

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))	

**THE DEPARTMENT OF ENERGY’S COMMENTS ON THE PROPOSED
THIRD CASE MANAGEMENT ORDER**

On July 10, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued its Proposed Third Case Management Order (PTCMO). The PAPO Board directed that all interested potential parties could file comments on the PTCMO by August 1, 2007. These are the Department of Energy’s (DOE) comments on the PTCMO:

1. Part I. Paragraph D, Page 1. DOE recommends that the definition be modified to read: “Naval Nuclear Propulsion Information” or “NNPI” for purposes of this Third Case Management Order means information 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 nuclear support facilities, to the extent Freedom of Information Act (FOIA) disclosure obligations do not apply to the information because, under FOIA Exemption 3, the information is specifically exempt from disclosure by statute (here 10 U.S.C. § 130). The current proposed definition uses the term “information created and controlled by the Naval Nuclear Propulsion

Program.” That wording might be construed to be limited to documents created by the Naval Nuclear Propulsion Program and not to derivative documents created by participants who obtained access to NNPI through this proceeding. By defining NNPI as a class of information that is exempt from FOIA, DOE’s alternative language makes clear that the definition applies even to derivative documents in this proceeding. This is similar to the definitions of OUO and UCNI which speak in terms of information without regard to the entity that creates a document.

2. Part I, Paragraph E, Page 2. DOE recommends that the definition be modified to read: “Official Use Only Information” or “OUO Information” is DOE or NRC information to which FOIA disclosure obligations do not apply because of either FOIA Exemption 2 or FOIA Exemption 3. DOE’s proposed definition does not characterize the nature of either exemption, and thus allows the originating agency to predicate a privilege claim on any ground that the case law recognizes under the exemptions.

3. Part II, Paragraph A, Page 3. On line 6, insert the word “be” between “will addressed.”

4. Part II, Paragraph A, Footnote 2, Page 4. The reference to DOE Order 471.2A (Information Security Program) should be deleted. This order has been cancelled, and the other DOE orders referenced in the footnote contain all the pertinent protection requirements.

5. Part II, Paragraph B, Page 4. DOE recommends that the phrase “originator of sensitive unclassified information” in the first sentence be modified to read: “federal agency that originated the sensitive unclassified information contained in a document.” Since the definition of “originator” means a “potential party that creates and asserts that a document” is exempt, the term “originator” is ambiguous in the context of this paragraph as applied to derivative documents that reflect SUI obtained through this proceeding but that are authored by non-federal agencies. The proposed change would make clear that the originating federal agency is intended

here. Similar changes are recommended for Part VII, Paragraph A.3, Page 14, because a non-federal originator does not have the authority to find that all or part of previously designated SUI does not require protection.

6. Part II, Paragraph C.1, Page 4. After the phrase “inadvertently produces” -- which appears twice in this paragraph -- insert the phrase: “or that subsequently determines that a previously produced document contains sensitive unclassified information.” The proposed formulation is consistent with Paragraph II.C.2 and is appropriate to give full relief to the situation contemplated in that paragraph. Paragraph II.C.2 permits a potential party that subsequently determines a document contains SUI to remove the document from the LSN. However, it does not address reclaiming the document from other parties. The proposed addition to Paragraph II.C.1 makes clear that relief is available.

7. Part III, Paragraph A.1, Page 6. At the end of the first sentence, insert: “to the extent a redacted version can be provided consistent with Paragraph III.A.3.” The current formulation could be construed to require a redacted version for every SUI document in all circumstances. However, Paragraph III.A.3 allows the possibility that a particular SUI document cannot be redacted because the SUI cannot reasonably be segregated. Paragraph III.A.1 should be modified as requested to eliminate this potential discrepancy with Paragraph III.A.3.

8. Part III, Paragraph B, Page 7. DOE recommends that the phrase “a diligent good faith effort to include” be inserted in the sentence following the word “make.” That is the standard already applicable to monthly updates following certification, and DOE believes that it is appropriate to apply the same standard to DOE’s initial certification for SUI documents. The redaction of SUI documents for public release entails a more intricate and time-consuming process than redactions for the primary and secondary legal privileges, in order to avoid

unauthorized releases of SUI. SUI documents that first become available towards certification, therefore, may not be able to be redacted as quickly as those other kinds of privileged documents. DOE will make every effort to have completed the redaction of its SUI documents by certification, but the recommended phrase would allow some tolerance for this special class of documents.

9. Part III, Paragraph C, Page 7. On lines 3 and 4, the phrase “sensitive unclassified information available on the LSN” erroneously appears twice.

