

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

Before Administrative Judges:

ASLBP BOARD 09-892-HLW-CAB04 Thomas S. Moore, Chairman Paul S. Ryerson Richard E. Wardwell
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In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	August 10, 2009

**STATE OF NEVADA'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS ASSERTED AS PRIVILEGED BY NRC STAFF**

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The State of Nevada ("Nevada") files this Motion to Compel requesting production by NRC Staff ("Staff") of all 29 documents listed by Staff in its privilege log filed on July 30, 2009, in this proceeding. This Motion is timely filed within ten days of Staff's filing of its privilege log. In accordance with the provisions of 10 C.F.R. 2.323(b), 10 C.F.R. 2.705, and paragraphs II.K. and III.F. of the PAPO Board's Revised Second Case Management Order (July 6, 2007), counsel for Nevada and Staff conferred in good faith with respect to the issues asserted in this Motion on Wednesday, August 5, 2009. Despite the good-faith effort on the part of both parties to resolve the issues, that effort was unsuccessful. In the course of that conference, no prior disclosure of the documents at issue was disclosed by the privilege claimant; there is a single, not multiple, claim of privilege at issue (i.e., the deliberative-process privilege); and neither the requester nor the privilege claimant asserted that the dispute raises a controlling issue of law.

I. BACKGROUND

PAPO's Revised Second Case Management Order, at pages 12, *et seq.*, set out the procedure for a party claiming a primary privilege (including deliberative-process privilege) to follow to do so, and the procedure to be followed by a recipient of a privilege log, should it disagree with the assertion of privilege and wish to challenge it by Motion to Compel. Significantly, the PAPO Board reiterates the legal principle at page 6 of its Revised Second CMO that "the privilege claimant shall have the ultimate burden of persuasion that a document or communication qualifies for a claimed privilege." The PAPO Board properly considered the necessity for parties required to place Documentary Material on the Licensing Support Network ("LSN") to be given the opportunity to withhold from full-text disclosure on the LSN those documents which that party believes to be subject to a primary privilege.

While the PAPO order permitted such documents to be withheld, it further required that each document so withheld be identified by a bibliographic "header" which was to be made publicly available on the LSN. Furthermore, the PAPO Board carefully set out, separately with respect to each of the various types of potential privilege claims, the information which would be required to be disclosed by a party in its privilege log in order to justify the particular claim of privilege being made. For example (and as applicable in this particular Motion), each header identifying a document withheld by a party on the basis of a claim of deliberative-process privilege was required to contain the information set out at Appendix C of the Revised Second CMO. The purpose of the detailed information required to be included in the documentary header was to provide (without disclosing the privileged information) the fullest possible explanation to the recipient as to the justification and rationale for the claim of privilege being made by the privilege claimant. The PAPO Board set out some 14 component pieces of information required to be supplied in the case of a document withheld on the basis of deliberative-process privilege, in order to apprise the recipient of the basis of the claim and thus reduce the number of potential disagreements or challenges.

Because the recipient is unable to see the document itself (since it has been withheld), it becomes critical that there is full disclosure of each of the required elements of the deliberative-process privilege required by the PAPO Board's Appendix C of the Revised Second CMO.

II. ARGUMENT AND AUTHORITIES

A. Categorization of Documents for Which Staff Asserts Application of Deliberative-Process Privilege

The documents for which Staff asserts deliberative-process privilege in its July 30 filing may be separated into two groups or categories. (Counsel for Staff and Nevada discussed the issues with respect to the privilege log in just this way during their conference, finding that the

same issues applied to all of the documents provided they were divided into two groups or categories.)

As a predicate to any challenge to a claim of deliberative-process privilege, the criteria for its application must be considered. The PAPO Board gave ample consideration to the requisites of each privilege and incorporated them into its mandate for the appropriate contents of privilege logs to be filed by the parties. The prerequisites for assertion of deliberative-process privilege, found at Appendix C of PAPO's Revised Second CMO, correctly require the claimant to identify the "specific decision" to which the document relates which is claimed privileged (requirement #9) and "a specific explanation why the document is deliberative" (requirement #10). These PAPO requirements simply recognize the applicable law. The court in *Assembly of the State of California v. U.S. Department of Commerce*, 968 F.2d 916, 920 (9th Cir. 1992) quoted the Supreme Court in holding that "a 'predecisional document' is one 'prepared in order to assist an agency decisionmaker in arriving at his decision,' [*Renegotiation Board v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184, 44 L. Ed. 2d 57, 95 S. Ct. 1491 (1975)]." Importantly, the court refused to apply the deliberative-process privilege if a document only "**may**" be used in some future decision, holding "[a]ny memorandum **always** will be 'predecisional' if referenced to a decision that **possibly** may be made at some undisclosed time in the future." *Id.* at 921 (emphasis added). Documents authored by Staff before DOE even filed a License Application are accordingly totally speculative with respect to any Staff decision regarding the LA which may become necessary at some unknown future date.

