR60789 PDR

D510

## **NYE COUNTY'S COMMENTS ON PROPOSED CHANGES TO 10 CFR 2, SUBPART J**

After reviewing the summary and transcript of that meeting, the Nye County Nuclear Waste Repository Project Office reaffirms the comments made orally by its representatives at the Advisory Review Panel (ARP) meeting in Las Vegas on February 24 & 25, 1998. These final comments are offered primarily for purposes of emphasis.

### **General Approach**

We fully agree with the general approach of moving the LSS to an Internet based system. Clearly, as the Supplementary Information states, and as the ARP members agreed, technology has long since overtaken the LSS development process, and the centralized LSS, while perhaps not entirely "obsolete", can no longer be economically justified. We also agree with the proposed approach to allow flexibility to incorporate innovations in information management technology as they become available. We can simply never play "catch-up", especially in view of the ponderous nature of the rulemaking and government procurement processes. Participants must be free to take advantage of technological advances as they become available without fear of finding themselves in violation of a rule which could become obsolete with the introduction of each new generation of software or hardware.

As stated at the ARP meeting, however, even an Internet based, flexible system should have a name. LSNet, or LSN, seemed to be generally accepted by the participants at the ARP meeting, and we thus recommend its formal adoption and incorporation into the final rule changes.

### **Documentary Material & Relevancy**

The definition of "Documentary material" is much improved over an earlier proposal, and coupled with the treatment of what we once called "raw data", or graphic oriented material, as well as the rules applying to derivative discovery in §2.1019, is a good start. Along with, we believe, a majority of the ARP, Nye recommends that the language "or is likely to lead to the discovery of relevant information" be reinserted from the current rule. This would make the LSNet loading requirements more consistent with current discovery practices, yet, with the exclusions which the rule incorporates would in our view keep the burden on the participants, principally of course the DOE, at a workable level. Additionally, the rule itself, and its supplementary information, should clearly provide that the definition applies to

documents which will be used only in the DOE EIS, and/or the NRC's consideration of whether or not to adopt that EIS, and not just to the more narrow (on its face at least) scope of the License Application.

### Compliance

We agree with the views expressed at the ARP meeting to the effect that, regardless of where within the NRC the position is located, or what its title may be, certain functions of the current LSS Administrator should be retained, and reside with a single officer or organization. Where that officer or entity is located is really an internal matter, so long as the functions and authority clearly exist. Among the functions, as pointed out by the ARP members, should be the ability and authority to review participants readiness to allow access to their documentary material; receive and resolve complaints regarding network problems; perform periodic audits or compliance reviews; assist participants in achieving and maintaining compliance; and coordinate technical issues such as standards for search engines.

Additionally, the Director of NMSS should have the authority, indeed the responsibility, not only to reject the DOE License Application if it is not able to be accessed through the electronic docket. That almost goes without saying. The authority should clearly extend to rejection of the LA if all requirements of the rule are not met at the time the LA is submitted. This can be accomplished by retaining the language of the current §2.1011(d)(6)&(7), and moving those provisions into §2.1012. Furthermore the revised rule should not abandon entirely the concept of some form of independent audit, or compliance assessment program, similar to what was previously proposed, and discussed at the LSSARP meeting in October of 1993.

### Advisory Review Panel

We appreciate the desire on the part of the NRC to reduce the number of formal advisory committees in keeping with the administration's policy in that area, but Nye, like other members of the ARP, strongly opposes reducing the LSSARP to a mere "informal users group". We thus much prefer the alternative expressed in the draft of a revised rule. Even that draft requires further revision, however. The State of Nevada and each affected unit of local government should be separately represented, rather than through any form of coalition, as §2.1011(c)(2) now calls for. That coalition language is an artifact of the original negotiating committee, and in practice has never been followed. Each unit of local government has had separate representation, as a matter of practice, on the LSSARP. The revised rule should acknowledge and formalize that reality. This is particularly true for Nye County, which has had its status as the situs jurisdiction recognized formally by the Congress in the NWPA, and whose interests,

position of neutrality, and level of activity in the program, are significantly different from other affected local governments. We believe there was strong support for this position, if not and outright commitment, expressed by the NRC representatives at the ARP meeting.

