May 12, 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)	)	

DEPARTMENT OF ENERGY'S MEMORANDUM IN RESPONSE TO MAY 11, 2005 MEMORANDUM AND ORDER REGARDING SECOND CASE MANAGEMENT CONFERENCE

In its May 11, 2005 Order, the Pre-License Application Presiding Officer (PAPO) Board directed the parties to file on or before May 12, 2005 a memorandum addressing four issues. The PAPO Board additionally instructed the United States Department of Energy (DOE) to provide any case management order or other filing or pleading in the Spent Fuel Litigation regarding the content of privilege logs in those cases. DOE submits this memorandum in response to those directions. This memorandum addresses the issues in the order set forth in the May 11, 2005 Order and identifies additional matters the Board is requested to address either in the forthcoming Case Management Order or in another case management conference following additional briefing.

I. SUGGESTED CHANGES TO PRIVILEGE LOG

A. Amendments to specific elements

DOE proposes the following amendments to the specific elements of the privilege log entries for the attorney-client communication, litigation work product, and deliberative process privileges as set forth in Appendices A, B and C of the Board's April 19, 2005 Memorandum and Order. Attached to this brief for the Board's convenience are revised versions of the appendices that incorporate DOE's comments.

1. Date of document. The only available date of creation for some documents may be a partial date, *e.g.*, a year only. No date of creation at all may be available for some documents. Also, where a complete date of creation is not available for a document on the Licensing Support Network (LSN), an obvious place holder date is used in the date field of the document's bibliographic header (*e.g.,* 1901/01/01, where no date at all is available). Since the privilege log database is to be populated from information in the LSN bibliographic headers, the date field on the privilege log should correspond to the document's date in the LSN. Accordingly, this requirement should read, "the date the document was created, to the extent identified in the document and as provided in the bibliographic header for the document on the LSN."

2. Author of document. The Board's formulation presumes that a specific individual will always be identifiable as a document's author. It may not be possible in all instances, however, to identify the specific individual who authored a document, as opposed to that person's employer or other affiliation. For example, outside counsel may prepare and submit a memorandum to its client that does not name specific attorneys as the authors. That fact does not defeat the memorandum's status as a privileged attorney-client communication from the law firm, assuming the other elements of the privilege are met. To address the situation

where an entity alone is identifiable as a document's author, this requirement should read, "the authors identified in the document and their employers or other affiliation, otherwise the entity that prepared the document."

3. **Job title or capacity.** As discussed at the May 4 hearing, it is not practical to provide the job title of the authors (or recipients) of a document. Nor is job title a prima facie element of the attorney-client, litigation work product, and deliberative process privileges. Also, the term "capacity" is ambiguous in practical application. To the extent it seeks to explicate the relationship between the document's authors and recipients, a separate requirement already calls for that information. The different information the word "capacity" is meant to require is unclear. These requirements should thus be deleted.

4. **Named recipients of document.** As with a document's author, it should be recognized that a named recipient may be an entity as opposed to an individual. Accordingly, this requirement should read, "all named recipients of the document, whether individuals or entities."

5. **Other persons who received or saw the document.** There are three problems with the requirement to identify "any persons known or believed to have received or seen" a document.

First, it begs the question, "known or believed by whom?" To state a prima facie privilege claim for a document, a party would not typically be required to interview the authors and named recipients of the document, or conduct some other investigation, to determine if the document was sent to or reviewed by someone not named in the document. Rather, for purposes

of making a prima facie claim a party is allowed to presume, absent some contrary red flag, that the document's distribution comported with the distribution specified in the document.[1]

The second problem is that, read literally, the requirement would mandate the identification of all persons who received or reviewed the document for litigation support functions, such as collecting and processing the document for the LSN as well as reviewing the document for potential privilege claims. A privileged document obviously does not lose its privileged status because it was collected, processed and reviewed by litigation counsel and litigation support personnel, and there is no need to require identification of such personnel.[2]

Third, the word "saw" is vague. Receipt or reading of a document is the more appropriate standard. Accordingly, this requirement should be deleted.

6. Persons who received a "summary" of the document. The identity of persons who received a "summary" of the document is ambiguous and is not required to state a prima facie privilege claim. A prima facie showing means "merely that which is sufficient to establish a fact or raise a presumption unless disproved or rebutted."[3] As such the "customary contents of the privilege log" sufficient to state prima facie grounds for withholding documents are "merely a description of the type of document (*e.g.*, an opinion letter, a request for an opinion

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[1] *Cf. Davis v. United States*, 968 F.2d 1276, 1279 (D.C. Cir. 1992) (litigant claiming that document was publicly available has the burden of production on the issue; "the task of proving the negative—that information has not been revealed—might require the government to undertake an exhaustive, potentially limitless search.") (emphasis in original).

[2] *Compulit v. Banctec, Inc.*, 177 F.R.D. 410, 412 (W.D. Mich. 1997) (holding that the attorney-client privilege is not lost if a law firm uses an outside vendor to copy privileged communications, and privilege not waived if an independent contractor is hired by counsel to provide a necessary service to effectively represent the client).

[3] *Yankee Atomic Electric Company v. United States*, 54 Fed. Cl. 306, 308 (Ct. Fed. Cl. 2002) (attached as Appendix E).

letter), its topic, date, the writer and recipient, and an explanation as to why the matter is deemed to be privileged (which privilege was being invoked and on what grounds).[4]

Whether an otherwise privileged communication was "summarized" in another communication is not a prima facie element needed to support the inference that the underlying communication is privileged. That is because a privileged communication does *not* lose its privileged status just because it is summarized in another document or communication.[5]

The effect, if any, of a summary on the underlying document's privileged status depends on many facts and circumstances. For example, it matters whether the summary merely restates the underlying document's conclusions or whether it sets forth a significant part of that document's analysis.[6] Also relevant is whether the summary was disclosed in litigation as opposed to having been used in an extrajudicial matter.[7]

Those facts and circumstances, as well as the treatment of the summary, relate to the issue of a potential subject matter waiver, and disproving such a waiver is *not* a prima facie requirement for asserting privilege. It is incumbent on a party opposing the assertion of a privilege to adduce sufficient facts suggesting that the privilege was waived. The proponent of

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[4] *Id.* at 309.

[5] *E.g., In re Dayco Corp. Derivative Sec. Litig.*, 99 F.R.D. 616, 619 (S.D. Ohio 1983) (summary disclosing the findings of a privileged report did not waive the privilege as to the report).

[6] *E.g., Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. Partnership*, 154 F.R.D. 202, 211 (N.D. Ind. 1993) (summary disclosing insignificant part of privileged report did not waive the privilege as to the report, even where the summary was not a privileged document).

[7] *Yankee Atomic*, 54 Fed. Cl. at 316 ("subject matter waiver is inapplicable where the disclosure was not made in the context of a judicial proceeding and did not afford the client and adversarial gain."); *accord, e.g., In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

the privilege need address the possible waiver only if the opponent satisfies its burden of adducing sufficient evidence tending to show that a waiver occurred.[8]

Representative federal cases holding the same include: *Perkins v. Gregg County*, 891 F. Supp. 361, 363 (E.D. Tex. 1995) ("The burden of proof regarding a privilege's applicability rests on the party invoking it ... Once the privilege has been established, the burden shifts to the other party to prove any applicable exceptions"); *Consolidated Health Plans, Inc. v. Principal Performance Group, Inc.*, 2003 WL 1193663, at *7 (E.D. La. Mar. 14, 2003) (the court stated that certain "non-controversial basic principles" underpin the attorney-client privilege, including that the party asserting the privilege bears the initial burden of demonstrating its existence and once a claim of privilege is established, the burden of proof shifts to the party seeking discovery to prove any applicable exception to it); *Renner v. Chase Manhattan Bank*, 2001 WL 388044, at *1-2 (S.D.N.Y. April 17, 2001) (the general rule is that the party asserting the attorney-client has the burden demonstrating its applicability while the burden shifts to the party seeking disclosure once the initial burden is met); *Aull v. Cavalcade Pension Plan*, 185 F.R.D. 618, 624 (D. Colo. 1998) ("A party asserting a privilege has the burden of establishing that the privilege is applicable. A party asserting waiver of a privilege has the burden of establishing the waiver."). Accordingly, the references to document summaries should be deleted.

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[8] *First Federal Savings Bank of Hegewisch v. United States*, 55 Fed. Cl. 263, 266-67 (Ct. Fed. Cl. 2003) (describing the "prevalent practice" in federal courts regarding the treatment of privilege claims as a three-step process, where first the party asserting the attorney-client privilege "has the initial burden of establishing the elements of the privilege. Once this showing is made, the burden shifts to the party opposing the privilege to establish a prima facie case of waiver ... Next, the burden shifts back to the party asserting the privilege to 'rebut the prima facie case by demonstrating that the privilege is still viable.'") (*quoting Attorney-Client Privilege in the United States* § 9:20, at 53).

7. Statement of facts/subject matter description. These requirements should be amended by adding the following phrase, "but without disclosing the privileged content of the document." This is a typical feature of a privilege log.[9]

8. A statement of the degree of confidentiality. There are two problems with requiring a statement of the degree of confidentiality.

First, as discussed at the May 4 hearing, confidentiality is not a prima facie element of the deliberative process privilege. The cases setting forth the elements of the deliberative process privilege do not list confidentiality as a requirement. Indeed, intra-agency communications are expressly shielded by this privilege, so there obviously can be no requirement that the communication remain within an agency.[10] Accordingly, any statement regarding confidentiality should be deleted from the requirements for the deliberative process privilege.

Second, while attorney-client communications and litigation work product must be treated with appropriate confidentiality to remain privileged, the identification of a document's authors and recipients, and a description of the relationship between them, typically suffices as a prima facie showing whether the document's distribution was appropriately circumscribed. Again, the burden is on the opponent to make a showing that the documents were not adequately protected notwithstanding an appropriate distribution before the proponent must address that issue.

Even then the proponent of the privilege is not required to make a document-by-document showing on a privilege log to rebut a general charge of insufficient confidentiality. Rather, it is sufficient for the proponent of the privilege to provide a general explanation of its

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[9] *See* Fed. R. Civ. P. 26(b)(5) (providing that description of privileged document withheld from production shall not "reveal[] information itself privileged or protected").

[10] *E.g., Access Reports v. Department of Justice*, 926 F.2d 1192, 1194 (D.C. Cir. 1991).

record-keeping practices and protections, usually by affidavit.[11] Inclusion of that information on each document's privilege log entry would be repetitive and would serve no purpose other than to unnecessarily swell the size of the privilege log.[12]

9. Other identifying information. Since each document with an entry on the privilege log will have a bibliographic header on the LSN, the document's "participant" accession number should be required as the identifying information. This will permit easy tracking between bibliographic headers and the privilege log.