10. Part III, Paragraph D, Page 7. At the end of the first sentence, insert: “to the extent a redacted version can be provided consistent with Paragraph III.A.3.” Same issue as with Paragraph III. A.1.

11. Part IV, Paragraph A.2, Page 8. DOE recommends deleting “in this proceeding” from the end of the first sentence. NNPI cannot be lawfully disclosed to any person who represents a foreign government, foreign private interest, or foreign national, except as allowed by a government to government agreement or as authorized by the Chief of Naval Operations. The current provision arguably limits the prohibition to persons who represent such foreign interests in this proceeding, whereas the restriction applies regardless of the scope, purpose, or forum of the representation.

12. Part IV, Paragraph B, Page 9. DOE recommends adding a reference to § 127 of the AEA in the last sentence of this paragraph. That is an additional statutory authority for DOE’s ability to restrict foreign access to export controlled/applied technology OUO information.

13. Appendix A, Paragraph D.3, Page 2. In the last sentence, change “should” to “must.” The word “should” could be interpreted as advisory, while “must” more clearly indicates a requirement. Make confirming changes in Paragraph D.3 of Appendices B and C.

14. Appendix B, Paragraph C, Page 2. The last sentence of this provision is ambiguous. It is not clear whether the phrase “that contains OUO information” applies (i) to each page that contains OUO information or (ii) each document that contains OUO information. In the first case, only those pages that contain OUO information would be marked. In the second case, every page would be marked, regardless of whether a given page actually contained OUO information. While either interpretation is useful depending on the circumstances and should be allowed, the intent is unclear. DOE recommends the following alternative language to address this: In addition, the words “Official Use Only” (or ‘OUO’ if space is limited) must be placed on those pages that contain the OUO information, although it also is permissible to similarly mark every page of a document that contains OUO information.

15. Appendix B, Page 3, addition of new paragraph after Paragraph D.5. Add the following paragraph: “Transmission by an Individual. An individual granted access to OUO under this Third Case Management Order may hand deliver a document marked as containing OUO information as long as that individual controls access to the document being transmitted.” This method is allowed and is the same as the equivalent requirement concerning UCNI.

16. Appendix C, Paragraph D.4, Page 2. Replace “UNCI” with “UCNI.”

17. Appendix C, Paragraph D.5, Page 3. Delete the following language: “or an individual...being transmitted.” Add the following paragraph: “Transmission by an Individual. An individual granted access to UCNI under this Third Case Management Order may hand deliver a document marked as containing UCNI as long as that individual controls access to the document being transmitted.” Hand-carrying a document should not be included in the “Transmission by Mail” paragraph.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

By Original Signed by Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dated August 1, 2007

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 Matter))	

**THE DEPARTMENT OF ENERGY'S COMMENTS ON THE PROPOSED
THIRD CASE MANAGEMENT ORDER
CERTIFICATE OF SERVICE**

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S COMMENTS ON THE PROPOSED THIRD CASE MANAGEMENT ORDER in the above captioned proceeding have been served on the following persons on August 1, 2007 by Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
E-mail: PAPO@nrc.gov
Alex S. Karlin
Administrative Judge
E-mail: PAPO@nrc.gov
Alan S. Rosenthal
Administrative Judge
E-mail: PAPO@nrc.gov &
rsnthl@comcast.net
G. Paul Bollwerk, III
Administrative Judge
E-mail: PAPO@nrc.gov
Anthony C. Eitreim, Esq.
Chief Counsel
E-mail: PAPO@nrc.gov
James M. Cutchin
E-mail: PAPO@nrc.gov
Bethany L. Engel
E-mail: PAPO@nrc.gov

Jonathan Rund
E-mail: PAPO@nrc.gov
Susan Stevenson-Popp
E-mail: PAPO@nrc.gov
Bradley S. Baxter
E-mail: bxlb@nrc.gov
Daniel J. Graser
LSN Administrator
E-mail: djg2@nrc.gov
ASLBP HLW Adjudication
E-mail:
ASLBP_HLW_Adjudication@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop - O-16 C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov
Andrew L. Bates
E-mail: alb@nrc.gov
Adria T. Byrdsong
E-mail: atbl@nrc.gov
Emile L. Julian, Esq.

