May 16, 2005

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)	)	

SECOND NRC STAFF RESPONSE TO ISSUES
IDENTIFIED AT FIRST CASE MANAGEMENT CONFERENCE

INTRODUCTION

Pursuant to An Order of the Pre-License Application Presiding Officer Board ("PAPO" or "Board"), the Nuclear Regulatory Commission Staff ("Staff") hereby submits this second response to issues identified during the first case management conference held on May 4, 2005. Memorandum and Order (Scheduling the Second Case Management Conference and Issues to be Briefed), May 11, 2005 ("May 11 Order"). That Order instructed the Staff to address the following issues: 1) whether the initial the Licensing Support Network ("LSN") certification must include redacted documents; 2) a proposed protective order and affidavit of non-disclosure for non-safeguards, protected information; and 3) the meaning of "potential parties" in a proceeding under 10 C.F.R. Part 2, Subpart J. May 11 Order at 3. The Staff addresses each issue below.

DISCUSSION

I. Provision of Redacted Documents on the LSN

A. Differing Positions on the Provision of Redacted Documents

The provision of redacted versions of documents for which a privilege is claimed is addressed in sections II.E.3 and III.H.4 of Proposed Case Management Orders submitted by the Staff and the Department of Energy ("DOE"). "NRC Staff Proposed Order Regarding Privilege

Logs," and attached "Second Case Management Order," April 7, 2005 ("Staff Proposed Order") at 3-4 and 9; "Department of Energy's Submittal of Proposed Case Management Order Regarding Privilege Designations and Challenges," April 7, 2005 ("DOE Proposed Order") at 3-4 and 9-10. These sections provide that a participant may request, pursuant to 10 C.F.R. § 2.1018(a)(1)(iii), documents for which a privilege has been asserted. *Id*. Under the Proposed Orders, the participant possessing the requested document must make the document available to the requesting participant within 7 business days either in full-text pursuant to a protective order or in redacted form. Staff Proposed Order at 3-4; DOE Proposed Order at 3-4. The Proposed Orders further provide that if a redacted version is produced, that document must be made available on the LSN within a reasonable time following the request. Staff Proposed Order at 4; DOE Proposed Order at 4.

The State of Nevada ("State") objects to sections II.E.3 and III.H.4. "State of Nevada Comments on Draft Case Management Order," April 7, 2005 ("State Comments") at 1-2. The State proposes insertion of a provision requiring that a participant make available on the LSN, at the time of initial certification, redacted versions of privileged documentary material which would require redaction under NRC discovery rules or the Freedom of Information Act (FOIA). *Id*. at 2.

The Staff, DOE, and the State each filed supplements addressing these differences. "NRC Staff Supplement Regarding Proposed Order Regarding Privilege Logs," April 25, 2005 ("Staff Supplement"); "Department of Energy's Supplement Regarding the Proposed Case Management Order Regarding Privilege Designations and Challenges," April 25, 2005 ("DOE Supplement"); "State of Nevada's Memorandum in Support of Its Comments on the Department of Energy's Draft Case Management Order," April 25, 2005 ("State Supplement"). These differences were discussed at the May 4, 2005, case management conference, and as a result of those discussions, the PAPO requested that each party file a brief on "the issue of whether the initial LSN certification must include a redacted version of any document that would require

redaction under the Freedom of Information Act." May 11 Order at 3. As discussed below, the LSN regulations require only that, at the time of certification, a bibliographic header be provided for documents for which a privilege is claimed.

B. NRC Regulations Do Not Require Provision of Redacted Documents on the LSN Prior to Certification

The State asserts that "whenever formal discovery rules or FOIA would require production of a redacted version of a document in response to an initial request, that same production must be part of any initial LSN production and certification." State Supplement at 3. The State argues that its position is supported by 10 C.F.R. § 2.1001 and § 2.1003; the regulatory history of 10 C.F.R. Part 2, Subpart J; and previous statements of the PAPO Board. *Id*. at 3-5. To the contrary, the Staff believes that the plain language and the regulatory history of 10 C.F.R. Part 2, Subpart J, as well as previous PAPO orders in this proceeding, make it clear that redacted documents themselves do not have to be placed on the LSN as a condition for meeting the certification requirement of § 2.1009(b).

