

**DRAFT CASE MANAGEMENT ORDER:  
PREPARATION OF PRIVILEGE LOGS AND CHALLENGES  
TO PRIVILEGE DESIGNATIONS WITH RESPECT TO NRC'S  
PROSPECTIVE YUCCA MOUNTAIN LICENSING PROCEEDING**

*In a January 25, 2005 Case Management Order in the pre-license application proceeding for the U.S. Department of Energy's anticipated application to construct a spent nuclear fuel and high-level radioactive waste repository at Yucca Mountain, Nevada, the NRC pre-license application presiding officer board ordered DOE, the State of Nevada and the NRC Staff to confer regarding procedures for privilege logs and challenges to privilege claims in that proceeding. Counsel for DOE, the State and the NRC Staff have conferred and have prepared the accompanying draft order (below) regarding privilege logs and procedures for privilege challenges. While this order is a draft and still under review by DOE, the State and the NRC Staff, a copy of the draft order is being provided for comment.*

*Persons who wish to provide comments on this draft order for DOE's, the State's and the NRC Staff's consideration should submit them via email to DOE's outside counsel, Michael Shebelskie, at the following address: [mshebelskie@hunton.com](mailto:mshebelskie@hunton.com) . Potential participants may advise through the same means whether they wish to join in DOE's, the State's and the NRC Staff's proposal.*

*DOE, the State and the NRC Staff must submit their joint proposal to the pre-license application presiding officer board on March 28, 2005. To ensure consideration of submitted comments, persons should provide their comments by March 25, 2005.*

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<b>DRAFT 16-Mar-05</b>
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SECOND CASE MANAGEMENT ORDER

(Regarding Preparation of Privilege Logs and Challenges to Privilege Designations)

This Order specifies requirements for (i) the preparation of privilege logs during the pre-license application phase of the expected application by the United States Department of Energy (DOE) for a license to construct a repository for spent nuclear fuel and high-level radioactive waste at Yucca Mountain, Nevada, and (ii) challenges to a participant's privilege claims.

I. BACKGROUND

On January 25, 2005, this Board entered its First Case Management Order. That Order directed DOE, the State of Nevada (State) and the NRC Staff, together with other potential participants who wished to respond, to meet regarding a joint format for privilege logs and associated procedures for resolving privilege disputes. According to

joint reports of DOE, the State and the NRC Staff, their counsel, together with other interested persons, met on February 10 and 22, 2005, pursuant to advance notice that had been published on the EIE docket and the NRC's High Level Waste website. Following those meetings, DOE, the State and the NRC Staff submitted to this Board on March 28, 2005, a joint report and proposed case management order. [IDENTIFY ANY SEPARATE SUBMITTALS TO THE BOARD]. Upon consideration of those submittals, this Board enters this Second Case Management Order.

## II. GENERAL REQUIREMENTS

A. The requirements of this Order shall apply equally to all present and future parties, potential parties, and interested governmental participants who make LSN certifications pursuant to 10 C.F.R. § 2.1003 (collectively, participants).

B. Bibliographic headers on the Licensing Support Network (LSN) shall serve as the privilege log for documents claimed to be privileged. The bibliographic header for a document claimed to be privileged shall include, in addition to any other required information, the following: (i) each privilege claimed for the document; (ii) all authors and all recipients (including all copyholders) shown in the document; (iii) the date of the document, where available; and (iv) subject matter description, containing sufficient information to enable the participant to evaluate the privilege claimed, which information could appear in the title or comment field. Each privilege claimed for a document shall be identified in the access control field of the document's bibliographic header and shall be identified using the terminology for the privilege as noted in Section III below. If a participant believes that the information provided in a document's bibliographic header is not sufficient for that participant to assess a privilege claim, that

participant may raise that issue through the dispute resolution process set forth in Section III below.

C. Each participant shall make a good faith effort to identify all applicable privileges for each document claimed to be privileged, and to include in the bibliographic header for such document the requisite information regarding each privilege claim, when it produces a bibliographic header for the document on the LSN. A participant shall not be precluded from subsequently claiming additional privileges for a document or supplementing the information in the document's bibliographic header.

