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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Dr. Anthony J. Baratta
Lester S. Rubenstein

In the Matter of ENTERGY NUCLEAR VERMONT YANKEE L.L.C. and ENTERGY NUCLEAR OPERATIONS, INC. (Vermont Yankee Nuclear Power Station)	Docket No. 50-271-OLA ASLBP No. 04-832-02-OLA December 21, 2005

MEMORANDUM AND ORDER
(Ruling on Deliberative Process Privilege Claims)

Before the Board are two motions by the Vermont Department of Public Service (State) seeking to compel the production of a total of twenty-eight documents that the NRC Staff (Staff) withheld from the mandatory disclosure required by 10 C.F.R. § 2.336(b).[1] The Staff claims that the documents are protected by the deliberative process privilege.[2] For the reasons stated below, the Board concludes that these documents qualify for the deliberative process privilege, and that the State has not shown a need for the documents that overrides the privilege.

[1] Vermont Department of Public Service Motion to Compel Production of Certain NRC Staff Documents (Aug. 31, 2005) (seeking production of three Staff documents) [State Motion I]; Vermont Department of Public Service Motion to Compel Production of Certain NRC Staff Documents (II) (Sept. 29, 2005) (seeking production of twenty-five Staff documents) [State Motion II].

[2] NRC Staff's Answer to Vermont Department of Public Service's Motion to Compel (Sept. 12, 2005) [Staff Answer I]; NRC Staff's Answer to Vermont Department of Public Service's Second Motion to Compel (Oct. 21, 2005) [Staff Answer II].

Accordingly, the State's first two motions to compel are denied.[3]

I. BACKGROUND

A. Procedural Posture

In November 2004, this Board granted the requests of the State and the New England Coalition (NEC) to hold a hearing concerning the Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (collectively, Entergy) application for an extended power uprate (EPU) for the Vermont Yankee Nuclear Power Station in Windham County, Vermont. LBP-04-28, 60 NRC 548 (2004). We admitted two NEC contentions. At that point, the Staff made certain documents available to the parties, as required by 10 C.F.R. § 2.336(b). The Staff also withheld certain documents, which it asserted were privileged or protected, and, in lieu thereof, provided lists of these "otherwise discoverable documents," including a deliberative process privilege log, as required by 10 C.F.R. § 2.336(b)(5).[4] The Staff has regularly updated its disclosures and privilege logs.[5]

On August 31, 2005, the State moved to compel the Staff to produce three documents that were listed in the Staff's July 27, 2005 deliberative process privilege log. State Motion I at 4-5. In its answer, the Staff maintained that the documents qualified for the privilege. Staff

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[3] The State has filed a third motion to compel that is not addressed here. See Vermont Department of Public Service Motion to Compel Production of Certain NRC Staff Documents (III) (Nov. 22, 2005) (challenging the Staff's deliberative process privilege claims for certain documents on the Staff's September 29, 2005 and October 31, 2005 privilege logs) [State Motion III].

[4] The Board accepted the parties' agreement to waive the privilege log requirement for documents covered by the attorney-client communication privilege or the attorney work product privilege. Licensing Board Initial Scheduling Order (Feb. 1, 2005) at 2 n.1 (unpublished).

[5] Under 10 C.F.R. § 2.336(d), the Staff and the parties have a continuing duty to supplement the initial mandatory disclosures every fourteen days. The Board, however, granted Entergy's unopposed motion to modify the update period to thirty days until the draft Safety Evaluation Report (SER) was issued. See Licensing Board Order (Granting Motion to Change Discovery Update Period) (Feb. 14, 2005) (unpublished).

Answer I at 5-7. On September 29, 2005, the State filed a second motion, seeking an additional twenty-five documents that the Staff listed in its September 6, 2005 deliberative process privilege log. State Motion II at 1 & Tab C. Meanwhile, on September 30, 2005, the Board, concerned about a potentially serious deficiency in the Staff's privilege claim, asked the Staff to provide certain supplemental information (i.e., the identity of the official who made the decision to withhold the documents) and to submit a supplemental brief.[6] Specifically, we noted that in the only two reported cases on point, the Licensing Boards had required that the deliberative process privilege be asserted by the head of the agency,[7] and we expressed concern as to how this requirement applied to NRC Staff. The State was permitted to file a responsive brief on this issue. Our September 30, 2005 Order also instructed the Staff to submit copies of the three documents covered by State Motion I for our in camera review.[8]

On October 21, 2005, the Staff submitted its answers and brief in response to the

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[6] Licensing Board Order (Regarding State of Vermont's Motion of Aug. 31, 2005) (Sept. 30, 2005) (unpublished) [September 30, 2005 Order].

[7] See Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP-85-38, 22 NRC 604, 627 (1985) (requiring an affidavit from the head of the relevant agency of the State of Illinois when claiming privilege for documents explaining the development of policies that would apply to Kerr-McGee); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-72, 18 NRC 1221, 1223 (1983) (requiring an affidavit from the head of the Federal Emergency Management Agency when claiming privilege for draft memoranda and letters from Agency officials to the NRC, and for briefing papers, status reports, and analyses).

[8] Earlier, the State had requested oral argument on the motion, or alternatively, the opportunity to file a request for leave to file a reply brief. Vermont Department of Public Service Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief (Sept. 15, 2005). The Staff opposed that motion. NRC Staff's Answer to Vermont Department of Public Service Request for Oral Argument or, Alternatively, for Leave to File a Request to File a Reply Brief (Sept. 21, 2005). On September 29, 2005, the State filed another motion for leave to file a reply brief. Vermont Department of Public Service Motion for Leave to File a Reply Brief in Support of its Motion to Compel (Sept. 29, 2005). The Board's September 30, 2005 Order held these motions for oral argument in abeyance.

Board's order,[9] the three documents for in camera review, and its answer to State Motion II. Included with the Staff's response was the affidavit of Ledyard B. Marsh, the Director of the Division of Licensing and Project Management (DLPM) within the NRC Office of Nuclear Reactor Regulation (NRR) (Division Director).[10] The State then submitted its responsive brief.[11]

B. Position of Parties

The State makes three main arguments in support of its motions to compel.[12] First, the State argues that the documents at issue are relevant to the admitted contentions and are related to Entergy's application, and thus must be disclosed under 10 C.F.R. § 2.336(b). State Motion I at 6-7. Second, the State asserts the documents are not protected by the deliberative process privilege because they do not contain "preliminary opinions" and thus are not deliberative, but instead merely deal with "preliminary inquiries" and the "information gathering process which precedes decision-making." Id. at 7-9. Third, the State claims that, even if the Staff has met its burden in establishing that these documents qualify for the deliberative process privilege, the documents still must be disclosed because the State's need for the information outweighs the Staff's need to protect the documents from disclosure. Id. at 10-11.

