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## NUCLEAR REGULATORY COMMISSION

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SECY-02

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

\* \* \* \* \*

ATOMIC SAFETY AND LICENSING BOARD PANEL

PAPO CASE MANAGEMENT TELECONFERENCE

\* \* \* \* \*

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IN THE MATTER OF: :

US DEPARTMENT OF ENERGY : Docket No. PAPO-00

(HIGH LEVEL WASTE : ASLBP No. 04-829-01-PAPO

REPOSITORY: :

PRE-APPLICATION MATTERS) :

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Wednesday, October 19, 2005

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:04 a.m.

BEFORE:

THOMAS MOORE, Chair

ALEX KARLIN, Administrative Judge

ALAN ROSENTHAL, Administrative Judge

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## P R O C E E D I N G S

(10:04 a.m.)

JUDGE MOORE: All right. We'll proceed.  
For the Court Reporter, would you all identify  
yourself starting with the NRC staff please?

MR. CUMMINGS: This is David A. Cummings  
and Harry E. Wedewer.

JUDGE MOORE: DOE?

MR. EDWARDS: This is Jeff Edwards, Mike  
Shebelskie, and Ed Noonan. And then from the Office  
of OGC, we have on the phone Martha Crosland and  
Angela Kordyak.

MR. PUTZU: From the Division of Naval  
Reactors, Frank Putzu with Commander Greg O'Borien and  
Partrick Card.

JUDGE MOORE: Nevada?

MR. MALSCH: For the State of Nevada,  
Martin Malsch.

JUDGE MOORE: Let's proceed.

To start this morning, Mr. Shebelskie you  
had indicated at the October 13th conference that you  
would be prepared to give us a status report on DOE's  
preparation of primary privilege law. This is a  
redaction of documents for which you were claiming  
secondary privileges and the redactions for employee

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1 concerns files.

2 Can you present that to us this morning?

3 MR. SHEBELSKIE: Your Honor, this is Mike  
4 Shebelskie. I must apologize. I did not realize the  
5 Court wanted to --

6 JUDGE MOORE: That's all right. When can  
7 you provide us that?

8 MR. SHEBELSKIE: We're preparing a written  
9 submission. And I will endeavor to have it filed by  
10 week's end.

11 JUDGE MOORE: That will be fine. Thank  
12 you.

13 MR. SHEBELSKIE: Thank you.

14 JUDGE MOORE: Then let's move on to how we  
15 shall proceed with the matters at hand and a schedule  
16 for doing so. Let's start with you again, Mr.  
17 Shebelskie. Have you had an opportunity to consult  
18 and reach agreement with a recommendation with all the  
19 other participants on how you think we should be  
20 proceed?

21 MR. SHEBELSKIE: Yes, sir.

22 JUDGE MOORE: Please go ahead.

23 MR. SHEBELSKIE: Actually if Mr. Edwards  
24 could address that, he was a participant in all those  
25 conversations as well.

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1 JUDGE MOORE: That would be fine. Mr.  
2 Edwards, please go ahead.

3 MR. EDWARDS: Thank you, Judge Moore. We  
4 have had a number of internal conversations and then  
5 one group conversation with the staff and the state.  
6 And let me give you a status of where we are.

7 First, with respect to the UCNI documents,  
8 if I could let me just -- if I was not clear about one  
9 thing at the hearing last week, let me clarify that.  
10 I think I was asked is the Yucca Mountain facility a  
11 production or utilization facility. And if I was not  
12 clear that it is not either of those facilities, let  
13 me clarify that right now. It is not.

14 And we've had some discussions about the  
15 UCNI documents based on that along the lines we talked  
16 about last week. We're doing a re-review of the ten  
17 UCNI documents that we currently have. I don't have  
18 a definitive answer yet but I have been told that it  
19 is in all likelihood the result will be that the UCNI  
20 documents that have been labeled UCNI are either not  
21 UCNI or will not remain on the LSN.