From: "LA FAYE, Miriam" <mdl@nei.org>  
To: "cag@nrc.gov" <cag@nrc.gov>  
Date: 3/27/98 3:43pm  
Subject: Comments

DOCKETED  
JS4RC

'98 MAR 30 P2:35

Attached please find the Nuclear Energy Institute (NEI) comments on 10 CFR Part 2, Procedures Applicable to Proceedings for the Issuance of Licenses for the receipt of High-Level Radioactive Waste at a Geologic Repository; Proposed Rule (62 Fed. Reg. 60,789, November 13, 1997)

If you have any question, please feel free to call.

DOCKET NUMBER  
PROPOSED RULE PR 2  
(62FR60789) (4)

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DS 10



DOCKETED  
USNRC

Steven P. Kraft  
DIRECTOR  
Spent Nuclear Fuel  
Management

'98 MAR 30 P2:35

March 27, 1998

Secretary  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

OFFICE OF  
RULEMAKING  
AND  
ADJUDICATION

Attention: Rulemakings and Adjudication Staff

Subject: 10 CFR Part 2, Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository; Proposed Rule (62 Fed. Reg. 60,789, November 13, 1997)

Gentlemen:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)<sup>1</sup> is pleased to submit these comments on proposed changes to the procedures for licensing high-level waste and spent nuclear fuel repositories. In general, NEI endorses the proposed changes.

The current procedures (promulgated on April 24, 1989 [54 Fed. Reg. 14,925]) were developed by the Nuclear Regulatory Commission (NRC) through a negotiated rulemaking process in which the nuclear industry was represented. The Licensing Support System (LSS) – required by the current rule – was intended to be a stand-alone, electronic document storage and retrieval system for (1) discovery of documents before the license application is filed; (2) electronic transmission of filings by the parties during the proceeding; (3) electronic transmission of orders and decisions related to the proceeding; and (4) access to an electronic version of the docket. Also included were procedures intended to provide for an efficient repository licensing proceeding aimed at assisting NRC in meeting the three to four year licensing requirement contained in Section 114 (d) of the Nuclear Waste Policy Act of 1982 (NWPA).

The proposed changes would upgrade the current procedures to take advantage of developments since 1989 in electronic document storage, retrieval, transmission, etc., especially the Internet. These changes are appropriate and help to resolve the industry's concerns with the LSS as originally conceived. In 1989, the industry

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<sup>1</sup> NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.

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2 62FR60789 PDR

questioned the cost-benefit of a stand-alone LSS (then estimated at \$200 million) given the changes that were beginning to occur in electronic document handling and are now being realized. The revised procedures would allow the use of improving technologies by the parties as the technologies become available without further changes to the rule. The changes will also save significant costs, because the requirement to design, build and maintain a stand-alone LSS is eliminated.

The proposed changes would not diminish, but rather assist in providing an efficient repository licensing proceeding, thereby helping NRC meet the three to four year licensing requirement as required by the NWPA. The parties will be better able to access licensing documentation and more easily participate in the proceeding. In addition, interested members of the general public will have more convenient access through the Internet. Thus, the proposed changes further the principles that underlie the purpose for which the LSS was created.

There were a number of important issues related to the proposed changes discussed at the February 24, 1998 LSS Advisory Review Panel (LSSARP) meeting, including the definition of documentary material, cost and equity concerns, compliance, and the need for the LSS Administrator and the LSSARP. Of these, only the definition of documentary material required additional, significant input. Several LSSARP members indicated that they would submit recommended definitions prior to the close of the comment period. It is recommended that NRC issue for comment a draft of the new definition, while the rest of the rule is issued as final. The rule can then be modified once the definition of documentary material is finalized. This approach would minimize any delay in implementing the revised rule pending the finalization of the definition of documentary material.

