

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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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

July 6, 2007

ORDER

(Questions to the NRC Staff and Other Potential Parties Regarding Access to Safeguards Information in the HLW Proceeding)

On May 23, 2007, the Pre-License Application Presiding Officer (PAPO) Board held a case management conference dealing with the subject of developing procedures for handling sensitive unclassified information, including Safeguards Information (SGI). To aid it in developing such procedures the Board directed NRC Staff and the Department of Energy (DOE) to answer a series of questions. Specifically, the Board posed a number of questions concerning the fingerprint, criminal history, and background check components of the Commission's proposed rule on the protection of SGI. See 71 Fed. Reg. 64,004 (Oct. 31, 2006). Recognizing that these components hold the potential of significant delay in providing access to SGI by proceeding participants, the Board had hoped that the Staff's answers would provide sufficient information to aid it in devising procedures to compress the time to complete these time-consuming steps.

For whatever reason, the Staff's answers, such as they were, lacked precision and provided little useful information or reason to be encouraged that the process could be expedited. Nevertheless, with an eye toward alerting the Commission to the prospect of significant delays in expeditiously completing the document discovery phase of the High Level Waste proceeding occasioned by the process for granting access to SGI, the Board needs a more complete understanding of several steps in the process.

Accordingly, each of the following questions are posed to the Staff, the Nuclear Energy Institute (NEI), or the State of Nevada (State). Except for Question 4.a., directed to the State, the identified participant shall provide a written answer to each question identifying them by July 31, 2007. Because Nevada's answer to Question 4.a. provides the foundation for a subsequent question posed to the NRC Staff, Nevada shall file its answer to that question by July 17, 2007. Each written answer should repeat the questions using the identified numbering and lettering scheme and then set forth the answer. If a participant cannot answer any question or questions, the participant shall so state and explain why the question cannot be answered.

1. (NEI) Background Investigations Conducted by Licensees

Under the Proposed Rule, potential parties in the High Level Waste (HLW) proceeding will be required to undergo a "background check" in addition to the criminal history check currently required in order to access Safeguards Information (SGI). See 71 Fed. Reg. at 64,061 (Proposed 10 C.F.R. § 73.22(b)(1)-(2)). Licensees will also have to perform these "background checks" for SGI access. Id.

Licensees are currently required to conduct background investigations for individuals who will have unescorted access authorization at a licensee's facility. 10 C.F.R. § 73.56(b)(2)(i).

These background investigations are "designed to identify past actions which are indicative of an

individual's future reliability within a protected or vital area of a nuclear power reactor" id.; the Commission has stated they are "are arguably more comprehensive" than the background checks for SGI. See 71 Fed. Reg. at 64,012. In addition to the background investigation, the licensee must conduct a psychological assessment and make behavioral observations before granting unescorted access. 10 C.F.R. § 73.56(b)(2). Because neither potential parties nor licensees have any practical experience applying the new proposed "background check" process for access to SGI in 10 C.F.R. Part 73, it is difficult for the Board to assess the practicality or reasonableness of the time-lines indicated by the Staff at the case management conference for the processing of background checks in this proceeding. However, licensees have for years performed the more detailed "background investigations" for the authorization of unescorted access and these, although not identical in depth or scope, might provide the Board with a useful example or benchmark.

While the background investigations conducted for access authorization under 10 C.F.R. § 73.56 are regulatory requirements of the NRC, it is the Board's understanding that the licensees, with some assistance and guidance from NEI, are responsible for the development of investigation procedures and their implementation. NEI should the answer following questions directed to them. We do not expect NEI to perform any formal survey of its members regarding their specific practices. Rather, in answering, NEI should provide its general understanding of the Section 73.56 process. We would hope that NEI would provide information from the licensees' point of reference to complement the information supplied by the NRC Staff.

- a. 10 C.F.R. § 73.56(b)(2)(i) Process.
 - i. Explain the process by which the background investigations under 10 C.F.R. § 73.56(b)(2)(i) are conducted.
 - ii. Identify the Staff's responsibilities in the process and responsibilities performed wholly by the licensee and/or NEI.