22 And so the UCNI documents should go away.  
23 And we do not anticipate that there will be additional  
24 UCNI documents or documents with UCNI information  
25 going forward.

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1 With respect to OUO documents, the  
2 assignment I think from last week was to consider  
3 whether the OUO designation or OUO information can be  
4 dealt with under the second case management conference  
5 order. We've looked at that. We've had discussions  
6 with the state and staff about that.

7 We are prepared to redact the OUO  
8 documents, which is what is contemplated under the  
9 second case management conference order with respect  
10 to secondary privileges documents.

11 We've considered whether it would be  
12 appropriate to deal with the OUO documents under that  
13 order or under a subsequent order, a third order, that  
14 would treat the OUO information in a manner similar to  
15 how the secondary privilege information is dealt with  
16 under the second order.

17 The second order specifically in a couple  
18 places excludes its application to protective,  
19 unclassified, sensitive information. In addition, the  
20 appendices to that order, while they contemplate or  
21 address certain FOIA exemptions, they don't address  
22 two or three I don't think and certainly not all eight  
23 that could possibly be applicable to OUO.

24 What we were going to suggest, and we've  
25 talked with the state and staff about, is dealing with

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1 the OUO information under a third case management  
2 conference order but treat it similar to how secondary  
3 privilege is dealt under the second.

4 It would extend -- well, it would be a  
5 little bit different because it would specifically  
6 contemplate the process that is in the second order  
7 but it would also contemplate access pursuant to  
8 protective order, full access pursuant to protective  
9 order which is not in the second order.

10 And I think there is agreement with the  
11 state and staff on that approach.

12 Third, with respect to the NNPI  
13 information, let me make a couple comments. And then  
14 I'll ask Mr. Putzu to add on. What we -- the two --  
15 well, three thing. First is -- four things. The  
16 first is the Navy Nuclear Propulsion Program is  
17 prepared to engage in redaction.

18 Second is this belief on their part that  
19 the number of documents that fall within the NNPI  
20 category is going to drop, will be reduced. It will  
21 not disappear.

22 Third is we have worked on coming up with  
23 a definition, if you will, of need-to-know with  
24 respect to NNPI documents. We've talked with the Navy  
25 folks and we've also talked with the state and staff

1 about that with respect to the NNPI documents. And I  
2 think we'll be able to reach agreement on a specific  
3 definition of need-to-know that we can put in a  
4 protective order with respect to that information.

5 And fourth is there was concern, you might  
6 remember, expressed at the hearing by Mr. Malsch  
7 regarding the requirement that excludes non-U.S.  
8 citizens from access to these documents. And there  
9 has been further exploration with that -- on that  
10 topic.

11 First, we had a list of Nevada's experts  
12 that has previously been published. And we've had  
13 some conversation with Mr. Malsch about that list,  
14 about one, whether it is active, and two -- not  
15 active, whether it is current, and two, whether he can  
16 identify for us the non-U.S. citizens on that list who  
17 would need access to NNPI. And three, are there any  
18 additional people who he thinks needs that  
19 information. And he's going to get back to us with  
20 that.

21 And based on that information, depending  
22 on what it is, we think we'll be able to resolve that  
23 issue, too. And I'll let Mr. Putzu address that.

24 MR. PUTZU: Your Honor, this is Frank  
25 Putzu, Division of Naval Reactors.

1 I really don't have too much to add to  
2 that. It was a pretty comprehensive point. We really  
3 just need the identity -- identifying information of  
4 the non-U.S. experts -- the non-U.S. citizens that are  
5 intending to testify as experts.

6 We do have the preliminary list for lack  
7 of a better word that does identify some United  
8 Kingdom witnesses. But we do have a process that we  
9 intend to follow and are glad to work with the state  
10 to try to reach resolution on that.