NEI appreciates the opportunity to comment on these needed proposed changes. If you have any questions, please do not hesitate to contact us.

Sincerely,

Steven P. Kraft

DOCKET NUMBER  
PROPOSED RULE PR 2  
(62FR60789)

DOCKETED  
USNRC

Nuclear Regulatory Commission  
Office of the Secretary  
Attn: John Hoyle

5 98 APR -1 A7:50

OFFICE OF THE SECRETARY

SUBJECT: CITY OF LAS VEGAS COMMENTS ON PROPOSED CHANGE TO THE  
LSS RULE (10 CFR PART 2 SUBPART J)

Dear John:

The following are our comments on the proposed LSS Rule Change. I hope these reach you in time to make the March 31, 1998 cut-off and I apologize for being so late with my input. I think the meeting of February 24th and 25th accomplished a lot towards airing the concerns of many of the parties in attendance, so my comments will be brief.

I think the proposal to use the Internet to access documents related to licensing is a good idea. The Internet provides wide public access which will make the information available to more of the affected parties and the public in general, and certainly the technology of the Internet will continue to improve and expand and become even more user friendly.

The City of Las Vegas has concerns about the elimination of the LSSARP and, in fact, supports the retention of the committee for the foreseeable future. The rule change would replace the LSSARP with an informal committee. This committee would be made up of users and, I would assume, all the current parties. The City would have to agree with many of the comments made at the meeting that once a formal committee becomes established and then becomes replaced with some sort of informal arrangement, the participation and commitment to the committee would diminish. I felt that the meeting in February of the committee was quite informative, and I am not certain that the turn-out, the information, and opinion exchange would be the same. In short, we recommend that the LSSARP as currently structured be retained.

The proposed rule eliminates the position of LSS Administrator and replaces that position with a Pre-License Application Presiding Officer. It is my understanding that the LSS Administrator's responsibility is basically to manage the system, be the watch dog that ensures all affected parties can provide documentation and have access to all documentation and information on the LSS. We view the LSSA as the man in charge to protect the interests of all parties involved in the process, whether they be large federal agencies, like DOE and NRC, or smaller entities and tribes in Nevada or elsewhere.

In previous meetings of the LSSARP and discussions of the duties of the LSSA, it was envisioned that the LSSA would be a responsible position filled by a highly qualified individual from the NRC. We feel that replacing the LSSA with another position creates a gray area and I believe fails to fulfill what affected parties had envisioned in that

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position.

Having reviewed the rest of the proposed rule change, the City is generally supportive of the changes to the rule. The question of the LSSA and the LSSARP are two areas that we do not support.

Again, John, I apologize for being so late with these comments.

PC:dh:3/30/98  
NWcomentNRC-LSSrule

Commenter:

Pete Cummings

March 31, 1998



**National  
Congress of  
American  
Indians**

**Executive Committee**

**President**  
W. Earl Allen  
Jamestown S'Klallam Tribe

**First Vice President**  
Emie Stevens, Jr.  
Ojibwa Nation of Wisconsin

**Recording Secretary**  
Lola Kaskalis  
Navajo Pueblo

**Treasurer**  
Russell Budd Mason  
Three Affiliated Tribes

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San Juan Pueblo

**Anadarko Area**  
Cory McAdams  
Wichita & Affiliated Tribes

**Billings Area**  
Earl Old Person  
Blackfeet Tribe

**Juneau Area**  
Steve Clinis  
Native Village of Fort Yukon

**Minneapolis Area**  
Bernice Churchill  
Little Lake Band of Ojibwa

**Mustakege Area**  
S. Diane Kelly  
Cherokee Nation

**Northeast Area**  
Michael W. Schindler  
Seneca Nation of Indians

**Phoenix Area**  
Don Mathis  
Salt River Pima-Maricopa

**Portland Area**  
Henry Casey  
Lummi Nation

**Sacramento Area**  
Cheryl A. Seidner  
Table Bluff Reservation-Wiyot

**Southern Area**  
A. Bruce Jones  
Lumbee Tribe

**Executive Director**  
JoAnn K. Chase  
Mandan, Hidatsa & Arikara

2010 Massachusetts Ave., NW  
Second Floor  
Washington, DC 20036  
202.466.7767  
202.466.7797 fax

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USNRC

98 APR -1 A9:14

March 31, 1998

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATION STAFF

**Secretary**  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555-0001

DOCKET NUMBER  
PROPOSED RULE **PR 2**  
(62 FR 60789)

