Environmental Management Consolidated Business Center (EMCBC)

Subject: Electronic Discovery

POLICY, PROCEDURE AND PLAN

APPROVED: **(Signature on File)**
EMCBC Director
ISSUED BY: Office of Legal Services

1.0 PURPOSE

The purpose of this procedure is to establish a process for the preservation, disclosure, discovery, and production of Electronically Stored Information (ESI) in accordance with the Federal Rules of Civil Procedure (FRCP).

2.0 SCOPE

The scope of this procedure is limited to ESI, however, parts of the procedure may be applied to the discovery of paper documents.

3.0 APPLICABILITY

This procedure applies to all EMCBC organizations and may be adopted by Service Level Agreement (SLA) sites, at their discretion.

4.0 REQUIREMENTS and REFERENCES

4.1 Requirements

4.1.1 FRCP Rule 16, “Pretrial Conferences; Scheduling; Management”

4.1.2 FRCP Rule 26, “General Provisions Governing Discovery; Duty to Disclose”

4.1.3 FRCP Rule 33, “Interrogatories”

4.1.4 FRCP Rule 34, “Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes”

4.1.5 FRCP Rule 37, “Failure to Make Disclosures or Cooperate in Discovery; Sanctions”

4.1.6 FRCP Rule 45, “Subpoena”

4.1.7 FRCP Form 35, “Report of Parties’ Planning Meeting”

4.2 References

4.2.1 The Sedona Principles: Best Practices, Recommendations, & Principles for Addressing Electronic Document Production, July 2005 Version and June 2007 Version

4.2.2 The Sedona Guidelines & Commentary for Managing Information & Records in the Electronic Age, September 2005

4.2.3 The Sedona Conference Commentary on Legal Holds, The Trigger and the Process, August 2007 Public Comment Version

4.2.4 The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery, August 2007 Public Comment Version

4.2.5 EMCBC Identifying, Filing and Maintaining Records, IP-243-04, Rev. 1, dated 3/12/07

5.0 DEFINITIONS

5.1 Active Data - Information residing on the direct access storage media of computer systems, which is readily visible to the operating system and /or application software with which it was created and immediately accessible to users without restoration or reconstruction.

5.2 Active Records - Records related to current, ongoing or in-process activities and are referred to on a regular basis to respond to day-to-day operational requirements.

5.3 Archival Data - Information that is not directly accessible to the user of a computer system, but that an organization maintains for disaster recovery.

5.4 Backup Data - Information that is not presently in use by an organization and is routinely stored separately upon portable media. Serves as a source for recovery in the event of a system problem or disaster.

5.5 Backup Tape Recycling - The process whereby an organization's backup tapes are overwritten with new data, usually on a fixed schedule.

5.6 Disposition - Those actions taken regarding records no longer needed for the conduct of the regular current business of the creator. These actions include transfer to storage facilities or records centers, transfer of physical and/or legal custody to the National Archives & Records Administration (NARA).

5.7 Document – A term for records, non-record materials, and personal papers that refers to all media on which information is recorded, regardless of the nature of the medium or the method of recording.

5.8 Electronically Stored Information (ESI) - Information recorded in a form that requires a computer to process it such as e-mail, instant messaging, PowerPoint, Excel spreadsheets, word processing files, among others.

5.9 Electronic Discovery – The process of collecting, preparing, reviewing, and producing ESI in a variety of litigation actions and proceedings.

5.10 Embedded Data - Draft language, editorial comments, and other deleted matter retained by computer programs.

5.11 File Format - The internal structure of a file, which defines the way it is used and stored.

5.12 Form of Production – The manner in which the requested information is produced. Used to refer to both file format and the media on which the information is produced.

5.13 Inactive Record - Records related to closed, completed, or concluded activities which are no longer routinely referenced, but must be retained in accordance with records retention schedules.

5.14 Information - Term used to mean both documents and data.

5.15 Legal Hold - Communication issued as a result of current or anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of ESI.

