

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING 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 April 25, 2005

**STATE OF NEVADA’S MEMORANDUM IN
SUPPORT OF ITS COMMENTS ON THE DEPARTMENT
OF ENERGY’S DRAFT CASE MANAGEMENT ORDER**

On April 7, 2005, the Department of Energy (“DOE”) submitted a draft case management order specifying requirements for privilege designations in the pre-application phase of the Yucca Mountain geologic repository licensing proceeding and for challenges to those privilege designations. On the same day, NRC Staff and the State of Nevada filed comments on the draft order. NRC Staff generally supported DOE’s proposal, while Nevada supported DOE’s proposal with two important exceptions relating to (1) when documentary material in the form of redacted versions of documents must be placed on the LSN, and (2) the availability of a work product privilege for documentary material prepared by scientists and engineers independent of counsel. Nevada promised to file this Memorandum supporting its two exceptions by April 25, 2005. Nevada will respond to the questions posed by this Board’s April 19, 2005 Memorandum at the May 4, 2005 conference.

I. Redacted Documentary Material (Draft Order at Sections II. E. 3. and III. H. 4.)

DOE’s draft order provides for the production of non-privileged, redacted versions of otherwise privileged documents (for example, documentary material containing the segregated

factual material in pre-decisional documents) within seven business days of a request, which may be a blanket request for all redacted documentary material covered by a specified privilege. However, this seven-day production may be in the form of paper copies; production of the redacted documentary material on the LSN would only occur within a “reasonable time” after both the request and the LSN certification. Since many thousands of pages of DOE documentary materials will be required to be produced in redacted form, the effect of this is that many thousands of pages of DOE documentary materials will not be electronically available on the LSN until some unspecified period (perhaps even months) after the LSN certification.

As Nevada indicated in its April 7, 2005 comments on the draft order, this delayed production on the LSN is contrary to the NRC’s LSN regulations. To conform the draft order to the NRC’s regulations, without massive editing of the draft order, Nevada proposed that a new section II. E. 4. be added to the draft order as follows:

Notwithstanding paragraph 3. above and paragraph III. H. 4., if Commission document discovery rules for formal adjudications or the Freedom of Information Act would require a participant to redact privileged documentary material and produce redacted versions, the participant shall make the redacted versions electronically available on the LSN (i) at the time of initial certification, (ii) whenever additional materials are made available pursuant to 10 C.F.R. § 2.1003(e), and (iii) at the time of updated certification (submission of the license application).

To minimize the changes that would need to be made to the draft order to accommodate Nevada’s concerns, Nevada’s April 7, 2005 comments also suggested that the highlighted text in sections II. E. 3. and III. H. 4 of DOE’s draft order could remain with the understanding that it would be limited to circumstances where, for some improper reason, particular redacted documentary material was not placed on the LSN and a participant requested that it be so placed. However, after further review, Nevada believes an order with both the highlighted text and

Nevada's suggested language could be confusing. It might be better if the highlighted text is deleted.

The legal basis for Nevada's exception and additional language can be simply stated. Since production of documentary material on the LSN is intended to speed the Yucca Mountain licensing proceeding and to be an expeditious substitute for the production of documents under formal discovery rules, as well as an expeditious alternative to production of documents under the Freedom of Information Act ("FOIA"), it follows that whenever formal discovery rules or FOIA would require production of a redacted version of a document in response to an initial request, that same production must be part of any initial LSN production and certification (as well as LSN additions and certification updates).

The premise for Nevada's argument is consistent with the letter and the spirit of 10 C.F.R. § 2.1003, which requires the inclusion of all "documentary material" on the LSN, and with 10 C.F.R. § 2.1001, which defines "documentary material" to include "information" in addition to discrete "reports" and "studies." Redacted documentary material would clearly constitute relevant information that must be included on the LSN. Moreover, the premise for Nevada's argument is also stated clearly in the regulatory history of the regulations in Subpart J of 10 CFR Part 2. The current rules can be traced to 1989, when Subpart J was first added to 10 CFR Part 2. The system of electronic discovery contemplated by Subpart J in 1989 was called the "Licensing Support System" or "LSS," but the essential purposes of Subpart J in 1989 remain the same today. The NRC stated in the preamble to the final 1989 rule that the LSS was intended to expedite the repository licensing proceeding by "[e]liminating the most burdensome and time-consuming aspect of the current system of document discovery –i.e., the physical production of documents after the license application has been filed – because the LSS will provide for the