D. The production of a privileged document, even if intentional, shall not cause a subject-matter waiver with respect to other privileged documents. A participant shall not be able to compel another participant to produce a privileged document on the ground that its production will not effect a subject-matter waiver with respect to other privileged documents. A participant who inadvertently produces a privileged document shall be able, upon a showing of good faith inadvertence, to re-claim the document from the other participants.

E. A request for documents pursuant to 10 C.F.R. § 2.1018(a)(1)(iii) may be for a category of documents. A participant who elects to produce a redacted copy of a document on the LSN in response to a request made pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), as discussed in Section III below, shall be allowed a reasonable time to produce such document in light of the number of outstanding requests.

F. If a participant who receives an unredacted copy of a privileged document pursuant to a protective order wants to use a redacted version of the document in the proceeding, that participant will submit for approval the proposed redactions to the

participant who provided the document. The proposed redactions shall be submitted sufficiently in advance to allow the producing participant time to review and consider the redactions. Disputes over proposed redactions, as well as whether a document should remain covered by a protective order, shall be subject to the dispute resolution process in section III.B below.

G. If a participant produces a bibliographic header for a document that it subsequently determines does not qualify as documentary material and therefore is not LSN-relevant, that participant may identify the document as non-documentary material in the header and need not provide the additional information required by this Order. Nor is that participant required to produce copies in either redacted or unredacted form. A participant may challenge any claim that such a document is not documentary material.

H. If a participant possesses an electronic document that it cannot review despite reasonable efforts (*e.g.*, emails with viruses, corrupt electronic media) that may constitute documentary material, the participant shall disclose its existence as part of its initial LSN certification. Another participant may request access to the electronic medium containing the document to try to access the document, the participant possessing the document will produce to the requesting participant the medium containing the document, subject to an appropriate protective order to safeguard whatever privileged information might be included in the document (and any other appropriate disclaimers it may desire based on the corruption of the electronic medium). Such a protective order shall include a provision that the retrieving participant may use a recovered document only after (i) the producing participant has been allowed to review

the document for privilege and (ii) any privilege claim regarding the document has been resolved.

I. If a participant identifies graphic-oriented or other non-imageable material (including databases) that contain privileged information and another participant requests access to that material, the participant in possession and the requesting participant shall enter into an appropriate protective order to safeguard the privileged information contained in the material.

J. Notwithstanding anything in this Order to the contrary, if DOE claims privilege in this proceeding for a document already identified on DOE's privilege log in the spent fuel litigation, [ADD DOCKET REFERENCE], DOE may provide the other participants the relevant entries from that privilege log for that document in lieu of providing in the document's bibliographic header the information otherwise required by this Order. The access control field will state that the document is on the spent fuel litigation privilege log.

K. Nothing in this Order prejudices the extent or validity of any privilege or its application to any document.

### III. REQUIREMENTS FOR SPECIFIC PRIVILEGES

The requirements in this section apply to specific privileges, as indicated. The omission of a privilege in this section does not prohibit a participant from claiming a privilege not here identified if such privilege is available pursuant to applicable law. A document may be subject to multiple privilege claims. If one privilege claim would require production under a protective order or in redacted form, but another applicable privilege would protect the entire document from disclosure, the document does not need to be produced under a protective order or in redacted form.

A. Classified information.

1. Classified information is excluded from the LSN.
2. This Order does not address the requirements for access to classified information.

B. Sensitive unclassified information.

1. The bibliographic header of a document containing sensitive unclassified information shall identify that fact in the access control field and further specify whether the information qualifies as safeguards information, official use only information, or other sensitive information (*e.g.*, UCNI; information qualifying under 10 C.F.R. § 2.390(d)), using the terms Security-SGI, Security OUO, or Security-Other as applicable. These terms are intended for the purpose of identifying privileged documents in bibliographic headers on the LSN only. Documents so identified may be marked for non-LSN purposes using other terms.

2. The Board will issue a further Order directing how representatives of eligible participants may obtain access to documents containing sensitive unclassified information.

