

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository:
Pre-Application Matters))

) Docket No. PAPO-00

) ASLB No. 04-829-01-PAPO

) NEV-01
)
)

**MOTION TO STRIKE THE DEPARTMENT OF ENERGY'S
LSN CERTIFICATION AND FOR RELATED RELIEF**

On June 30, 2004, the U.S. Department of Energy ("DEN"¹) provided NRC with an "initial LSN certification" in the captioned matter. For the reasons set forth herein, the State of Nevada ("NEV") hereby moves² that this purported "certification" be struck from the docket as unlawful, unauthorized, antithetical to the measures NRC has implemented over the last fifteen years to expedite the geologic repository licensing proceeding, and contrary to every promise DEN made to the NRC about how it would cooperate in implementation of electronic discovery. Nevada also requests a ruling that DEN's merely populating its website, the so-called "Yucca Vista" site, with documentary material does not satisfy NRC's LSN requirements. Finally, NEV

¹ The NRC's new rules for this proceeding require parties to use the acronym "DEN" for the Department of Energy and "NEV" for Nevada. ASLB Order, July 9, 2004, at p. 5 n.3. However, "DOE" is the acronym used by the agency itself, as well as by other parties and prospective parties in all of their historical documents. Nevada therefore respectfully requests that, to avoid confusion, parties be allowed hereafter to use the acronym "DOE" in their pleadings instead of "DEN."

² Pursuant to the requirements of 10 C.F.R. §2.323(b), Nevada hereby certifies that its attorneys have contacted attorneys for DEN and for NRC and have made a sincere effort to resolve the issues raised in this motion, but efforts in this regard were unsuccessful.

requests a ruling that DEN's purported "certification" does not constitute the event that initiates the ninety-day period specified in 10 C.F.R. § 1003(a) for LSN certification by NEV and other prospective parties to the licensing proceeding.

NEV believes the relief requested above has "a direct relation to the LSN" and therefore falls within the jurisdiction of the Pre-License Application Presiding Officer ("PAPO"). *U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters)*, CLI-04-20 (July 7, 2004) at 3. If the PAPO should rule otherwise, NEV respectfully asks that its requests for relief be referred promptly to the Commission for decision.

I. Background and History of NRC's LSN Certification Requirements

1. More than 15 years ago, NRC adopted rules aimed at ensuring the complete availability of all relevant documentary materials to the parties and to the public long before the commencement of any licensing proceeding for a high-level waste repository. Notably, the NRC plan, initially denominated Licensing Support System ("LSS") but later changed to Licensing Support Network ("LSN"), moved the very substantial and time-consuming task of document discovery by all parties from its usual position after the filing of a License Application ("LA") and before the commencement of hearings to a time well before the filing of an LA. The goal was to ensure that all parties and potential parties had thorough access and a substantial period of time to review the documents of all others and to enable potential parties to prepare high-quality contentions, if justified, at the outset of the licensing proceeding.

2. On April 14, 1989, NRC published a final rule to "establish the basic procedures for the licensing proceeding, including procedures for the use of the [LSS]." 54 Fed. Reg. 14925, 14926. NRC stated as a benefit of the LSS "eliminating the most burdensome and time-consuming aspect of the current system of document discovery – i.e., the physical production of

documents after the License Application has been filed – because the LSS will provide for the identification and submission of discoverable documents before the License Application is submitted.” *Id.* NRC further explained the purpose of the LSS as “enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.” *Id.*

3. Finally, focusing on the role of the Host State (here, NEV), the Commission stated: “To discharge this responsibility, which is also mandated by the Nuclear Waste Policy Act (“NWPA”) with respect to the host state and any affected Indian tribes, they must be intimately involved in the review of the program. To effectively participate in program reviews, the prospective intervenors must have excellent access to the information base the program is using. They do not now have even marginally adequate access to that information.” *Id.* at 14928. NRC concluded the LSS promised to vastly improve such access.

4. In the background discussion of its 1989 notice of final rulemaking, NRC endorsed the observation of one commenter that the high-level waste licensing hearings would be delayed substantially without LSS, explaining that the LSS rulemaking “will remove document discovery as an obstacle to timely completion of the HLW proceeding by providing relevant documents well in advance of the license application.” *Id.*

5. On November 13, 1997, NRC published a proposed amendment to its 1989 rule. 62 Fed. Reg. 60789. NRC’s preamble to the proposed rule reiterated the agency’s longstanding goal of “making the information and data supporting a DOE application available simultaneously in a centralized database to all interested parties before the application is submitted and formal NRC review begins.” *Id.* at 60789. NRC emphasized that the primary function of what it now

called the LSN was “[d]iscovery of documents before the license application is filed.” *Id.* at 60790.

6. In an October 19, 1998 memorandum from NRC’s LSN management team to the Commission discussing Subpart J of the proposed new rule, LSN management reaffirmed 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.” SECY-98-0237 at p. 3.

7. In commenting on the proposed LSN rule, DEN itself confirmed its understanding that “[t]he 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.” DEN Comments on Proposed Revision to 10 C.F.R. Part 2, Subpart J, March 25, 1998.

8. On December 30, 1998, NRC published its revised final rule for the LSN. 63 Fed. Reg. 71729. NRC prescribed a deadline beginning 30 days after DEN’s site recommendation for DEN to make all of its documentary material available in electronic form, with documents of other parties and intervenors to be submitted later: “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.” *Id.* at 71734.

9. The LSN rule remained in essentially this same form, with that specific deadline for compliance by DEN, until May 31, 2001, when NRC again revised Subpart J, changing the deadline for compliance by DEN, at the urging of DEN itself, to its present formulation, requiring all relevant and existing documentary material to be made publicly and electronically available at least six months prior to submitting an LA. 66 Fed. Reg. 29453. The single-most decisive arguments resulting in NRC's adoption of the current DEN LSN compliance deadline were embodied in DEN's own comments submitted to NRC on October 6, 2000, in connection with the proposed revised rulemaking.

10. DEN prefaced its comments by articulating the premise on which it requested NRC to adopt the "six-month rule." Ivan Itkin, Director of DEN's Office of Civilian Radioactive Waste Management, explained that "[t]he Department fully supports the underlying object of the LSN system to ensure that interested parties will have an opportunity to review documentary material in preparation for NRC's License Application review." Itkin transmittal letter at p. 1. Promising that DEN was committed to taking the steps necessary to ensure that the LSN achieved its objectives, Mr. Itkin recommended that NRC's rule requiring the availability of "all of the Department's documentary material" not be pegged to DEN's site recommendation, but instead urged that NRC link DEN's LSN compliance to DEN's submission of the LA. *Id.* Mr. Itkin said this could be accomplished by requiring the certification to be submitted no later than six months in advance of DEN's submission to NRC of the LA. *Id.* at pp. 1-2. "Importantly," he said, "in recommending this approach, the Department is committed to ensuring that interested members of the public have a full six months in advance of submission of the License Application to review the Department's documentary material." *Id.* at p. 2.

11. DEN's October 6, 2000 comments explain its commitment and underlying rationale:

The DOE fully supports the objective of ensuring that interested members of the public have comprehensive and early access to relevant documentary material, so as to facilitate early identification and resolution of licensing issues, as well as preparation for the NRC's formal licensing proceeding. Indeed, this basic objective has been at the heart of the NRC's deliberations since 1988 over how best to structure an efficient, effective document retrieval system to support its formal licensing proceeding for a geologic repository, so as to permit the NRC to meet its statutory obligation to complete its licensing proceeding in three years.

DEN Comments at p. 1. DEN explained it "believes that the objective of ensuring early access by potential parties to documentary material can best be achieved by a simple, straight-forward requirement that the initial certification of compliance by the DOE occur no later than a specified period of time (e.g., six months) in advance of submission of the License Application by the DOE." *Id.* at p. 2. DEN reiterated that "by requiring certification to be made 6 months prior to the DOE's submission of its License Application, as the DOE is proposing, interested members of the public will be assured a defined period of time to review the DOE's documentary material (i.e., 6 months)." *Id.* at p. 3.

12. NRC acceded to DEN's request and amended its proposed rulemaking to adopt the "six-month rule." In recommending approval of the final amendments to Subpart J, NRC General Counsel Karen D. Cyr reported in a memorandum to the Commissioners on March 9, 2001: "DOE recommended that the initial certification of compliance be linked to its submission of the license application. Furthermore, DOE noted that it is 'committed to ensuring that interested members of the public have a full six months in advance of submission of the license application to review the Department's documentary material. . . .' Accordingly, DOE recommended revising various portions in the rule to require that the availability of documentary

material, and the accompanying certification, should occur no later than six months before the submission of the license application.” SECY-01-0039 at p. 7.

13. Ms. Cyr observed that access for the participants to review DEN’s documentary material was an important component of NRC’s efforts to meet its mandated three-year timetable for conducting its licensing review, because of the LSN’s capacity to provide early equitable document availability and the basis for contention formulation for all participants.³ *Id.*

14. The final revised rule was published on May 31, 2001. 66 Fed. Reg. 29453. It specifically discussed and adopted DEN’s proposal “to require that the availability of documentary material, and the accompanying certification, should occur no later than six months before DOE’s submission of the license application. In no event should the Commission receive the license application before six months from when DOE actually made the certification.” *Id.* at 29459.

15. The notice of final rulemaking also pointed to the likelihood that additional “documentary material” would be generated after the date of DEN’s initial certification, and it made provision therefore: “Documentary material created after the initial certification of compliance is expected to be made available reasonably contemporaneous with its creation, rather than stored for entry as a group at some point during the remaining time before DOE submits the license application.” *Id.* at 29460. This ongoing delivery of newly created material – not in existence at the time of DEN’s initial certification – would be consistent with “the need to provide participants with early and useful access to documentary material before DEN submits the license application. As DEN noted in its comments on the proposed rule, new information will continue to be produced during the period before it submits the license application.

³ Ms. Cyr originally recommended that the lead-time be eight months, not six, calling the longer interval more “appropriate” and “adequate” for participants. *Id.* at p. 8.

Participants must have timely access to this material in order to prepare for the licensing proceeding.” *Id.* See also, *U.S. Department of Energy (High Level Waste Repository: Pre-Application Matters)*, CLI-04-20 (July 7, 2004), at p. 1.

16. The Commission’s June 14, 2004 amendments to Subpart J, 69 Fed. Reg. 32836, also address the matter of additional documents and certifications. Section 2.1003(e) now provides that parties and potential parties “shall” supplement documentary material made available “with any additional material *created after the time of its initial certification.*” (Emphasis added.)

II. DEN’s Purported “Certification” Is Unlawful and Unauthorized

1. Parties’ and potential parties’ responsibilities with regard to the LSN are defined in Subpart J of 10 C.F.R. Part 2. In particular, 10 C.F.R. §2.1003(a) provides that, subject to specified exclusions, DEN shall make available, no later than six months in advance of submitting its application for a construction authorization, “(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 [DEN],” “(2) in electronic image format, subject to the claims of privilege in §2.1006, graphic-oriented documentary material,” “(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,” and “(4) an electronic bibliographic header for each documentary material” protected from disclosure under specified privileges. (Emphasis added.)

2. The key term in §2.1003(a) is “all documentary material.” NRC defines this term in 10 C.F.R. §2.1001 as “[a]ny information upon which a party...intends to rely and/or to cite in support of its position;” “[a]ny information that is known to, and in the possession of, or

developed by the party that is relevant to, but does not support, that information or that party's position," and "[a]ll reports and studies, prepared by or on behalf of the potential party...relevant to both the license application and the issues set forth in the Topical Guidelines...regardless of whether they will be relied upon and/or cited by a party." (Emphasis added.)

3. Related to these, 10 C.F.R. §2.1009(b) provides that DEN's responsible official "shall certify to the Pre-License Application Presiding Officer that the procedures [to implement §2.1003] 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.*" (Emphasis added.)

4. The regulations could not be clearer that DEN's initial certification must include *all* documentary material that is known to, in the possession of, or developed by or at the direction of DEN at the time of certification. 10 C.F.R. §2.1003 (referenced in 10 C.F.R. §2.1009). That is, the certification can only occur following the *completed* task of document identification. If there were any doubts about the nature of this requirement, they are altogether dispelled by the history of NRC's Subpart J and the LSN, as discussed above.

