

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

DOCKETED 08/30/07  
SERVED 08/30/07

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 30, 2007

THIRD CASE MANAGEMENT ORDER<sup>1</sup>

I. DEFINITIONS

For purposes of this Third Case Management Order, the following definitions shall apply:

A. "DOE" means the United States Department of Energy, which includes the Naval Nuclear Propulsion Program.

B. "Document" means any written, printed, recorded, magnetic or graphic matter or material regardless of form or characteristic that contains "documentary material" as that term is defined in 10 C.F.R. § 2.1001.

C. "Information protection requirements" refers to the controls or systems that must be in place to possess sensitive unclassified information and prevent its unauthorized dissemination.

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<sup>1</sup> The Pre-License Application Presiding Officer (PAPO) Board issued a draft of this Third Case Management Order on July 10, 2007 and requested comments on the draft from potential parties. Thereafter, the Board issued an order allowing potential parties who previously submitted comments to respond to other comments.

D. “Naval Nuclear Propulsion Information” or “NNPI” for purposes of this Third Case Management Order is 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 which Freedom of Information Act (FOIA) disclosure obligations do not apply because, under FOIA Exemption 3, the information is specifically exempt from disclosure by statute (here 10 U.S.C. § 130). See 5 U.S.C. § 552(b)(3).

E. “Official Use Only information” or “OUO information” is DOE or NRC information, not subject to being withheld under the Revised Second Case Management Order, to which FOIA disclosure obligations do not apply because, under FOIA Exemption 2, the information relates 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. See 5 U.S.C. § 552(b)(2), (3). As used in this Third Case Management Order, OUO information does not include Safeguards Information, NNPI, or Unclassified Controlled Nuclear Information.

F. “Originator” means a potential party that creates and asserts that a document qualifies, in whole or in part, as exempt from inclusion on the Licensing Support Network (LSN) in full text format because it contains sensitive unclassified information.

G. “Potential party” means DOE, the NRC Staff, the State of Nevada, and any person or entity that meets the definitions of “party,” “potential party,” or “interested governmental participant” under 10 C.F.R. § 2.1001.

H. “Receiver” means any person to whom access has been granted to a document that contains sensitive unclassified information pursuant to this Third Case Management Order.

I. “Requester” is any potential party seeking access to an unredacted document on the LSN that contains sensitive unclassified information pursuant to this Third Case Management Order.

J. “Safeguards Information” or “SGI” is information to which FOIA disclosure obligations do not apply because, under FOIA Exemption 3, the information is specifically exempted from disclosure by statute (here Section 147 of the Atomic Energy Act (AEA), 42 U.S.C. § 2167). See 5 U.S.C. § 552(b)(3). While SGI represents a class of sensitive unclassified information, the operative provisions of this case management order do not apply to SGI.

K. “Sensitive unclassified information” for purposes of this Third Case Management means any SGI, UCNI, NNPI, or OUO.

L. “Sensitive unclassified information log” means a chart that identifies documents claimed to be protected from disclosure because they contain sensitive unclassified information and, without revealing protected information, establishes that each identified document is entitled to be protected from disclosure in full text format on the LSN.

M. “Unclassified Controlled Nuclear Information” or “UCNI” is information to which FOIA disclosure obligations do not apply because, under FOIA Exemption 3, the information is specifically exempted from disclosure by statute (here Section 148 of the Atomic Energy Act (AEA), 42 U.S.C. § 2168(a)(1)). See 5 U.S.C. § 552(b)(3).

## II. GENERAL REQUIREMENTS

### A. Scope.

The requirements of this Third Case Management Order shall apply equally to all potential parties. In addition to the requirements contained herein, the general requirements set

forth in the Second Case Management Order in Parts II.C, II.D, II.E, II.G, II.K, II.L, II.M, II.N, II.O, and all of Part VII (Other Matters) are also applicable.<sup>2</sup> This Third Case Management Order does not address the specific procedures to be followed for documents containing SGI, which, to the extent necessary, will be addressed in subsequent orders, or the procedures to be followed for documents for which a primary or secondary privilege addressed in the Second Case Management Order is claimed. The provisions of this Third Case Management Order also do not restrict the use of documents containing sensitive unclassified information received outside this proceeding.<sup>3</sup>

**B. Burden of Persuasion.**

The federal agency that originated the sensitive unclassified information contained in a document bears the ultimate burden of persuasion that information is entitled to be protected as NNPI, OUO, or UCNI. The requestor bears the burden of persuasion that the requestor meets the requirements for access to sensitive unclassified information.

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<sup>2</sup> The applicable sections in the Second Case Management Order address: Appearance, Practice and Representation; Signature; Designation of Point of Contact; Subject Matter Waiver; Good Faith Consultation; Copyrighted Material; Timely Completion of Pre-License Application Phase Document Discovery; Filings and Service via the NRC's Adjudicatory EIE system; and Captions for Filings.

<sup>3</sup> The provisions of this Third Case Management Order do not apply to NRC staff, counsel, consultants, and contractors with respect to sensitive unclassified information that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g., information available to, or required to be submitted to, the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Such information is subject to internal NRC requirements governing the treatment of protected sensitive information. See NRC Management Directive 12.6, "NRC Sensitive Unclassified Information Security Program," (Dec. 20, 1999), ADAMS Accession No. ML0417006030. The provisions of this Third Case Management Order do apply to NRC staff, counsel, consultants, and contractors with respect to sensitive unclassified information that NRC would not be entitled to receive except by virtue of an Order in this proceeding. The provisions of this Protective Order also do not apply to DOE staff, counsel, consultants, and contractors with respect to sensitive unclassified information in this proceeding because such information is otherwise subject to protection pursuant to its internal DOE Orders. See DOE Order 471.1A (Identification and Protection of Unclassified Controlled Nuclear Information) (Approved June 30, 2000); DOE Order 471.3 (Identifying and Protecting Official Use Only Information) (Approved April 9, 2003).

