

March 3, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
 )  
U. S. DEPARTMENT OF ENERGY ) Docket No. 63-001-HLW  
 )  
(High-Level Waste Repository) ) ASLBP No. 09-892-HLW-CAB04  
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NRC STAFF RESPONSE TO FEBRUARY 25, 2011, BOARD ORDER

INTRODUCTION

On February 25, 2011, the Construction Authorization Board 04 (Board) issued an order directing the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) to show cause why it should not be ordered to place Volume 3 of the Safety Evaluation Report (SER) in unredacted form, except for classified and safeguards information, in its Licensing Support Network (LSN) collection as a circulated draft. Order (Directing NRC Staff's Show Cause), dated February 25, 2011 (unpublished) (Order). For the reasons set forth below, the Staff should not be ordered to place an unredacted version of SER Volume 3 on the LSN because it is a preliminary draft, not a circulated draft.

BACKGROUND

On September 30, 2009, the Board issued a case management order pacing Phase I discovery in the above-captioned proceeding with the planned SER schedule. See CAB Case Management Order #2, dated September 30, 2009 (unpublished), at 3. Phase 1 discovery, which includes all safety, environmental, and legal contentions related to the subject matters in SER Volume 1 or 3, began in the fall of 2009, and was scheduled to end on November 30, 2010 (or two months after issuance of Volume 3, whichever is later). *Id.* at 3.

A number of events have affected (or have the potential to affect) the SER issuance schedule. In June 2010, the Board denied a March 3, 2010, U.S. Department of Energy (DOE) motion to withdraw its License Application (LA).<sup>1</sup> Petitions “as to whether the Commission should review, and reverse or uphold, the Board’s decision” are pending before the Commission.<sup>2</sup> Also in June 2010, the State of Nevada filed a motion requesting, among other things, that the Commission direct the Staff to suspend all efforts to complete and issue SER Volume 3 pending a final Commission decision on the DOE motion to withdraw.<sup>3</sup> In October 2010, Aiken County filed a motion requesting, in part, that the Commission direct the Staff to resume its review of the DOE LA.<sup>4</sup> In addition, in a proceeding challenging DOE’s authority to withdraw the LA, the United States Court of Appeals for the District of Columbia Circuit held the proceeding in abeyance pending further NRC proceedings, but later lifted the stay on the proceeding, set an expedited briefing schedule, and announced that oral arguments would begin on March 22, 2011. See *In re Aiken County* (No. 10-1050) (D.C. Cir. July 28, 2010); *In re Aiken County* (No. 10-1050) (D.C. Cir. Dec. 10, 2010); *In re Aiken County* (No. 10-1050) (D.C. Cir. Jan. 10, 2011).

Due to the lack of an NRC budget for Fiscal Year (FY) 2011, the Staff has noted in pleadings to the Commission and Board that the NRC has been operating under a Continuing

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<sup>1</sup> *U.S. Dep’t of Energy* (High-Level Waste Repository), LBP-10-11, 71 NRC \_\_ (June 29, 2010) (slip op.).

<sup>2</sup> See Order, dated June 30, 2010 (unpublished). On December 6, 2010, in response to Congressional inquiries, the Secretary of the Commission stated that the Commission did not have a completion date for its decision on the DOE motion to withdraw. See Letters from Annette L. Vietti-Cook to Congressmen Hastings, Issa, & Sensenbrenner, dated December 6, 2010 (ML103410010).

<sup>3</sup> See State of Nevada Petition for Relief with Respect to Possible Issuance of a Partial Safety Evaluation Report for Yucca Mountain, dated June 14, 2010, at 3 (Nevada Petition).

<sup>4</sup> See Motion for a Commission Order Restoring the Technical Review of the Yucca Mountain License Application, dated October 7, 2010, at 2, 7 (Aiken County Motion).