5. LSN is intended to substitute for most of traditional document discovery in the Yucca Mountain licensing proceeding, to allow parties and potential parties timely access to *all* of the data that will be relevant to the license application, and to facilitate early filing of adequate contentions, thereby fostering fair and equitable access to information for all parties and enabling NRC to meet the licensing decision deadline specified in the NWPA. These objectives cannot be served by disclosure of only some of the relevant and available information, with the remainder to follow at some uncertain future date while the beleaguered DEN document identification task

continues.

6. Recently, in promulgating new Rules of Practice (69 Fed. Reg. 2182, January 14, 2004) the Commission required that petitions to intervene in the Yucca Mountain licensing proceeding be filed within thirty days (as opposed to the more usual sixty days) “in view of the ample pre-application document disclosures provided by the LSN.” *Id.* at 2199. Elsewhere in the same notice of final rulemaking the Commission noted that, under Subpart J, “prior to the filing of any application, potential parties, including the applicant, must enter *all* pertinent documents into the LSN which will make such documents available to all potential parties.” *Id.* at 2195 (Emphasis added).

7. Moreover, 10 C.F.R. §2.1009(b) states explicitly that “[t]he initial certification must be made at the time the participant is required to comply with §2.1003.” Since this section can only be satisfied with full availability of all DEN documentary materials, it follows that the initial certification must correspondingly apply to all available DEN documentary materials in existence at the time of initial certification.

8. Nor can supplemental submissions following initial certification cure an incomplete initial certification. In its June 14, 2004 amendments to Subpart J, the Commission was quite clear that parties and potential parties may supplement their documentary materials after the initial certification only to the extent such materials are “created after the time of the initial certification.” 10 C.F.R. §2.1003(e). If an incomplete initial certification were to be allowed, the result would be that subsequent submissions and certifications (e.g., at submission of the license application) could never resolve the missing documents problem, as they would be limited to new documents, and the old documents not included initially would be left out forever.

9. In sum, the regulations and related history are clear that DEN's initial certification must include *all documentary material* known to, in the possession of, or developed by or at the direction of DEN. The opportunity to provide additional certifications as new documentary material comes into existence cannot remedy defects in the initial certification.

10. In sharp contrast to the above requirement, DEN's purported initial certification does not claim to have come even close to satisfying the rule, stating in its cover letter that "DOE will supplement its production as additional documentary material *is identified...*," confirming only that DEN's document identification process is not complete but is ongoing. (Emphasis added.) Indeed, DEN provided only approximately 500,000 documents to NRC (while estimating in its press release that its own database has 1.2 million relevant documents), and then asked NRC to return some 150,000 of these on alleged privilege, privacy, and Homeland Security grounds.⁴ See Affidavit of Robert R. Loux, attached, at p. 4. In Appendix D to DEN's June 30, 2004 certification letter to NRC, DEN's senior officer John Arthur represented only that DEN has provided to NRC that documentary material "identified from those documents submitted to [its LSN contractor] CACI by April 15, 2004 and made electronically available." He assured NRC that DEN was continuing its document identification process. There is not the slightest proof or indication in this *non sequitur* that "those documents" comprise the full set of documentary materials required by Subpart J to be made available, or anything remotely close to it. In short, the certification, while perhaps not fraudulent, falls far short of what the rule

⁴ The rule requires that privileges and exclusions, if truly applicable, be attached to relevant documents *as they are submitted* to NRC, not after. 10 C.F.R. §2.1003(a)(4)(i). Moreover, Subpart J does not on its face provide for the return of documents after they are submitted, as DEN has requested, without at a minimum a withdrawal of the certification and submittal of a new one that covers only the documents that remain. In any event, NEV preserves its right to contest the validity of any claim of privilege as to individual documents.

requires. Notably, DEN concedes in its "Office of Civilian Radioactive Waste Management Licensing Support Network Certification Plan For Initial Certification (at pp. 3-4) that "the cut-off date of April 15, 2004 was necessary for purposes of initial certification because of the lead time necessary to process the large volume of documents consistent with the requirements of NRC regulations and guidance." Thus, there can be no association of the April 15, 2004 cut-off date with the point in time when DEN ostensibly *completed* its identification of all of the documentary materials to be provided to the LSN.⁵ Instead, the April 15, 2004 cut-off date (and the corresponding cut-off on the documents to be provided and certified) appears to have been driven solely by DEN's desire to meet some artificial schedule for submission of an application for construction authorization prior to the end of 2004.⁶

11. Not only is there no indication from the certification that all documentary material has indeed been made available, there is overwhelming affirmative evidence that countless relevant documents (likely many millions of pages) were *not* and are *not* now available, on LSN or anywhere else where they could be deemed accessible to the public. See Affidavit of Robert R. Loux. This is not surprising. As recently as April 30, 2004, in its comments on a DEN Inspector General Report questioning DEN's ability to comply with Subpart J, DEN

⁵ Nor can there be any association of the April 15, 2004 cut-off date with any concept of a search governed by a "rule of reason," both because this date was chosen to meet a purely artificial deadline and because the search did not even begin until May 5, 2003 (see DEN's Call-Memo), more than fourteen years after the NRC's LSN requirement went into effect. In effect, DEN is attempting to saddle NRC and the potential parties with the consequences of its own lack of diligence.

⁶ Nevada believes the artificial deadlines are linked to extraordinary monetary bonuses for DEN's Yucca Mountain contractors under the bonus and deadline provisions of their contracts. Nevada has asked DEN's Inspector General to review whether these bonus provisions are now perverting implementation of the program. DEN's "initial certification" appears to be a striking potential example of the cart leading the horse.

acknowledged that it still needed to load “between three and four million documents.”⁷ Then only two business days later, armed with its Inspector General’s report, DEN abruptly lowered its document estimate to one million. And DEN’s purported initial certification, coming less than two months later, involved submission of only 350,000 documents, excluding the 150,000 DEN now wants returned.⁸ NEV has identified a plethora of inarguably relevant documents in DEN’s possession that are not on the LSN, or even on DEN’s self-administered Yucca Vista web site. Affidavit of Robert R. Loux, at pp. 4-5 and Exhibit No. 7.

12. Thus, the impression created by the June 30 letter that an initial certification “pursuant to 10 CFR 2.1009” was being provided by DEN is at best grossly misleading. Since DEN’s purported initial certification fails to meet the elemental requirements of Subpart J, it is unlawful on its face and of no legal effect.

13. Strikingly, DEN’s purported certification fails even to meet DEN’s own requirements for satisfying LSN regulations, developed in part by its General Counsel’s office. Revision 0 of “OCRWM Licensing Support Network Certification Plan for Document Collection” (provided with the June 30 letter) requires at section 4.2, under “Certification,” that “the responsible manager for each DOE program and contractor office must certify that he or she has identified and provided to CACI *all* documents potentially relevant to the NRC licensing application that are required to be processed for the LSN as defined in the NRC regulations and further specified in this memorandum,” citing page 8 of the “Call Memo,” Memorandum to

⁷ In addition, after telling the Inspector General that it was working to improve its software to screen 3.4 million “archival” email, DEN appears to have decided simply to exclude the whole lot. *See* Affidavit of Loux, at p. 2.

⁸ Indeed, DEN’s purported need for the return of tens of thousands of documents speaks volumes about the lack of care and attention taken in preparing its initial certification.

Distribution from Lee Liberman Otis, General Counsel, dated May 5, 2003. (Emphasis added.)

And the Call Memo similarly provides that a responsible manager “will be required to certify that he or she has identified *all* of the organization’s documentary material potentially relevant to the licensing proceeding as defined in the NRC regulations.”⁹ Call Memo at p. 1.

(Emphasis added.) Ms. Otis had earlier instructed DEN’s Yucca program offices that “DOE is responsible for loading the LSN with all of its Discovery Documents no later than six months in advance of submission of the license application,” Memorandum to Distribution from Lee Liberman Otis, August 9, 2002, at p. 1, “and again at the time the license application is submitted.” *Id.* at p. 2. DEN thus failed to follow its own rules as well as NRC’s.

14. In its public “Frequently Asked Questions” document about LSN, released with its certification, DEN confirms that Subpart J provisions “require DOE to provide the general public and parties to the licensing hearing with electronic access to *all* documentary material relevant to the licensing proceeding,” and that the NRC regulations require all of these documents to “be loaded in the LSN and be available electronically six months prior to DOE’s submittal of the Yucca Mountain license application.” *Requirements for Inclusion of DOE Documents in LSN: Frequently Asked Questions*, at p. 1.

III. Merely Populating DEN’s Website Does Not Satisfy Subpart J

1. While DEN’s purported certification (Appendix D to the June 30, 2004 letter) states that the documents have been “made electronically available,” this statement (like others in the certification) is highly misleading. While it would be natural to read this statement to

⁹ Interestingly, the distribution list for the Call Memo fails to include a wide variety of DEN’s contractors who were intimately involved in the Yucca Mountain project and who apparently were not asked by DEN to canvass their relevant documentary material to ensure compliance with NRC’s rule. For example, the list fails to include the previous lead M&O contractor for Yucca project, TRW, or DEN’s own attorneys, Winston & Strawn.

indicate that the documents are available to the public on the LSN, this is in fact *not* the case, for elsewhere we learn (in the June 30 letter and Appendix A) that the documents have in fact only been loaded onto the “DOE Licensing Support Network Server.”

2. Under 10 C.F.R. §2.1007, the LSN must include “[a] system to provide electronic access...*at the NRC web site.*” (Emphasis added.) Under 10 C.F.R. § 2.1011(a)(2), the LSN must also include availability of documents “on a web accessible server which is able to be canvassed by web indexing software (i.e., a ‘robot’, ‘spider’, ‘crawler’).” And 10 C.F.R. §2.1001 (definition of “LSN Administrator”) is clear that NRC, through its LSN Administrator, “is responsible for coordinating access to and the integrity of data available on the Licensing Support Network.” From these it is clear that it is not sufficient for DEN simply to make documents available on its own web site. Compliance with Subpart J requires that the documents be available and indexed on *NRC’s* web site (at least by an active hyperlink to DEN’s LSN server) and that the LSN Administrator (not DEN) be in a position to assure access and data integrity. The regulations specifically contemplate that the documents will be in the custody and control of NRC, not the project proponent, DEN.

3. The proposition that mere availability of documentary material on DEN’s own server satisfies Subpart J has, moreover, been specifically addressed and *rejected* by NRC’s LSN Administrator. On June 11, 2003, DEN wrote to the Administrator suggesting a “shortcut” to the LSN process whereby DEN would index its own documents and then “provide the resulting index to the NRC at the same time it submits its LSN documents.” Letter from Ziegler to Graser, June 11, 2003, at p. 1. Theoretically, such a procedure would eliminate the step of NRC’s indexing the documents with its spidering software, and enable DEN to simultaneously deliver its LSN documents to NRC and certify its LSN database collection. NRC’s Administrator

studied and unequivocally rejected the DEN proposal. In a June 27, 2003 response to DEN, the Administrator (Mr. Daniel J. Graser) addressed “DOE’s desire to make three to four million documents available in their totality at a point in time that would correspond with DOE’s certification under 10 C.F.R. Section 2.1009(b) relative to its Section 2.1003 documentary material, i.e., six months prior to a planned submission of its application for authorization to construct a high-level waste geologic repository.” He acknowledged that DEN proposed to index its own documents using the same methodology that the LSN will use and subsequently deliver the resulting index to the LSN. He summed up: “In effect, DOE proposes to implement a separate but functional LSN environment with the goal of having its documents converted for availability via the LSN by June 2004, albeit without making any DOE materials available via the LSN until the entire DOE collection is LSN-available.” Letter from Graser to Ziegler, June 27, 2003, at p. 1. Mr. Graser explained discussions that had occurred between a DEN technical team and the LSN staff to assess the DEN proposal. He commented that DEN “should be fully cognizant of the overall structure of the LSN ‘spider’ software module and the role it plays in the system’s operation and administration.” He explained that the “spider” not only indexes textual materials, but also establishes a baseline snapshot of each document that the NRC’s LSN Administrator subsequently uses to ensure the ongoing integrity of the documentary material. *Id.* at pp. 1-2. Mr. Graser advised that such a baseline is not established until such time as software that is under NRC’s LSN operational control has processed the document collection. *Id.* at p. 1. Mr. Graser concluded that even if DEN attempted to go through an indexing process similar to that planned by NRC, nonetheless, “the LSN spider would still have to process the full DOE collection separately to establish the baseline needed to provide an independent audit capability.” Mr. Graser concluded, “The LSN Administrator’s technical assessment is that the proposed

solution described in your June 11 letter is not feasible because it would preclude the LSNA from fulfilling his responsibility regarding documentary material integrity pursuant to 10 C.F.R. 2.1011(c)(4).” *Id.* at p. 2. DEN obviously ignored this advice.