11 JUDGE MOORE: When you're mapping this out  
12 in a third proposed case management order, protective  
13 order, and affidavit of non-disclosure and spelling  
14 out this process, please keep in mind that it is  
15 possible that there will be at this point unknown  
16 potential parties stepping forward with an expert that  
17 might fall into that category.

18 If it doesn't happen, all to the good.  
19 But if it does, we have to be prepared to meet it.  
20 And the provisions and criteria in which you spell out  
21 what you want should keep that in mind.

22 MR. PUTZU: Yes, Your Honor. I understand  
23 the existence of potential parties that may also  
24 employ non-U.S. citizens. And I think the Court makes  
25 an excellent point that the protective order needs to

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1 encompass that as well.

2 JUDGE MOORE: Realistically and as a  
3 practical matter, I think that's less likely to happen  
4 with others than with the State of Nevada who may well  
5 not be faced with the same precise problems that the  
6 state has. But if you are prepared for that, that  
7 would be most helpful.

8 MR. PUTZU: Yes, sir, understood.

9 JUDGE MOORE: Judge Karlin has something.

10 JUDGE KARLIN: Well, yes, a question Mr.  
11 Edwards and Mr. Putzu, you've covered a lot of ground  
12 and that's very valuable. It looks like you've had  
13 some good analysis and discussion.

14 What are you proposing? Maybe you were  
15 going to get to that. Do you have a joint or  
16 individual proposal that you would be submitting to  
17 cover this ground?

18 MR. EDWARDS: Yes, what may make sense,  
19 Judge Karlin, is let's let the staff address the SGI  
20 and then we can talk about a proposal that encompasses  
21 all of it.

22 JUDGE MOORE: Mr. Edwards, are you  
23 prepared -- since at this point in time all 40 SGI  
24 documents are yours -- to develop, independent of the  
25 staff, in consultation with the state, if you all can

1 agree, your proposals as well for SGI?

2 MR. EDWARDS: Where we are on that is not  
3 independent of the staff, no. We actually intended to  
4 further the staff with respect to the treatment of the  
5 SGI information.

6 JUDGE MOORE: Okay. Then let's hear from  
7 Mr. Cummings at this point.

8 MR. CUMMINGS: Yes, Your Honor. We've  
9 talked internally with the staff and with both the  
10 state and DOE. And first, as we discussed at the case  
11 management conference, we do believe a separate SGI  
12 protective order would be best as it seems that there  
13 is little to no overlap any longer between the NNPI  
14 and SGI documents. So we would, therefore, pursue the  
15 development of a separate order.

16 And as far as -- you've charged the staff  
17 with kind of reevaluating whether there were any  
18 elements we could maybe seek alternatives or  
19 compromise to and the staff does concede that we will  
20 go ahead and redact documents. We will redact SGI  
21 documents.

22 However, the staff believes it should  
23 pursue the access and handling requirements that we  
24 first proposed in the protective order and at the case  
25 management conference. That we would incorporate

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1       those elements into the new draft SGI protective  
2       order.

3               JUDGE MOORE: Anything else? Mr. Malsch,  
4       what is your position on all of this?

5               MR. MALSCH: Well, I'm hopeful we can work  
6       these things out especially with respect to DOE. I  
7       think we're very hopeful that we can work out issues  
8       with respect to citizenship of consultants and  
9       experts. And I'll be talking to DOE about that in the  
10      next few days.

11              As far as the staff is concerned, we may  
12      have still a few issues along the lines of those we  
13      raised earlier. And there might be a further issue  
14      about fingerprinting but I think that is yet to be  
15      developed because I think the staff position is itself  
16      kind of evolving. And so we may be able to work that  
17      out with the staff under the scope of negotiations of  
18      a separate order on SGI.

19              But I'm a little less hopeful about this  
20      than I am in the case of DOE. But we'll have to see  
21      how it develops.

22              JUDGE MOORE: Okay. I guess the next  
23      steps is let's talk schedule for accomplishing this.  
24      Back to you Mr. Shebelskie. What is -- if you've had  
25      a chance to consult with the other participants, do

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1 you have a proposed schedule?