5.16 Litigation Response Team (LRT) - A team of employees established in anticipation of, or in response to, litigation in order to properly respond to an electronic discovery request.

5.17 Metadata - Information about a particular data set which describes how, when, and by whom it was collected, created, accessed or modified and how it is formatted.

5.18 Record - All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an Agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by the Agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the information value of the data in them.

5.19 Record Custodian - Person appointed by his/her Assistant Director to maintain organizational unit records and to ensure that information is managed in accordance with Records Management procedures. They are responsible to administratively control the records of all assigned record holders within the organizational unit.

5.20 Records Retention Schedule - A plan for the management of records, listing types of records and how long they should be kept in accordance with National Archives and Records Administration (NARA) guidelines; the purpose of which is to provide a continuing authority for disposition of records.

5.21 Requesting Party – Term used to refer to a party to litigation who has filed an electronic discovery request.

5.22 Responding Party – Term used to refer to a party to litigation who is responding to an electronic discovery request.

5.23 Sampling- Term used to describe the process of testing a database for the existence or frequency of relevant information, assessing whether the source contains privileged or protected information, and assessing the costs and burdens of identifying and producing the requested ESI.

5.24 Spoliation - The destruction of ESI which may be relevant to ongoing or anticipated litigation, government investigation or audit.

6.0 RESPONSIBILITIES

6.1 Director

6.1.1 Fully endorse compliance with this procedure and the actions of the LRT.

6.2 Assistant Directors

6.2.1 Allocate organizational responsibility for preservation and collection of ESI as necessary.

6.2.2 Provide support to LRT as appropriate.

6.3 Assistant Director, Office of Legal Services (OLS)

6.3.1 Provide Notice of Legal Hold and subsequent reminders.

6.3.2 Provide Notice of Termination of Legal Hold.

6.4 Office of Legal Services

6.4.1 Evaluate the need to institute a Legal Hold.

6.4.2 Evaluate the need to establish a LRT and serve as team lead as appropriate.

6.4.3 Determine appropriate scope of Legal Hold and Notice distribution.

6.4.4 Ensure effective communication of Legal Hold and subsequent reminders.

6.4.5 Educate employees on how to comply with Legal Hold.

6.4.6 Monitor effectiveness of Legal Hold.

6.4.7 Determine when Legal Hold can be terminated.

6.4.8 Maintain documentation of the Legal Hold and discovery process.

6.4.9 Engage in disclosure as required.

6.4.10 Maintain a copy of the ESI produced.

6.5 Office of Information and Resource Management (OIRM)

6.5.1 Assist OLS in the preservation, disclosure, and discovery of ESI as appropriate.

6.5.2 Determine whether the ESI requested for production is reasonably accessible or whether the request presents an undue burden or cost.

6.5.3 Coordinate the search and collection of responsive ESI and forward to OLS for evaluation.

6.5.4 Produce ESI as directed by OLS.

6.5.5 Participate on LRT as necessary.

6.6 Office of Logistics Management (OLM)

6.6.1 Assist OLS in the preservation, disclosure, discovery, and production of ESI as appropriate.

6.6.2 Participate on LRT as necessary.

6.7 EMCBC Personnel

6.7.1 Preserve ESI as directed by Notice of Legal Hold.

6.7.2 Search for and collect ESI as appropriate.

7.0 GENERAL INFORMATION

7.1 The Federal Rules of Civil Procedure were amended on December 1, 2006, to address the disclosure and discovery of ESI. This procedure is designed to facilitate compliance with the electronic discovery amendments.

7.2 Parties to litigation have a duty to plan for appropriate discovery of ESI at the commencement of any litigation in which ESI will be sought.

7.3 Parties may request production, inspection, copying, testing, or sampling of ESI which is in the possession, custody, or control of the party upon whom the request is served.

7.4 The primary source of ESI for preservation and production should be active data purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Backup data and inactive files are generally considered less accessible.