The Staff argues that the documents the State seeks were properly withheld under the deliberative process privilege because they contain the thought processes, views, and opinions of individual Staff members. Staff Answer I at 5-7. Specifically, two of the documents

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[9] NRC Staff Response to the Atomic Safety and Licensing Board's Order of September 30, 2005, Regarding Vermont Department of Public Service's First Motion to Compel (Oct. 21, 2005) [Staff Response].

[10] Staff Response, Affidavit of Ledyard (Tad) B. Marsh (Oct. 20, 2005) [Marsh Aff.].

[11] Vermont Department of Public Service Answer to NRC Staff Response to the Atomic Safety and Licensing Board's Order of September 30, 2005, Regarding Vermont Department of Public Service's First Motion to Compel (Oct. 28, 2005) [State Answer to Staff Response].

[12] In its second motion the State incorporates by reference the arguments in its first motion. State Motion II at 2-3.

requested in the State Motion I, ML051940095 and ML051990237, "are e-mails wherein members of the staff are exchanging questions and views regarding the nature and scope of the Staff's review of Entergy's station black out (SBO) coping strategy," conveying discussions "between members of the Staff regarding the scope of the review to be undertaken." Id. at 6. The Staff claims that the third document, ML052060072, is more substantive because it is "an e-mail between members of the Staff that express [sic] one Staff member's opinion on a matter that has not been decided, and proposes one alternative course of action and asks for further deliberation." Id.

In explaining why the twenty-five documents that are the subject of State Motion II are privileged, the Staff asserts that the documents are all deliberative, falling into one or more of the following five categories:

> Category 1: "Contains draft requests for information" or "draft requests for additional information";
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> Category 2: "Contains draft requests for . . . clarification of terms in previous responses to RAIs";
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> Category 3: "Contains staff recommendations to changes to request for additional information";
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> Category 4: "Contains staff discussion of responses to requests for additional information"; and
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> Category 5: "Contains staff recommendations regarding internal procedures for following up responses to requests for additional information."

Staff Answer II at 4-5. The Staff also argues that the State has failed to demonstrate an overriding need that would require disclosure of documents protected by the deliberative process privilege because the withheld documents do not relate to the State's admitted contentions. Staff Answer I at 7-10; Staff Answer II at 8-9.

In its answers to the Board's September 30, 2005 Order, the Staff indicates that the only people who reviewed the three documents that are the subject of State Motion I before they

were withheld and placed on the Staff's July 27, 2005 privilege log were a project engineer on this matter, Mr. G. Edward Miller, and the Staff counsel then assigned to this proceeding, Ms. Brooke Poole. Staff Response at 4. Mr. Miller made the initial determination and Ms. Poole concurred. Id. According to the Staff, subsequent to the Board's September 30, 2005 inquiry on this point, the DLPM Division Director personally reviewed all of the documents at issue and affirmed Mr. Miller's determination that the documents should be withheld based on a claim of the deliberative process privilege. Id. at 4-5.

The Staff asserts that the requirement that a high level agency official invoke the deliberative process privilege claim "do[es] not apply to the Staff's assertion of privilege when it compiles or updates a hearing file." Staff Response at 7. According to the Staff, "there is no reason why the formal invocation process established under federal caselaw should be applied" when the Staff makes the "initial determination" to assert the deliberative process privilege, arguing that this "would cause an excessive and unnecessary burden on the agency." Id. at 7-8. If the Board were to find such a procedure necessary, the Staff maintains that the Division Director's affidavit, which was included with the Staff's response to the Board's questions, satisfied any "'invocation' requirements." Id. at 10-11.

The State does not dispute that the Division Director is of sufficiently high rank to invoke the deliberative process privilege, but claims that the fact that he saw the documents only to decide whether to withhold them as deliberative, and not as a participant in the purported deliberations, demonstrates that the documents are not protected by the deliberative process privilege. State Answer to Staff Response at 2-3.

As a related matter, the briefing on the two motions reveals a procedural issue that the Board must address, i.e., the relationship between the requirement that motions be filed within ten days of the occurrence from which the motion arises and the requirement that motions be accompanied by a certification that the movant has made a sincere effort to contact and consult

the other party before filing the motion. See 10 C.F.R. § 2.323(a)-(b). The question presented is whether the parties can, without leave of the Board, waive the 10-day deadline in order to give themselves more time to perform the required consultation. The Staff first asserted the privilege on July 27, 2005, when it placed the documents on its deliberative process privilege log. State Motion I was filed more than ten days later, on August 31, 2005.[13] The State explained that the Staff had agreed that if the State raised objections to the privilege logs within ten days of its production, and then filed a motion to compel within five days of the Staff's written response to the State's objection, the Staff would not raise the issue of the timeliness of the motion to compel. State Motion I at 2. The Staff has complied with this agreement and has not objected to the timeliness of either of the State's motions. Nonetheless, the appropriateness of this procedure needs to be addressed.

II. ANALYSIS

A. Timeliness

We turn first to the procedural issue concerning the ability of the parties to waive, without leave of the Board, the requirement that a motion be filed "no later than ten (10) days after the occurrence or circumstance from which the motion arises." 10 C.F.R. § 2.323(a). Specifically, we address the relationship of the 10-day requirement to the next subsection of the regulation, which states:

> A motion must be rejected if it does not include a certification by the attorney or representative of the moving party that the movant has made a sincere effort to contact other parties in the proceeding and resolve the issue(s) raised in the motion, and that the movant's efforts to resolve the issue(s) have been unsuccessful.

10 C.F.R. § 2.323(b). The second subsection is referred to as the "consultation" requirement.[14]

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[13] The same process and delay occurred with regard to State Motion II.

[14] Although we refer to 10 C.F.R. § 2.323(b) as the consultation requirement, we recognize that it merely requires a sincere effort to contact the other party and resolve the

Both requirements were added when the Commission amended the Part 2 procedural rules in 2004.[15] Each requirement has laudable goals. The first promotes the expeditious raising and resolution of issues. The second seeks to avoid unnecessary litigation by requiring the movant to make a reasonable effort to discuss and perhaps resolve the problem or misunderstanding before involving the Board.

