

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 RESPONSE TO THE PRE-LICENSE
APPLICATION PRESIDING OFFICER BOARD'S APRIL 19, 2007 ORDER**

On April 19, 2007, the Pre-License Application Presiding Officer (PAPO) Board entered an order directing the U.S. Department of Energy (DOE) to provide written responses to certain questions regarding the Proposed Third Case Management Order (PTCMO). This is DOE's response to those questions.

Answers to Written Questions

1. Potential substantial delays associated with lack of deadlines for NRC actions.

Given the statutory and regulatory deadlines associated with the high level waste proceeding, time is of the essence during the pre-license application phase.

The PTCMO sets forth a process whereby (a) the originator of the requested SGI document has 20 business days to make an initial need to know determination; (b) the originator has another 40 business days (with the right of indefinite continuance) for the NRC, after receiving the necessary information from the requestor, to conduct a fingerprint criminal history background check or an alternative background check. PTCMO at 16. Thereafter, the requestor who objects to a denial of access to the document cannot file a motion to compel until, inter alia, the originator submits a privilege log, for which there is no filing time deadline. Thus, actions required by the originator will likely consume approximately 90 days and, only at that point, can the Board's review of such motion under 10 C.F.R. § 2.1010(b) even begin. Thus, even if the requestor initiated the process for an SGI document on the same day that DOE certifies its LSN collection, the process set forth in the PTCMO would take over 50% of the likely 6 month pre-license application phase to resolve.

The time problem becomes even more acute if the dispute resolution process specified in the proposed 10 C.F.R. § 2.1010(b)(6)(i)(D) is used. The dispute

resolution process described in that section of the proposed rule adds 40 days to the time-line after a final determination has been made by the NRC.

(DOE, NRC, and the State) Discuss how the process under both scenarios might be expedited and shortened.

Response: The dispute resolution process regarding SGI documents may be expedited in the following ways:

- a. Persons who anticipate that they will want access to SGI documents during the pre-license application phase can initiate now the fingerprint and background check process. For these individuals, the only further determination that will need to be made following DOE's certification is their "need to know," which the NRC has 20 business days to complete following a request for a specific document.
- b. For persons who do not initiate the clearance process prior to DOE's certification, they can initiate the fingerprint and background check process when they request access to a SGI document. For these individuals, the need-to-know determination and the fingerprint and background check process can proceed simultaneously rather than seriatim.
- c. Challenges to an adverse need-to-know determination can proceed when made, even if the fingerprint and background check process is not complete.
- d. Challenges to the categorization of a document as SGI can proceed irrespective of whether a need-to-know determination or clearance process has been completed, or even been requested.
- e. A log entry for an SGI document can be provided on the same schedule following a meet and confer process similar to the privilege log entry schedule for secondary privileges as specified in the Second Case Management Order.

2. PTCMO Definitions

(a) The definition of Naval Nuclear Propulsion Information (NNPI) in the PTCMO states that it "concerns the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of the naval nuclear powered ships or prototypes, including the associated nuclear support facilities." PTCMO at 1. It then lists a large swath of statutes, regulations, and an Executive Order as governing the disclosure of NNPI. Id. at 1-2.

The word "concerns" is not generally definitional because many things that concern these subjects are not NNPI.

(1) (DOE) Provide the definition of NNPI. Stated otherwise, specify what NNPI means.

Response: NNPI is defined in Naval Sea Systems Command (NAVSEA) Instruction 5511.32C. NAVSEA Instruction 5511.32C defines NNPI as follows:

Naval Nuclear Propulsion Information is all information, classified or unclassified, concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance and repair of the propulsion plants of Naval nuclear-powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities.

NAVSEA Instruction 5511.32C (attached hereto in publicly available form as Exhibit A).

NOTE: As the definition indicates, there are two categories of NNPI--Classified NNPI and Unclassified NNPI. The PTCMO concerns Unclassified NNPI only.