E-mail: elj@nrc.gov
Evangeline S. Ngbea
E-mail: esn@nrc.gov
Rebecca L. Gütter
E-mail: rl@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of Congressional Affairs**
Mail Stop -O-17A3
Thomas R. Combs
E-mail: trc@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of Public Affairs**
Mail Stop - O-2A13
David McIntyre
E-mail: dtm@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of Nuclear Material Safety and
Safeguards**
Mail Stop - T-7 F3
Washington, DC 20555-0001
Jeffrey A. Ciocco
Email: jac3@nrc.gov

**U.S. Nuclear Regulatory Commission
Office of the General Counsel**
Mail Stop - O-15 D21
Washington, DC 20555-0001
Karen D. Cyr, Esq.
General Counsel
E-mail: kdc@nrc.gov
David A. Cummings, Esq.
E-mail: dac3@nrc.gov
Gwendolyn D. Hawkins
E-mail: gxh2@nrc.gov
Janice E. Moore, Esq.
E-mail: jem@nrc.gov
Trip Rothschild, Esq.
E-mail: tbr@nrc.gov
Andrea L. Silvia
E-mail: alc1@nrc.gov
Harry E. Wedewer, Esq.
E-mail: hew@nrc.gov
Mitzi A. Young, Esq.

E-mail: may@nrc.gov
Marian L. Zobler, Esq.
E-mail: mlz@nrc.gov
OGCMailCenter
E-mail: OGCMailCenter@nrc.gov

**Egan, Fitzpatrick, Malsch & Cynkar,
PLLC**
Counsel for the State of Nevada
The American Center at Tysons Corner
8300 Boone Boulevard, Suite 340
Vienna, VA 22182
Robert J. Cynkar, Esq.
E-mail: rcynkar@nuclearlawyer.com
Joseph R. Egan, Esq.
E-mail: eganpc@aol.com
Charles J. Fitzpatrick, Esq.
E-mail: cfitzpatrick@nuclearlawyer.com
Jack Kewley
E-mail: jkeewley@nuclearlawyer.com
Martin G. Malsch, Esq.
E-mail: mmalsch@nuclearlawyer.com
Susan Montesi
E-mail: smontesi@nuclearlawyer.com
Nakita Toliver
E-mail: ntoliver@nuclearlawyer.com

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

**U.S. Department of Energy
Office of General Counsel**
1000 Independence Avenue, S.W.
Washington, DC 20585

Mary B. Neumayr, Esq.

E-mail: mary.neumayr@hq.doe.gov

Martha S. Crosland, Esq.

E-mail: martha.crosland@hq.doe.gov

Angela M. Kordyak, Esq.

E-mail: angela.kordyak@hq.doe.gov

U.S. Department of Energy

1000 Independence Avenue, S.W.

Washington, DC 20585

Eric Knox

**Associate Director, System Operations
and External Relations, OCRWM**

E-mail: eric.knox@hq.doe.gov

Dong Kim

LSN Project Manager, OCRWM

E-mail: dong.kim@rw.doe.gov

U.S. Department Of Energy

Office of General Counsel

1551 Hillshire Drive

Las Vegas, NV 89134-6321

George W. Hellstrom

E-mail: george.hellstrom@ymp.gov

Hunton & Williams LLP

**Counsel for the U.S. Department of
Energy**

Riverfront Plaza, East Tower

951 East Byrd Street

Richmond, VA 23219

W. Jeffery Edwards, Esq.

E-mail: jedwards@hunton.com

Kelly L. Faglioni, Esq.

E-mail: kfaglioni@hunton.com

Melissa Grier

E-mail: mgrier@hunton.com

Donald P. Irwin, Esq.

E-mail: dirwin@hunton.com

Stephanie Meharg

E-mail: smeharg@hunton.com

Edward P. Noonan, Esq.

E-mail: enoonan@hunton.com

Audrey B. Rusteau

E-mail: arusteau@hunton.com

Michael R. Shebelskie, Esq.

E-mail: mshebelskie@hunton.com

Patricia A. Slayton

E-mail: pslayton@hunton.com

Belinda A. Wright

E-mail: bwright@hunton.com

White Pine County

City of Caliente

Lincoln County

Jason Pitts

E-mail: idt@idtservices.com

**Lander County Nuclear Waste Oversight
Program**

315 South Humboldt St.

Battle Mountain, NV 89820

Deborah Teske, Administrator

E-mail: dteske@landercounty.com

**Intertech Services Corporation
(for Lincoln County)**

P.O. Box 2008

Carson City, NV 89702-2008

Dr. Mike Baughman

E-mail: bigboff@aol.com

Environment Protection Agency

Ray Clark

E-mail: clark.ray@epa.gov

Public Citizen

215 Pennsylvania Ave, SE

Washington, DC 20003

**Michele Boyd, Legislative Representative
Critical Mass Energy and Environment**

E-mail: mboyd@citizen.org

Senator Harry Reid

Attn: Sandra Schubert

Room 528 Hart Senate Office Building

United States Senate

Washington, DC 20510-2803

Email: sandra_schubert@reid.senate.gov

Abby Johnson
617 Terrace St.
Carson City, NV 89703
E-mail: abbyj@gbis.com

National Congress of American Indians
1301 Connecticut Ave. NW - Second floor
Washington, DC 20036
Robert I. Holden, Director
Nuclear Waste Program
E-mail: robert_holden@ncai.org