- iii. What guidance has the Staff provided regarding how the investigation should be conducted? Provide a copy of any guidance.
 - iv. Is the licensee permitted to utilize outside contractors in the conduct of background investigations?
 - 1) If so, to what extent?
 - 2) What functions may an outside contractor perform?
 - 3) Must the licensee make the final determination with respect to the background investigation?
 - 4) Approximately how many companies perform these background checks on behalf of licensees or assist licensees in the process?
- b. 10 C.F.R. § 73.56(b)(2)(i) Time-lines
- i. How long does it take to complete an average background investigation (which excludes the other requirements of 10 C.F.R. § 73.56(b)(2), such as psychological tests) for a new employee (i.e., an employee who has not been employed previously by a licensee of the NRC) who is a U.S. citizen? If NEI is unable to provide an average time estimate, provide a range of time estimate.
 - ii. Are the investigations comprised of multiple components? (i.e., criminal history, employment history, character). If so, how long does each component take to complete?
 - iii. The NRC has stated that its goal is a “72-hour turnaround” for licensee fingerprint reviews.¹ In the view of NEI, has the Staff achieved this goal? If not, what is the approximate length of a fingerprint review submitted today?
 - iv. If any portion of the investigation is performed by a contractor, provide a brief description of each such component and the typical time required for completion of such component.
- c. How long does it take to complete an average background investigation for a new employee who is a foreign national? If NEI is unable to provide an average time estimate, provide a range of time estimate for each investigation component.
- d. Do Licensees have a process for expedited background investigations? If so, explain the process and provide an estimate of time required to perform an expedited review.

¹ See, e.g., Jenny Weil, Companies Begin Implementing Order, Inside NRC, Vol. 24, No. 6 (Mar. 25, 2002) at 2.

2. (NRC) Background Investigations under 10 C.F.R. § 73.56(b) and SGI Access in HLW

Section 73.56(b)(2)(i) states that the “background investigation” required for unescorted access to a licensee’s facility must “[a]s a minimum, . . . verify an individual’s true identity, and develop information concerning an individual’s employment history, education history, credit history, criminal history, military service, and verify an individual’s character and reputation.” The proposed rule regarding access to safeguards information contains a similar definition for the term “background check,” stating that it “includes, at a minimum, a criminal history check, verification of identity, employment history, education, and personal references.” 71 Fed. Reg. at 64,059 (Proposed 10 C.F.R. § 73.2). Recognizing that the two processes might not be identical and that the Staff might be required to apply two different standards, nevertheless, it appears that there are great similarities between the two.

- a. Based on the Staff’s understanding of applicants’ background investigation process, is the time required to perform the background check for access to SGI (*i.e.*, 4 to 6 months) similar to the amount of time required to perform the “background investigation” in § 73.56?
- b. If the time required to perform the background check under the proposed rule for access to SGI is greater than the time required to perform “background investigations” under § 73.56, explain why.
- c. Could the 10 C.F.R. § 73.56(b)(2)(i) background investigation process be used as a model for processing HLW proceeding participants?
- d. How could the background investigation process be used as a model?
- e. Can the Staff commit to processing HLW participant fingerprint reviews in the same amount of time it takes to process licensee fingerprint reviews (ideally, 72 hours)?
- f. Other than the additional requirements of 10 C.F.R. § 73.56(b)(2)(ii) & (iii) (requiring a psychological assessment and behavioral observation), how is the background investigation process different than processing potential parties in the HLW proceeding?

3. (NRC) Time Estimates for Background Checks Under the Proposed Safeguards Rule

At the May 30, 2007, case management conference, the NRC Staff estimated that it will take between four and six months to complete an entire background check and determination regarding the trustworthiness and reliability of each United States citizen who applies for access to SGI. See Tr. at 1126, 1160-61. After probing from the Board, the Staff elaborated further regarding the process and time estimates. The Staff stated that after a requestor submits to the NRC a complete package of required forms (fingerprint cards, a credit history release form, and Standard Form - 85) and two forms of identification, the NRC would send the entire package to the Office of Personnel Management (OPM) for processing. Tr. at 1140-141. From this point, the Staff indicated that it would expect an initial product from OPM regarding the results of the fingerprint criminal history check in approximately 40 days. Tr. at 1141. From this point forward, the Staff waits for the results of OPM's complete background investigation on the "entire package," which could take 3 to 5 months on average. Tr. at 1166. The Staff further represented that, after receiving the final package from OPM, the Office of Administration would take "between 20 to 30 days" to make a determination with regard to the trustworthiness and reliability of the requestor. Tr. at 1164-165.