It is our determination that the listing of a document on a privilege log is the "occurrence or circumstance" that triggers the 10-day period of 10 C.F.R. § 2.323(a) for the filing of a motion challenging the asserted privilege. The moment the document is withheld and the privilege log is served on the other parties is the moment when the privilege is asserted and opposing parties must study the log and decide whether to challenge it.[16]

We also hold that the consultation requirement of 10 C.F.R. § 2.323(b) does not extend the 10-day filing requirement of 10 C.F.R. § 2.323(a) and that the parties cannot, without approval of the Board, agree to waive the 10-day rule applicable to the filing of motions. The Board is responsible for managing the adjudicatory proceeding in a fair and expeditious manner, and our ability to do so could be undermined significantly if the parties could simply discard or extend the regulatorily prescribed deadlines for the filing of motions and bring

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issue.

[15] Compare 10 C.F.R. § 2.323 with 10 C.F.R. § 2.730 (2004). See also Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-12, 59 NRC 237, 239 n.3 (2004) (noting that the old rules did not contain a 10-day deadline for filing motions).

[16] The suggestion that the 10-day deadline is not triggered until the after the consultation is complete or at an impasse, puts the cart before the horse. Consultation is necessarily a subsequent event, because consultation is only required if first there is an event or circumstance that causes a problem and raises the need to file a motion. The objectionable event must necessarily precede any duty to consult about settling it.

disputed matters to the Board at some late date in a proceeding.[17]

We recognize that the 10-day deadline for filing motions to compel, if mechanically applied, could be unfair and counter-productive. Within the 10-day window a party must: (a) identify the occurrence or circumstance provoking the motion (e.g., promptly read the privilege logs); (b) make a sincere effort to consult the opposing party and resolve the matter; and (c) research, draft, and file its motion (its only pleading and brief on the matter, given that the movant has no right to reply). See 10 C.F.R. § 2.323(a)-(c). Obviously, any consultation needs to be prompt, and the opposing party needs to cooperate. Likewise, it may prove difficult, if not impossible, to consult and resolve issues within the 10-day window, if the privilege logs lack "sufficient information" and the ten days is consumed by explaining or supplementing them. Accordingly, if the parties believe that additional time for consultation may be productive, either on a specific dispute or more generally, they are encouraged to advise the Board and move for the enlargement of the 10-day time frame of 10 C.F.R. § 2.323(a).

Applying these principles here, we find that the listing of the three documents on the Staff's July 27, 2005 privilege log was the "occurrence or circumstance" that triggered the 10-day requirement of 10 C.F.R. § 2.323(a). When the Staff withheld a document from the mandatory disclosure and instead put it on the list of "documents for which a claim of privilege or protected status is being made," 10 C.F.R. § 2.336(b)(5), the Staff was invoking the

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[17] For example, in this case the State and the Staff apparently had an agreement whereby the State was obliged to register its informal objection with the Staff within ten days of the issuance of the privilege log, the Staff would respond in writing, and the State, if not satisfied, was to file its motion to compel within five days after the Staff's written response. State Motion I at 2. This agreement gave the Staff an indefinite amount of time to issue its written response, thus allowing an indefinitely long amount of time for the filing of motions. Recently, the Staff took more than thirty-five days to file such a written response. See State Motion III at 2. Even if the parties had agreed to a specific time frame for such responses, if extension of regulatory deadlines by agreement of the parties is acceptable in principle, there would be nothing to constrain them against agreeing to long (e.g., 90 day) time frames, delaying resolution of issues and adversely affecting the Board's management of the case.

deliberative process privilege. However, the State did not file its motion challenging the asserted privilege until August 31, 2005.

Several circumstances incline us to excuse the delay in this case. First, the relevant regulations were new and untested. Second, the State relied on the interpretation of the NRC Staff itself, which initially agreed not to raise the untimeliness defense under these circumstances.[18] Third, in some instances the Staff's deliberative process privilege logs did not provide "sufficient information for assessing the claim of privilege" as required by 10 C.F.R. § 2.336(b)(5), and the absence of this information made it difficult, if not impossible, for an opposing party to assess the validity of the privilege claim without additional information. The logs provided, inter alia, the name and affiliation of the author and addressee, and the title/description of the document. For example, ML051940095 is described as "E-mail - Reddy NRR to Gill, NRR, re: VY EPU SBO Review." State Motion I at 5. This identifies the document as an intra-NRR e-mail on the subject of the station blackout review, but does not provide "sufficient information" to assess, even superficially, whether the Staff's claim of deliberative process privilege is valid, i.e., information that helps one determine whether it is predecisional and contains "deliberations." The fact that the Staff puts a document on a privilege log, and thus labels a document as "deliberative," is not sufficient information to assess whether it is.

We recognize that litigants often mutually tolerate privilege logs that merely identify documents claimed to be privileged, and, absent objections, the Board is not involved. We also recognize that the agreement of the parties here, apparently tolerating some of the skimpy privilege logs and allowing the party claiming the privilege to supplement the privilege log information at some later time and attempt to substantiate the privilege, is not an atypical

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[18] See State Motion I, Tab A, Letter from Anthony Z. Roisman, National Legal Scholars Law Firm, P.C. to Brooke Poole, Counsel for NRC Staff (July 20, 2005); E-mail from Brooke Poole, Counsel for NRC Staff to Anthony Roisman, National Legal Scholars Law Firm, P.C. (July 21, 2005).

approach.[19] No single method or model for privilege logs satisfies all situations, and the supplementation dialogue engaged in by the parties here may be a good use of the consultation process. But such supplementation does not convert a privilege log that lacks "sufficient information" for assessing the validity of a claimed privilege into one that does. An inadequate privilege log is particularly problematic in Subpart L proceedings, where no other discovery is allowed, because without "sufficient information" as to what allegedly makes the document "deliberative," the challenger is forced to shoot in the dark and face a substantive answer by the document withholder, without the right to reply.[20]

Given the agreement of the Staff and the newness of the regulations, we will not rule the State's motions untimely. However, if the parties wish to continue this approach and to permit more than the ten days allotted by 10 C.F.R. § 2.323(a), they must submit a proposed order to extend the time allowed for motions to compel.

B. Scope of Staff Disclosure Obligations under 10 C.F.R. § 2.336(b)(3)

The State has argued that the documents in dispute must be produced, even if they are not relevant to the contentions, because 10 C.F.R. § 2.336(b) requires the Staff to disclose all documents related to Entergy's application. State Motion I at 6-7. We agree that the Staff's disclosure obligations under 10 C.F.R. § 2.336(b) are broader than the subject matter of the admitted contentions. Under 10 C.F.R. § 2.336(b)(3) the Staff must provide "[a]ll documents

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[19] Until State Motion I, the Staff's deliberative process privilege logs contained little or no information in the "comments" field and essentially just identified the documents in question. Since that time, the Staff has generally completed the comments field by providing some information that helps explain or substantiate how or why the document is deliberative. Compare State Motion I at 5 (providing an excerpt of the Staff's deliberative process privilege logs of July 27, 2005), with State Motion III, Tab C (providing the Staff's deliberative process privilege logs of September 29, 2005).

