

April 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of)	Docket No. PAPO-00
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	
(High Level Waste Repository: Pre-Application Matters))	NEV-01
)	

**DEPARTMENT OF ENERGY'S SUBMITTAL OF PROPOSED CASE MANAGEMENT
ORDER REGARDING PRIVILEGE DESIGNATIONS AND CHALLENGES**

The United States Department of Energy (DOE), pursuant to the First Case Management Order, submits the accompanying draft case management order regarding privilege designations and procedures for challenges to a participant's privilege designations. DOE requests the Board to enter that order.

DOE, the State of Nevada (State) and the Nuclear Regulatory Commission (NRC) Staff engaged in extensive, good faith discussions regarding the treatment of privilege claims and have agreed upon the form of an order with the exception of two issues (which affects three clauses of the proposed order). A copy of the agreed-upon order accompanies this submittal, with the clauses related to the two issues in contention highlighted in bold. The two issues are: (i) the timing for production of redacted documents on the Licensing Support Network; and (ii) application of the litigation work product privilege to non-attorney work product.

The bolded language in the draft order is DOE's proposed language on the two contested issues. The State plans to submit alternate language for those issues. Pursuant to the Board's March 11, 2005 Order, DOE and the State have conferred and will submit by April 25, 2005,

memoranda explaining the reasons for their respective proposed language on those two issues as well as responding to any material differences in proposed orders that other potential participants may submit.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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Dated: April 7, 2005

April 7, 2005

PROPOSED SECOND CASE MANAGEMENT ORDER
(Regarding Privilege Designations and Challenges to Privilege Designations)

This Order specifies requirements for (i) a participant's privilege designations during the pre-license application phase of the expected application by the United States Department of Energy (DOE) for a license to construct a repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada, and (ii) challenges to a participant's privilege designations.

I. BACKGROUND

On January 25, 2005, this Board entered its First Case Management Order. That Order directed DOE, the State of Nevada (State) and the NRC Staff, together with other potential participants who wished to respond, to meet regarding a joint format for privilege logs and associated procedures for resolving privilege disputes. According to joint reports of DOE, the State and the NRC Staff, their counsel, together with other interested persons, met on February 10 and 22, 2005, pursuant to advance notice that had been published on the Electronic Information Exchange (EIE) and the page for high-level waste on the NRC's website. Following those meetings, DOE, the State and the NRC Staff circulated to participants in those meetings, and made publicly available through their respective websites, a proposed form of order. Following a comment period, Nye County and the Nuclear Energy Institute notified DOE's counsel that they concurred with the proposed draft order. DOE, the State and the NRC Staff thereafter continued to confer to resolve open issues regarding the draft order, and on April 7, 2005, submitted alternate proposals to this Board. The proposals were identical except for three clauses. Upon consideration of those submittals, this Board enters this Second Case Management Order.

II. GENERAL REQUIREMENTS

A. The requirements of this Order shall apply equally to all present and future parties, potential parties, and interested governmental participants who make LSN certifications pursuant to 10 C.F.R. § 2.1003 (collectively, participants).

B. Subject to any exclusions in this Order, the bibliographic header on the Licensing Support Network (LSN) for a document claimed to be privileged shall include, in addition to any other required information, the following: (i) each privilege claimed for the document; (ii) all authors and all recipients (including all copyholders) as shown in the document; (iii) the date of the document, where available; and (iv) subject matter description, containing sufficient information to enable the participant to evaluate the privilege claimed, which information may appear in either the title or the comment field. Each privilege claimed for a document shall be identified in the access control field of the document's bibliographic header (which shall be a searchable field) and shall be identified using standard terminology for the privilege, stated in Section III below. If a participant believes that the information provided in a document's bibliographic header is not sufficient for that participant to assess a privilege claim, that participant may raise that issue through the dispute resolution process set forth in Section III.B below.

C. Each participant shall make a good faith effort to identify all applicable privileges for each document claimed to be privileged, and to include in the bibliographic header for such document the requisite information regarding each privilege claim, when it produces a bibliographic header for the document on the LSN. A participant shall not be precluded from subsequently claiming additional privileges for a document or supplementing the information in the document's bibliographic header.

D. The production of a privileged document, even if intentional, shall not cause a subject-matter waiver with respect to other privileged documents. A participant shall not be permitted to compel another participant to produce a privileged document on the ground that its production will not effect a subject-matter waiver with respect to other privileged documents. A participant who inadvertently produces a privileged document shall be permitted, upon a showing of good faith inadvertence, to re-claim the document from the other participants.

