

Section J

Appendix L

MEMORANDUM FROM DAVID R. HILL, GENERAL COUNSEL,
DATED NOVEMBER 30, 2006,
SUBJECT: ONGOING LICENSING SUPPORT NETWORK (“LSN”) OBLIGATIONS



Department of Energy
Washington, DC 20585

November 3, 2006

MEMORANDUM TO: Distribution

FROM: David R. Hill 
General Counsel

SUBJECT: Ongoing Licensing Support Network ("LSN") Obligations

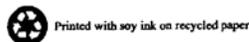
This memorandum and its attachments provide further guidance concerning LSN obligations of personnel in affected Department of Energy (DOE) and contractor organizations working on the Yucca Mountain project. DOE and contractor organizations previously have been given guidance through the May 5, 2003 memorandum of the DOE General Counsel ("Call Memo") and the May 24, 2005 memorandum of the DOE Assistant General Counsel ("Refresher Guidance") regarding the submittal and retention of documents for the Yucca Mountain license proceeding.

You are required to distribute a copy of this guidance to each person in your organization who is working on matters concerning the Yucca Mountain project. You also are required to distribute a copy to all contractors of your organization who work on matters concerning the Yucca Mountain project, with instructions that these contractors distribute copies to their affected personnel and subcontractors. Upon doing so, provide written verification (using the accompanying form) to the DOE LSN Project Manager, Dong Kim, in the DOE Office of Civilian Radioactive Waste Management ("OCRWM"), that (i) your organization has appropriately distributed this guidance to its personnel and contractors, and (ii) your organization's affected contractors have similarly verified in writing to you that they have appropriately distributed this guidance to their personnel and subcontractors.

Computer-based training on this guidance will soon be available for all affected organizations and personnel. Also, LSN project members will soon contact the LSN Responsible Manager and LSN Point of Contact for your organization to provide additional information regarding implementation of this guidance.

Please contact Dong Kim (202-586-1223) if you have any questions.

Attachments



Distribution

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GUIDANCE CONCERNING ONGOING LSN OBLIGATIONS

A. DOCUMENTS TO BE INCLUDED ON THE LSN

DOE needs to make available on the LSN its “documentary material” prior to submitting its license application for a geologic repository for spent nuclear fuel and high level radioactive at Yucca Mountain. Generally speaking, a document qualifies as “documentary material” and is “LSN-Relevant” if it falls into any of the following three categories:

- (1) Class 1: It contains information that DOE intends to cite or rely on in the license application or in support of its positions in the license proceeding.
- (2) Class 2: It contains information that is adverse to, contradictory of, or inconsistent with the information in the first category.
- (3) Class 3: It is a report or study prepared by or for DOE that is relevant to both the license application and the issues in the Topical Guidelines in NRC Regulatory Guide 3.69 (including “circulated drafts” of such reports and studies).

To enable DOE to collect the documents that potentially qualify as “documentary material,” personnel need to follow the document submittal procedures below. A one-page summary of these document submittal requirements is attached for reference as Attachment 1.

1. **Follow project procedures for submittal of documents to the OCRWM Records Processing Center (“RPC”).** If you perform work on the Yucca Mountain project that is subject to procedures that require records to be submitted to the RPC, *e.g.*, Procedure AP-17.1Q, you must follow those procedures. When you submit a record to the RPC, you are required to designate on the transmittal form whether you consider the document to be LSN-Relevant, *i.e.*, that it qualifies as documentary material. You are also required to mark appropriately, and identify on the transmittal form, all submitted documents that you believe may be privileged.

Personnel in the RPC review all submitted documents and forward copies as appropriate to DOE’s Automated Litigation Support (“ALS”) Contractor, *i.e.*, CACI, Inc., for inclusion on the LSN. Accordingly, submittal of a record to the RPC satisfies your LSN obligations for that document. You do not need to retain for purposes of derivative discovery a copy of any document that is submitted to the RPC.

2. **Submittal of other potentially LSN-Relevant documents to the ALS Contractor.** If you author a final document that is not submitted to the RPC, you must assess whether the document falls within any of the three classes of documentary material and therefore is LSN-Relevant. You must make the same assessment for all documents that you receive from persons outside the Yucca Mountain project in the course of your work on the project (*e.g.*, letters or studies received from universities) that are not submitted to the RPC.