C. Re-claiming Documents that Contain Sensitive Unclassified Information.

1. A potential party that inadvertently produces sensitive unclassified information or that subsequently determines that a previously produced document contains sensitive unclassified information may notify any potential party that received the information and demand prompt return or destruction of any documents containing such information. Upon timely motion, a potential party that inadvertently produces sensitive unclassified information or that subsequently determines that a previously produced document contains sensitive unclassified information may seek appropriate relief from the PAPO Board to protect the sensitive unclassified information from further unauthorized dissemination.

2. If a potential party wishes to delete the full text of a Public LSN Document because the potential party subsequently has determined that the document contains sensitive unclassified information, and should not have been placed on the LSN without redactions, the potential party shall provide the LSN Administrator (LSNA) the accession number of the document. The LSNA shall delete the document from the potential party's publicly available document collection on the LSN, permanently post on the LSN under an appropriate heading the accession number of the deleted document, and notify the potential party that it should delete the document from its document server. When the potential party provides the LSNA the accession number of the document to be deleted, the potential party shall also provide the LSNA an appropriate bibliographic header for the withheld document identifying the original LSN accession number. The LSNA shall promptly place the bibliographic header on the LSN.

D. Withdrawal of Sensitive Unclassified Information Protection.

A potential party that withdraws its claim that a document requires the sensitive unclassified information protection shall, within three (3) business days or as soon thereafter as practicable, make all necessary corrections to its LSN document collection.

E. Stipulations.

The right to and terms of access to sensitive unclassified information pursuant to this Third Case Management Order may be stipulated by written agreement among the relevant potential parties, and the stipulation will be filed with the PAPO Board.

F. Accounting Records.

Receivers shall keep a record of all unredacted documents containing sensitive unclassified information that they receive pursuant to this Third Case Management Order. Every six (6) months for as long as it possesses such documents, each potential party shall file with the PAPO Board and serve on the originator from whom access has been granted an accounting of the unredacted documents that contain sensitive unclassified information that the potential party and all other receivers under its control have received under this Third Case Management Order, including the LSN Accession number of each document and the persons given access to such information during the preceding six (6) months. The accounting shall be filed and served via the Electronic Information Exchange (EIE). The PAPO Board, with the assistance of the originators, will keep a master list of receivers who have been granted access to unredacted documents containing sensitive unclassified information.

G. Inadvertent Public Release.

Inadvertent public release of information designated as sensitive unclassified information, regardless of when such release occurs, does not relieve anyone from complying with this Third Case Management Order. Information formerly designated as sensitive unclassified information that is properly disclosed in the public record of this proceeding is no longer subject to this Third Case Management Order.

### III. REDACTION OF SENSITIVE UNCLASSIFIED INFORMATION

#### A. Requirement to Produce Redacted Versions.

1. To the extent a redacted version can be provided consistent with Paragraph III.A.3, each originator that withholds a document on the ground that it contains sensitive unclassified information shall make an electronic redacted version of the document available on the LSN, with an appropriate bibliographic header. The bibliographic header for the redacted document shall cross-reference the bibliographic header for the unredacted document. The redacted version shall be a separate document on the LSN.

2. Unless otherwise ordered, an originator need not make an electronic redacted version of a document available on the LSN if the document is also subject to a claim of primary privilege, as defined in the Second Case Management Order.

3. The redacted version of a document shall provide all information that is not sensitive unclassified information to the extent such information can reasonably be segregated from sensitive unclassified information. The amount of information deleted shall be fully and accurately indicated in the redacted version of the document. See 10 C.F.R. § 9.19.

#### B. Producing Redacted Versions of Documents by DOE.

At the time DOE certifies its LSN collection pursuant to 10 C.F.R. § 2.1009(b), it shall make a redacted version of each document containing sensitive unclassified information available on the LSN with an appropriate bibliographic header.

#### C. Producing Redacted Versions of Documents by Other Federal Agencies.

All other federal agencies originating sensitive unclassified information subject to this Third Case Management Order shall make a diligent good faith effort to include a redacted version of each document that contains sensitive unclassified information available on the LSN with an appropriate bibliographic header on the date prescribed by 10 C.F.R. §§ 2.1003 and 2.1009 for their initial certification.

D. Duty to Supplement.

To the extent a redacted version can be provided consistent with Paragraph III.A.3, on or before the first of each month following its certification of its document collection on the LSN, each potential party shall make available, with an appropriate bibliographic header, a redacted version of each document containing sensitive unclassified information created or discovered after the time of initial certification. Each potential party shall make a diligent good faith effort to include a redacted version of all after-created and after-discovered documents containing sensitive unclassified information as promptly as possible in each monthly supplementation and shall file a certification to that effect with the PAPO Board when the monthly supplementation is made.

IV. ACCESS REQUIREMENTS FOR UN-REDACTED DOCUMENTS THAT CONTAIN SENSITIVE UNCLASSIFIED INFORMATION

Only requesters who agree to comply with this Third Case Management Order and the appropriate Protective Orders in Appendices A through C, and who have executed and filed with the originator and PAPO Board the attached Non-Disclosure Declaration may have access to sensitive unclassified information. Additional access requirements for each category of sensitive unclassified information are set forth below.