7.5 Potentially relevant ESI may be found in local and network computers, laptop computers, handheld storage devices (such as Personal Digital Assistants and flash memory drives), archive and backup tapes, cellular phones, voice mail systems, and closed-circuit television monitoring systems, among others.

7.6 Absent exceptional circumstances, a court should not impose sanctions on a party for failing to produce ESI lost as a result of routine, good-faith operation of an electronic information system. Sanctions, including spoliation findings, should be considered by the court only if it finds that there was a clear duty to preserve, a culpable failure to preserve and produce relevant ESI, and a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

8.0 PROCEDURE

8.1 Preservation

8.1.1 Legal Hold

8.1.1.1 The Office of Legal Services (OLS) shall determine whether there is a need to institute a Legal Hold.

8.1.1.2 The determination is usually based on the reasonable anticipation of litigation, but may also be based on the nature of the incident, other litigation, or government audits or investigations.

8.1.1.3 The reasonable anticipation of litigation arises when the EMCBC is on notice of a credible threat that it will become involved in

litigation or when it anticipates taking action to initiate litigation.

8.1.1.4 Once a determination is made that a Legal Hold is required, a LRT should be formed to ensure a successful launch to the preservation campaign. The LRT should remain active through disclosure, discovery, and production.

8.1.1.5 The LRT should consist of members of OLS, OIRM, and OLM, most knowledgeable in the area(s) of concern, as well as others appropriate to matters of the anticipated litigation, including contractor employees.

8.1.1.6 The obligation to preserve relevant ESI is generally understood to require an employee to make reasonable efforts to identify and manage the relevant information available to him or her while continuing the routine destruction of non-relevant records in accordance with records retention schedules.

8.1.2 Notice of Legal Hold

8.1.2.1 The OLS shall determine the distribution requirements for the Notice.

8.1.2.2 Notice shall come from the Assistant Director, OLS, or other Assistant Director, as appropriate.

8.1.2.3 Notice shall be provided to the Program Records Officer within Department of Energy (DOE) Environmental Management (EM), Legacy Management (LM) organizations, and the Office of Chief Counsel (GC), as well as the Contractor organization, as appropriate.

8.1.2.4 Notice shall be provided to key employees who may have relevant information, as well as parties responsible for maintaining and operating computer systems and files. Notice shall be provided to third parties, as appropriate.

8.1.2.5 Notice must advise key employees of pending litigation or similar activity and inform them of their potential liability for non-compliance with the Legal Hold.

8.1.2.6 Notice should be communicated through the means most likely to reach the intended audience, but should include electronic and paper distribution.

8.1.2.7 Notice shall be repeated on a quarterly basis as a reminder to adhere to the Legal Hold.

8.1.3 Scope of Legal Hold

8.1.3.1 The OLS shall determine the scope of the Legal Hold.

8.1.3.2 Legal Hold should be limited in scope to only that information that may be relevant to the litigation or similar activity. However, it is preferable to err on the side of inclusiveness rather than expand the scope at a later date.

8.1.3.3 The decision as to what information is required to be preserved should be made as soon as practicable, and refined over time.

8.1.3.4 Legal Hold shall provide a sufficient description of the subject matter of the information to be preserved to allow the affected record originator, or record custodian, to segregate and preserve identified information.

8.1.3.5 Legal Hold shall identify locations of electronic records likely to contain relative information.

8.1.3.6 Legal Hold shall address government-owned ESI in the possession of the contractor, as appropriate.

8.1.3.7 Legal Hold shall address shared areas, such as public folders, that may contain relevant information not belonging to any specific employee.

8.1.3.8 Legal Hold shall address the suspension of recycling of backup tapes or automatic deletion programs that may be in place, as necessary.

8.1.3.9 Legal Hold shall address the preservation of archival data that are reasonably likely to contain relevant information, as necessary.

8.1.3.10 Legal Hold shall address the preservation of records that are ready for disposition and have or will fulfill the established retention period during the period of Legal Hold.