The NRC regulations regarding the LSN are set out in 10 C.F.R. Part 2, Subpart J. Section 2.1003(a)(4) clearly indicates that only a bibliographic header must be provided for documentary material for which a privilege is asserted.[1] In order to comply with the certification requirement in § 2.1009(b), each potential party[2] must certify that the documentary material specified in § 2.1003 has been identified and made electronically available. Thus, with respect to documentary material for which a privilege is asserted, a potential party must certify that a bibliographic header has been

[1] This is in contrast to § 2.1003(a)(1), which requires both an electronic file and a bibliographic header for other documentary material.

[2] For the purposes of the discussion of redacted documents, the use of the term "potential party" also includes parties (*i.e.* DOE, the Staff and the State) and interested governmental participants.

made electronically available as required by § 2.1003(a)(4).[3] There is no requirement in § 2.1009, or anywhere else in Subpart J, that a potential party must also certify that it has made available redacted versions of documents for which a privilege is claimed.

The State does not point to a specific section in Subpart J that links provision of redacted documents to a potential party's LSN certification. The State instead argues that its position is "consistent with the letter and spirit" of §§ 2.1003 and 2.1001. State Supplement at 3. The State seems to base its argument on the fact that § 2.1003 uses the words "documentary material" rather than "documents." State Supplement at 3; *See* Transcript of May 4, 2005, Case Management Conference ("Transcript") at 162-163. The State appears to assert that, under the definition of "documentary material" in § 2.1001, § 2.1003(a)(4) applies not to documents in their entirety but only to the specific "information" within the document to which the privilege applies. *Id*. This is a strained reading of Subpart J and is inconsistent with the regulations themselves and with the intent of the Commission as indicated by the Statement of Considerations published with Subpart J.

First, the regulations themselves make clear that "any written . . . or other documentary material" is a "document." 10 C.F.R. § 2.1001. In addition, the Commission itself clearly contemplated that the term "documentary material" would be used to define categories of documents that, in their entirety, would be subject to the LSN rule. The Commission stated that, "In determining which *documents* must be placed in the LSS by a LSS participant, the document must fall within the definition of 'documentary material' in 2.1001." *Submission and Management of Records and Documents Related to the Licensing of a Geologic Repository for the Disposal of*

[3] This reading is in accord with recent orders issued by the PAPO in this proceeding. *See U.S. Dep't. of Energy* (High Level Waste Repository: Pre-Application Matters), LBP-04-20, 60 NRC 300, 311; "First Case Management Order (Regarding Preparation of Privilege Logs), slip op. at 3 (Jan. 24, 2005).

High-Level Radioactive Waste, 54 Fed. Reg. 14925, 14933-34 (April 14, 1989).[4] There is no indication that the Commission intended that potential parties parse each document to determine which parts of it are "documentary material" and which are not and which parts are privileged and which are not.

Throughout the Statement of Considerations published with the LSS rule, the Commission, when referring to submission of material to the LSS, refers to "documents." For example, the Commission refers to the "use of the LSS for the submission and management of *documents* in the proceeding." 54 Fed. Reg. at 14933 (emphasis added). In its discussion of § 2.1003 of the LSS rule, the Commission says that that section requires submission of "an ASCII file, a bibliographic header, and an image for all *documents* generated by the LSS participant" and that "Submission of these *documents* must be made reasonably contemporaneous with their creation." *Id*. at 14934 (emphasis added). The Commission also states that "The submission of *documents* to the LSS is subject to the traditional privileges from discovery" and notes that a circulated draft that is subject to a claim of privilege (other than the deliberative process privilege, which is explicitly waived) "is not required to be submitted for entry in searchable full text to the LSS under § 2.1003." *Id.* at 14934-35 (emphasis added). The Commission also notes in the Statement of Considerations that "The submission requirements of § 2.1003 generally apply only to final *documents*." *Id*. at 14934 (emphasis added). Thus it is clear from both the text of Subpart J itself and from the Commission's longstanding view of the purpose of the LSN as expressed in the Statement of Considerations published with the original LSS rule, that the State is reading too much into the distinction between "documentary material" and "documents." The Commission's intent was to use the term