10. Non-attorney litigation work product. As discussed at the May 4 hearing, the term "i.e." should be changed to "e.g." in item 6 of Appendix B. This is necessary to make clear that the cited examples of work product are illustrative and do not limit the litigation work product privilege to counsel's mental impressions and counsel's work product.[13]

11. Decisionmaking process. Consistent with the Joint Proposed Order, item 6 of Appendix C should not be limited to a "specific decision or potential decision," but should read, "decision, potential decision, or decisionmaking process." This is consistent with the case law regarding the deliberative process privilege.[14]

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[11] *E.g., Federal Trade Commission v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).

[12] *See* 8 Wright & Miller, Fed. Prac. & Proc. Civ. 2d § 2016.1.e (the "basic objective [of the privilege log] is a sufficient description of the matters withheld to satisfy the needs of the case; rigid insistence on certain logging or indexing procedures may go well beyond that, particularly in larger cases.").

[13] *See* 10 C.F.R. 2.1018(b)(2); *see also* May 4, 2005 Transcript at p. 64, line 11.

[14] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n.18 (1975) (holding that the "emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process."); *Access Reports*, 926 F.2d at 1196 (holding that the deliberative process privilege does not "require that the document contribute to a single, discrete decision").

B. General amendments

The appendices should be amended to address the following two general issues for the attorney-client communication, litigation work product, and deliberative process privileges.

1. Timing of entries. The Board indicated at the May 4 hearing that entries on the privilege log should follow requests for privileged documents made pursuant to 10 C.F.R.1018(a)(1)(iii). DOE is concerned that, without further structure, such an arrangement could result in major inefficiencies and disruption without further definition. Such requests, and ensuing motions to compel, could come in random order (or all in one omnibus request), be overlapping and redundant, and impose unnecessary logistic burdens on the Board, the LSN Administrator and the participants. There also could be a large surge of requests and motions at the end of the pre-license application phase, the result of which would tend to delay the proceedings.

DOE believes that the following type of schedule, with deadlines for a participant's privilege log entries by category of privilege, as well as deadlines for challenges based on common or generic questions of law raised by each category, is a preferable approach and should be incorporated into the appendices:

• 30 days after LSN certification	Production of privilege log data for deliberative process documents
• 60 days after LSN certification	Production of privilege log data for litigation work product documents/generic challenges to deliberative process documents
• 90 days after LSN certification	Production of privilege log data for attorney-client communication documents/generic challenges to litigation work product documents
• 120 days after LSN certification	Generic challenges to attorney-client communication documents

Entries for the deliberative process documents are first under this schedule because those are the documents the State has advised it is particularly interested in challenging. The litigation work product documents are next so participants can have a reasonable time—up to 90 days—to develop a case for need to overcome the qualified protection for fact work product. The attorney-client communications are last because those have an absolute protection and are documents essentially impervious to challenge.

This approach provides several advantages. It provides predictability, so the Board, the LSN Administrator and participants can plan the expenditure of resources and coordinate other activities that will occur during the pre-license application phase. It provides an orderly time table for the creation of the privilege log and encourages the identification and resolution of generic privilege challenges in order to minimize delays in the proceeding. And not least, it moots questions concerning the time needed by the participants and the LSN Administrator to produce a privilege log entry following receipt of a request.

Of course, requests under § 1018(a)(1)(iii) would still be available for the privileged documents to be produced under a protective order as well as non-imageable material. Privilege challenges also could be permitted after the deadlines in the foregoing schedule for individual, fact-based challenges, for good cause. Implementation of the schedule, though, would materially advance the goal of orderly and timely proceedings.

2. Supplementation of entries. The elements listed in the appendices will not provide the information the Board needs in all instances to resolve a motion to compel production of a privileged document. For example, a motion to compel may rely on assertions outside the four corners of the privilege log. It would be unfair in that circumstance to decide the

motion on the face of the original privilege log entry without allowing the proponent of the privilege to rebut the allegations.

To address that, the appendices should include a requirement that the relevant participants must confer in advance about (i) the basis for an anticipated motion to compel and (ii) supplementation of the relevant privilege log entries, if necessary, to address either the grounds of the motion or the movant's expected evidence. The participant claiming privilege should then be allowed either to supplement the relevant privilege log entries to respond to the motion, or be allowed to provide supporting information in connection with its brief in opposition to the motion. That way, the Board will have before it information tailored to the specific issue framed by the motion. (Note: This would not allow the assertion of a privilege not originally identified in the privilege log. Rather, it would permit the provision of additional information to corroborate the existing privilege claim in light of the specific legal or evidentiary basis of a motion to compel.)

II. PRIVILEGED STATUS OF INTER-ORGANIZATIONAL COMMUNICATIONS OF NON-ATTORNEYS RELAYING COUNSEL'S ADVICE

Federal courts have long recognized that when "the client is by nature a group, as is true of both the government and corporations, ... the [attorney-client privilege] should not be defeated by some limited circulation beyond the attorney and the person within the group who requested the advice."[15] This principle reflects the practical reality that counsel's advice must be disseminated to the organization's personnel who are responsible for the activities to which the advice relates. Such communications relaying counsel's advice, even if among non-attorneys, are protected by the attorney-client communication privilege.[16]

Representative decisions recognizing this principle include the following: *Premiere Digital Access, Inc. v. Cent. Tel. Co.*, 360 F. Supp. 2d 1168, 1175 (D. Nev. 2005) (applying privilege to attorney-client email contained in email chain exchanged between non-attorney company employees); *Long*, 204 F.R.D. at 134 (applying the privilege to protect communications relaying legal advice between agents of a corporation); *McCook Metals L.L.C. v. Alcoa, Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000) (applying the privilege to the communication of legal advice between a company's business personnel); *Baltimore Scrap Corp. v. David Joseph Co.*, 1996 WL 720785, at *6 (D. Md. Nov. 20, 1996); (applying privilege to vice president's transmission of legal advice to co-employees); *In re Pfizer Inc. Sec. Lit.*, 1993 WL 561125, at *9 (S.D.N.Y. Dec. 23, 1993) (applying privilege to attorney-client communication circulated to non-attorney employees); *United States v. Aluminum Co. of America*, 193 F. Supp. 251, (N.D.N.Y. 1960) (applying the privilege to protect communication of legal advice between

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[15] *Coastal States Gas Corp. v. Dep't. of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980).

[16] *See* 3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence*, § 503.22[4][a] & n.33 (recognizing application of the attorney-client communication privilege to internal corporate communications); E. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*, (4th Ed., Supp. 2004) (same).

non-legal employees); *see also United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1077 (N.D. Cal. 2002) (extending privilege to protect non-legal employee "communications that reflect matters about which the client intend[ed] to seek legal advice").

As these cases additionally show, application of the privilege in this context does not require a specific showing of need for each person who received the advice. Where the advice relates generally to the employee's duties, the court "may reasonably infer that the information was deemed necessary for the employees' or contractors' work."[17]

Of course, the communication must actually relay advice of counsel to be privileged. [18] Also, the work that personnel thereafter undertake consistent with the legal advice, or otherwise perform to implement that advice, is not protected by the attorney-client privilege (although that work may be protected by another privilege if the requirements for such other privilege are satisfied).[19] These limitations, however, do not defeat the ability to claim the attorney-client communication privilege for communications among non-attorneys relaying advice of counsel.[20]

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[17] *FTC v. GlaxoSmithKline*, 294 F.3d 141, 148 (D.C. Cir. 2002); *accord Alexander v. FBI*, 186 F.R.D. 154, 162 (D.D.C. 1999); *Long v. Anderson Univ.*, 204 F.R.D. 129, 134 (S.D. Ind. 2001); *Verschoth v. Time Warner, Inc.*, 2001 WL 286763, at *2 (S.D.N.Y. March 22, 2001) (holding that executive's transmission of legal advice to another who shares "responsibility for the subject matter underlying the consultation" is privileged); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 518 (D. Conn. 1976) (same).

[18] *Verschoth v. Time Warner, Inc.*, 2001 WL 286763, at *2 (S.D.N.Y. March 22, 2001).

[19] *See Bank of New York v. Meridien Biao Bank Tanzania, Ltd.*, 1996 WL 474177, at *1 (S.D.N.Y. April 21, 1996) ("all of the defendant's documents produced in order to implement that [legal] advice would not be privileged") (internal quotations omitted).

[20] *See additionally Bank of New York*, 1996 WL 474177, at *3 (applying the privilege to protect communication of legal advice where recipient had a need to know counsel's advice and where the legal advice related to the recipient's performance); *Shriver v. Baskin-Robbins Ice Cream Co.*, 145 F.R.D. 112, 115 (D. Colo. 1992) (extending privilege in breach of lease agreement action. where the director of operations transmitted legal advice only to company's real estate review board); *Santrade, Ltd. v. General Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993) (applying the privilege to cover corporate communication of legal advice to non-attorneys "especially individuals involved in corporate decision-making"); *Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 454, 456 (N.D. Ill. 1974) (applying the privilege in patent infringement action where the recipient's employees had the "primary responsibility" for dealing with the patent infringement issue).

III. DOE'S DESIGNATION OF SENIOR OFFICIAL FOR DELIBERATIVE PROCESS PRIVILEGE

DOE designates Ronald A. Milner as its official to approve the assertion of the deliberative process privilege over its documents in this proceeding. Mr. Milner has been the Chief Operating Officer for DOE's Office of Civilian Radioactive Waste Management (OCRWM) since January 2000. Prior to that he served as Acting Deputy Director, OCRWM from January 1997 to January 2000. He also served as Acting Deputy Director, OCRWM from January 2001 to August 2003.

Previously, Mr. Milner was the Director, Office of Waste Acceptance, Storage and Transportation in OCRWM. Mr. Milner has also served as the Director, Office of Program Management and Integration, the Associate Director for Storage and Transportation, Director of Program Control Division and as Director of the Financial Management and Analytical Services Division, within OCRWM.

In 2002 Mr. Milner was delegated pursuant to standing orders still in effect the authority to assert the deliberative process privilege over documents in OCRWM's purview. Pursuant to that authority, Mr. Milner was the DOE official who approved the assertion of the deliberative process documents in the spent fuel litigation.[21]

Counsel for the NRC Staff has advised that the Staff has no objection to Mr. Milner's acting as DOE's official to authorize the deliberative process privilege for its documents in this proceeding. Counsel for the State of Nevada has advised that the State does not object to

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[21] *See Yankee Atomic*, 54 Fed. Cl. 306 at 309-10.

Mr. Milner either (although the State is proposing some additional language to the deliberative process elements).[22]

[22] At present, DOE expects that all its deliberative process documents fall under OCRWM's purview. If DOE were to identify documentary material from its other organizations that are candidates for the deliberative process privilege, it will identify another official to assess those documents.

