

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/22/05

ATOMIC SAFETY AND LICENSING BOARD

SERVED 09/22/05

Before Administrative Judges:

Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

NEV-03

September 22, 2005

MEMORANDUM AND ORDER

(Ruling on State of Nevada's June 6, 2005 Motion to Compel)

Before the Pre-License Application Presiding Officer (PAPO) Board is a motion by the State of Nevada (State) seeking to compel production of the United States Department of Energy's (DOE) July 2004 draft license application (Draft LA) on or before the date DOE makes its initial Licensing Support Network (LSN) certification, or in the alternative, for a declaratory order to the same effect.¹ After due consideration of the written presentations and the

¹ Nevada's Motion to Compel Production of DOE's Draft Yucca Licensing Application, or in the Alternative, for a Declaratory Order (June 6, 2005) at 1 [hereinafter State Motion to Compel]. In this decision, as discussed subsequently in Part II.B.2, the term "Draft LA" refers to the draft license application submitted to DOE by its contractor, Bechtel-SAIC Company, LLC, on July 26, 2004, and its September 2004 interim iteration. It excludes the "second draft," of the license application (so described by the person in overall charge of the office responsible for producing the license application, Dr. Margaret Chu, Director of the DOE Office of Civilian Radioactive Waste Management), that was prepared in November 2004. State Motion to Compel, Exh. 10, U.S. Nuclear Waste Technical Review Board (NWTRB), Winter Board Meeting Transcript (Feb. 9, 2005) at 16 [hereinafter 2/9/05 NWTRB Transcript].

representations at an oral argument, we conclude that the Draft LA is “documentary material,” is a “circulated draft,” and is not protected by the litigation work product or deliberative process privileges. Therefore, we grant the State’s motion.

I. BACKGROUND

A. Procedural Posture

DOE initially raised the issue of the status of its Draft LA with respect to the LSN and requested briefing and early resolution of this issue. In an April 25, 2005 filing discussing the content of privilege logs, DOE stated that “drafts of the License Application and comments on those drafts” are protected by the litigation work product privilege.² During the May 4, 2005 case management conference, DOE stood by this claim and added that, because drafts of the license application are “preliminary drafts,” they need not be included on the LSN.³ In its next filing, DOE requested that we establish a briefing schedule to resolve this matter.⁴

During a May 18, 2005 case management conference, we learned that the dispute now involved a specific draft of the license application, the “July 2004 Draft LA,” and that the State agreed with DOE’s request to set a briefing schedule.⁵ At that conference, DOE repeated its desire for early resolution of the dispute on this document and suggested a procedure for handling the matter.⁶ Generally adopting DOE’s suggestions, we established a briefing schedule and the procedures to be followed. Specifically, we directed that, if the State desired to pursue

² [DOE]’s Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges (Apr. 25, 2005) at 8 n.2.

³ Tr. at 89-95.

⁴ [DOE]’s Memorandum in Response to May 11, 2005 Memorandum and Order Regarding Second Case Management Conference (May 12, 2005) at 27-29.

⁵ Tr. at 379-81.

⁶ Id. at 384.

the matter, it should make a 10 C.F.R. § 2.1018 document request for the Draft LA by May 19, 2005.⁷ We instructed DOE to respond, setting forth the specific grounds for its position, by May 23, 2005, a requirement with which DOE agreed.⁸ Thereupon, the State would have until June 6, 2005 to file a motion to compel production and a brief addressing each of DOE's grounds for refusing to produce the Draft LA.⁹ DOE and any other interested party would then have until June 20, 2005 to file responses.¹⁰ The State would have until June 28, 2005 to file a reply brief.¹¹

The parties complied with the established deadlines. On May 19th, the State requested the Draft LA.¹² DOE denied the State's request, asserting that (1) the license application is not "documentary material," but is a "basic licensing document" for which there is no specific mandate to produce drafts; (2) the Draft LA is not "documentary material" because it merely

⁷ Id. at 413-14.

⁸ Id. at 404-05, 413-14.

⁹ Id. at 414.

¹⁰ Id.

¹¹ Id. It should be noted that, because DOE raised this issue initially, we could have ordered DOE to file a motion for a protective order regarding the Draft LA, rather than requiring the State to file a motion to compel production of it. Although such procedural distinctions sometimes determine which party has the burden of proof, see 10 C.F.R. § 2.325 ("[u]nless the presiding officer otherwise orders, the applicant or the proponent of an order has the burden of proof"), this is not necessarily the case and the presiding officer can allocate the burden differently. As set forth infra Part II.B.6, and as discussed at the case management conference, Tr. at 404-12, given that DOE possesses virtually all of the relevant information regarding this draft (to whom was this document circulated? for what purpose? what comments were received?), we conclude that it should have significant elements of the burden of proof herein. This conclusion is consistent with our Second Case Management Order, which placed the burden of establishing a privilege on the claimant of the privilege. See Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution) (July 8, 2005) at 5 (unpublished) ("The privilege claimant shall have the ultimate burden of persuasion that a document or communication qualifies for a claimed privilege.").

¹² State Motion to Compel, Exh. 1, Letter from Martin G. Malsch, Egan, Fitzpatrick, Malsch & Cynkar, PLLC, to Donald P. Irwin, Hunton & Williams (May 19, 2005) at 1.

cites and relies on underlying information that constitutes documentary material; (3) even if it were documentary material, the Draft LA is a “preliminary draft,” and, as such, is specifically excluded from production on the LSN; and (4) the Draft LA is protected by the litigation work product and deliberative process privileges.¹³ The State filed its motion to compel, briefing the four reasons DOE gave for denying the State’s request and making the additional argument that refusal to produce the Draft LA violates Freedom of Information Act (FOIA)¹⁴ principles.¹⁵

DOE, the NRC Staff, and the Nuclear Energy Institute (NEI) filed responses.¹⁶ DOE insisted that the Draft LA is not documentary material or a circulated draft. It did not argue, however, that the Draft LA was privileged, as it had in its refusal letter to the State, asserting instead that the question of whether the Draft LA is a circulated draft “trumps any need to consider” the deliberative process privilege, and that the application of the litigation work product privilege is “irrelevant or at least premature.”¹⁷ The NRC Staff disagreed with the State on issues of legal interpretation, but did not take a position on the factual questions of whether the

¹³ State Motion to Compel, Exh. 2, Letter from Donald P. Irwin, Hunton & Williams, to Martin G. Malsch, Egan, Fitzpatrick, Malsch & Cynkar, PLLC (May 23, 2005) at 1-2 [hereinafter DOE Denial Letter]. Contrary to our instructions, Tr. at 408-09, and DOE’s agreement, *id.* at 405, 412-13, DOE’s denial letter provided only a brief, conclusory explanation of the reasons for denying the State’s request.

¹⁴ 5 U.S.C. § 552 (2000).

¹⁵ State Motion to Compel at 3, 21-25.

¹⁶ [DOE]’s Brief in Opposition to Nevada’s Motion to Compel Production of the Draft Yucca License Application, or in the Alternative, for a Declaratory Order (June 20, 2005) [hereinafter DOE Brief in Opposition]; Brief of the [NEI] Opposing the State of Nevada’s Motion to Compel Production of the July 2004 Draft Yucca Mountain License Application (June 20, 2005) [hereinafter NEI Brief in Opposition]. The NRC Staff filed its response on June 20, 2005 but inadvertently omitted the Table of Contents and Table of Authorities. A complete copy of its response was filed on June 21, 2005. Correction to the NRC Staff Response to Nevada’s Motion to Compel Production or Issue a Declaratory Order (June 21, 2005) [hereinafter NRC Staff Response].

¹⁷ DOE Brief in Opposition at 15.

Draft LA is documentary material, a circulated draft, or privileged.¹⁸ NEI urged us to deny the State's motion because: (1) NRC regulations do not require disclosure of any draft versions of the license application; (2) the Draft LA is not "documentary material"; and (3) the State is seeking to circumvent the established pre-license application phase of the proceeding.¹⁹ In its reply brief, the State maintained that the Draft LA is documentary material and a circulated draft, and that we may consider the public interest in deciding this matter and order disclosure of the Draft LA without undermining the adjudicatory process.²⁰

On July 12, 2005, we held oral argument on the State's motion.²¹ During the argument, it became clear that there were several important factual issues, the answers to which would materially improve the record and assist in resolving the issues before us. Accordingly, on July 18, 2005, we ordered DOE to file certain documents and to answer several questions.²² DOE responded to the order on July 29, 2005.²³ On August 11, 2005, the State filed a response to DOE's response.²⁴

¹⁸ NRC Staff Response at 1.

¹⁹ NEI Brief in Opposition at 2.

²⁰ Nevada's Reply Brief in Support of Motion to Compel Production of Draft License Application (June 28, 2005) [hereinafter State Reply Brief].

²¹ See Tr. at 441-574.

²² Licensing Board Order (Regarding State of Nevada's June 6, 2005 Motion) (July 18, 2005) (unpublished).

²³ [DOE]'s Response to the [PAPO] Board's July 18, 2005 Order (July 29, 2005) [hereinafter DOE Response].

²⁴ Nevada's Reply to [DOE]'s Response to the Board's July 18, 2005 Order (Aug. 11, 2005).

B. Regulatory Background

The issues before us arise in the context of regulations enacted to assist the Commission in meeting the three-year statutory deadline for issuing a final decision on DOE's application for a license to construct a HLW repository at Yucca Mountain, Nevada.²⁵ In order for NRC to complete this challenging assignment, the regulations require that DOE and other potential parties participate in a pre-license application document discovery phase during the period before NRC will "docket" DOE's license application. See 10 C.F.R. § 2.1012(a). During this pre-license application phase, DOE must make all of its documentary material pertaining to Yucca Mountain available on the LSN. See 10 C.F.R. § 2.1003(a)(1).

As discussed in LBP-04-20, 60 NRC 300, 311-12 (2004), "documentary material" is defined in the Commission's regulations to cover three categories of information: Class 1 Reliance Documentary Material: "Any information upon which a party . . . intends to rely and/or to cite in support of its position in the proceeding"; Class 2 Nonsupporting Documentary Material: "Any information that is known to, and in the possession of, or developed by the party that is relevant to, but does not support, that information or that party's position"; and Class 3 Relevant Reports and Studies Documentary Material: "All reports and studies, prepared by or on behalf of the . . . party, including all related 'circulated drafts,' relevant to both the license application and the issues set forth in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether they will be relied upon and/or cited by a party." 10 C.F.R. § 2.1001. The general rule is that if a document falls within any of these three classes of documentary material, then its full text must be made available on the LSN. See 10 C.F.R. §§ 2.1001, 2.1003(a)(1).

There are two relevant exceptions to this rule. First, the regulations exclude "preliminary drafts." 10 C.F.R. § 2.1003(a)(1). This term is defined negatively as "any nonfinal document that

²⁵ Nuclear Waste Policy Act (NWPA) of 1982 § 114(d), 42 U.S.C. § 10134(d) (2000).

is not a circulated draft.” 10 C.F.R. § 2.1001. For its part, “circulated draft” is defined as any “nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred.” Id. Thus, a document must meet at least five criteria in order to be a “circulated draft”: (1) nonfinal; (2) circulated; (3) for supervisory; (4) concurrence or signature; and (5) a nonconcurrence. See infra Part II.B.1-5. “Circulated drafts” are not eligible for the deliberative process privilege, see 10 C.F.R. § 2.1006(c), and unless otherwise privileged (e.g., litigation work product), must be produced in full text as documentary material. See 10 C.F.R. § 2.1003(a)(1). The status of the Draft LA as a “circulated draft” is a central issue in controversy.