Attention: Rulemakings and Adjudication Staff

6

Thank you for the opportunity for the National Congress of American Indians to provide comments to the proposed rule to amend the Nuclear Regulatory Commission Rules of Practice for the licensing proceeding on the disposal of high-level radioactive waste at a geologic repository. The NCAI is a member of the NRC Licensing Support System Advisory Review Panel. As the oldest largest national Indian advocacy organization in the country the NCAI has a membership of 225 American Indian and Alaska Native governments.

Thank you for accepting into the record our comments on this important issue. We look forward to implementation of the comments into the proposed rule changes by the Nuclear Regulatory Commission. If you have any questions regarding our comments, please call Robert Holden, Director of the NCAI Nuclear Waste Program, (202) 466-7767, fax 466-7797.

Sincerely,

  
JoAnn K. Chase  
Executive Director

Attachment



# National Congress of American Indians

## Executive Committee

President  
W. Ken Allen  
Jumawam 3rd Clallam Tribe

First Vice President  
Emie Stevens, Jr.  
Oneida Nation of Wisconsin

Recording Secretary  
Lela Kashala  
Navajo Pueblo

Treasurer  
Russell Blud Maman  
Three Affiliated Tribes

## Area Vice Presidents

Aberdeen Area  
Gerald M. Clifford  
Oglala Sioux

Albuquerque Area  
Joe A. Carls  
Osage Damages  
San Juan Pueblo

Anchorage Area  
Gary McAdams  
Wichita & Affiliated Tribes

Billings Area  
Earl Old Person  
Blackfoot Tribe

Juneau Area  
Steve Ginnis  
Native Village of Fort Yukon

Minneapolis Area  
Bernie Churchill  
Mille Lacs Band of Ojibwa

Montpelier Area  
S. Diane Kelly  
Cherokee Nation

Northeast Area  
Michael W. Schindler  
Seneca Nation of Ind

Phoenix Area  
Ian Maki  
Salt River Pima-Maricopa

Portland Area  
Henry Cagay  
Lummi Nation

Sacramento Area  
Cheryl A. Bender  
Table Bluff Reservation-Wyo

Southeast Area  
A. Bruce Jones  
Lumbee Tribe

Executive Director  
John E. Ouse  
Mandan, Hidatsa & Arikara

## Comments of the National Congress of American Indians on the U.S. Nuclear Regulatory Commission Proposal to Amend the Rules of Practice for Issuance of Licenses for a High-Level Radioactive Waste Geologic Repository

March 31, 1998

The following comments reflect initial concerns of the National Congress of American Indians on the U.S. Nuclear Regulatory Commission proposal to amend the Rules of Practice for Issuance of Licenses for a high-level radioactive waste geologic repository. Additional comments will be provided as this action proceeds.

1. Tribal governments and peoples in the area are impacted by site characterization of Yucca Mountain and will indeed be impacted by placement of a geologic repository at Yucca Mountain. We are concerned that tribal governments indigenous to the area for hundreds of years before the contemporary governments and populations moved to the area, may not be included as parties to the licensing proceedings. In regard to Section 2.715, tribal governments are not specifically included. The NCAI urges a broad interpretation affording tribal representatives an opportunity to be a party. This is perhaps not within the purview of the proposed rulemaking, but the matter should be addressed in either a policy decision or another formal rulemaking.