IV. PROTECTION OF ECP FILES

The types of employee concerns documents on which DOE asserts a qualified privilege and for which it seeks protection from discovery are a subset of the files of documents created or collected by the staff of the employee concerns program (ECP) and maintained as confidential, protected files by the ECP. That subset includes only those documents that qualify as "documentary material" as defined in 10 C.F.R. § 2.1001 and the release of which potentially compromises the confidentiality that the ECP accords individuals who report a concern, those who may be interviewed in the course of a concern investigation, and those against whom an allegation may be made. For the sake of convenience, this protected subset will be referred to herein as the privileged ECP documents. DOE does not seek protection for ECP files *in toto* or for non-privileged "documentary material" merely because it appears in an ECP program file. Nor does it seek protection of potentially identifying information for any individual who declines confidential treatment.

The privileged ECP documents consist of documents that are subject to qualified privilege protection under the Privacy Act of 1974[23] and FOIA exemptions, particularly 5 and 6.[24] Moreover, 10 CFR § 2.1018(c)(1) authorizes the PAPO Board to condition discovery upon good cause shown. Good cause exists to limit production of requested, privileged ECP documents to redacted versions of those documents under a protective order that limits their dissemination and use.

A. BACKGROUND

1. ECPs uniquely contribute to the NRC expectation for a safety conscious work environment free from retaliation or discrimination. Safety is a paramount

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[23] 5 U.S.C. § 552a.

[24] 5 U.S.C. §§ 552(b)(5), and 552(b)(6).

consideration in the design, construction, operation, and maintenance of nuclear facilities. As a result, Congress and the NRC require licensees to maintain a work environment free from discrimination or retaliation for reporting safety concerns.[25] More broadly, the NRC expects licensees to "establish and maintain a safety-conscious work environment in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation."[26]

Although the NRC does not require licensees to have an ECP, it has long recognized that a licensee's ECP goes hand-in-hand with its commitment to safety.[27] The NRC encourages each licensee "to have a dual focus: (1) on achieving and maintaining an environment where employees feel free to raise their concerns directly to their supervisors and to licensee management, and (2) on ensuring that alternate means of raising and addressing concerns are accessible, credible, and effective."[28] The NRC specifically includes in its routine inspections of licensees an assessment of their establishment of a safety-conscious work environment.[29]

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[25] 42 U.S.C. § 5851; 10 C.F.R. § 63.9.

[26] NRC Policy Statement, *Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation,* 61 F.R. 24336-01, 1996 WL 249772 (N.R.C., May 14, 1996).

[27] *See, e.g.,* NRC Policy Statement, *Freedom to Raise Safety Concerns, supra* n.5*;* NRC Request for Public Comment regarding Safety-Conscious Work Environment, 62 F.R. 8785, 8786-8787 (N.R.C., Feb. 26, 1997); Proposed Generic Communication on Establishing and Maintaining a Safety Conscious Work Environment, 69 F.R. 61049, 61054-61058 (N.R.C., Oct. 14, 2004); *In the Matter of Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2)*, DD-93-12, Docket Nos. 50-445, 50-446, 37 N.R.C. 477, *489, 1993 WL 438821 (N.R.C.O.N.R.R., June 4, 1993).

[28] NRC Policy Statement, *Freedom to Raise Safety Concerns, supra* n.5 at *24338.

[29] *See, e.g.,* NRC Policy Statement, *Freedom to Raise Safety Concerns, supra* n.5 at *24337*; In the Matter of Power Authority of the State of New York (Indian Point Nuclear Generating Station, Unit 3),* DD-00-3, Docket No. 50-286, 52 N.R.C. 17, 21, 2000 WL 1456993 (N.R.C.O.N.R.R., July 26, 2000) (review of safety-conscious work environment part of inspection program); NRC Inspection Procedure 40001, "Resolution of Employee Concerns" (requiring assessment of whether licensee's ECP meets objective).

2. Confidentiality is critical to meeting the objective of establishing a safety-conscious work environment. The NRC expressly recognizes that confidentiality is critical to meeting the objective of establishing a safety-conscious work environment. The NRC has observed that the "success of a licensee alternative program for concerns may be influenced by how accessible the program is to employees, prioritization processes, independence, provisions to protect the identity of employees including the ability to allow for reporting issues with anonymity, and resources."[30] Additionally, NRC Inspection Procedure 40001 ("Resolution of Employee Concerns"), at ¶¶ 02(f) and (g), advises the NRC inspector assessing the licensee's process for resolving employee concerns to evaluate "how employees are assured that confidentiality will be preserved" and "whether sufficient controls are in place to protect those employees who identify concerns from any type of retaliatory action."[31] This Inspection Procedure, moreover, requires a determination of whether "Records are maintained in an officially designated secure location accessible only to internal auditors, ECP staff, and authorized management."[32]

The NRC has required licensees to take corrective action when confidentiality has been actually compromised.[33] Moreover, it has expressed concern "over any *perception* that an

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[30] NRC Policy Statement, *Freedom to Raise Safety Concerns, supra* n.5 at *24338.

[31] *Accord* NRC Inspection Procedure 40001, ¶ 03.01(b) (requiring determination of the following programmatic elements: "assurance of employee confidentiality" and "measures to protect employees from retaliation"), ¶ 03.02(f) (requiring determination whether "the ECP is independent," "confidentiality of employees is maintained," and "employees understand the accessibility, confidentiality, and protection against retaliation provided by the ECP").

[32] NRC Inspection Procedure 40001, ¶ 03.02(a).

[33] *See, e.g., In the Matter of Niagara Mohawk Power Corporation (Nine Mile Point Nuclear Station, Units 1 and 2)*, Docket Nos. 50-220, 50-410, 50 N.R.C. 281, 1999 WL 1335079 (N.R.C.O.N.R.R., Oct. 28, 1999).

employee might suffer discrimination because of raising safety concerns," and has required corrective action to "resolve this perception problem."[34]

3. DOE's ECP is an important pillar of its program to establish and maintain a safety conscious work environment. As detailed in the accompanying Affidavit of Ms. Goeckner, ECP Program Manager for the Office of Civilian Radioactive Waste Management (OCRWM), DOE's ECP is an important pillar of its program to establish and maintain a safety conscious work environment. The program is a confidential one operated in accordance with applicable NRC guidance and DOE requirements.[35]

As Ms. Goeckner explains, requiring disclosure of ECP files, even in redacted form, introduces risk that individuals may be identified by involved or knowledgeable persons from the non-redacted portions of a document, exposing them to the very risks of discrimination and retaliation, whether real or perceived, that confidentiality is intended to preclude. Disclosure and broad dissemination of privileged ECP documents, moreover, would tend to create a chilling effect on the ECP and feed a perception that the ECP's promise of confidentiality is an empty one. This would seriously undermine DOE's ability to maintain an effective ECP.

B. DOE's privileged ECP documents are subject to qualified privilege protection under the Privacy Act and FOIA exemptions, particularly 5 and 6.

The LSN regulations specifically recognize that parties may assert "traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in Section 2.390." 10 C.F.R. § 2.1006(a). The privileged ECP documents are subject to qualified

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[34] *In the Matter of Arizona Public Service Company*, DD-92-7, Docket Nos. 50-528, 50-529, 50-530, 36 N.R.C. 338, 1992 WL 540811 (N.R.C., Nov. 24, 1992); *see also, In the Matter of Houston Lighting and Power Company (South Texas Project, Units 1 and 2)*, DD-94-13, Docket Nos. 50-498, 50-499, 40 N.R.C. 377, *380-81, 1994 WL 778174 (N.R.C.O.N.R.R., Dec. 20, 1994) (when NRC inspection team found that "employees *perceived* that the [ECP] did not always protect the alleger's identity," NRC required corrective action to resolve "chilling effect."). (Emphasis added throughout unless otherwise).

[35] DOE Order 442.1A, Department of Energy Employee Concerns Program (June 6, 2001).

privilege protection under the Privacy Act and FOIA exemptions, particularly 5 and 6, which are privileges recognized in NRC adjudicatory proceedings that are excepted from disclosure in § 2.390. Other FOIA exemptions and privileges may apply on a case-by-case basis to specific ECP documents.

1. The Privacy Act protects the privileged ECP documents. Subsection b of the Privacy Act, 5 U.S.C. § 552, limits a government agency's ability to disclose information placed in a system of records. The ECP records are a Privacy Act system of records and have been noticed as such in the Federal Register, 68 F.R. 38762 (June 30, 2003). The DOE must protect those records in accordance with the Privacy Act. 5 U.S.C. § 552(a)(5). As discussed in the accompanying Affidavit of Julie A. Goeckner, and the Federal Register notice, DOE does.

2. FOIA Exemptions 5 and 6 protect the privileged ECP documents.

Exemption 6 permits the government to withhold information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy."[36] The U.S. Supreme Court has firmly held that the term "similar files" is to be interpreted broadly rather than narrowly, observing that the protection of an individual's privacy "surely was not intended to turn upon the label of the file which contains the damaging information."[37] Rather, the Court made clear that all information that "applies to a particular individual" meets the threshold requirement for Exemption 6 protection.[38] Accordingly, the threshold for Exemption 6 is met for information that applies to any particular, identifiable individual, including individuals who report a concern,

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[36] 5 U.S.C. § 552(b)(6). *See generally,* United States Department of Justice annotated discussion of FOIA Exemption 6 at www.usdoj.gov/oip/foi-act.htm.

[37] *United States Department of State v. Washington Post Co.,* 456 U.S. 595, 601 (U.S.D.C. 1982).

[38] *Id.* at 602.

those interviewed in the course of a concern investigation, and those against whom an allegation may be made.[39]

Exemption 5 of FOIA permits the government to withhold those documents normally privileged in the civil discovery context, encompassing both statutory privileges and those commonly recognized by case law.[40] NRC case law and guidance as discussed in Section IV(A) above establish a qualified privilege for files associated with an NRC or licensee program that allows individuals to raise safety concerns without risk of discrimination or retaliation.

Because nuclear facility ECPs are uniquely a product of the federal regulatory structure, a privilege for ECP documents is not one specifically documented in any state's common law, the usual source for privileges recognized by FOIA Exemption 5. The NRC is a unique source of authority for this qualified privilege, because the privilege is an outgrowth of the requirement that nuclear licensees and potential licensees establish and maintain a safety culture with an atmosphere free of harassment, discrimination, intimidation, and retaliation. The fact that NRC case history, policy statements, and guidance provide the "common law" source of the privilege rather than state or federal courts does not diminish the status of the privilege or DOE's ability to withhold privileged ECP documents under FOIA Exemption 5. The privilege recognized by the

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[39] The D.C. Circuit determined that Exemption 6 is equally applicable to the "author" and the "subject" of a file. *See N.Y. Times Co. v. NASA*, 920 F.2d 1002, 1005 (D.C. Cir. 1990) (en banc). *See also, Mueller v. United States Dep't of the Air Force*, 63 F. Supp. 2d 738, 743 (E.D. Va. 1999) (declaring that even given pre-existing publicity, "individuals have a strong interest in not being associated with alleged wrongful activity, particularly where, as here, the subject of the investigation is ultimately exonerated") (Exemptions 6 and 7(C)).