The second exception is that a participant is not required to produce the full text of documentary material that is subject to a claim of privilege, but instead must produce only an electronic bibliographic header for the document. See 10 C.F.R. § 2.1003(a)(4)(i). Thus, if a document is protected by one of the NRC’s “traditional discovery privileges” (e.g., the attorney-client privilege, the litigation work product privilege, or the deliberative process privilege), only its header need be made available on the LSN. See 10 C.F.R. § 2.1006; 54 Fed. Reg. 14,925, 14,935 (Apr. 14, 1989).

C. Factual Background

1. Origin and Delivery of July 2004 Draft LA

There is a long history underlying the Draft LA. In 1982, when the NWPA was enacted, DOE was charged with preparing and submitting an application to NRC for a license to construct a high-level waste (HLW) geologic repository.²⁶ As recounted in LBP-04-20, 60 NRC at 303-06, since 1982 DOE has spent many years and billions of dollars on this task. Then, in 2002, the Secretary of Energy recommended Yucca Mountain to the President for the HLW repository.

²⁶ See NWPA of 1982, Pub. L. No. 97-425, Title I §§ 112-114 (codified as amended at 42 U.S.C. §§ 10132-10134 (2000)).

See 67 Fed. Reg. 9048 (Feb. 27, 2002). The President then recommended Yucca Mountain to Congress. Over the State of Nevada's formal disapproval, the Congress responded by passing a joint resolution approving the development of Yucca Mountain as a repository. The President signed the joint resolution on July 23, 2002.²⁷ This event triggered the statutory requirement that DOE submit a license application to the NRC within ninety days (i.e., by October 21, 2002).²⁸

DOE did not meet the statutory deadline, and instead set December 2004 as the target date for submitting its application. In May 2003, Dr. Margaret Chu, the Director of the DOE Office of Civilian Radioactive Waste Management (OCRWM), stated before the U.S. Nuclear Waste Technical Review Board (NWTRB), a statutorily-created board tasked with reviewing the progress of the Yucca Mountain project,²⁹ that DOE was focused on submitting a "high quality license application by December '04."³⁰ Over the following nineteen months, Dr. Chu and W. John Arthur III, the OCRWM Deputy Director for the Office of Repository Development (ORD), reiterated to the NWTRB that DOE planned to file the license application in December 2004 and reported on DOE's progress toward this goal.³¹ To meet the December 2004 deadline, DOE anticipated it would make the necessary documentary material available in June 2004, when it

²⁷ See Approval of Yucca Mountain Site, Pub. L. 107-200, 116 Stat. 735 (codified as amended at 42 U.S.C. § 10135 note (2000)).

²⁸ See NWSA of 1982 § 114(b) (codified as amended at 42 U.S.C. § 10134(b) (2000)).

²⁹ See 42 U.S.C. §§ 10262-10263 (2000). Because the NWTRB is charged with reviewing DOE's technical and scientific activities relating to Yucca Mountain, senior DOE officials often address the board at NWTRB meetings and give updates on the status of DOE's application. NWTRB meeting transcripts are available at <http://www.nwtrb.gov/meetings/meetings.html>.

³⁰ See State Motion to Compel, Exh. 4, NWTRB, Spring Meeting Transcript (May 13, 2003) at 16.

³¹ State Motion to Compel, Exh. 5, NWTRB, Fall 2003 Board Meeting Transcript (Sept. 16, 2003) at 15; Exh. 6, NWTRB, Repository Design Update Panel on the Engineered System Transcript (Jan. 20, 2004) at 16, 24, 27-28 [hereinafter 1/20/04 NWTRB Transcript]; Exh. 7, NWTRB, 2004 Spring Meeting Transcript (May 18, 2004) at 59-60, 64-65.

would certify its LSN collection.³² DOE nominally met this goal when it certified its LSN collection on June 30, 2004, although that certification was challenged and subsequently stricken. See LBP-04-20, 60 NRC at 300.

On July 26, 2004, Bechtel-SAIC Company, LLC (BSC), DOE's prime contractor for the Yucca Mountain project, delivered the approximately 5,800 page³³ Draft LA to DOE.³⁴ This event, the "Submission of a Complete Draft LA," was a major milestone under the DOE-BSC contract, which, if met, would entitle BSC to a performance-based incentive (PBI) fee of \$11,043,476.³⁵ Producing a complete Draft LA in July was essential to DOE's ability to file the final license application in December.³⁶ Thereafter, the July 26, 2004 draft went through a review and iterative modification process,³⁷ resulting in what DOE called its "second draft" that was generated in November 2004.³⁸

³² 1/20/04 NWTRB Transcript at 24.

³³ Tr. at 551.

³⁴ DOE Brief in Opposition, Attach. B, Declaration of Joseph D. Ziegler (June 20, 2005) ¶ 2 [hereinafter Ziegler Decl.]; DOE Response at 1.

³⁵ DOE Brief in Opposition, Attach. A, DOE-BSC Contract, Modification No. A057 at B-6 to B-7 [hereinafter DOE-BSC Contract]. The Draft LA submitted by BSC apparently met DOE's requirements. See State Motion to Compel, Exh. 11, Steve Tetreault, Yucca Mountain Contractor Qualifies for \$11 Million Payment, Pahrump Valley Times (Aug. 4, 2004). DOE did not, however, pay the PBI for the Draft LA because, due to supervening events, DOE and BSC subsequently renegotiated the contract, eliminating these milestones. DOE Brief in Opposition, Attach. C, Declaration of Kenneth W. Power (June 20, 2005) ¶¶ 2-3.

³⁶ See 1/20/04 NWTRB Transcript at 26-27.

³⁷ Tr. at 502.

³⁸ 2/9/05 NWTRB Transcript at 16.

2. DOE's Draft LA Review Plan

DOE's technical and managerial review of the Draft LA was to be conducted pursuant to DOE's July 2004 License Application Management Plan (LAMP), which established the process and framework for the review process.³⁹ The key elements of the July LAMP included:

4.4.2. Technical Team Review Process⁴⁰

[A] formal, multidisciplinary review consisting of BSC, ORD, RW headquarters, GC, EM (including NSNFP, NR, SO, EH, and USGS personnel . . . [including] meetings [to] provide information regarding the review schedule, review period, due date for comments, comment resolution period, and final concurrence on the sections being reviewed.

. . . .

4.4.2.4 Technical Team Concurrence Review and Comment Resolution

[This involves review of] the concurrence draft to make sure the comments made by members of [the respective] organization[s] have been addressed satisfactorily [and] . . . [t]o facilitate concurrence, a comment resolution meeting

. . . .

4.4.4.3. Resolution of Joint Comments

Following the joint chapter reviews, representatives from the ORD, NR, and BSC will attend a joint meeting . . . to resolve comments . . . [a]t the end of [which], signed concurrence will be obtained from representatives of each of the organizations that attended the meeting This concurrence will indicate agreement with the completeness and accuracy of the joint chapter review draft . . . as augmented by documented actions to be taken to resolve any outstanding issues.

. . . .

4.4.4.5 Final Concurrence

Once the changes resulting from the . . . joint chapter reviews have been incorporated [into the LA], . . . signature sheets . . . indicating concurrence with

³⁹ DOE Response at 6; Exh. C, DOE, OCRWM, Management Plan for Development of the Yucca Mountain License Application (July 2004) [hereinafter July LAMP].

⁴⁰ As used in the LAMP, "RW headquarters" refers to OCRWM; "GC" to the DOE Office of General Counsel; "EM" to the DOE Office of Environmental Management; "NSNFP" to the National Spent Nuclear Fuel Program; "NR" to Naval Reactors, DOE; "SO" to the DOE Office of Security; "EH" to the DOE Office of Environment, Safety, and Health; and "USGS" to the U.S. Geological Survey. July LAMP at xiii.

the resulting draft LA text will be obtained from the representatives of each organization

The production team will incorporate the changes from the final concurrence review and will prepare the LA for DOE headquarters.

. . . .

4.4.6 Submittal to DOE Headquarters

The ORD will submit the draft LA to DOE headquarters for review and concurrence.

. . . .

4.4.7.2 Signature of the OCRWM Deputy Director, ORD

After incorporation of the comments from the final concurrence review, the LA is provided to the OCRWM Deputy Director, ORD [i.e., the DOE official designated to sign the LA for filing with NRC].⁴¹

In September 2004, in the middle of DOE's review of the Draft LA, DOE revised its LAMP.⁴² The September LAMP retained the Technical Team Review step,⁴³ the BSC and ORD Joint Chapter Review step,⁴⁴ and the DOE headquarters concurrence requirements.⁴⁵ However, the September LAMP deleted the "Final Concurrence" step from the July LAMP section 4.4.4.5 and in lieu thereof inserted the "LA Completion" step.⁴⁶ This step covered several elements, including a "Joint Management Review," described as follows:

A final management review of the LA will be performed to assess the overall completeness and accuracy of the LA. LA sections will be evaluated to ensure actions of LA Open Items resulting from the chapter reviews have been adequately resolved. The joint management review will also evaluate the list of

⁴¹ July LAMP at 13-17 (emphasis added).

⁴² DOE Response at 6; Exh. D, DOE, OCRWM, Management Plan for Development of the Yucca Mountain License Application (Sept. 2004) [hereinafter September LAMP].

⁴³ September LAMP § 4.4.2.

⁴⁴ See id. § 4.4.3

⁴⁵ See id. § 4.4.4.7.

⁴⁶ See id. § 4.4.4.

LA issues that have not been fully resolved or closed to ensure an acceptable path forward exists.

The joint management review team will be lead by the Director of the OLAS; the OCRWM Deputy Director, ORD; and the Repository Development Manager, BSC. The joint management team will include full- or part-time participation by the following individuals or their designees:

Director, OCRWM
OCRWM Deputy Director, ORD
General Manager, BSC
Lead legal counsel
Director, Office of Project Management and Engineering.⁴⁷

The license application would be submitted to DOE “headquarters” for its review and concurrence only after the Joint Management Review and certain completion, validation, and certification activities.⁴⁸ At that point, the license application would be submitted to “DOE headquarters [for] concurrence,”⁴⁹ for “final concurrence,” and for signature by the OCRWM Deputy Director ORD, W. John Arthur, III.⁵⁰

3. DOE’s Actual Review of the Draft LA

The record reflects that the Draft LA underwent all of the steps specified in the September LAMP up to, but not including, formal submission of the license application to DOE “headquarters.” The Draft LA or relevant portions of it were circulated to over ninety key supervisors and managers, including senior individuals such as Dr. Chu, Director, OCRWM; James Owendoff, Associate Director of Integration, OCRWM; Theodore Garrish, Deputy Director, Office of Strategy and Program Development, OCRWM; W. John Arthur, III, OCRWM Deputy Director, ORD; Joseph Ziegler, Director, Office of License Application Strategy, OCRWM;

⁴⁷ Id. § 4.4.4.3.

⁴⁸ See id. § 4.4.4.3 to -.5.

⁴⁹ Id. § 4.4.4.7.

⁵⁰ Id. § 4.4.5.2.

Storm Kauffman, Director, Reactor Safety and Analysis Division, Naval Nuclear Propulsion Program (NNPP); John McKenzie, Director, Regulatory Affairs Division, NNPP; Lee Liberman Otis, General Counsel, DOE; Gary Lavine, Deputy General Counsel, Environment & Nuclear Programs, DOE Office of General Counsel; DOE's outside counsel, Hunton & Williams; John Mitchell, General Manager of BSC; and Margaret McCullough, Deputy General Manager of BSC.⁵¹

It is also clear that some of these key managers and supervisors spent a considerable amount of time reviewing and commenting on the Draft LA. On September 20, 2004, Mr. Arthur, the DOE official designated to sign the final license application, stated that "myself and a number of out [sic] senior managers have been spending continuously over the last three weeks, and it will complete in the next week and a half, the full review, integrated review of every section of that license [application] of the 70 subsections."⁵² At that same September meeting, Mr. Arthur's supervisor, Dr. Chu, assured the NWTRB that DOE was moving ahead at "full speed" and still on schedule to file the final license application in December 2004.⁵³ Later, Dr. Chu characterized DOE's activities as follows: "You may remember that our Management and Operating contractor, BSC, delivered the first draft of the license application in July of 2004, and we reviewed the draft intensively, and made many comments . . . which were incorporated into our second draft, which was delivered to us in November of 2004."⁵⁴

More specifically, DOE's responses to several of our questions correlate DOE's review of the Draft LA with the various steps specified in DOE's license application management plans.