Further delineation of the type of information that qualifies as NNPI is provided in the controlled version of NAVSEA Instruction 5511.32C, and in the Department of Energy – Department of Defense Classification Guide for the Naval Nuclear Propulsion Program, dated February 1996 (CG-RN-1 Revision 3), which is also a controlled document; *see also* DOE Manual 470.4-4, Section A, Chapter II, paragraph 3(1)(5). Attachment 1 to Enclosure 1 of the publicly available version of NAVSEA Instruction 5511.32C provides the decision matrix followed to determine whether a document contains Unclassified NNPI.

If the PAPO Board wants more specification for the definition of NNPI in the PTCMO, it could define NNPI as “information that qualifies as Unclassified NNPI pursuant to NAVSEA Instruction 5511.32C and the Department of Energy – Department of Defense Classification Guide for the Naval Nuclear Propulsion Program, dated February 1996 (CG-RN-1 Revision 3).”

(2) (DOE) Provide a specific citation to the statute, regulation or other authority directly supporting the definition of NNPI. If no such statute, regulation, or other authority exists directly supporting the definition of NNPI, so state.

Response: The Director of the Naval Nuclear Propulsion Program executed NAVSEA Instruction 5511.32C pursuant to his authority to administer the Naval Nuclear Propulsion Program (“NNPP” or “Program”). Executive Order (EO) 12344 (dated February 1, 1982) empowered the Director with administration of the Program, including authority over “security,” “nuclear safeguards,” and “public information.” EO 12344 §§ 5(e), 8(b). EO 12344 has been codified into statute at 42 U.S.C. § 7158 and 50 U.S.C. §§ 2406, 2511.

(3) (DOE) Provide a specific citation to the specific statute that exempts NNPI disclosure under exemption 3 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3), and parallel 10 C.F.R. 2.390(a)(3).

Response: Unclassified NNPI is subject to FOIA exemption 3 pursuant to 10 U.S.C. § 130 and its implementing regulations, 32 C.F.R. § 250. More particularly, 10 U.S.C. § 130 authorizes the Department of Defense to withhold from the public the following information:

any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully outside

the United States without an approval, authorization, or license under the Export Administration Act of 1979 (50 App. U.S.C. 2401–2420) or the Arms Export Control Act (22 U.S.C. 2751 et seq.).

See also 10 U.S.C. § 128. The implementing regulation similarly provides that the Department of Defense:

. . . may withhold from public disclosure, notwithstanding any other provision of law, any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully without an approval, authorization, or license under E.O. 12470 or the Arms Export Control Act.

32 C.F.R. § 250.4(a).

The implementing regulation additionally mandates that qualifying information shall be withheld pursuant to FOIA exemption 3:

(a) . . . Such FOIA requests for technical data currently determined to be subject to the withholding authority effected by this part shall be denied under citing the third exemption to mandatory disclosure, and the requester shall be referred to the provisions of this part permitting access by qualified U.S. contractors.

(b) Upon receipt of a request for technical data in the possession of, or under the control of, the Department of Defense, the controlling DoD office shall determine whether such data are governed by this part. The determination shall be based on the following:

- (1) The office's finding that such data would require an approval, authorization, or license for export under E.O. 12470 or the Arms Export Control Act and that such data may not be exported pursuant to a general, unrestricted license (15 CFR 379.3, EAR) (see § 250.7) or exemption (22 CFR 125.11, ITAR) (see § 250.8).
- (2) The office's judgment that the technical data under consideration disclose critical technology with military or space application. For purposes of making this determination, the Militarily Critical Technologies List (MCTL) shall be used as general guidance. . . .