identification and submission of discoverable documents before the license application is submitted.” 54 Fed. Reg. 14925, 14926, 14928, April 14, 1989. The LSS would also expedite the licensing proceeding by “[e]liminating the equally burdensome and numerous FOIA requests for the same information that both DOE and the NRC will surely receive before and after the application is filed...” *Id.* And, with the LSS in effect, “the Commission does not anticipate continual discovery requests for large amounts of additional documents.” 54 Fed. Reg. 14925, 14927, April 14, 1989.

Since, as indicated above, the LSN was intended to be an expeditious substitute for document discovery and an expeditious alternative to document production under FOIA, it follows that the standards for document production under formal discovery and FOIA must also be applicable to production under the LSN rules, for otherwise the essential purposes of the LSN rules cannot be achieved. Since an adequate production under formal discovery and FOIA will often require production of redacted documents in response to initial requests, it follows that adequate initial production under the LSN rules must also include production of redacted documentary material on the LSN.

DOE’s draft order fails to meet this standard because, under it, the production of redacted documents on the LSN will not be a necessary part of the initial LSN certification required by 10 CFR § 2.1009(b). Indeed, it may be months after the initial LSN certification before thousands of pages of redacted documentary material are actually placed on the LSN. Moreover, thousands of pages of non-privileged but redacted documentary material may never be made available to the public on the LSN because no participant requested redacted copies. And, although perhaps not as important as the production associated with the initial certification, the draft order also

fails in not assuring that redacted documents will be an automatic part of the additions required by 10 C.F.R. § 1003(e) or the updated certification required by 10 C.F.R. § 2.1009(b).

While the draft order does contemplate the production of paper copies of redacted documentary material, this is no adequate substitute for electronic discovery. In 1989 the Commission rejected an industry alternative whereby documents would be made available in microfiche because “the Commission does not believe that the mere *availability* of documents in hard copy or microfiche without electronic full text search capability will permit an adequate substantive review of the documents in the HLW proceeding by the staff itself or any other party, nor will it permit the hearing to be completed within the NWPA time frame.” 54 Fed. Reg. 14925, 14929, April 14, 1989 (emphasis in original). This Board also stressed the need for electronic access and full search capability in its August 31, 2004 Memorandum and Order, LBP-04-20, __NRC __ (2004) (slip opinion at 5, 42). Placing redacted documentary material on the LSN not only facilitates document research, but it also eliminates the great expense associated with making paper copies of thousands of pages of documents for reviews by participants’ teams of experts. Under DOE’s draft order, Nevada (and the other participants) would be faced with the choice of duplicating and sending all of the hundreds of thousands of pages of documentary materials to all of its experts, or trying to minimize the burden of copying and sending by dividing the material into expert subject matter categories without the benefit of LSN search capability. The former would be very wasteful and expensive, but the latter would likely be impossible. NRC’s LSN rules were designed to avoid such problems.

In its August 31, 2004 Memorandum and Order The Board also properly emphasized the importance of the link between initial LSN certification and the schedule for docketing of the license application and filing of contentions. The Board found that “a full and fair six-month

document discovery period, where all of DOE's documents are to be available to the potential parties and the public, is a necessary precondition to the development of well-articulated contentions and to the Commission's ability to meet the statutory mandate to issue a final decision within three years." LBP-04-20, *supra* at 17-18.

It follows from the above that the production of paper copies is no substitute for production on the LSN. Under DOE's draft order the six-month period for electronic discovery before submission of contentions, called for by the LSN rules and described in the Board's Memorandum and Order, could shrink to a few months or less.

Finally, the question must be asked why DOE is so adamant on this issue. As the Board's August 31, 2004 Memorandum and Order pointed out, the timing of initial certification is within DOE's control. LBP-04-20, *supra* at 5. There can be no valid reason why DOE cannot time its initial LSN certification so that the production of redacted documentary material on the LSN precedes rather than follows the certification.