[40] 5 U.S.C. § 552(b)(5). *See generally,* United States Department of Justice annotated discussion of FOIA Exemption 5 at www.usdoj.gov/oip/foi-act.htm. Exemption 5 provides that FOIA does not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Certainly memorialized communications between employees and the ECP are "inter-agency or intra-agency memorandums or letters."

NRC, moreover, can be viewed as a specific application of the long-recognized self-critical analysis or self-evaluative privilege[41] as well as the safety-related investigations privilege.[42]

The Supreme Court has ruled that FOIA exemption 5 encompasses not only privileges existing at its enactment, but also those privileges subsequently recognized.[43] According to the Supreme Court, the law of privilege is not static but should be extended as "reason and experience" recommend.[44] Reason and experience support recognition of a privilege for ECP files.

C. There is good cause to protect employee concern files as DOE proposes pursuant to 10 CFR § 2.1018(c)(1).

In accordance with the applicable privileges discussed above, and pursuant to the PAPO Board's authority to limit discovery upon motion and for good cause shown pursuant to 10 CFR § 2.1018(c)(1), DOE specifically proposes production of privileged ECP documents only:

- In header-only format initially;[45]
- In protected form[46]; and
- To the person requesting the document.[47]

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[41] *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *affirmed*, 479 F.2d 920 (D.C. Cir. 1973); *Washington Post Co. v. U.S. Dep't of Justice*, 1987 U.S. Dist. LEXIS 14936, *19 (D.D.C. 1987).

[42] *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802-3 (1984); *Machin v. Zuckert*, 316 F.2d 336, 339 (D.C. Cir. 1963).

[43] *Weber Aircraft*, 465 U.S. at 799-800.

[44] *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996).

[45] DOE proposes that the headers be crafted to protect identities and file numbers; designate applicable privileges; disclose subject matter of document crafted to protect identities and file numbers; describe document in file (e.g., investigator notes); and give document date.

[46] The protected form would safeguard any personally identifying information via redaction, which may be extensive, and would limit dissemination and use of the redacted document under the terms of a protective order.

[47] This would exclude distribution to other non-requesting parties and publication to the LSN even in redacted form, because such publication directly controverts the NRC guidance requiring restricted-access files as discussed in Section IV(A) above. *Accord,* NRC Final Policy Statement, *Protecting the Identity*

The pertinent question is not whether the PAPO Board *can* order the protection DOE seeks for the privileged ECP documents. It unquestionably can under the applicable privileges discussed above. Even absent any applicable privilege, it can do so under the authority granted it by § 2.1018(c)(1), which requires no privilege as a prerequisite to its application.[48] The pertinent question under this section is whether DOE has shown "good cause" for the level of protection it seeks. That "good cause" is evident from considerations flowing from the applicable privileges, Ms. Goeckner's testimony, and the NRC's long and extensive history of requiring special protection for employee concern documents. DOE's proposal does not foreclose access to the privileged ECP documents. Rather, it ensures that access to a particular document is a merited compromise of the promised confidentiality and impact on future effectiveness of the ECP.

The PAPO Board and Nevada both appear to recognize the need for redaction of personally identifying information from the privileged ECP documents, and Nevada claims that this is all that occurs in providing ECP documents in response to a FOIA request.[49] DOE's past case-specific FOIA responses provide little guidance on the appropriate protection to be afforded the subset of privileged employee concern documents in the context of implementing the unique requirements to make documentary material publicly available on the LSN. Those past responses generally involved disclosure of documents that had already been publicly released or documents specific to an individual released to that individual, or his or her authorized legal

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of Allegers and Confidential Sources, 61 F.R. 25924 (N.R.C., May 23, 1996); *Reporting Safety Concerns to the NRC,* NRC NUREG/BR-0240, Revision 2 (July 2003) (stating NRC intent to "protect the identity of the individual *to the greatest degree possible,*" including assurance that documents will not be placed in NRC public document rooms).

[48] An applicable privilege makes invocation of protection under § 2.1018(c)(1) unnecessary. As the NRC recognized in *Public Service Co. of NH,* 1988 WL 236160 (N.R.C. 1988), "discovery rules do not end with" FOIA exceptions. Rather, "the general NRC discovery rule on protective orders . . . . clearly permit[s] protection from annoyance and oppression ***independently*** of FOIA exemptions."

[49] May 4, 2005 Transcript at p. 117.

representative, under the Privacy Act. In any event, a FOIA officer's case-specific determination cannot be used in future circumstances to foreclose the agency from asserting additional privileges or pursuing additional protections.[50]

Whether or not Nevada is correct as to a specific FOIA request to date, it is clear that redaction of individual identifying information is necessary but may not be enough. As the NRC has recognized, redaction alone still poses the risk that the identity of individuals can be inferred[51] at least by those most closely associated at work, who are the likely reason confidential treatment was sought in the first instance. The magnitude of that risk changes when the context changes from limited numbers of specific FOIA request responses to the wholesale assessment and potential production of all documentary material contained within ECP files. Accordingly, DOE seeks the additional protection accorded by a protective order imposing limitations on dissemination and use of this narrow subset of documents.

The PAPO Board appears to be considering release of redacted versions of privileged ECP documents to the LSN.[52] Publication of redacted documents on this publicly accessible forum is inconsistent with NRC directives to make *all reasonable efforts* to protect actual and perceived confidentiality to the greatest degree possible, store documents in secured areas with controlled access, and withhold from publication to the NRC's public document rooms. Such disclosure materially increases the risk of the chilling effect on DOE's ECP against which the NRC has long warned.

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[50] *Public Citizen v. Department of State,* 276 F.3d 634 (D.C. Circ. Ct. App. 2002).

[51] *In the Matter of Florida Power & Light Company,* DD-98-10, Docket Nos. 50-335, 50-389, 50-250, 50-251, 48 N.R.C. 245, 249-250, 1998 WL 958299 (N.R.C.O.N.R.R.) (October 21, 1998) (observing that information released by newspaper did not include names of employees, but stating that there remained the possibility that the employees' identities could be determined).

[52] May 4, 2005 Transcript at p. 105

Both the PAPO Board and Nevada cited the warning provided to the individuals participating in certain concerns investigations that confidentiality cannot be guaranteed.[53] Although employees have been warned of the potential and limited circumstances for disclosure, those warnings were accompanied by assurances that all reasonable steps would be taken to avoid unnecessary disclosure. Those warnings did not put employees on notice that disclosure could occur without careful balancing of the need for release against the risk of release. Those warnings also did not put employees on notice that disclosures could exceed that which is necessary to balance competing interests. DOE's proposed protection for its privileged ECP documents is based on good cause and strikes a reasonable balance of competing interests. Accordingly, the PAPO Board should order protection of privileged ECP documents in accordance with DOE's proposed protections.

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[53] *Id.* at p. 113

V. STATEMENT REGARDING SPENT FUEL LITIGATION

There was no case management order *per se* in the spent fuel litigation that specified the requirements for the parties' privilege logs. By Order entered June 6, 2002 (attached as Appendix D), the court in that litigation found that DOE needed to provide additional detail on its original privilege log and ordered the parties to agree on a format that was "sufficient to make *a prima* facie determination that withholding is appropriate." Although the parties conferred, they were unable to reach an agreement about the format and level of detail for the privilege log. DOE consequently developed the format for the privilege log as previously submitted to the Board. In ruling on subsequent motions to compel, the court held that DOE's descriptions on that privilege log were proper.[54]

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[54] *See Yankee Atomic Electric Company v. United States*, 54 Fed. Cl. 306 (Ct. Fed. Cl. 2002) (attached as Appendix E).

VI. ADDITIONAL MATTERS

DOE requests the Board to address the following additional matters, either in its anticipated Case Management Order or following briefing and a subsequent case management conference:

1. **Removal of irrelevant documents.** DOE requests the PAPO Board to include in its Case Management Order a direction requiring DOE to remove from its document collection on the LSN those documents that DOE produced last year in bibliographic header only format but that DOE has subsequently determined do not qualify as documentary material. This matter was discussed at the May 4 hearing, *see* May 4, 2005 Transcript at pp. 201-05, and the PAPO Board stated from the bench that DOE should remove these documents, *see* May 4, 2005 Transcript at p. 205. DOE is proceeding in compliance with that direction, but it would be preferable if that direction were included in a formal order.

2. **Requirement to produce the draft license application on the LSN.** Nevada asserted at the May 4 hearing that the drafts of the license application do not qualify as litigation work product (and implicitly that they are required to be produced on the LSN). Although the May 11, 2005 Order did not request briefing on this matter, DOE respectfully requests the Board to establish a briefing schedule on the issue whether the LSN regulations require production of drafts of the license application. This is an important issue, and its resolution now will avoid inevitable future disputes. The State also sought at the May 4 hearing to interject extra-record factual allegations on this matter, and DOE ought to have an opportunity to respond to those allegations before any decision is made on this issue.

The drafts, as well as edits and comments thereon, are privileged litigation work product since they are undertaken in preparation of the license application, which is the primary litigation document in the licensing proceeding. Disclosure of these documents developed in anticipation

of litigation would be an "unnecessary intrusion by opposing parties and their counsel" into the process by which DOE assembles information, sifts relevant facts from irrelevant facts, prepares legal theories and plans its litigation strategy.[55] Indeed, if DOE were required to produce drafts of its license application, as well as edits and comments thereon, equity requires that the other parties and participants be required to do the same with drafts of their contentions and other pleadings.

But equally important, the drafts of the license application, as well as edits and comments thereon, are not required to be produced on the LSN *irrespective of whether they are deemed to be privileged.* This is because the license application itself is not encompassed by the regulatory definition of "documentary material." The "documentary material" required to be made available on the LSN is the underlying "information" that DOE intends to cite or rely on in support of the license application, or that does not support what DOE intends to cite or rely on. 10 C.F.R. § 2.1001 (definition of "documentary material"). The regulations thus require the supporting and non-supporting "information" to be produced. It does not require, however, production of drafts of the license application. The license application cites and relies on the "information" that constitutes the documentary material, but the application itself is not documentary material.

Further, it is significant that while 10 CFR. § 2.1003(b) requires production of the license application as a basic licensing document, there is no regulatory requirement to produce drafts of the license application (which of course makes sense since it is the license application as filed

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[55] *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

"that is at issue in [NRC] adjudications."[56] Also, even if drafts of the license application were to be considered documentary material, the regulations would be excludable as preliminary drafts.[57]

As the foregoing summary shows, Nevada's assertions at the May 4 hearing ignored the actual requirements of the regulations. The Board should schedule briefing and argument on this issue before issuing any rulings on it.