A. NNPI.

Access to specific documents that contain NNPI will be granted once the requester has established (i) a need to know the NNPI and (ii) that the requester is a United States citizen.

1. For purposes of access to NNPI under this Third Case Management Order, a requester has a “need to know” if, in its request, it: (a) submits to the jurisdiction of the PAPO Board; (b) states that it will use NNPI solely for the purpose of participating in any Commission proceeding concerning a license application for a geologic repository at Yucca Mountain or any



appeal to a federal court from such proceeding; (c) identifies the documents by a LSN Accession number and the particular subject of inquiry for which the NNPI is sought; and (d) states that the requester shall abide by this Third Case Management Order.

2. For purposes of access to NNPI, a “United States citizen” is any United States national who does not represent a foreign government, foreign private interest, or foreign national on any matter. The term “United States citizen” does not include immigrant aliens. A requester may seek a waiver of this requirement by submitting an application to the point of contact (POC) for DOE. If DOE designates a separate POC for the Naval Nuclear Propulsion Program, then the requestor should submit its waiver application to the POC for Naval Nuclear Propulsion Program. Such waivers can only be granted by the Chief of Naval Operations.

B. OUO Information.

Access to specific documents that contain OUO information will be granted once the requester has established a need to know the OUO information. For purposes of access to OUO information under this Third Case Management Order, a requester has a “need to know” if, in its request, it: (1) submits to the jurisdiction of the PAPO Board; (2) states that it will use OUO information solely for the purpose of participating in any Commission proceeding concerning a license application for a geologic repository at Yucca Mountain or any appeal to a federal court from such proceeding; and (3) identifies the documents by a LSN Accession number and the particular subject of inquiry for which OUO information is sought. To the extent that the OUO information is also export controlled information, access to such information must be in accordance with Section 57(b) of the AEA, 42 U.S.C. § 2077(b), Section 127 of the AEA, 42 U.S.C. § 2156, and 10 C.F.R. Part 810.

C. UCNI.

Access to specific documents that contain UCNI under this Third Case Management Order will be granted pursuant to the “special access” provisions of 10 C.F.R. § 1017.16. A

requester must submit a request that includes: (1) the name, current residence or business address, birthplace, birthdate, and country of citizenship of the person submitting the request; (2) a LSN Accession number of the document that contains the UCNI requested; (3) a description of the purpose for which the UCNI is needed; and (4) a statement that the requester shall abide by this Third Case Management Order. Nothing in this Third Case Management Order will prevent a potential party from receiving access to UCNI under the “routine access” provisions of 10 C.F.R. § 1017.16(a).

#### V. PROCESS FOR REQUESTS FOR ACCESS TO SENSITIVE UNCLASSIFIED INFORMATION

A potential party may request full-text access to specific documents containing sensitive unclassified information from the originator of such document as set forth below.

##### A. Requests.

Requests for documents containing sensitive unclassified information shall be made pursuant to 10 C.F.R. § 2.1018(a)(1)(iii). All requests under this Third Case Management Order for OUO information and UCNI shall be submitted electronically to the email address of the appropriate POC posted on the LSN for the potential party whose document collection contains the requested document. All requests under this Third Case Management Order for NNPI shall be submitted via U.S. mail, return receipt requested, to the address of the appropriate POC posted on the LSN for DOE or, if DOE designates a separate POC, the Naval Nuclear Propulsion Program. In addition to the “signature” requirements set forth in the Second Case Management Order, Part II.D, all document requests shall also provide the requisite information for each category of sensitive unclassified information identified in Part IV above for which the requester seeks access. Failure of a requester to submit the request to the posted email or mailing address, as appropriate, of the appropriate POC and to include the required information shall vitiate the request.

B. Response to Requests.

Within ten (10) business days of receiving a request for access to NNPI, OUO information or UCNI, the originator of the requested document shall either (1) grant access subject to this Third Case Management Order and upon the execution and filing by the requester of the Non-Disclosure Declaration attached at Appendix D, (2) submit to the requester a denial that fully justifies and explains, without revealing the sensitive unclassified information, the reasons for the denial, or (3) indicate that the originator requires additional time to process the request and provide the date by which a determination will be made.

C. Process for Resolving Disputes Concerning Sensitive Unclassified Information.

1. If a requester has been denied access to sensitive unclassified information or believes that a decision on whether to grant access has been unreasonably delayed, the requester may file a motion consistent with 10 C.F.R. §§ 2.323 and 2.705(h).

2. As provided in Part II.K. of the Second Case Management Order, prior to filing any motion, the requester must in good faith confer with the POC of the originator. The good faith discussion shall include: (a) a disclosure by the originator as to whether, during the proceeding, it has previously provided access to the document (or parts of the document) at issue to another potential party; (b) the submission by the originator of an entry for the particular document on a sensitive unclassified information log (the form of which is described in Appendix E to this Third Case Management Order); (c) whether the document is subject to other claims of privilege, which may moot a challenge regarding access to the sensitive unclassified information; (d) whether the requester or originator believes that the dispute raises a controlling issue of law; and (e) information provided by the requester that would allow the originator to conclude whether the requester can meet the access or information protection requirements for sensitive unclassified information. The certification by the requester shall specify the results of the discussion of these issues.

3. Within seven (7) business days after such written motion has been filed, the originator (and no other potential party except as provided below) may file a response to the motion, along with any supporting affidavits or other accompanying evidence. Submission of supporting affidavits or other accompanying evidence that contain sensitive unclassified information must be submitted in camera to the PAPO Board. When more than one federal agency could be considered a holder of a document containing sensitive unclassified information, each such federal agency may file a response to the motion. The response to the motion may also address whether the PAPO Board has authority to resolve the issues in question.