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[4] The LSS - Licensing Support System - was the predecessor to the current, web-based document management system now referred to as the LSN. While the LSS regulations were revised in 1998, there is no indication that the Commission intended to change the purpose of the term "documentary material." *See Procedures Applicable to Proceedings for the Issuance of Licenses for the Receipt of High-Level Radioactive Waste at a Geologic Repository*, 63 Fed. Reg. 71729 (Dec. 30, 1998).

"documentary material" to describe which categories of documents, not which portions of documents, should be placed in the LSN. For this reason, the State's position that redacted documents must be provided prior to certification is inconsistent with Subpart J.

The State also points to the Commission's statements in the preamble to the final LSS rule to the effect that the purpose of the LSS was to expedite the proceeding by eliminating the burdensome and time-consuming physical production of documents after filing of a license application and by eliminating equally burdensome and numerous FOIA requests. State Supplement at 3-4. However, nothing in these statements mandates a finding that redacted documents must be provided on the LSN prior to initial certification. Under § 2.1018(a)(1)(iii) potential parties can request access to any documentary material for which a bibliographic header only has been submitted. A timely request under § 2.1018(a)(1)(iii) would result in production of the requested documents well before the filing of an application and would eliminate any need for a potential party to file a FOIA request for the same information. Thus, the Commission's intent to expedite the proceeding by eliminating burdensome discovery procedures and FOIA requests is effectuated by requiring the provision of a bibliographic header, prior to certification, for documents for a privilege is asserted and by allowing potential parties an opportunity to then request access to those documents.

Finally, the State points to Commission and PAPO statements stressing the importance of electronic full text search capabilities to permit the parties to adequately review documents. State Supplement at 5; Transcript at 166-167. While § 2.1018(a)(1)(iii) does not specifically require potential parties to provide electronic access to documents requested under that section, the Staff and DOE Proposed Orders do in fact provide that all documents subject to a privilege, upon a request pursuant to § 2.1018(a)(1)(iii), would be provided in electronic form, either under a protective order or in redacted form. *See* Staff Proposed Order at 3-4 and DOE Proposed Order at 3-4. Thus, potential parties are provided with a mechanism for obtaining electronic access to

documents withheld under a claim of privilege. For this reason, it is unnecessary to require provision of redacted documents prior to LSN certification.

For the reasons discussed above, the Staff submits that the LSN regulations require only that a bibliographic header be provided prior to LSN certification for documents subject to an asserted privilege. Thus, the PAPO should not adopt a requirement that potential parties make available, via the LSN, redacted versions of these documents prior to certification.

II. Proposed Protective Order

Attached is a Joint Proposed Protective Order and Non-Disclosure Declaration agreed to by the Staff, DOE, and the State (Attachment 1). The one area where the parties did not reach agreement, and which is not addressed in the Proposed Protective Order, is the question of who receives copies of executed Non-Disclosure Declarations.

III. The Meaning of "Potential Parties" in 10 C.F.R. Part 2, Subpart J

A. Introduction

Pursuant to the May 11 Order, the parties were required to brief their answer on the meaning of "'potential parties' as it applies to this proceeding and specifically to receiving documents under a protective order and affidavit of non-disclosure." The NRC Staff's response is set forth below.