The NCAI plays a national role providing feedback on various issues and dissemination of information, but in the scope of government to government protocol and standing, those tribal governments directly impacted by the NRC licensing activities should be active participants. The NRC may be aware the State of Nevada and some county governments are supportive of meaningful tribal participation. We are mindful of budgetary and other constraints, but the process will remain one of inequity if the State of Nevada and selected counties are deemed parties to the licensing process while tribes continue to be excluded. Several federally recognized tribes have been working with the Department of Energy on cultural resource management issues. These tribes are designated as "impacted", which has no legal or political meaning, but more a descriptive term for the DOE. The NCAI recommends that the NRC set up a process to work with federally recognized Indian nations to determine which tribes are interested in representation and will be part of an interactive process on licensing issues.

2. The NCAI believes the Licensing Support System Advisory Review Panel should continue to function in its advisory capacity with the addition of

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tribal government members. The NCAI is appreciative of its membership and will continue to serve as a member of the NRC Licensing Support System Advisory Review Panel. The NCAI supports and encourages individual Indian nation participation on the LSSARP to include tribes in the Yucca Mountain area. Several local units of government serve on the LSSARP but tribal governments with a closer nexus for trust responsibility protection by federal government are not members. We believe a process for inclusion should be made for membership of tribes. The National Congress of American Indians supports the notion that Yucca Mountain area tribes should be included as parties to the licensing activities and proceedings.

The Foreword of a 1990 DOE supported study states, "Yucca Mountain symbolizes the cultural diversity and conflicting values in America: To some government officials, state and federal, it is a vast, useless landscape fit only for the toxic waste of modern society. It has an owner who has the right to define how it is used. To the Southern Paiute, Owens Valley Paiute, Western Shoshone, and other groups of Native Americans in the Las Vegas area, Yucca Mountain is a bountiful harvest of plants, animals, and cultural remembrances. It means food, medicine, religious inspiration, and cultural history. It is a living place without ownership; it is there for all to use as needed. The contrast in attitudes between western civilization and Native American cultures is stark and immediate." (Native American Cultural Resources Resource Studies at Yucca Mountain, Nevada; Stoffle, Halmo, Olmsted, and Evans; Institute for Social Research, University of Michigan; 1990).

Indian tribes have a government to government relationship with the United States grounded in the U.S. Constitution and solemn and extant treaties which bind the parties to this day. Indeed, from the earliest days of the U.S., tribal sovereignty has been recognized. As far back as 1832 the United States Supreme Court ruled that the Indian tribes are "*distinct, independent public communities.*" (Worcester v. Georgia, 31 U.S. (6 Pet.) 559 (1832)).

On April 24, 1994, President Clinton issued a "Memorandum for the Heads of Executive Departments and Agencies on Government to Government Relations With Native American Tribal Governments." The Memorandum states that in order to ensure the rights of sovereign tribal governments are fully respected, executive branch activities shall be guided by the following [excerpts]: (a) The head of each executive department and agency shall be responsible for ensuring that the department or agency operates within a government to government relationship with federally recognized tribal governments. (b) Each executive department and agency shall consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments. All such consultations are to be open and candid so that all interested parties may evaluate for themselves the potential impact of relevant proposals. (c) Each executive department and agency shall assess the impact of Federal Government plans, projects, programs and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs and activities.

3. We have stated in the past and we again restate to the Nuclear Regulatory Commission that it should adhere to a consistent federal policy based on treaties, federal law, and the

NRC's responsibilities as a federal agency to ensure that tribal rights and interests are identified and fully considered in decision-making regulatory processes. Thank you for the opportunity for the National Congress of American Indians to provide comments on the proposed rulemaking.