⁵¹ DOE Response at 9-14; Exhs. J to M.

⁵² State Motion to Compel, Exh. 8, NWTRB, Fall Meeting Transcript (Sept. 20, 2004) at 42 [hereinafter 9/20/04 NWTRB Transcript].

⁵³ Id. at 31-32.

⁵⁴ 2/9/05 NWTRB Transcript at 16.

First, the July 26, 2004 iteration of the Draft LA underwent and completed the “Technical Team Review,” including “concurrence review and comment resolution.”⁵⁵ Second, DOE acknowledges that the Draft LA underwent and completed the “Joint Chapter Review” step specified in section 4.4.3 of the September LAMP.⁵⁶ This included joint DOE and BSC meetings, signed concurrences, and preparation of the license application for final concurrences.⁵⁷ DOE completed the Joint Chapter Review in August 2004.⁵⁸ DOE described its Technical Team Review and Joint Chapter Review as an “iterative process,”⁵⁹ with “new drafts of the various sections . . . emerging in September.”⁶⁰

Next, the September iteration of the Draft LA underwent and completed the Joint Management Review step specified in section 4.4.4.3 of the September LAMP.⁶¹ As specified in Part I.C.2, this step consisted of a “final joint management review of the LA” by key senior officials including the OCRWM Director, the OCRWM Deputy Director, ORD, the Director of the DOE Office of License Application and Strategy, the General Manager of BSC, the lead legal

⁵⁵ See September LAMP §§ 4.4.2, 4.4.2.4. The fact that the Draft LA underwent and completed step 4.4.2, is demonstrated by DOE’s acknowledgment that it underwent and completed the subsequent steps of 4.4.3 (Joint Chapter Review) and 4.4.4 3 (Joint Management Review).

⁵⁶ DOE Response at 7.

⁵⁷ See September LAMP §§ 4.4.3.3 to 4.4.3.4.

⁵⁸ Ziegler Decl. ¶ 5; DOE Response at 7.

⁵⁹ Tr. at 502-03.

⁶⁰ Id. at 502. “[S]et in motion then was the process for the author teams to look at the comments, respond to the comments. The responses could be literally adopting exactly what was said, or this iterative process back and forth discussing the comments. As the author teams and the technical review teams worked through that iterative process, new drafts of the various sections emerged, started emerging in September.” Id. “[T]he iterative process between the chapter authors and the review teams were ongoing in September.” Id. at 503.

⁶¹ DOE Response at 7.

counsel, and the Director of DOE's Office of Project Management and Engineering.⁶² Mr. Arthur described this as follows: "In September 2004 DOE and [BSC] completed a major management review of the draft LA. . . . Following the September management review, DOE and BSC produced an interim consolidated draft LA. This will form the basis for the final application."⁶³ Mr. Ziegler stated that "a comprehensive management review of the LA has been completed, and data qualification, software verification, and model validation are essentially complete."⁶⁴

During the Joint Chapter Review and the Joint Management Review, "virtually everyone identified in response to Question 6 [i.e., the ninety plus senior officials and managers] had some kind of comment – whether written or oral – . . . requesting that the draft license application be changed 'in some way.'"⁶⁵ However, these comments "were not systematically tracked to individuals."⁶⁶ Not all of these comments or open items were resolved by November 22, 2004, and even now there remain some open items ("ongoing refinements") for issues that arose before that date.⁶⁷ After the completion of the Joint Management Review in September 2004, DOE continued to work on the license application, to gather supporting information, to address open items, and to conduct various validation activities.⁶⁸

⁶² September LAMP § 4.4.4.3.

⁶³ DOE Response, Exh. P, Summary of the [NRC/DOE] Quarterly Management Meeting in Rockville, Maryland (Nov. 22, 2004) at 4 (emphasis added).

⁶⁴ Id. at 8 (emphasis added).

⁶⁵ DOE Response at 16.

⁶⁶ Id.

⁶⁷ Id. at 17.

⁶⁸ See id. at 8; September LAMP §§ 4.4.4.4 (Completion of Supporting Documents), 4.4.4.5 (Validation and Certification Activities).

DOE is adamant, however, that “the license application was not submitted to DOE in October, 2004 for concurrence review as estimated in Figure 6 of the September 2004 [LAMP].”⁶⁹ Stated another way, the Draft LA did not formally reach step 4.4.4.6 of the September LAMP, “Preparations for LA Submittal to DOE Headquarters.”⁷⁰

4. November Termination of Review of Draft LA

In November 2004, adverse developments in two cases, one in the courts and one before us, provided the coup de grace to DOE’s plan to file its license application in December 2004. On July 9, 2004, the United States Court of Appeals for the District of Columbia Circuit had vacated the United States Environmental Protection Agency (EPA) radiation-exposure standard for Yucca Mountain. The EPA standard specified the key environmental criteria that any DOE license application must satisfy. The Court ruled that EPA’s standard violated section 801 of the Energy Policy Act of 1992⁷¹ because the regulatory 10,000-year compliance period was not “based upon and consistent with” the findings and recommendations of the National Academy of Sciences. NEI v. EPA, 373 F.3d 1251, 1268-73 (D.C. Cir. 2004). On September 1,

⁶⁹ DOE Response at 8; see also DOE Response, Exh. E, Yucca Mountain Project License Application, Plan of Action and Milestones Draft (Oct. 15, 2004).

⁷⁰ See DOE Response at 8; September LAMP at 35, Fig. 6, ID 22. Although the Draft LA was never formally submitted to “DOE headquarters” for review and concurrence pursuant to Step 4.4.4.6 of the September LAMP, DOE’s answers make clear that the Draft LA was submitted to and reviewed by numerous high level DOE officials who appear to be DOE Headquarters officials. These include Dr. Chu, the Director, OCRWM; James Owendoff, Associate Director of Integration; Theodore Garrish, Deputy Director, Office of Strategy and Program Development; John Arthur, OCRWM Deputy Director, ORD; Joseph Ziegler, Director, Office of License Application Strategy; Storm Kauffman, Director, Reactor Safety and Analysis Division (NNPP); John McKenzie, Director, Regulatory Affairs Division of the Naval Nuclear Propulsion Program (NNPP); Lee Liberman Otis, General Counsel DOE; and Gary Lavine, Deputy General Counsel, Environment & Nuclear Programs. This extensive “Headquarters” review, indicates that the subsequent formal submission of the document to “DOE Headquarters” is more of a final formality than the arena where the substantive objections and issues are raised.

⁷¹ Codified at 42 U.S.C. § 10141 note (2000).

2004, the D.C. Circuit denied both the request for rehearing and the request for rehearing en banc, NEI v. EPA, 373 F.3d at 1251, but there remained the possibility of Supreme Court review. Despite this setback, DOE proceeded with its review as scheduled, still planning to submit the license application in December 2004.⁷²

Meanwhile, on August 31, 2004, we granted the State's motion challenging the sufficiency of the production of documentary material by DOE and striking DOE's certification regarding the availability of its documentary material on the LSN. See LBP-04-20, 60 NRC at 300. Without a valid June 2004 certification, the NRC could not docket DOE's license application, even if it were filed in December 2004. See 10 C.F.R. § 2.1012(a). DOE appealed a portion of the Board's decision.

In November 2004, both appeals – and any hope of DOE filing its license application in December 2004 – came to an end. On November 10, 2004, the Commission declined to reverse our August 31, 2004 decision and, instead, held DOE's appeal in abeyance. See CLI-04-32, 60 NRC 469 (2004).⁷³ Likewise, the deadline for filing a petition for a writ of certiorari to seek Supreme Court review of the D.C. Circuit's decision passed on November 30, 2004. In short, it became clear, just as DOE was on the verge of submitting its license application, that this timetable needed to be abandoned.⁷⁴ Until that moment, DOE pursued an aggressive and high level review of the Draft LA, and produced a new draft of the license application in

⁷² See 9/20/04 NWTRB Transcript at 31 (Dr. Chu assuring the NWTRB that DOE was still on schedule to file the final license application in December 2004).

⁷³ We note that, because DOE appealed only one of the two independent grounds for our decision striking the certification, even if the Commission were to have ruled in DOE's favor, the certification could not have been reinstated.

⁷⁴ See State Motion to Compel, Exh. 9, Steve Tetreault, DOE Revises Yucca Schedule: Application Won't Be Submitted by Dec. 31, Las Vegas Rev.-J. (Nov. 23, 2004).

November 2004 that would have been ready for final DOE headquarters review and December 2004 submission.⁷⁵

II. ANALYSIS

This case presents three broad issues relating to whether DOE must make the full text of its Draft LA available on the LSN at the time of its initial certification under 10 C.F.R. § 2.1009(b). The first concerns whether the Draft LA constitutes “documentary material.” The second focuses on whether the Draft LA is a “circulated draft,” which (unless otherwise privileged) must be on the LSN, or a “preliminary draft,” which need not. The third concerns whether the Draft LA is protected by the litigation work product privilege. For the reasons set forth in more detail in Parts A, B, and C, we conclude that the Draft LA is documentary material, is a circulated draft, and is not subject to any legitimate claim of privilege. Thus, DOE must make the Draft LA available when it certifies that all of its documentary material is on the LSN.

First, it is clear from the record before us that the Draft LA satisfies the second (i.e., non-supporting material revealing potential weaknesses in DOE’s position) and third (i.e., relevant reports and studies) prongs of the definition of documentary material. Second, the Draft LA meets the definition of a circulated draft because the record shows that it was a key document that was widely circulated to numerous senior DOE officials for their substantive agreement or “concurrence,” and that many of these individuals provided substantive comments that required that the Draft LA be changed before they would approve it (i.e., nonconcurrences). Finally, by failing to defend its assertion of the litigation work product privilege, DOE has waived it. In any event, the Draft LA does not qualify for the litigation work product privilege because it was prepared for the independent regulatory purpose of meeting NRC’s license application

⁷⁵ See 2/9/05 NWTRB Transcript at 16-18.

requirements, see 10 C.F.R. §§ 63.21-63.24, and not because of an anticipated hearing or litigation.

A. Documentary Material

NRC regulations require that DOE make its documentary material available on the LSN, see 10 C.F.R. § 2.1003(a)(1), and divides “documentary material” into three classes: Class 1 “reliance” documentary material; Class 2 “nonsupporting” documentary material; and Class 3 “relevant reports and studies” documentary material. See 10 C.F.R. § 2.1001; Part I.B supra. The State argues that the Draft LA fits all three classes of documentary material.⁷⁶ On the other hand, DOE insists that the Draft LA fails to fit within any of the three classes of documentary material.⁷⁷ Additionally, DOE makes the more general argument that the license application is not documentary material because it is instead a “basic licensing document.”⁷⁸ We first address DOE’s general argument regarding basic licensing documents before examining each of the three classes of documentary material.

1. Basic Licensing Documents

DOE maintains that the license application is not documentary material, but instead falls within a separate and distinct category of “basic licensing documents” for which there is no specific requirement to produce drafts.⁷⁹ DOE’s argument is as follows: Under 10 C.F.R. § 2.1003(a), DOE must make its “documentary material” available on LSN. Under section 2.1003(b), DOE must also make its “basic licensing documents” available. To avoid making subsection (b) superfluous, “documentary material” and “basic licensing documents” must be

⁷⁶ State Motion to Compel at 4-7.

⁷⁷ DOE Brief in Opposition at 2-7.

⁷⁸ Id. at 2-3.