E. A request for documents pursuant to 10 C.F.R. § 2.1018(a)(1)(iii) may be for a complete category of documents subject to privilege claims as provided in Section III below. In response to such a request, the participant possessing the requested documents will make the requested documents available to the requesting participant, either in full-text subject to a protective order (if authorized by law) or in redacted form, within 7 business days of the request, pursuant to the following:

1. For a privileged document produced in full-text subject to a protective order, the document will be provided in electronic form (*e.g.*, on a cd-rom) that includes the document's bibliographic header, image and OCR text. The protective order governing the document will require the requesting participant to keep the document confidential absent further order or agreement of the producing participant; however, the requesting participant will be allowed to duplicate the document to provide copies to its attorneys, experts and consultants who agree to be bound by the protective order.

2. If a participant will produce the full-text of a privileged document in response to a request as provided in this section, the bibliographic header for that document need not identify all the authors and recipients of the document or provide a subject matter description

of the document containing sufficient information to enable a participant to evaluate the privilege claim.

3. If a participant elects to provide a redacted version of a privileged document in response to a request as provided in this section, that participant shall make the redacted version electronically available on the LSN as a separate document. **A participant will be allowed a reasonable time to make the redacted versions electronically available on the LSN following the request, provided that participant provides copies of the redacted versions (which for this purpose may be paper copies) to the requesting participant within 7 business days of the request.**

F. If a participant who receives an unredacted copy of a privileged document pursuant to a protective order wants to use a redacted version of the document in the proceeding free of the protective order, that participant will submit for approval the proposed redactions to the participant who provided the document. The proposed redactions shall be submitted sufficiently in advance to allow the producing participant time to review and consider the redactions. Disputes over proposed redactions, as well as whether a document should remain covered by a protective order, shall be subject to the dispute resolution process in section III.B below.

G. If a participant produces a bibliographic header for a document that it subsequently determines does not qualify as documentary material and therefore is not LSN-relevant, that participant may identify the document as non-documentary material in the header and need not provide the additional information required by this Order. Nor is that participant required to produce copies in either redacted or unredacted form. A participant may challenge any claim that such a document is not documentary material.

H. If a participant possesses electronic documents that may constitute documentary material but that it cannot review despite reasonable efforts (*e.g.*, emails with viruses, corrupt electronic media), the participant shall file with its initial LSN certification a statement identifying the categories and numbers of such documents. If another participant requests an electronic copy of such documents to try to access them, the participant possessing the documents will produce such copies, subject to an appropriate protective order to safeguard whatever privileged information might be included in the document (and any other appropriate disclaimers that the producing participant may desire based on the corruption of the electronic medium). Such a protective order shall additionally include a provision that the retrieving participant may use a recovered document free of the protective order only after (i) the producing participant has been allowed to review the document for privilege and (ii) any privilege claim regarding the document has been resolved.

I. If a participant identifies graphic-oriented or other non-imageable material (including databases) that contain privileged information and another participant requests access to that material, the participant in possession and the requesting participant shall enter into an appropriate protective order to safeguard the privileged information contained in the material.

J. Notwithstanding anything in this Order to the contrary, if DOE claims privilege in this proceeding for a document already identified on DOE's privilege logs in the spent fuel litigation in the United States Court of Federal Claims, DOE may provide the other participants the relevant entries from that privilege log for that document in lieu of providing in the document's bibliographic header the information otherwise required by this Order. The access control field will state that the document is on the spent fuel litigation privilege log.

K. Nothing in this Order prejudices the extent or validity of any privilege or its application to any document.

III. REQUIREMENTS FOR SPECIFIC PRIVILEGES

The requirements in this section apply to specific privileges, as indicated. The omission of a privilege in this section does not prohibit a participant from claiming a privilege not here identified if such privilege is available pursuant to applicable law. A document may be subject to multiple privilege claims. If one privilege claim would require production under a protective order or in redacted form, but another applicable privilege would protect the entire document from disclosure, the document does not need to be produced under a protective order or in redacted form.

A. Classified information.

1. Classified information is excluded from the LSN.
2. This Order does not address the requirements for access to classified information.