4. The requester shall have no right of reply, except as permitted by the PAPO Board pursuant to 10 C.F.R. § 2.323(c).

D. Form and Format of Sensitive Unclassified Information Logs.

Each entry for a document on a sensitive unclassified information log under this Third Case Management Order shall set forth the elements specified in Appendix E. The information filed shall be arrayed in a columnar format corresponding to the elements identified in the Appendix. The log shall be filed via NRC's EIE process in PDF format as specified in the EIE Guidance Document. The log will be available to potential parties via the NRC's Electronic Hearing Docket.

Concurrent with any such filing, parties shall submit the electronic file used to generate the log to the LSNA in the data format and via transfer media mutually agreed upon by the party and the LSNA. Proposed file format and transfer media specifications should be provided to the LSNA at the earliest possible opportunity and, without exception, prior to file creation and submission to the LSNA. The LSNA will review and make the sole determination of the technical acceptability of any such proposal.

## VI. INFORMATION PROTECTION REQUIREMENTS

Upon receiving access to sensitive unclassified information, receivers must prevent the unauthorized dissemination of the information. The originator will be available to provide advice and assistance in implementing any or all of the information protection requirements described herein and in Appendices A through D. If, after consultation with the originator, a receiver is unable to comply with all of those requirements or the originator and receiver otherwise agree that access should be had at the originator's premises in lieu of possession, the originator will make sensitive unclassified information available to the requestor, upon reasonable notice, for inspection at the originator's premises.

Specific information protection requirements for each category of sensitive unclassified information are set forth in the appropriate Protective Orders found at Appendices A through C of this Third Case Management Order: NNPI (Appendix A); OUO information (Appendix B); and UCNi (Appendix C). The general information protection requirements for sensitive unclassified information are set forth below.

### A. General Information Protection Requirements Applicable to All Categories of Sensitive Unclassified Information.

1. After receiving an unredacted version of a document that contains sensitive unclassified information, a receiver may provide that document to other persons who (a) have been authorized to access and possess such information under this Third Case Management Order, and (b) have executed and filed the Non-Disclosure Declaration. Sensitive unclassified information received pursuant to this Third Case Management Order shall only be used as required for the conduct of any Commission proceeding concerning a license application for a geologic repository at Yucca Mountain or any appeal to a federal court from such proceeding, and its disclosure shall be limited to those authorized to receive such information.

2. Receivers of sensitive unclassified information subject to this Third Case Management Order may take notes on such information. If such notes contain sensitive unclassified information, they must be marked and protected to the same extent as the original sensitive unclassified information. Receivers of sensitive unclassified information subject to this Third Case Management Order may make copies of such information only to the extent provided in Appendices A through C for the particular category of sensitive unclassified information.

3. If a receiver has reason to suspect that a document containing sensitive unclassified information has been lost or misplaced, or that it has otherwise become available to unauthorized persons, the receiver shall promptly notify the PAPO Board and the originator of the sensitive unclassified information, of those suspicions and the reasons for them.

4. Any pleading or other filing (including testimony) that contains sensitive unclassified information shall be:

a. Marked in accordance with the applicable marking requirements identified in Appendices A through C for the particular category of sensitive unclassified information;

b. Submitted and transmitted in accordance with the applicable transmission by mail requirements identified in Appendices A through C for the particular category of sensitive unclassified information;

c. Served only on the NRC Office of the Secretary (the NRC Office of the Secretary receives the original), other potential parties and counsel identified on the master list referenced in Part II.F who have been granted access and possession under this Third Case Management Order to the specific sensitive unclassified information contained in the pleading or filing, and the individual members of the PAPO Board; and

d. Accompanied by a cover letter or memorandum, to be filed via the EIE, that briefly describes the contents of the pleading or other filing without revealing the sensitive unclassified information.

## VII. MISCELLANEOUS

### A. Reservation of Rights.

Nothing in this Third Case Management Order, or any appendices attached hereto, shall preclude:

1. Any potential party from objecting to the introduction or use of sensitive unclassified information in this proceeding;
2. Any potential party from seeking public disclosure of sensitive unclassified information in accordance with applicable regulatory procedures;
3. Any originator from arguing that the PAPO Board does not have the authority to override the originator's determination that a document contains sensitive unclassified information; and
4. The federal agency that originated the sensitive unclassified information contained in a document having cognizance over the sensitive unclassified information from finding in the course of this proceeding that all or part of previously-designated sensitive unclassified information need no longer be protected. A potential party may request that the originator make such a determination, and the filing of such a request does not preclude a challenge that the originator does not have authority to make that determination. If the originator makes such a finding, the sensitive unclassified information shall nevertheless be subject to this Third Case Management Order for ten (10) business days from the date of issuance of such a decision. If a potential party seeks continued protection under this Third Case Management Order and requests that the issue be certified to, or files an interlocutory appeal with, an appropriate forum, this Third Case Management Order shall apply until the issue has been resolved.

B. Availability of Sensitive Unclassified Information.

Sensitive unclassified information shall remain available to receivers until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the sensitive unclassified information is concluded and no longer subject to judicial review. Absent further order, the receiver shall, within fifteen (15) days of that later date, return the sensitive unclassified information to the originator, or destroy the information in accordance with the destruction requirements for that category of sensitive unclassified information discussed in Appendices A through C. Within the 15-day period, each receiver shall also submit to the originator an affidavit stating that, to the best of the receiver's knowledge, all sensitive unclassified information, copies of such information (in accordance with the requirements set forth in Appendices A through C for the particular category of sensitive unclassified information), and all notes of such information have been returned or have been destroyed in accordance with this Third Case Management Order.