32 C.F.R. § 250.5.

Unclassified NNPI qualifies as technical data with military application in the possession of, or under the control of, the Department of Defense that may not be exported from the United States without an appropriate license, and thus falls within the exemptions from public disclosure provided by § 130 and its implementing regulation. The export restrictions on Unclassified NNPI follow from the International Traffic in Arms Regulations (ITAR) and Munitions List of the Department of State, 22 C.F.R. Part 120, which require a Department of State license for the export of sensitive unclassified information on a variety of military equipment including naval nuclear propulsion plants and their support facilities. *See also* 15 C.F.R. Part 744 (Department

of Commerce license required for exporting sensitive unclassified information that can be used for maritime nuclear propulsion, “provided that United States naval nuclear propulsion information is not disclosed”); 10 C.F.R. § 810 (Sensitive Nuclear Technology regulations of DOE).

Consistent with these various regulations, NAVSEA Instruction 5511.32C directs that documents with NNPI be marked as NOFORN (No Foreign Eyes) and that disclosure be limited to United States citizens with a need-to-know. See NAVSEA Instruction 5511.32C, Attachment 2 to Enclosure 1 at p. 3.

Further, the Chief of Naval Operations has executed OPNAVINST 5510.161, which applies to the Naval Nuclear Propulsion Program. OPNAVINST 5510.161 expressly provides that export-controlled information such as NNPI be withheld pursuant to FOIA Exemption 3. See OPNAVINST 5510.161 at §§ 4 & 5 (attached hereto as Exhibit B).

The protection of NNPI as a consequence of these authorities was recognized in *Bordell v. General Electric Co.*, 732 F. Supp. 327 (N.D.N.Y. 1990), *vacated and remanded on other grounds* 922 F.2d 1057 (2nd Cir. 1991). In that case the district court held that “NNPI, defined **and protected under 10 U.S.C. § 130**, includes information on shipboard and prototype naval nuclear propulsion plants, technical requirements pertaining to how those plants are designed, analyzed, and operated, and standards and practices that apply to nuclear powered ships and Navy support facilities.” *Id.* at 330 (emphasis added). On appeal, the court added that NNPI is the product of a “complicated statutory and regulatory scheme, which is not challenged in this suit, **protects against public disclosure** of classified and sensitive information . . . [C]ertain technical data with military application and other information relating to atomic energy defense programs, although not classified, **is protected against unauthorized public disclosure**. See 10 U.S.C. § 130; 42 U.S.C. § 2168.” *Bordell*, 922 F.2d at 1058 n.1 (emphasis added).

In summary, 10 U.S.C. § 130 authorizes the Secretary of Defense to withhold from public disclosure technical data with military or space application if such data may not be exported without a license. Export of Unclassified NNPI would require such a license pursuant to 22 C.F.R. § 120 and thus such information falls under FOIA exemption 3. The Director of the NNPP and the Chief of Naval Operations have implemented instructions to effect these restrictions on disclosure of NNPI.

(4) (DOE) Provide a complete list of all the information that must be included in a privilege log to establish a prima facie case that a NNPI document is entitle to be withheld under Exemption 3 of FOIA.

Response: A NNPI document, by definition, is protected from disclosure by law and is required to be withheld under Exemption 3 of FOIA. Consequently, an attestation by a qualified derivative classifier that a document contains information that qualifies as NNPI under the criteria of NAVSEA Instruction 5511.32C and the Department of Energy – Department of Defense Classification Guide for the Naval Nuclear Propulsion Program, dated February 1996 (CG-RN-1 Revision 3) provides the *prima facie* basis to withhold the document under FOIA Exemption 3.

NOTE: DOE will make available on the LSN a redacted version of any document in its LSN collection that is subject to protection because it contains Unclassified NNPI. The redacted version will provide parties and potential participants a practical ability to assess the claim that the document contains NNPI.

(5) (DOE) If NNPI is not exempt from disclosure under exemption 3 of FOIA, what is the specific statute, regulation, or other authority that authorizes withholding NNPI. If no such statute, regulation, or other authority exists, so state.

Response: N/A.