B. Discussion

As this Board has previously held, a regulation is interpreted according to its plain meaning unless, because of ambiguity, the regulatory history is consulted. *See U.S. Dep't of Energy* (High-Level Waste Repository), PAPO-00, 60 NRC 300, 302 (2004). Application of this principle to the instant matter shows that while there are ambiguities with respect to the term "potential parties" given its regulatory history, it seems to include any party that can access, and certify its submissions to the LSN. As so designated, the potential party is entitled to discovery of documents under protective order in the absence of a concrete showing of a risk of disclosure.

Support for the above interpretation of the meaning of potential parties can first be seen from analysis of the two prongs of the definition in 10 C.F.R. § 2.1001. The first prong of the definition is one who is "given access to the Licensing Support Network" which by the term "given access" suggests that there is an affirmative act that must happen prior to a party being able to access the LSN. However, this introduces some ambiguity because as noted, in the current worldwide web-based configuration of the LSN, anyone with access to the web can access the LSN without having to be "given" anything. *See* Transcript at 247-48.

Recourse to the regulatory history does not provide a conclusive answer. It does reveal that the access requirement, which was original to the regulation, seems to be an artifact of the LSS architecture, which, because of its limitations as a centralized data base, necessitated some prioritization as to who would be permitted to use it. *See generally* 54 Fed. Reg. 14925, 14946 (Apr. 14, 1989). Accordingly, to gain access to the LSS, a party had to meet the standing-like requirements to become a potential party as contained in 10 C.F.R. § 2.1008, which, in addition to requiring a potential party to petition the Licensing Board for access to the LSS, also required some showing of right, interest and ability to have their claims redressed by the proceeding. *See id.* at 14948. With the subsequent migration to web-based technology on the LSN, the apparent technological rationale for limiting a party's access no longer existed and the 10 C.F.R. § 2.1008 requirements were removed because as the Commission noted, "The requirements for petitioning for access during the pre-license application phase are not consistent with allowing *public access* to the electronic information." 63 Fed. Reg. 71729, 71734 (Dec. 30, 1998) (emphasis added). There is no evidence that at the time Subpart J was modified to incorporate the LSN, that "given access" meant other than to allow anyone with web tools to in turn access the LSN. *See id.* The foregoing suggests that there is no longer an affirmative requirement for a potential party to be

"given access" and that access means anyone who, as noted, can access the web. This in turn suggests a broader meaning of the term "potential parties."[5]

A broader meaning of "potential party" may also be suggested by the second prong of its definition which is to consent to comply with Subpart J regulations and the authority of the Board. Viewed on its plain terms, the text of the definition unambiguously states that someone only has to "consent" without imposing an affirmative prerequisite to making that consent known. The regulatory history is silent as to any requirement for other than ordinary adherence to the regulations and it implicitly suggests there is none. Under the now-stricken 10 C.F.R. § 2.1008, a party, as noted, was required to formally petition for access to the LSS and after approval of its access petition, a party was separately expected to "comply with the regulations set forth in this subpart . . . and agree to comply with the orders of the Pre-license Application Licensing Board" which suggests that the act of gaining written access through petition, and compliance with the regulations, were two separate actions with the first being an affirmative act and the second not. 54 Fed. Reg. at 14948. Furthermore, where an affirmative act of consent is required elsewhere in relevant Part 2 regulations, it is specified in the text as is the case with a consent order. *See* 10 C.F.R. § 2.338(g)-(h); *See generally Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Units 1 and 2), LBP-84-10, 19 NRC 509, 515 (1984) ("We have merely interpreted two sections of the regulation to be consonant with one another, a standard method of regulatory interpretation"). Based on this and the prior discussion of access, the meaning of potential parties, as defined in 10 C.F.R. § 2.1001, at least during the initial phase of discovery, seems to be anyone who can access the LSN via the web and provides ordinary consent to Subpart J regulations and the authority of the Board.