For any such document that you believe is LSN-Relevant, you must submit a copy to the LSN Point of Contact for your organization, who will provide the documents to DOE's ALS Contractor. Each document that you provide to your organization's LSN Point of Contact should be accompanied by a copy of the form provided as Attachment 3, on which you should note all privileges that you believe may apply to the document. You should note the following regarding this document submittal requirement:

- This obligation applies to any type of document, *e.g.*, memoranda, letters, faxes, electronic files, etc. Whether a document qualifies as documentary material depends on its content, not its form.
- With one exception, you do not need to submit drafts and should submit only final versions of documents. The one exception is a "circulated draft" of an LSN-Relevant report or study. A "circulated draft" of a report or study is a presumptively final version that has been distributed for organizational approval and that received a formal, written non-concurrence.
- This obligation does not apply to documents that are submitted to the RPC (whether by you or someone else).
- This obligation does not apply to documents you receive that are authored by Yucca Mountain project personnel. That is because each project member has the independent duty to submit LSN-Relevant documents that member authors. Your submittal obligation applies to (i) documents you author and (ii) documents you receive from persons outside the project.

NOTE: If you plan to submit LSN-Relevant documents with either Protected Personal Identifying Information (Protected PII) or Safeguards Information (SGI), you must identify those documents to your organization's LSN Point of Contact in advance, so special arrangements can be made for them.

Protected PII is information that can be used to distinguish or trace an individual's identity, such as their social security number, date and place of birth, mother's maiden name, personal financial information, biometric records, medical history, and any other personal information that is linked or linkable to an individual (or that could be used for identity theft).

SGI is information that is authorized by §147 of the Atomic Energy Act (AEA) of 1954, as amended, to be protected from inadvertent release and unauthorized disclosure, and that is further governed by 10 C.F.R. Part 73.

NOTE: Do not submit any documents that contain classified information even if they are LSN-Relevant. Preserve these documents, and contact your organization's LSN Point of Contact to receive special handling instructions.

3. **Submit potentially “non-supporting” and “supporting” emails.** You must submit all emails you author that you believe may contain either “non-supporting” or “supporting” information. Emails in either category should be treated as LSN-Relevant.

“Non-supporting” emails are those that contain information that may be adverse to, inconsistent with, or contradictory of--or that otherwise call into question--the information or analyses relied upon or used in preparation of the license application or documents underlying the license application, *e.g.*, AMRs. These also include emails that may call into question DOE’s compliance with QA requirements or DOE’s ability to satisfy the requirements of NRC’s Part 63 regulations for the Yucca Mountain repository.

“Supporting” emails are those that it might be useful for DOE to cite and rely on in the license proceeding. For example, DOE may cite emails that explain or otherwise put in context emails or other information cited by opponents in connection with their contentions. Accordingly, you should identify emails you believe may assist DOE in the license proceeding (*e.g.*, emails that put into context or resolve an issue raised in a non-supporting email) as LSN-Relevant and submit those emails.¹

For each email that you submit--whether non-supporting or supporting--that you believe may be privileged under the deliberative process privilege, attorney client communication privilege, litigation work product doctrine or other applicable privilege, you should mark the email as privileged. If you do not have an OCRWM Lotus Notes email account, you can do this for emails that you author by writing in the beginning of the email that the email is “Privileged and Confidential.”

If you have an OCRWM Lotus Notes email account, that system employs a template that requires you to categorize for LSN relevance and privilege each email you send as well as each email you receive from outside that system. All emails that you categorize as LSN-Relevant through the OCRWM Lotus Notes system are sent to the ALS Contractor, which fulfills your submittal requirement for such emails. Because of this feature, you should use your OCRWM Lotus Notes account to the extent practicable for matters related to the Yucca Mountain project.

The OCRWM Lotus Notes system template, in addition to requiring users to determine whether the email is “LSN-Relevant” and/or “Privileged,” also requires you to indicate whether the email is a “Federal Record.” You generally should mark all emails that pertain to your work for the Federal government as a “Federal Record.” Further, the template also requires you to indicate whether the email reflects a “Condition Adverse to Quality,” and you must also make this determination for all emails.

¹Emails that merely distribute copies of reports and studies do not need to be submitted to the ALS Contractor. DOE’s reports and studies that need to be produced on the LSN are obtained either through the RPC or by direct submittal to the ALS Contractor. Any copies attached to emails are therefore duplicates.

If your organization uses an email system other than the OCRWM Lotus Notes system, you can submit LSN-Relevant emails from that system by sending a copy to one of the OCRWM Lotus Notes addresses established to capture external email. Personnel working for the lead lab should cc: "LEAD_LAB@notes.ymp.gov". Personnel other than those working directly for the lead lab should cc: OCRWM_RPC@notes.ymp.gov". Alternatively, you can submit copies of LSN-Relevant emails from these other systems to your organization's LSN Point of Contact in either paper or electronic form, using the transmittal form for submittal of documents discussed in the preceding section. You should denote whether you consider any such submitted emails from these other networks to be privileged. (Note: You are not required to denote such emails as a "Federal Record" or "Condition Adverse to Quality." Those designations are a function of the template on the OCRWM Lotus Notes system.)