3. **Retention of emails and other documents.** The Board should schedule another case management conference to establish uniform requirements for the retention of emails and other documents that apply equally to the parties and the other participants.

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[56] *In re Duke Energy Corporation* (Oconee Nuclear Station, Units 1, 2, and 3), 1999 NRC LEXIS 52 *20-21 (April 15, 1999) (*quoting In re Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), 428 N.R.C. 325, 350, 1998 NRC LEXIS 93 (Dec. 23, 1998)).

[57] 10 C.F.R. § 2.1003(a)(1).

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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Dated: May 12, 2005

APPENDIX A

Attorney-Client Privilege:

1. The date the document was created, to the extent identified in the document and as provided in the LSN bibliographic header for the document.

2. The authors identified in the document and their employers or other affiliation, otherwise the entity that prepared the document.

3. All named recipients of the document, whether individuals or entities, including the employer of the named individuals.

4. The relationship between the author(s) and recipient(s) of the document.

5. Statement of facts supporting the assertion that the primary purpose for which the document was created and transmitted was either (a) providing legal advice or (b) requesting legal advice, but without disclosing the privileged content of the document.

6. A description of the subject matter addressed in the document, but without disclosing the privileged content of the document.

7. Type of document (e.g., internal memorandum, electronic mail, handwritten notes).

8. LSN participant accession number.

APPENDIX B

Work Product Privilege:

1. The date the document was created, to the extent identified in the document and as provided in the LSN bibliographic header for the document.

2. The authors identified in the document and their employers or other affiliation, otherwise the entity that prepared the document.

3. All named recipients of the document, whether individuals or entities, including the employer of the named individuals.

4. The relationship between the author(s) and recipient(s) of the document.

5. Statement of facts supporting the assertion that the document was created in anticipation of a hearing or litigation.

6. Whether the document contains opinion work product (e.g., counsel's mental impressions, opinions, conclusions or legal theories), fact work product (e.g., facts obtained by counsel or at the request of counsel), or both.

7. A description of the subject matter addressed in the document, but without disclosing the privileged content of the document.

8. Type of document (e.g., internal memorandum, electronic mail, handwritten notes).

9. LSN participant accession number.

APPENDIX C

Deliberative Process Privilege:

1. The date the document was created, to the extent identified in the document and as provided in the LSN bibliographic header for the document.

2. The authors identified in the document and their employers or other affiliation, otherwise the entity that prepared the document.

3. All named recipients of the document, whether individuals or entities, including the employer of the named individuals.

4. The relationship between the author(s) and recipient(s) of the document.

5. The name, job title or capacity, of the senior official who made the determination that the document meets the requirements of the deliberative process privilege.

6. The decision, potential decision or decisionmaking process to which the document relates and, if a decision has been made, the date of the decision.

7. A specific explanation why the document is deliberative.

8. An affirmation that the document is not a "circulated draft", see 10 C.F.R. §§ 2.1001, 2.1006(c).

9. A specific explanation why any factual information in the document cannot be segregated.

10. Type of document (e.g., internal memorandum, electronic mail, handwritten notes).

11. LSN participant accession number.

APPENDIX D

In the United States Court of Federal Claims

(Filed June 6, 2002)

FILED
JUN 6 2002
U.S. COURT OF FEDERAL CLAIMS

YANKEE ATOMIC ELECTRIC COMPANY CONNECTICUT YANKEE ATOMIC POWER COMPANY MAINE YANKEE ATOMIC POWER COMPANY FLORIDA POWER & LIGHT COMPANY NORTHERN STATES POWER COMPANY DUKE POWER, A Division of DUKE ENERGY CORP. INDIANA MICHIGAN POWER COMPANY SACRAMENTO MUNICIPAL UTILITY DISTRICT SOUTHERN NUCLEAR OPERATING COMPANY, et al. COMMONWEALTH EDISON COMPANY BOSTON EDISON COMPANY GPU NUCLEAR, INCORPORATED WISCONSIN ELECTRIC POWER COMPANY POWER AUTHORITY OF THE STATE OF NEW YORK OMAHA PUBLIC POWER DISTRICT NEBRASKA PUBLIC POWER DISTRICT TENNESSEE VALLEY AUTHORITY PSEG NUCLEAR LLC Plaintiffs, v. THE UNITED STATES, Defendant.	Case Nos. 98-126C, 98-154C, 98-474C, 98-483C, 98-484C, 98-485C, 98-486C, 98-488C, 98-614C, 98-621C, 99-447C, 00-440C, 00-697C, 00-703C, 01-115C, 01-116C, 01-249C, 01-551C UNCONSOLIDATED Judge Diane Gilbert Sypolt Discovery Judge

Order

Before the court are plaintiffs' motions to compel, defendant's response, and plaintiffs' reply to defendant's response.

On or before June 14, 2002, defendant shall file a brief, not to exceed 15 pages, including appendices, responding to plaintiffs' arguments, asserted in its June 3, 2002 reply, regarding the inapplicability of the deliberative process privilege.

With respect to the other disputed claims of privilege, the court finds that the current privilege log is inadequate to determine to what extent defendant's assertions of privilege are warranted. Therefore, on or before June 17, 2002, defendant shall confer with plaintiffs' counsel and agree in principle upon a revised privilege log, describing with greater particularity than now exists each document the withholding of which is disputed, and sufficient to make a prima facie determination that withholding is appropriate. This shall include, at a minimum, a meaningful description of each document's contents and their connection to a claim of privilege. Thus, for example, for documents related to settlement negotiations, defendant shall describe the information and identify the settlement negotiation. In case of attorney-client or attorney work product privilege documents, defendant shall identify the attorney whose advice or work product is at issue.

On or before June 24, 2002, defendant shall file the revised privilege log and both parties shall identify the documents or categories of documents (excluding those withheld under the deliberative process privilege) that remain the subject of dispute.

Diane G. Sypolt

DIANE GILBERT SYPOLT*
Judge, U.S. Court of Federal Claims

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* Appointed as Judge Diane Gilbert Weinstein.

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Motions, Pleadings and Filings

United States Court of Federal Claims.
YANKEE ATOMIC ELECTRIC COMPANY, Connecticut Yankee Atomic Power Company, Maine Yankee Atomic Power Company, Florida Power & Light Company, Northern States Power Company, Duke Power, a Division of Duke Energy Corp., Indiana Michigan Power Company, Sacramento Municipal Utility District, Southern Nuclear Operating Company, et al., Commonwealth Edison Company, Boston Edison Company, GPU Nuclear, Incorporated, Wisconsin Electric Power Company, Power Authority of the State of New York, Omaha Public Power District, Nebraska Public Power District, Tennessee Valley Authority, PSEG Nuclear LLC, Plaintiffs,
v.
The UNITED STATES, Defendant.
Nos. 98-126C, 98-154C, 98-474C, 98-483C, 98-484C, 98-485C, 98-486C, 98-488C, 98-614C, 98-621C, 99-447C, 00-440C, 00-697C, 00-703C, 01-115C, 01-116C, 01-249C, 01-551C.

Oct. 30, 2002 [FN1].

FN1. This order originally was filed on October 9, 2002. The order is being re-issued for publication in response to defendant's October 15, 2002 request.

Electric utilities brought suit against the United States for breach of a contract to dispose of nuclear waste. On plaintiffs' motion to compel, the Court of Federal Claims, Sypolt, J., held that: (1) Secretary of Energy could delegate the power to invoke the deliberative process privilege to the Chief Operating Officer, Civilian Radioactive Waste Management (OCRWM), within the Department of Energy (DOE); (2) agency documents were protected by deliberative proces privilege; (3) documents were protected by attorney-client privilege, except for two documents which were disclosed; and documents were protected as work product.

Motion denied.

West Headnotes

[1] Witnesses 216(1)
410k216(1) Most Cited Cases
The "deliberative process privilege" applies to documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.

[2] Witnesses 217
410k217 Most Cited Cases
Secretary of Energy could delegate the power to invoke the deliberative process privilege to the Chief Operating Officer, Civilian Radioactive Waste Management (OCRWM), within the Department of Energy (DOE). Department of Energy Organization Act, § 642, 42 U.S.C.A. § 7252.

[3] Witnesses 216(1)
410k216(1) Most Cited Cases
To be eligible for deliberative process protection, a policy-making document must be both pre-decisional and deliberative; thus, the privilege does not apply to communications made after the decision and designed to explain it, or to factual material severable from the deliberative context.

[4] Witnesses 216(1)
410k216(1) Most Cited Cases
Documents superceded by final agency action and not expressly adopted therein are protected by the deliberative process privilege as pre-decisional because they reflect the deliberations of the agency.

[5] Witnesses 216(1)
410k216(1) Most Cited Cases
Agency documents which appeared to be non-binding recommendations were protected by the deliberative process privilege, where they were not final dispositions, were not used as precedent, had no operational effect except to the extent they informed agency officials, and were not expressly incorporated into or adopted by final agency decision.

[6] Witnesses 216(1)
410k216(1) Most Cited Cases
Agency's failure to identify a later, specific agency decision that was based on "pre-decisional"

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documents did not negate protection of the deliberative process privilege.

[7] Witnesses 216(1)
410k216(1) Most Cited Cases
Deliberative process privilege protects intra-governmental documents reflecting advisory opinions, recommendations and deliberations.

[8] Witnesses 198(1)
410k198(1) Most Cited Cases

[8] Witnesses 201(1)
410k201(1) Most Cited Cases
The attorney-client privilege protects the information that was communicated with the expectation of privacy, but not the underlying factual information.

[9] Witnesses 201(1)
410k201(1) Most Cited Cases
An agency attorney's interpretation of a statute, regulation, or contract, normally protected by attorney-client privilege, is not discoverable merely because the underlying information is public.

[10] Witnesses 222
410k222 Most Cited Cases
With regard to the attorney-client privilege, a communication by a client with his or her attorney is presumptively a request for legal advice.

[11] Witnesses 219(3)
410k219(3) Most Cited Cases
Generally, disclosure of a privileged communication waives the attorney-client privilege over other communications of the same subject matter.

[12] Witnesses 219(3)
410k219(3) Most Cited Cases
Subject matter waiver of the attorney-client privilege is inapplicable where the disclosure was not made in the context of a judicial proceeding and did not afford the client an adversarial gain.

[13] Federal Courts 1112
170Bk1112 Most Cited Cases
Evidence.
The work-product of government attorneys created in anticipation of litigation is protected even if the litigation involves obligations under a statute, regulation, or a contract.
***307** Jerry Stouck, Spriggs & Hollingsworth, Washington, DC, attorney of record for plaintiffs Yankee Atomic Electric Co., Connecticut Yankee Atomic Power Co., and Maine Yankee Atomic Power Co. Of counsel were Robert L. Shapiro, Peter J. Skalaban, Jr., Glenn S. Greene, and Raymond Krncevic, Spriggs & Hollingsworth, Washington, DC.