B. None of the Documents Contained in the First Category of Documents Enumerated by Staff in Its July 30 Privilege Log are Shown to Warrant Treatment as Deliberative-Process Privileged Documents, Because Staff's Assertion of Privilege is Untimely

The first category of documents may be characterized as those pertaining to Staff's decision (made September 5, 2008) with respect to its adoption determination as to DOE's Environmental Impact Statement ("EIS"). There are a total of 29 documents enumerated in Staff's July 30 privilege log. Of those 29, 12 fall into this Category 1. With respect to each of the 12 documents, the basis for Staff's claim of deliberative-process privilege is that the document was generated in the course of Staff's deliberations as to whether to adopt (in whole or in part) the DOE's EIS, a determination it is required by regulation to make. Indeed, the typical statement made by Staff in its "headers" for these 12 documents, in explaining the "specific decision" at issue with respect to which Staff was deliberating, reads: "This document relates to discussion regarding the decision to adopt DOE's EIS with supplementation on 09/05/08." Nevada is willing to concede, for the purpose of this Motion to Compel only, that the 12 documents enumerated by Staff which fall into this Category 1 possess the indicia of the deliberative-process privilege, had the assertion of such privilege been made in a timely fashion. The specific LSN accession numbers of these 12 documents are as follows: NRC000030318, NRC000030350, NRC000030324, NRC000030381, NRC000030275, NRC000030327, NRC000030299, NRC000030333, NRC000030304, NRC000030307, NRC000030366, and NRC000030373.

The decision which Staff describes in its LSN headers for the documents in Category 1 all tie these documents to the Staff's September 2008 adoption determination decision, and not surprisingly, each of the 12 documents in question was generated prior to the date of that decision. The problem lies in the obvious fact that Staff's (1) withholding of these documents for

a period approximating a year or more after their authorship; and (2) only then asserting a privilege, (3) identifying the documents and admitting their existence for the first time only now, but (4) withholding them from full text presentation in the LSN, have all been done in an extremely dilatory fashion. Indeed, in accordance with PAPO's Revised Second CMO (paragraph III.D.), the timeliness requirement with respect to Staff's assertion of privilege required that Staff "shall file privilege logs, identifying and covering each document claimed to be subject to a primary privilege, on the date prescribed by 10 C.F.R. §§ 2.1003 and 2.1009 for their initial certification."

While Staff's initial certification in this matter was filed in July 2004, Nevada is willing to acknowledge that documents created subsequent to NRC's initial LSN certification (such as the 12 documents related to its EIS adoption determination in September 2008) would be added to the LSN (or withheld from the LSN on the basis of a privilege claim) at a time after Staff's **initial** certification. However, Staff has (as has every party in this proceeding) filed monthly LSN supplementations in which the parties confirm that they have placed all newly identified or newly generated Documentary Materials on the LSN. In the period of time since its September 2008 adoption determination, and in the months before that decision (when the 12 withheld documents in Category 1 were being generated), Staff obviously has withheld these documents from LSN production for over a year without any claim of privilege or other justification to do so. Staff's claim of deliberative-process privilege regarding these documents is untimely by any measurement and any privilege which could have been asserted in a timely fashion has accordingly been waived. These 12 documents should be ordered disclosed.

C. **None of the Documents Contained in the Second Category of Documents Enumerated by Staff in Its July 30 Privilege Log are Shown to Warrant Treatment as Deliberative-Process Privileged Documents**

1. **Headers Do Not Comply with the Letter or Spirit of the Revised Second CMO**

Out of the 29 documents listed in Staff's July 30, 2009 privilege log, 17 fall into what the parties discussed as "Category 2" which pertains to all those documents which did **not** relate to Staff's adoption determination with respect to DOE's EIS. Instead, all 17 of the documents in Category 2 relate to analyses of various technical issues pertaining to a potential nuclear waste repository. The LSN accession numbers of the 17 documents which fall into this category are as follows: NRC000030280, NRC000030348, NRC000030354, NRC000030358, NRC000030322, NRC000030295, NRC000030374, NRC000030385, NRC000030284, NRC000030364, NRC000030300, NRC000030335, NRC000030371, NRC000030326, NRC000030375, NRC000030312, and NRC000030314.