You should not use personal email accounts (e.g., Yahoo, AOL, MSN) for matters related to the Yucca Mountain project.

The following kinds of emails do **NOT** contain supporting or non-supporting information and should **NOT** be categorized as LSN-Relevant or otherwise submitted:

- Emails that solely concern the schedule or process for preparing or reviewing the license application or other documents.
- Emails that solely concern the date, time, location and topic of meetings.
- Emails that merely distribute a draft of a document for review with no substantive analysis or commentary about the draft.
- Emails that solely concern internal administrative matters such as budgets, financial management, personnel matters, office space or payroll information.
- Emails that solely concern procurement matters.
- Emails that solely concern DOE's processes to collect documents for the LSN.

B. DOCUMENTS TO BE RETAINED. While they do not need to be submitted to the ALS Contractor at this time, there are 6 categories of other documents that need to be preserved for potential use in the "derivative discovery" phase of the license proceeding. That phase will follow docketing of the license application. Unless copies of these documents are submitted to the RPC or are otherwise retained by your organization--such as by the LSN Point of Contact for your organization--you (or your organization) must retain one copy of any documents in the following 6 categories **THAT YOU CREATE**. A one-page summary of these document retention requirements is attached for reference as Attachment 2.

1. **Preliminary drafts.** If you are writing a report, study, or other document that is likely to qualify as documentary material when finalized, you must save drafts of these documents that are distributed to others for comment **AND** that are not submitted to the RPC.

2. **Marginalia on documents.** If you write on a document, you must retain that copy of the document if your notation reasonably could be construed as non-supporting information--that is, a reasonable person could think that an opposing party could use the notation to help frame or support a contention against DOE in the license proceeding. This does not mean that you must save a copy of every document that you write on. You need to retain a copy only if your notations contain substantive information that could reasonably be construed as non-supporting information in the license proceeding. The following rules also apply to and limit the scope of this retention obligation:

- If your marginal notations are comments on draft work product that will be collected and submitted to the RPC as part of a records package, you do not need to retain a copy of the draft with your notations.
- If you have submitted to the ALS Contractor a document that includes marginalia, you do not need to retain a copy.
- Highlighting and underlining are not marginalia, and you do not need to retain a copy of a document merely because you have highlighted or underlined text.

3. **Notes for personal use.** If you write a note for your personal use--either on paper or electronically--you must retain a copy of your note if it contains substantive content that reasonably could be construed as non-supporting information--that is, if a reasonable person could think that an opposing party could use the note as evidence to help frame or support a contention against DOE in the license proceeding. This does not mean that you must save a copy of all your personal notes. For example, you do **NOT** need to retain the following kinds of personal notes:

- Notes that are merely a to-do list or other type of action item list.
- Schedules or calendars, or notes that merely recite the date and topics of meetings.
- Notes that solely concern administrative or personal matters.
- Notes that merely list attendees and topics discussed in a meeting, with no substantive information pertaining to the merits of the license application.
- Notes that are reminders to call someone.

As these examples illustrate, you do not need to retain every note that you write during a meeting, presentation or phone call. You need to retain your notes **ONLY IF** they contain specific, substantive information from the discussion that could be considered non-supporting evidence.

4. **Speeches.** If you give a speech concerning the Yucca Mountain project, you (or your organization) should keep a copy of any text and presentation materials you prepared for the speech.

5. **Yucca Mountain-related travel vouchers.** If you travel on Yucca Mountain-related business, you (or your organization) should retain a copy of the travel vouchers for the trip.

6. **Offsite transportation documents.** As noted in the Call Memo, documents concerning offsite transportation of spent nuclear fuel or high-level radioactive waste to Yucca Mountain are not to be submitted to the ALS Contractor. However, if you work on offsite transportation matters, you (or your organization) must retain all documents that contain substantive information concerning the environmental effects of offsite transportation to Yucca Mountain. You do not need to retain such documents that are submitted to the RPC or that are included in the administrative record for an Environmental Impact Statement.

C. POST-PROJECT EMPLOYMENT. If you discontinue working on the Yucca Mountain project, you should advise your organization's LSN Point of Contact so appropriate arrangements can be made for the safekeeping of the documents you have retained for derivative discovery. As a general matter, if you discontinue work on the project because you are leaving the employment of DOE or a DOE contractor, the documents you have retained for derivative discovery, including personal notes, should remain in the custody of DOE or the DOE contractor, and should not be taken with you.