- a. Initiation of Background Check and Process.
 - i. How long will it take the NRC to submit a complete package submitted by a requestor to OPM?
 - ii. Are there any intermediate steps, or does the Staff immediately forward the package to OPM?
 - iii. After the NRC receives the results of the initial criminal history check from OPM, how long will it take the NRC to inform a requestor as to the results of that check?

- iv. At the case management conference the Staff stated that a requestor will be required to submit paper fingerprint cards. May a requestor submit electronic fingerprints?
 - v. Would the use of electronic fingerprint processing, instead of paper cards, expedite the process?
- b. Trustworthiness and Reliability Determinations.
- i. Is there a formal practice by which the NRC Office of Administration, which makes determinations of trustworthiness and reliability, prioritizes its workload?
 - ii. Do they simply apply a first-in first-out method?
 - iii. Will the Office of Administration employ decision-makers to make determinations on trustworthiness and reliability for access to SGI separate from decision-makers who act on NRC employment and security clearance determinations?
 - iv. Will SGI request determinations be processed with other determinations, including security clearances (i.e., will SGI determinations be placed in the same pile as all other files)?
 - v. Because the NRC will be confronted with only a limited number of background checks for adjudicatory participants seeking access to SGI and the NRC will have advance notice regarding the exact number of background checks and the dates submitted, is there any reason that would, once the Office of Administration receives a final product from OPM, prevent the NRC from prioritizing determinations for those adjudicatory participants?

4. (NRC) (State) Foreign Nations and Background Checks under the Proposed Safeguards Rule

At prior case management conferences, the State of Nevada indicated that some number of its experts, which might require access to SGI, are foreign nationals. Tr. at 740-741, 1183. Because the proposed rule does not expressly address procedures to be followed with respect to foreign nationals and access to SGI, Nevada's experts present unique circumstances that must be anticipated and preemptively addressed so that this proceeding may move forward in an efficient and expeditious manner.

- a. (State) Although Nevada might not be in a position to predict exactly which of its experts will be utilized with respect to unidentified future documents, advanced warning might provide the Staff and Nevada with the opportunity to remedy quickly any time delays associated with foreign background checks. Thus, Nevada should provide a list including the country of citizenship and country of residence of its non-U.S. citizen experts who might be required to address topics involving SGI, as defined in Part 73 and Section 147 of the AEA. Presumably, this list will not include each foreign expert that Nevada intends to utilize in this proceeding, only those that might reasonably be required to access SGI. Nevada should not include any identifying information (i.e., name, C.V., etc.) except for country of citizenship and country of residence. Nevada shall submit such a list by July 17, 2007, so that the NRC may answer the subsequent question utilizing the information provided.
- b. (NRC) Under the NRC's arrangement, contract or otherwise, with OPM, will OPM be responsible for conducting the background checks of non-resident foreign nationals? If not, what entity will conduct such background checks? Will OPM be responsible for conducting the background checks of U.S. resident foreign nationals?
- c. (NRC) With respect to (1) citizens of the United Kingdom, and (2) citizens from any other country identified by Nevada in Question 4.a. as the country of citizenship or residence of one or more of its relevant experts:
 - i. Provide the Staff's best estimate of the time required to process the fingerprints and initial information.
 - ii. Provide the Staff's best estimate of the time required for the NRC to transmit this information to OPM, or other responsible entity.
 - iii. Is this transmittal done by a federal employee or a contractor?
 - iv. If a contractor is involved in this transmission process, does the contract contain any time limits for such transmissions?
 - v. Provide the Staff's best estimate of the time required for OPM, or other responsible entity, to conduct the background investigation.
 - vi. Provide the Staff's best estimate of the time required for the NRC, once it has received any and all information from OPM, or other responsible entity, to make a determination of trustworthiness and reliability.
- d. (NRC) Other than the prompt submission of a request for a pre-clearance, Tr. at 1060-61, are there any steps that a non-citizen seeking access to SGI can take to expedite the process?