2 MR. SHEBELSKIE: Yes, sir, Your Honor, the  
3 parties did confer yesterday about that. And worked  
4 up a schedule that includes -- and Mr. Edwards or Mr.  
5 Cummings could give you the detail -- but the concept  
6 is giving public notice and access to a proposed draft  
7 here in the short run, allowing a period of some  
8 public comment on them.

9 And then a preestablished telephone  
10 conference call similar to what we did with some of  
11 the draft orders last summer. And then ultimately  
12 submittal of what would hopefully be a uniform  
13 proposed order that everybody had signed off on.

14 And Mr. Edwards and Mr. Cummings I think  
15 have the particulars of the proposed date that they  
16 had in mind.

17 JUDGE MOORE: Okay. Mr. Cummings? Mr.  
18 Edwards?

19 MR. EDWARDS: David, do you have those?

20 MR. CUMMINGS: Yes, Your Honor. This is  
21 David Cummings. The schedule that all the three  
22 parties worked out, both Mr. Malsch, Mr. Edwards, and  
23 myself was that drafts, initial drafts of both a joint  
24 -- well, for one point of clarification, Your Honor,  
25 were you seeking a single case management order to

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1 cover the separate protective orders? Or were you  
2 looking for separate case management orders?

3 JUDGE MOORE: It really doesn't matter.  
4 If they're separate, one dealing with the UCNI, if  
5 there is any, OUO, and NNPI and one dealing with SGI,  
6 they could be melded. It would certainly be easier if  
7 it was Chapter 1 and Chapter 2 of the same order.

8 But you've indicated that the staff  
9 believes that a separate protective order will be  
10 necessary. And hence that would also probably  
11 indicate a separate affidavit of non-disclosure. So  
12 that being the case, it could all be part of the same  
13 document and developed independently. And then joined  
14 as Chapter 1 and 2.

15 MR. CUMMINGS: I believe that makes sense,  
16 Your Honor.

17 In that case, what we would propose is  
18 that a single case management order with the separate  
19 protective orders and separate non-disclosure  
20 affidavits would be due on November 9th with a two-  
21 week public comment period to close on November 23rd  
22 with one week and five days, taking us to December 5th  
23 for the final resolution of public comments and  
24 allowing for the conference call that Mr. Shebelskie  
25 mentioned.



1 JUDGE KARLIN: Mr. Cummings, you're  
2 referring to your process it would undertake with the  
3 three parties here. And then submission to us?

4 MR. CUMMINGS: Oh, yes, Your Honor. We  
5 would work in concert the three parties together and  
6 provide a draft case management order. And then  
7 individually we will have developed, in consultation  
8 with the other parties, separate protective orders  
9 which we would then make available probably via public  
10 websites with public notice on November 9th for a two-  
11 week public comment period to end on November 23rd.

12 JUDGE KARLIN: No, this is Judge Karlin  
13 again. I think I understood that. My question is you  
14 know we are not really involved in the process. This  
15 is something that you all will be undertaking until  
16 the day comes when you submit the proposed hopefully  
17 joint third case management order I guess with the  
18 appropriate attachments.

19 This would obviously have to be sometime  
20 after I guess December 5th.

21 MR. CUMMINGS: Well, we would propose that  
22 we would be submitting that to the Board, all of these  
23 documents, the case management order and the separate  
24 protective orders and non-disclosure affidavits on  
25 December 5th.

1 JUDGE KARLIN: On December 5th?

2 MR. CUMMINGS: Yes. That would allow us  
3 sufficient time to address any public comments.

4 JUDGE KARLIN: Oh, okay. So your  
5 submission to us would be December 5th?

6 MR. CUMMINGS: Yes, Your Honor.

7 JUDGE KARLIN: All right. Thank you.

8 JUDGE MOORE: Now you are all in agreement  
9 that that gives you all the time you'll need to get  
10 this done? Because very frankly I in no way want to  
11 discourage DOE from certifying this collection as  
12 quickly as possible but I think realistically we're  
13 not under severe time constraints here. So if more  
14 time is needed, we would rather you take the time to  
15 get it correct than to, if you're pushing the schedule  
16 just for the schedule's sake.