(b) The first sentence of the definition of Official Use Only Information (OUO) in the PTCMO states that OUO is “DOE information that may be protected from disclosure under [FOIA] (5 U.S.C. § 552(b) Exemptions 2 and 3.” PTCMO at 2. With respect to Exemption 2, the definition states that OUO is information “predominantly internal to DOE, the disclosure of which would risk circumvention of applicable law or render the documents operationally useless, and includes: critical infrastructure information; vulnerability assessments; inspection guidelines; classification guidelines; and evaluations of critical nuclear systems, facilities, stockpiles and other similar assets.” Id. With respect to Exemption 3, the definition states that OUO is information that “includes export controlled information whose unrestricted public dissemination could assist proliferants or potential adversaries of the United States.” Id.

FOIA Exemption 2 exempts from disclosure documents “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2); see 10 C.F.R. § 2.390(a)(2).

(1) (DOE) With respect to FOIA Exemption 2, explain how the definition in the PTCMO stating that OUO is “predominantly internal to DOE,” is consistent with FOIA Exemption 2, which only exempts records “related solely to the internal personnel rules and practices of an agency.”

Response: The definition of “OUO information” in the PTCMO as it relates to Exemption 2 is based on federal court interpretations of FOIA Exemption 2 (5 U.S.C. § 552(b)(2)). There are two categories of information that federal courts have recognized as OUO under Exemption 2. The first is typically referred to as “low 2” information which concerns matters internal to a federal agency that are of a relatively trivial nature. The second category is referred to as “high 2” information. *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). It is the second category of information that the PTCMO addresses.

“High 2” OUO information is defined in the case law as (1) information that is predominantly internal to the federal agency, and (2) the disclosure of which could significantly risk circumvention of agency regulations or statutes. *See, e.g., Crooker v. BATF*, 670 F.2d 1051,

1074 (D.C. Cir. 1981); *Institute for Policy Studies v. Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987) (“*Policy Studies*”). The definition in the PTCMO tracks that definition from the case law.

The *Policy Studies* decision is especially instructive on this issue. In *Policy Studies*, a FOIA requester sought access to the Air Force’s Security Classification Guide for the Air Force Groundware Emergency Network Program (“GWEN”). GWEN was a low frequency network that would have permitted the government and military to communicate after and during a nuclear attack. The Classification Guide detailed the categories of information that were classified as well as the level of classification for each category. The Guide itself was not classified information, but its dissemination was restricted. *Id.* at 4. In that case, the Air Force denied the FOIA request based on FOIA Exemption 2. The plaintiff argued that “Exemption 2 of FOIA is inappropriate for withholding unclassified national security information,” and that Exemption 2 was an “anemic form of classification that runs counter to congressional intent to protect under the rubric of national security information only data that has been properly classified according” to appropriate Executive Orders. *Id.* at 5.

The D.C. district court disagreed with the FOIA requester’s argument. It held that the Air Force met its burden of showing that (1) the document was “predominantly internal” to the Air Force, and (2) the disclosure of the material would risk circumvention of applicable law. *Id.* Discussing the Guide for the GWEN program, the court stated that while it was not “classified,” “the Guide’s classification of information provides clues by which a reader can gauge which components of GWEN are the most sensitive and consequently the most important. Foreign intelligence services could use the Guide to identify and gather unclassified documents which could be used to seek out the vulnerabilities of GWEN.” *Id.* In rejecting plaintiff’s argument that Exemption 2 was “anemic,” the court held that there is “considerable overlap among the FOIA exemptions,” and that the use of “Exemption 2 to withhold internal agency information on grounds of national security is not inconsistent with Exemption 1.” *Id.*

(2) (DOE) Provide a specific citation to the statute, regulation or other authority directly supporting the definition in the PTCMO of Exemption 2 OOU. If no such statute, regulation, or other authority exists directly supporting the definition of Exemption 2 OOU, so state.