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[5] The regulatory history is silent as to the implications of exponentially increasing the number of potential parties and the attendant impact on discovery, for example, under 10 C.F.R. § 2.1018, that results from a broad interpretation of potential parties to include anyone who can access the LSN via the web.

To retain its status, however, a party must comply with the requirements of 10 C.F.R. § 2.1003 and § 2.1009, which, by their interlocking terms, become mandatory 90 days after certification by DOE. *See* 10 C.F.R. § 2.1003(a). Unlike the requirements of § 2.1001, these provisions explicitly *do* place an affirmative obligation on all potential parties to certify their inputs to the LSN whether they enter documents or not. The requirements of 10 C.F.R. § 2.1009 plainly support this. The text of § 2.1009(a) is directed to "Each potential party" and § 2.1009(b) requires an official of that party to certify the availability of its documents under § 2.1003. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1), LBP-95-17, 42 NRC 137, 145 (1995) ("[When] the meaning of the regulatory language is clear and obvious, the regulatory language is conclusive"). Additional support for this conclusion is contained in the regulatory history. From the outset, the LSS, and later the LSN, were intended to expedite discovery and reduce surprises with a key characteristic of that being the early disclosure of documents. *See* 54 Fed. Reg. 14925-26; 63 Fed. Reg. at 71735. In this respect, 10 C.F.R. § 2.1003 and § 2.1009 contain requirements intended to serve those interests and the more fundamental principle of fairness in addition to mitigating the burden on the network administrator. Additionally, certification also allows potential parties with initially no documents to later submit documents under 10 C.F.R. § 2.1003(e).

Where a potential party certifies that it does not have any documents for submission under 10 C.F.R. § 2.1003(a) and otherwise meets the requirements of 10 C.F.R. § 2.1009(b), its status as a potential party is not disturbed. There is no indication in the regulatory history that actual production of a discoverable document was a literal necessity. *See* 63 Fed. Reg. at 71737, as amended 66 Fed. Reg. 29465 (May 31, 2001); 69 Fed. Reg. 2264 (Jan. 14, 2004); 69 Fed. Reg. 32848 (June 14, 2004). Moreover, the same history states that these regulations would be applied "in a manner that allows flexibility in implementation" to minimize impacts on small intervenors and potential intervenors. 63 Fed. Reg. at 71737. Accordingly, 10 C.F.R. § 2.1003 and

§ 2.1009 do apply to the definition of "potential parties" for purposes of this proceeding, whether they ultimately submit documents or not.

During the 90-day period after DOE's LSN certification, and subsequent to this period, assuming a potential party complies with 10 C.F.R. § 2.1003 and § 2.1009, then that party under 10 C.F.R. § 2.1018 (a)(1)(iii) will have access to documents under a protective order if it signs an affidavit of non-disclosure. Neither in the text of Subpart J, or the regulatory history, is there support for limiting or otherwise requiring an additional showing for a potential party to discover material under protective order merely because of its status as a potential party. *See* 54 Fed. Reg. 14925 as amended at 56 Fed. Reg. 7787 (Feb. 26, 1991); 63 Fed. Reg. 71729; 66 Fed. Reg. 29453; 66 Fed. Reg. 55732 (Nov. 2, 2001); 69 Fed. Reg. 2182; 69 Fed. Reg 32836. To the contrary, the regulatory history and structure indicates that potential parties were expected to be full participants in the initial discovery process as indicated by application of the requirements of 10 C.F.R. § 2.1003 and § 2.1009 to them. *See id*.

Additional support for not prematurely excluding potential parties from access to material under protective order comes from historical practice under which it was "assume[d] protective orders will be obeyed unless a *concrete showing* to the contrary is made."[6] *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-764, 19 NRC 633, 644 n. 14 (1984) (citing *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 25 (1983) (emphasis added). As the Board in *Houston Lighting and Power Co.* noted, "this Commission and its adjudicatory boards have always proceeded on the assumption that the terms of all protective orders will be scrupulously observed by everyone who acquires confidential information under such an order." *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station 1), ALAB-535,

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[6] The Staff recognizes that arguably, admitted intervenors may have a greater motivation to obey a protective order than potential parties. Yet the motivation of a potential party to obey a protective order should not be discounted as that party would lose any ability to gain admission to the hearing in addition to being subject to other sanctions.

