

August 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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

NRC STAFF COMMENTS ON
DRAFT THIRD CASE MANAGEMENT ORDER

INTRODUCTION

On July 10, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued a draft of its Proposed Third Case Management Order (TCMO) and requested that comments on the TCMO be filed by August 1, 2007. The NRC staff's ("Staff") comments on the TCMO follow.

DISCUSSION

The TCMO addresses three categories of sensitive unclassified information, including Official Use Only (OUO) information, which is defined in the TCMO as "information to which [Freedom of Information Act (FOIA)] disclosure obligations do not apply because, under FOIA Exemption 2, the information is related solely to the internal personnel rules and practices of an agency, or under FOIA Exemption 3, the information is specifically exempted from disclosure by statute." TCMO at 2. One type of information not included in the definition of OUO information is information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d). The Staff respectfully requests that such information be included in the definition of OUO information.

Pursuant to 10 C.F.R. § 2.390(d), "correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear

material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data,” along with information transmitted from a foreign source to the Commission in confidence, “is considered commercial information,” and, therefore, is protected from public disclosure. The revised Second Case Management Order (SCMO) issued on July 6, 2007 addresses information withheld from public disclosure due to a claim of privilege pursuant to 10 C.F.R. § 2.390, including business proprietary information. SCMO at 6.

The PAPO Board, by including business proprietary information in the SCMO, has already recognized that the parties have an interest in protecting such information from inadvertent public disclosure. See Revised SCMO at 6 (definition of “secondary privilege” includes proprietary information). Per the NRC’s regulations, information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d) is, in fact, business proprietary information and, therefore, should be afforded the same types of protections as other information withheld from public disclosure pursuant to other provisions in 10 C.F.R. § 2.390. In addition, because the SCMO refers only to 10 C.F.R. § 2.390 in general and does not differentiate between information withheld pursuant to § 2.390(a) and § 2.390(d)¹, the provisions of the SCMO afford the parties the right to claim as privileged information normally withheld from public disclosure pursuant to § 2.390(d).

Although information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d) could arguably be included in the definition of business proprietary information in the SCMO, the Staff maintains it is more appropriately included in the definition of OUO information in the TCMO. This is because the NRC has established internal policies for the handling of all types

¹ However, it should be noted that while the SCMO includes a specific template for a privilege log related to business proprietary withheld pursuant to 10 C.F.R. § 2.390(a)(4), there is no such template for business proprietary information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d). See SCMO, App. E.

of sensitive unclassified non-safeguards information (SUNSI). See "NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information," October 26, 2005, *available at* <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2005/2005-0054comscy-attachment2.pdf>. Although information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d) is a type of business proprietary information, because of its highly sensitive nature, it, along with other security-related information including NRC-generated information designated OUO and withheld pursuant to FOIA Exemption 2, is subject to a particular set of document handling requirements. These particular requirements are consistent with the handling requirements proposed by the PAPO Board in the Draft Protective Order for OUO information appended to the TCMO. Therefore, the Staff is confident that if security-related information normally withheld pursuant to 10 C.F.R. § 2.390(d) were included in the TCMO's definition of OUO information, it would be adequately protected from inadvertent public disclosure. For this reason, the Staff requests that the definition of OUO information in the TCMO be revised to include information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d).

CONCLUSION

For the reasons stated above, the Staff respectfully requests that the definition of OUO information in the TCMO be revised to include information withheld from public disclosure pursuant to 10 C.F.R. § 2.390(d).

Respectfully submitted,

/RA/_____
Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
This 1st day of August, 2007

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF COMMENTS ON DRAFT THIRD CASE MANAGEMENT ORDER" in the above captioned proceeding, have been served on the following persons this 1st day of August, 2007, by Electronic Information Exchange.

Thomas S. Moore, Chair
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

Alex S. Karlin
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

Alan S. Rosenthal
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board
Mail Stop: T-3F23
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov
rsnthl@comcast.net

G. Paul Bollwerk, III
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop: T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
E-mail: PAPO@nrc.gov

Office of the Secretary
ATTN: Docketing and Service
Mail Stop: 0-16C1
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
E-mail: HEARINGDOCKET@nrc.gov

Edward P. Noonan, Esq.
W. Jeffrey Edwards, Esq.
Kelly L. Faglioni, Esq.
Melissa Grier, Esq.
Donald P. Irwin, Esq.
Stephanie Meharg, Esq.
Michael R. Sheldons, Esq.
Audrey B. Rusteau
Belinda A. Wright
Pat Slayton

Hunton & Williams LLP
951 East Byrd Street
Richmond, VA 23219

E-mail: dirwin@hunton.com
kfaglioni@hunton.com
enoonan@hunton.com
arusteau@hunton.com
jedwards@hunton.com
mgrier@hunton.com
smeharg@hunton.com
bwright@hunton.com
msheldons@hunton.com
pslayton@hunton.com

Michael A. Bauser, Esq.
Associate General Counsel
Anne W. Cottingham, Esq.
Ellen C. Ginsberg, Esq.
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708
E-mail: mab@nei.org
ecg@nei.org
awc@nei.org