C. Receiver No Longer Uses or is Qualified to Access Sensitive Unclassified Information.

If a receiver of sensitive unclassified information pursuant to this Third Case Management Order no longer uses such information or no longer qualifies as a receiver or potential party, or if an individual serving as counsel, consultant, other representative, or assistant no longer qualifies as such, then within fifteen (15) days, such receiver or individual shall return or destroy the documents containing sensitive unclassified information in



accordance with this Third Case Management Order and submit an affidavit that the sensitive unclassified information has been returned or appropriately destroyed.

It is so ORDERED.

The Pre-license Application  
Presiding Officer Board\*

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

*/RA/*

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Alan S. Rosenthal  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 30, 2007

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\* Judge Karlin's dissenting opinion follows.

## **DISSENT: Separate Views of Karlin, A., dissenting in part**

For reasons largely set forth in my July 16, 2007 dissent to the proposed Third Case Management Order, I must likewise respectfully dissent from the overly broad definition of “official use only” (OUO) information contained in the final Third Case Management Order. While the Second Case Management Order of July 2005 establishes a process for managing ordinary privilege claims, the Third Case Management Order being issued today establishes a more difficult process for challenging claims that a document contains “sensitive unclassified information” (SUI), which, by the majority’s approach, will include OUO. Stated differently, by including all possible OUO in the third order the Board makes it even harder for potential parties to obtain access to such documents.

In this context the broad, virtually unbridled, definition of OUO contained in the Third Case Management Order is pernicious. The artificial OUO label has no legal basis as a privilege. Heedless of this fact, the Third Case Management Order adopts the position of DOE and creates the broadest possible definition of “OUO,” allowing it to include anything covered by FOIA exemptions 2 and 3. In my view, while some exemption 2 and 3 privileges may deserve inclusion in the more secretive regime of the Third Case Management Order, all do not. The use of FOIA exemption 3 is especially problematic, because it is the catch-all FOIA exemption that includes any other exemption authorized by any Federal statute. For example, the NRC uses FOIA exemption 3 to withhold documents such as “contractor proposals” (protected under 41 U.S.C. § 253b(m)(1), see NRC Annual FOIA Report for Fiscal Year 2006 at § IV.A.1 (<http://www.nrc.gov/reading-rm/foia/annual-reports/2006.html>)) and such privilege claims have no place in the more difficult regime established by the Third Case Management Order. Thus, in this matter, I must agree with the State of Nevada:

A definition that simply references FOIA exemptions 2 and 3 will include huge categories of information . . . that should not be OUO. OUO is predominately [an] internal agency designation, and it is all too easy for agency employees to stamp something “OUO” simply to limit internal distribution or to avoid embarrassment or public scrutiny. The definition of OUO should be narrowly drawn to avoid misuse and abuse.

State of Nevada's Response to Comments on Proposed Third Case Management Order  
(Aug. 13, 2007) at 2.

If the Third Case Management Order is to be issued at all, I would use the more limited and specific definition of OUO proposed by the State of Nevada.

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Alex S. Karlin  
ADMINISTRATIVE JUDGE

Rockville, MD  
August 30, 2007

Appendix A to Majority Order

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

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In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 30, 2007

PROTECTIVE ORDER

(Regarding Naval Nuclear Propulsion Information (NNPI))

This Protective Order governs the specific information protection requirements for NNPI. Notwithstanding any order terminating this pre-license application phase proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-License Application Presiding Officer (PAPO) Board, a subsequent Presiding Officer in this proceeding, or the Commission.

A. Except where otherwise expressly defined in this Protective Order, all terms used herein shall have the same meaning and definition as in the Third Case Management Order.

B. Receivers shall prevent the unauthorized disclosure of NNPI as required in the Third Case Management Order and accompanying Non-Disclosure Declaration (Appendix D).

C. The originator of documents that contain NNPI, and any qualified receiver who makes notes derived from NNPI, shall mark the documents with the word NOFORN at the top and bottom of each page. Documents originated in the course of work that reproduce, expand or modify NNPI shall be marked and controlled in the same way as the original. All documents, as defined in the Third Case Management Order, containing NNPI must be marked and controlled similar to the markings on the original information. The cover sheet will have the

warning statement shown below:

NOFORN: This document is subject to special export controls and each transmittal may be made only with the prior approval of the Naval Nuclear Propulsion Program.

D. Receivers who receive any NNPI shall take all reasonable precautions necessary to ensure that it is not distributed to unauthorized persons. Reasonable precautions shall include the following information protection requirements:

1. Protection in Use. Documents containing NNPI must remain in the direct control of the receiver. Reasonable precautions must be taken to prevent unauthorized access to documents containing NNPI by persons who are not receivers under this Third Case Management Order. At no time may NNPI be left unsecured, such as in a home or automobile, unattended in a hotel or motel room, or sent with baggage.

2. Protection in Storage. When not under the direct control of a receiver, documents containing NNPI must be secured in a locked container (e.g., file cabinet, desk, safe). Access to the container must be such that only receivers can access it and compromise of the container can be visually detected. Containers should have no labels that indicate the contents. If removed from the site, NNPI must remain in the personal possession of a receiver.

3. Reproduction. Receivers are not authorized to make photocopies of NNPI. Additional copies of documents that contain NNPI may be requested from the originator to the minimum extent necessary to carry out a receiver's duties in connection with this proceeding. Copies must be protected in the same manner as originals. Any unneeded documents containing NNPI must be destroyed as described below.