17 MR. CUMMINGS: Well, Your Honor, this is  
18 David Cummings. The staff would not object -- if we  
19 wanted to build in some additional time for the  
20 initial drafting to allow for thorough consultation  
21 between the parties and for, you know, to ensure that  
22 the drafting of these, you know, initial documents is  
23 as good as we can get it.

24 MR. SHEBELSKIE: Judge Moore, this is Mike  
25 Shebelskie.

1 JUDGE MOORE: Yes, Mr. Shebelskie?

2 MR. SHEBELSKIE: I know for the various  
3 categories of protective information for DOE, we  
4 really think that we are at the right place.

5 JUDGE MOORE: Okay.

6 MR. SHEBELSKIE: And we can meet this  
7 schedule.

8 JUDGE MOORE: Let's try to deal with this.  
9 And if more time is necessary, feel free to come in  
10 and ask for it.

11 Then on December 5th, you will submit  
12 something to us. We will begin to study it and  
13 subsequent to that we will either have another case  
14 management conference to discuss any final concerns or  
15 perhaps we can do it on telephone conference. And  
16 then we can decide what further action we will need to  
17 take.

18 Just for the record, the panel will be in  
19 Las Vegas the week of December 5th for the annual  
20 panel meeting. So that will remove the panel members  
21 that week. So if you need -- there's a week right  
22 there you could move it back to December 12th because  
23 we'll all be in Las Vegas.

24 MR. EDWARDS: David, this is Jeff. Maybe  
25 what we ought to do is maybe just back everything up

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1 a week?

2 MR. CUMMINGS: I think that would make  
3 sense.

4 JUDGE MOORE: Okay. Then why don't you,  
5 Mr. Edwards -- first of all, Mr. Malsch, are you in  
6 full accord with that schedule?

7 MR. MALSCH: Oh, yes I am.

8 JUDGE MOORE: Mr. Edwards, why don't you  
9 present to us that schedule in a proposed order and  
10 we'll issue it and lock it in then as an order that  
11 that's the approach and the schedule.

12 MR. EDWARDS: I'll do that.

13 JUDGE MOORE: And then each of you will  
14 develop it. And we again remind you that that second  
15 case management order, as DOE has indicated, should be  
16 the template hopefully for what you develop for both  
17 the case management order, the protective orders, and  
18 the affidavits of non-disclosure.

19 MR. EDWARDS: Yes, sir.

20 JUDGE MOORE: And again, using that as a  
21 template, we would emphasize that it is the PAPO  
22 Board's view that the requirements that people have to  
23 comply with belong in the protective order and are  
24 referenced then in the affidavit of non-disclosure,  
25 not vice versa, the approach that you did in your last

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1 proposed protective order and affidavit of non-  
2 disclosure to us.

3 MR. EDWARDS: Understood.

4 JUDGE KARLIN: And even more if the  
5 substances of the process -- in as much substance I  
6 think as possible. It might even be in the case  
7 management order rather than even the protective  
8 order. But, you know, the non-disclosure agreement is  
9 not the place for all that material.

10 And while I'm on the subject, I think it  
11 would be useful if we could ask you to submit your  
12 proposal to us on the 12th, I guess, of December in  
13 some WordPerfect format so that we might have it and  
14 manipulate it if we so choose to try to tweak it a  
15 little bit.

16 JUDGE MOORE: That would be in addition to  
17 filing the EIE, if you wouldn't mind sending it to the  
18 -- just send it to the PAPO that you're used to using  
19 as a WordPerfect file. That would be helpful.