C. Copyrighted material.

1. The bibliographic header of a document that is subject to copyright protection shall identify in the access control field that the document is copyrighted, using the term Copyright.

2. A participant producing a bibliographic header for a copyright-protected document shall provide a copy of the document to a participant upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii).

D. Archeological privilege.

1. The bibliographic header of a document containing information protected by the National Historic Preservation Act (16 U.S.C. § 470) or the Archeological Resources Protection Act (16 U.S.C. § 470aa) shall identify in the access control field that the document is subject to the archeological privilege, using the term Archeologically Sensitive.

2. A participant claiming that a document contains information protected by the archeological privilege shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

E. Privacy information.

1. The bibliographic header of a document containing privacy information protected under exemption 6 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(6), shall identify in the access control field that the document contains privacy protected information, using the term Privacy.

2. A participant claiming that a document contains protected privacy information shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

3. These provisions do not pertain to documents from an employee concerns program file, which are addressed in the following section.

F. Employee Concerns Program files.

1. Based upon the representations of DOE, the State and the NRC Staff that they are still conferring about the treatment of employees concerns program files, this Order does not address the treatment of such documents. The Board will issue a separate Order addressing the treatment of those documents.

G. Business-proprietary/confidential.

1. The bibliographic header of a document containing protected business-proprietary or confidential financial or commercial information shall identify in the access control field that the document contains such information, using the term Proprietary.

2. A participant claiming that a document contains protected business-proprietary or confidential financial or commercial information shall, upon request pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), either (i) produce an unredacted copy of the document to the requesting participant pursuant to a protective order or (ii) produce a redacted copy of the document on the LSN.

H. Deliberative process.

1. The bibliographic header of a document that is protected by the deliberative process privilege will identify in the access control field that the document is both predecisional and deliberative, using the term Deliberative Process.

2. Based upon the representation of DOE, the State and the NRC Staff that they are still conferring about the treatment of documents subject to a deliberative process claim, including production of redacted versions of such documents, this Order does not address the treatment of such documents. The Board will enter a separate Order concerning these issues.

I. Attorney-client/litigation work product.

1. The bibliographic header of a document that is protected by either the attorney-client communication privilege and/or the litigation work product privilege shall identify in the access control field which, or both, of the privileges apply. The access control field shall use the terms Attorney-Client Privilege and Litigation Work Product, as applicable.

2. The bibliographic header for such a document will additionally classify the document into one or more of the following subcategories:

a. Confidential communication from counsel to client for purpose of providing legal advice;

b. Confidential communication from client to counsel for purpose of seeking legal advice;

c. Confidential client discussion regarding legal advice;

d. Confidential litigation work product prepared by counsel;

and

e. Confidential litigation work product prepared under counsel's direction.

3. A participant will either (i) indicate in the bibliographic header of a document subject to the attorney-client communication privilege which authors and/or recipients of the document are attorneys or (ii) file with this Board as part of its initial LSN certification the names of the attorneys for which the attorney-client privilege is

claimed in its privileged documents. A party shall not be precluded from later identifying additional counsel.

4. A participant need not include documents or bibliographic headers for documents, including emails, exchanged solely among its counsel. For purposes of this section, this includes with respect to DOE the attorneys in DOE's Office of the General Counsel, DOE's Offices of Chief Counsel, the United States Department of Justice, and the law firms of Hunton & Williams LLC; Winston & Strawn; and Morgan Lewis & Bockius; for the State, this means the attorneys in the Office of the State Attorney General and the law firms of Egan, Fitzpatrick, Malsch & Cynkar, PLLC; Cooper & Kirk, PLLC; and Rossmann & Moore, LLP; and William Briggs; Paul Lamboley and Howard Shapar; and for the NRC Staff, this means the attorneys in NRC's Office of the General Counsel. Other participants relying on this provision must file with this Board at the time of their initial LSN certification the identities of their counsel for purposes of this provision. With the exception of the designations provided above for DOE, the State and the NRC Staff, a participant may challenge another participant's designation of counsel for purposes of this provision. The identification of a participant's counsel, whether in this provision or at the time of a participant's certification, shall not limit that participant's right to claim privilege for communications with other persons, including other attorneys as well as that participant's contractors and consultants.