Response: The PTCMO defines “high 2” OOU information consistent with the case law. In the PTCMO, the parties agreed that information concerning critical systems, facilities, stockpiles, and other security-related assets warranted protection from public disclosure on the LSN pursuant to the “high 2” standards as interpreted by the federal courts. Additionally, in 2002 the Attorney General of the United States distributed a memorandum shortly after 9-11 directing federal agency heads to take a closer look at whether information in their possession should be appropriately categorized as “high 2” information. *See* Attorney General’s Memorandum for Heads of All Federal Department and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001). The categories of information that the parties agreed qualify as “high 2” information under the PTCMO is consistent with that directive.

(3) (DOE) Provide a complete list of all the elements of information that must be included in a privilege log to establish a prima facie case that an OOU document is entitled to be withheld under Exemption 2 of FOIA.

Response: Each document in DOE's LSN collection that will be withheld under Exemption 2 of FOIA will have been reviewed by an authorized derivative classifier in consultation with the technical expert to understand the materials being reviewed and determined to satisfy the definition of "high 2" information in the PTCMO. These reviews are conducted and documents withheld in accordance with the Joint DOE/NRC Sensitive Unclassified Information and Classification Guide for the Office of Civilian Radioactive Waste Management. An attestation that this review has confirmed that the document contains "high 2" information along with production on the LSN of the redacted version of the document is sufficient to allow the requestor to assess the claimed protection.

FOIA Exemption 3 exempts from disclosure records that are "specifically exempted from disclosure by statute." 5 U.S.C. 522(b)(3); see 10 C.F.R. 2.390(a)(3).

(4) (DOE) Provide the definition of export controlled information.

(5) (DOE) Provide a specific citation to the statute, regulation, or other authority directly supporting the definition of export controlled information. If no such statute, regulation, or other authority exists directly supporting the definition of export controlled information, so state.

Response: Export Controlled Information (ECI) is a designation that DOE uses that encompasses any technical information whose export requires an export license or authorization. As applied by DOE, ECI is unclassified technical information whose export is subject to licensing and whose unrestricted public dissemination could contribute to the military potential of adversaries or potential adversaries of the United States. Thus, ECI is a reference to all the technical information that is export controlled by the Department of Commerce Export Administration Regulations 15 C.F.R. Parts 730-774, Department of State International Traffic in Arms Regulations 22 C.F.R. Parts 120-130, NRC regulations 10 C.F.R. Part 110, or DOE regulations 10 C.F.R. Part 810.

DOE has defined ECI in its orders as: "Certain unclassified Government information for which DOE is accountable and responsible and which requires a specific license or authorization to export. Export controlled information must be protected consistent with U.S. laws and regulations. Unrestricted dissemination of export-controlled information could reasonably be expected to have adverse effect on U.S. national security and nonproliferation objectives." *DOE O 142.2A*.

(6) (DOE) Provide a specific citation to the specific statute that exempts export controlled information from disclosure under Exemption 3 of FOIA.

Response: The statutory basis applicable to the majority of the ECI documents in DOE's LSN collection is section 57(b) of the Atomic Energy Act, 42 U.S.C. 2078. DOE's

implementing regulations can be found at 10 C.F.R. 810. The Department of Energy's Office of Hearings and Appeals has previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g.*, Barton J. Bernstein, 22 DOE ¶ 80,165 (1992); William R. Bolling, II, 20 DOE ¶ 80,134 (1990).