[20] If a privilege log lacks sufficient information, then it increases the chance that the moving party "could not reasonably have anticipated" the privilege claimant's arguments and thus should be granted a right to file a reply. See 10 C.F.R. § 2.323(c).

(including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding." This broad language contrasts with 10 C.F.R. § 2.336(a)(2), which only requires that parties (other than the Staff) disclose documents that are "relevant to the contentions." The Commission recognized this distinction and understood that the broader language obligated the Staff to disclose documents that are beyond the scope of the contentions.[21] Accordingly, the Staff is obliged by 10 C.F.R. § 2.336(b)(3) to produce and disclose all documents that provide support for, or opposition to, the application or proposed action, supporting the Staff's review of Entergy's EPU application.[22]

C. Withholding of Documents Under the Deliberative Process Privilege

We analyze the Staff's withholding of documents claimed to be protected under the deliberative process privilege in three steps. First, we review the role of mandatory disclosures in Subpart L proceedings. Second, we discuss the requirements that must be met in order to successfully assert a claim of deliberative process privilege and determine whether the Staff

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[21] The Commission demonstrated it was aware of this distinction when it deleted proposed 10 C.F.R. § 2.336(a)(4), which was to require that parties other than the NRC Staff disclose documents that "provide direct support for, or opposition to, the application or other proposed action that is the subject of the proceeding." 69 Fed. Reg. 2182, 2208 (Jan. 14, 2004). This proposed provision was deleted because it required non-Staff parties to make disclosures that "extended beyond the scope of the contested issues in the proceeding." Id. The requirement that the Staff disclose documents, "(including documents that provide support for, or opposition to, the application or proposed action) supporting the NRC staff's review of the application or proposed action that is the subject of the proceeding," remained in the final rule.

[22] The Staff does not appear to dispute this point. The State quotes the Staff's assertion that "DPS has no need for the memorandum, which does not pertain to DPS's admitted contentions," State Motion I at 6, but, in context, that statement does not appear to challenge the Staff's disclosure obligations under 10 C.F.R. § 2.336(b)(3), but rather appears to address the State's showing of need under the deliberative process privilege balancing. See State Motion I, Tab A, Letter from Antonio Fernandez, Counsel for NRC Staff, to Anthony Z. Roisman, Esq., National Legal Scholars Law Firm, P.C. (Aug. 24, 2005). Further, by listing the disputed documents on its privilege logs, the Staff implicitly acknowledged that, but for the assertion of privilege, disclosure would be required.

has satisfied these requirements. Third, we weigh the State's argument that, even if the documents qualify for the deliberative process privilege, the State has an overriding need for the documents.

1. Importance of Mandatory Disclosure in Subpart L Proceedings

In adjudicatory hearings conducted under 10 C.F.R. Part 2, Subpart L, the general rule is to prohibit all discovery. "[A] party may not seek discovery from any other party or the NRC or its personnel, whether by document production, deposition, interrogatories or otherwise." 10 C.F.R. § 2.1203(d). With regard to the NRC Staff, there are two main exceptions. First, the Staff is obliged to make a hearing file available. "[T]he NRC staff shall file in the docket, present to the presiding officer, and make available to the parties to the proceeding a hearing file."[23] 10 C.F.R. § 2.1203(a)(1). Second, as previously discussed, the NRC Staff is required to make documents available to parties as mandatory disclosures pursuant to 10 C.F.R. §§ 2.1203(d) and 2.336(b).[24] The scope of the Staff's duty to make mandatory disclosures is broader than the scope of its duty to provide the hearing file.[25] These required disclosures are the "foundation" of the Commission's goals of reducing the "burden of discovery" and "enhanc[ing] the participation of ordinary citizens in the discovery process." 69 Fed. Reg. at 2194.

The Staff may withhold an otherwise discoverable document from mandatory disclosure

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[23] The hearing file must contain "the application, if any, and any amendment to the application, and, when available, any NRC environmental impact statement or assessment and any NRC report related to the proposed action, as well as any correspondence between the applicant/licensee and the NRC that is relevant to the proposed action." 10 C.F.R. § 2.1203(b).

[24] See 69 Fed. Reg. at 2194 (noting that the NRC mandatory disclosure provisions are "generally modeled on Rule 26 of the Federal Rules of Civil Procedure" but "have been tailored to reflect the nature and requirements of NRC proceedings").

[25] Compare 10 C.F.R. § 2.1203(b) (hearing file contents), with 10 C.F.R. § 2.336(b)(1)-(5) (mandatory disclosure requirements).

only if it is a document "for which there is a claim of privilege or protected status." 10 C.F.R. § 2.336(b). If the Staff asserts such a privilege or protection, it must, in lieu of providing the document, describe it on a privilege log that provides a "list of all otherwise-discoverable documents for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents." 10 C.F.R. § 2.336(b)(5). The deliberative process privilege is a privilege that may be asserted in NRC proceedings. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994). However, the Staff should not withhold a document from disclosure "in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure." 10 C.F.R. § 2.390(a).

As the hearing file and mandatory disclosure are the sole forms of "discovery" imposed on the Staff in Subpart L proceedings, the Staff's full compliance with these obligations is the "foundation" of the ability of intervenors to effectively participate in, and in the fairness and integrity of, such proceedings.

2. Deliberative Process Privilege

a. General Requirements

The deliberative process privilege is a subset of the executive privilege,[26] which is

[26] Although the terms "executive privilege" and "deliberative process privilege" are often used interchangeably, see, e.g., Zenith Radio Corp. v. United States, 764 F.2d 1577, 1580 (Fed. Cir. 1985) ("executive privilege . . . protects agency officials' deliberations, advisory opinions and recommendations in order to promote frank discussion of legal or policy matters in the decision-making process"), the deliberative process privilege is but one variant of executive privilege, see, e.g., Grand Cent. P'ship., Inc. v. Cuomo, 166 F.3d 473, 481 (2d Cir. 1999) (noting that the "'deliberative process privilege,' . . . is encompassed within the executive privilege"); In re Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) (noting that "[t]he most frequent form of executive privilege raised in the judicial arena is the deliberative process privilege"); Tax Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997) (noting that deliberative process privilege is "a variant of executive privilege"); Taxation with Representation Fund v. IRS, 646 F.2d 666, 676-77 (D.C. Cir. 1981) (noting that deliberative process privilege is

unique to governmental agencies.[27] The Commission provided an excellent overview of much of the law applicable to the deliberative process privilege in Vogtle, CLI-94-5, 39 NRC at 196-98, and we will only recount several of the main points here. As Vogtle makes clear, the privilege available in NRC proceedings is closely related to Exemption 5 under the Freedom of Information Act, 5 U.S.C. § 552(b)(5). Id. at 197. The deliberative process privilege protects 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 (1975) (quoting Carl Zeiss, 40 F.R.D. at 324), but does not extend to factual material severable from the deliberative context. EPA v. Mink, 410 U.S. 73, 87-88 (1973). If, however, the factual material is so "inextricably intertwined" with the deliberative sections of a document that its disclosure would inevitably reveal agency deliberations, then the factual material need not be disclosed. Vogtle, CLI-94-5, 39 NRC at 198.