4. Finally, in a June 6, 2004 memorandum to the Commission, Mr. Graser said he refused to place an active hyperlink to DEN’s document collection server on the LSN because “there was a concern this could be misinterpreted as an endorsement of the integrity of the documentary material on that web site.”

5. Accordingly, a certification that documents are available on the “DOE Licensing Support Network Server” is not sufficient under Subpart J. DEN’s failure to meet NRC’s availability requirements thus constitutes a separate, independent ground for why the purported certification must be declared invalid.

IV. DEN’s Purported Certification Is Antithetical to Expedition

As explained in Section I above, from the outset, the purpose of the LSN was “enabling the comprehensive and early review of the millions of pages of relevant licensing material by the potential parties to the proceeding, so as to permit the earlier submission of better focused contentions resulting in a substantial saving of time during the proceeding.” 54 Fed. Reg. 14925, 14926 (April 14, 1989). DEN’s partial certification and limited document disclosure frustrates this objective, for complete and adequate contentions addressing DEN’s safety case cannot be filed unless all documentary material is available for review in the LSN, and an incomplete initial certification cannot be cured by adding additional documentary materials that could have been, but were not, identified before the initial certification. Indeed, as it now stands, though it may indeed trigger bonus provisions for DEN’s contractors, DEN’s purported and woefully incomplete certification serves no legitimate *regulatory* purpose whatsoever. If certification

could be interpreted to mean the identification of less than all documentary materials, then certification would become meaningless, since a party could “certify” a collection containing any number of documents it wished, thus frustrating the basic purpose of the LSN.

V. DEN’s Partial Certification Breaches DEN’s Commitments to the NRC

1. In its October 6, 2000 letter to NRC (commenting on proposed revisions to Subpart J), DEN stated it was “committed to ensuring that interested members of the public have a full six months in advance of submission of the License Application to review the Department’s documentary material.” Itkin transmittal at p. 2. DEN further stated it “fully supports the objective of ensuring that interested members of the public have comprehensive and early access to relevant documentary material, so as to facilitate early identification and resolution of licensing issues, as well as preparation for the NRC’s formal licensing proceeding.” DEN comments at p. 1. DEN’s purported partial certification flies in the face of its commitment to give the public “comprehensive and early access.”

2. Finally, the partial certification breaches a commitment to NRC that DEN would comply with NRC’s indexing requirements. As noted above, DEN’s making documents available on its own server does not satisfy Subpart J. Yet, on June 11, 2003, DEN wrote to Mr. Graser discussing the “technical means and timing by which the DOE’s Licensing Support Network documents, when provided to the NRC, could be indexed and made available through the NRC LSN website.” Referring to a meeting DEN had had with NRC, DEN acknowledged that “NRC expressed the view that the DOE’s documents must be indexed [by the NRC ‘spidering’ or ‘crawling’ software] before they could be considered electronically available.” Letter from Ziegler to Graser, June 11, 2003, at p. 1. DOE stated it “intends to comply with the requirements of the LSN rule including certification that relevant documentary material is

electronically available no later than six months prior to the submission of its LA. The DOE recognizes the NRC's position on the need to index the documentary material." *Id.* This commitment was obviously abandoned.

VI. Even the Documents DEN Has Only Partially Certified are Unavailable

Whatever the legal status of DEN's so-called certification, it is obvious to any member of the public that even DEN's partial set of documentary material on its self-administered, non-LSN website have not been electronically "available" to the public, as any interpretation of the law requires. This unavailability is vividly recounted in the Affidavit of Robert R. Loux. Initially, almost no member of the public was able to access the site or, if they could, to download documents. (Apparently a very recent edition of Microsoft Internet Explorer is or was required.) On NRC's LSN site, the box for "DOE documents" was made grey, or inaccessible, at DEN's request, so no documents at all were available on the LSN. By July 1, DEN had posted a notice on its web site stating that there were "problems" with document retrieval and that these problems would soon be fixed. Calling DEN's listed "LSN inquiry" phone number revealed a person who did not even know she was the contact person for LSN questions, and who was unable to answer any questions. By July 2, DEN's web site was completely down "for maintenance," with a notice that "[t]he estimated time it will be available is to be announced." Though the web site is now finally up and running, an extraordinary number of the documents indexed with headers have no link to the actual documents, making them unavailable to anyone. As of this filing, NRC's LSN posts a disclaimer that *no* DEN documents are yet available on the LSN, with no date for availability listed. In short, DEN's first exercise with LSN and document availability has been nothing short of an embarrassment, and, as Mr. Loux opines, DEN's initial certification appears to have been stunningly premature.

VII. Conclusion

For the reasons set forth above, NEV respectfully requests that DEN's certification be struck from the docket and declared null and void. NEV further requests that the Panel rule that merely populating DEN's website with documentary material does not satisfy NRC's LSN requirements. Finally, NEV requests that the Panel rule that DEN's alleged certification does not constitute the event that initiates the ninety-day period for LSN compliance by NEV and other prospective parties that is specified in 10 C.F.R. §1003(a).

Respectfully submitted,

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Joseph R. Egan

July 12, 2004

Affidavit of
Robert R. Loux

AFFIDAVIT OF ROBERT R. LOUX

I, Robert R. Loux, do hereby swear under penalty of perjury that the following is true and correct and that, if called as a witness, I would testify as follows:

1. I am the Executive Director of the Nevada Agency for Nuclear Projects ("Agency"), the Agency created by the Nevada Legislature to, among other things, lead Nevada's participation in the Yucca Mountain licensing proceeding before the Nuclear Regulatory Commission ("NRC"). I have been the Executive Director of the Agency since 1983.
2. Nevada's representative at the Department of Energy's ("DOE's") quarterly management meeting with NRC in Rockville, Maryland, on February 19, 2004, reported to me (as confirmed in the official summary of that meeting, attached hereto as Exhibit No. 1) that Mr. John Arthur, Deputy Director of DOE's Office of Repository Development, asserted to NRC that DOE's input to the LSN was projected to contain approximately 30 million pages comprising about 3 million documents, and that the processing of those documents "is about 50 percent complete." Exhibit No. 1 at 3. When asked by NRC what this meant, Mr. Arthur stated that it meant the documents had been reviewed for accuracy and cleared with respect to sensitivity and security and were nearing readiness to be placed in the LSN. *Id.* (Only a year ago, DOE had been publicly projecting to NRC that its LSN documentary material would comprise a much larger set, up to 35 million pages. *See* Exhibit No. 2, at p. 2)
3. On May 20, 2004, DOE's Inspector General released a report of its audit of DOE's readiness for LSN certification. "Given that the initial licensing process is an important

first step in the Yucca Mountain Project,” the IG’s Division Director Lawrence Ackerly stated, “we initiated this audit to determine if the Department’s portion of the Network will be ready for initial certification and available for public review by June 2004.” *See* Exhibit No. 3, cover memorandum, p. 1. Attached to the report was a letter from DOE’s John Arthur, dated April 30, 2004, representing that DOE’s LSN database continued to comprise “between 3 and 4 million documents.” The IG report noted that DOE had “captured an estimated 87 percent and processed 71 percent” of these documents as of March 10, 2004. *Id.* at cover memorandum, p. 2. But the IG report noted that, “[a]dditionally, about 6.4 million electronic mail documents have not been processed, of which 3.1 million belong to personnel currently associated with the Yucca Mountain Project.” *Id.* at audit p. 2. The IG report concluded that, since NRC can only index about 150,000 documents per week, “it could take between 5 and 13 months to index the Department’s 3 million to 8.5 million documents.” *Id.* at 3.

4. Only 4 days following Mr. Arthur’s volume estimate to the IG, and in a separate letter to NRC, DOE sharply lowered its estimate of the volume of its documentary material to “one million documents consisting of approximately 12 million pages.” *See* Exhibit No. 4, at p. 1. No explanation was given for the sudden reduction, but on May 11, at the Quarterly Management Meeting between DOE and NRC, Mr. Arthur explained simply that DOE now felt that one million documents was “adequate,” according to notes of the meeting taken and reported to me by my staff. After telling the IG that DOE was working to improve its software to screen 3.4 million “archival” emails, it appears that DOE decided simply to exclude the whole lot.

5. Late in the day on June 30, DOE tendered its “initial certification” of LSN compliance to NRC. In a press release, DOE represented that it had certified public availability of 1.2 million documents totaling 5.6 million pages. The following day, I directed my staff and some of Nevada’s expert consultants to review DOE’s LSN data, as well as DOE’s self-administered web site collection of its LSN documents, which was briefly labeled by DOE, and will hereafter be referred to, as “Yucca Vista.” No one was able to access DOE documents on the actual LSN, because that specific category of documents had been rendered “grey” and was thus inaccessible.
6. That day, July 1, only one of my staff, whose computer was operating with Internet Explorer version 6.0 – the latest available version – was able even to access the Yucca Vista site. A series of document searches revealed innumerable documents that were only indexed on the system and were not available at all for observation or downloading. Later in the day, the Yucca Vista site became altogether unavailable, and DOE posted a notice there that it was having software problems that would be fixed “soon.”
7. The Yucca Vista site contained the name of a DOE contact person, and a phone number, to call if members of the public were having trouble accessing the system. I directed my staff to call this number. My staff reported that the person answering the number July 2, 2004 was completely unaware that she had been appointed as an LSN contact person for DOE, expressing shock and anger at the information. She was unable to answer any questions.
8. On July 2, 2004, with no DOE documentary material available on LSN, the Yucca Vista site was taken out of service by DOE. A notice was posted at the site, saying, “The DOE

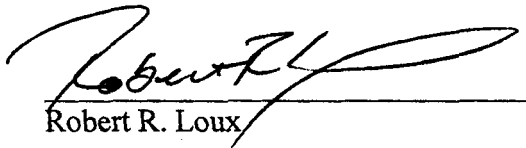
LSN site is temporarily down for maintenance. We will be back up as soon as possible.

The estimated time it will be available is to be announced.” See Exhibit No. 6.

9. On July 2, I directed my staff to discuss the matter with Mr. Dan Graser, NRC’s LSN Administrator. Mr. Graser represented that, contrary to representations in its press release, DOE had furnished NRC with only approximately 500,000 documents. Moreover, he indicated that DOE had requested the “return” of approximately 150,000 documents on grounds of Homeland Security and privacy concerns, and that, therefore, DOE had requested that NRC’s LSN site not activate access to *any* DOE documentary material until further notice from DOE.
10. As of the date of this affidavit, the Yucca Vista site is finally up and running, but innumerable documents indexed on the system are unavailable for observation or downloading and appear not to be on the system yet. Some documents appear to have been withheld on grounds of privileges that clearly do not apply. Nevada has no way of knowing how many documents are on the Yucca Vista site, or whether the documents on the Yucca Vista site are the same documents that DOE provided to LSN. Nevada does not know whether the 500,000 documents provided by DOE to NRC are even a subset of Yucca Vista. Moreover, Nevada does not know whether the 150,000 documents DOE now says should be returned are on Yucca Vista or were removed from that site, or whether their sudden “return” is authorized or justified.
11. As of the date of this affidavit, NRC’s LSN contains a broad disclaimer stating: “The DOE document collection currently is unavailable pending the resolution of issues regarding the disclosure of recently identified privacy protected information. Please check back later.”

