

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

**RAS 9177**

**DOCKETED 01/18/05**

Before Administrative Judges:

**SERVED 01/18/05**

G. Paul Bollwerk, III, Chairman  
Dr. Paul B. Abramson  
Dr. Charles N. Kelber

In the Matter of

LOUISIANA ENERGY SERVICES, L.P.

(National Enrichment Facility)

Docket No. 70-3103-ML

ASLBP No. 04-826-01-ML

January 18, 2005

MEMORANDUM AND ORDER  
(Amending and Clarifying Protective Order)

Pending with the Licensing Board is a December 30, 2004 motion filed by intervenors Nuclear Information and Resource Service and Public Citizen (NIRS/PC) requesting clarification of the Board's December 21, 2004 protective order, to which both applicant Louisiana Energy Services, L.P., (LES) and the NRC staff filed responses dated January 7, 2004. We address below, in the order they were made, the seven NIRS/PC requests for clarification or modification.

1. Staff Publication of Screening Determinations. NIRS/PC have requested that the staff be required to make screening determinations public, specifying the documents to which they apply. The Electronic Hearing Docket ("EHD") for this proceeding contains pleadings filed before the Board or the Commission, orders issued by the Board or the Commission, and the staff's hearing file. The staff has advised that, as of December 30, 2004: (i) all documents in the hearing file have been provided or made available to party representatives who have completed the confidentiality and non-disclosure agreement pursuant to the protective order; (ii) all non-sensitive documents have been made available through Citrix-based ADAMS; (iii) all

sensitive documents have been redacted, provided to the parties on CDs and made available through Citrix-based ADAMS; and (iv) the staff has determined that none of the remaining documents in the EHD is sensitive and those document are also now available through ADAMS. We have no reason to believe the staff will not continue to make timely screening determinations regarding future filings and/or additions to the hearing file and promptly notify the parties of such determinations. Hence we decline to establish the NIRS/PC requested-requirement that the Staff make any screening determinations public, specifying the documents to which they apply.

2. Certification by Counsel. NIRS/PC have requested that, with respect to future filings, counsel for the respective parties be authorized to certify that a document filed by counsel does not contain information deemed sensitive under the criteria identified by the staff and provided to all the parties subsequent to the December 21 protective order. We agree that a certification of some sort by those submitting documents is appropriate, with the caveat that the parties should also make use of the redacted documents completed by the staff as guidance in determining whether documents generated hereafter contain sensitive information that must be kept confidential under the protective order. To this end, we revise section five of the December 21, 2004 protective order to add the following additional language:

Further, with respect to any document submitted in this proceeding in accordance with 10 C.F.R. § 2.304 that does not include a protected information designation in accordance with section 4.c above, the signature of any person executing the document in a representative capacity shall constitute his or her certification that the document (including any attachments) has

been reviewed in its entirety and does not contain protected information.

Thus, each new document submitted by a party that is not designated as containing protected information will be presumed to have been reviewed by counsel or a representative authorized to sign the pleading and found not to contain sensitive information.

The Board would also note that if upon review of any party submittal the staff finds it does contain sensitive information, the staff's determination shall govern and the submittal shall be treated thereafter as protected information under the protective order, subject to any timely challenge before the Board.

3 and 4. Oral Statements and Transcripts. Based upon the staff's screening memorandum and the material actually redacted from documents, it should be clear to counsel what information is protected and what is not. (Indeed, this is a determination similar in kind to that the parties already are called upon to make relative to any proprietary information in the context of the May 21, 2004 protective order governing such information.) As such, counsel are responsible for ensuring that their statements and the testimony of their witnesses during any public portion of the hearing does not include a discussion of any protected information. Moreover, if there is any question in counsel's mind regarding the status of any information during any public session of the upcoming evidentiary hearing,<sup>1</sup> counsel should request leave to bring that matter to the Board prior to presenting (or eliciting) the information in question. While it is the Board's intent to conduct the hearing sessions publicly to the extent possible, as necessary the Board will close a hearing session for those specific portions of the testimony,

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<sup>1</sup> Since it is the sensitive information in a document that is protected, absent specific disclosure of the protected information, the mere reference to a document does not implicate this concern.

argument, or cross-examination that involve protected information, with those portions of the record subject to the same protections as sensitive information in the EHD.