4. Destruction. Documents containing NNPI must be disposed of using a method that ensures the information is not easily retrievable (e.g., shredding or burning). Alternatively, documents may be returned to the Naval Nuclear Propulsion Program for disposal.

5. Transmission by Mail. NNPI may be sent within the United States via first class mail in a single opaque envelope that has no markings indicating the nature of the contents.

6. Transmission by Facsimile. NNPI may be faxed using a laser fax machine within the United States provided there is a receiver waiting to collect the document and to control it properly. NNPI may not be faxed to facilities outside the United States, including military installations, unless encrypted by Naval Nuclear Propulsion Program approved means.

7. No Electronic Mail Transmission. NNPI cannot be transmitted via e-mail.

8. Transmission over Voice Circuits. NNPI may be transmitted over the telephone. If encryption is available, NNPI should be protected by encryption whenever possible.

9. Process on Automated Information Systems (AIS). An AIS or AIS network may not be used to process or access NNPI, unless specifically approved by the Naval Nuclear Propulsion Program. Personally owned computing systems, including, but not limited to, personal computers, laptops, and Portable Electronic Devices such as Personal Digital Assistants, are not authorized for processing NNPI. Exceptions require the specific approval of the Naval Nuclear Propulsion Program.

#### E. Violations of Third Case Management Order.

Any violation of the terms of this Protective Order may result in the imposition of sanctions as the PAPO Board, another presiding officer in this proceeding, or the Commission may deem appropriate. Such sanctions may include, but are not limited to: (1) refusal to consider a filing by the offending receiver; (2) denial of the right to receive documents under this Third Case Management Order; (3) denial of the right to cross-examine or present evidence; (4) refusal to allow the receiver, or counsel, consultant, or other representative of a receiver to participate in this proceeding; (5) dismissal of one or more of a receiver's contentions; or (6) dismissal of the receiver from the proceeding. In addition, sanctions may include, and are not limited to, an originator: (1) referring the violation to appropriate bar associations and/or

other disciplinary authorities; (2) referring the violation to the U.S. Department of Justice for criminal prosecution, if appropriate; (3) imposing civil penalties as authorized by applicable law; and (4) denying access to sensitive unclassified information.

It is so ORDERED.

FOR THE PRE-LICENSE APPLICATION  
PRESIDING OFFICER BOARD

*/RA/*

---

Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 30, 2007

Appendix B to Majority Order

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 30, 2007

PROTECTIVE ORDER  
(Regarding OUO Information)

This Protective Order governs the specific information protection requirements for Official Use Only (OUO) information. Notwithstanding any order terminating this pre-license application phase proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-License Application Presiding Officer (PAPO) Board, a subsequent Presiding Officer in this proceeding, or the Commission.

A. Except where otherwise expressly defined in this Protective Order, all terms used herein shall have the same meaning and definition as in the Third Case Management Order.

B. Receivers shall prevent the unauthorized disclosure of OUO information as required in the Third Case Management Order and accompanying Non-Disclosure Declaration (Appendix D).

C. The originator of a document that contains OUO information, and any receiver who makes copies or notes derived from OUO information, shall mark the document on the front page as "Official Use Only" and identify which FOIA Exemption prevents the document from being disclosed to the public on the LSN. If information qualifies as OUO information because it



is export controlled and exempt from disclosure under FOIA Exemption 3, then the document containing such information shall also be marked "Export Controlled Information" along with the accompanying statement: "Contains technical information whose export is restricted by statute." Each page of a document that contains OUO information must also be marked "OUO" in a conspicuous manner.

D. Receivers who receive any OUO information shall take all reasonable precautions necessary to ensure that it is not distributed to unauthorized persons. Reasonable precautions shall include the following information protection requirements:

1. Protection in Use. Documents containing OUO information must remain in the direct control of the receiver. Reasonable precautions must be taken to prevent unauthorized access to documents containing OUO by persons who are not receivers under this Third Case Management Order. Receivers should not examine OUO information in public places (e.g., do not read documents that contain OUO information in a public place, such as in a cafeteria or while using public transportation).

2. Protection in Storage. When not under direct control of a receiver, documents containing OUO information may be stored in unlocked receptacles such as file cabinets, desks, or bookcases so long as internal building security is provided during off hours (i.e., a building is protected by security personnel after the close of normal business hours). When such internal building security is not provided, OUO information should be stored in a locked room or office suite, or in a locked receptacle (e.g., a locked file cabinet, desk, bookcase, or briefcase).

3. Reproduction. Documents containing OUO information may be reproduced without permission of the originator only to the minimum extent necessary to carry out a receiver's duties in connection with this proceeding. Copies must be marked and protected in the same manner as originals. Copy machine malfunctions must be cleared, and all paper

paths checked for materials containing OUO information. Any unneeded documents containing OUO information must be destroyed as described below.

4. Return of Documents or Destruction. Documents containing OUO must be disposed of using a method that ensures the information is not easily retrievable (e.g., shredding or burning). Alternatively, documents may be returned to the originator for disposal. Copies of OUO information stored or processed on electronic storage media (e.g., compact disc) or hard drives of electronic media shall also be destroyed. Secure Clean PC software or its equivalent should be used to permanently remove OUO information, or storage media should otherwise be destroyed to ensure that data cannot be retrieved.