Ross, Dixon & Bell
2001 K Street N.W.
Washington D.C. 20006-1040
William H. Briggs
E-mail: wbriggs@rdblawn.com

Churchill County (NV)
155 North Taylor Street, Suite 182
Fallon, NV 89406

Alan Kall
E-mail: comptroller@churchillcounty.org

State of Nevada (NV)
100 N. Carson Street
Carson City, NV 89710
Marta Adams
E-mail: maadams@ag.state.nv.us

Lander, Churchill and Mineral County
P. O. Box 33908
Reno, NV 89533
Loreen Pitchford, LNS Administrator for Lander
E-mail: lpitchford@comcast.net

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

Inyo County (CA) Yucca Mtn Nuclear Waste

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

Nuclear Waste Technical Review Board
Victoria Reich
E-mail: reich@nwtrb.gov

White Pine County (NV) Nuclear Waste Project Office
959 Campton Street
Ely, NV 89301
Mike Simon, Director
(Heidi Williams, Adm. Assist.)
E-mail: wpnucwst1@mwpower.net

Inyo County (CA) Yucca Mtn Nuclear Waste

Repository Assessment Office
P.O. Drawer L
Independence, CA 93526
Andrew Remus, Project Coordinator
E-mail: aremus@qnet.com

Nye County (NV) Department of Natural Resources & Federal Facilities
1210 E. Basin Road, Suite 6
Pahrump, NV 89048
David Swanson
E-mail: dswanson@nyecounty.net

Nye County (NV) Regulatory/Licensing Adv.
18160 Cottonwood Rd. #265
Sunriver, OR 97707
Malachy Murphy
E-mail: mrmurphy@cmc.net

Nuclear Waste Project Office
1761 East College Parkway, Suite 118

Carson City, NV 89706

Robert Loux

E-Mail: bloux@nuc.state.nv.us

Steve Frishman, Tech. Policy Coordinator

E-mail: steve.frishman@gmail.com

Nevada Nuclear Waste Task Force

Alamo Plaza, 4550 W. Oakley Blvd., Suite 111

Las Vegas, NV 89102

Judy Treichel, Executive Director

E-mail: judyntwf@aol.com

Yucca Mountain Project, Licensing Group,

DOE/BSC

Jeffrey Kriner

E-mail: jeffrey_kriner@ymp.gov

Lincoln County (NV) Nuclear Oversight Prgm

100 Depot Ave., Suite 15; P.O. Box 1068
Caliente, NV 89008-1068

Lea Rasura-Alfano, Coordinator

E-mail: jcciac@co.lincoln.nv.us

Mineral County (NV) Board of County Commissioners

P.O. Box 1600

Hawthorne, NV 89415

Linda Mathias, Administrator

Office of Nuclear Projects

E-mail: mineral@oem.hawthorne.nv.us

Eureka County (NV) Yucca Mtn Info Ofc

P.O. Box 990

Eureka, NV 89316

Laurel Marshall, Program Coordinator

E-mail: ecmarshall@eurekanv.org

Counsel to Eureka County and Lander County, Nevada

1726 M Street N.W., Suite 600

Washington, D.C. 20036

Diane Curran

E-mail: dcurran@harmoncurran.com

Clark County (NV) Nuclear Waste Division

500 S. Grand Central Parkway

Las Vegas, NV 89155

Irene Navis

E-mail: iln@co.clark.nv.us

Engelbrecht von Tiesenhausen

E-mail: evt@co.clark.nv.us

Fredericks & Peebles, LLP

Counsel for Timbisha Shoshone Tribe

1001 Second Street

Sacramento, CA 95814

Darcie L. Houck, Esq.

dhouck@ndnlaw.com

John M. Peebles

jpeebles@ndnlaw.com

U.S. DEPARTMENT OF ENERGY

By Original Signed by Michael R. Shebelskie

Donald P. Irwin
Michael R. Shebelskie
Kelly L. Faglioni
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
Email: dirwin@hunton.com

Of Counsel:

Martha S. Crosland
U.S. DEPARTMENT OF ENERGY
Office of General Counsel
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585