B. Sensitive unclassified information.

1. The bibliographic header of a document containing sensitive unclassified information shall identify that fact in the access control field and further specify whether the information qualifies as safeguards information, official use only information, or other sensitive information (*e.g.*, UCNI; information qualifying under 10 C.F.R. § 2.390(d)), using the terms Security-SGI, Security-OUO, or Security-Other as applicable. These terms are intended for the purpose of identifying privileged documents in bibliographic headers on the LSN only. Documents so identified may be marked for non-LSN purposes using other terms.

2. The Board will issue a further Order directing how representatives of eligible participants may obtain access to documents containing sensitive unclassified information.

C. Copyrighted material.

1. The bibliographic header of a document that is subject to copyright protection shall identify in the access control field that the document is copyrighted, using the term Copyright.

2. A participant producing a bibliographic header for a copyright-protected document shall provide a copy of the document to a participant upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii). Copies are not required to be produced on the LSN.

D. Archeological privilege.

1. The bibliographic header of a document containing information protected by the National Historic Preservation Act (16 U.S.C. § 470) or the Archeological Resources Protection Act (16 U.S.C. § 470aa) shall identify in the access control field that the document is subject to the archeological privilege, using the term Archeologically Sensitive.

2. A participant claiming that a document contains information protected by the archeological privilege shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

E. Privacy information.

1. The bibliographic header of a document containing protected privacy information shall identify in the access control field that the document contains privacy protected information, using the term Privacy.

2. A participant claiming that a document contains protected privacy information shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

3. These provisions do not pertain to documents from an employee concerns program file, which are addressed in the following section.

F. Employee Concerns Program files.

1. Based upon the representations of DOE, the State and the NRC Staff that they are still conferring about the treatment of employees concerns program files and certain documents from DOE's Safety Conscious Work Environment program, this Order does not address the treatment of such documents. The Board will issue a separate Order addressing the treatment of those documents.

G. Business-proprietary/confidential.

1. The bibliographic header of a document containing protected business-proprietary or confidential financial or commercial information shall identify in the access control field that the document contains such information, using the term Proprietary.

2. A participant claiming that a document contains protected business-proprietary or confidential financial or commercial information shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

H. Deliberative process.

1. A document that a participant claims is protected by the deliberative process privilege will be identified by the term Deliberative Process in the access control field of the document's bibliographic header.

2. For a participant to claim that a document is protected by the deliberative process privilege, an appropriate government official must have personally reviewed the document and determined that the document is both predecisional and deliberative. That official also must have determined whether the information being withheld contains factual information that could be reasonably segregated from the claimed privileged information.

3. For purposes of satisfying Section II.B.iv above, a participant claiming that a document is protected by the deliberative process privilege will provide a statement that identifies the official who made the determination required by Section III.H.2 above, the specific decisionmaking process to which the document relates, an explanation why the document is deliberative, and if it is the case, why any factual information in the document cannot be reasonably segregated, along the lines of the description contained in the April 1, 2005 letter from the NRC attached to this Order. Such statement can be provided in a separate index that the participant files on the EIE. Any such index must be filed at the time of a participant's initial LSN certification for documents that are part of the participant's documentary material collection at the time, and the index must be updated if a participant subsequently identifies on the LSN additional documents claimed to be protected by the deliberative process privilege.

4. **If a document subject to the deliberative process privilege contains factual information that can be reasonably segregated from the deliberative portions of the**

document, the participant claiming the privilege will produce, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), a redacted copy of the document on the LSN.

I. Attorney-client/litigation work product.

1. The bibliographic header of a document that is protected by either the attorney-client communication privilege and/or the litigation work product privilege shall identify in the access control field which, or both, of the privileges apply, using the terms ACP and/or LWP.

2. The bibliographic header for such a document will additionally classify the document into one or more of the following subcategories, using the terminology set forth in the following parentheses:

a. Confidential communication from counsel to client for purpose of providing legal advice (conf com from atty to client providing legal advice);

b. Confidential communication from client to counsel for purpose of seeking legal advice (conf com from client to atty seeking legal advice);

c. Confidential client discussion regarding legal advice (conf com discussing advice of atty);

d. Confidential litigation work product prepared by counsel (conf litig work product prepared by atty);

e. Confidential litigation work product prepared under counsel's direction (conf litig work product prepared under atty direction); and

f. **Confidential litigation work product prepared by other representative of participant (other conf litig work product prepared by party rep).**

3. A participant will either (i) indicate in the bibliographic header of a document subject to the attorney-client communication privilege which authors and/or recipients of the document are attorneys or (ii) file with this Board as part of its initial LSN certification the names of the attorneys for which the attorney-client privilege is claimed in its privileged documents. A party shall not be precluded from later identifying additional counsel.