A statement from an unnamed tribal chairperson contained in the cultural resources study mentioned above will serve as closing remarks :

" The best thing that could happen to the United States of America is for a group of us Indian people to be elected to address the Supreme Court. Because there are so many things that they don't really understand. It is like this black thing I am holding. Where did it come from? The earth, right, because all material is from the earth. Who is to say that this part [pointing to one part of the object] is more important than that one over there [pointing to another part of the object]. We have to put these things into perspective. It is like this thing [the high-level waste proposal] that came out. They are saying, "We are not damaging that, all we are going to do is to cut down that tree." As an Indian person I feel I am important, but am I more important than that tree or is that tree more important than me? We are on this earth, we are insignificant. Indian people say, "What's more important; the earth that we stand on, the air that we breathe, or the water that we drink?" They all have their reason to be here and that is what we have to get over to the United States Supreme Court. We are nothing, but to put it all together it forms a circle. And we all have to live together no matter what, because it's our earth. These things are here, we didn't put them here, so who are we to move them. We didn't create them, but we are here to protect them." (Native American Cultural Resources Resource Studies at Yucca Mountain, Nevada; Stoffle, Halmo, Olmsted, and Evans; Institute for Social Research, University of Michigan; 1990).



## ATTACHMENT 3

The Honorable Dan Schaefer, Chairman  
Subcommittee on Energy and Power  
Committee on Commerce  
United States House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

The U.S. Nuclear Regulatory Commission intends to publish the enclosed final amendments to the Commission's rules in 10 C.F.R. Part 2 regarding Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository. The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, providing for a thorough technical review of the license application, and providing for equitable access to information for the parties to the hearing.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Representative Ralph Hall

The Honorable James M. Inhofe, Chairman  
Subcommittee on Clean Air, Wetlands, Private  
Property and Nuclear Safety  
Committee on Environment and Public Works  
United States Senate  
Washington, D.C. 20510

Dear Mr. Chairman:

The U.S. Nuclear Regulatory Commission intends to publish the enclosed final amendments to the Commission's rules in 10 C.F.R. Part 2 regarding Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository. The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, providing for a thorough technical review of the license application, and providing for equitable access to information for the parties to the hearing.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Federal Register Notice

cc: Senator Bob Graham

## ATTACHMENT 4

The Honorable Al Gore  
President of the United  
States Senate  
Washington, D.C. 20510

Dear Mr. President:

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801, the U.S. Nuclear Regulatory Commission is submitting final amendments to the Commission's rules in 10 C.F.R. Part 2 regarding Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository. The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, providing for a thorough technical review of the license application, and providing for equitable access to information for the parties to the hearing.

We have determined that this rule is not a "major rule" as defined in 5 U.S.C. 804(2). We have confirmed this determination with the Office of Management and Budget.

Enclosed is a copy of the Final rule that is being transmitted to the Office of the Federal Register for publication. The Regulatory Flexibility Certification is included in the final rule. This final rule will become effective 30 days after it is published in the Federal Register.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Final Rule

The Honorable Newt Gingrich  
Speaker of the United States  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Speaker:

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801, the U.S. Nuclear Regulatory Commission is submitting final amendments to the Commission's rules in 10 C.F.R. Part 2 regarding Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository. The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, providing for a thorough technical review of the license application, and providing for equitable access to information for the parties to the hearing.

We have determined that this rule is not a "major rule" as defined in 5 U.S.C. 804(2). We have confirmed this determination with the Office of Management and Budget.

Enclosed is a copy of the Final rule that is being transmitted to the Office of the Federal Register for publication. The Regulatory Flexibility Certification is included in the final rule. This final rule will become effective 30 days after it is published in the Federal Register.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Final Rule

Mr. Robert P. Murphy  
General Counsel  
General Accounting Office  
441 G Street, Northwest  
Washington, D.C. 20548

Dear Mr. Murphy:

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801, the U.S. Nuclear Regulatory Commission is submitting final amendments to the Commission's rules in 10 C.F.R. Part 2 regarding Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository. The amendments are intended to allow application of technological developments that have occurred after the original rule was adopted in 1989, while achieving the original goals of facilitating the NRC's ability to comply with the schedule for decision on the construction authorization for the repository contained in Section 114(d) of the Nuclear Waste Policy Act, providing for a thorough technical review of the license application, and providing for equitable access to information for the parties to the hearing.