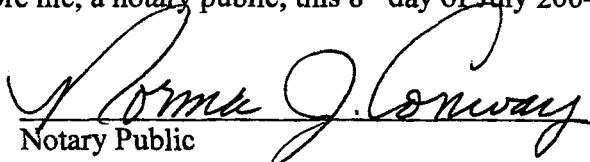
12. My staff and consultants have identified numerous extremely relevant documents pertaining to key aspects of the Yucca Mountain licensing proceeding that we know are in DOE's possession, are not currently on the LSN, and are not even indexed, let alone available, on Yucca Vista. A very partial listing of some of those documents is attached as Exhibit No. 7.
13. In conclusion, Nevada believes that DOE has grossly failed to comply with the most elemental LSN requirements, and that DOE's documentary material, to the limited extent it could be considered electronically available at all to the public on a non-NRC administered DOE web site, is woefully incomplete. Therefore, Nevada believes DOE's initial certification was stunningly premature and is invalid.

Further Affiant sayeth not.


Robert R. Loux

STATE OF NEVADA)
COUNTY OF Carson)

SUBSCRIBED AND SWORN before me, a notary public, this 8th day of July 2004.


Notary Public

My commission expires Sept. 19, 2005.

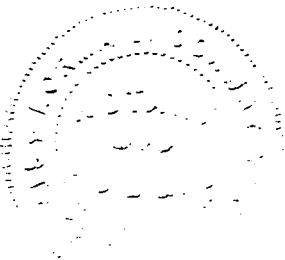


EXHIBIT #1

**SUMMARY OF THE
U.S. NUCLEAR REGULATORY COMMISSION/U.S. DEPARTMENT OF ENERGY
QUARTERLY MANAGEMENT MEETING
IN ROCKVILLE, MARYLAND
ON FEBRUARY 19, 2004**

Introduction

The U.S. Nuclear Regulatory Commission (NRC) and U.S. Department of Energy (DOE) held a public Quarterly Management Meeting for the Yucca Mountain Project (YMP) on February 19, 2004. The purpose of this meeting was to discuss the overall progress of the project at the potential geologic repository site at Yucca Mountain, Nevada. The meeting was hosted at the NRC Headquarters in Rockville, Maryland, with video and audio connections to the DOE Office of Repository Development in Las Vegas, Nevada, and the Center for Nuclear Waste Regulatory Analyses (CNWRA) in San Antonio, Texas. Other participants included representatives from the Nuclear Energy Institute (NEI), NRC Region IV, Bechtel SAIC Co. LLC (BSC), General Accounting Office (GAO), State of Nevada, Nevada Nuclear Waste Task Force, Clark County, and interested members of the public.

NRC Opening Remarks

Mr. Martin Virgilio, Director of the NRC's Office of Nuclear Materials Safety and Safeguards (NMSS), began his opening remarks by stating that the DOE/NRC Quality Assurance (QA) meeting held on February 18, 2004, was very productive. He went on to cover three major topics in his opening remarks, including (1) resolution of Key Technical Issue (KTI) Agreements, (2) recent evaluations performed by the NRC concerning DOE's technical documents, and (3) the Technical Exchange on February 3-4, 2004, regarding level of detail (especially "design" detail).

Mr. Virgilio noted that measurable progress has been made in the area of KTI Agreements, but emphasized the importance of adhering to the schedule, especially for igneous activity. He also stated that, after reviewing the Technical Basis Documents (TBDs), the NRC staff appreciates the bundling approach, which provides a better context for reviewing the issues.

Regarding the NRC's evaluations of DOE technical documents, Mr. Virgilio indicated that a publically available report summarizing the three evaluations will be available in the March/April time frame. He also provided the basis for the NRC's decision to conduct the evaluations using a "no-observer" approach. He explained that these evaluations were outside the scope of the DOE/NRC Pre-licensing interactions agreement and were not in a meeting-style format.

Mr. Virgilio also indicated that the Technical Exchange regarding level of detail was a success, with the parties reaching a common understanding of the level of detail that DOE will provide in its license application (LA) and the need for additional interaction concerning the classification of items that are important to safety.

In concluding his opening remarks, Mr. Virgilio stated that the NRC is continuing to develop its inspection program, which will ultimately transition to increased participation by Region IV.

NRC Program Update

Ms. Janet Schlueter, Chief of the NRC's High-Level Waste (HLW) Branch in the NMSS Division of Waste Management, provided an update concerning the NRC's program activities since the Quarterly Management Meeting in November 2003. Her remarks addressed the staff's review of bundled KTI agreements, an update of the Risk Insights Baseline report, the staff's ongoing efforts to update the Integrated Issue Resolution Status Report (IIRSR), development of the inspection program, and the staff's interactions with the NRC's Advisory Committee on Nuclear Waste (ACNW) and others.

Ms. Schlueter indicated that since last October, the NRC has received seven Technical Basis Documents (TBDs) that address 81 KTI Agreements. She also noted that the NRC has expressed concerns to DOE regarding the lack of supporting information and documents referenced in the TBDs that have been submitted for NRC review. Specifically, Ms. Schlueter mentioned that in a letter dated December 23, 2003, the NRC asked DOE to provide 50 reference documents to enable the staff to complete its reviews. In its response dated January 30, 2004, DOE provided a detailed plan on how it intended to provide both the NRC and the public with the supporting information, including the status of all 50 documents requested by the NRC. Since then, DOE has provided most of these documents to the NRC and has simultaneously made them available to the public. Ms. Schlueter encouraged DOE to "stay on track" with its current KTI Agreement schedule, under which DOE would address the remaining agreements by late August of this year, providing the NRC with review time prior to receipt of the LA (planned for December 2004).

Ms. Schlueter also stated that the staff has continued its activities regarding the Risk Insights Initiative and has integrated the risk insights into various program areas, including the ongoing review of the TBDs. She added that the staff will likely issue an updated version, based on new information, before receipt of the LA.

In addition, Ms. Schlueter indicated that in June 2002, the staff issued the Integrated Issue Resolution Status Report (IIRSR) to reflect the then current status of the 293 agreements and the staff's understanding of the performance of the potential repository from a systems approach. The integrated sub-issues approach also aligns with the structure of the current Yucca Mountain Review Plan and reflects the staff's approach to reviewing an LA. She indicated that since that time, the staff has increased its knowledge and understanding of the repository and its potential performance; however, the status of many agreements has changed. As a result, the staff believes that it will be of benefit to the NRC staff and the agency's stakeholders to issue an update to the IIRSR before receipt of the LA.

As for the ongoing development of the NRC's inspection program, Ms. Schlueter stated that the staff is continuing its efforts to integrate risk insights into the development of various aspects of the inspection program, which will be in effect if the NRC docket the LA. The staff has issued several inspection procedures and continues to work with the Region IV office and the CNWRA to develop additional procedures. The NRC's Region IV staff is also assisting

headquarters in qualifying staff as HLW inspectors. One has been qualified to date, and the NRC expects two others to be qualified by December of this year.

In concluding her remarks, Ms. Schlueter stated that the staff is working diligently to issue a publicly available final report on the findings of the three-part evaluations of the DOE program, which the NRC's teams of experts completed in the November – January time frame.

DOE Program Update

Dr. Margaret Chu, Director of DOE's Office of Civilian Radioactive Waste Management (OCRWM), provided an update from the DOE Program perspective. Specifically, she covered the breakdown of the proposed \$880 million budget for fiscal year (FY) 2005 into three major components, including the repository, transportation, and waste acceptance. Dr. Chu also explained the planned transition of the Management Improvement Initiatives (MII) to the various line organizations to continue as routine business practices. She indicated that, via a letter to the NRC, DOE will document the details of closure of the MII. Dr. Chu also summarized the current status of the silica screening program and indicated that two known cases of silicosis exist to date. She further indicated that after hearing allegations of document falsification regarding test results for dust in the Exploratory Studies Facility, she has asked DOE's Office of the Inspector General to investigate the allegations. Dr. Chu added that although this issue is not a regulatory matter for the NRC, the Program remains committed to ensuring occupational safety in conjunction with a safety-conscious work environment (SCWE).

DOE Yucca Mountain Project Update

Mr. John Arthur, Deputy Director of DOE's Office of Repository Development (ORD), provided the YMP update. He began by announcing DOE's pending decision that he will function as the Chief Nuclear Officer and will certify DOE's Input to the Licensing Support Network (LSN). The DOE input to LSN is projected to contain approximately 30 million pages, comprising about 3 million documents, and is about 50 percent complete. Mr. Arthur also confirmed that DOE will respond to the NRC's letter on this subject, dated February 5, 2004. In addition, he stated that the Disposal Decision Plan is expected to be available in June and that DOE will brief the NRC on the details of that plan.

Mr. Virgilio asked what Mr. Arthur meant by the statistic that the LSN is 50 percent complete. Mr. Arthur explained that about half of the pages are nearing readiness to be placed in the LSN, and that they have been reviewed for accuracy and have been cleared with respect to sensitivity and security.

Mr. Arthur then expressed appreciation for the valuable insights and lessons learned from the NRC's three technical evaluations, especially in terms of the recognition that the technical documents need to be written in a more transparent style and be as standalone as practical.

Mr. Arthur also provided an update concerning the annunciator panel status and the role of the Leadership Council. He explained that the Leadership Council meets every 2 weeks to review selected condition reports (CRs) and the bases for late actions. Mr. Arthur noted that while progress has been made, the process needs to become stabilized and decisions regarding the "white" (i.e., no data population) and "gray" (i.e., awaiting final approval) indicators

need to be made. The NRC requested an interaction to discuss performance indicators, including those that are "red" and those that are "yellow" and declining.

The NRC staff inquired about incorporating the performance metric for "human performance" in the panel. DOE noted that most human performance problems are in the areas of skill-based and procedural noncompliance. Furthermore, implementations of six key project procedures (including those for data, software, and models) comprise the majority of problems in this area. DOE added that their senior managers have taken action to meet with the managers of the three offices with the highest numbers of human performance issues. Additionally, they will emphasize the need for improvement in the area of human performance with approximately 200 project managers and supervisors in a quality-focus meeting soon.

In response to a question from the NRC concerning where the human performance metric would be placed on the panel, Mr. Dennis Brown, Director of the OCRWM Office of Quality Assurance (OQA), indicated that although a final decision has not yet been made, a human performance indicator could be placed in the SCWE box. DOE agreed to provide a briefing to the NRC on the panel and selected individual metrics.

Mr. Virgilio asked what corrective actions DOE has planned to improve the implementation of six procedures that comprise more than half of the procedural noncompliance issues. Mr. Brown indicated that this is being handled through the action plan regarding human performance, and added that the action plan includes activities such as "pre-job briefings."

Mr. Arthur then provided an overview of the status of the commitments described in DOE's letter to the NRC dated May 29, 2003. Specifically, he indicated that 8 of the 13 actions have been closed. In particular, Mr. Arthur discussed DOE's new Corrective Action Program (CAP), the status of major corrective actions that are currently underway, and personnel changes in the Employee Concerns Program. He also indicated that DOE is aggressively recruiting someone to manage the Employee Concerns Program. Mr. Arthur also noted Mr. John Streeter's good work in managing the program in the interim. In addition, in response to the NRC's question regarding the timing for completion of commitment number 13 in DOE's letter dated May 29, 2003, Mr. Ziegler, Director of the Office of License Application and Strategy in DOE's Office of Repository Development, responded that the commitment action is expected to be closed within the next 60 days (by April 2004). DOE's Commitment number 13, in its May 29, 2003, letter, indicated that DOE would provide a semiannual report to its employees to communicate successes, lessons learned, and emphasize commitment to accountability. This commitment was to be fulfilled in October 2003. Even though information was communicated to employees in October 2003, DOE has deferred closure of this commitment until the process for reporting semi-annually has been institutionalized.

Mr. Arthur then went on to discuss the results of several recent independent assessments of DOE programs. Specifically, he outlined the process for integrating and prioritizing the various recommendations in the performance management assessment, the organizational assessment, the SCWE external survey and the quality assurance management assessment (QAMA). Mr. Arthur also described the five-phase approach used to evaluate the set of recommendations, the grouping of like recommendations, and the prioritization method. He added that those recommendations that provide the greatest benefit and can be implemented

in a reasonable time frame will be done first, with several items being deferred until after submission of the LA.