Joseph R. Egan, Esq.
Martin G. Malsch, Esq.
Charles J. Fitzpatrick, Esq.
Susan Montesi
Egan, Fitzpatrick, Malsch & Cynkar, PLLC
The American Center at Tysons Corner
2001 K Street, NW, Suite 400
Washington, DC 20006
E-mail: eganpc@aol.com
mmalsch@nuclearlawyer.com
cfitzpatrick@nuclearlawyer.com
smontesi@nuclearlawyer.com

Timothy C. Gunter, Director
Susan L. Rives, Esq.
US Department of Energy
Office of Civilian Radioactive Waste
Management
Office of Repository Development
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: timothy_gunter@ymp.gov
Susan_rives@ymp.gov

Jason Pitts
White Pine County
City of Caliente
Lincoln County
E-mail: idt@idtservices.com

Atomic Safety and Licensing Board
Panel
ASLB HLW Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, DC 20555-0001
(E-mail: ASLB_HLW_Adjudication@nr.gov)

Michele Boyd, Legislative Director
Critical Mass Energy and Environment
Public Citizen
215 Pennsylvania Ave., SE
Washington, DC 20003
E-mail: mboyd@citizen.org

Margaret Parish
Debra Wolf
James M. Cutchin
Jered Lindsay
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Andrew L. Bates
Adria T. Byrdsong
Rebecca L. Giitter
Emile L. Julian
Evangeline S. Ngbea
Office of the Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop: O-16C1
Washington, D.C. 20555
Hearing Docket
E-mail: alb@nrc.gov
atb1@nrc.gov
rl@nrc.gov
ldl@nrc.gov
elj@nrc.gov
esn@nrc.gov

Martha S. Crosland
Angela M. Kordyak, Esq.
U.S. Department of Energy
Office of the General Counsel
1000 Independence Avenue, S.W.
Washington, DC 20585
E-mail: martha.crosland@hq.doe.gov
angela.kordyak@hq.doe.gov

William Greene
Public Information Officer
US Department of Energy
1000 Independence Avenue, SW
Washington, DC 20585
E-mail: William.greene@hq.doe.gov

Anthony C. Eitrem, Esq.
Chief Counsel
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: papo@nrc.gov

Daniel J. Graser
Licensing and Support Network
Administrator
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D.C. 20555
E-mail: djq2@nrc.gov

Steve Frishman
Technical Policy Coordinator
Nuclear Waste Project Office
1761 East College parkway, Suite 118
Carson City, NV 89706
E-mail: ssteve@nuc.state.nv.us

Jeffrey Kriner
Yucca Mountain Project, Licensing Group,
DOE/BSC
Regulatory Programs
1180 North Town Center Drive
Las Vegas, NV 89144
E-mail: jeffrey.kriner@ymp.gov

Judy Treichel, Executive Director
Nevada Nuclear Waste Task Force
Alamo Plaza
4550 W. Oakley Blvd., Suite 111
Las Vegas, NV 89102
E-mail: judynwtf@aol.com

George W. Hellstrom, Esq.
Matthew C. Urie
U.S. Department of Energy
Office of the General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321
E-mail: george.hellstrom@ymp.gov
matt.urie@ymp.gov

Loreen Pitchford, LNS Administrator
for Lander, Churchill and Mineral County
3888 Snow Valley Drive
Reno, NV 89506
E-mail: qb4@charter.net

Robert Loux
Steve Frishman, Tech. Policy Coordinator
Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706
E-mail: bloux@nuc.state.nv.us
Steve.frishman@gmail.com

Diane Curran, Esq.
Eureka County and Lander County, Nevada
Harmon, Curran, Spielberg & Eisenberg,
LLP
1726 M. Street N.W., Suite 600
Washington, D.C. 20036
E-mail: dcurran@harmoncurran.com

Chris Howard, GIS/LAN Administrator
Inyo County (CA)
Yucca Mtn Nuclear Waste
Repository Assessment Office
163 May St
Bishop, CA 93514
E-mail: choward@inyowater.org

Debora Teske
Lander County Nuclear Waste Oversight
315 S. Humboldt
Battle Mountain, NV 89820
E-mail: dteske@landercounty.com

Patricia Larimore
Talisman International, LLC
1000 Potomac St., NW
Suite 300
Washington, DC 20007
E-mail: plarimore@talisman-intl.com

Barry S. Neuman, Esq.
Carter Ledyard & Milburn, LLP
Counsel for Lincoln County
1401 Eye Street, NW
Suite 300
Washington, DC 20005
E-mail: neuman@clm.com

Margaret Plaster, Management Analyst
City of Las Vegas
400 Stewart Avenue
Las Vegas, NV 89101
E-mail: mplaster@lasvegasnevada.gov

John M. Peebles, Esq.
Darcie L. Houck, Esq.
Fredericks & Peebles, LLP
1001 Second St.
Sacramento, CA 95814
E-mail: jpeebles@ndnlaw.com
dhouck@ndnlaw.com

/RA/_____
Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 1st day of August, 2007