Neither the information set out in Staff's July 30 filing, nor its headers on the LSN, comply with the letter or spirit of the requirements of the Revised Second CMO. They do not apprise the recipient of the log of the rationale or any justification for the assertion by Staff of any privilege with respect to these 17 documents. The most critical of the component pieces of information required by the PAPO Order to be supplied by a privilege claimant (with respect to deliberative-process privilege, Appendix C of the Revised Second CMO) are the components requiring the privilege claimant to (1) identify the **specific decision** with respect to which the allegedly privileged document constitutes deliberation, and (2) provide an explanation why the document is deliberative. A basic requirement prerequisite to asserting the deliberative-process privilege was articulated by the United States Court of Appeals for the D.C. Circuit in *Senate of Puerto Rico v. U.S. Department of Justice*, 823 F.2d 574 (D.C. Cir. 1987), when it focused on the

prerequisite that the withheld material be "predecisional." The Court drew the logical conclusion that such a document would precede, in temporal sequence, the "decision" to which it relates and added: "Accordingly, to approve exemption of a document as predecisional, a court must be able 'to pinpoint an agency decision or policy to which the document contributed.' *Paisley*, 712 F.2d at 698. We search in vain through the supporting material submitted by the DOJ for any identification of the specific final decisions to which the advice or recommendations contained in the withheld documents contributed; absent that, we are not positioned to pass upon the applicability *vel non* of this privilege." *Id.* at 585. The Court went on to conclude that the agency must establish what deliberative process is involved and the role played by the documents in issue in the course of that process.

Staff's entries in these explanation fields are entirely inadequate to respond to the most important PAPO inquiries (i.e., what is the **specific decision** and **why** is the document deliberative of that decision).

Out of the 17 instances in which Staff listed a Category 2 document on its privilege log, not once did it identify any specific decision in furtherance of which the document was allegedly deliberative. The following chart precisely replicates Staff's statements of those "specific decisions" with respect to each of the 17 Category 2 documents:

Staff Statements of Specific "Decision"		
Document No.	LSN Accession No.	Alleged Specific Decision
1	NRC000030280	This document relates to discussion on technical information regarding Models.
2	NRC000030348	This document relates to discussion on Pre-Closure Pre-licensing Issues Report.
3	NRC000030354	This document relates to discussion on TAD canisters.
4	NRC000030358	This document relates to discussion on Pre-Closure Pre-licensing Issues Report.
5	NRC000030322	This document relates to discussion on technical data for Models.

6	NRC000030295	This document relates to discussion on technical data for Models.
7	NRC000030374	This document relates to discussion on technical data for Models.
8	NRC000030385	This document relates to discussion on technical input for Models.
9	NRC000030284	This document relates to discussion on technical data regarding Models.
10	NRC000030364	This document relates to discussion on technical information regarding Models.
11	NRC000030300	This document relates to discussion on statistical information in Models.
12	NRC000030335	This document relates to discussion on technical data regarding Pena Blanca.
13	NRC000030371	This document relates to discussion on findings on technical data regarding Pena Blanca.
14	NRC000030326	This document relates to discussion on technical data presented in a slide.
15	NRC000030375	This document relates to discussion on DOE's information regarding Spent Fuel.
16	NRC000030312	This document relates to discussion on technical data regarding Waste Packages.
17	NRC000030314	This document relates to discussion on technical input to slides for an ACNW presentation.

Yucca Mountain has been referred to as "the most studied piece of real estate on earth" over the last 20 years. DOE, NRC Staff, and others have been involved in analyses over almost that entire duration, with respect to an enormous number of technical aspects of the proposed facility. However, the mere fact that an agency employee is **discussing** in a document some technical aspect of Yucca Mountain itself or the proposed repository constitutes no indication that a document containing such discussion is part of any deliberative process connected to a **specific decision**, and it is that which is prerequisite to the applicability of the deliberative-process privilege.

2. There is No Basis to Conclude Any of the Documents Enumerated in Category 2 are Deliberative-Process Privileged Documents

The goal of the deliberative-process privilege is to enable an agency which is internally debating the pros and cons of a **specific decision** to do so without publishing those competing positions. Were an agency required to do so, then it is predictable that every agency decision would be second guessed by those relying on the unsuccessful arguments of deliberators and suggesting that that unsuccessful position was the correct one and that the agency has ignored the recommendations of its trusted staff and done just the opposite. Nevada understands the justification in certain circumstances for documents to be withheld, to prevent a chilling effect on the ability of an agency to conduct internal deliberations in its making of **final decisions**. But with respect to the 17 documents enumerated in Category 2, Staff has not articulated any specific decision which was being made, and there was none. Staff may argue that it does have a decision to make – whether to approve DOE's License Application in whole or in part – a decision to be embodied in its Safety Evaluation Report ("SER"). Conceivably, this argument might someday justify a claim of deliberative-process privilege to certain documents created by Staff in the course of **that** decision, but only as to documents generated **after** the June 3, 2008 filing of the DOE License Application, in furtherance of Staff's safety evaluation and SER. However, **all** the documents enumerated in Category 2 of Staff's July 30 privilege log were created well before the time DOE filed its License Application, many of them at least three years before DOE did so, and as long as seven years before DOE did so. At the point in time at which these Category 2 documents were created there **was** neither a License Application nor any specific decision under consideration by Staff of which Nevada is aware. But more to the point here, Staff's purported deliberative-process privilege log fails to **identify** or claim deliberation of any such decision, which it is required to do as a prerequisite to withholding documents from full