5. Non-Signatories. In their motion, NIRS/PC have requested that the Board make clear that anyone who has not signed a confidentiality and non-disclosure agreement is not bound by the terms of the protective order. While it seems obvious that only the persons who sign the non-disclosure agreement are subject to its provision that signatories “agree to be bound by” the protective order, it should also be apparent that the parties to this litigation, in the person of their counsel and others who have executed a non-disclosure agreement, have a responsibility to protect sensitive information, including preventing the disclosure of protected information to unauthorized persons and reporting any such disclosures to the Board. Non-signatories are, of course, unauthorized persons.

6. Limitation on Reporting Requirement for Unauthorized Disclosures. NIRS/PC seek a limitation on the unauthorized disclosure reporting requirement for those persons who have signed the confidentiality and non-disclosure agreement so that it applies only to “files within their control.” Under section eight of the protective order, counsel, consultants, or representatives of a party who have reason to suspect that protected information has been lost or misplaced or has become available to unauthorized persons are promptly to report those suspicions, a requirement that extends to information that previously was publicly available.

Initially we note that, as the staff has observed, this obligation is not limited to the unauthorized disclosure of “files,” as referenced by NIRS/PC, but extends to any discussion of what has now been identified as protected information (including information contained in a previously public document). Be that as it may, with regard to information already in existence at the time the protective order was entered, the thrust of this provision is to ensure that once protected information is identified by the staff (or other parties based on the screening criteria

released by the staff and the staff's document redaction determinations), thereafter any person who has executed a non-disclosure affidavit and who becomes aware that an unauthorized person has come into possession of such information as a result of a disclosure not authorized under the December 21, 2004 protective order (i.e., a disclosure of the information subsequent to its December 2004 staff identification by a person who has executed a non-disclosure affidavit) must make the Board aware of that disclosure and the circumstances surrounding the disclosure.

We trust that as to any information in this proceeding identified in December 2004 by the staff (or thereafter by the staff or the parties) as protected, once having been apprised of its status, party personnel who have executed non-disclosure affidavits have not disclosed that protected information to any unauthorized person (and will not do so in the future). Nonetheless, if such a disclosure has taken place (or hereafter takes place) the notification obligation in section eight extends to such a disclosure.

7. Timing of Challenges. NIRS/PC have requested that the Board clarify that a question regarding non-disclosure (which we take to mean a question regarding whether or not specific information is protected) may be raised at any time. Relative to the matters at issue in the scheduled February 2005 evidentiary hearings, as we noted in our December 21, 2004 memorandum and order denying a NIRS/PC request to suspend that hearing schedule, challenges to staff non-disclosure findings regarding documents associated with those hearings or requests that testimony provided during closed hearing sessions be made public are being deferred to the filing of the parties proposed findings of fact and conclusions of law. Thereafter, the parties can raise questions about non-disclosure issues as they arise by motions filed in

accordance with 10 C.F.R. § 2.323, subject to any future Board directives regarding the timing of such challenges.

It is so ORDERED.

FOR THE ATOMIC SAFETY  
AND LICENSING BOARD<sup>2</sup>

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G. Paul Bollwerk, III  
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 18, 2005

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<sup>2</sup> Copies of this memorandum and order were sent this date by Internet e-mail transmission to counsel for (1) applicant LES; (2) intervenors New Mexico Environment Department, the Attorney General of New Mexico, and NIRS/PC; and (3) the NRC staff.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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(National Enrichment Facility) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (AMENDING AND CLARIFYING PROTECTIVE ORDER) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution.

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Docket No. 70-3103-ML  
LB MEMORANDUM AND ORDER  
(AMENDING AND CLARIFYING  
PROTECTIVE ORDER)

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[Original signed by Adria T. Byrdsong]

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of January 2005