In addition to the Atomic Energy Act, FOIA Exemption 3 may be claimed for items that are export controlled under 10 U.S.C. 130, 22 U.S.C. 2778, 50 App. U.S.C. § 2400 *et seq.* (the Export Administration Act), and other statutes that control the export of information. For example, the Export Administration Act ("EAA") restricts the export of technology and information that would contribute to the military potential of possible adversaries of the United States. *See* 50 App. U.S.C. § 2402(2)(A). Consistent with the EAA, the Secretary of Commerce has enacted regulations to implement the EAA. These regulations, known as the Export Administration Regulations ("EAR"), specifically apply to "nuclear, missile, chemical and biological activities and nuclear maritime end-uses." 15 C.F.R. § 744.1(a). In particular, § 744.2 provides that a license is required for information that "will be used directly or indirectly in" "[u]nsafeguarded nuclear activities" or "[s]afeguarded and unsafeguarded nuclear activities." 15 C.F.R. § 744.2(a)(2), (3). The EAR states that unsafeguarded nuclear activities include "research on, or development, design, manufacture, construction, operation, or maintenance of any nuclear reactor, critical facility, facility for the fabrication of nuclear fuel, facility for the conversion of nuclear material from one chemical form to another, or separate storage installation" *Id.* § 744.2(a)(2). Safeguarded and unsafeguarded nuclear activities include "research on or development, design, manufacture, construction, operation or maintenance of any of the following facilities, or components for such facilities: (i) Facilities for the chemical processing of irradiated special nuclear or source material; (ii) Facilities for the production of heavy water; (iii) Facilities for the separation of isotopes of source and special nuclear material; or (iv) Facilities for the fabrication of nuclear reactor fuel containing plutonium." *Id.* § 744.2(a)(3). Indeed, § 744.2(a)(3) notes that such "activities may also require a specific authorization from the Secretary of Energy pursuant to § 57(b)(2) of the [AEA], ... as implemented by the Department of Energy's regulations published in 10 C.F.R. 810." *Id.*

With respect to the EAA as a withholding statute under Exemption 3 of FOIA, the D.C. Circuit has held that the EAA does qualify as an Exemption 3 statute. *See Wisconsin Project on Nuclear Arms Control v. Dep't of Commerce*, 317 F.3d 275, 281 (D.C. Cir. 2003).

(7) (DOE) Provide a complete list of all the elements of information that must be included in a privilege log to establish a prima facie case that an export controlled information document is entitled to be withheld under Exemption 3 of FOIA.

Response: Each document in the DOE's LSN collection that will be withheld under Exemption 3 of FOIA as containing Export Controlled Information will have been reviewed by a trained official in consultation with the technical expert to understand the materials being reviewed and determined to satisfy the definition included in the PTCMO. If a determination is made that the information is Export Controlled Information it is appropriately marked and identified with the statutory basis that restricts its export. An attestation that this review has

occurred along with production of the redacted version of the document is sufficient to allow the requestor to assess the assertion of the claimed protection.

3. Production of redacted documents by other federal agencies.

The PTCMO requires DOE, which definitionally includes the Naval Nuclear Propulsion Program, to produce redacted documents. PTCMO at 1, 9. It also requires “[a]ll other federal agencies originating sensitive unclassified information [SUI] subject to this [PTCMO]” to produce redacted versions of such documents. Id. at 9.

(a) (NRC, DOE and State) Under the PTCMO, is the NRC required to produce redacted versions of SGI documents?

Response: If the NRC originates the SGI they would be responsible for redacting and producing the SGI document. If the NRC holds an SGI document, but they are not the originator, they will work in conjunction with the originating agency to redact and produce the document. If the originating agency is a party to the proceeding, the originating agency will be responsible for redacting and producing the SGI document.

(b) (NRC, DOE, and State) What “other federal agencies” will be potential parties to the PAPO proceeding and “subject to” to PTCMO?

Response: At this time it is not anticipated that any other federal agencies will be potential parties and subject to the PTCMO.

(c) What entity, if any, produces the redacted version of a document on the LSN where the NRC possesses the document but the “other federal agenc[y],” which is the originator, is not “subject to” the PTCMO?

Response: If the NRC possesses the sensitive document of another agency that is not a party to the proceeding, the NRC would be responsible for placing a redacted version of the document on the LSN. Prior to placing the redacted document on the LSN, the NRC would have to coordinate with the originating agency to complete the redacted version and for release authority.