⁷⁹ Id. at 2-3; Tr. at 489-94.

mutually exclusive categories. Therefore, DOE reasons, because the license application is specifically listed in subsection (b) as a basic licensing document, it cannot also be documentary material.

We reject the argument that “documentary material” and “basic licensing documents” are mutually exclusive categories. Nothing in the language of the Subpart J regulations requires or supports this result. To the contrary, the definition of “documentary material” counsels against such an interpretation because the documents listed in 10 C.F.R. § 2.1003(b) as examples of basic licensing documents (e.g., the environmental impact statement) are also specifically listed in the Topical Guidelines in Regulatory Guide 3.69 (Reg. Guide 3.69) as examples of documents that should be made available on the LSN, presumably under the Class 3 (relevant reports and studies) category.

In addition, the Commission made it clear that “documentary material” includes “basic licensing documents” when it stated that “[r]eports’ and ‘studies’ [Class 3 documentary material] will also include the basic documents relevant to licensing such as the DOE EIS, the NRC Yucca Mountain Review Plan, as well as other reports or studies prepared by a LSN participant or its contractor.” 69 Fed. Reg. 32,836, 32,843 (June 14, 2004) (emphasis added).

Thus, the regulation and the Commission’s statement make clear that there is no mutually exclusive dichotomy between 10 C.F.R. § 2.1003(a) and (b). Instead, basic licensing documents are simply a subcategory of documentary material.⁸⁰ As we see it, subsection (b) is

⁸⁰ It should also be noted that accepting DOE’s argument would result in an incongruous result under the Commission’s pre-license application document discovery regulations. On the one hand, circulated drafts revealing non-concurrences of DOE experts on relevant, but minor, technical reports and studies would be required to be disclosed through production on the LSN. On the other hand, circulated drafts revealing non-concurrences on the Safety Analysis Report portion of the license application – the most critical license application document – seemingly would not be disclosed on the LSN. In drafting the regulations, we do not believe the Commission intended such an illogical result or one that is the very antithesis of ensuring public health and safety.

primarily intended to provide direction as to who is responsible for making these very large documents, which will be in the hands of multiple parties, electronically available on the LSN. The plain language of subsection (b) supports this conclusion, directing that basic licensing documents “shall be made available in electronic form by the respective agency that generated the document.” 10 C.F.R. § 2.1003(b) (emphasis added).⁸¹

2. Class 1 “Reliance” Documentary Material

Although it does not provide a separate analysis of Class 1 and Class 2 documentary material, the State claims two grounds on which the Draft LA is Class 1 “reliance” documentary material. First, the State argues that “differences between the draft and final LA, would be something that a litigant would likely use to support its position and oppose DOE’s position.”⁸² Second, the State explains that the Draft LA contains the type of information that DOE is likely to rely upon because the Draft LA was a relatively complete draft which addressed all applicable regulatory requirements.⁸³ We disagree with the State’s argument.

⁸¹ In this regard, DOE also argues that requiring it to produce drafts of the license application creates a “one-sided obligation” because the State is not required to produce draft contentions, which “certainly [would be] of interest to DOE and theoretically might be useful to rebut the State’s positions in the license proceeding.” DOE Brief in Opposition at 7. Similarly, DOE argues that “[t]he public interest would benefit from having its license application be the most sound it can be, and the licensing proceeding could be facilitated if DOE could address contentions in the pre-license application phase.” *Id.* at 18. Thus, according to DOE, “[b]y the same logic that would obligate DOE to produce draft versions of its license application in conjunction with its initial LSN certification, the State and others should be required to share their draft contentions with DOE at this time.” *Id.* The State notes, however, that it is not seeking a one-sided obligation and states in its brief (as it did at oral argument) that it fully intends to make the circulated drafts of its contentions available on the LSN. State Reply Brief at 17; Tr. at 473. Given that the State concedes that it intends to make “circulated drafts” of its contentions available on the LSN, there is no “one-sided obligation” imposed upon DOE in making the Draft LA available on the LSN.

⁸² State Motion to Compel at 4.

⁸³ State Reply Brief at 5-6.

As to the State's first argument, it fundamentally misconstrues one element of the scope of the "reliance category" of documentary material. It applies to "[a]ny information upon which a potential party . . . intends to rely and/or cite in support of its position in the proceeding."

10 C.F.R. § 2.1001. Whether or not a potential party intends to rely upon or to cite a document is determined from the perspective of the potential party that is producing the document on the LSN. Stated another way, the phrase "potential party" in this context means the producing party. This is the only logical interpretation, because it would be impossible for the producing party to know whether some unknown third party might later "intend to rely and/or cite" the document in support of the third party's unknown position. Accordingly, in this situation, the Draft LA is Class 1 documentary material only if DOE intends to rely upon it to support DOE's position in the proceeding. Whether, as the State asserts, some other potential party might cite or rely upon the document in the future is not relevant to its status as "reliance" documentary material when DOE is the producing party.

The State's second argument, i.e., that DOE is "likely to rely" on the information in the Draft LA and therefore that it should be classified as reliance documentary material, suffers from several defects. While it may be true that the Draft LA was used, and in some sense "relied" upon, by DOE for purposes of formulating the second draft, this is not the type of reliance required to constitute documentary material. It is implicit from DOE's arguments that it does not intend to rely upon or to cite the Draft LA "in the proceeding." See 10 C.F.R. § 2.1001. Further, merely because there is a continuity of certain "information" between the Draft LA and the final license application does not render the Draft LA "reliance" category documentary material. The question is whether the producing party intends to rely upon or to cite the document in question, not just some of the information in it.⁸⁴

⁸⁴ Indeed, nothing could be more self-serving than to cite to your own drafts as support for your final document.

3. Class 2 “Nonsupporting” Documentary Material

The State also asserts that the Draft LA is Class 2 “nonsupporting” documentary material because “differences between the draft and final LA, would be something that a litigant would likely use to support its position and [to] oppose DOE’s position.”⁸⁵ The State explained at oral argument that a comparison between the Draft LA and the final license application would “reveal the key differences that scientists had in the program or that scientists had with the politicians in the program.”⁸⁶

DOE argues that the State’s position asserting the differences between the Draft LA and the final license application is unavailing because the State’s position is based on an ungrounded conclusory assertion⁸⁷ and because the final license application, not any draft license application, is what “is at issue in [NRC] adjudications.”⁸⁸

We conclude that the Draft LA constitutes “nonsupporting” documentary material, although for reasons somewhat different than those propounded by the State. The definition of this category is “[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, [Class 1] information or that party’s position.” 10 C.F.R. § 2.1001. As with “reliance” documentary material, whether or not a document fits the “nonsupporting” category is determined from the perspective of the potential party producing the

⁸⁵ State Motion to Compel at 4.

⁸⁶ Tr. at 555.

⁸⁷ See also NEI Brief in Opposition at 5 (similarly arguing that the State “offers nothing more than argument of counsel that the Draft LA ‘would likely’ be used by a litigant opposing [DOE]’s position”).

⁸⁸ DOE Brief in Opposition at 4 (citing Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999)).

document. Does the document “not support” the producer’s information or position?⁸⁹ If so, it is nonsupporting documentary material.

In this case, we agree with the State that a comparison between the Draft LA and the final license application would likely identify potential safety and environmental difficulties, issues, and changes and thus, would provide information that undermines, or at least does not support, DOE’s ultimate position. In these circumstances, we conclude that the Draft LA provides information that “is relevant to, but does not support” DOE’s position and is “nonsupporting” documentary material.

We reject DOE’s argument that we should dismiss as “conclusory” the State’s assertion about the key differences between the Draft LA and the final license application because the State has not identified these differences. It is obvious to any litigator that the differences between the draft and the final version of a document often reveal defects or difficulties that raise questions about the final version. It is equally obvious that it would be an inappropriate burden to require that the one challenging a failure to produce documentary material provide concrete factual support showing that the document, which the challenger has not seen, does not support its possessor’s position.⁹⁰ Here, we believe that basic logic, as well as the State’s

⁸⁹ This perspective is different from the one posed by the State, i.e., whether the document is “something that a litigant would likely use to support its position and oppose DOE’s position.” State Motion to Compel at 4 (emphasis added). Nonsupporting documentary material covers documents that do not support the producer’s position or information, not just those documents that support an opponent’s position.

⁹⁰ This is not a situation where there are other policy considerations, such as national security concerns, that require that a participant seeking to obtain a document show that there is a “need to know” the contents of the document. See, e.g., Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 72-73 (2004) (holding a party’s “belief that the information is needed to provide context or background may have little or no bearing” on a safeguards “need-to-know” determination because there is a “strong interest in limiting access to safeguards and security information”).

description as to how it proposes to use DOE's Draft LA to oppose DOE's information or position, show that the Draft LA constitutes Class 2, nonsupporting documentary material.⁹¹

DOE's citation to Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 338 (1999), is inapposite, as that case stands merely for the proposition that petitioners may not wait for the NRC Staff's review to formulate contentions, but instead must base their contentions on the filed license application. In this case, the State is not seeking to delay filing its contentions until it receives more information. To the contrary, it is seeking to assure the full availability of documentary material during the pre-application discovery phase of this unique proceeding so that, when the final license application is filed, it may formulate more complete and detailed contentions alleging flaws in that document due to changes that may have occurred, for whatever reason, in the drafting process.⁹²

⁹¹ Before leaving the topic of "reliance" and "nonsupporting" documentary material, we point out that these categories will likely grow once the potential parties file contentions and the "positions" of the parties become known. For example, once a license application is docketed and contentions are filed, the Staff may take positions on them. Likewise, once contentions are known, DOE will respond and take certain positions. At this point, each of them will need to examine their documents, and to supplement, as appropriate, its production of documentary materials to include documents that contain information that it will rely upon, or that does not support its positions. See 69 Fed. Reg. at 32,843. Accordingly, even if a party makes a good faith production of all documentary material at the time of its initial certification, all potential parties are counseled to preserve other extant documents, until after contentions are filed and positions are known. See LBP-04-20, 60 NRC at 323-24.

⁹² One of the primary reasons the Commission created the LSN and required early availability of documentary material was to allow "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." 53 Fed. Reg. 14,925, 14,926 (Apr. 14, 1989). As the Commission stated just last year:

[T]he history of the LSN and its predecessor, the Licensing Support System, makes it apparent it was the Commission's expectation that the LSN, among other things, would provide potential participants with the opportunity to frame focused and meaningful contentions and to avoid the delay potentially associated with document discovery, by requiring parties and potential parties to the proceeding to make all their Subpart J-defined documentary material available through the LSN prior to the submission of the DOE application. These

4. Class 3 “Relevant Reports and Studies” Documentary Material

The State asserts that the Draft LA is Class 3 “relevant report and study” documentary material because the Draft LA is relevant to the final license application and also to the issues set forth in the Topical Guidelines in Regulatory Guide 3.69 (Reg. Guide 3.69).⁹³ DOE contests the State’s designation of the Draft LA as “relevant report and study” material because, it alleges, interpreting the Draft LA as being relevant to the license application results in a convoluted reading of the regulations and because Reg. Guide 3.69 fails to list the Draft LA among the documents required to be on the LSN.⁹⁴ We reject both of DOE’s arguments and find that the Draft LA is “relevant report and study” documentary material.

The heart of any license application, and necessarily the Draft LA, is the Safety Analysis Report (SAR). The NRC’s Yucca Mountain Review Plan, which “anticipates the form and substance of the DOE license application,”⁹⁵ devotes about ninety percent of its table of contents and substantive text to providing guidance on how the NRC Staff will evaluate the SAR.⁹⁶ Given the importance with which the Staff views the SAR, it is clear that it is relevant to the final license application and, therefore, is Class 3 documentary material. This result is supported by the regulatory history previously discussed in Part II.A.1, where the Commission states that “[r]eports’ and ‘studies’ will also include the basic documents relevant to licensing.”⁹⁷ In fact,

objectives are still operational.