5. Transmission by Mail. OUO information may be sent to a receiver in a sealed, opaque envelope or wrapping marked with the receiver's address, a return address, and the words "TO BE OPENED BY ADDRESSEE ONLY." Any of the following United States Postal Service methods may be used: First Class, Express, Certified, or Registered Mail. Any commercial carrier may also be used.

6. 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.

7. Transmission by Facsimile. OUO may be transmitted by facsimile to a receiver. If encryption is available, OUO information should be protected by encryption whenever possible. If encryption is unavailable, an unencrypted facsimile transmission must be preceded by a telephone call to the receiver so that the document will be controlled when it is received.

8. Transmission by E-mail. If encryption is available, OUO information should be protected by encryption whenever possible. If encryption is unavailable, the OUO information,

may be included in a word processing file that is protected by a password and attached to the e-mail message. Senders should call the receiver with the password so that the receiver can access the file.

9. Transmission over Voice Circuits. OUO information may be transmitted over the telephone to a receiver. If encryption is available, OUO information should be protected by encryption whenever possible.

10. Process on Automated Information Systems (AIS). The AIS or AIS network must ensure that only individuals authorized access to OUO can access that information. For example, networks interconnected with a public-switched broadcast network (e.g., Internet) must provide methods (e.g., authentication, file access controls, etc.) to ensure that OUO is protected against unauthorized access.

E. Violations of Third Case Management Order.

Any violation of the terms of this Protective Order may result in the imposition of sanctions as the PAPO Board, another presiding officer in this proceeding, or the Commission may deem appropriate. Such sanctions may include, but are not limited to: (1) refusal to consider a filing by the offending receiver; (2) denial of the right to receive documents under this Third Case Management Order; (3) denial of the right to cross-examine or present evidence; (4) refusal to allow the receiver, or counsel, consultant, or other representative of a receiver to participate in this proceeding; (5) dismissal of one or more of a receiver's contentions; or (6) dismissal of the receiver from the proceeding.

In addition, sanctions may include, and are not limited to, an originator: (1) referring the violation to appropriate bar associations and/or other disciplinary authorities; (2) referring the

violation to the U.S. Department of Justice for criminal prosecution, if appropriate; (3) imposing civil penalties as authorized by applicable law; and (4) denying access to sensitive unclassified information.

It is so ORDERED.

FOR THE PRE-LICENSE APPLICATION  
PRESIDING OFFICER BOARD

*/RA/*

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Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 30, 2007

Appendix C to Majority Order

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 30, 2007

PROTECTIVE ORDER  
(Regarding UCNI)

This Protective Order governs the specific information protection requirements for UCNI. Notwithstanding any order terminating this pre-license application phase proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-License Application Presiding Officer (PAPO) Board, a subsequent Presiding Officer in this proceeding, or the Commission.

A. Except where otherwise expressly defined in this Protective Order, all terms used herein shall have the same meaning and definition as in the Third Case Management Order.

B. Receivers shall prevent the unauthorized disclosure of UCNI as required in the Third Case Management Order and accompanying Non-Disclosure Declaration (Appendix D).

C. The originator of documents that contain UCNI, and any person who makes copies or notes derived from UCNI shall mark in a conspicuous manner the first page of the document or material that contains UCNI with the following notice:

Unclassified Controlled Nuclear Information  
Not for Public Dissemination  
Unauthorized dissemination subject to civil and criminal sanctions under section 148 of the  
Atomic Energy Act of 1954, as amended (42 U.S.C. 2168).

The first page and each page thereafter shall be marked as "Unclassified Controlled Nuclear Information" or "UCNI" at the top and bottom of each page.

D. Receivers who receive any UCNI shall take all reasonable precautions necessary to ensure that it is not distributed to unauthorized persons. Reasonable precautions shall include the following information protection requirements:

1. Protection in Use. Documents containing UCNI must remain in the direct control of the receivers. Reasonable precautions must be taken to prevent unauthorized access to documents containing UCNI by persons who are not receivers under this Third Case Management Order. Receivers should not examine UCNI in public places (e.g., do not read documents that contain UCNI in a public place, such as in a cafeteria or while using public transportation).

2. Protection in Storage. When not under direct control of a receiver, documents containing UCNI must be stored in a secured container (e.g., locked desk or file cabinet) or in a location where access is limited (e.g., locked or guarded facility, controlled access facility).

3. Reproduction. Documents that contain UCNI may be reproduced without permission of the originator only to the minimum extent necessary to carry out a receiver's duties in connection with this proceeding. Copies must be marked and protected in the same manner as the originals. Copy machine malfunctions must be cleared, and all paper paths checked for materials containing UCNI. Any unneeded documents containing UCNI must be destroyed as described below.

4. Destruction. Documents containing UCNI must be disposed of using a method that ensures the information is not easily retrievable (e.g., shredding or burning). Alternatively,

documents may be returned to the originator for disposal. Copies of UCNI stored or processed on electronic storage media (e.g., compact disc) or hard drives of electronic media shall also be destroyed. Secure Clean PC software or its equivalent should be used to permanently remove UCNI, or storage media should be destroyed to ensure that data cannot be retrieved.

5. Transmission by Mail. UCNI must be packaged to prevent disclosure of the presence of UCNI when transmitted by means that could allow access to UCNI to an individual who is not authorized access to UCNI. The receiver's address and a return address must be indicated on the outside of the package. A document containing UCNI may be transmitted by United States Postal Service first class, express, certified, or registered mail or by any commercial carrier.

6. 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.

7. Transmission by Facsimile. UCNI may be transmitted by facsimile, but must be protected by encryption. Transmission using encryption may be accomplished using encryption algorithms that comply with applicable Federal laws, regulations, and standards that address the protection of sensitive unclassified information.