9 NRC 377, 400 (1979). Moreover, the Board's assumption of compliance with protective orders in NRC proceedings has proven to be accurate with only one exception. In that case, the Massachusetts Attorney General's office was cautioned against releasing bus company names that had been protected from disclosure due to threats from groups in opposition to a proposed plant. *See Public Svc. Co. of New Hampshire* (Seabrook Station, Units 1 and 2), LBP-88-28, 28 NRC 537 (1988).

Based on this, and the absence of contrary provisions in Subpart J, parties that intend to exclude potential parties from viewing material under protective order must make some concrete showing to the Board pursuant to 10 C.F.R. § 2.1010(c)(1). Finally, with regard to Safeguards and other sensitive material, the requirements of "need to know" and trustworthiness would, of course, apply. *See Duke Energy Corp*. (Catawba Nuclear Station, Units 1 and 2), CLI-04-06, 59 NRC 62, 71 (2004).

For purposes of this proceeding, the term "potential parties" is ambiguous due to the uncertainty of the access requirement although based on the regulatory history. However, it seems to mean anyone who can access the LSN via the web and properly certify their documentary submissions. A party fitting the definition of a potential party is permitted access to documents under protective order if it properly executes an affidavit of non-disclosure.

CONCLUSION

For the foregoing reasons, the Staff requests that the PAPO not adopt a requirement that potential parties make available, via the LSN, redacted versions of privileged documents prior to certification and that the PAPO adopt the attached Joint Proposed Protective Order. In addition, the Staff concludes that there is ambiguity in the regulations with regard to the meaning of "potential parties," but that it seems to mean anyone who can access the LSN.

Respectfully submitted,

/RA/

Shelly D. Cole
Counsel for NRC Staff

/RA/

Harry E. Wedewer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 16th day of May 2005

ATTACHMENT 1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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)	)	

MEMORANDUM AND ORDER
(Protective Order)

A. This Protective Order governs the disclosure and use of protected material, as defined in Paragraph B, produced in this proceeding. Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-license Application Presiding Officer Board ("PAPO Board"), another Presiding Officer in this proceeding, or the Commission.

B. The term "protected material" means:

1. documentary material, as defined by 10 C.F.R. § 2.1001, in any form (including electronic form) produced by a participant[1] in this proceeding and designated by the participant producing it as protected material;[2]

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[1] The term "participant" means any party, potential party, or interested governmental participant that is entitled, under an order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission, to receive documents in this proceeding subject to this Protective Order and Non-Disclosure Declaration. However, the provisions of this Protective Order do not apply to NRC employees, contractors, or consultants with respect to protected material required to be submitted to the NRC by statute, regulation, or license condition or to protected material submitted to the NRC in support of a requested licensing action. Disclosure of such protected material is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25.

[2] A participant may designate as protected material any documentary material that it believes, in good faith, is subject to a privilege under 10 C.F.R. § 2.1006 or under any order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission. Protected material

(continued...)

2. any information contained in or obtained from protected material;

3. any other material that is made subject to this Protective Order by the PAPO Board, another Presiding Officer in this proceeding, or the Commission;

4. notes of protected material;[3] and

5. copies of protected material.

C. The participant producing protected material shall mark it on each page as "PROTECTED MATERIAL." Individuals with access to protected material pursuant to this Order may make copies of and take notes on the protected material, but such copies and notes become protected material and must be marked on each page as "PROTECTED MATERIAL."

D. Only participants and counsel, consultants, and others representing a participant, who have executed the attached Non-Disclosure Declaration may have access to protected material. Protected material shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the minimum number of counsel, consultants, or other participant representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding.