69 Fed. Reg. at 32,843.

⁹³ State Motion to Compel at 4.

⁹⁴ DOE Brief in Opposition at 5-6.

⁹⁵ 69 Fed. Reg. at 32,843.

⁹⁶ NUREG-1804, “Yucca Mountain Review Plan,” at v-xiii (Rev. 2, July 2003). Cf. Reg. Guide 3.69 at 3.69-3 to -6.

⁹⁷ 69 Fed. Reg. at 32,843.

there is probably not a document in DOE's possession that is more basic or more relevant to licensing than the SAR.

DOE also asserts that lumping the license application into Class 3 documentary material requires "[s]ubstitution of the phrase 'license application' for 'reports and studies' in the pertinent regulatory text," resulting in a definition that reads: "All license applications . . . relevant to . . . the license application" ⁹⁸ DOE insists that, if the Commission truly intended for the license application to be documentary material, it would have said so in plain English instead of relying upon such a "convoluted, circular and senseless" reading of its regulations. ⁹⁹ DOE's substitution of "license application" for "reports and studies" is inapt. Instead, the proper phrase to substitute is "draft license application," which gives the entirely sensible resulting reading of: "All draft license applications . . . relevant to . . . the license application" This reading is entirely appropriate, as also would be a substitution of "Safety Analysis Report" for "reports and studies."

We also find that the Draft LA is relevant to the issues set forth in Reg. Guide 3.69, which "defines the scope of documentary material that should be . . . made available via the LSN." ¹⁰⁰ Appendix A to Reg. Guide 3.69 lists examples of the types of documents that should be made available on the LSN and specifically includes the license application. ¹⁰¹ It follows that, if the license application is a type of document that must be on the LSN, then any circulated draft of that same document must also be made available on the LSN. DOE argues otherwise, asserting that, because Appendix A mentions the "license application" but does not mention "drafts" of the license application, this means that drafts are excluded and thus the Draft LA

⁹⁸ DOE Brief in Opposition at 5.

⁹⁹ See id.

¹⁰⁰ Reg. Guide 3.69 at 3.69-1.

¹⁰¹ Id. at 3.69-7.

need not be made available on the LSN.¹⁰² This argument, however, is in direct contravention of the instruction in Reg. Guide 3.69 that Appendix A is a “nonexhaustive list of types of documents that may be included in the LSN.”¹⁰³ Appendix A merely provides examples of the types of documents that are to be on the LSN, making it improper to rely on the absence of a specific example to suggest a document need not be made available.¹⁰⁴

B. Circulated Draft Analysis

The regulations parenthetically deal with the production of drafts, stating that parties shall make available “all documentary material (including circulated drafts but excluding preliminary drafts).” 10 C.F.R. § 2.1003(a)(1). This cursory statement sets up the dichotomy between preliminary drafts and circulated drafts, which are mutually exclusive. As previously noted, a “preliminary draft” is “any nonfinal document that is not a circulated draft.” 10 C.F.R. § 2.1001. The term “circulated draft” is more substantively defined as “a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred.” Id.¹⁰⁵ This definition can be broken into five essential elements requiring: (1) a nonfinal document; (2) that has been circulated; (3) to supervisors; (4) for the purposes of concurrence or signature; and (5) in which the original author or others in the

¹⁰² DOE Brief in Opposition at 6.

¹⁰³ Reg. Guide 3.69 at 3.69-2.

¹⁰⁴ Although DOE has apparently abandoned the claim, its original denial of the State’s request for the Draft LA stated that the license application is not documentary material because it “cites and relies on the ‘information’ that constitutes the documentary material.” DOE Denial Letter at 2. Essentially, DOE was arguing that the Draft LA is not a “relevant report and study” because it cites and relies upon relevant reports and studies. Nothing in the definition of documentary material prevents a document that compiles other reports and studies into a single document from also being a report or a study.

¹⁰⁵ As DOE indicates, Tr. at 531, there is nothing in the regulatory definition of a circulated draft that precludes there from being more than one such draft of a nonfinal document.

concurrence process have non-concurred. None of these elements is further defined or clarified in the regulations. We address each of these elements in turn as applicable to the Draft LA.

1. Nonfinal Document

Although the regulations do not define the phrase “nonfinal document,” the Statement of Considerations for the initial Subpart J rule gives an example of a final document as one “bearing the signature of an employee of an LSS participant or its contractors.” 54 Fed. Reg. 14,925, 14,934 (Apr. 14, 1989). Documents signed by the potential party or its contractors are “final.” However, even documents without a signature, such as memoranda and e-mails, if finalized, treated as final, or delivered to the intended addressees, can be final documents. Thus, for example, the written comments by the ninety plus reviewers of the Draft LA are presumably final documents, even if the Draft LA is not.¹⁰⁶ In this case, all parties seem to accept that the Draft LA is a nonfinal document.

2. Circulated

Here again, the record is clear that the Draft LA was widely distributed and circulated. As earlier discussed in Part I.C.3, DOE sent the July and September iterations of the Draft LA to numerous individuals.¹⁰⁷

¹⁰⁶ See Minutes of the [Sixth] HLW Licensing Support System [LSS] Advisory Committee Meeting: April 18-19, 1988 (May 31, 1988) at 4, ADAMS Accession No. ML012050034 (DOE stated that it “intended to include the concurrence sheets which summarized suggested revisions to the document, as well as any memoranda which commented upon the draft document”). The initial Subpart J regulations dealing with the LSS (the predecessor system to the LSN) and related discovery were the product of a negotiated rulemaking that was subsequently adopted, in large part, by the Commission. Consequently, with the exception of those portions of the negotiated rule not accepted by the Commission, which are not involved here, the minutes of the LSS Advisory Committee provide the greatest insight into the drafters intended meaning in the regulatory history. Those minutes are publicly available on the NRC electronic agency record systems, ADAMS.

¹⁰⁷ DOE Response at 9-15.

In this regard, we reject DOE's suggestion that, because the July 26, 2004 iteration of the Draft LA was modified during the Technical Team Review in September before it was circulated for further review by senior management for the Joint Chapter Review Step and the Joint Management Review Step, the State's motion must fail for having asked for a draft with the wrong date (i.e., arguing that the July iteration was not circulated to management, whereas the September iteration was).¹⁰⁸ DOE has acknowledged that the Draft LA was evolving, in an iterative process with large and small changes, perhaps daily, during the period from July 26, 2004 until November 2004,¹⁰⁹ when DOE generated what Dr. Chu, the Director of OCRWM, described as the "second draft."¹¹⁰ DOE's logic leads to the strained and unnecessary conclusion that each daily iteration is a different "draft," and the document requestor automatically loses unless it asks precisely for the iteration dated the same day as it was "circulated" to management. The requestor has no way of knowing the precise date. Nor would it make any sense to deny the current motion to compel on the grounds that the "July Draft" was not circulated to management, when the State could immediately file a request for, as DOE would now have it, the "September draft." We reject this approach and instead interpret the State of Nevada's request in a practical manner, consistent with DOE's own position that a "second draft" did not arise until November, as covering the July 26, 2004 iteration (which was clearly a major milestone and deliverable) and its September interim iteration, but excluding the November 2004 draft. Any other approach would result in endless sub-parsing of daily "drafts."¹¹¹

¹⁰⁸ Tr. at 502-04.

¹⁰⁹ Id.

¹¹⁰ 2/9/05 NWTRB Transcript at 16.

¹¹¹ The fact that DOE did not send the September iteration back to the beginning of its review process (i.e., restart the review entirely) further demonstrates that it should not be

3. Supervisory

The regulation specifies that a circulated draft is circulated for “supervisory” concurrence, 10 C.F.R. § 2.1001, but does not define the term “supervisory.” The Statement of Considerations merely adds that the regulation is intended to capture documents that have been subjected to “management review.” 54 Fed. Reg. at 14,934. Webster’s Third New International Dictionary at 1372, 2296 (1993), defines “manager” as “one that manages” and “supervisor” as “one that supervises a person, group, department, organization, or operation.” Under either definition, it is clear to us that a substantial number of the individuals listed by DOE in response to Question 6 of our July 18, 2005 order asking, inter alia, for the name, title, and organization of the supervisors and managers to whom the Draft LA was distributed, are “supervisors” within the meaning of the definition of “circulated draft.” The fact that not all of these individuals reviewed the entire draft merely demonstrates the document’s size and complexity and does not negate the fact that supervisors reviewed part or all of the Draft LA.¹¹²

4. Concurrence or Signature

The purpose of circulating the Draft LA to DOE managers and supervisors is where the real controversy begins. DOE asserts that a draft becomes a circulated draft only if it is distributed for the “special” and “narrow” purpose of supervisory concurrence or signature.¹¹³

Describing this as an “exacting requirement,” DOE states:

Distribution of a draft for comments, even to a supervisor, is not sufficient. The document must have reached the point where the document is distributed for approval in the form of concurrence or signature. Further, comments on a draft

considered a new draft but rather was a continuation of the review of the same draft.

¹¹² See Tr. at 551.

¹¹³ DOE Brief in Opposition at 8, 11-12.

are not sufficient, even where the draft was distributed for supervisory concurrence or signature.¹¹⁴

DOE goes on to assert that the Draft LA plainly does not qualify as a circulated draft under these standards, arguing that it was merely an “incomplete” draft in an “active state of revision,” circulated for “multidisciplinary working-level review, referred to as ‘chapter review’ by technical review teams.”¹¹⁵ DOE acknowledges that its Deputy Director, ORD and its Director of OLAS, ORD, “read various parts” of the Draft LA, but insists this was done only to “apprise themselves of the license application’s general state of preparation” and not for the purpose of their concurrence or signature.¹¹⁶ DOE also argues that the fact that the July 2004 draft was modified to conform to some of DOE’s internal objections demonstrates that it was not a circulated draft and adds that, if the State’s arguments were accepted, “essentially every draft would qualify as a ‘circulated draft’ . . . effectively writ[ing] out of existence the exclusion for preliminary drafts.”¹¹⁷

The State rejects DOE’s argument that distributing a draft “for supervisory concurrence” is limited to some “acutely formal process” because, according to the State, it would allow any party to “create an artificial internal review process that effectively eliminates the possibility of there ever being any circulated drafts.”¹¹⁸ The State asserts:

¹¹⁴ Id. at 8 (emphasis added); see also Ziegler Decl. at 2.

¹¹⁵ DOE Brief in Opposition at 10.

¹¹⁶ Id. at 10-11.

¹¹⁷ Id. at 14.

¹¹⁸ State Reply Brief at 10. Indeed, the State includes as Exhibit 3 to its motion to compel a January 8, 1993 DOE interoffice memorandum addressing whether a OCRWM record procedure has done just that. As characterized by the State, the memo author opines “that when a document cannot proceed through internal review without resolution of comments it is a circulated draft even though no formal concurrence process is identified because ‘what you have here, effectively, is something that is quacking just like the duck that HQ and the rule calls a circulated draft.’” State Motion to Compel at 8 & Exh. 3.

The ordinary definition of concur is “agree,” “assent to,” “go along with,” or “accept.” A concurrence process for a document is simply a process whereby the author of a document and others are asked by supervisors whether they agree, accept or go along with the document in question. Someone has “non-concurred,” if he or she has not agreed, accepted, or gone along with the document in question.¹¹⁹

The State further maintains that the Draft LA meets all of the criteria of a circulated draft and the fact that DOE “artificially refused” to call its “chapter review process” a “concurrence process” “elevates form over substance.”¹²⁰ The State points out that DOE’s own earlier Project Summary Schedules “mandate the word ‘concurrence’ at each successive level of DOE review.”¹²¹

Our analysis of this issue starts with the word “concurrence,” which appears, in some form, three times in the definition of circulated draft. A circulated draft is a nonfinal document circulated for supervisory “concurrence” or signature, in which the original author or others in the “concurrence” process have “nonconcurred.” 10 C.F.R. § 2.1001. Unfortunately, the key term – concurrence – is never defined. Instead, we are left to glean its definition from its plain meaning, the structure of the regulation, and then, if appropriate, the regulatory history.