4. A participant need not include documents or bibliographic headers for documents, including emails, exchanged solely among its counsel. For purposes of this section, this includes with respect to DOE the attorneys in DOE's Office of the General Counsel, DOE's Offices of Chief Counsel, the United States Department of Justice, and the law firms of Hunton & Williams LLC; Winston & Strawn; and Morgan Lewis & Bockius; for the State, this means the attorneys in the Office of the State Attorney General and the law firms of Egan, Fitzpatrick, Malsch & Cynkar, PLLC; Cooper & Kirk, PLLC; and Rossmann & Moore, LLP; and William Briggs; Paul Lamboley and Howard Shapar; and for the NRC Staff, this means the attorneys in NRC's Office of the General Counsel. Other participants relying on this provision must file with this Board at the time of their initial LSN certification the identities of their counsel for purposes of this provision. With the exception of the designations provided above for DOE, the State and the NRC Staff, a participant may challenge another participant's designation of counsel for purposes of this provision. The identification of a participant's counsel, whether in this provision or at the time of a participant's certification, shall not limit that participant's right to claim privilege for communications with other persons, including other attorneys as well as that participant's contractors and consultants.

IV. PROCEDURES FOR PRIVILEGE CHALLENGES

A. Time for challenges.

1. The 10-day period in 10 C.F.R. § 2.323(a) as applied to a participant's motion to compel production of another participant's document claimed to be privileged does not commence until the dispute resolution process described in section B below has been completed with respect to the document.

2. This Order is without prejudice to a participant's right to move for good cause for a reasonable cutoff date on privilege challenges. A participant must initiate the dispute resolution process with respect to another participant's document claimed to be privileged within a reasonable time in the interest of completing discovery in a timely manner. Failure to do so may be advanced by another participant to oppose any extension in any schedule or other deadline.

B. Dispute resolution process.

Participants shall exhaust the following process before filing with this Board a motion to compel the production of a document subject to a privilege claim or to challenge redactions made to a document. Participants shall engage in this dispute resolution process in a good faith effort to reduce to the greatest extent practicable privilege disputes submitted to this Board.

1. A participant seeking to challenge a document's privileged status first must confer with the participant possessing the document to identify and discuss the basis for the potential challenge. The conference does not need to be in person.

2. The producing participant shall be allowed a reasonable opportunity to respond to the query, presumptively five business days.

3. If the document implicates the privacy or other privilege interests of a non-participant (*e.g.*, an inter-agency communication; proprietary information of an agency's

contractors or subcontractors; document claimed as privileged by a non-participant in another lawsuit), the participant in possession of the document may notify that non-participant who will be allowed to participate in the dispute resolution process, including any matter regarding the document before the settlement judge discussed below.

4. If the dispute is not resolved by conference, the challenging participant must next submit the dispute to a settlement judge to be appointed by this Board pursuant to 10 C.F.R. § 2.338 (unless the document has already been reviewed through that process at the request of another participant). The purpose of proceeding before the settlement judge is to provide the participants the benefit of an objective assessment of the privilege claim and the challenge. A participant shall not make an unreasonable number of requests for review and shall submit a document to the settlement judge for review only if that participant has a good faith belief that the document may not be privileged. The process before the settlement judge will be subject to the following:

a. The process will be informal, and 10 C.F.R. §§ 2.338(e) and (g-i) shall not apply. No briefs or hearing shall be permitted, although the settlement judge shall afford the participant claiming the privilege (and any interested non-participant described in section 3 above) an opportunity to explain the basis for the claimed privilege.

b. The process shall be expedited.

c. The challenging participant shall initiate review of a document by advising the settlement judge of the LSN accession number of the document and the basis for the challenge. The method of notification will not be through the EIE but shall be by

email or other method preferred by the settlement judge. The challenging participant will copy the other participants on any such communication.

d. During the course of the settlement judge's consideration of a dispute over a document, a participant may initiate contact with the settlement judge by phone or in writing (which includes email), but only if the challenging participant and the participant possessing the document are allowed to participate in the phone call or are copied on the written communication.

e. The settlement judge may initiate contact with a participant to ask questions about the privilege claim or challenge. Such communications will not be held to violate any prohibition on ex parte communications or separation of function requirements.