20 MR. EDWARDS: Yes, sir.

21 JUDGE MOORE: Is there anything further  
22 that you would like to bring to our attention today?

23 MR. EDWARDS: I think Mr. Shebelskie has  
24 one item, Judge Moore.

25 JUDGE MOORE: Mr. Shebelskie, please go

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1 ahead.

2 MR. SHEBELSKIE: Yes, sir, Your Honor. A  
3 small housekeeping matter. You may remember at last  
4 week's conference, at the beginning of the conference,  
5 we discussed two matters about treating documents  
6 currently on the LSN.

7 JUDGE MOORE: Yes.

8 MR. SHEBELSKIE: And we -- counsel  
9 understood from the Board's comments that with respect  
10 to the removal of previously indexed documents that we  
11 had subsequently determined to be not documentary  
12 material that we would proceed with the process of  
13 posting the accession numbers, waiting a 60-day  
14 period, and then they would be removed, assuming there  
15 was no objection to any of them.

16 JUDGE MOORE: Yes.

17 MR. SHEBELSKIE: I understand that among  
18 the discussions on the technical staff working on the  
19 LSN project with DOE dealing with the LSN  
20 administrator, there was some confusion as to whether  
21 or not the Board was going to issue an order --

22 MR. SHEBELSKIE: -- before the 60-day  
23 period could start? We just wanted a clarification on  
24 that.

25 JUDGE MOORE: The Board will be issuing an

1 order dealing with the subject of deletions on the  
2 publically-available document collections on the LSN.  
3 And will be mentioning the non-public portions of  
4 parties' document collections in that order as well.

5 We hope to have that out next week and it  
6 will cover the matters that we discussed and took  
7 under advisement at the conference on the 13th.

8 MR. SHEBELSKIE: Very good. Thank you,  
9 Your Honor.

10 And just as one last follow up on that, I  
11 think the issue that it would be helpful to address in  
12 that order is with respect to the accession numbers  
13 that have been posted since, I believe, September 7th.  
14 If the Board would specify -- if it would -- whether  
15 the 60-day period starts on September 7th or the date  
16 of issuance of this order.

17 JUDGE MOORE: Oh, we dealt with the 60  
18 days when we spoke last May 18th. And I don't think  
19 there should be any argument from the date they are  
20 posted is when the clock begins to run.

21 MR. SHEBELSKIE: Thank you, Your Honor.

22 JUDGE MOORE: The 60 days that you dealt  
23 with this past summer has come and gone for a first  
24 batch -- we now learned I guess it was 4,000  
25 approximately documents that was posted by the LSN and

1 then you posted on your own DOE website the other  
2 5,6000 accession numbers. That period has come and  
3 gone. And I assume all those actions have been taken.

4 MR. SHEBELSKIE: Yes, sir.

5 JUDGE MOORE: Okay. Well, that same 60-  
6 day period, I think it was always our contemplation,  
7 ran from when it was posted. And so you don't need --  
8 that clock isn't going to restart when we issue the  
9 order for what is currently up on -- being posted.

10 MR. SHEBELSKIE: Thank you, Judge Moore.

11 JUDGE MOORE: Does anyone have any other  
12 matters?

13 MR. SHEBELSKIE: No, Your Honor.

14 JUDGE MOORE: Then this conference is  
15 adjourned. Again, we thank you for your cooperation.  
16 We appreciate you trying to work this out. And we  
17 look forward to the filing on December 12th. The  
18 conference is adjourned.

19 (Whereupon, the above-entitled  
20 teleconference was concluded at 10:32 a.m.)  
21  
22  
23  
24  
25



CERTIFICATE

This is to certify that the attached proceedings  
before the United States Nuclear Regulatory Commission  
in the matter of:

Name of Proceeding: U.S. DOE High-Level Waste  
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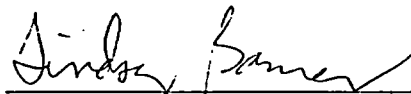
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Docket Number: PAPO-00;

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Location: Rockville, MD

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