E. Participants, and counsel, consultants, and others representing a participant, who receive any protected material shall maintain its confidentiality as required in the attached Non-Disclosure Declaration, the terms of which are hereby incorporated in this Protective Order.

F. Participants, and counsel, consultants, and others representing a participant, who receive any protected material shall take all reasonable precautions necessary to ensure that protected

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[2] (...continued)
does not include classified information, safeguards information, unclassified controlled nuclear information, and any similarly sensitive unclassified information that is covered by a separate PAPO Board order in this proceeding.

[3] "Notes of protected material" means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses information in protected material.

material is not distributed to unauthorized persons. Reasonable precautions include maintaining all protected material in a secure place and limiting access to that material to persons authorized to receive such material. Any person who receives protected material shall take all reasonable precautions to ensure that persons under their supervision or control comply with this Protective Order.

G. Protected material shall remain available to all participants 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 protected material is concluded and no longer subject to judicial review. Absent further order, the participants shall, within fifteen (15) days of the later date described above, return the protected material (excluding notes of protected material) to the participant that produced it, or shall destroy the information, except that copies of filings, official transcripts, and exhibits in this proceeding that contain protected material, and notes of protected material may be retained, if they are maintained in a secure place. Within such time period, each participant shall also submit to the producing participant an affidavit stating that, to the best of its knowledge, all protected material and all notes of protected material have been returned or have been destroyed or will be maintained in accordance with the above. To the extent protected material is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

H. All copies of all documents filed in this proceeding that disclose information contained in protected material shall be filed and served in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission.

I. Nothing in this Protective Order shall prevent any participant from challenging the designation of material as protected. Such a challenge shall be conducted and resolved in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission

J. Participants, and counsel, consultants, or any other individual representing a participant, who have reason to suspect that protected material may have been lost or misplaced or that protected material has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the PAPO Board, or other appropriate Presiding Officer in this proceeding, promptly of those suspicions and the reasons for them.

K. Any violation of the terms of this Protective Order, including a violation of Paragraph F, or a Non-Disclosure Declaration executed in furtherance of this Protective Order may result in the imposition of sanctions as the PAPO Board or the Commission may deem appropriate, including but not limited to referral of the violation to appropriate bar associations and/or other disciplinary authorities, including the Department of Justice for criminal prosecution, if appropriate.

L. The PAPO Board, another Presiding Officer in this proceeding, or the Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding. The participants shall be afforded notice and an opportunity to be heard before any such alteration or amendment comes into effect.

It is so ORDERED.

The Pre-License Application
Presiding Officer Board

_____

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)
	)
U.S. DEPARTMENT OF ENERGY	)
	)
(High-Level Waste Repository)	)

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that access to protected material is provided to me pursuant to the terms and restrictions of the Protective Order, dated _____; that I have been given a copy of and have read this Protective Order; and that I agree to be bound by it. I understand that the contents of any protected material, as defined in that Protective Order, shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this Declaration or the Protective Order, which incorporates the terms of this Declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the PAPO Board, another Presiding Officer in this proceeding, or the Commission may deem to be appropriate, including, but not limited to, referral of the violation to appropriate bar associations and other disciplinary authorities, including the Department of Justice for criminal prosecution, if appropriate.

WHEREFORE, I do solemnly agree to protect such protected material as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____

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(High-Level Waste Repository: Pre-Application Matters)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the "SECOND NRC STAFF RESPONSE TO ISSUES IDENTIFIED AT FIRST CASE MANAGEMENT CONFERENCE" in the above captioned proceeding have been served on the following persons this 16th day of May, 2005, by electronic mail, and/or Electronic Information Exchange as denoted by an asterisk (*).

Thomas S. Moore, Chair *
Administrative Judge
U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3 F23
Washington, D.C. 20555
E-Mail: papo@nrc.gov

G. Paul Bollwerk, III *
Administrative Judge
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