Mr. Matula, NRC, expressed concern regarding the transition of the Corrective Action Program (CAP) to line management. Mr. Arthur and Mr. Brown indicated that DOE will develop a formal transition plan and that the transition will occur gradually and systematically. However, they stated that the project must move toward holding the line accountable for CAP with strong oversight by the OQA.

License Application Status

Mr. Ziegler reported progress in DOE's preparation of the LA and in the technical areas of data qualification, software verification, and model validation. However, he noted the possibility of slippage of the schedule for preparing some analysis and model reports (AMRs), and stated that DOE would examine whether the delays in submitting AMRs to the NRC could impact the staff's review of the seven TBDs for which the NRC has requested 50 specific references. Mr. Ziegler also provided DOE's views regarding the NRC's relative risk ranking of the model abstraction categories and four additional areas. He noted that there is agreement in most areas and that DOE staff provided a basis for the few instances in which there are differing views. Mr. Ziegler also discussed the basis for the differences, and the NRC requested continuing discussions on this topic. Mr. Virgilio indicated that the NRC staff will be focusing more on DOE's Total System Performance Assessment model.

Mr. Ziegler indicated that DOE will identify the data inputs for the safety analyses that are used in the LA required to be qualified and are indicated as "to be verified" (or TBV) at the time of LA submittal. He also confirmed that the data to be used in the LA must be of a high quality for its intended use.

Mr. Virgilio asked if DOE's LA schedule is flexible enough to allow time to incorporate the NRC's review results. Mr. Ziegler replied "yes, depending on the specific comments received" and any issues in comments received from the NRC after September would be resolved in the license application review process.

Quality Assurance Program Update

Mr. Dennis Brown (DOE) presented an overview of the QA meeting from the previous day and indicated it provided for excellent discussion of both the improvements and remaining weaknesses in the DOE QA program. He indicated the Navarro Quality Services contract had been extended and that additional QA/nuclear licensing expertise had been added with the hiring of Warren Dorman, who recently retired from Progress Energy.

He discussed the current status of the CAP and stated that improvements in this area include implementation of a new single CAP, increased management oversight through the CAP Oversight Committee as well as monitoring the effectiveness of the CAP. For example, the line organizations are currently performing assessments of the CAP to identify program constraints and areas where there may be difficulty in meeting their goals or requirements. He indicated that a full scale audit of the CAP is currently scheduled to be performed in July 2004.

He stated that although there are no adverse trends found per criteria in procedure AP-16.3Q, Trend Evaluation and Reporting, in the area of human performance, BSC did find a pattern of errors. Specifically, 90 percent of CRs from Fiscal Year 2003 are related to human performance (40 percent), management (26 percent), and communications (24 percent). He stated that root cause of human performance issues were primarily skill-based. He also noted that rule-based and knowledge-based causes were due to less-than-adequate self-checking and omitting steps in the procedures. He added that skill-based errors are caused primarily by the amount of time it takes to complete a product according to procedural controls.

Mr. Brown added that CAR BSC-01-C-002 (CR-102), which addresses ineffective implementation of software management requirements, is an area of improvement. He stated that CR-102 corrective actions include procedure revisions/development (which include templates to ensure QARD requirements are met), training and implementation of requirements emphasis, and management improvement activities. There are two corrective actions remaining. He described the results of the OQA sponsored evaluation of software deficiency resolutions conducted by industry experts. He also reported that to date no adverse impact on code functionality or technical products has been noted.

Mr. Brown also discussed CAR BSC-03-C-107 (CR-016) regarding data management and qualification. This CAR was issued by BSC because of recurring data deficiencies. He added that, as a corrective action, BSC evaluates each technical product for procedure compliance. He further explained that the evaluation is being performed in two Phases. In Phase I, review for product compliance is completed during checking and review of AMRs, and in Phase II, reviews cover legacy data issues and are completed on approved AMRs.

Mr. Brown said that BSC issued CAR BSC-01-C-001 (CR-099) in May of 2001 and that the corrective actions included changes to address model validation issues identified in technical products, procedure enhancements, and training. BSC completed corrective actions and requested OQA verification in August 2003. OQA performed an audit of Model Reports in October 2003. OQA also verified that BSC completed 11 of the 12 CR-099 corrective actions. During the verification OQA found that six of the 20 sampled Model Reports were unsatisfactory. As a result, OQA concluded that CR-099 could not be closed.

Mr. Brown indicated that Dr. Chu and Jesse Roberson of EM had signed a new Memorandum of Agreement and an audit schedule for EM has been developed and shared with the NRC.

He explained that DOE is developing a transition plan to transfer CAP responsibility to the line that will include determining corrective action effectiveness. He also noted that DOE will ensure the transition is well managed and appropriate controls will remain in effect. In addition, this transition will be reflected in an upcoming revision to the Quality Assurance Requirement Description (QARD), which DOE expects to submit to the NRC for review and acceptance in the March time frame.

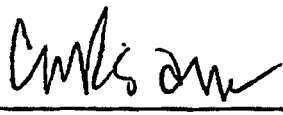
In conclusion of his presentation, Mr. Brown noted improvements in Trending Program. He stated that based on the results and findings from the fourth Quarter FY 2003 Trend Evaluation Report, DOE was able to; (1) identify the processes that are experiencing the most errors in implementation, (2) identify why those processes have errors, and (3) take focused corrective actions based on the errors' likely causes.

Closing Remarks

In concluding the meeting, Mr. Virgilio noted the forthcoming reorganization of the NRC's Division of Waste Management into two divisions. He stated that Mr. C. William (Bill) Reamer will become the Director of a newly created High-Level Waste Repository Safety Division, which will focus on the Yucca Mountain Project. In addition, Mr. Virgilio announced that, beginning March 1, 2004, Ms. Schlueter will serve in the NRC Chairman's Office. The next NRC/DOE Quarterly QA and Management meeting is planned for May 11-12, 2004, in Las Vegas, Nevada.

Public Comments

After the closing remarks, Mr. Von Tiesenhausen of Clark County stated that the Project's efforts to benchmark performance against the nuclear industry were commendable. However, he took exception to the NEI representative's general statement, from the previous day, that writing large number of deficiency reports suggests a healthy organization. Mr. Von Tiesenhausen emphasized that an effective corrective action program, which appropriately addresses repetitive conditions, should result in a decreasing number of deficiency reports. He further stated that an effectively implemented trend reporting system could be beneficial, but it should be appropriately weighted to account for the time that items remain open.


Date: 3/31/04
C. William Reamer, Deputy Director
Division of Waste Management
Office of Nuclear Material Safety and Safeguards
U.S. Nuclear Regulatory Commission

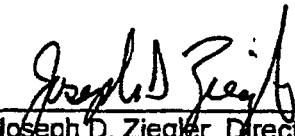

Date: 3/26/04
Joseph D. Ziegler, Director
Office of License Application and Strategy
Office of Repository Development
U.S. Department of Energy

EXHIBIT #2

June 27, 2003

Mr. Joseph D. Ziegler
Acting Director
Office of License Application and Strategy
U.S. Department of Energy
P.O. Box 364629
North Las Vegas, Nevada 89036-8629

SUBJECT: REQUESTED FOLLOW-UP TO LICENSING SUPPORT NETWORK ADVISORY
REVIEW PANEL (LSNARP) ON JUNE 3, 2003

Reference: Letter, Ziegler to Graser, dated June 11, 2003

Dear Mr. Ziegler:

As requested at the June 3, 2003 Licensing Support Network Advisory Review Panel (LSNARP) meeting and subsequently in your June 11, 2003 letter, we have considered the Department of Energy (DOE) suggestion that alternative technical solutions be considered for future Licensing Support Network (LSN) operations. As we understand it, DOE has asked that the LSN Administrator (LSNA) address DOE's desire to make 3 to 4 million documents available in their totality at a point in time that would correspond with DOE's certification under 10 C.F.R. § 2.1009(b) relative to its section 2.1003 documentary material, i.e., six months prior to a planned submission of its application for authorization to construct a high-level waste (HLW) geologic repository. As outlined in your letter, DOE proposes to index its own documents using the same software, methodology, and auditing procedures that the LSN will use and subsequently deliver the resulting index to the LSN at the time its documents are placed on the DOE collection server. DOE would provide access to audit and otherwise monitor and comment on the DOE's indexing activity during the process. In effect, DOE proposes to implement a separate but functional LSN environment with the goal of having its documents converted for availability via the LSN by June 2004 (based on DOE's current estimated December 2004 application submission date), albeit without making any DOE materials available via the LSN until the entire DOE collection is LSN-available.

A DOE technical team has worked with the LSN staff extensively since the summer of 2001 to validate DOE's technical solution and its interoperability with the LSN. DOE thus should be fully cognizant of the overall structure of the LSN "spider" software module and the role it plays in the system's operation and administration. In this regard, the spider not only indexes textual materials, but also establishes a baseline snapshot of each document made available by a potential HLW repository licensing adjudication participant that the LSNA subsequently uses to

ensure the ongoing integrity of documentary material. That baseline thus is not established until such time as software that is under LSN operational control has parsed the document collection. As a result, even if a fully-indexed collection were made available on a date certain, the LSN spider would still have to process the full DOE collection separately to establish the baseline needed to provide an independent audit capability.

It should be added that we previously have assessed approaches to ensuring audit integrity and concluded that any audit based on manual reviews or merely having access to browse files populating a potential participant's server would be ineffective given the document volumes involved. Thus, recognizing that an automated approach to auditing is essential, we also have concluded that it is operationally impractical to have LSN staff routinely access a potential participant's server to install, execute, and then uninstall audit software. Further, the alternative of giving DOE (or any other potential participant) access to the LSN auditing program to utilize in conducting its own spidering would afford the participant significant technical details about the LSN data integrity scheme that could permit LSN auditing efforts to be circumvented.

Accordingly, given the current LSN design and operational configuration,^{*} the LSNA's technical assessment is that the proposed solution described in your June 11 letter is not feasible because it would preclude the LSNA from fulfilling his responsibilities regarding documentary material integrity pursuant to 10 C.F.R. § 2.1011(c)(4).

Although this DOE proposal thus is not technically viable, it should be noted that to the degree the June 11 proposal reflects a concern about the sensitivity of the timing of the release of certain portions of the DOE collection, DOE may wish to consider that the LSN rule contains no requirement about which participant documents must be made available when, so long as all documentary material is available by the time certification is made. Thus, DOE can choose to make those items available to the LSN spider last. As a practical matter, this alternative seems preferable to attempting to import into the LSN a 30- to 35-million page text database in its entirety on a time-sensitive basis.

Finally, it should be noted that, putting aside any technical considerations, implementing the DOE proposal appears to raise a number of regulatory compliance or policy issues that are outside the purview of the LSNA. Accordingly, if DOE wishes to pursue its current proposal further, it may wish to raise the matter through a rulemaking petition or by utilizing the procedures in 10 C.F.R. § 2.1010 for seeking to resolve disputes about pre-application availability of documents. Additionally, in accordance with the terms of 10 C.F.R. § 2.1011(c)(1), (d), it seems likely that the LSNARP would have to be consulted before a change such as that sought in the June 11 letter could be implemented.

^{*} In addition to the auditing problem, and putting aside the significant additional unbudgeted NRC manpower and funding resources that would be required to implement the proposed DOE solution, we have serious concerns about whether the time remaining under the current DOE schedule would be sufficient to address the problems inherent in ensuring that any DOE portal software would be able to create the necessary links between document indices and the headers required under 10 C.F.R. Part 2, Subpart J.

- 3 -

As is the case with each of the potential participants to the HLW repository licensing proceeding, the LSNA and the LSN staff continue to stand ready to provide appropriate advice and assistance to DOE in making its documentary material available through the LSN on a timely basis.