II. Trial Preparation Materials by Scientists and Engineers.

Section III of the draft Order contains "Requirements for Specific Privileges." Subsection I. of section III. provides that a privilege identified as "Attorney-client/litigation work product" will be applicable to categories of documentary material. The categories subject to the specified privilege are described in more detail in subsection I. 2. Categories a. through c of subsection I. 2. address attorney-client privileged materials, while categories d. through f. address litigation work product materials. For the reasons below, Nevada objects to the inclusion of paragraph f., "[c]onfidential litigation work product prepared by other representative of participant (other conf litig work product prepared by party rep)."

It is long settled that the privilege for trial preparation materials recognized by the Commission in 10 C.F.R. § 2.705 (b)(3) and (4) (and its predecessor 10 C.F.R. § 2.740 (b)(2)) is the same as the traditional work product privilege recognized in litigation in the federal courts and in Rule 26(b)(3) of the Federal Rules of Civil Procedure. *Commonwealth Edison Company (Zion Station, Units 1 and 2)*, ALAB-196, 7 AEC 457, 460 (1974); *Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)*, LBP-82-82, 16 NRC 1144, 1157-1159 (1982).

The attorney work product privilege is traceable to the venerable case *Hickman v. Taylor*, 329 U.S. 495 (1947). While the scope of the privilege is broader than the scope of the attorney-client privilege, the essence of the privilege still relates to the efforts and thought processes of attorneys. As the D.C. Circuit explained in *Coastal States Gas Corp. v. DOE*, 617 F. 2d 854, 864 (D.C. Cir. 1980), the attorney work product privilege “provides a working attorney with a ‘zone of privacy’ within which to think, plan, weigh facts and evidence, candidly evaluate a client’s case, and prepare legal theories.” It applies to materials “prepared by agents for the attorney as well as those prepared by the attorney himself.” *U.S. v. Nobles*, 422 U.S. 225, 238-239 (1975). See also *In re Grand Jury Subpoena Dated March 19, 2002 and August 2, 2002*, 318 F. 3d 379 (2nd Cir. 2003). Categories d. and e. of subsection II. 2. anticipate the application of this privilege because they apply by their terms to litigation work product “prepared by counsel” or “prepared under counsel’s direction.” In contrast, category f. applies only to litigation work product *not* prepared by counsel or under counsel’s direction. Such product can have nothing to do with the thought processes and theories of counsel (counsel’s “zone of privacy”) that the attorney work product privilege is designed to protect from disclosure.

In 1970, Rule 26 was amended to recognize the application of the work product privilege to materials prepared in anticipation of litigation by a representative of a party, not just the party's attorney. Thus, the privilege is potentially applicable to reports prepared in anticipation of litigation by a party's accountant, insurer, claims adjustor, and investigator. *See U.S. v. Adlman*, 68 F.3d 1495 (2nd Cir. 1995) (accountant); *Linde Thomson Langworthy Kohm and Van Dyke, P.C. v. Resolution Trust Corporation*, 5 F.3d 1508 (D.C. Cir. 1993) (communications between insurer and insured); *Holmgren v. State Farm Mutual Auto. Ins. Co.*, 976 F.2d 573 (9th Cir. 1992) (claims adjustor); *In re International Systems and Controls Corp. Securities Litigation*, 693 F.2d 1235 (5th Cir. 1982) (investigative report by accountant).

However, regardless of whether the materials were prepared by or for a party's attorney or by another representative of the party, the concept of the privileges is still the same—to shield from discovery (absent a special showing) materials that would give a party an inexpensive short cut into the litigation planning and strategy of an adversary, and there is no privilege unless the materials in question was prepared in anticipation of litigation. The Advisory Committee Notes on the 1970 amendment to Rule 26 explain in this regard that “[m]aterials assembled in the ordinary course of business, *or pursuant to public requirements unrelated to litigation*, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision” [emphasis added].