***308** Alex D. Tomaszczuk, Shaw Pittman LLP, McLean, Virginia, attorney of record for plaintiffs Boston Edison Co., Duke Power Co., Florida Light & Power Co., GPU Nuclear, Inc., Indiana Michigan Power Co., Northern States Power Co., Power Authority of the State of New York, Omaha Public Power District, Nebraska Public Power District, and PSEG Nuclear LLC, Of counsel were Jay E. Silberg, Devon E. Hewitt, Daniel S. Herzfeld, and Jack Y. Chu, Shaw Pittman LLP, Washington, DC.

Melvin C. Garbow, Arnold & Porter, Washington, DC, attorney of record for plaintiff Sacramento Municipal Irrigation District.

M. Stanford Blanton, Balch & Bingham LLP, Birmingham, Alabama, attorney of record for plaintiff Southern Nuclear Operating Co.

Richard W. Oehler, Perkins Coie LLP, Seattle, Washington, attorney of record for plaintiff Wisconsin Electric Power Co.

David A. Handzo, Jenner & Block LLC, attorney of record for plaintiff Commonwealth Edison Co.

Peter K. Shea, Knoxville, Tennessee, attorney of record for plaintiff Tennessee Valley Authority.

Harold D. Lester, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, for defendant, with whom were David M. Cohen, Director, and Robert D. McCallum, Jr., Assistant Attorney General. Of Counsel were Jane K. Taylor, Office of General Counsel, Department of Energy, Washington, DC, and Franklin E. White, Jr., Assistant Director, Marian E. Sullivan, William L. Olsen, Erin E. Powell, Heide L. Herrmann, R. Alan Miller, Kevin B. Crawford, and Russell A. Shultis, Attorneys, Department of Justice, Washington, DC.

Order regarding Motions for Clarification and to Compel

SYPOLT, Judge.

Plaintiffs have moved for clarification of the court's July 23, 2002 order directing plaintiffs, as to each

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document listed in its privilege log, to provide reasons "why the Government's description of the particular document [sought to be protected] does not constitute *prima facie* grounds for invoking a claim of privilege." They also, by way, *inter alia,* of motions to compel, contest defendant's requests for a protective order to prevent disclosure of materials listed in its privilege log and allegedly covered by the deliberative process, attorney work-product, or attorney-client privileges.

Prima Facie Description

Plaintiffs suggest that the court's reference to "*prima facie* grounds" is inappropriate because some of the grounds provided by the Government, although ostensibly supporting a claim of privilege, should not be credited. Plaintiffs also request that the court "clarify" that the Government shall have no more chances to support its privilege claims.

The term "*prima facie*" comes from the Latin phrase for "at first view." *Webster's Ninth New Collegiate Dictionary* 932 (1990). Normally, a "*prima facie* case" consists of a presentation of evidence that suffices as a matter of law to warrant submission of an issue for decision by the trier of fact. 9 J. Wigmore, *Evidence* § 2494 (J. Chadbourn rev. ed.1981). "[T]he phrase '*prima facie* case' ... may be used by courts to describe [a party's] burden of producing enough evidence to permit the trier of fact to infer the fact at issue." *Demaco Corp. v. F. Von Langsdorff Licensing Ltd.,* 851 F.2d 1387, 1392 (Fed.Cir.1988).

However, "*prima facie*" also may mean merely that which is sufficient to establish a fact or raise a presumption unless disproved or rebutted. *E.g., Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 254 n. 7, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) (in the Title VII context the Supreme Court uses "prima facie case" to mean establishing a legally mandatory, rebuttable presumption).

As to the attorney-client privilege, a major area of plaintiffs' challenge to defendant's privilege log, Dean Wigmore states:

> It is not easy to frame a definite test for distinguishing legal from nonlegal advice.... The most that can be said by way ***309** of generalization is that a matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege *unless it clearly appears to be lacking* in aspects requiring legal advice.

8 Wigmore, *Evidence* § 2296 (McNaughton rev. ed.1961) (emphasis added).

Therefore, the court's order that each party submit its *prima facie* grounds for denying production of each withheld document requires merely a description of the type of document (*e.g.,* an opinion letter, a request for an opinion letter), its topic, date, the writer and recipient, and an explanation as to why the matter is deemed to be privileged (which privilege was being invoked and on what grounds). Needless to say, the party invoking the privilege need not reveal so much about the contents of a communication as to compromise the privilege. These are the customary contents of a privilege log, and plaintiffs have demonstrated no reason why they should not apply in this case.

The challenger of a privilege has the burden of showing, whether based on the terms of the description, or on extraneous knowledge, that the document appears *not* to be privileged. These standards are sufficiently clear from the court's July 23, 2002 order, and the usual rules governing this type of discovery. Therefore, plaintiffs' motion for further clarification on this point is denied.

Deliberative Process Privilege

The Government has asserted the deliberative process privilege over 24 documents described in an affidavit from Mr. Ronald A. Milner, Chief Operating Officer, Civilian Radioactive Waste Management (OCRWM), within the Department of Energy (DOE). By a May 13, 2002 amendment to the standing delegation order from the Secretary to the Under Secretary for Energy, Science, and Environment, DOE Delegation Order No. 00-002.00, the Secretary of Energy delegated to that Under Secretary, with the right to re-delegate in part or in whole, the authority to assert the deliberative process privilege in matters within her cognizance. On the same day, the Under Secretary re-delegated this authority, with the power to re-delegate, to the Director of the OCRWM, and the latter re-delegated this authority to Mr. Milner.

In his affidavit, Mr. Milner provides a description of each document, including the author, the nature of his or her advice, and, in most cases, the specific decision being deliberated. The affidavit also states that invoking the privilege in each instance is necessary to assure the free flow of ideas and candid discussions within the agency.

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The Government argues that: 1) delegation of the authority from the Secretary down to Mr. Milner is proper under the Secretary's general sub-delegation authority contained in 42 U.S.C. § 7252; 2) Mr. Milner's affidavit meets the requirements for invoking the deliberative process privilege; 3) any factual information in the withheld documents is so intertwined with the deliberative recommendations that redaction is impractical; and 4) plaintiffs have shown no need (such as relevance, cumulativeness, unavailability from other sources) to override the privilege.

Plaintiffs contend that, because Mr. Milner is not the head of the agency, his assertion of privilege is improper and that, even if the authority could be delegated, the head of the agency first must issue guidelines on the proper use of the privilege, which was not done.

Furthermore, according to plaintiffs, even if Mr. Milner may assert the privilege, his descriptions of the withheld documents are insufficiently detailed because they do not establish that they were prepared by their authors for the purpose of assisting an agency official charged with making the decision, but merely establish that the documents "reflect" policy deliberations.

Plaintiffs allege that 20 of the 24 documents described in the affidavit are deficient on various other grounds as well, *e.g.*, because the privilege was waived by the document's later incorporation into official agency decisions, or because the document relates to discussions with another agency, such as the Office of Management and Budget (OMB), as ***310** to which the Secretary of Energy cannot assert a privilege. Plaintiffs also complain that the affidavit does not provide "precise and certain" reasons for asserting the privilege as to each document.

[1] The deliberative process privilege, sometimes confused with executive privilege, [FN2] applies to "documents '*reflecting* advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (emphasis added) (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.1966)). (This statement by the Supreme Court should lay to rest plaintiffs' argument that merely "reflecting" agency deliberations, etc., does away with the privilege.)

FN2. "Executive privilege" generally refers to the constitutional privilege invoked by the President of the United States to withhold confidential Presidential or intra-executive branch communications of the President. *See United States v. Nixon*, 418 U.S. 683, 703-706, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). The privilege is not absolute. *Id.* at 705-06, 94 S.Ct. 3090. *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 n. 17, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975). The deliberative process privilege must be distinguished from the "state secrets" privilege protecting military and state secrets. *See United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Guong v. United States*, 860 F.2d 1063 (Fed.Cir.1988).

A. *Delegation*

[2] Under 42 U.S.C. § 7252, the Secretary of Energy is permitted to delegate his authority unless otherwise prohibited by law. [FN3] Although some courts have required that the deliberative process privilege be invoked by the head of the agency himself, after personal consideration, *see United States v. O'Neill*, 619 F.2d 222, 225 (3d Cir.1980), so high a level of authorization has not been required in this circuit. [FN4]

FN3. 42 U.S.C. § 7252 provides:
Except as otherwise expressly prohibited by law, and except as otherwise provided in this Act, the Secretary may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem to be necessary or appropriate.

FN4. The trial courts in *Vons Cos. v. United States*, 51 Fed.Cl. 1, 22-23 (2001); *Walsky v. U.S.*, 20 Cl.Ct. 317, 320 n. 3 (1990), and *CACI Field Services, Inc. v. United States*, 12 Cl.Ct. 680, 687 (1987), have concluded that delegation is not allowed in reliance on *Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727, and *Cetron Elec. Corp. v. United States*, 207 Ct.Cl. 985, 1975 WL 6632 (1975). However, *Reynolds* involved, not a deliberative process, but a state secrets, privilege. The *dictum* in *Cetron* that "an executive privilege ... can be invoked only by the head of a department or agency," 207

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Ct.Cl. at 989, referred to the constitutional executive privilege vested in the President of the United States, discussed in *U.S. v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039, and *Sun Oil Co. v. United States*, 206 Ct.Cl. 742, 514 F.2d 1020 (1975), not the deliberative process privilege. *See Cetron*, 207 Ct.Cl. at 992.

On the contrary, *Department of Energy v. Brett*, 659 F.2d 154, 155 (Temp.Em.Ct.App.1981), held that the deliberative process privilege need not be asserted by the head of an agency or even a senior official, but may be "raised by individuals with specific and detailed knowledge of the documents in which the privilege is asserted". [FN5]

FN5. Plaintiffs contend that the precedential effect of decisions by the Temporary Emergency Court of Appeals (TECA) is limited to cases that the Federal Circuit reviews as a successor to TECA (*i.e.*, cases arising under emergency price control legislation). However, the Federal Circuit has repeatedly stated, without any qualification, that TECA decisions are precedential. *See, e.g., Consolidated Edison Co. of N.Y., Inc. v. Richardson*, 232 F.3d 1380, 1383 (Fed.Cir.2000) ("This court has adopted the decisions of the [TECA] as its precedent."). Clearly, the appropriateness of the delegation of authority to invoke the deliberative process privilege should not depend on whether the underlying complaint involved emergency price controls. Moreover, even if TECA decisions are not binding, this court remains free to follow them.