The deliberative process privilege applies only if the information is (1) predecisional and (2) deliberative. Id. at 197 (quoting Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1434 (D.C. Cir. 1992)). "A document is predecisional if it was prepared before the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision." Id. A document is deliberative if it reflects a "consultative process." Id. at 198.

"sometimes called the 'executive' or 'governmental' privilege"). Other forms of executive privilege include the constitutional presidential communications privilege, see Cheney v. United States Dist. Court, 542 U.S. 367 (2004); United States v. Nixon, 418 U.S. 683 (1974), and the state secrets privilege, see United States v. Reynolds, 345 U.S. 1 (1953). Although the substantive elements of each form of the executive privilege differ, the procedural requirements established in Reynolds generally apply to all forms of the executive privilege. See, e.g., National Lawyers Guild v. Attorney General, 96 F.R.D. 390, 396 n.10 (S.D.N.Y. 1982); Coastal Corp. v. Duncan, 86 F.R.D. 514, 517 (D. Del. 1980); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327 n.33 (D.D.C. 1966).

[27] Coastal States Gas Corp. v. DOE, 617 F.2d 854, 866 (D.C. Cir. 1980).

This can include "analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency." Id. A document does not need to contain a specific recommendation to be deliberative. Id.

The substantial majority of federal cases, and the only two Licencing Board cases on point, hold that an agency's decision to assert the deliberative process privilege over a document, while not requiring the personal review of the actual head of the agency, must at least be made by a senior person, such as the head of the department having control over the requested information.[28]

> [M]ost courts, with the approval of the writers, have refused to allow the governmental [deliberative process] privileges to be claimed by any governmental attorney. Indeed, some courts have gone so far in following Reynolds as to require the agency head to

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[28] See, e.g., Landry v. FDIC, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (holding that the head of the FDIC's regional division is of sufficient rank to assert the deliberative process privilege); Northrop Corp. v. McDonnell Douglas Corp., 751 F.2d 395, 405 n.11 (D.C. Cir. 1984) (rejecting claim because not claimed by head of department); Branch v. Phillips Petroleum Co., 638 F.2d 873, 882-83 (5th Cir. 1981) (holding the director of the EEOC's district office sufficient); Kerr v. United States Dist. Court, 511 F.2d 192, 198 (9th Cir. 1975) (rejecting claim of privilege because not invoked by any official of the agency); Jade Trading, LLC v. United States, 65 Fed. Cl. 487, 497 (Fed. Cl. 2005) (requiring the assertion of privilege by the Commissioner of the IRS or the Secretary of the Treasury); Yankee Atomic Elec. Co. v. United States, 54 Fed. Cl. 306, 311 (Fed. Cl. 2002) (allowing the Secretary of Energy to delegate the authority to claim the privilege to the Chief Operating Officer of Civilian Radioactive Waste Management within DOE); Ferrell v. HUD, 177 F.R.D. 425, 428 (N.D. Ill. 1998) (allowing HUD's Assistant Secretary for Housing-Federal Housing Commissioner, whom HUD delegated authority, to assert privilege); Mobil Oil Corp. v. DOE, 102 F.R.D. 1, 6 (N.D.N.Y. 1983) (rejecting claim invoked by a DOE staff attorney and not by the agency's head or a "subordinate with high authority"); Exxon Corp. v. DOE, 91 F.R.D. 26, 43-44 (D. Tex. 1981) (finding procedural requirements not met because no affidavit or other statement has been submitted by the Secretary of Energy or other agency official); Kerr-McGee Chemical Corp. (West Chicago Rare Earths Facility), LBP 85-38, 22 NRC 604, 627 (1985) (requiring an affidavit from the head of the relevant agency of the State of Illinois); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP 83-72, 18 NRC 1221, 1223 (1983) (requiring an affidavit from the head of the Federal Emergency Management Agency). But see DOE v. Brett, 659 F.2d 154, 155 (Temp. Em. Ct. App. 1981) (per curiam) (holding that the deliberative process privilege does not need to 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"); Fed. R. Evid. 509, 56 F.R.D. 183, 251-52 (1972) (rejected by Congress in 1973) (allowing assertion of the deliberative process privilege, as a "privilege for official information," as low as the level of "any attorney representing the Government").

> give personal consideration to the claim of privilege, though other courts have been unwilling to take so extreme a position. The justification for requiring the agency head to claim the privilege is that this will discourage the making of frivolous claims for purely tactical reasons.[29]

Most cases allow the delegation of this responsibility by the head of the agency to the head of the relevant department because the privilege is to be asserted only after "actual personal consideration" of the document by the person making the decision. See, e.g., Landry, 204 F.3d at 1135 (quoting In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988)). However, relatively high level personal review is still required. Such review is "designed to deter governmental units from too freely claiming a privilege that is not to be lightly invoked . . . by assuring that some one in a position of high authority could examine the materials involved from a vantage point involving both expertise and an overview-type perspective." Coastal Corp. v. Duncan, 86 F.R.D. at 517 (quoting Smith v. FTC, 403 F. Supp. 1000, 1016 n.48 (D. Del. 1975)).

The deliberative process privilege is qualified and not absolute. Vogtle, CLI-94-5, 39 NRC at 198. Thus, although the government agency claiming the privilege has the initial burden of showing that the document qualifies for the privilege, once that burden is met, the litigant seeking the document can overcome the privilege by demonstrating an overriding need for the document. Id. In short, a Board may require the Staff to produce a deliberative document if the intervenor shows a sufficient need for it.

Applying these general principles here, we focus on two issues: whether the documents are deliberative, and whether the appropriate person determined that NRC should assert the privilege and withhold them from the mandatory disclosure required by 10 C.F.R. § 2.336(b)(3).