8.1.4 Documentation of Legal Hold

8.1.4.1 The OLS shall maintain documentation of the Legal Hold.

8.1.4.2 Copies of all Notices and corresponding distribution lists shall be maintained.

8.1.4.3 A record of the actions taken to meet the preservation obligations, including monitoring the effectiveness of the Legal Hold, shall be preserved.

8.1.4.4 OLS should require employees to certify receipt of, and compliance with, the Legal Hold and subsequent reminders. A Certificate of Completion Form is provided as Attachment A.

8.1.5. Termination of Legal Hold

8.1.5.1 The OLS shall determine when the Legal Hold can be terminated.

8.1.5.2 Legal Hold should be terminated when the circumstances giving rise to the preservation obligation no longer exist.

8.1.5.3 Factors to consider in terminating the Legal Hold include the possibility of the resolved litigation giving rise to the reasonable anticipation of other similar litigation or whether the preserved information may be needed for another purpose.

8.1.5.4 Notice of termination shall come from the Assistant Director, OLS, or other Assistant Director, as appropriate.

8.2 <u>Disclosure</u>

8.2.1 The OLS shall engage in disclosure with the other parties to the litigation.

8.2.2 OLS shall disclose the ESI that may be used to support its claims or defenses.

8.2.3 OLS shall discuss discovery of ESI during the discovery-planning conference, if such discovery is contemplated in the action.

8.2.4 OLS shall discuss any issues related to the ownership or possession of the ESI sought.

8.2.5 OLS shall discuss what sources of ESI need to be preserved and what information may continue to be recycled or deleted (i.e. backup data, archival data).

8.2.6 OLS shall discuss the scope of the ESI sought (i.e. e-mails from current employees versus former employees, draft word processing files versus final documents) including the accessibility of the information.

8.2.7 OLS shall discuss issues related to production of information from sources not reasonably accessible, as appropriate.

8.2.7.1 OLS should discuss the burdens and costs of accessing and retrieving the information.

8.2.7.2 OLS should discuss the needs that may establish good cause for requiring production.

8.2.7.3 OLS should discuss conditions on obtaining and producing this information such as scope, time, and allocation of cost.

8.2.8 OLS shall discuss whether "embedded data" and "metadata" exist and whether it will be requested.

8.2.9 OLS shall discuss the format in which the ESI is to be produced. If the requesting party does not specify a form or if OLS objects to the requested form, OLS shall state in writing the form it intends to use for producing the ESI.

8.2.10 OLS shall discuss the need for inspection, copying, testing, or sampling of designated ESI as appropriate. Additionally, OLS should consider discussing specific selection criteria, including search terms.

8.2.11 OLS should discuss the inadvertent disclosure of privileged or trial preparation materials.

8.2.11.1 OLS may agree to provide a "quick peek", whereby the responding party provides certain requested materials for initial examination without waiving any privilege or protection.

8.2.11.2 OLS may enter a "clawback agreement", whereby materials that are disclosed without intent to waive privilege or protection are not waived and are returned to the responding party.

8.2.12 OLS shall discuss the same items above with non-parties to the litigation when requesting ESI from such non-parties.

8.3 <u>Discovery</u>

8.3.1 With guidance from OLS, OIRM shall coordinate and execute the reasonable search and collection of responsive ESI.

8.3.2 Factors to consider in determining reasonableness include the cost of the collections the burden and disruption of normal activities, as well as the defensibility of the search.

8.3.3 OLS and OIRM shall exercise due diligence in choosing a particular ESI retrieval methodology(s) and be prepared to explain the search methodology(s) used in subsequent legal contexts.

8.3.4 Both manual and automated procedures for collection may be appropriate in a particular situation.

8.3.4.1 Manual collection involves hand selecting items that are potentially relevant to a given litigation. This selection should be performed by the document authors or custodians themselves.

8.3.4.2 Automated collection involves using computerized processes to collect data meeting certain criteria, such as search terms, file and message dates, or folder locations.