Several other jurisdictions also allow delegation. *See Landry v. Federal Deposit Insurance Corp.*, 204 F.3d 1125 (D.C.Cir.2000) (affidavit from the head of a regional division sufficient to invoke the deliberative process privilege); *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 882-83 (5th Cir.1981) (same); *Kerr v. United States Dist. Ct. for North. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir.1975) ***311** (privilege generally available but not in that case because not invoked by any official of the agency); *Grossman v. Schwarz*, 125 F.R.D. 376, 381 (S.D.N.Y.1989) (governmental privilege may be invoked by an agency official other than the department head); *Mobil Oil Corp. v. DOE*, 520 F.Supp. 414, 418 (N.D.N.Y.1981) (allowing delegation as long as the delegatee can render "reasoned judgment" on the privilege), *rev'd on other grounds*, 659 F.2d 150 (Temp.Em.Ct.App.1981).

Significantly, the Supreme Court's Proposed Rule 509 allows assertion of the deliberative process privilege, as a "privilege for official information," as low as the level of "any attorney representing the Government."

The rationale for delegation in *Brett* and *Landry* applies fully here. Insisting that the deliberative process privilege be asserted only by the Secretary of an agency after gaining "specific and detailed" knowledge of every document sought effectively would prevent the Government from ever invoking the privilege. Moreover, even if the Secretary were to attempt to acquire such detailed personal "knowledge," it invariably would derive from briefings by the very officials given the delegations. Failing to permit invocation by the agency officials most familiar with the matter at hand, in fact, would conflict with another principle underlying the privilege--the need for actual, personal consideration by the invoker of the privilege. *Landry*, 204 F.3d at 1134- 35. Therefore, the court concludes that the Secretary of Energy is not prohibited from delegating to Mr. Milner the power to invoke the deliberative process privilege.

B. *Invocation of the Privilege*

[3] To be eligible for deliberative process protection, a policy-making document must be both pre-decisional and deliberative. *In re Sealed Case*, 121 F.3d 729, 737 (D.C.Cir.1997) (citations omitted). *See also Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C.Cir.1975) (a document is part of the deliberative process if it makes recommendations or expresses opinions on legal or policy matters). Thus, the privilege does not apply to "communications made after the decision and designed to explain it," *Sears, Roebuck*, 421 U.S. at 152, 95 S.Ct. 1504, or to factual material severable from the deliberative context, *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

[4] Plaintiffs argue that documents later incorporated into an official agency decision are not privileged. *See Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C.Cir.1980) (a document can lose its pre-decisional status if adopted as the agency position). However, as the Supreme Court made clear in *Sears, Roebuck*, 421 U.S. at 159-162, 95 S.Ct. 1504, and *Renegotiation Bd. v. Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 186, 95 S.Ct. 1491, 44 L.Ed.2d

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57 (1975), documents superceded by final agency action and not expressly adopted therein are protected as pre-decisional because they reflect the deliberations of the agency and only the final action itself will accurately reflect the agency's final view.

The court in *Coastal States*, 617 F.2d at 867-68, was concerned that agencies might develop a "secret law" based on internal memoranda, which, while labeled "pre-decisional," in fact were final dispositions used as binding guidelines or precedents or as the means to apply established policies to particular facts, which clearly would be post-decisional.

[5] However, the documents described in Mr. Milner's affidavit appear to be non-binding recommendations; were not, as far as has been shown, final dispositions; apparently were not used as precedent; have not had operational effect except to the extent they informed agency officials; and were not expressly incorporated into or adopted by final agency decision. Therefore, they are properly protected.

While plaintiffs claim that document A, for example, became part of the final "decision" to which it relates and is, therefore, outside the privilege, nothing in Mr. Milner's affidavit, or proffered by plaintiffs, reveals that document A was adopted, implemented, or enforced as a final agency decision. [FN6] And ***312** *Coastal States,* even if it bound this court, does not apply, because the affidavit, defendant's privilege log, and plaintiffs' objections to it, do not indicate, in the first instance, that any of the documents as to which the deliberative process privilege has been asserted contain final or binding agency legal or regulatory decisions.

> FN6. The affidavit states that document A "*seeks* Secretary-level approval of the attached Program Directions for Safeguarding Irradiated Nuclear Materials." (Emphasis added).

[6] Neither is the privilege negated by defendant's failure, in some cases, to identify a later, specific agency decision that was based on the "pre-decisional" documents. As the Supreme Court stated:

> [The] emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

Sears, Roebuck, 421 U.S. at 153 n. 18, 95 S.Ct. 1504.

Mr. Milner's affidavit provides sufficient information to conclude that each document was prepared in order to offer opinions or recommendations to agency decision-makers prior to their taking action on legal or policy matters. Plaintiffs have pointed to no factual information regarding any document listed in the affidavit that would undermine that conclusion, or even to any severable factual information not qualifying for the privilege.

[7] Plaintiffs' proposition that documents relating to DOE's discussions with OMB or with any other agency are outside of the scope of this privilege, or waived, also must be rejected. The privilege protects "*intra-governmental* documents reflecting advisory opinions, recommendations and deliberations." *Carl Zeiss Stiftung,* 40 F.R.D. at 324 (emphasis added).

The Supreme Court's Proposed Rule 509(a)(2)(A) (emphasis added) also defines information subject to the privilege as "*intra-governmental* opinions or recommendations ...." *See also Texaco P.R. v. Dep't of Consumer Affairs,* 60 F.3d 867, 884-85 (1st Cir.1995) ("the deliberative process privilege 'shields from public disclosure confidential *inter-agency* memoranda on matters of law or policy' ") (quoting *Nat'l Wildlife Fed'n v. United States Forest Serv.,* 861 F.2d 1114, 1116 (9th Cir.1988)). Since the privilege is being invoked by the agency "having control over the requested information," *Landry,* 204 F.3d at 1135, *Walsky,* 20 Cl.Ct. at 320, DOE's assertion of the privilege over such documents is proper even if they were discussed with OMB.

Accordingly, the court denies plaintiffs' motion to compel the production of the documents withheld pursuant to the deliberative process privilege asserted in Mr. Milner's May 13, 2002 affidavit. To the extent that the Government needs to offer "precise and certain reasons" for invoking the privilege, *see Coastal Corp. v. Duncan,* 86 F.R.D. 514, 519 (D.Del.1980) (citing *Smith v. Federal Trade Com.,* 403 F.Supp. 1000, 1017 (D.Del.1975)), [FN7] it has done so by providing descriptions of the documents and averring that continued confidentiality is necessary to assure the free flow of ideas and candid discussions within the agency.

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FN7. None of the decisions binding on this court, including *Sears, Roebuck*, 421 U.S. 132, 95 S.Ct. 1504, 44 L.Ed.2d 29, and *Kaiser Aluminum & Chemical Corp. v. United States*, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958), recognizes this as an independent condition for invoking the deliberative process privilege.

Attorney-Client Privilege

Plaintiffs' original motions to compel disputed the Government's withholding of 925 documents based on attorney-client or attorney workproduct privileges. [FN8] Following the ***313** Government's July 10, 2002 revisions to its privilege log, plaintiffs continue to demand production of 276 documents withheld under these privileges.

FN8. On April 22, 2002, the Utility Plaintiffs filed a motion to compel covering defendant's February 15, 2002 privilege log. On April 29, 2002, the Yankee Utilities filed a separate motion to compel, covering defendant's February 15, 2002 and two 1999 privilege logs. On May 7, 2002, defendant filed a copy (originally filed with Judge Merow) of its response to the Yankee Utilities' motion to compel covering the 1999 privilege logs. On May 13, 2002, the Government filed a single response to both motions to compel covering the February 15, 2002 privilege log. On June 3, 2002, all Utility Plaintiffs filed a single reply covering the 1999 and February 15, 2002 privilege logs. On June 6, 2002, the court ordered defendant to confer with plaintiffs to agree in principle on a revised privilege log. Defendant filed the revised privilege log on July 10, 2002.

Plaintiffs argue that in this revised log, the Government has failed adequately to indicate the author and recipient and the legal issue involved, or to show that the Government attorneys were not acting in their "regulatory capacity." They also argue that the Government has not shown that certain documents dating back to 1992 and earlier were prepared in anticipation of litigation, and that defendant has waived its privilege over certain documents by voluntarily disclosing related documents or by failing to "verify" their confidentiality.

Defendant maintains that it has satisfied its burden of claiming the privileges by providing the names of the author and recipient, the date (if available), and a description of the document, identifying the legal issue. The Government denies that any of the withheld documents involve policy-making, rather than legal advice or work-product. As to the challenged attorney work-product, the Government argues that it was prepared in anticipation of litigation, even if not the litigation in this case, one of the numerous lawsuits filed since the 1980s under the Nuclear Waste Policy Act of 1982. Finally, the Government claims that no waiver has occurred because: 1) the disclosures of two of the documents at issue were extrajudicial; and 2) the documents it continues to withhold do not relate to the subject matter of the documents it voluntarily disclosed.

Plaintiffs dispute the invocation of the attorney-client privilege for a significant number of the documents on the grounds that the Government's attorneys' analyses of the Government's obligations under a statute, regulation, or contract constitute, not legal advice, but policy-making, and therefore fall outside the scope of the attorney-client privilege, or because the advice or request for advice concerns public matters.

It is clear that an agency and its lawyers may enjoy the type of relationship that would entitle them to the attorney-client privilege, *Coastal States*, 617 F.2d at 863, regardless of whether the agency's lawyer serves as in-house agency counsel, as an attorney employed by the Department of Justice, or as outside, private counsel, *see* 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 3:12, at 49-50, § 4:28, at 124 (2d ed.1999) (citing cases).

Furthermore, the privilege, under certain circumstances, may protect, not only communications from client to counsel, but also communications from counsel to client, which may reveal by implication whether a communication was made and its substance. 8 Wigmore, *Evidence* § 2320 (McNaughton rev. ed.1961). *See American Standard, Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed.Cir.1987) (holding that communications from attorney to client may be covered by the lawyer-client privilege if they "reveal, directly or indirectly, the substance of a confidential communication by the client;" but refusing to apply privilege to unsigned, undated opinion letter, addressed to no-one). *See also id.* at 745 ("It is conceivable that disclosure of the bare fact that counsel was consulted" might in some circumstances justify application of the privilege) (citing *United States v. Tratner*, 511 F.2d 248, 252 (7th Cir.1975)); *Ohio-Sealy Mattress Mfg.*

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Co. v. Kaplan, 90 F.R.D. 21, 28 (N.D.Ill.1980).