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[29] 26A Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5693 (1992) (footnotes omitted).

b. The "Deliberative" Element

The thrust of the State's assertion that the documents in question are not protected by the deliberative process privilege is that the documents are not deliberative because "[t]hey do not represent preliminary opinions on the final decision Staff will make on Entergy's EPU application" but instead are "more in the nature of factual information - i.e., what facts does [the] Staff believe it needs to see in order to properly evaluate Entergy's proposal - not opinion or predecisional analyses." State Motion I at 7. Essentially, the State argues that the documents are "merely information requests or identifications of potential areas of concern" and thus, do "not reveal the decision-making process but only the information gathering process which precedes decision-making." Id. at 9.

We disagree with the State's position and find that the Staff communications at issue are deliberative. Requests for additional information (RAIs), are a normal part of the NRC application process and well drafted and pertinent RAIs help the Staff in probing the right issues and gathering the necessary information to reach its decision on an application. Internal communications between Staff members about the adequacy of the application, the potential need to request additional information, and the Staff's evaluation of the adequacy or inadequacy of the RAI responses (and the possible need for more RAIs), are a legitimate, if not particularly high level, part of the thought process and deliberations by the Staff. The disclosure of such internal discussions, drafts, and debate could have a chilling effect on the willingness of Staff members to speak up, raise questions, or engage in appropriate professional debate about safety or environmental issues.[30] Of course such communications deal with the gathering of factual information (which, if severable, must be disclosed), but these communications reflect the opinions and evaluations of individual Staff members regarding

[30] Final RAIs and the responses thereto are not protected by the deliberative process privilege.

these areas of inquiry and the sufficiency of these facts. Without deliberative process privilege protection for these communications, Staff members may be reluctant to engage in frank discussions about the quality or completeness of a pending application.

The fact that the Division Director, or other high level NRC officials, may not have seen these documents in the course of the EPU decision-making process is not determinative. See State Answer to Staff Response at 3. The requirement that the "head of a department" or senior agency official make the agency decision to assert the deliberative process privilege does not mean that such higher level individuals must be involved in the deliberation itself, i.e., the analyses, evaluations, recommendations, proposals, or opinions that qualify the document as deliberative. These are separate issues. Here, based both on the affidavit of the Division Director and our in camera review of the three documents, we are satisfied the documents involve a staff-level debate and discussion about the adequacy of certain RAI responses and the possible need for additional RAIs. This discussion and the decision whether to issue additional RAIs would not seem to require the involvement of the Division Director. His involvement in these deliberations is not required to make them deliberative communications.[31] While the level of the deliberations may be a factor in assessing the extent of the chill that the disclosure of the document might cause, and in balancing this consideration against the movant's need for the document in the litigation, lower level discussions are not, per se, not deliberative.

On the foregoing basis, we conclude that the Staff has demonstrated that the documents in question here qualify for the deliberative process privilege.

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[31] In contrast, the level of the person deciding to assert the privilege is important because part of the justification for high level review of privileged documents is that someone with "both expertise and an overview-type perspective," Coastal Corp. v. Duncan, 86 F.R.D. at 517, can make the balancing decision (possible chilling effect vs. basic duty to disclose) as to whether the agency truly needs to assert the privilege and withhold the relevant and otherwise discoverable documents.

c. Assertion of the Deliberative Process Privilege

This case presents two interrelated issues concerning the NRC Staff's assertion of deliberative process privilege for the documents in question. First, does the "head of department" requirement apply when the deliberative process privilege is asserted by the NRC Staff? Second, if so, must this official make the decision to assert the privilege when Staff first asserts the privilege, withholds the otherwise discoverable document, and instead places it on the privilege log required by 10 C.F.R. § 2.336(b)(5)? We answer both of these questions in the affirmative.

We hold that the NRC Staff's decision to assert the deliberative process privilege over a document, while not requiring the involvement of the "head of the agency,"[32] must at least be made by a person, such as the head of the department or division, having both expertise and an overview-type perspective concerning the balance between the agency's duty of disclosure versus its need to conduct frank internal debate and deliberation without the chilling effect of public scrutiny.[33] The deliberative process privilege is a form of executive privilege and is not to be lightly invoked.[34] The decision to assert it is not merely a technical determination as to whether a document is predecisional or deliberative, but involves a discretionary balancing of

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[32] In the context of the NRC Staff the "head of the agency" (which we do not require) would probably be the Executive Director for Operations, given that the Commissioners and their immediate staff might have an appellate adjudicatory function in this matter. See generally 10 C.F.R. § 2.348.

[33] For example, in the High-Level Waste proceeding, the NRC Staff, DOE and the State of Nevada all designated and agreed as to the minimum senior level individual who would assert the deliberative process privilege. See U.S. Department of Energy (High-Level Waste Repository: Pre-Application Matters), NRC Staff Response to Issues Identified at First Case Management Conference at 8-10 (May 12, 2005); [DOE]'s Memorandum in Response to May 11, 2005 Memorandum and Order Regarding Second Case Management Conference at 14-15 (May 12, 2005); State of Nevada's Memorandum Regarding Issues Arising from the Board's May 4, 2005 Hearing at 13-14 (May 12, 2005).

[34] See Cheney, 542 U.S. at 389 ("Executive privilege is an extraordinary assertion of power 'not to be lightly invoked.'") (quoting Reynolds, 345 U.S. at 7).

the agency's interests by a person who is above the fray of the immediate dispute or litigation.[35] This balancing and judgment is particularly important in Subpart L proceedings, where the hearing file and the Staff's mandatory disclosure of documents, as the only Staff discovery available to an intervenor, are fundamental. As stated above, the "head of department" requirement is the rule in the vast majority of federal cases and there is no reason why NRC Staff should be exempt. Indeed, in the only two NRC cases on point, Licensing Boards have required that the head of the agency or department assert the deliberative process privilege.[36]

Applying these principles to the facts of this case, we hold that the decision of the project engineer and the Staff counsel litigating this case, who were the only people involved in the Staff's decision to withhold the documents from the mandatory disclosure and instead to place them on the deliberative process privilege logs (dated July 27, 2005 and September 6, 2005), did not comply with the legal requirements of the deliberative process privilege. However, we agree with the Staff and the State that the Division Director, who subsequently made the decision to assert the privilege, was of sufficiently high position to invoke the deliberative process privilege for the documents at issue. Staff Response at 10-11; State Answer to Staff Response at 2. In Landry, the regional director of the FDIC's division of supervision, rather than the head of the FDIC, was permitted to assert the deliberative process privilege. Landry, 204 F.3d at 1136. In the present case, the Division Director is responsible for the particular division handling the Vermont Yankee EPU application. Therefore, this

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[35] See, e.g., Marriott Int'l Resorts, L.P. v. United States, 61 Fed. Cl. 411, 417 (Fed. Cl. 2004) (requiring "familiarization with the documents involved and a determination that disclosure would significantly and adversely affect the agency's vital functions"); Resolution Trust Corp. v. Diamond, 773 F. Supp. 597, 602 (S.D.N.Y. 1991) (requiring the "expertise of the agency head . . . to exercise discretion to determine whether the public interest in confidentiality outweighs the public interest in disclosure").