Sincerely,

/RA/

Daniel J. Graser
Licensing Support Network Administrator

cc: Those on Attached List

cc: G. P. Bollwerk, III, NRC/ASLBP
M. Schmit, NRC/ASLBP
A. Bates, NRC/SECY
J. Linehan, NRC/NMSS
J. Ciocco, NRC/NMSS
J. Schaeffer, NRC/OCIO
M. Adams, State of Nevada
L. Bradshaw, Nye County
W. Briggs, Ross Dixon & Bell
R. Clark, EPA
E. Culverwell, Lincoln County
J. Egan, Egan & Associates
E. Ezra, Terraspectra
L. Fiorenzi, Eureka County
S. Frishman, State of Nevada
J. Gandi, DOE/OCRWM
K. Garcia, Nye County
G. Hellstrom, DOE/OCRWM
R. Holden, NCAI
A. Johnson, Eureka County
A. Kall, Churchill County
D. Kolkman, White Pine County
S. Kraft, NEI
J. Larson, White Pine County
H. Leake, DOE/OCRWM
C. Little, Nye County
S. Lynch, State of Nevada
G. McCockrell, Esmerelda County
R. McCullum, NEI
T. Manzini, Lander County
R. Massey, Churchill and Lander Counties
L. Mathias, Mineral County
S. Morris, DOE/OCRWM
M. Murphy, Nye County
I. Navis, Clark County
L. Pitchford, Lander County
J. Pitts, IDT Services
V. Reich, NWTRB
A. Remus, Inyo County
J. Treichel, NNWTF
M. Van Der Puy, DOE/OCRWM
E. Von Tiesenhausen, Clark County
J. Wallace, Mineral County
R. Wells, DOE/OCRWM
J. Wooley, DOE/OCRWM

EXHIBIT #3



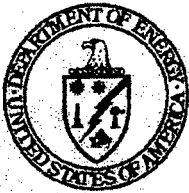
U.S. Department of Energy
Office of Inspector General
Office of Audit Services

Audit Report

Report on Management Controls Over the Licensing Support Network for the Yucca Mountain Repository

OASIM-04-04

May 2004



Department of Energy

Washington, DC 20585

May 20, 2004

MEMORANDUM FOR THE DEPUTY DIRECTOR FOR THE OFFICE OF REPOSITORY DEVELOPMENT

FROM: Lawrence R. Ackerly, Division Director *Lawrence R. Ackerly*
National Nuclear Security Administration Audits Division
Office of Audit Services
Office of Inspector General

SUBJECT: INFORMATION: Audit Report on "Management Controls Over the
Licensing Support Network for the Yucca Mountain Repository"

BACKGROUND

Decades of nuclear weapons and commercial power production have left a large legacy of spent nuclear fuel and radioactive waste. In 2002, Congress approved construction of the first geological waste repository in Yucca Mountain, Nevada, to dispose of this waste. Prior to construction, the Nuclear Regulatory Commission (NRC) must grant the Department of Energy (Department) a license to construct the facility. Before beginning the license application process in December 2004, the Department is required to publicly disclose all relevant documents by posting them on the Department's public website which is accessible through the NRC-sponsored, internet-based Licensing Support Network (Network). To satisfy current schedule requirements, the Department must certify that relevant documents have been posted to the Network and made available for public review by June 2004. The Office of Civilian Radioactive Waste Management (OCRWM) is responsible for all aspects of the license application process.

The NRC Network is designed to expedite the Yucca Mountain Project license application process by providing interested parties with the ability to access relevant documents electronically. Once the Department's documents are posted and indexed, the NRC will make all documents available for public review. Other interested parties, such as the State of Nevada and affected units of local government, will then have 90 days to make pertinent documents available on the Network. Each step of the process must be accomplished sequentially--starting with the Department's documents. Therefore, delays by the Department could jeopardize a series of events that must occur before the license application process can begin. Given that the initial licensing process is an important first step in the Yucca Mountain Project, we initiated this audit to determine if the Department's portion of the Network will be ready for initial certification and available for public review by June 2004.

RESULTS OF AUDIT

Our audit disclosed that the Department had made significant progress in preparing licensing related information for public disclosure on the Network. Specifically, we noted that it had:

- Captured an estimated 87 percent and processed 71 percent of all relevant documents;
- Developed software to screen documents for privileged and Privacy Act information; and,
- Revised its management structure to improve accountability for the Network.

While OCRWM has overcome certain organizational impediments and is optimistic that it will complete the initial certification by June 2004, a number of obstacles may prevent it from doing so. In particular, a majority of the documents must still be screened for privileged and Privacy Act information; procedures for processing several million electronic mail documents must be finalized; and an agreement to provide the documents to the NRC for indexing must be completed.

It is important to note that in Fiscal Year 2004, the House Committee on Appropriations directed the Department to submit the license application to the NRC no later than December 31, 2004. The House Report stressed that problems with the submission would cause unacceptable delays in the start of repository operations, which would not only increase the Federal government's liability on commercial spent fuel, but also impact the ability of the Department to remove defense-related high level radioactive waste and spent nuclear fuel from other sites in the Department complex. Not beginning the licensing process by established deadlines may also affect the government's ability to meet legally enforceable cleanup milestones at those sites.

While progress has been substantial, in our judgment, if the Department is to meet the House-imposed license application deadline, all of the Network related tasks must be completed as expeditiously as possible. Since we began our audit, a number of important phases of the effort have been initiated or completed, but more remains to be done. In that connection, we have made several recommendations designed to help ensure that the Department can move forward with the licensing process.

MANAGEMENT REACTION

The Deputy Director for OCRWM's Office of Repository Development generally concurred with the report's finding and recommendations and has initiated corrective actions to minimize the delays associated with populating the Network. These corrective actions are scheduled for completion before June 2004. Management's comments in their entirety are included as Appendix 3.

Attachment

cc: Director, Office of Civilian Radioactive Waste Management
General Counsel, Office of the General Counsel

REPORT ON MANAGEMENT CONTROLS OVER THE LICENSING SUPPORT NETWORK FOR THE YUCCA MOUNTAIN REPOSITORY

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LICENSING SUPPORT NETWORK

Background

The Department identified a number of steps that had to be accomplished prior to making its documents available on the Network. Initially, relevant documents have to be identified and captured from each of its organizations and contractors. Then, the documents must be reviewed for legibility; a bibliographic header must be added; and each document has to be screened to ensure that sensitive unclassified, Privacy Act, or privileged information is not released to the public. Once relevant documents are processed through these steps, they are posted to the Department's website.

Once posted to the Department's website, the documents will be made available for indexing by the NRC. The NRC will then search the information for key words and build indices into the Network. After indexing is complete, the documents will be available to the public. Although the Department plans to submit its license application in December 2004, the NRC will not begin the license application proceedings unless all documents are available for public review through the Network for at least six months.

Capturing, Processing, and Screening Documents

As of March 10, 2004, the Department estimated that it had captured 87 percent and processed 71 percent of the relevant documents. Nearly all documents had been captured including those in the records management system, which is a database of program records; electronic files; and, electronic mails. In particular, personnel associated with the Yucca Mountain Project had reviewed 1.4 million of the Department's 6.4 million electronic mail documents and anticipated finishing its review by June 2004. Finally, OCRWM developed the software needed to screen all documents for privileged and Privacy Act information and began processing in late February 2004. OCRWM anticipates that all documents will be screened for privileged and Privacy Act information before the initial certification date. While most paper documents had been captured, efforts related to databases and computer programs remained incomplete.

Management Structure

In August 2003, at the start of our audit, we observed that organizational impediments had the potential to impact completion of the Department's Network goals. In particular, we observed that management responsibility for the effort was shared by two separate organizations. The Office of the General Counsel served as the primary technical point of contact and directed interactions with the Network contractor. OCRWM was responsible for integrating the Department's efforts to the overall licensing strategy, interacting with

the NRC, and providing access to the Yucca Mountain project records, personnel, and facilities. During the audit, OCRWM management informed us that it was modifying the management structure to correct these weaknesses as part of a baseline change proposal.

**Availability of
Documents to the NRC**

Based on recent plans, the Department did not intend to make documents available to the NRC until the June 2004 certification date. However, in February 2004, the NRC requested access to the documents in advance of the initial certification date. Since NRC needs access to the documents to begin the indexing process, the earlier the documents are provided to the NRC, the faster the documents can be available to the public. While tentative agreement was reached with the NRC to start making the documents available, the details of such an agreement have yet to be finalized. Should they be able to finalize terms of the agreement in the short-run, OCRWM officials estimated that they could start providing documents to the NRC for indexing in April 2004.

Remaining Challenges

Despite significant movement, the Department still faces a number of obstacles in preparing the Network for initial certification and ensuring that documents are available for public review by June 2004. Specifically, the majority of the documents have yet to be screened for privileged and Privacy Act information. In February 2004, the Department implemented a newly designed software package and began processing documents; however, it had not yet evaluated whether the system was effective and was properly identifying information that should not be disclosed. Further, OCRWM had not developed a plan addressing how databases and computer programs would be captured and processed.

Additionally, about 6.4 million electronic mail documents have not been processed, of which 3.1 million belong to personnel currently associated with the Yucca Mountain Project. The Department initially planned to use software to eliminate irrelevant items. However, after it developed and tested the software, it determined that the software was not functioning as intended. Because of these problems, officials determined that personnel still associated with the Yucca Mountain Project must manually review their electronic mail documents for relevancy and initiated this process in late February 2004. These manual reviews, daunting due to the sheer volume of information that must be processed, have the potential to delay the posting process.

Department officials told us that they were still trying to improve the effectiveness of the software in hopes of using it to process the remaining 3.3 million electronic mail documents.

Finally, the Department still needed to provide its documents to the NRC for indexing. As of February 2004, program officials anticipated that they would start providing documents to the NRC in April 2004. Since the NRC can only index about 150,000 documents per week however, it could take between 5 and 13 months to index the Department's 3 million to 8.5 million documents. Unless the Department takes additional action to improve delivery to the NRC for indexing, the availability of the documents to the public could be delayed until as late as May 2005. Ultimately, the inability of the Department to meet the deadline for Network posting could adversely affect the completion of the license application by the House-imposed deadline.

RECOMMENDATIONS

We recommend that the Deputy Director for OCRWM's Office of Repository Development minimize the delays associated with populating the Network by:

1. Evaluating the effectiveness of the Privacy Act screening software and determining if it is a viable tool for document processing.
 - If so, fully implement the software for use on the remaining documents.
 - If not, identify and implement an alternative method for screening the documents for Privacy Act information.
2. Completing the implementation of the software to process the electronic mail associated with the Yucca Mountain Project.
3. Developing a plan and begin processing information maintained in other relevant databases and computer programs.
4. Finalizing the agreement regarding document availability and indexing with the NRC.

**MANAGEMENT
REACTION**

The Deputy Director for OCRWM's Office of Repository Development generally concurred with the report's finding and recommendations and has initiated corrective actions to minimize the delays associated with populating the Network. These corrective actions are scheduled for completion before June 2004. Management believes the Department will have between 3 to 4 million documents for the Network; however, management will provide the NRC with a revised estimate within the next few weeks. Management's comments are included in Appendix 3 in their entirety.

AUDITOR COMMENTS

Management's actions, should, when implemented, address the challenges discussed in our report.

Appendix 1

OBJECTIVE

Our objective was to determine if the Department's portion of the Network will be ready for initial certification and available for public review by June 2004.

SCOPE

The audit was performed between August 2003 and March 2004, at the Office of Repository Development in Las Vegas, Nevada. We also interviewed personnel from the OCRWM, Office of the General Counsel, and the Department of Justice in Washington, DC. The scope was limited to the Department's activities associated with the Network.

METHODOLOGY

To accomplish the audit objective we:

- Obtained and reviewed the Nuclear Waste Policy Act, as amended; Code of Federal Regulations; and other guidelines and requirements related to the Network;
- Reviewed planning documents and status reports for the Network program;
- Reviewed findings from prior audits regarding the Network;
- Interviewed program and contract personnel;
- Assessed internal controls and performance measures established under the Government Performance and Results Act of 1993; and,
- Analyzed performance, timelines, and target completion dates.

The audit was performed in accordance with generally accepted Government auditing standards for performance audits and included tests of internal controls and compliance with laws and regulations to the extent necessary to satisfy the audit objective. Specifically, we tested controls with respect to the Department's planning process for meeting the June 2004 initial certification date. Because our review was limited, it would not necessarily have disclosed all internal control deficiencies that may have existed at the time of our audit. We did not rely on computer processed data to accomplish our audit objective.