text disclosure on the LSN. Staff's privilege claim is unjustified with respect to the 17 Category 2 documents, and those documents should be fully disclosed.

3. As in the Case of the Documents Contained in Category 1, the Disclosure of Headers and Claims of Privilege with Respect to Documents Claimed Privileged in Category 2 are Extremely Untimely

The documents in Category 2 range from documents generated slightly before DOE's License Application was filed to one document almost eight years old, but most of them are in the range of two to four years before the LA. Their inclusion on the LSN, or justification for withholding them from full-text disclosure on LSN due to some claim of privilege, was required to have been made long ago (see Revised Second CMO at III.D., requiring privilege claims to be made at the time of LSN certification).

While the parties are certainly encouraged to re-review all their documents on an ongoing basis, and add to the LSN those whose character has changed (i.e., from **not** being LSN worthy to being LSN worthy) due to new circumstances, that argument cannot credibly be made with respect to the documents currently sought to be withheld by Staff, considering their obviously LSN-relevant subject matter.

As to the 12 Category 1 documents which were deliberative of the EIS adoption determination, they were such from the moment they were generated over a year ago. They did not, a year after the adoption determination, suddenly **become** deliberative of that decision.

As to the 17 Category 2 documents, unrelated to any specific decision, the LSN relevancy of the documents is clear, even from the limited information provided by Staff in its headers. Thus, documents discussing the Preclosure Safety Analysis, TSPA models, TAD canisters, spent fuel, and waste packages, for example (LSN#s NRC000030348, NRC000030280, NRC000030354, NRC000030375, and NRC000030312) were obviously LSN relevant from the

moment of their authorship. Any suggestion that a determination of relevance had to await the DOE LA or the contentions of the Petitioners is untenable, since 10 C.F.R. § 2.1003 required **all** parties to make available all their Documentary Material on the LSN upon a schedule which **predated** the License Application and contentions by months or years. Indeed, Staff's initial LSN certification was made over five years ago (comprising about 25,000 documents), and so, Staff cannot be heard to say it is just now learning what subjects are LSN relevant.

If Staff makes that argument (i.e., that the documents in this untimely filed privilege log have just newly become LSN worthy due to a change in characterization), that argument should not be permitted to be made in a vacuum or in a hypothetical fashion. Rather, with respect to the specific 29 documents now listed in Staff's privilege log, Staff should be required (if it makes the "new characterization" argument) to explain the reason **why** each document was previously **not** LSN relevant, but has suddenly become so now.

III. CONCLUSION

The 12 documents in Category 1, even assuming they were at one time subject to a claim of deliberative-process privilege, were not timely identified nor was the privilege with respect to them timely asserted in accordance with the requirements of the Revised Second CMO. The 17 documents in Category 2 were not deliberative with respect to any specific decision; were not justified as privileged in accordance with the requirements of the Revised Second CMO; and were identified and the claim of privilege made with respect to them in a manner which is extremely untimely. Both categories of documents should be ordered produced on the ground that they are not privileged, or that (in the case of the adoption determination documents) any privilege they may have had has long since been waived.

Staff's response to this Motion should be limited to that information which it provided in its privilege log and headers and not new and extraneous assertions which were not made available to the privilege log recipients in the first place; Staff's log should stand or fall on its own merits, particularly because no reply is permitted to Staff's response.

WHEREFORE, PREMISES CONSIDERED, Nevada respectfully prays that, upon hearing, the Board grant its Motion to Compel and require production to Nevada of the documents identified in Staff's July 30, 2009 privilege log.

Respectfully submitted,

(signed electronically)

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Dated: August 10, 2009

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Atomic Safety and Licensing Board

In the Matter of)	
)	
U.S. DEPARTMENT OF ENERGY)	Docket No. 63-001-HLW
)	
(High Level Waste Repository))	July 31, 2009

CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Motion to Compel Production of Documents Asserted as Privileged by NRC Staff has been served upon the following persons by the Electronic Information Exchange:

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