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Enclosed is a copy of the Final rule that is being transmitted to the Office of the Federal Register for publication. The Regulatory Flexibility Certification is included in the final rule. This final rule will become effective 30 days after it is published in the Federal Register.

Sincerely,

Dennis K. Rathbun, Director  
Office of Congressional Affairs

Enclosure: Final Rule

**ATTACHMENT 5**



# D R A F T

## **NRC REVISES REGULATIONS ON AVAILABILITY OF INFORMATION FOR HIGH-LEVEL RADIOACTIVE WASTE REPOSITORY LICENSING PROCEEDING**

**The Nuclear Regulatory Commission is amending its procedural rules for the future licensing of a high-level radioactive waste repository. The changes require that all potential participants in the license application review process make their documentary material available in electronic form to all members of the public.**

**The amendments replace the "Licensing Support System" (LSS) concept set out in NRC regulations adopted in April 1989 with what is known as a "Licensing Support Network" (LSN).**

**The NRC published a proposed rule on this subject in the Federal Register on November 13, 1997, for comment. The agency agreed with a suggestion from the public that "Licensing Support Network" is a more appropriate name for the system. It also made several other changes to the proposed rule as a result of public comments received.**

**The LSS concept featured an electronic information management system with a centralized database. One of its main purposes was to reduce the time normally spent on the legal discovery of documents at the start of a licensing proceeding. It would have done so by making available simultaneously to all parties the information and data that might be produced in the discovery phase of the high-level waste licensing proceeding. That regulation gave NRC responsibility for administering and maintaining the database, and the Department of Energy (DOE) responsibility for designing and implementing it.**

However, DOE – which must apply to NRC for a waste repository license – has not yet developed the central database envisioned in the Licensing Support System. But while that effort has stalled, the technology of automated document storage and retrieval has advanced rapidly, so that the use of computers to generate and maintain complex documents in litigation is widespread and commonplace. The Internet is universally available to tie geographically dispersed systems together. Therefore, the centralized Licensing Support System database described in the current regulation now appears to be an unjustified expense.

Under the amendments now being put into effect, the documentary material that will have to be made available electronically under the Licensing Support Network will consist of the information that a party, potential party, or interested government participant intends to rely on in support of its position in the licensing proceeding, and certain other relevant information.

A pre-license application presiding officer will be named by the NRC to resolve any disputes over electronic access to documents.

Parties to the proceeding will be the Department of Energy, the NRC staff, and any person admitted as a party under NRC's rules, as well as – if certain procedures are followed – the host state and any affected unit of local government or Indian tribe. In addition, any person can be considered a potential party to the proceeding who complies with the new regulations, including the requirement to contribute documentary material, and agrees to comply with orders of the pre-license application presiding officer.

The Department of Energy and NRC will have to make their documentary material available beginning 30 days after DOE submits its site recommendation decision to the President. All other potential parties or interested governmental participants will have to make their material available no later than 30 days after the repository site selection

decision becomes final after review by Congress.

The proposed rule would have eliminated the requirement in the current regulations for an administrator, with responsibility for ensuring the viability of the central database. However, the Commission agreed with comments that this function should be retained. Thus the final rule provides for an Licensing Support Network Administrator, who will coordinate the functioning of the electronic network and will report periodically on its status to the Commission.

The proposed rule would also have eliminated the current advisory review panel, replacing it with an informal users group. In response to comments, the Commission has retained the requirement for a panel, to be renamed the "LSN Advisory Review Panel," which will provide advice on the type of computer system necessary to access the licensing support network effectively, on format standards and on other issues.

The final rule also adopts a suggestion that, because the Licensing Support Network appears likely to be a World Wide Web-based system, easily accessible by home or office personal computers, rather than a specially designed stand-alone system, there is little reason to continue the provision for limiting access to the documentary material to potential parties to the licensing proceeding. Instead, the material will be made available to all members of the public. The list in the proposed rule of specified individuals to whom electronic information must be made available has therefore been deleted.

Other details of the final rule are described in a Federal Register notice to be published shortly.

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