#### IV. PROCEDURES FOR PRIVILEGE CHALLENGES

##### A. Time for challenges.

1. The 10-day period in 10 C.F.R. § 2.323(a) as applied to a participant's motion to compel production of another participant's document claimed to

be privileged does not commence until the dispute resolution process described in section B below has been completed with respect to the document.

2. This Order is without prejudice to a participant's right to move for good cause for a reasonable cutoff date on privilege challenges. A participant must initiate the dispute resolution process with respect to another participant's document claimed to be privileged within a reasonable time in the interest of completing discovery in a timely manner. Failure to do so may be advanced by another participant to oppose any extension in any schedule or other deadline.

B. Dispute resolution process.

Participants shall exhaust the following process before filing with this Board a motion to compel the production of a document subject to a privilege claim or to challenge redactions made to a document. Participants shall engage in this dispute resolution process in a good faith effort to reduce to the greatest extent practicable privilege disputes submitted to this Board.

1. A participant seeking to challenge a document's privileged status first must confer with the participant possessing the document to identify and discuss the basis for the potential challenge. The conference does not need to be in person.

2. The producing participant shall be allowed a reasonable opportunity to respond to the query, presumptively five business days.

3. If the document implicates the privacy or other privilege interests of a non-participant (*e.g.*, an inter-agency communication; proprietary information of an agency's contractors or subcontractors, document claimed as privileged by a non-participant in another lawsuit), the participant in possession of the document may notify

that non-participant who will be allowed to participate in the dispute resolution process, including any matter regarding the document before the settlement judge discussed below.

4. If the dispute is not resolved by conference, the challenging participant must next submit the dispute to a settlement judge to be appointed by this Board pursuant to 10 C.F.R. § 2.338. The purpose of proceeding before the settlement judge is to provide the participants the benefit of an objective assessment of the privilege claim and the challenge. A participant shall not make an unreasonable number of requests for review and shall submit a document to the settlement judge for review only if that participant has a good faith belief that the document may not be privileged. The process before the settlement judge will be subject to the following:

a. The process will be informal, and 10 C.F.R. §§ 2.338(e) and (g-i) shall not apply. No briefs or hearing shall be permitted, although the settlement judge shall afford the participant claiming the privilege (and any interested non-participant described in section 3 above) an opportunity to explain the basis for the claimed privilege.

b. The process shall be expedited.

c. The challenging participant shall initiate review of a document by advising the settlement judge of the LSN accession number of the document and the basis for the challenge. The method of notification will not be through the EIE but shall be by email or other method preferred by the settlement judge. The challenging participant will copy the other participants on any such communication.

d. During the course of the settlement judge's consideration of a dispute over a document, a participant may initiate contact with the settlement judge by phone or in writing (which includes email), but only if the challenging participant and the participant possessing the document are allowed to participate in the phone call or are copied on the written communication.

e. The settlement judge may initiate contact with a participant to ask questions about the privilege claim or challenge. Such communications will not be held to violate any prohibition on ex parte communications or separation of function requirements.

f. The settlement judge may conduct an in camera review of the document in question if appropriate to reach an opinion on the privilege challenge. Such review and sharing of information with the settlement judge will not cause a waiver of any privilege.

g. The settlement judge will advise the participants in writing (which may be by email) whether or not he agrees with the assertion of the privilege. The notice does not need to detail the reasoning behind the settlement judge's opinion, but any of the participants may ask the settlement judge to explain his reasoning, subject to the provisions of subparagraph d above.

h. The settlement judge's opinion and reasoning will be non-binding. No participant may cite the settlement judge's opinion or reasoning to this Board.

i. The settlement judge shall not communicate with this Board or the Commission about any privilege challenge or document that is the subject of such a challenge.

5. If the settlement judge's opinion does not resolve the dispute, a participant may file a motion to compel pursuant to 10 C.F.R. § 2.1010.