First, given that the regulation speaks in terms of a document being circulated for “concurrence or signature,” 10 C.F.R. § 2.1001, it is clear that “concurrence” does not mean “signature.” Thus, “concurrence” is not limited to the final formal signature or initialing step when a document is circulated up a management chain, with each manager signing or initialing the document in boxes at the bottom until final execution and signature by the most senior official. Turning to the Statement of Considerations issued when this regulation was promulgated,¹²² a

¹¹⁹ State Reply Brief at 10-11.

¹²⁰ Id. at 11.

¹²¹ Id.

¹²² The Statement of Considerations discussion for the proposed regulation concerning circulated drafts, 53 Fed. Reg. 44,411, 44,415 (Nov. 3, 1988) and for the final regulation, 54 Fed. Reg. at 14,934, are identical, consisting of two paragraphs. These two paragraphs are

parenthetical phrase seems to equate “concurrence process” with “management review process.”¹²³ The Commission goes on to state: “Although many of the LSS participants or their contractors do not have the same type of concurrence process as DOE and NRC, the Commission expects all LSS participants to make a good faith effort to apply the intent of this provision to their document approval process.”¹²⁴ Again, unfortunately, the regulatory history fails to delineate the “type of concurrence process” to which the Commission is referring.¹²⁵

virtually identical to two paragraphs developed during the regulatory negotiation that preceded this rulemaking.

¹²³ 54 Fed. Reg. at 14,934 (“[t]he intent . . . is to capture those documents to which there has been an unresolved objection . . . in the internal management review process (the concurrence process)”; Minutes of the [Sixth] HLW Licensing Support System Advisory Committee Meeting: April 18-19, 1988 (May 31, 1988) at 4-5, ADAMS Accession No. ML012050034 (“‘concurrence draft,’ has a particular meaning in the parlance of DOE’s record management system”).

¹²⁴ 54 Fed. Reg. at 14,934.

¹²⁵ At our request, DOE provided us with a copy of the concurrence procedure it had in effect in 1988. See DOE Response, Exh. A, Department of Energy Correspondence Manual, DOE Order 1325.1A (emphasis added). The title and substance of this Manual reveal that it is intended for correspondence – a short document with short turn around – not a 5000 plus page license application years in the making. Nevertheless, the Manual states that concurrences “indicate agreement with the concept of the response and how it is written,” whereas nonconcurrences “are directed to the entire concept of the response and not to how the response is written.” *Id.* at VI-2 (emphasis added). As set forth *infra*, we agree that the terms concurrence and nonconcurrence focus on the concepts or substance in a document, not editorial suggestions as to “how it is written.” However, we reject DOE’s argument that a nonconcurrence occurs only if someone disagrees with the “entire concept” of the Draft LA. DOE Response at 4. Although the DOE Manual may make sense as applied to items such as correspondence, it is nonsense when applied to the Draft LA. If there is anyone at DOE in 2004 who challenged the “entire concept” of submitting a license application for the HLW repository, he or she either has not read the statutory mandates of the NWPA or is ready for the Don Quixote Rest Home for Former DOE Officials. In any event, DOE itself acknowledges that DOE Order 1325.1A did not establish the concurrence process applicable to the Draft LA, which instead was governed by the July LAMP, the September LAMP, and DOE Response, Exh. E, Yucca Mountain Project - License Application Plan of Action and Milestones - Draft (October 15, 2004). See DOE Response at 6.

Later in the same Statement of Considerations, the Commission refers to the circulated draft being subjected to an “internal decision-making process.”¹²⁶

Based on these indicia, we conclude that the term “concurrence” should be given its plain meaning, i.e., “agreement” or “approval.”¹²⁷ A document that is circulated for “concurrence” is circulated for substantive agreement or approval. DOE acknowledges this point by stating that a document is circulated for supervisory concurrence when it has “reached the point where the document is distributed for approval.”¹²⁸ The State supports using the ordinary definition of concur - to “agree.”¹²⁹ Similarly, we construe the term “concurrence process” as used in 10 C.F.R. § 2.1001 as a process whereby management reviews the document for substantive agreement or disagreement. An “author or others in the concurrence process have non-concurred” within the meaning of that section when they have raised a substantive comment or objection that they think needs to be corrected or changed before the document goes further or is finalized.

We believe that the regulatory phrase “concurrence process” refers to a serious management review of a document perceived to be approaching final form, and the phrase “non-concur” refers to a concern, comment, or objection seeking a substantive change. We reject any suggestion that the concurrence process can refer only to the bureaucracy’s final sign-off sheet, must take a special narrow form, or must be expressly labeled as a “concurrence

¹²⁶ 54 Fed. Reg. at 14,934.

¹²⁷ See Webster’s Third New International Dictionary 472 (1993) (defining “concurrence” as meaning “agreement or union in action” and “agreement in opinion,” and “concur” as meaning “approve” or “agree”).

¹²⁸ DOE Brief in Opposition at 8.

¹²⁹ State Reply Brief at 10.

process.” It would allow any party to establish an artificial “final” concurrence step that would avoid the production of any circulated drafts.

Likewise, we refuse to accept that the concept of circulated draft (i.e., whether the document was circulated “for . . . concurrence”) hinges upon the subjective intent of the person who circulated it or to the after-the-fact labels applied to the process. Instead, in determining whether a “concurrence process” has occurred, we look to objective factors such as whether the document is a significant, well-developed, mostly complete draft; the nature and extent of management review devoted to the document; and whether the management review was for the purpose of agreement on the substance of the draft. In determining whether there has been a “non-concurrence,” we look at whether a supervisor or manager, or the original authors or others in the concurrence process, whose approval would be requested before the document could be finalized, provided comments that seek substantive, not just editorial, changes in the document. If so, such substantive comments, however labeled, are, in fact, deemed to be “non-concurrences.” There is no regulatory dictate that we narrowly limit the term “concurrence process” to a formalistic, final sign-off sheet, or require that “non-concurrences” must be expressly labeled as such, for any such interpretation would reward form over substance and allow potential parties to design and implement processes that could easily prevent the existence of any “circulated drafts,” except those that are identical to the final document.

Applying the foregoing criteria to the Draft LA, we conclude that it was “circulated for supervisory concurrence.” The Draft LA was the first full and consolidated version of DOE’s license application and a major deliverable by BSC to DOE.¹³⁰ Until November 22, 2004, DOE was still using the Draft LA as the operative version of the license application that DOE planned to file with NRC in December 2004. DOE obviously treated the Draft LA with utmost gravity,

¹³⁰ See 2/9/05 NWTRB Transcript at 16.

urgency, and importance, distributing the document to over ninety managers and supervisors, including many very senior DOE officials as well as innumerable other technical and editorial reviewers.¹³¹ The Draft LA was treated as the penultimate document. DOE's License Application Management Plans of July and September 2004 laid out careful, thorough, and formal review processes for the Draft LA.¹³² The Technical Team Review was "formal," "multidisciplinary," and involved "concurrence review."¹³³ The BSC and ORD Joint Chapter Reviews involved "signed concurrences."¹³⁴ The "Joint Management Review," involved some of the most senior DOE officials assessing the overall completeness and accuracy of the Draft LA for, inter alia, resolving open items to ensure an acceptable path forward.¹³⁵ As recounted in Part I.C.3, numerous senior officials, including the one official specifically designated to sign the final license application, spent many weeks poring over the Draft LA. This was "a comprehensive management review of the LA."¹³⁶

DOE acknowledges that the Draft LA was widely circulated to senior management, but nonetheless argues that this distribution was not for the purpose of concurrence or signature, and therefore the Draft LA cannot be a circulated draft.¹³⁷ Applying any realistic interpretation of the term "concurrence," DOE's position is untenable. When we asked DOE to specify, for each of the ninety plus managers and supervisors who reviewed the Draft LA, "those who submitted a

¹³¹ DOE Response at 9-15.

¹³² See Part I.C.2 supra.

¹³³ July LAMP §§ 4.4.2, 4.4.2.4.

¹³⁴ Id. § 4.4.4.3.

¹³⁵ September LAMP § 4.4.4.3.

¹³⁶ DOE Response, Exh. P, Summary of the [NRC/DOE] Quarterly Management Meeting in Rockville, Maryland (Nov. 22, 2004) at 8 (emphasis added).

¹³⁷ Tr. at 505-06; Ziegler Decl. ¶ 4.

mandatory comment or comment requesting or requiring that the Draft License Application be changed in any way,” DOE answered “virtually everyone . . . had some kind of comment – whether written or oral – at least requesting that the draft license application be changed ‘in some way.’”¹³⁸ It thus appears to us that these senior officials participated in this process as a serious and formal review pursuant to the formal License Application Management Plan and provided substantive comments on the Draft LA requesting or suggesting substantive modifications to the document. Senior officials do not need to shout or to label their comments as “non-concurrences” for underlings to get the point. Whether stated or not, the comments of DOE management represented their agreement, or not, to the Draft LA, and serious consideration and response to management’s substantive comments was an implicit, if not explicit, condition of management approval. This is the way that many bureaucracies, whether governmental or corporate, review major documents.

In short, the Draft LA underwent a major and very serious approval process, i.e., a concurrence process. That the July and September LAMPs repeatedly use the word “concurrence” to describe the process that the Draft LA underwent simply underscores this conclusion. That the Draft LA never reached the formal step of submittal to “DOE headquarters for concurrence,”¹³⁹ does not change the reality that the Draft LA had already been reviewed for approval, agreement, or “concurrence” by many very senior managers (many from DOE “headquarters”).

5. Non-Concurrence

The definition of the circulated draft requires that it be a document in which the original author or others in the concurrence process have “non-concurred.” 10 C.F.R. § 2.1001. As

¹³⁸ DOE Response at 16.

¹³⁹ See September LAMP § 4.4.4.6.

discussed above, we interpret the word “non-concurrence” in a practical way to mean a comment or objection indicating significant, substantive non-agreement with the draft in question, i.e., a non-agreement requiring a substantive change in the document before the individual in question agrees with or will approve it. It needs to be “formal” in the sense that it must be substantive and serious, but need not bear the label of “non-concurrence” or some other formalistic name.¹⁴⁰

DOE acknowledges that virtually all of the managers and supervisors in the review process had such substantive comments requiring at least some changes in the Draft LA, and that these comments were generated in a formal License Application Management Plan process, with numerous levels of review, “story boards,” concurrence resolution meetings, and continual iterations. That being so, we conclude that these substantive comments from key individuals constituted “non-concurrences” in some aspect of the Draft LA. The label placed on the comment, whether it be “non-concurrence,” “mandatory comment,” or “formal objection,” is not determinative. A comment requiring substantive change to the circulated document as a condition to agreement or further approval of it, is the essential concept. Here, we are satisfied that this element of the definition of 10 C.F.R. § 2.1001 has been met for the Draft LA.¹⁴¹

¹⁴⁰ See Minutes of the [Ninth] HLW Licensing Support System Advisory Committee Meeting: July 20-21, 1988 (Sept. 12, 1988) at 12, ADAMS Accession No. ML012050071 (“the Committee agreed to delete the reference to ‘written objections’ in the discussion of the definition of ‘circulated draft’ . . . since the Committee had agreed to drop this requirement in the rule itself”).

¹⁴¹ Even DOE’s facile, but ultimately affirmative, answer to our question as to whether DOE management submitted comments requiring substantive changes in the Draft LA (Question 6), (i.e., “virtually everyone” had such a comment), is sufficient. We did not ask DOE to “unscramble the egg” or reconstruct the entire process. DOE was the only party with knowledge of the facts as to what happened to the draft. Once it acknowledged that management submitted comments requiring substantive changes to the Draft LA, it was DOE’s burden to show that these were not non-concurrences, e.g., that DOE senior managers would have approved the draft even if their comments were ignored.