Resolution (CR) since October 1, 2010, and that the Staff commenced orderly closure of Yucca Mountain activities in accordance with Commission decisions on the FY 2011 budget. See NRC Staff Response to December 8, 2010 Board Order and Notification Regarding SER Volume 4 Issuance, dated December 22, 2010, at 3, 5 (December Response); NRC Staff Answer to Motion for an Order Restoring Technical Review of the Yucca Mountain License Application, dated October 18, 2010, at 3-4. The Staff stated that orderly closure would not preclude future completion of an SER if warranted. See December Response at 5.<sup>5</sup>

On November 29, 2010, the Staff informed the Board that it would not be issuing SER Volume 3 in November 2010, and that a revised schedule is "indeterminate." NRC Staff Notification Regarding SER schedule, dated November 29, 2010 (November Notification). In response to the Board's order that the Staff fully explain the timing of its November Notification and why the Staff cannot establish an SER issuance date, the Staff explained the timing of its notification, noting uncertainty regarding the proceeding and future budget decisions. See Order (Addressing Nevada's Motion and Discovery Status), dated December 8, 2010 (unpublished); December Response at 5.

On February 17, 2011, the Staff informed the Board that, on that same date, redacted copies of preliminary drafts of Volumes 2 and 3 of the SER had been made available in response to a Freedom of Information Act request. NRC Staff Notification of Disclosure Pursuant to Freedom of Information Act, dated February 17, 2011. In its February 25, 2011, Order, the Board stated that the Staff's December 22, 2010, explanation did not comport with

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<sup>5</sup> The Staff noted that the Chairman has stated that the transition to close out the high-level waste program will allow the agency to respond to direction from the Congress or the courts. See, e.g., December Response at 5 (citing Letter from Chairman Jaczko to Congressman Sensenbrenner, dated October 27, 2010, encl. at 1 (ML102980673)). The Chairman recently repeated this statement on February 15, 2011. See Letter from Chairman Jaczko to Issac Winograd, dated February 15, 2011 (ML103270666).

the Staff's February 17 notification, which categorized SER Volume 3 as a "preliminary draft." Order at 1. The Board directed the staff to show cause why it should not be ordered to place an unredacted version of SER Volume 3 on the LSN in accordance with 10 C.F.R. § 2.1001 and its continuing obligation to make a good faith effort to include after-created documents in its LSN collection. *Id.* at 1-2.

## DISCUSSION

### A. Applicable Legal Standards

Subpart J of 10 C.F.R. Part 2 requires that participants in this proceeding make documentary material available via the LSN. 10 C.F.R. § 2.1003(a). Each participant must make a good faith effort to identify documentary material using a rule of reason. *U.S. Dep't of Energy* (High-Level Waste Repository), LBP-04-20, 60 NRC 300, 314 (2004) (citing Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, 54 Fed. Reg. 14,925, 14,934 (Apr. 14, 1989)), *appeal on other grounds held in abeyance*, CLI-04-32, 60 NRC 469 (2004). This includes an obligation to "make a diligent good faith effort" to identify all after-created and after-discovered documents in each monthly supplementation of the LSN. See Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution), dated July 6, 2007 (unpublished), at 21.

Documentary material includes (1) any information that a participant in the proceeding intends to rely upon or cite in support of its position; (2) any information that is relevant to, but does not support, the participant's position; and (3) all reports and studies, including circulated drafts, prepared by or on behalf of a participant and related to both the LA and the issues in the Topical Guidelines in Regulatory Guide 3.69, regardless of whether the participant intends to rely upon or cite the document. 10 C.F.R. § 2.1001. The requirement to submit documentary material generally applies only to final documents, *e.g.*, a document bearing the signature of an

employee or the contractor of an LSN participant. 54 Fed. Reg. at 14,934. “The only drafts of any document that must be placed on the LSN are circulated drafts of reports and studies.” *U.S. Dep’t of Energy* (High-Level Waste Repository), CLI-06-05, 63 NRC 143, 154 (2006).<sup>6</sup> Preliminary drafts, which are defined as “any nonfinal document that is not a circulated draft,” are not required to be placed on the LSN. See 10 C.F.R. § 2.1001 (defining preliminary draft); 10 C.F.R. § 2.1003(a)(1) (requiring that an electronic file including bibliographic header for “all documentary material (*including circulated drafts but excluding preliminary drafts*)” be made available on the LSN (emphasis added)).