4. SUI Log

The PTCMO requires the originator of a document to produce a privilege log for certain contested SUI. PTCMO at 17. The proposed SUI log states, inter alia, that the originator should provide “[a] justification . . . that the information qualifies as [SUI].” PTCMO at App. F.

It appears that the proposed SUI privilege log in the PTCMO is fundamentally different from the privilege log formats contained in the July 8, 2005, Second Case Management Order. The privilege logs in our previous order are based upon the

requirement in 10 C.F.R. § 2.336(b)(5) that logs contain “sufficient information for assessing the claim of privilege or protected status.” In turn, that regulatory requirement has its roots in Rule 26(b)(5) of the Federal Rules of Civil Procedure, requiring that a privilege log describe a withheld document in a manner that “will enable other parties to assess the applicability of the privilege or protection.”

(NRC, DOE and State) Explain why the proposed SUI privilege log should not have to present facts sufficient to establish a prima facie case that the document at issue is entitled to be withheld. Stated otherwise, should not the SUI privilege log require sufficient facts to establish each element of the particular protection claimed for the document?

Response: The parties agreed to the SUI log described in Appendix F of the PTCMO because they determined that the requirements of Appendix F, if implemented in good faith, would enable participants to assess the basis for withholding a document, or portion of a document, as sensitive unclassified information (“SUI”). In that regard, the parties recognized that participants would have access to a redacted version of an SUI document in addition to the SUI log entry pursuant to Appendix F. The combination of the redacted version and the log entry, along with the requirement on NRC and DOE to engage in a good-faith meet and confer process, will provide an ample basis for participants to assess any SUI claim.

Further, the parties recognized that the log requirements should not be overly prescriptive in the SUI area. It is imperative that the log entry for an SUI document not reveal in any way, directly or indirectly, the controlled information. The log entry for an SUI document, therefore, must necessarily be carefully crafted and tailored to the specific document. The parties recognized that given the variety of SUI documents and bases for SUI categorization, it was impractical to prescribe a one-size-fit-all approach to log entries for SUI documents that could adequately safeguard SUI. What should be employed instead is a flexible, good faith standard that can be calibrated to a particular document and its specific SUI content. That is what the proposed Appendix F does.

As a practical matter, there also should not be a need for many SUI log entries. There will be relatively few SUI documents, and SUI protection for those documents will not be casually claimed. Every SUI document in DOE’s LSN collection will have been reviewed by qualified personnel who verified that the subject information meets the applicable criteria for the claimed SUI protection. All participants will have access to a redacted version of the document which will enable them to assess the context of the SUI claim, and many participants could even have access to the unredacted document (in which case they would not need a log entry to assess the SUI claim). As a consequence, the parties anticipated that there should be relatively few good-faith disputes regarding SUI categorization that will occasion the need for an SUI log entry and thus no need to prescribe overly particularized requirements for the SUI log.

It should also be noted that the intended function of the SUI log is not exactly the same as the logs in the Second CMO. Unlike the Second CMO, the SUI log was not intended to establish a *prima facie* case. Appendix F in the PTCMO was not intended to establish a *prima facie* case

because that implies that if a log entry is not deemed sufficient, the authority having jurisdiction over the dispute could order the public release of the information being withheld.

Such a “default” waiver of protection is inappropriate for security sensitive information of the kind addressed in the PTCMO. Federal agencies have made the determination that such information is sufficiently sensitive to limit its dissemination for national security reasons. Thus, the policy reasons for withholding this information from production on the LSN differ from the reasons information is withheld under traditional civil discovery privileges. Information is withheld under the attorney-client privilege, for example, to encourage the frank and candid discussion between attorney and client. The privilege is designed to ensure that our adversary system of justice operates fairly and effectively, but the disclosure of a document subject to that privilege affects only a limited number of people, generally the immediate parties to the proceeding.

