

August 14, 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 RESPONSE TO COMMENTS  
ON DRAFT THIRD CASE MANAGEMENT ORDER

INTRODUCTION

On August 7, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued an order authorizing potential parties that previously filed comments on the PAPO Board's draft Proposed Third Case Management Order (TCMO) to submit responses to the comments filed by other potential parties. The NRC staff ("Staff") responds to the State of Nevada's ("Nevada") second comment on the TCMO below.<sup>1</sup>

DISCUSSION

Paragraph I.E. of the draft TCMO, in relevant part, defines Official Use Only (OUO) information as "DOE or NRC 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 . . . ." TCMO at 2. Nevada argues that the definition of OUO, with respect to FOIA Exemption 2, should be limited and suggests the following revision: "OUO information is . . . NRC or DOE information that is exempt from public disclosure under

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<sup>1</sup> See "State of Nevada Comments on Proposed Third Case Management Order," Aug. 1, 2007 (Nevada Comments) at 2.

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.”<sup>2</sup> Nevada Comments at 3. The Staff, however, does not agree that this limitation is warranted.

FOIA Exemption 2 applies to matters that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552(b)(2). Courts have interpreted this provision as exempting two classes of information from public disclosure, “low-2” and “high-2.” “Low-2” information, in addition to being related solely to internal agency rules and practices, is also information in which there is no genuine and significant public interest. See *Dept. of the Air Force v. Rose*, 425 US 352 (1976). However, even where there may be a genuine and significant public interest in a document, if that document is predominantly internal “and if disclosure significantly risks circumvention of agency regulations or statutes, then Exemption 2 exempts the material from mandatory disclosure” under FOIA pursuant to the “high-2” theory. See *Crooker v. A.T.F.*, 670 F.2d 1051, 1074 (1981).

Because it is consistent with the statutory language, the PAPO Board’s definition of OUO Information in the draft TCMO would include information that may be withheld from public disclosure under both the “low-2” and “high-2” FOIA Exemption. Thus, the Staff had no comment on the text of the draft TCMO with respect to the PAPO Board’s

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<sup>2</sup> Nevada also proposes an amendment to the portion of the draft TCMO’s definition of OUO information related to FOIA Exemption 3, which withholds from public disclosure information specifically exempted by statute. See 5 U.S.C. § 552(b)(3). Safeguards information (SGI) is specifically excluded from the TCMO. Therefore, the Staff takes no position on Nevada’s proposed amendment to the portion of the definition of OUO information related to FOIA Exemption 3.

characterization of FOIA Exemption 2 and believes that the draft TCMO will provide adequate protection for all security-related information withheld from public disclosure pursuant to Exemption 2.<sup>3</sup> Nevada states that the FOIA Exemption 2 needs to be further narrowed so as to limit the kinds of information the NRC and DOE will designate as OUO. Nevada Comments at 2. However, in order to withhold information as OUO, the withholding party still bears the burden of persuasion that the information meets the requirements of the applicable FOIA exemption. Because the draft TCMO is consistent with the statutory language permitting the withholding of information, there is no reason to further narrow the definition of OUO. Accordingly, the PAPO Board should retain the language in the draft TCMO with regard to FOIA Exemption 2 in the final TCMO.

#### CONCLUSION

For the reasons stated above, the Staff respectfully requests that the description of FOIA Exemption 2 contained in the draft TCMO be retained in the final TCMO.

Respectfully submitted,

**/RA/**

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Marian Zabler  
Counsel for NRC Staff

Dated at Rockville, Maryland  
This 14<sup>th</sup> day of August, 2007

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<sup>3</sup> For this reason, although the Staff does not object to DOE's proposed amendment to the draft TCMO that would delete the phrase "related solely to the internal personnel rules and practices of an agency," the Staff does not believe that such amendment is necessary.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "NRC STAFF RESPONSE TO COMMENTS ON DRAFT THIRD CASE MANAGEMENT ORDER" in the above captioned proceeding, have been served on the following persons this 14<sup>th</sup> day of August, 2007, by Electronic Information Exchange.

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