[36] See West Chicago, LBP 85-38, 22 NRC at 627 (requiring an affidavit from the head of the relevant agency of the State of Illinois); Shoreham, LBP 83-72, 18 NRC at 1223 (requiring an affidavit from the head of the Federal Emergency Management Agency).

individual is high enough above the fray to offer "both expertise and an overview-type perspective" so as to make the review of the claimed documents meaningful.

Assuming it is applicable to adjudicatory proceedings at all, NRC Management Directive 3.4 supports this result. It specifies that "Office Directors and Regional Administrators" are the persons authorized to "[g]rant permission for the release of draft or predecisional information." NRC Management Directive 3.4, Release of Information to the Public 4 (rev. Dec. 1, 1999). The Staff notes that "Management Directive 3.4 specifically empowers Office Directors to protect predecisional agency documents [and] [t]he Office of Nuclear Reactor Regulations . . . has further delegated responsibility to Division Directors to withhold privileged documents pursuant to ADM-200." Staff Response at 11.

As to the second question, it is clear to us that Staff's decision to assert the deliberative process privilege occurs at the moment when the Staff first withholds the otherwise discoverable document and instead places it on the privilege log required by 10 C.F.R. § 2.336(b)(5). That is the decision that requires the involvement of the appropriate senior person. The Staff's mandatory disclosures in Subpart L proceedings must be made "without further order or request from any party," 10 C.F.R. § 2.336(b), and the privilege is asserted or invoked at the instant the document is placed on the privilege log. This decision to withhold an otherwise discoverable document is not a mere "initial determination" because, in a Subpart L proceeding, and absent the filing of a motion to compel and litigation over the issue, it results in the permanent withholding of an otherwise discoverable document from a litigant and is, in short, "in derogation of the search for the truth." See Nixon, 418 U.S. at 710. The Staff, which has a responsibility to protect the public interest, should not assert this executive privilege lightly.

The Staff raises the specter of a "formal invocation process" and argues that there is no reason why it should be applied when the Staff makes its "initial determination" to withhold a

document from mandatory disclosure. Staff Response at 7. It denigrates the importance of such mandatory disclosures and argues that "[u]nless and until a party informs the Staff that it wishes to obtain a document which has been withheld as privileged, the agency has no reason to go through a formal 'invocation' process to support that claim of privilege." Id. at 8. The Staff avers that requiring a senior person to review documents and assert the privilege would cause an "excessive and unnecessary burden," would "bog down the agency's management in endless document review," and "would adversely affect the agency's ability to carry out its statutory functions." Staff Response at 8-9. We are not persuaded.

First, nothing we have said imposes a "formal invocation process" on the Staff. There is no talismanic significance to the words "invoke" or "invocation," they merely mean to "assert" or "claim" that a document is privileged. Some relatively senior individual must make the decision to assert or "invoke" the privilege, but we impose no "process," formal or otherwise, on that person or on the Staff. Nor do we rule that a specific level of senior executive must always assert the privilege. Further, since the non-disclosure of otherwise discoverable documents in an adjudicatory hearing is clearly an adjudicatory issue within the purview of this Board, we are not intruding into the Staff's performance of its "nonadjudicatory activities."[37] We merely require, consistent with the overwhelming majority of federal case law, that the Staff's determination to assert the deliberative process privilege over a document must be made by a department head who has reviewed the document and made the decision.[38]

Second, we are unpersuaded by the Staff's argument that "the need to follow the 'invocation' procedures does not arise until a motion to compel is filed." Staff Response at 10.

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[37] See Duke Energy Corp. (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 74 (2004).

[38] See, e.g., Reynolds, 345 U.S. at 7-8 ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter."); Landry, 204 F.3d at 1136.

To the contrary, the Staff is legally obligated to disclose all documents, other than those for which it asserts a privilege, "without further order or request from any party." 10 C.F.R. § 2.336(b). The Staff's position is inconsistent with this regulation and would inevitably cause motions to compel to proliferate, a result that is inconsistent with the purposes of mandatory disclosure. Further, postponing senior level review until after the project engineer and litigating attorney had already asserted the deliberative process privilege could strongly predispose the senior person to affirm the privilege claim, to avoid publicly reversing and thus embarrassing his or her staff. The Staff's approach would undermine a key value inherent in senior level review - to allow an individual who is above the fray of the immediate litigation tactics to weigh the potential chill that might be caused by disclosure against the agency's general duty to release documents and its specific duties to do so in Subpart L proceedings.[39]

While we recognize that our ruling will require some additional thought and effort by the Staff before it asserts the deliberative process privilege over a document, we believe that the burden is a reasonable one, is required by the law and regulations, and is far outweighed by the time and effort that would be imposed if the Staff's position (requiring the filing of motions to compel) were accepted. The Staff's burden – that a senior person review the document and make the decision whether to assert the deliberative process privilege before it is withheld under 10 C.F.R. § 2.336(b)(3) – is relatively modest. No affidavit or declaration is required from

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[39] The Staff rightly points out that in both West Chicago, LBP-85-38, 22 NRC at 627, and Shoreham, LBP-83-72, 18 NRC at 1223, the Board gave the head of the agency a specified number of days (ten and fifteen, respectively) within which to submit an affidavit and argues that the Staff should enjoy the same benefit here. Staff Response at 9. We find this argument unpersuasive. First, this Board's September 30, 2005 Order gave the Staff an even greater amount of time (twenty days) within which to submit the affidavit regarding the previously asserted privilege logs. Second, this decision, like the two cited cases, does not require an affidavit or declaration from the Division Director until after a motion to compel is filed. Third, neither of the prior cases dealt with the mandatory disclosure and privilege log requirements of 10 C.F.R. § 2.336(b), which impose an affirmative duty "without further order or request" to disclose documents in lieu of all other discovery.

this person at the time the document is listed on the privilege log.[40] No process, formal or otherwise, is mandated. The level of seniority required is a case-by-case determination, dependent on the size and nature of the case.[41]

We reject the dire predictions that Division Directors will be overwhelmed and that the burden on them will "adversely affect the agency's ability to carry out its statutory functions." Staff Response at 8-9. And it bears noting that a fair adjudicatory hearing process, whereby members of the public are afforded the opportunity to raise, and have resolved, appropriate challenges to safety and technical aspects of a proposed licensing action, helps to promote NRC's mission to protect the public against unreasonable risks to health and safety, and is itself a key "statutory function" of the agency. See 42 U.S.C. § 2239(a). Under these circumstances, we see no unreasonable burden in requiring a senior person to make the decision whether to withhold an otherwise discoverable document and assert the deliberative process privilege.