f. The settlement judge may conduct an in camera review of the document in question if appropriate to reach an opinion on the privilege challenge. Such review and sharing of information with the settlement judge will not cause a waiver of any privilege.

g. The settlement judge will advise the participants in writing (which may be by email) whether or not he agrees with the assertion of the privilege. The notice does not need to detail the reasoning behind the settlement judge's opinion, but any of the participants may ask the settlement judge to explain his reasoning, subject to the provisions of subparagraph d above.

h. The settlement judge's opinion and reasoning will be non-binding. No participant may cite the settlement judge's opinion or reasoning to this Board.

i. The settlement judge shall not communicate with this Board or the Commission about any privilege challenge or document that is the subject of such a challenge.

5. If the settlement judge's opinion does not resolve the dispute, a participant may file a motion to compel pursuant to 10 C.F.R. § 2.1010.



UNITED STATES
NUCLEAR REGULATORY COMMISSION

WASHINGTON, D.C. 20555-0001

APR 01 2005

SECRETARY

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Re: Appeal 2005-006A

Dear Mr. Fitzpatrick:

I am responding to your March 11, 2005 appeal of the agency's February 11, 2005 response to your FOIA request of November 30, 2004. This response (FOIA-2005-0060) identified in Appendix A the two documents found by a search of NRC agency records to be within the scope of your request and withheld them in their entirety pursuant to Exemption 5. The NRC's form response cited the deliberative process and attorney-client privileges as reasons for the denial of release.

Your appeal objected to the NRC's responding to your FOIA request by a preprinted form on which checkmarks identified the reasons for denial. The NRC finds this procedure necessary for expedition in handling the many FOIA requests received by the agency. The form response benefits FOIA requesters by reducing the time needed for the NRC to process their request while informing them of the basis for the denial.

In response to your appeal we have determined to release a redacted version of document 1, "E-Mail from Cordes to Jones et al." We continue to withhold portions of this document pursuant to Exemption 5 both as deliberative process material and as attorney work product. In the withheld portions Mr. Cordes describes for the Commissioners' legal assistants his impressions of the Environmental Protection Agency's views on possible actions responding to the D.C. Circuit's July 9, 2004 decision vacating and remanding portions of EPA's standards for Yucca Mountain. Mr. Cordes's observations are deliberative and predecisional. Moreover, they deal with legal options related to ongoing litigation. This material is clearly withholdable under Exemption 5. Releasing it would intrude on the NRC's deliberative process and on attorneys' preparation for anticipated litigation. These considerations outweigh any public benefit from release of the complete document. A copy of the released portion of this record is enclosed.

The Executive Director for Operations will respond separately to your appeal of the denial of the second document covered by your FOIA request.

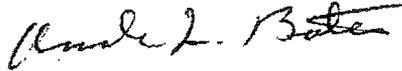
We have performed a further search and have found two earlier drafts of the other document subject to your appeal. These records will be addressed in the response of the Executive Director for Operations to your appeal. We note that your appeal contrasts the large number of EPA documents identified as responsive to a similar request with the very small number (two) the NRC has found. An explanation for the difference is suggested by the released paragraph 5 of the Cordes document. Mr. Cordes notes that the EPA has the lead

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responsibility for developing standards and a compliance period, to which the NRC must then conform its regulations.

This is a final agency action on this record pursuant to 10 C.F.R. §9.29(c)(3)(2001). As set forth in the FOIA (5 U.S.C. §552(a)(4)(B)), judicial review of this decision is available in a district court of the United States in the district in which you reside or have your principal place of business, or in the District of Columbia.

Sincerely,



Andrew L. Bates
Acting Secretary of the Commission

Enclosure: as stated

April 7, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of)	Docket No. PAPO-00
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U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01-PAPO
)	
(High Level Waste Repository: Pre-Application Matters))	NEV-01
)	

DEPARTMENT OF ENERGY'S SUBMITTAL OF PROPOSED CASE MANAGEMENT
ORDER REGARDING PRIVILEGE DESIGNATIONS AND CHALLENGES
CERTIFICATE OF SERVICE

I certify that copies of the foregoing DEPARTMENT OF ENERGY'S SUBMITTAL OF PROPOSED CASE MANAGEMENT ORDER REGARDING PRIVILEGE DESIGNATIONS AND CHALLENGES has been served upon the following persons by electronic mail and/or Electronic Information Exchange as denoted by an asterisk (*).

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