As plaintiffs point out, several cases, including Coastal States, 617 F.2d 854, and Gulf Oil Corp. v. Schlesinger, 465 F.Supp. 913 (E.D.Pa.1979), have held that analyses of agency regulations or statutory programs do not fall under the protection of the attorney-client privilege. However, those courts did not base their holdings on any conclusion that interpreting the Government's obligations under a statute or regulation is not "legal" advice. Rather, courts have refused to apply the privilege to interpretations of the Government's legal rights and obligations ***314** under statutes or regulations where: 1) revealing these communications would not disclose confidential information, *cf.* Coastal States, 617 F.2d at 863 (legal opinions based on factual information obtained from a third party do not reveal client's confidences); Schlefer v. United States, 702 F.2d 233, 245 (D.C.Cir.1983) (same); Tax Analysts v. I.R.S., 117 F.3d 607, 619 (D.C.Cir.1997) (same); Schlesinger, 465 F.Supp. at 917 (interpretation of public regulations is not confidential); or 2) the legal opinions of the Government's attorneys have the effect of "law," Niemeier v. Watergate Special Prosecution Force, 565 F.2d 967, 974 (7th Cir.1977) (legal memoranda of agency counsel have the force of law); Tax Analysts, 117 F.3d at 619 (opinions of IRS counsel amount to making law).

The attorney-to-client privilege for communications by an attorney that reveal, directly or indirectly, the substance of a confidential communication by the client, which was validated in American Standard, 828 F.2d at 745, also was applied in Carter v. Gibbs, 909 F.2d 1452, 1458 (Fed.Cir.1990), to deem not privileged a memorandum from the Acting Assistant Attorney General to the Solicitor General because it did not "betray any communications between the client (the IRS or the Department of Treasury) and the attorney (the Justice Department)."

However, unlike the D.C. Circuit in *Coastal States, Schlefer,* or *Tax Analysts,* the Federal Circuit has never expressly limited the attorney-to-client communications privilege to communications revealing confidential *information,* as opposed to confidential *communication. But see* American Standard, 828 F.2d at 744-46. [FN9] Instead, in *In re* Spalding Sports Worldwide, Inc., 203 F.3d 800, 806 (Fed.Cir.2000), the court observed that "[i]f an attorney-client communication could be discovered if it contained information known to others, then it would be the rare communication that would be protected and, in turn, it would be the rare client who would freely communicate to an attorney." (quoting Knogo Corp. v. United States, 1980 WL 39083, 1980 U.S.Ct. Cl. LEXIS 1262, at *13 (Ct. Cl. Trial Div.1980)).

FN9. As pointed out in Judge Newman's dissent, American Standard, 828 F.2d at 747-48, the following language in the majority's opinion blurs the distinction between confidential communication and confidential information:
The district court said the opinion letter was not a privileged communication because it relied on nonconfidential information and stated the source of that information. Contrary to American Standard's assertion, it did not say the opinion letter was not privileged merely because it relied on publicly available information. It clearly said the letter relied on nonconfidential information gleaned from public records. American Standard simply ignores the finding of nonconfidentiality and focuses alone on its source.

[8] The distinction between information and communication is critical because the attorney-client privilege protects the information that was communicated with the expectation of privacy, but not the underlying factual information. 3 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence,* § 503.14[4][a] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed.2002) ("Thus, for example, if the privilege is invoked, a client may not be asked the question: 'What did you tell your attorney about the amount claimed as a business expense?' However, the client may be asked the question: 'Did you spend the amount claimed as a business expense for meals or for travel?' ")

While most courts have properly construed the privilege as protecting *communications* and not the underlying facts or *information; see* Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir.1968) (refusing to force disclosure of attorney-client communications even though they were based on publicly-available documents); Byrnes v. IDS Realty Trust, 85 F.R.D. 679, 683 (S.D.N.Y.1980) (the fact that information is non-confidential will not defeat the privilege as long as the communication was made in confidence); In re Ampicillin Antitrust Litigation, 81 F.R.D. 377, 389-90 (D.D.C.1978) (it is not necessary that information be confidential as long as the communication of the information was made in confidence), some courts have had difficulty

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distinguishing the two concepts and "have rendered questionable decisions." 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 5:1, at 19, 33 (2d ***315** ed.1999) (listing *Coastal States, Schlefer,* and *Tax Analysts* as examples of cases where the court confused confidential *communications* with non-confidential *information*).

[9] Therefore, the court rejects plaintiffs' argument, based on *Coastal States* and *Schlesinger,* that an attorney's interpretation of a statute, regulation, or contract is discoverable merely because the underlying information is public. [FN10] Neither are these interpretations discoverable based on plaintiffs' argument that they constitute secret law. As discussed in connection with the deliberative process privilege, the Supreme Court held in *Sears, Roebuck,* 421 U.S. at 159-162, 95 S.Ct. 1504, and *Grumman Aircraft,* 421 U.S. at 186, 95 S.Ct. 1491, that documents not having precedential value, and that are superceded by final agency action, do not constitute secret law unless expressly adopted in a final disposition. Plaintiffs here have failed to identify a single document in the revised privilege log that has the characteristics of secret law.

> FN10. The court also rejects plaintiffs' contention that defendant's disclosure of the four "Cavanaugh Documents" somehow waives the attorney-client privilege over all documents relating to the Standard Contract or its interpretation. It is clear from the record that the disclosed documents (3 draft contracts and a memo containing minutes of a meeting) were prepared for distribution to third parties and, therefore, were not confidential, and not privileged. The disclosure of unprivileged documents, however, does not constitute waiver of privilege. *American Standard,* 828 F.2d at 746.

While the attorney-client privilege applies only to requests for any confidential communication transmitted for the purpose of obtaining legal services, in determining that purpose "[i]t is enough that the overall tenor of the document indicates that it is a request for legal advice or services." *Spalding Sports,* 203 F.3d at 806.

[10] Moreover, a communication by a client with his or her attorney is presumptively a request for legal advice: "[A] matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege unless it clearly appears to be lacking in aspects requiring legal advice." 8 Wigmore, *Evidence* § 2296 (McNaughton rev. ed.1961). In addition, the services need not be rendered in conjunction with actual or potential litigation. *Coastal States,* 617 F.2d at 862. *Montgomery County v. Microvote Corp.,* 175 F.3d 296, 303 (3rd Cir.1999) (citing *Weinstein's Federal Evidence,* § 503.13[1]); *Attorney-Client Privilege in the United States,* § 1:13.

The documents authored by Susan Klein after 1997 do constitute legal, rather than policy, advice because, contrary to plaintiffs' contention, and as Ms. Klein's deposition testimony states, she continued to provide legal advice and to report to the General Counsel between 1997 and 1999. Thus, the documents she authored between 1997 and 1999, and described as her legal advice, are protected by the attorney-client privilege.

Plaintiffs also maintain that two documents, Nos. 1875 and 1878, requesting the legal advice of Sandra Sherman of the DOE Office of General Counsel, [FN11] are not protected because the advice voluntarily was disclosed by DOE, as defendant concedes, in a September 1994 draft report, unrelated to any litigation, on greater than class C low level radioactive waste owned by DOE.

> FN11. Only one of these documents, No 1878, appears to be a request for a legal opinion.

[11] As a general rule, disclosure of a privileged communication waives the privilege over other communications of the same subject matter. *See GFI, Inc. v. Franklin Corp.,* 265 F.3d 1268, 1275 (Fed.Cir.2001). Disclosure of legal advice has been said to waive the attorney-client privilege "with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." *In re Pioneer Hi-Bred Int'l, Inc.,* 238 F.3d 1370, 1374-75 (Fed.Cir.2001). The rationale for waiving the attorney-client privilege as to documents with the same subject matter as the disclosed documents is predicated on fairness and consistency. ***316** 8 Wigmore, *Evidence* § 2327 (McNaughton rev. ed.1961).

[12] However, subject matter waiver is inapplicable

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where the disclosure was not made in the context of a judicial proceeding and did not afford the client an adversarial gain. *See In re von Bulow*, 828 F.2d 94, 102 (2d Cir.1987) (un-disclosed portions of a communication protected because "[w]here disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed."); *Graco Children's Prods. v. Dressler*, 1995 WL 360590 *8, 1995 U.S. Dist. LEXIS 8157 *23 (N.D.Ill.1995) (no subject matter waiver because no tactical advantage sought or gained by disclosure); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F.Supp.2d 582, 597 (N.D.Ohio 1999) (refusing to compel production of documents because no showing that disclosure was for a tactical or unfair advantage).

Accordingly, because plaintiffs have failed to demonstrate any prejudice or tactical disadvantage resulting from DOE's disclosure of two memoranda in a non-judicial setting over eight years ago, related confidential documents, if privileged, may be protected from disclosure. *See Stratagem Dev. Corp. v. Heron Int'l N.V.*, 153 F.R.D. 535, 545 (S.D.N.Y.1994).

Plaintiffs do not, as they must, satisfactorily explain why documents that on their face appear to be legal communications "clearly appear to be lacking in aspects requiring legal advice." Therefore, plaintiffs' motion to compel the production of the documents defendant has withheld under the attorney-client privilege is denied.

Attorney Work-Product Privilege

The attorney work-product privilege attaches to documents prepared in anticipation of litigation or trial by a party or its representative. *Hickman v. Taylor*, 329 U.S. 495, 511-12, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The attorney work-product rule is indubitably applicable to government attorneys in litigation. *Sears, Roebuck*, 421 U.S. at 152, 95 S.Ct. 1504 (citing *Kaiser Aluminum*, 157 F.Supp. at 947).

The parties agree that the attorney work-product privilege applies only if the anticipated litigation is "fairly foreseeable" or "a real possibility." *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 754 (E.D.Pa.1983); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 143 (D.Del.1982). Plaintiffs, however, contend that numerous documents withheld under this privilege and prepared in 1992 and 1993 were not prepared in anticipation of "fairly foreseeable future litigation," but merely as part of "programmatic planning."

From a review of the correspondence submitted by defendant, it is evident that litigation was "fairly foreseeable" by the agency as early as September 30, 1991, when the Minnesota Department of Public Service wrote to the Secretary of Energy: "... it is highly probable that your department will experience significant delay in meeting its obligations to begin taking high-level radioactive waste in 1988. Therefore, I have directed my legal counsel to prepare a Petition for Relief." The fact that the first suit actually was filed in 1994, one or two years after the challenged documents were written, also supports defendant's position that imminent litigation was more than a mere possibility in 1991.

[13] Accordingly, the privilege log provides sufficient basis to conclude that documents withheld under the attorney work-product privilege were created for "the primary motivating purpose," *see United States v. Gulf Oil Corp.*, 760 F.2d 292, 296-97 (Temp.Em.Ct.App.1985), of anticipated litigation. For reasons discussed in connection with the attorney-client privilege, the work-product of government attorneys created in anticipation of litigation is protected even if the litigation involves obligations under a statute, regulation, or a contract.

CONCLUSION

For the foregoing reasons, the plaintiffs' motion to compel the production of documents withheld under the deliberative process privilege, the attorney-client privilege, ***317** or the attorney work product privilege, is denied.

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