

August 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

In the Matter of)	Docket No. PAPO-00
)	
U.S. Department of Energy)	ASLBP No. 04-829-01-PAPO
)	
(High Level Waste Repository:)	
Pre-Application Matters))	

**STATE OF NEVADA COMMENTS ON PROPOSED
THIRD CASE MANAGEMENT ORDER**

By Order dated July 10, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued its Proposed Third Case Management Order in draft form, and requested comments by August 1, 2007. The State of Nevada has only two comments, both regarding certain Definitions in Part I, and otherwise supports the draft Order.

Nevada Comment 1 (Part I, Section D of Proposed Third Case Management Order)

Part I, Section D of the Proposed Third Case Management Order defines "Naval Nuclear Propulsion Information" or "NNPI" for purposes of the Order. The PAPO's specific reference to 10 U.S.C. §130 here is helpful, and comports with Nevada's understanding of the sole statutory basis for the privilege from disclosure here asserted. However, the limiting language from NAVSEAINST C5511.32B, defining NNPI, and some limiting language from 10 U.S.C. §130, should also be used in the definition, so that the actual scope of the privilege from disclosure is more apparent to the reader. Accordingly, Nevada proposes that the definition of NNPI be modified to read as follows:

"Naval Nuclear Propulsion Information" or "NNPI" for purposes of this Third Case Management Order refers to technical data concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance and repair of the propulsion plants of Naval nuclear powered ships and prototypes,

including the associated shipboard and shore-based support facilities, in the possession of or under the control of the Naval Nuclear Propulsion Program within the Department of Defense, but only to the extent Freedom of Information Act (FOIA) disclosure obligations do not apply to such data because, under FOIA Exemption 3, the data is specifically exempted from disclosure by 10 U.S.C. §130.

The first part of this definition (the term "technical data") comes directly from 10 U.S.C. §130; the second part of the definition (the language "concerning . . . shore based support facilities") is lifted directly from the definition of NNPI in NAVSEAINST C5511.32B; the third part (the language "in the possession of . . . Department of Defense") is based on 10 U.S.C. §130, which refers only to technical data "in the possession of, or under the control of, the Department of Defense;" and the fourth part (the language "but only to the extent . . . by 10 U.S.C. §130") uses language from the PAPO's proposed definition, which is based on 10 U.S.C. §130 and FOIA. The NAVSEAINST C5511.32B language is also in DOE's, NRC Staff's and Nevada's December 19, 2005 Joint Proposed Third Case Management Order.

Nevada Comment 2 (Part I, Section E of the Proposed Third Case Management Order)

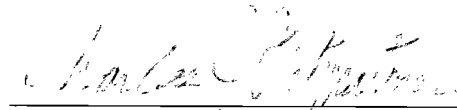
Part I, Section E of the Proposed Third Case Management Order defines "Official Use Only Information" or "OUO." Simply designating information as OUO cannot serve as any sufficient basis for a non-disclosure privilege because OUO is not recognized as a basis for non-disclosure in any statute. Thus, the PAPO properly confined the OUO privilege to information exempt from disclosure under FOIA Exemptions 2 and 3. However, Nevada believes that the definition and corresponding privilege should be further narrowed so as to limit it to the kinds of information DOE and NRC designate as OUO. Specifically, OUO should be limited to two kinds of information. The first is information protected under the so-called "high-2" FOIA Exemption, which is information that is "predominantly internal" and for which disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 670 F.2d 1051 (D.C. Cir. 1981). The second is export-controlled information, protected from disclosure

under various export control statutes such as section 57b of the Atomic Energy Act (and 10 C.F.R. Part 810). Accordingly, Nevada proposes a more specific definition as follows:

"Official Use Only information" or "OUO information" for purposes of this Third Case Management Order refers to two types of DOE or NRC information that is exempt from disclosure under FOIA. Specifically, OUO information is, first, NRC or DOE information that is exempt from disclosure under FOIA Exemption "high-2" because it is predominantly internal to the agency and its disclosure would risk circumvention of applicable law or render the documents operationally useless. This includes FOIA exempted critical infrastructure information, vulnerability assessments, inspection guidelines, classification guidelines, and evaluations of critical nuclear systems, facilities, stockpiles, and similar assets. Second, OUO information is information that is exempt from disclosure under FOIA Exemption 3 because its unrestricted export from the United States could assist in the production of special nuclear materials or nuclear weapons, or otherwise assist potential adversaries of the United States. This includes information protected from disclosure under section 57b. of the Atomic Energy Act. As used in this Third Case Management Order, OUO information does not include Safeguards Information, NNPI, or Unclassified Controlled Nuclear Information.

This definition is similar to the definition proposed in DOE's, NRC Staff's and Nevada's December 19, 2005 Joint Proposed Third Case Management Order, with one exception. The second category (FOIA Exemption 3) is limited to export controlled information, while the December 19, 2005 proposal might be read to suggest that the OUO Exemption 3 category might include other statutorily exempted information.

Respectfully submitted,



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Dated: August 1, 2007

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing State of Nevada's Comments on the Proposed Third Case Management Order has been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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