Finally, whatever burden that is involved in requiring that a senior level person make the decision to assert the deliberative process privilege is less than the burden that the Staff would have us transfer to the other parties and the Board. The Staff's position, requiring a motion to

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[40] An affidavit or declaration will be required only if a motion to compel is filed.

[41] This result is entirely consistent with West Chicago and Shoreham, both of which required that the deliberative process privilege be asserted by the head of the respective agencies or departments. West Chicago, LBP 85-38, 22 NRC at 627; Shoreham, LBP 83-72, 18 NRC at 1223. These cases were conducted long before the NRC eliminated discovery for licensing proceedings and imposed the mandatory disclosure requirements, which change the situation dramatically by requiring disclosure "without further order or request from any party." 10 C.F.R. §2.336(b). Certainly, in both cases, the Board issued an order providing the offending party some additional time in which to submit an affidavit or declaration from the head of the department. Likewise in this case, once the issue was raised and a motion to compel filed, the Board provided the Staff additional time within which to have the appropriate senior individual make the privilege determination. See September 30, 2005 Order at 3. In none of these cases was the Board obliged to provide the privilege claimant with additional time to carry its burden of meeting the requirements for the deliberative process privilege. Our conclusion here – that senior level determination is required before the Staff can place a document on the deliberative process privilege log, and that the submission of a formal affidavit or declaration is not required unless and until a motion to compel is filed – is consistent with these two cases.

compel before the Division Director has even looked at the documents, shifts all of the burden to the intervenors, who are likely least able to bear it. In particular, intervenors must go to the time, effort, and expense of drafting a motion to compel and a supporting brief, without knowing who made the determination to assert the privilege, possibly without sufficient information to assess the validity of the claimed privilege, and without the right to file a reply. This approach would burden the parties, the Board, and the hearing process with numerous and unnecessary motions and disputes. This is not consistent with the purpose of mandatory disclosures and privilege logs. On balance, although a modest burden is involved in the determination to assert the privilege, it is appropriately placed, by law and reason, on the party asserting it.

3. Absence of Demonstrated Overriding Need

Having concluded that the three documents involved in State Motion I and the twenty-five documents involved in State Motion II satisfy the requirements of the deliberative process privilege, a qualified privilege, we now turn to the question as to whether the State has shown a sufficient need for the documents in this litigation to override the privilege. We think not.

The State makes three arguments.[42] First, the State declares that the documents, which relate to the station blackout analysis, are relevant to its contentions concerning the need for containment overpressure. State Motion I at 6. Second, the State asserts that the Staff might as well disclose the documents now because "in the near future, when the Staff publishes its initial position on the EPU, these documents will have to be produced since they will no longer be pre-decisional." State Motion I at 10. Third, the State says that "the extent to which the documents contain important information that will materially assist [the State] . . . cannot be ascertained," but it is "apparent the documents relate to an important coping analysis." State Motion I at 11.

[42] These arguments were made in State Motion I, but the State has incorporated by reference the arguments made in its first motion in State Motion II at 2-3.

We cannot conclude, based on the foregoing statements, that the State has carried its burden of demonstrating an overriding need for the documents. We posit that documents relating to the station blackout analysis are relevant to the containment overpressure contentions. Relevance alone is not sufficient. Other than asserting that the documents relate to an important coping analysis, the State fails to explain or demonstrate how this establishes an overriding need for the documents.

We also reject the argument that documents will no longer be predecisional once the Staff makes a decision as to whether to issue the particular RAI in question. Documents that are protected by the deliberative process privilege do not lose their protected status after a final agency decision is made, because post-decisional release would have the same pernicious effect as predecisional release – to inhibit the Staff from a thorough discussion of issues and options for fear of public airing of these internal discussions.[43]

III. CONCLUSION

We conclude that although the Staff's original claim that the twenty-eight documents are protected by the deliberative process privilege was deficient because the Staff failed to provide "sufficient information" to assess the privilege in its privilege log and because the decision to assert the privilege was not made by the "head of the department," the Staff subsequently remedied these problems and has demonstrated that the documents qualify for the privilege. We further conclude that the State has not made a showing of substantial need for the documents that would override the deliberative process privilege. Therefore, the State's August 31, 2005, and September 29, 2005, motions to compel the production of documents are denied. Likewise, the State's motions for oral argument and for the opportunity to file reply briefs on State Motions I and II are denied.

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[43] See, e.g., Federal Open Mkt. Comm. v. Merril, 443 U.S. 340, 360 (1979).

Further, with regard to all deliberative process privilege logs hereinafter filed in this proceeding, we order that the log include, for each document, the name and job title of the most senior person who made the decision to withhold the document and assert the privilege. This person must be senior enough to have both the expertise and overview perspective to balance the agency's duties of disclosure against its need to conduct internal deliberations and to make the discretionary determination that the agency will assert the deliberative process privilege. We also encourage the Staff to provide "sufficient information for assessing" the validity of the privilege claim, as required by 10 C.F.R. § 2.336(b)(5), so as to avoid unnecessary disputes over documents on its privilege logs. With regard to the Staff's deliberative process privilege logs disclosed before the date of this order but after September 6, 2005 (the date of the log

challenged by State Motion II), the Staff shall have 30 days from the date of this order to resubmit them in conformance with the foregoing requirements.[44]

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD[45]

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/

Dr. Anthony J. Baratta
ADMINISTRATIVE JUDGE

/RA by G.P. Bollwerk for:***/***

Lester S. Rubenstein
ADMINISTRATIVE JUDGE

Rockville, Maryland
December 21, 2005

[44] This memorandum and order does not alter or expand the completed briefing on State Motion III.

[45] Copies of this order were sent this date by Internet e-mail transmission to counsel for (1) licensees Entergy Nuclear Vermont Yankee L.L.C. and Entergy Nuclear Operations, Inc.; (2) intervenors Vermont Department of Public Service and New England Coalition of Brattleboro, Vermont; and (3) the Staff.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE L.L.C.	)	Docket No. 50-271-OLA
and ENTERGY NUCLEAR OPERATIONS, INC.	)	
	)	
Vermont Yankee Nuclear Power Station)	)	
	)	
(Operating License Amendment)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (RULING ON DELIBERATIVE PROCESS PRIVILEGE CLAIMS) (LBP-05-33) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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Docket No. 50-271-OLA
LB MEMORANDUM AND ORDER (RULING ON
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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 21st day of December 2005