8. Transmission by E-mail. UCNI may be transmitted by e-mail, but must be protected by encryption. Transmission using encryption may be accomplished using encryption algorithms that comply with applicable Federal laws, regulations, and standards that address the protection of sensitive unclassified information.

9. Transmission over Voice Circuits. UCNI may be transmitted by telephone only if protected by encryption. Transmission using encryption may be accomplished using encryption algorithms that comply with applicable Federal laws, regulations, and standards that address the protection of sensitive unclassified information.

10. Process on Automated Information Systems. The AIS or AIS network must ensure that only individuals authorized access to UCNI can access that information. For example, networks interconnected with a public-switched broadcast network (e.g., Internet) must provide methods (e.g., authentication, file access controls, etc.) to ensure that UCNI is protected against unauthorized access.

E. Violations of Third Case Management Order.

Any violation of the terms of this Protective Order may result in the imposition of sanctions as the PAPO Board, another presiding officer in this proceeding, or the Commission may deem appropriate. Such sanctions may include, but are not limited to: (1) refusal to consider a filing by the offending receiver; (2) denial of the right to receive documents under this Third Case Management Order; (3) denial of the right to cross-examine or present evidence; (4) refusal to allow the receiver, or counsel, consultant, or other representative of a receiver to participate in this proceeding; (5) dismissal of one or more of a receiver's contentions; or (6) dismissal of the receiver from the proceeding.

In addition, sanctions may include, and are not limited to, an originator: (1) referring the violation to appropriate bar associations and/or other disciplinary authorities; (2) referring the violation to the U.S. Department of Justice for criminal prosecution, if appropriate; (3) imposing civil penalties as authorized by applicable law; and (4) denying access to sensitive unclassified information.

It is so ORDERED.

FOR THE PRE-LICENSE APPLICATION  
PRESIDING OFFICER BOARD

**/RA/**

---

Thomas S. Moore, Chairman  
ADMINISTRATIVE JUDGE

Rockville, Maryland  
August 30, 2007



Appendix D to Majority Order

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before Administrative Judges:

Thomas S. Moore, Chairman  
Alex S. Karlin  
Alan S. Rosenthal

In the Matter of

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:  
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

August 30, 2007

NON-DISCLOSURE DECLARATION  
(Regarding Sensitive Unclassified Information)

Under penalty of perjury, I hereby declare my understanding that access to sensitive unclassified information is provided to me pursuant to the terms and restrictions of the applicable Protective Order, dated [DATE], that I have been given a copy of and have read the applicable Protective Order; and that I agree to be bound by it as well as the terms of the Third Case Management Order dated [DATE]. I understand that the contents of sensitive unclassified information, as defined in that Third Case Management Order, shall not be disclosed to anyone other than in accordance with the applicable Protective Order and Third Case Management Order. I acknowledge that a violation of this Declaration, the Third Case Management Order, or the applicable Protective Order, which incorporates the terms of these Orders, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Pre-License Application Presiding Officer (PAPO) Board, a subsequent Presiding Officer in this proceeding, or the Commission may deem to be appropriate. Such sanctions may include, but are not limited to, refusal to consider a filing by the offending receiver; denial of the right to receive documents under this or any other protective order in this proceeding; denial of the right to cross-examine or present evidence; refusal to allow the

counsel, consultant, or other representative of a receiver to participate in this proceeding; dismissal of one or more of a receiver's contentions; or dismissal of the participant from the proceeding. Sanctions may also include, and are not limited to, referral of the violation to appropriate bar associations and/or other disciplinary authorities, including the U.S. Department of Justice for criminal prosecution, if appropriate, and the imposition of civil penalties as authorized by applicable law.

WHEREFORE, I do solemnly agree to protect such sensitive unclassified information as may be disclosed to me in this Yucca Mountain licensing proceeding, in accordance with the terms of this declaration.

Name (printed): \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

Subscribed and sworn or affirmed before me this \_\_\_\_ day of \_\_\_\_\_, 200\_\_.

\_\_\_\_\_  
NOTARY PUBLIC

My commission expires on: \_\_\_\_\_.

Appendix E to Majority Order

(Sensitive Unclassified Information Log)

Sensitive Unclassified Information Log:

1. LSN header number.
2. The date the document was created.
3. The title of the document.
4. A description of the subject matter of the document without revealing the sensitive unclassified information.
5. A justification, without revealing the sensitive unclassified information, that the information qualifies as sensitive unclassified information.
6. A statement to the best of the potential party's knowledge that the document is being maintained under procedures or practices that preserve the protection of the document, listing any exceptions including whether the document was previously publicly available.
7. The type of document (e.g., internal memorandum, email, handwritten notes).
8. An identification of all other privileges or protections claimed for the document.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PAPO BOARD ORDER (THIRD CASE MANAGEMENT ORDER) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (\*)).

**U.S. Nuclear Regulatory Commission**  
**Atomic Safety and Licensing Board Panel**  
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**Administrative Judge**  
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PAPO BOARD ORDER  
(THIRD CASE MANAGEMENT ORDER)

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PAPO BOARD ORDER  
(THIRD CASE MANAGEMENT ORDER)

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**U.S. Department of Energy**

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PAPO BOARD ORDER  
(THIRD CASE MANAGEMENT ORDER)

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Docket No. PAPO-00

6

PAPO BOARD ORDER  
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[Original signed by R. L. Giitter] \_\_\_\_\_  
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Dated at Rockville, Maryland  
this 30<sup>th</sup> day of August 2007