Subpart J defines a “circulated draft” as

a nonfinal document circulated for supervisory concurrence or signature in which the original author or others in the concurrence process have non-concurred. A ‘circulated draft’ meeting the above criterion includes a draft of a document that eventually becomes a final document, and a draft of a document that does not become a final document due to either a decision not to finalize the document or the passage of a substantial period of time in which no action has been taken on the document.

10 C.F.R. § 2.1001. A draft document that “has received a nonconcurrence” satisfying the regulatory definition of circulated draft must be placed on the LSN. *High-Level Waste Repository*, CLI-06-05, 63 NRC at 158. As the Commission stated, “[t]he heart of the definition of circulated draft is the meaning of non-concurrence.” *Id.* According to the Commission, there are three elements of a “non-concurrence”:

1. A non-concurrence must be part of a formalized process;
2. A non-concurrence must be unresolved, with the original

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<sup>6</sup> The circulated draft exception to the general rule that only final documents are required to be placed on the LSN is intended to capture documents where there is an unresolved objection by the author or other person in the internal concurrence process. *High-Level Waste Repository*, CLI-06-05, 63 NRC at 158 (citing Rule on the Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of High-Level Radioactive Waste, Notice of Proposed Rulemaking, 53 Fed. Reg. 44,411, 44,415 (Nov. 3, 1988)).

author or others in the concurrence process in disagreement with the final product; and

3. The decision-making on the document must be completed.

*Id.* at 159. In identifying these elements, the Commission explained that in order to qualify as a circulated draft, a “document must undergo a degree of formal review.” *Id.* Further, circulated drafts need only be placed on the LSN “after the decision-making process on the document has been completed, *i.e.*, the requirements of § 2.1003 do not require a[n] [LSN] participant to submit a circulated draft on the [LSN] while the internal decision-making process is ongoing.” *Id.* at 158-59 (alteration in original) (quoting 54 Fed. Reg. at 14,934). The decision-making process is considered complete when there is a determination not to issue a final document or a substantial period of time is allowed to elapse with no action being taken to issue a final document. 54 Fed. Reg. at 14,934. “In sum, in order for documentary material to be considered a ‘circulated draft,’ it must have received a nonconcurrence in a formalized process, *and* the decisionmaking on the document must be completed.” *High-Level Waste Repository*, CLI-06-05, 63 NRC at 159 (emphasis added). These “aspects of formality and finality” distinguish a circulated draft from a preliminary draft. *Id.* The Commission expects all participants to make a good faith effort to apply the intent of the circulated draft rule to their document approval process. 54 Fed. Reg. at 14,934.

B. SER Volume 3 Is a Preliminary Draft, Not a Circulated Draft

The Board should not order the Staff to place SER Volume 3 on the LSN because SER Volume 3 is a preliminary draft that is not required to be placed on the LSN. See 10 C.F.R. § 2.1003(a)(1) (providing that “all documentary material (including circulated drafts but excluding preliminary drafts)” is to be placed on the LSN); *see also High-Level Waste Repository*, CLI-06-05, 63 NRC at 154 (“The only drafts of any document that must be placed on the LSN are circulated drafts of reports and studies.”). Subpart J defines a “preliminary draft” as “any

nonfinal document that is not a circulated draft.” 10 C.F.R. § 2.1001. Draft SER Volume 3 is a nonfinal document because the reviews of the document have been ongoing since October 2010 for the purpose of developing a technical evaluation report (TER). See Haney Affidavit at ¶ 5. Thus, the Staff’s analyses, recommendations, opinions, and evaluations in draft SER Volume 3 are preliminary, not final. *Id.* Accordingly, the draft document is not suitable for inclusion in the LSN unless it is a circulated draft.

Draft SER Volume 3 is not a circulated draft. See 10 C.F.R. § 2.1001. For a nonfinal document to be considered a circulated draft, three elements of non-concurrence must be satisfied: (1) the document must have received a non-concurrence in a formalized process, (2) the non-concurrence must be unresolved, and (3) the decision-making on the document must be completed. *High-Level Waste Repository*, CLI-06-05, 63 NRC at 158-59; see also 10 C.F.R. § 2.1001. According to the Commission, 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 document, shall be deemed to be the completion of the decision-making process.” 54 Fed. Reg. at 14,934. The Staff has used a formalized concurrence process for SER Volume 3. See Haney Affidavit at ¶ 2. To date, there have not been any non-concurrences on SER Volume 3. *Id.* Therefore, the first two elements have not been satisfied, which is sufficient alone to render the document a preliminary, not circulated, draft.