5. (NRC) OPM and Background Checks under the Proposed Safeguards Rule

At the May 30 case management conference, the Staff indicated that because the background checks are to be conducted by OPM, the time it takes to complete a background check is out of its hands. See Tr. at 1131-1132.

- a. NRC's Arrangement with OPM.
 - i. Has the Staff entered into a contract with OPM specifically dealing with the performance of background checks for access to safeguards information by NRC adjudication participants?
 - ii. If not, what is the vehicle by which NRC utilizes OPM's services to conduct such checks?
- b. Contract or Agreement Obligations.
 - i. Does the NRC's contract or other applicable arrangement (as specified in Question 5.a.ii.) with OPM contain any provisions requiring that background checks be performed in a specified amount of time?
 - ii. Does the NRC's contract or other applicable agreement with OPM provide any enforceable benchmarks for performance of a background check?
 - iii. If so, what are those benchmarks or timetables?
- c. Does the NRC have any recourse if a background investigation were to be unreasonably delayed?
- d. Does the NRC's contract or other applicable agreement provide for the availability of expedited processing of specific classes of background checks, such as those checks for NRC adjudication participants?
- e. Nature of NRC's Contract or Agreement with OPM.
 - i. Is the NRC's contract or other applicable agreement with OPM regarding the performance of background checks for access to SGI, related to, negotiated in concert with, or part of the NRC's contract with OPM to perform background checks for NRC employment and/or NRC employee security clearances?
 - ii. If so, does the NRC have the ability to prioritize the checks being performed by OPM?

- iii. May the NRC require OPM to process a specific check or type of check before others?
- iv. Has the NRC's contract or other applicable arrangement with OPM with regard to background checks for access to SGI been finalized?
- v. If not, are there provisions the NRC might include so that the processing of background checks for access to SGI in the High-level Waste proceeding can proceed in an efficient and expeditious manner?

6. (NRC) The Use of Contractors, Besides OPM, to Perform Background Investigations

At the May 30, 2007, case management conference, the Staff suggested to the Board that despite the 4 to 6 month turnaround time for background checks there were no reasonable alternatives to the use of OPM because if "[the Staff] attempted to contract it out separately . . . [it] would actually be longer to put a contract in place to get a different organization." Tr. at 1131. At the case management conference the Staff stated that the total cost of each individual background check is \$172.50. Tr. at 1145. As we noted above, the number of possible requestors of SGI that have demonstrated a need to know and require a background check in this proceeding and future COL proceedings is limited. Accordingly, the total value of a contract to perform background checks in the HLW proceeding and future COL proceedings would fall far below \$1 million in value. With the preceding in mind, the Staff shall answer the following questions:

- a. If ordered by the Commission, what is the shortest period of time required to put a contract worth less than \$1 million to conduct background checks for HLW adjudication participants into place?
- b. Are there any existing contracts that could be modified to include conducting background checks for HLW adjudication participants?

- c. Under such a contract, what is the shortest period of time in which a background check and determination regarding trustworthiness and reliability could be completed?

It is so ORDERED.

The Pre-license Application
Presiding Officer Board*

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 6, 2007

* Judge Karlin does not join the majority order and will be filing a dissent.

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 (QUESTIONS TO THE NRC STAFF AND OTHER POTENTIAL PARTIES REGARDING ACCESS TO SAFEGUARDS INFORMATION IN THE HLW PROCEEDING) have been served upon the following persons either by Electronic Information Exchange or electronic mail (denoted by an asterisk (*)).

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(QUESTIONS TO THE NRC STAFF AND OTHER
POTENTIAL PARTIES REGARDING ACCESS TO
SAFEGUARDS INFORMATION IN THE HLW PROCEEDING)

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[Original signed by R. L. Giitter] _____
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 6th day July of 2007