6. Two Additional, Non-Regulatory Criteria?

We conclude that the Draft LA satisfies all five of the elements of the regulatory definition of “circulated draft.” The Draft LA is (a) a nonfinal document, (b) it was circulated (c) to supervisors or management, (d) for supervisory concurrence, and (e) the original author or others in the concurrence process have non-concurred. See 10 C.F.R. § 2.1001. Presumably, this should be enough.

However, DOE and the NRC Staff argue that a document cannot be deemed a circulated draft unless it meets two additional criteria. First, they point out that the Statement of Considerations states that “[t]he intent of this exception to the general rule or [sic] final documents is to capture those documents to which there has been an unresolved objection,” and “[t]he objection or non-concurrence must be unresolved.”¹⁴² Second, they cite the regulatory history for the proposition that the regulations “do not require a LSS participant to submit a circulated draft to the LSS while the internal decision-making process is still ongoing.”¹⁴³ DOE and the NRC Staff argue that the Draft LA must satisfy both of these additional criteria – the non-concurrence is unresolved and decision-making is complete – before it can qualify as a circulated draft.

As an initial matter, where the language of the regulation is clear, it is unnecessary and improper to modify it by resorting to entirely extraneous statements in the Statement of Considerations.¹⁴⁴ Here the regulatory terms “concurrence” and “non-concur” are undefined but

¹⁴² 54 Fed. Reg. at 14,934 (emphasis added); see DOE Brief in Opposition at 8-9; NRC Staff Response at 4.

¹⁴³ 54 Fed. Reg. at 14,934 (emphasis added); see DOE Brief in Opposition at 12; NRC Staff Response at 5.

¹⁴⁴ See Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-05-15, 61 NRC 365, 373-74 (2005) (turning to the Statement of Considerations only after finding dictionary definitions insufficient to resolve questions of interpretation); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988) (“Although

the plain meaning of these terms is sufficient to resolve fully the questions of interpretation. See Part II.B.4 supra. Even if we were to examine the two Statement of Considerations points cited by DOE and the NRC Staff, they provide no clarification of these terms. Instead, they merely purport to add two entirely new requirements to the concept of “circulated draft.” The term “unresolved” specifies the status of a non-concurrence, but does not assist in defining the terms “concurrence” or “non-concur.” Likewise, requiring that a decision-making process be complete adds a new element, but does not define or clarify the meaning of the terms “concurrence” or “non-concur.” In these circumstances, we may not appropriately consult the Statement of Considerations, and have no legitimate basis upon which to engraft these two additional requirements onto the regulatory definition of “circulated draft.”

Further, these concepts are inconsistent with the regulation, mutually contradictory, and difficult, if not impractical, to administer realistically. First, the passage in the Statement of Considerations indicating that the non-concurrence must be unresolved, is inconsistent with the words of the regulation, which speaks in the past tense and states that a person must “have non-concurred.” 10 C.F.R. § 2.1001 (emphasis added). Under the regulation, it is sufficient if a non-concurrence occurred during the review process. But mandating, as DOE and the NRC Staff would have it, that the non-concurrence be unresolved requires that, at the relevant point in time, a person is still non-concurring. This is contrary to the wording of the regulation.

Second, the two Statement of Considerations concepts are contradictory. On the one hand, it is said that the non-concurrence must be unresolved. On the other, we are told the decision-making process must be complete. But if the decision-making process is complete,

administrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation’s language, its interpretation may not conflict with the plain meaning of the wording used in that regulation”). Cf. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

then, of necessity, all non-concurrences must have been resolved – a final decision has been made, either accepting the point of the non-concurrence or overruling whatever objections may have been raised, and thereby resolving all disputes. This contradiction means that it is not possible to satisfy both of these non-regulatory criteria at the same time, and thus there could never be a draft that meets both criteria, i.e., there can never be a “circulated draft.” This cannot be the intent of the regulation.¹⁴⁵

Further support for our conclusion is found in the fact that the procedures established by DOE for raising objections and non-concurrences concerning the draft license application do not even contemplate the possibility that any comment or non-concurrence could remain unresolved.¹⁴⁶ In every case, the LAMPs assume as a given that the non-concurrences will be resolved.¹⁴⁷ The DOE system does not permit an unresolved non-concurrence on the license application.

In any event, if these criteria are appropriate for consideration at all, because DOE is the party with the relevant information, DOE should bear the burden of showing that all of the non-concurrences to the Draft LA have been resolved. We raised this matter with DOE on July 18, 2005. It acknowledged that, as of November 22, 2004, the date when work on the Draft LA was abruptly halted, there were still a number of open items arising from the substantive comments received during the management review.¹⁴⁸ DOE further acknowledged that some of these

¹⁴⁵ We are unpersuaded by DOE’s attempt at oral argument to reconcile these two concepts. See Tr. at 514-18. As Judge Rosenthal indicated at oral argument and DOE counsel essentially agreed, reconciling the terms “unresolved” and “complete” in the manner suggested by DOE requires setting the entire notion of plain meaning on its head. See id. at 517-18.

¹⁴⁶ See July LAMP §§ 4.4.2.2, 4.4.4.3; September LAMP §§ 4.4.2.2, 4.4.3.3.

¹⁴⁷ See July LAMP §§ 4.4.2.2, 4.4.4.3; September LAMP §§ 4.4.2.2, 4.4.3.3.

¹⁴⁸ See DOE Response at 17.

items are still open today.¹⁴⁹ Accordingly, we find that at least some of the non-concurrences were, and still are, unresolved.¹⁵⁰

Similarly, even if the “decision-making process is complete” criterion from the Statement of Considerations were deemed appropriate to engraft onto the regulation, we conclude that the criterion is met under the second clause of the second sentence of the regulatory definition of “circulated draft.” That portion of the definition in 10 C.F.R. § 2.1001 states:

A “circulated draft” meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due either to a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

The second and third clauses of the second sentence of the definition make clear that, should a draft document satisfy the five criteria in the definition of circulated draft, the draft document must be made available on the LSN if a decision is made not to finalize the draft document, or if a substantial period of time has passed with no further action on the draft document. In other words, these provisions delineate two situations in which the decision-making process on a draft document is deemed to be final or concluded.¹⁵¹

¹⁴⁹ See id.

¹⁵⁰ Finally, we are concerned with the administrative practicalities of ruling that a non-concurrence must be “unresolved” and the “decision-making process complete” before a draft can be a circulated draft. Depositions and interrogatories are not available during the pre-license application phase. See 10 C.F.R. § 2.1018(b). In this situation, it is hard enough for a challenging party to (a) know of the document’s existence and (b) make an initial showing that the document must be produced. How is the challenger expected to discover, know, or establish to the Board the negative proposition – that the non-concurrence is not resolved? How is the party to show that the decision-making process is complete?

¹⁵¹ In this regard, the regulatory history states:

The requirement [of submitting a document to the LSS] applies regardless of whether any final document ultimately emerges from the LSS participant’s decision-making process. A determination not to issue a final document, or allowing a substantial period of time to elapse with no action being taken to issue a final

In the circumstances presented, we find that the DOE decision-making process with respect to the Draft LA should be deemed completed under the terms of the second above-quoted clause. As previously discussed, see Part I.C.4, DOE, in November 2004, abandoned its nearly-met goal of finalizing the Draft LA and filing the license application by the end of 2004. Also as earlier indicated, see Part I.C.4, DOE's decision was forced, at least in part if not primarily, because of the decision by the Court of Appeals in NEI v. EPA, striking the EPA post-closure radiation standard for a HLW repository – a standard that the Draft LA was intended to meet. As DOE's counsel stated, the State has asked for "a draft LA that, in part, addresses a regulatory standard that has been, in part, vacated by the Court of Appeals."¹⁵² And, before the application can be filed, EPA must develop and issue a new post-closure radiation standard that the NRC must adopt. DOE then must ensure its application meets the new, as yet unissued, standard. In this situation, we think it can fairly be said that DOE's determination not to finish and issue the Draft LA was, in the words of the regulation, "a decision not to finalize the document." Thus, with respect to the Draft LA, we deem DOE's decision-making process completed.¹⁵³

document, shall be deemed to be the completion of the decision-making process.

54 Fed. Reg. at 14,934.

¹⁵² Tr. at 488.

¹⁵³ Our ruling that there has been a decision not to finalize the Draft LA should be contrasted with, the typical document drafting scenario in which editorial, or even minor substantive changes, are made to a draft that then becomes a so-called second or subsequent draft. In the typical drafting scenario, the first draft is then abandoned and it is possible to say that there is a decision not to finalize the initial draft. The regulatory language should not be read so hyper-literally.

7. Circulated Draft v. Preliminary Draft

Finally, we address DOE's argument that "[t]he State's interpretation would effectively write out of existence the exclusion for preliminary drafts in 10 C.F.R. § 2.1003(a) and transform the narrow definition of 'circulated draft' into a wide-ranging production obligation that would swamp the LSN."¹⁵⁴ DOE asserts that "essentially every draft would qualify as a 'circulated draft' if the State's argument were accepted."¹⁵⁵ DOE's argument is neither factually nor legally correct. Our interpretation of the regulations and our decision today concerning the Draft LA establish practical and logical parameters around the definition of "circulated draft," and will not open the floodgates to "swamp the LSN."

First, it is clear that the Draft LA was a very significant document that represented a major milestone in DOE's license application process. It was the first full version of the draft license application.¹⁵⁶ Indeed, at the time of its delivery to DOE, BSC was contractually entitled to a performance-based incentive fee of over \$11 million.¹⁵⁷ Very high levels of DOE management, including the official designated to sign the license application, devoted enormous amounts of management time reviewing the Draft LA. It underwent and completed DOE's Technical Team Review, Joint Chapter Review, and Joint Management Review.¹⁵⁸ The Draft LA received, in the words of key senior DOE officials, a "major management review" and a "comprehensive management review."¹⁵⁹ It was prepared and reviewed on the basis of DOE's

¹⁵⁴ DOE Brief in Opposition at 14-15.

¹⁵⁵ Id. at 14.

¹⁵⁶ See 2/9/05 NWTRB Transcript at 16.

¹⁵⁷ See DOE-BSC Contract at B-6.

¹⁵⁸ See supra Part I.C.3.

¹⁵⁹ See DOE Response, Exh. P, Summary of the [NRC/DOE] Quarterly Management Meeting in Rockville, Maryland (Nov. 22, 2004) at 4, 8.

own schedule mandating that the final license application be filed in December 2004. It was only on November 22, 2004, for reasons beyond its control, that DOE pulled back from the brink of filing the license application in December. In short, this was no routine draft. Ruling that this unique and enormously significant draft is a “circulated draft” does not render every draft a “circulated draft” and, thus, will have no deleterious effect on the scheme underlying the LSN.¹⁶⁰

Second, because DOE has stated that it intends to produce on the LSN all the preliminary drafts of all of the technical documents that underlie the Draft LA, it is somewhat surprising that DOE would object to producing the Draft LA. At oral argument on the State’s motion, counsel for DOE stated:

[W]e [DOE] made this decision, Judge Karlin, with respect to the underlying technical documents, like the reports and studies, and analyses and AMRs, that we could have gone through – I mean, all of these documents go through a lot of drafting iterations, as you might imagine. And we could have gone through and said this one is not a circulated draft, this one is not, this is not, this one is not. We also recognize though that was, in part, going to be a very time-consuming and expensive process, and we said well, we have these drafts in our record compilation system. We’re not culling them out because they do or do not meet the definition of circulated draft, so we are voluntarily producing many, many drafts of these technical underlying documents so people can see the development of the science. You don’t need to see the draft license application. We’re going to be producing all the details, warts and all, for the development of the science on the project.¹⁶¹

While we applaud this plan, we have difficulty imagining why DOE would not also produce one of the single most significant drafts that it has generated to date. In contrast to the “many, many drafts of these technical underlying documents” that DOE will be producing, the Draft LA brings it all together in one coherent package that the potential parties can better use and understand.