We coordinated the contents of the audit with management throughout the audit. As a result of the coordination, management waived an exit conference.

Appendix 2



Department of Energy
Office of Civilian Radioactive Waste Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321

QA: N/A

APR 30 2004

MEMORANDUM FOR: Rickey R. Hass (IG-34)

FROM: W. John Arthur, III
Deputy Director

SUBJECT: Response to Office of Inspector General (OIG) Draft Audit
Report, Management Controls over the Licensing Support
Network (LSN) for the Yucca Mountain Project

Enclosed is the Office of Civilian Radioactive Waste Management's comments on the OIG draft audit report entitled "Management Controls over the Licensing Support Network (LSN) for the Yucca Mountain Project." If you have any questions in this regard, please contact Harry E. Leake at (702) 794-1457.

OPM&I:HCW-1197

Enclosure:
Comments on the Office of Inspector General (OIG)
Licensing Support Network (LSN) Draft Audit Report

cc w/encl:
Margaret Chu, DOE/HQ (RW-1), FORS
M. S. Crosland, DOE/HQ (GC-52), FORS
T. J. Garrish, DOE/HQ (RW-2E), FORS
S. M. Showard, DOE/HQ (RW-2E), FORS
W. J. Arthur, III, DOE/ORD (RW-2W), Las Vegas, NV
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H. C. White, Jr., DOE/ORD (RW-70W), Las Vegas, NV
Records Processing Center - "4"

Appendix 2 (continued)

Comments on the Office of Inspector General (OIG) Licensing Support Network (LSN) Draft Audit Report

The Office of Civilian Radioactive Waste Management (OCRWM) appreciates the comments provided by OIG concerning the management controls over the LSN. It should be pointed out that OCRWM has estimated that it would provide between 3 and 4 million documents to the OCRWM LSN, and a revised estimate for the initial LSN Certification will be provided the NRC within the next few weeks.

The following sections provide the actual or planned corrective actions with pertinent target dates for each recommendation.

Recommendation 1.

Evaluate the effectiveness of the Privacy Act screening software and determine if it is a viable tool for document processing.

- If so, fully implement the software for use on the remaining documents.
- If not, identify and implement an alternative method for screening the documents for Privacy Act information.

Response

Concur: Analysis has shown the software is effective at identifying privileged and Privacy Act information within its functional limitations. Consequently, it was implemented on March 4, 2004, and the manual privileged and privacy review is going forward. Additionally, both electronic searches and user review are being used to identify the privileged and Privacy Act information.

Recommendation 2.

Complete the implementation of the software to process electronic mail associated with the Yucca Mountain Project.

Response

Concur: We have been working to address this area of concern through a variety of methods, including manual and electronic processing.
Estimated Completion Date: May 15, 2004.

Appendix 2 (continued)

Recommendation 3.

Develop a plan and begin processing information maintained in other relevant databases and computer programs.

Response

Concur: A Concept of Operation for the handling of potentially relevant databases and software programs has been developed and is in the management approval process. The amount of documentary material within this category is 115 databases and 900 software programs. The draft OCRWM LSN Project Execution Plan calls for the relevant databases and software programs to have a bibliographic header created and all of the manual reviews for privacy and sensitive unclassified information to be completed by May 28, 2004. The processing of the databases and software programs is not expected to present a problem to OCRWM in meeting the June 23, 2004, LSN certification date.

Recommendation 4.

Finalizing the agreement regarding document availability and indexing with the U.S. Nuclear Regulatory Commission (NRC).

Response

Concur: The U.S. Department of Energy (DOE) has met and discussed with the NRC the NRC's desire to obtain early release of DOE material to the OCRWM LSN. The NRC has created a new LSN Guideline, *Guideline 23 Access Control Prior to Initial Certification*, to control access to materials and indices related to pre-certification loading/indexing, and OCRWM has provided comments on this Guideline to the NRC.
Estimated Completion Date: May 11, 2004.

Appendix 3

PRIOR REPORTS

Office of Inspector General Reports

- *Management Challenges at the Department of Energy* (DOE/IG-0626, November 2003). The report identified that while the Department has made great strides in addressing the inherent risks in the environmental cleanup, it has not consistently met its goals or integrated its programs for site cleanup and waste disposal. The report also identified that the Department has been criticized for many years for weaknesses in its project management. For example, the Department lacks sufficient control over its projects, ultimately resulting in projects with cost and schedule overruns. In addition, the Department lacks consistency and continuity of applying project management principles, risk management, and contingency.
- *Review of Alleged Conflicts of Interest Involving a Legal Services Contract for the Yucca Mountain Project* (DOE-OIG-I01IG001, November 2001). The Office of Inspector General reviewed the contract the Department awarded to a law firm to assist the Department during the license application process. The law firm had not disclosed lobbying and non-lobbying work that was potentially a conflict of interest.

General Accounting Office Reports

- *Major Management Challenges and Program Risks - Department of Energy* (GAO-03-100, January 2003). This report addresses the major management challenges facing the Department as it works to carry out its multiple and highly diverse missions. The General Accounting Office (GAO) found that the Department continued to have difficulty keeping some of its major projects on schedule and within budget. For example, the Department's original 1992 baseline for the Yucca Mountain Project estimated a total project cost of \$6.3 billion and a completion date of October 2001 for submitting the license application. According to the Department's latest estimate, the license application will not be submitted until December 2004, with an estimated cost of almost \$8.4 billion.
- *Technical, Schedule, and Cost Uncertainties of the Yucca Mountain Repository Program* (GAO-02-191, December 2001). This audit report determined that the Department lacks information for the license application and their license application milestone date was not supported by the program's baseline. GAO said the Department was unlikely to achieve its goal of opening the repository by 2010 and the Department did not have a reliable estimate of when and at what cost such a repository could be opened.

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1. What additional background information about the selection, scheduling, scope, or procedures of the audit would have been helpful to the reader in understanding this report?
2. What additional information related to findings and recommendations could have been included in this report to assist management in implementing corrective actions?
3. What format, stylistic, or organizational changes might have made this report's overall message more clear to the reader?
4. What additional actions could the Office of Inspector General have taken on the issues discussed in this report which would have been helpful?

Please include your name and telephone number so that we may contact you should we have any questions about your comments.

Name _____ Date _____

Telephone _____ Organization _____

When you have completed this form, you may fax it to the Office of Inspector General at (202) 586-0948 or you may mail it to:

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Washington, D.C. 20585
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U.S. Department of Energy Office of Inspector General, Home Page
<http://www.ig.doe.gov>

Your comments would be appreciated and can be provided on the Customer Response Form attached to the report.

EXHIBIT #4



Department of Energy
Office of Civilian Radioactive Waste Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321

QA: N/A

Project No. WM-00011

MAY 04 2004

OVERNIGHT MAIL

Mr. Daniel J. Graser
Licensing Support Network Administrator
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

**Subject: Participant Request for Licensing Support Network (LSN) Access Control
Prior to Initial Certification**

Dear Mr. Graser:

As provided in Chapter 23 of the April 2004 Licensing Support Guidelines (Access Control Guidelines), the U.S. Department of Energy (DOE) submits this request for access control prior to its initial certification under 10 CFR 2.1003(a). As requested in the Access Control Guidelines, DOE provides the following information:

DOE currently estimates that the size of its document collection to be made available at the time of its initial certification is approximately one million documents consisting of approximately 12 million pages. DOE expects to begin populating its participant website with these documents on or about May 5, 2004, with weekly feeds thereafter. The feed for the initial, as well as subsequent weeks will approximate 150,000 documents, which we understand is the current weekly capacity of the U.S. Nuclear Regulatory Commission (NRC) technical staff to crawl documents for the LSN. An exact schedule will be determined after consultation between the DOE and the NRC technical staff to ensure that operational and technical factors are considered.

DOE requests acknowledgement from the NRC that DOE will be provided access control pursuant to Access Control Guidelines for the documents that DOE populates on its participant website prior to its initial certification. Additionally, DOE understands the Access Control Guidelines to mean (i) that the documents DOE populates on its participant website will not be in any way released to the web, identified in response to web queries, or otherwise disclosed by the NRC before DOE makes its initial certification per 10 CFR 2.1003(a); (ii) that DOE can recall documents for any reason prior to its initial certification; and (iii) that DOE does not waive any privileges by providing documents to the NRC technical staff for crawling pursuant to the Access Control Guidelines. DOE requests NRC's confirmation that this understanding of the Access Control Guidelines is correct.

Mr. Daniel J. Graser

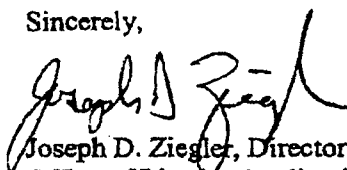
-2-

MAY 04 2004

In consideration of DOE's desire to begin populating its participant website this week as early as Wednesday, May 5, 2004, DOE requests by May 5, 2004, NRC's acknowledgement that it will be providing access control and confirmation that DOE's understanding of the Access Control Guidelines on the three points referenced above is correct.

If you have any questions, please contact Harry E. Leake at (702) 794-1457 or e-mail at harry_leake@ymp.gov.

Sincerely,



Joseph D. Ziegler, Director
Office of License Application and Strategy

cc:

A. C. Campbell, NRC, Rockville, MD
L. L. Campbell, NRC, Rockville, MD
D. D. Chamberlain, NRC, Arlington, TX
G. P. Hatchett, NRC, Rockville, MD
R. M. Latta, NRC, Las Vegas, NV
J. D. Parrott, NRC, Las Vegas, NV
D. B. Spitzberg, NRC, Arlington, TX
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Michael King, Inyo County, Edmonds, WA

Mr. Daniel J. Graser

-3-

MAY 04 2004

cc: (continued)

Andrew Remus, Inyo County, Independence, CA

Mickey Yarbrow, Lander County, Battle Mountain, NV

Spencer Hafen, Lincoln County, Pioche, NV

Linda Mathias, Mineral County, Hawthorne, NV

L. W. Bradshaw, Nye County, Pahrump, NV

Mike Simon, White Pine County, Ely, NV

R. I. Holden, National Congress of American Indians, Washington, DC

EXHIBIT #5

Licensing Support Network (LSN)

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- [LSN Hours of Operation](#)
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Quick References

- [42 USC 108, Nuclear Waste Policy Act of 1982, as Amended](#)
- [10 CFR 2](#)
- [10 CFR 50](#)
- [10 CFR 63](#)
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- [NRC News Releases](#)
- [5 USC 552, FOIA](#)
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The DOE document collection currently is unavailable pending the resolution of issues regarding the disclosure of recently identified privacy protected information. Please check back later.

Search the LSN Document Collection

Viewing the LSN Document Collection requires several different document viewer plug-ins. [More Information.](#)

• [Advanced Search Form](#) HELP

Search by LSN Document information fields, natural language query or boolean query.

• [Accession Number](#) HELP

This search provides direct access to a document if you know the document LSN or Participant Accession Number.

LSN:

OR

Participant:

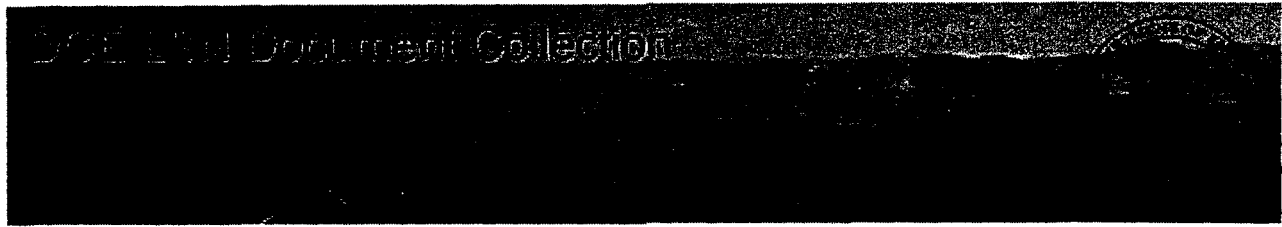
• [Document Content](#) HELP

Search the LSN Document Collection of text content using a word, group of words or a natural language query.