More specifically, even though documents and drafts of documents prepared by a public decision-maker are likely to be the subject of later litigation, they are not covered by the work product privilege because they are “acts performed by a public employee in the performance of his official duties.” *Grossman v. Schwarz*, 125 F.R.D. 376, 388 (S.D.N.Y. 1989). In the same vein, a litigant “cannot hide behind the work product doctrine the research, tests, and

experiments which are pertinent to the patent application,” *Natta v. Hogan*, 392 F.2d 686, 693 (10th Cir. 1968), or shield “exposure records which are necessary for OSHA to carry out its enforcement or other regulatory functions.” *Martin v. Bally’s Park Place Hotel & Casino*, 983 F.2d 1252, 1261 (3rd Cir. 1993).

NRC case law is to the same effect. The work product privilege does not apply to materials such as drafts of quality assurance documents required by NRC’s regulations, or materials otherwise prepared in the ordinary course of business. *Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-7, 23 NRC 177 (1986); *Kerr McGee Chemical Corporation (West Chicago Rare Earths Facility)*, LBP-85-38, 22 NRC 604, 615 (1985); *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit No. 1)*, LBP-82-82, 16 NRC 1144, 1161-1162 (1982). In fact, the NRC has been reluctant to apply the privilege to any documentary material unless counsel was somehow involved in its preparation. *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit No. 1)*, LBP-82-82, *supra*. The category in the draft order in question (category f.) anticipates the invocation of a privilege for documentary materials “prepared by other representative of participant” in anticipation of litigation. Since categories d. and e. already recognize a privilege for attorney work product, category f. applies by its terms only to litigation work product that is *not* prepared under counsel’s direction. Moreover, because of the definition of “documentary material” in 10 C.F.R. § 2.1001, it is also clear that the documentary material covered by category f. would be relevant to satisfaction of NRC requirements. If it were *not* so relevant, it would not need to have been placed on the LSN in the first place. DOE has a nearly limitless group of managers, consultants, engineers, and contractors who might be considered to be DOE representatives and the “documentary material” that these representatives would produce would be in response to NRC

requests for information or other NRC requirements. Circulated draft and final versions of these individuals' or organizations' work product (for example, draft application materials) would be indistinguishable from the draft and final documents not subject to the privilege and ordered disclosed in NRC cases cited above because they were prepared in the ordinary course of business to satisfy NRC requirements.

The concept underlying DOE's category f. must be that draft or final technical materials prepared by non-lawyers for eventual submission to the NRC to establish the safety or environmental suitability of Yucca Mountain would often be "prepared in anticipation of litigation." Nevada submits that this very concept presumes an odious relationship between DOE (the regulated) and NRC (the regulator) whereby scientific truth and candor are sacrificed in favor of non-lawyer advocacy and litigation strategy. One should expect responsible advocacy in motions, briefs, and similar items produced by attorneys; one should not encourage the same advocacy in technical documents prepared by scientists and engineers over 23 years for ultimate submission to the NRC. Indeed, the Licensing Board in *Braidwood* went even further, holding that "[t]he input of counsel to documents required under the regulatory process and otherwise discoverable cannot immunize those documents from discovery." *Commonwealth Edison Company (Braidwood Nuclear Power Station, Units 1 and 2)*, LBP-86-7, *supra* at 179. Inclusion of DOE's category f. would send the wrong signal that it is perfectly acceptable for every scientist and engineer representing DOE on the Yucca Mountain Project to function as an advocate for the project and for such scientists' and engineers' work product to be shielded from public scrutiny. Internal e-mails within the Yucca Mountain Project already suggest that litigation strategy is leading DOE to be less than full and frank in its dealings with the NRC Staff. *See* Exhibit A attached. This kind of conduct should not be encouraged.

