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Issue Date: 06 December 2004

CASE NO. 2004-SWD -00003

In the Matter of:

Steve and Virginia Wallace,
Complainants,

vs.

CH2M Hill Group, Inc.,
Respondent.

Order on Respondent's Application for Protective Order

The protective order proposed by Respondent generally has been adopted in a separate order. Discovery exchanged by the parties may cover broad topics, so much of what is disclosed will never find its way into evidence. The protective order balances the purposefully broad exchange of material in pretrial discovery with the privacy expectations of the Respondent and of third parties. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). The order requires that if a discovery dispute develops, the party seeking to protect materials as confidential has the burden to seek an adjudication of the matter. The order entered today gives no presumption of protection, it preserves the *status quo* until the matter is resolved.

I remain doubtful that pleadings, motions, and materials filed in the record as evidence, whether at trial or in connection with dispositive motions (such as motion for summary adjudication), may be shielded from public disclosure, any more than the trial itself could be closed. Those materials form the basis for governmental action, the Secretary's final order. I decline to make an *a priori* ruling that pleadings may be sealed. In the context of a specific motion or other filing, the parties can negotiate the issue, and if they are unsuccessful, the proponent of protection may ask to seal pleadings, motions or evidence. The matter should be raised in the same manner that an application to seal evidence would be presented to a U. S. District Court. I will look to those precedents; whatever would happen in an Article III trial court likely will happen here as well.

It goes without saying that I may establish procedures at trial to deal with confidentiality issues, so that provision has been deleted as unnecessary.

A provision has been added dealing with privilege claims, to make clear that they are governed by different substantive standards and procedures than confidentiality claims. When materials are withheld from disclosure, however, the opponent is handicapped in making

arguments about the status of unseen materials. Should a party withhold materials, it also should follow the procedure applicable to privilege claims, and prepare the equivalent of a privilege log describing the materials withheld.

Whether materials exchanged here can be used in other cases should only be determined in those proceedings, using discovery procedures available there. I have no reason to engage in a prospective First Amendment analysis on the use elsewhere of materials produced here, with one narrow exception. The protective order does not change reality. If in a future proceeding Respondent were to deny that something exchanged here even exists, I would not interpret the protective order to forbid Complainants or their lawyers from showing that what they seek actually had been produced here. I will go no further into the question of future use.

A

William Dorsey
Administrative Law Judge