Disclosure of SUI does not have such a limited impact. For “high 2” OIU information, the federal courts have recognized that agencies may properly withhold that kind of information because its disclosure could allow enemy combatants, foreign intelligence services, and others to harm the general public. The other categories of information subject to the PTCMO are protected for the same reasons—to prevent those who may have malicious intent towards the United States from gaining access to information that concerns nuclear technology or security systems. Thus, the “*prima facie*” approach outlined in the Second CMO for privilege logs does not transfer to the PTCMO. It would not be in the nation’s interest to force the DOE, Navy or NRC to disclose security-sensitive information simply because an entry in a log may be deemed facially inadequate, when the information should, in fact, be protected from public disclosure.

Rather than require a *prima facie* showing, the log described in Appendix F should instead provide sufficient information for participants to assess the claimed protection. That is completely consistent with the Federal Rules of Civil Procedure and the NRC’s Rules of Practice. Neither the NRC Rules of Practice nor the Federal Rules of Civil Procedure require any particular format when a party notifies another party in litigation that it is withholding information. Federal Rule of Civil Procedure 26(b)(5) simply states instead that “[w]hen a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a matter that, without revealing information itself privileged or protected, ***will enable other parties to assess the applicability of the privilege or protection.***” Fed.R.Civ.P. 26(b)(5) (emphasis added); *see also* Fed.R.Civ.P. 26(b)(5) 1993 advisory committee’s note (“the rule does not attempt to define for each case what information must be provided where a party asserts a claim of privilege or work product protection.”).

Likewise, 10 C.F.R. § 2.336(b)(5) (which does not apply in Subpart J proceedings) says that, “to the extent available,” the NRC Staff should provide 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) (emphasis added). Section 2.336(b)(5) does indicate that

the NRC Staff should provide a “list,” but it does not further spell out what “sufficient information” should be included in that list.

In other words, these rules do not state that a privilege log needs to establish a *prima facie* case for protection. Rather, the plain text of Rule 26(b)(5) and § 2.336(b)(5) make it clear that only enough information needs to be provided so other parties can *assess* the claim of privilege or protection. The format of the log that is contained in Appendix F is designed so participants to the HLW proceeding who have access to the redacted versions of the document can do just that..

This flexibility regarding log entries carries over to FOIA disputes as well. Federal courts have understood that a *Vaughn* index, or log, is not an end unto itself but a means to an end. The Second Circuit has held that courts should “eschew[] rigid adherence to any particular indexing format under the *Vaughn* standard, [and opt] instead for a functional approach.” *Halpern v. F.B.I.*, 181 F.3d 279, 291 (2d Cir. 1999) (citing *Keys v. United States Dep't of Justice*, 830 F.2d 337, 349 (D.C.Cir.1987)). In *Keys*, the D.C. Circuit stated that regarding the *Vaughn* index, “it is the function, not the form, of the index that is important.” *Keys*, 830 F.2d at 349; *see also Donovan v. F.B.I.*, 806 F.2d 55, 58-59 (2d Cir. 1986) (“[I]t must be emphasized that these requirements are not ends in themselves, but are merely methods or procedures that assist the trial court in its *de novo* review.”).

In sum, the PTCMO establishes a reasonable process for participants to gain access to SUI information. The SUI log is part of that process, and it should not be an end unto itself that would force DOE (or any other federal agency) to disclose information publicly that should be properly protected from such disclosure simply because it fails to follow a certain log format.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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May 16, 2007

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 Matter))	

DEPARTMENT OF ENERGY'S RESPONSE TO THE PRE-LICENSE
APPLICATION PRESIDING OFFICER BOARD'S APRIL 19, 2007 ORDER
CERTIFICATE OF SERVICE

I certify that copies of the foregoing DEPARTMENT OF ENERGY'S RESPONSE TO THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD'S APRIL 19, 2007 ORDER in the above captioned proceeding have been served on the following persons on May 16, 2007 by Electronic Information Exchange.

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