In addition, decision-making on draft SER Volume 3 is not yet complete because a decision on whether to issue that volume will depend on the culmination of decision-making that is still in progress and beyond the Staff’s control. Haney Affidavit at ¶ 6; see December Response at 5. A decision whether to issue the SER simply cannot be made at this juncture and is indeterminate. See Haney Affidavit at ¶ 6. Decision-making on SER Volume 3 has been and could be impacted by matters currently pending before the Commission—*e.g.*, the Nevada Petition seeking suspension of the Staff’s work on SER Volume 3 and the Aiken County Motion

seeking resumption of the Staff's review of the LA—and the uncertainty regarding future Congressional appropriations. *See id.*; December Response at 5. Because matters that inform a decision on SER issuance are pending before the Commission, Congress, and Federal court, decision-making on draft SER Volume 3 is not complete. *See Haney Affidavit at ¶¶ 6.*

Further, in light of the uncertainty associated with the budget and pending legal actions, there has not been a substantial period of time that has elapsed with no action taken on the SER Volume 3. *See 10 C.F.R. § 2.1001.* In addition, the Staff is using SER Volume 3 to develop the TER. *Haney Affidavit at ¶¶ 4.* TER activities include ongoing reviews of draft SER Volume 3, and were in progress at the time of the November Notification. *See id. at ¶¶ 5.* Thus, action is being taken that would assist, in part, in finalizing an SER if warranted in the future. *See id.* Because the third element is not satisfied, SER Volume 3 cannot be considered a circulated draft. *See High-Level Waste Repository, CLI-06-05, 63 NRC at 159 (“[I]n order for documentary material to be considered to be a ‘circulated draft,’ . . . the decision-making on the document must be completed.”).*

Therefore, SER Volume 3 is a nonfinal document that satisfies the “preliminary draft” definition set forth in 10 C.F.R. § 2.1001 and is not required to be placed on the LSN. Because the Staff's determination that SER Volume 3 is a preliminary draft is both well-supported and reasonable, the Staff has fulfilled its good faith obligation as an LSN participant. *See High-Level Waste Repository, LBP-04-20, 60 NRC at 314* (LSN participants must expend, “in good faith, every reasonable effort to make all of its documentary material available”); Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution), dated July 6, 2007 (unpublished), at 21.

A Board ruling that SER Volume 3 is a circulated draft would be contrary to the Commission's statement that all three elements of non-concurrence must be satisfied for a document to be a circulated draft. *See High-Level Waste Repository, CLI-06-05, 63 NRC*

at 159. In addition, an order requiring the Staff to place an unredacted version of Volume 3 in the LSN would cause harm because the Staff's deliberative process privilege would, in effect, be waived. See *High-Level Waste Repository*, CLI-06-05, 63 NRC at 158 ("In effect, the Commission and the other government agencies who are [LSN] participants are waiving their deliberative process privilege for these circulated drafts." (alteration in original) (quoting 53 Fed. Reg. at 44,415)). The purpose of the deliberative process privilege is "to prevent injury to the quality of agency decisions." *David Geisen* (Davis-Besse employee), LBP-06-25, 64 NRC 367, 380 (2006) (quoting *National Labor Relations Board v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975)). The release of predecisional information regarding the Staff's preliminary evaluations, conclusions, and findings could adversely affect future Staff deliberations, cause confusion, and mislead the public with regard to the agency's final decision on whether the DOE LA meets post-closure requirements. See Haney Affidavit at ¶ 7. Accordingly, the Board should not order the Staff to place an unredacted version of SER Volume 3 on the LSN.<sup>7</sup>

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<sup>7</sup> As shown, neither Subpart J nor any other authority requires that draft SER Volume 3 be placed on the LSN. Accordingly, the Board should not order the Staff to release the document. Since the Board does not direct the Staff's license application review activities, including the Staff's decision whether to publicly release license review documents, the Board should not order release of an unredacted version of SER Volume 3 before the Commission has the opportunity to consider the issue. See *Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004) ("We long have held that licensing boards do not sit to correct NRC Staff misdeeds or to supervise or direct NRC Staff regulatory reviews.").