¹⁶⁰ See, e.g., Minutes of the [Sixth] HLW Licensing Support System Advisory Committee Meeting: Apr. 18-19, 1988 (May 31, 1988) at 4-5, ADAMS Accession No. ML012050034 (where DOE stated “that including all ‘preliminary drafts’ in the LSS, before they reach the stage of a ‘concurrence draft,’ would simply bog the system down”).

¹⁶¹ Tr. at 544-45 (emphasis added).

Additionally, although our conclusion that the Draft LA meets the regulatory criteria (and even putatively applicable non-regulatory criteria) of a “circulated draft” stands on its own, we believe that the production of the Draft LA on the LSN should substantially and materially promote the purpose of the pre-license application phase – to allow potential parties to formulate better and more focused contentions and thereby expedite the process.¹⁶² Recognizing that the final application will certainly be different, perhaps significantly different, than the Draft LA, with the enactment of a new EPA post-closure standard this draft will be invaluable in allowing potential parties (a) to assess whether they have lingering concerns about the proposed project and license, and (b) if so, to formulate intelligible contentions. For example, the Commission’s regulations require that each contention:

must include references to specific portions of the application (including the applicant’s environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner’s belief.

10 C.F.R. § 2.309(f)(vi). Yet, unless the time is extended, petitioners will have just thirty days (shorter than the normal sixty days) from the date the application is docketed within which to file each such contention. 10 C.F.R. § 2.309(b)(2). Our decision, based upon the preceding reasoning, including our ruling on the contours of a circulated draft, also promotes the best and most efficient management of the HLW license application adjudicatory process. Any other conclusion likely would cause major delays.

C. Privilege Analysis

On May 12, 2005, DOE requested that we “establish a briefing schedule on the issue whether the LSN regulations require production of drafts of the license application. This is an

¹⁶² See 69 Fed. Reg. at 32,843.

important issue, and its resolution now will avoid inevitable future disputes.”¹⁶³ DOE specifically claimed that the document was subject to the litigation work product privilege.¹⁶⁴ Upon questioning at the May 18, 2005 case management conference, it asserted that this is a “high profile document” and that “for orderly proceedings” it is best to brief and to resolve the issues now.¹⁶⁵ The State agreed and the Staff had no objection.¹⁶⁶ Accordingly, we established a schedule for the presentation of this issue. Pursuant to that schedule, on May 23, 2005, DOE issued a letter denying the State’s request for the Draft LA, on the grounds, inter alia, that the Draft LA was protected against disclosure by legal privileges: the litigation work product privilege and the deliberative process privilege.¹⁶⁷ The State addressed each of these issues in its motion to compel.¹⁶⁸ DOE filed its opposition but, despite its own earlier requests for briefing on the specific issue of the litigation work product privilege, failed to address whether the Draft LA was protected by this privilege. Instead, DOE now asserts that the applicability of the litigation work product privilege is “irrelevant or at least premature.”¹⁶⁹ Additionally, DOE states

¹⁶³ [DOE]’s Memorandum in Response to May 11, 2005 Memorandum and Order Regarding Second Case Management Conference (May 12, 2005) at 27.

¹⁶⁴ Id. DOE first asserted that drafts of the license application qualified for the litigation work product privilege in its April 25, 2005 Supplement Brief concerning the proposed case management order. See [DOE]’s Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges (Apr. 25, 2005) at 8 n.2.

¹⁶⁵ Tr. at 384.

¹⁶⁶ Id. at 387-88.

¹⁶⁷ DOE Denial Letter at 2.

¹⁶⁸ State Motion to Compel at 16-21.

¹⁶⁹ DOE Brief in Opposition at 15.

that we need not reach the issue of the deliberative process privilege because it is rendered moot by the resolution of the circulated draft issue.¹⁷⁰

We view DOE's failure to address whether the Draft LA is covered by the litigation work product privilege as a waiver of the claim.¹⁷¹ DOE raised this issue and moved for its resolution now. After focusing the resources of the Board and the potential parties on this important issue, DOE now labels the matter as premature. The issue as to the proper scope of the litigation work product privilege in this proceeding has been briefed¹⁷² and we have heard oral argument on it twice.¹⁷³ Resolution of this issue in the context of the Draft LA presents no factual difficulties. In these circumstances, we find DOE's failure to defend its asserted privilege claim as a waiver of that claim.

Alternatively, because the matter is before us and the same issue is likely to arise with regard to many other documents, we also resolve DOE's asserted claim as a matter of good case management.¹⁷⁴ Accordingly, we address the merits of the privilege issues.

¹⁷⁰ Id.

¹⁷¹ See 10 C.F.R. § 2.705(b)(4) ("When a party withholds information otherwise discoverable under these rules by claiming that it is . . . subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.").

¹⁷² DOE Brief in Opposition at 15-16.

¹⁷³ Tr. at 86-100 (May 4, 2005); Tr. at 447-48 (July 12, 2005).

¹⁷⁴ DOE also asserts that we should not address the litigation work product privilege because doing so would be rendering an "advisory opinion." DOE Brief in Opposition at 15-16. Assuming it is correct on the "circulated draft" issue, DOE suggests that the applicability of any privilege is irrelevant because the Draft LA need not be made available on the LSN. Id. at 15. DOE's premise is flawed. First, we are not prohibited from issuing advisory opinions, where, as here, there is a genuine dispute, well presented. Texas Utilities Generating Co. (Comanche Peak Steam Electric Station, Units 1 and 2), ALAB-714, 17 NRC 86, 94 (1983). Second, even if the Draft LA is a preliminary draft, this merely postpones the day of reckoning during derivative discovery, when the litigation work product privilege claim must be confronted again. See

1. Deliberative Process Privilege

NRC regulations clearly waive the deliberative process privilege for all circulated drafts, stating: “Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be provided for electronic access pursuant to § 2.1003(a).” 10 C.F.R. § 2.1006(c). Both DOE and the State agree that, should we find the Draft LA to be a circulated draft, that finding trumps any claim of the deliberative process privilege.¹⁷⁵ Therefore, because we have so found, the deliberative process privilege is overridden by regulation and that privilege does not preclude the Draft LA from being made available on the LSN.

2. Litigation Work Product

There is no dispute that the litigation work product privilege applies in this proceeding and protects documents prepared in anticipation of the litigation or hearing. As codified in Subpart J, the litigation work product privilege states:

A party . . . may obtain discovery of documentary material otherwise discoverable under paragraph (b)(1) of this section and prepared in anticipation of, or for the hearing by, or for another party’s . . . representative (including its attorney, surety, indemnitor, insurer, or similar agent) only upon a showing that the party . . . seeking discovery has substantial need of the materials in the preparation of its case and that it is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

10 C.F.R. § 2.1018(b)(2) (emphasis added).

The issue here is whether the Draft LA was “prepared in anticipation of, or for the hearing.” The State argues that the Draft LA was not prepared in anticipation of the hearing but

10 C.F.R. § 2.1019(i)(2)(iv). Given that the facts necessary to resolve the litigation work product question are currently before us are unlikely to change, we see no reason to delay ruling on the privilege status of the Draft LA.

¹⁷⁵ DOE Brief in Opposition at 15; State Motion to Compel at 16.

was prepared for independent regulatory reasons.¹⁷⁶ On the other hand, DOE asserted at the case management conference that the Draft LA “is being prepared for filing with the NRC as part of the adjudicatory process.”¹⁷⁷ Thus, the parties are in disagreement as to the purpose underlying the document’s preparation.

Such a disagreement is not uncommon given that many documents are prepared for both litigation and non-litigation purposes. Federal courts have generally adopted the same test for dealing with such “dual purpose” documents.¹⁷⁸ Under that test, which DOE concedes is the appropriate one,¹⁷⁹ a document is “prepared in anticipation of litigation” if, “in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.” 8 Charles Alan Wright et al., Federal Practice & Procedure § 2024 (2d ed. 1994) (emphasis added). In expounding upon this formulation, the Court of Appeals for the Second Circuit explained that “the ‘because of’ formulation . . . withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation . . . [e]ven if such documents might also help in preparation for litigation” United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998).

In this case, the issue is whether the Draft LA was prepared because of the hearing or because of some regulatory requirement or non-litigation purpose. In other words, if not for the

¹⁷⁶ State Motion to Compel at 19.

¹⁷⁷ Tr. at 89.

¹⁷⁸ See, e.g., In re Grand Jury Subpoena, 357 F.3d 900, 908-09 (9th Cir. 2004); Maine v. United States Dep’t of Interior, 298 F.3d 60, 68 (1st Cir. 2002); National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); Senate of Puerto Rico v. United States Dep’t of Justice, 823 F.2d 574, 586 n.42 (D.C. Cir.1987); Binks Mfg. Co. v. National Presto Indus., Inc., 709 F.2d 1109, 1119-20 (7th Cir. 1983). But see United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981) (adopting a “primary purpose” test).

¹⁷⁹ Tr. at 87-88.

hearing, would the Draft LA have been created in essentially the same form? In answering that question, we reject DOE's assertion that the Draft LA is "prepared for filing with the NRC as part of the adjudicatory process."¹⁸⁰ It is fundamental that a license application must be prepared because it is a prerequisite to receiving a license. See 10 C.F.R. § 2.101(f)(1). Admittedly, there is a mandatory hearing that will take place on DOE's application and the application will be of central importance during that adjudicatory phase. But the Draft LA "would have been created in essentially similar form irrespective of the [adjudicatory hearing]." See Adlman, 134 F.3d at 1202. Because, DOE must submit, and the NRC Staff must review and approve, an application before DOE receives a license, see generally 10 C.F.R. Part 63, we find that the Draft LA is not protected by the litigation work product privilege.¹⁸¹

III. CONCLUSION

As set forth in Parts II.A and B, we conclude that the DOE Draft LA is documentary material and is a circulated draft within the meaning of 10 C.F.R. § 2.1001. Further, as set forth in Part II.C.1, we find that, pursuant to 10 C.F.R. § 2.1006(c), the Draft LA is not protected by any deliberative process privilege. Finally, as set forth in Part II.C.2, we find that DOE has waived its claim that the Draft LA is protected from disclosure by the litigation work product privilege and, even if not waived, the litigation work product privilege does not protect the Draft LA from disclosure. Accordingly, we grant the State of Nevada's June 6, 2005 motion to compel production of DOE's July 2004 draft license application, which, as noted in Part II.B.2, necessarily includes the September 2004 interim iteration. DOE shall make the Draft LA

¹⁸⁰ Tr. at 89.

¹⁸¹ The State also asserts that FOIA policies provide an additional reason why DOE must make available the entire Draft LA, or at the very least, all non-privileged segregable portions of the document. State Motion to Compel at 21-25. Because it is DOE and then the United States district courts that are vested with jurisdiction over FOIA cases involving DOE documents, we have no jurisdiction to enforce DOE's FOIA regulations. See 5 U.S.C. § 552(a)(4)(B) (2000); 10 C.F.R. Part 1004.

available on the LSN no later than the time it makes its initial certification pursuant to 10 C.F.R.
§ 2.1009(b).

It is so ORDERED.

The Pre-license Application
Presiding Officer Board

/RA/

Thomas S. Moore, Chairman
Administrative Judge

/RA/

Alex S. Karlin
Administrative Judge

/RA/

Alan S. Rosenthal
Administrative Judge

Rockville, Maryland
September 22, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON STATE OF NEVADA'S JUNE 6, 2005 MOTION TO COMPEL) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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Docket No. PAPO-00
LB MEMORANDUM AND ORDER(RULING ON
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Docket No. PAPO-00
LB MEMORANDUM AND ORDER(RULING ON
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Office of the Secretary of the Commission

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