8.3.5 The search and collection process shall be accompanied by documentation and validation appropriate to the needs of the litigation. The documentation should describe what is being collected, the procedures used, and any steps used to validate the collection.

8.3.6 Both positive and negative responses to requests for ESI shall be maintained.

8.3.7 OLS, in coordination with OIRM, shall automatically supplement, correct or modify the ESI requested as additional or different ESI becomes known or available.

8.4 <u>Production</u>

8.4.1 OIRM shall produce ESI that is reasonably accessible, relevant, and not privileged. ESI that is not reasonably accessible shall be produced upon a showing of good cause.

8.4.2 OLS should have the ESI produced Bates-numbered, as appropriate.

8.4.3 OLS shall keep a copy of the ESI produced in a secure location.

8.4.4 OLS shall identify, by category or type, the sources containing potentially responsive ESI that it is not searching or producing.

8.4.5 If the form of production is not specified by party agreement or court order, the ESI shall be produced either in a form or forms in which it is ordinarily maintained or in a form or forms that are readily usable. As a general rule, production of ESI should only be required in one format.

8.4.6 OLS shall interpret requests for production of "Documents" to include ESI, unless discovery has clearly distinguished between ESI and "Documents".

8.4.7 The reasonable costs of retrieving and reviewing ESI should be borne by OLS unless the information sought is not reasonably available in the ordinary course of business. Whether the ESI is reasonably available turns primarily on whether it is kept in an accessible or inaccessible format.

8.4.8 Responses and objections shall indicate that reasonable steps have been taken to produce responsive ESI. If production has not been made from all reasonably available sources, OLS shall tender appropriate objections based upon existing production efforts, cost, burden, over breadth of request, and/or other factors.

8.4.9 If privileged or trial preparation materials are inadvertently produced, OLS shall notify the requesting party of such disclosure and attempt to resolve the claim.

9.0 RECORDS MAINTENANCE

Records generated as a result of this procedure include:

9.1 Notice of Legal Hold and distribution list

9.2 Quarterly Notice Reminder

9.3 Certificate of Completion, IP-510-01-F1

9.4 Notice of Termination of Legal Hold

10.0 FORMS USED

10.1 IP-510-01-F1, Rev. 1, Certificate of Completion, may be used to certify compliance with the Legal Hold and document the search for ESI.

11.0 ATTACHMENTS

11.1 Attachment A – Certification of Completion

Attachment A

Certification of Completion

CERTIFICATION TO THE OFFICE of LEGAL SERVICES (OLS)

Notice of Legal Hold: _____

☐ I have read and understand the above Notice of Legal Hold. I certify that since receiving Notice from the OLS, I have not altered, discarded or destroyed any Electronically Stored Information (ESI).

☐ I further certify that I have searched the following locations for ESI:

(Please check all boxes, as appropriate)

Search Completed	LOCATION
	Local Area Server for my office
	Personal Share or Personal Folders on Server
	Dedicated Server for EMCBC
	Laptop and/or Office Computer
	Home Computer, Blackberry and/or PDA
	E-mail, including archived e-mail and sent e-mail
	E-mail Trash Bin, Desktop Recycle Bin
	Removable Storage Media, such as disks, CDs, DVDs, memory sticks, and thumb drives

The result of my search is indicated below (*mark any items applicable*):

_____ I have responsive material and have forwarded that material to the Office of Legal Services.

_____ Based on a reasonable search, I have no responsive material.

_____	_____	_____
Name	*Office*	*Date*

IP-510-01-F1, Rev. 1

EMCBC RECORD OF REVISION

DOCUMENT

If there are changes to the controlled document, the revision number increases by one. Indicate changes by one of the following:

- Placing a vertical black line in the margin adjacent to sentence or paragraph that was revised.
- Placing the words GENERAL REVISION at the beginning of the text.

Rev. No.	Description of Changes	Revision on Pages	Date
1	Initial Procedure	All	12/20/07