CONCLUSION

For the reasons set forth above, the Board should not order the Staff to place an unredacted version of SER Volume 3 on the LSN because it is a preliminary draft.

Respectfully submitted,

**/Signed (electronically) by/**

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**/Executed in accord with 10 C.F.R. § 2.304(d)/**

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Date at Rockville, Maryland  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of )  
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U. S. DEPARTMENT OF ENERGY ) Docket No. 63-001-HLW  
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(High-Level Waste Repository) ) ASLBP No. 09-892-HLW-CAB04  
 )

AFFIDAVIT OF CATHERINE HANEY  
IN RESPONSE TO FEBRUARY 25, 2011, BOARD ORDER

I, Catherine Haney, do hereby state as follows:

1. I am employed by the Nuclear Regulatory Commission (NRC) as the Director of the Office of Nuclear Material Safety and Safeguards (NMSS). The Division of High-Level Waste Repository Safety, which reports to me, is responsible for reviewing the U.S. Department of Energy (DOE) License Application (LA) for a geologic repository at Yucca Mountain, Nevada.

2. The Staff's concurrence process for the Safety Evaluation Report (SER) related to the LA is governed by formal procedures, including the Division of High-Level Waste Repository Safety Director's Policy and Procedures Letter 002, Documenting Non-concurrence, dated October 25, 2005 (ML052760346), and Management Directive 3.57, Correspondence Management, dated October 18, 2005 (ML053070034). To date, there have not been any non-concurrences on SER Volume 3.

3. In my capacity as NMSS Director, I was provided a draft of SER Volume 3 in July 2010 for concurrence and authorization to request publication. It is my responsibility as NMSS Director to provide revisions and comments as I deem necessary on documents submitted for my review.

4. In October 2010, the Staff began transitioning its DOE LA review activities to orderly closure. As part of this process, the Staff transitioned from completing SER Volume 3 to

completing a technical evaluation report (TER) on post-closure information in the DOE LA. The Staff is using the draft SER Volume 3 to develop the TER. Yucca Mountain orderly closure activities will not preclude future completion of an SER.

5. After a draft copy of SER Volume 3 was provided to me in July 2010, the Staff continued to review and revise portions of that draft through September 2010. Since October 2010, reviews of individual chapters of SER Volume 3 have been ongoing for the purpose of developing the TER. This work would also assist, in part, the future finalization of an SER, if directed. I have neither concurred nor non-concurred on the July 2010 draft nor any subsequent drafts of SER Volume 3. In my view, the Staff's analyses, recommendations, opinions, and evaluations in SER Volume 3 are, therefore, preliminary.

6. Issuance of an SER is indeterminate due to circumstances beyond the Staff's control. The decision-making is, therefore, not complete.

7. In my opinion, release of an unredacted version of draft SER Volume 3 during an ongoing adjudicatory proceeding could result in harm to the agency. It could prematurely disclose the preliminary views of the Staff prior to the Staff's final decision on whether the DOE LA meets post-closure requirements and could inhibit the open and frank exchange of ideas essential to the deliberative process. In addition, release could create confusion regarding the agency's final decisions.

8. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the forgoing statements are true and correct to the best of my knowledge and belief.

**/RA/**

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Catherine Haney  
Director  
Office of Nuclear Material Safety and Safeguards  
U.S. Nuclear Regulatory Commission

Executed in Rockville, Maryland  
this 3rd day of March, 2011

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY LICENSING BOARD

In the Matter of )  
 )  
U. S. DEPARTMENT OF ENERGY ) Docket No. 63-001-HLW  
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(High-Level Waste Repository) ) ASLBP No. 09-892-HLW-CAB04  
 )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO FEBRUARY 25, 2011, BOARD ORDER" in the above-captioned proceeding have been served on the following persons this 3rd day of March, 2011, by Electronic Information Exchange.

CAB 04

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