An analogy can be drawn to *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984). In this case, the Supreme Court refused to recognize a discovery privilege for working documents prepared by public corporations' independent auditors. The Court held that such a privilege would be contrary to the public interest given the special obligations of auditors to corporations' stockholders, investors, and regulatory agencies. Here, too, the managers, scientists and engineers working for DOE on Yucca Mountain owe an independent duty to the NRC (and to the public) to be complete and accurate in their technical communications. 10 C.F.R. § 63.10. Shielding from disclosure technical materials prepared by non-lawyers for eventual submission to NRC, as suggested by category f., would be contrary to the public interest for the same reason that shielding auditors' reports was contrary to the public interest in *Arthur Young & Co.* Arguably, DOE has been anticipating Yucca Mountain litigation since 1982, when the Nuclear Waste Policy Act of 1982 was first enacted, or at least since 1987 when that Act was amended to focus repository development on Yucca Mountain. A broad and retroactive application of the privilege described in DOE's category f. would be especially contrary to the public interest given the duration, size and importance of the Yucca Mountain Project, the special obligations DOE owes to the NRC and the public, and the large quantity of documents that are potentially affected.

Settling this issue now, rather than waiting until particular documents are withheld, will promote the orderly course of this proceeding and eliminate or narrow future controversy. Nevada emphasizes that, from its standpoint, the defect in the draft order is that, by including category f., DOE would seem to be paving the way for the withholding of a large category of documentary materials of a purely technical nature, contrary to a proper application of the work product privilege and the public interest. This concern is not speculative. As this Board noted in

its August 31, 2004 Memorandum and Order, LBP-04-20, *supra* at 23-24, in its June 30, 2004 LSN certification DOE tried to shield from discovery nearly five thousand purely technical documents just on the issue of Alloy-22 corrosion. Thus, there is reason to be concerned that hundreds of thousands of other purely technical documents might be the subjects of DOE privilege claims.

Respectfully submitted,



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April 25, 2005

EXHIBIT

A

Author: Larry Rickertsen
Organization: RWDOE
From: CN=Larry Rickertsen/OU=YM/O=RWDOE
PostedDate: 08/01/2002 02:00:06 PM
SendTo: CN=Peter Swift/OU=YM/O=RWDOE@CRWMS
CopyTo:
ReplyTo:
BlindCopyTo:
Subject: Re: KTIA escalation?
Body: I will be glad to provide you the documentation if this comes up, but I think Rob has taken care of it.

DEK 001231578

In case he has not apprised you, I think the conflict has the two following features. One is their desire to meet their schedule. They wanted this paper to be close to the product we provided them in June. Our attempt to update this on the basis of what we presented and heard in the KTI technical exchange last week was something they saw as affecting their need to meet their July deadline. However, this also meant rejecting comments regarding grammar and spelling that we made.

The second problem is more important (and the reason I am giving you this explanation). Apparently the LAP position on these KTI papers is to provide minimum information to the NRC, hoping that will be sufficient. They would provide additional information as requested. Accordingly, they desire to reduce the technical content. Because they do not fully understand what we have written, their reduction results in discrepancies from what we can justify technically.

As I said, I think this particular conflict is addressed (except for the difference we have in how quality assurance of the analyses should be described--this one will get elevated. Our position is to state up front these are not Q and then to describe what we have to maintain traceability. Their approach is to discuss only what we have done as if following part of the procedure overcomes the problem. I consider this part of a much bigger problem--that LAP thinks we actually have to have Q analyses to justify our decisions (including the decision about how much validation is needed).

Peter Swift

08/01/2002 09:18 AM

To: Larry Rickertsen/YM/RWDOE@CRWMS

cc:

Subject: KTIA escalation?

User Filed as: Excl/AdminMgmt-14-4/QA:N/A

Larry, Rob tells me that you and he and Prasad had a difficult exchange yesterday involving a TSPA I KTI that addresses UZ flow. Can you send me the files? Our text, LAP's changes?

In case it comes up for management escalation, I'll need a copy in front of me.

Thanks

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U.S. DEPARTMENT OF ENERGY)	ASLBP No. 04-829-01 PAPO
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(High Level Waste Repository: Pre-Application Matters))	NEV-01
)	April 25, 2005

CERTIFICATE OF SERVICE

I certify that copies of the foregoing STATE OF NEVADA'S MEMORANDUM IN SUPPORT OF ITS COMMENTS ON THE DEPARTMENT OF ENERGY'S DRAFT CASE MANAGEMENT ORDER has been served upon the following persons by electronic mail.

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