If you have questions concerning this guidance, contact either the LSN Point of Contact for your organization or Martha Crosland (202-586-5793) or Angela Kordyak (202-586-4301) in the Office of the General Counsel.

Attachments

LSN 2006 GUIDANCE, ATTACHMENT 1

SUMMARY GUIDANCE FOR LSN DOCUMENT SUBMITTAL

1. Follow project procedures for submittal of documents to the Records Processing Center (RPC). If a document is submitted to the RPC, no further action is required.
2. Submit to your organization's LSN Point of Contact all other "LSN-Relevant" documents that (i) you author or (ii) you receive from outside the Yucca Mountain project. A document is "LSN-Relevant" if it is:
 - a. A final report or study relevant to both the Yucca Mountain license application and the issues set forth in the Topical Guidelines in NRC Regulatory Guide 3.69;
 - b. A "circulated draft" of any report or study identified in item 2.a above. A "circulated draft" is a presumptively final version of a report or study distributed for organizational approval but that receives a formal, written non-concurrence; or
 - c. Any other final document that contains "non-supporting" information.
3. If you send or receive emails on the OCRWM Lotus Notes system, you do not need to retain copies of these emails because they are automatically retained. However, you must complete a template to categorize emails on the OCRWM Lotus Notes system. You should:
 - a. Categorize as "LSN-Relevant" all emails that contain "non-supporting information," *or* contain "supporting information" that could be helpful to DOE in the license proceeding, such as emails that put in context or resolve issues raised by "non-supporting" emails;
 - b. Categorize as "Privileged" all emails that you believe may contain information that is privileged under the deliberative process privilege, attorney client communication privilege, litigation work product doctrine or any other applicable privilege.
 - c. Categorize as a "Federal Record" all emails that pertain to your work for the Federal government.
4. If you send or receive an LSN-Relevant email on another system, you must either (a) send a copy to one of the addresses on the OCRWM Lotus Notes system designated for receipt of outside relevant emails; or (b) submit a copy to your organization's LSN Point of Contact.

NOTE: Consult your organization's LSN Point of Contact before you submit any documents with either Protected Personal Identifying Information or Safeguards Information.

NOTE: Do not submit documents with classified information. Preserve these documents, and contact your organization's LSN Point of Contact for instruction.

LSN 2006 GUIDANCE, ATTACHMENT 2

SUMMARY GUIDANCE FOR DOCUMENT RETENTION

1. Preliminary drafts. Retain a copy of drafts of potentially relevant documents if:
 - a. The draft was distributed for comment; and
 - b. A copy has not been submitted to the RPC.
2. Personal records/notes. Retain any notes or other personal records that you write if they contain substantive information that could reasonably be considered “non-supporting” of the license application.
3. Marginalia. If you write on a document, retain a copy of the document with your marginalia if the marginalia contains substantive information that could reasonably be considered “non-supporting” of the license application.
4. Speeches. Retain a copy of all speeches that you give that concern Yucca Mountain (unless your organization already retains them in a central location).
5. Travel vouchers. Retain a copy of your travel vouchers for Yucca Mountain-related business (unless your organization already retains them in a central location).
6. Offsite transportation. Retain a copy of any document that contains substantive information concerning the environmental effects of offsite transportation to Yucca Mountain (unless the document is in the administrative record of an environment statement prepared for the Yucca Mountain project or the document has been submitted to the RPC).

LSN 2006 GUIDANCE, ATTACHMENT 3

LSN Document Shipment Form

Custodian: _____

Date Shipped: _____

The attached document is subject to the following privileges
(mark all that apply):

- Attorney-client communication
- Litigation work product
- Deliberative process
- Protected Personal Privacy Information (PII)
- Other privacy information
- Proprietary privilege
- Safeguards Information (SGI)
- Other security privilege (OUO, UCNI, etc.)
- Archeological privilege

**VERIFICATION FORM FOR LICENSING SUPPORT NETWORK GUIDANCE
DISTRIBUTION**

I hereby verify that I have (1) distributed the guidance from the DOE General Counsel regarding Ongoing Licensing Support Network Obligations dated November 3, 2006, to all personnel in my organization who work on matters concerning the Yucca Mountain project; (2) distributed the guidance to all contractors of my organization who work on matters concerning the Yucca Mountain project, with instructions that these contractors distribute copies to their affected personnel and subcontractors; and (3) received written verification from those contractors that they have appropriately distributed the guidance to their personnel and subcontractors. I will continue to distribute the guidance to new personnel and contractors who work on matters concerning the Yucca Mountain project.

Signature: _____

Title: _____

Date: _____