The Licensing Support Network (LSN) is an official United States Government web site.

Please e-mail your comments and suggestions to the [LSN Webmaster](#).

EXHIBIT #6



The DOE LSN site is temporarily down for maintenance. We will be back up as soon as possible.
The estimated time it will be available is to be announced.

DOE LSN Document Collection



The Department of Energy (DOE) took its LSN website off-line the afternoon of July 1, 2004 because of a technical problem that occurred after DOE's initial certification. This error inadvertently made available on the website the text and image of a number of documents that contain privacy protected information of project personnel, such as social security numbers, that were to be produced in "header" format only. DOE took its website off-line in order to safeguard this information. DOE is working to restore its website as quickly as possible.

EXHIBIT #7

Exhibit No. 7

The following is a very partial list of documents in the possession of DEN, and clearly important to the licensability of the Yucca Mountain project, which (as of Monday, July 12, 2004) Nevada staff and consultants have been unable to locate either on the NRC Licensing Support Network or on DEN's self-administered database collection of licensing documents, Alta Vista:

1. "Probabilistic Volcanic Hazard Analysis for Yucca Mountain, Nevada," June 1996, Search term: "BA00000000-01717-2200-00082, Rev. 0" (This is the key expert elicitation for volcanic hazards at Yucca Mountain) (Searched "Title" getting hits but none appear to be the document. Search term: "DE-AC01-91RW00134," by "Title," related documents found but none indicated by MOL number to be the 1996 document.)
2. Au, F.H.F.; Leavitt, V.D.; Beckert, W.F.; and McFarlane, J.C. 1977. "Incorporation of Transuranics into Vegetable and Field Crops Grown at the Nevada Test Site." *Transuranics in Desert Ecosystems*. White, M.G.; Dunaway, P.B.; and Wireman, D.L., eds. NVO-181. Pages 1-15. Las Vegas, Nevada: U.S. Energy Research & Development Administration. TIC: 201875 (explicitly cited by DEN in its biosphere reports for YMP).
3. Baes, C.F., III; Sharp, R.D.; Sjoreen, A.L.; and Shor, R.W. 1984. A Review and Analysis of Parameters for Assessing Transport of Environmentally Released Radionuclides Through Agriculture. ORNL-5786. Oak Ridge, Tennessee: Oak Ridge National Laboratory. ACC: NNA.19870731.0041 (explicitly cited by DEN in its biosphere reports for YMP).
4. Bird, G.A. and Ewing, L.L. 1996. *Surface Water Model Simulations of the Fate of ¹⁴C Added to Lake 226, Experimental Lakes Area*. Technical Record TR-729. Pinawa, Manitoba, Canada: Atomic Energy of Canada Limited, Whiteshell Laboratories. TIC: 223925 (explicitly cited by DEN in its biosphere reports for YMP).
5. BIOMASS (The IAEA Programme on Biosphere Modelling and Assessment Methods) 2001. "Themes for a New Co-ordinated Research Programme on Environmental Model Testing and Improvement: Theme 1: Radioactive Waste Disposal, Theme 2: Environmental Releases, Theme 3: Biospheric Processes." Working Material, Limited Distribution, Biosphere Modelling and Assessment, Biomass Programme. Version {beta}2. Vienna, Austria: International Atomic Energy Agency. TIC: 252966 (explicitly cited by DEN in its biosphere reports for YMP).
6. dpc_r402.txt; B000000000-01717-5700-00021 REV 04 ICN 02 (Documentation of Program Change, September 2002). (This document is listed in DEN's longstanding Yucca Mountain project database in its "Technical Documents" section described as follows by DEN: "In this section, you will find reference materials with increasing levels of complexity that will enhance your understanding of the work being done by the U.S. Department of Energy in Nevada." Not found on DEN "LSN" database.)
7. E-mail from Zell Peterman (DEN) to William Boyle (DEN) dated May 5, 2000, subject: CI-36 Validation Project (which states, among other things, "I really fail to understand

why certain people in the Project seem to be so upset by the implementation of 'good scientific practice'. The implication is that it would be better to live with questionable data than to know the truth. I think that this is a very dangerous road to take especially as we move towards licensing."'). (This document was acquired from DEN in response to a recent FOIA request.)

8. E-mail from Zell Peterman (DEN) to William Boyle (DEN) dated July 23, 2001, subject: Cl-36, with carbon copies to 17 other DEN employees (discussing a critical Chlorine-36 validation study, states, *inter alia*, "Although the allegation by Bruce Robinson that the 36-Cl validation study is a boondoggle [sic] was intended to be part of a private communication, it has become so widely distributed as to justify the following response..."). (Note: In another e-mail on the same Chlorine-36 subject, DEN deleted the identity of the sender and recipient from the e-mail when it was delivered pursuant to a recent FOIA request. *That* e-mail (which can likewise not be located) states, among other things, "The way this was done looks like very prejudicial and subjective science to me, June's observation that someone ... was mean-spirited and wanted her not to have any part in this whatsoever, makes it look like DOE is trying to discredit the professional reputation of a scientist that came up with the wrong answer!" And further stated, "What a terrible mess this is! It is embarrassing, the way it was planned and carried out was heavy handed, non-objective, and wrong-headed." And further, "We'd all love for there to be no bomb-pulse 36-Cl at depth. It'd be nice if it came out that way. I might even want it to come out that way, ...")
9. E-mail from Mark Tynan (DEN) to Richard Quittmeyer (DEN) and Daniel Soeder (DEN) dated June 6, 1996, subject: Long Range Plan (DEN representative states, among other things, "the final dollar chart should not read zero for key activities" and "Loss od [sic] modeling capability here would be devasrtating [sic] for the program" and "the M&O has killed last of small but important geophysical model processing testing program" and "I am not willing to cripple the geotechnical program"). (This document was acquired from DEN in response to a recent FOIA request.)
10. E-mail from Warren Day to Mark Tynan (DEN) dated September 11, 1997, subject: Where are we? (states, among other things, "what is going on between the M&O and DOE in the budget negotiations . . . Do you guys have any stroke in the process anymore or has this 600 pound elephant really short circuited the entire scientific process? I wonder how you keep on."'). (This document was acquired from DEN in a recent FOIA request.)
11. E-mail from Dwight Hoxie (DEN) to Roger Henning (DEN), et al., dated September 15, 1998, subject: Infiltration maps and data (states, among other things, "I can't help but think that we may have a serious problem in that the infiltration model to be used for the SR/LA may not be based on the currently best available data . . . we may be making a serious mistake by not assuring that the infiltration model, which provides major input to the UZ flow and transport model, is the best that we can possibly do"). (This document was acquired from DEN in a recent FOIA request.)

12. E-mail from Mark Tynan (DEN) to Cady Johnson dated June 14, 1996, subject: SPO Weekly Report (states, among other things, "see Mark Peters for copy of my last NRC presentation. In it are a series of idiot diagrams for the alcove testing, plan views with perm readings provided. I want the same information for the thermal alcove."). (This document was acquired from DEN in a recent FOIA request.)

Note: In addition to the foregoing few examples of what are apparently millions of "documentary materials" (previously identified as such by DEN, but missing from both the NRC LSN database and the DEN database), there are additional critical documentary materials which can be found only in "Headers" on DEN's database, and despite being identified thereon as "Public Access," the documents cannot be found. Examples of this are two key "Expert Elicitations" performed by Geomatrix Consultants for DEN:

1. Saturated Zone Flow and Transport Expert elicitation Project – January 1998. (*See attached.*)
2. Unsaturated Zone Flow Model Expert elicitation Project, May 1997. (*See attached.*)

DOE LSN Document Collection

Participant Accession #: MOL.19980825.0008

Document #(s): SL5X4AM3
EIS-AR-ID-REF-00586

Title: SATURATED ZONE FLOW AND TRANSPORT EXPERT ELICITATION
PROJECT - JANUARY 1998 - SCPB: NA (C)

Comments:

Date: 19980101

Version #(s):

QA Record: Y

Access: PUB

Author(s): N/A - GEOMATRIX CONSULTANTS INC

Receiver(s):

Trace #(s): WBS 1.2.5.7
EIS-AR-REF-60725
SL5X4AM3
VADD VOL-03

Package(s): MOY-991201-03-06

Related Record(s):

Type(s): REPORT

Non Digital Media: OPTIC

Images: 224

Text URL:

Image URLs:

DOE LSN Document Collection**Participant Accession #:** MOL.19971009.0582**Document #(s):****Title:** UNSATURATED ZONE FLOW MODEL EXPERT ELICITATION PROJECT
MAY 1997 APPROVED COPY - (THIS HAS BEEN SUPPLEMENTED BY
MOL.20010604.0105) (C)**Comments:****Date:** 19970530**Version #(s):****QA Record:** Y**Access:** PUB**Author(s):** COPPERSMITH KJ - GEOMATRIX CONSULTANTS
PENDLETON M - N/A
PERMAN RC - GEOMATRIX CONSULTANTS
YOUNGS RR - GEOMATRIX CONSULTANTS
YOUNKER JL - N/A**Receiver(s):****Trace #(s):** 1.2.5.7
VADD VOL-03**Package(s):** MOY-970828-07-01
MOY-990209-09-01**Related Record(s):****Type(s):** REPORT**Non Digital Media:** OPTIC**Images:** 175**Text URL:****Image URLs:***Header - No Document*

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

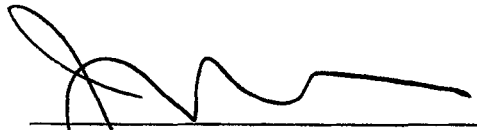
BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. PAPO-00
)	State of Nevada-01
(High-Level Waste Repository:)	
Pre-Application Matters))	
)	

NOTICE OF APPEARANCE

The undersigned, JOSEPH R. EGAN, being an attorney-at-law in good standing and admitted to practice before the courts of the District of Columbia, the State of New York, the Commonwealth of Virginia, and various federal courts, hereby enters his appearance as counsel on behalf of the State of Nevada in any proceeding related to the above-captioned matter. Service on the State of Nevada may be made on the undersigned.

Respectfully submitted,



Joseph R. Egan

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(703) 918-4943 – Fax
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DATED: July 9, 2004

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

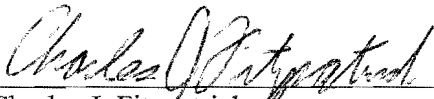
BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. PAPO-00
)	State of Nevada-01
(High-Level Waste Repository:)	
Pre-Application Matters))	

NOTICE OF APPEARANCE

The undersigned, CHARLES J. FITZPATRICK, being an attorney-at-law in good standing and admitted to practice before the courts of the State of Texas and various federal courts, hereby enters his appearance as counsel on behalf of the State of Nevada in any proceeding related to the above-captioned matter.

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION**

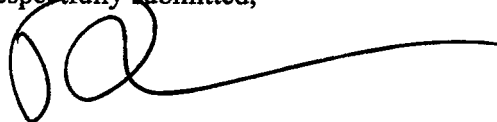
BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. PAPO-00
)	State of Nevada-01
(High-Level Waste Repository:)	
Pre-Application Matters))	
)	

NOTICE OF APPEARANCE

The undersigned, MARTIN G. MALSCH, being an attorney-at-law in good standing and admitted to practice before the courts of the District of Columbia, the State of Connecticut, the Commonwealth of Virginia, and various federal courts, hereby enters his appearance as counsel on behalf of the State of Nevada in any proceeding related to the above-captioned matter.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

In the Matter of)

U.S. DEPARTMENT OF ENERGY)

(High-Level Waste Repository:
Pre-Application Matters))

) Docket No. PAPO-00
) State of Nevada-01
)
)

NOTICE OF APPEARANCE

The undersigned, ROBERT J. CYNKAR, being an attorney-at-law in good standing and admitted to practice before the courts of the District of Columbia, State of Illinois, Commonwealth of Virginia, and various federal courts, hereby enters his appearance as counsel on behalf of the State of Nevada in any proceeding related to the above-captioned matter.

Respectfully submitted,



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BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER

NEV-01

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