

August 1, 2007

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))	

THE DEPARTMENT OF ENERGY'S COMMENTS ON THE PROPOSED
THIRD CASE MANAGEMENT ORDER

On July 10, 2007, the Pre-License Application Presiding Officer (PAPO) Board issued its Proposed Third Case Management Order (PTCMO). The PAPO Board directed that all interested potential parties could file comments on the PTCMO by August 1, 2007. These are the Department of Energy's (DOE) comments on the PTCMO:

1. Part I. Paragraph D, Page 1. DOE recommends that the definition be modified to read: "Naval Nuclear Propulsion Information" or "NNPI" for purposes of this Third Case Management Order means 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 the extent Freedom of Information Act (FOIA) disclosure obligations do not apply to the information because, under FOIA Exemption 3, the information is specifically exempt from disclosure by statute (here 10 U.S.C. § 130). The current proposed definition uses the term "information created and controlled by the Naval Nuclear Propulsion

Program.” That wording might be construed to be limited to documents created by the Naval Nuclear Propulsion Program and not to derivative documents created by participants who obtained access to NNPI through this proceeding. By defining NNPI as a class of information that is exempt from FOIA, DOE’s alternative language makes clear that the definition applies even to derivative documents in this proceeding. This is similar to the definitions of OUO and UCNI which speak in terms of information without regard to the entity that creates a document.

2. Part I, Paragraph E, Page 2. DOE recommends that the definition be modified to read: “Official Use Only Information” or “OUO Information” is DOE or NRC information to which FOIA disclosure obligations do not apply because of either FOIA Exemption 2 or FOIA Exemption 3. DOE’s proposed definition does not characterize the nature of either exemption, and thus allows the originating agency to predicate a privilege claim on any ground that the case law recognizes under the exemptions.

3. Part II, Paragraph A, Page 3. On line 6, insert the word “be” between “will addressed.”

4. Part II, Paragraph A, Footnote 2, Page 4. The reference to DOE Order 471.2A (Information Security Program) should be deleted. This order has been cancelled, and the other DOE orders referenced in the footnote contain all the pertinent protection requirements.

5. Part II, Paragraph B, Page 4. DOE recommends that the phrase “originator of sensitive unclassified information” in the first sentence be modified to read: “federal agency that originated the sensitive unclassified information contained in a document.” Since the definition of “originator” means a “potential party that creates and asserts that a document” is exempt, the term “originator” is ambiguous in the context of this paragraph as applied to derivative documents that reflect SUI obtained through this proceeding but that are authored by non-federal agencies. The proposed change would make clear that the originating federal agency is intended

here. Similar changes are recommended for Part VII, Paragraph A.3, Page 14, because a non-federal originator does not have the authority to find that all or part of previously designated SUI does not require protection.

6. Part II, Paragraph C.1, Page 4. After the phrase “inadvertently produces” -- which appears twice in this paragraph -- insert the phrase: “or that subsequently determines that a previously produced document contains sensitive unclassified information.” The proposed formulation is consistent with Paragraph II.C.2 and is appropriate to give full relief to the situation contemplated in that paragraph. Paragraph II.C.2 permits a potential party that subsequently determines a document contains SUI to remove the document from the LSN. However, it does not address reclaiming the document from other parties. The proposed addition to Paragraph II.C.1 makes clear that relief is available.

7. Part III, Paragraph A.1, Page 6. At the end of the first sentence, insert: “to the extent a redacted version can be provided consistent with Paragraph III.A.3.” The current formulation could be construed to require a redacted version for every SUI document in all circumstances. However, Paragraph III.A.3 allows the possibility that a particular SUI document cannot be redacted because the SUI cannot reasonably be segregated. Paragraph III.A.1 should be modified as requested to eliminate this potential discrepancy with Paragraph III.A.3.

8. Part III, Paragraph B, Page 7. DOE recommends that the phrase “a diligent good faith effort to include” be inserted in the sentence following the word “make.” That is the standard already applicable to monthly updates following certification, and DOE believes that it is appropriate to apply the same standard to DOE’s initial certification for SUI documents. The redaction of SUI documents for public release entails a more intricate and time-consuming process than redactions for the primary and secondary legal privileges, in order to avoid

unauthorized releases of SUI. SUI documents that first become available towards certification, therefore, may not be able to be redacted as quickly as those other kinds of privileged documents. DOE will make every effort to have completed the redaction of its SUI documents by certification, but the recommended phrase would allow some tolerance for this special class of documents.

9. Part III, Paragraph C, Page 7. On lines 3 and 4, the phrase “sensitive unclassified information available on the LSN” erroneously appears twice.

10. Part III, Paragraph D, Page 7. At the end of the first sentence, insert: “to the extent a redacted version can be provided consistent with Paragraph III.A.3.” Same issue as with Paragraph III. A.1.

11. Part IV, Paragraph A.2, Page 8. DOE recommends deleting “in this proceeding” from the end of the first sentence. NNPI cannot be lawfully disclosed to any person who represents a foreign government, foreign private interest, or foreign national, except as allowed by a government to government agreement or as authorized by the Chief of Naval Operations. The current provision arguably limits the prohibition to persons who represent such foreign interests in this proceeding, whereas the restriction applies regardless of the scope, purpose, or forum of the representation.

12. Part IV, Paragraph B, Page 9. DOE recommends adding a reference to § 127 of the AEA in the last sentence of this paragraph. That is an additional statutory authority for DOE’s ability to restrict foreign access to export controlled/applied technology OUO information.

13. Appendix A, Paragraph D.3, Page 2. In the last sentence, change “should” to “must.” The word “should” could be interpreted as advisory, while “must” more clearly indicates a requirement. Make confirming changes in Paragraph D.3 of Appendices B and C.

14. Appendix B, Paragraph C, Page 2. The last sentence of this provision is ambiguous. It is not clear whether the phrase “that contains OUO information” applies (i) to each page that contains OUO information or (ii) each document that contains OUO information. In the first case, only those pages that contain OUO information would be marked. In the second case, every page would be marked, regardless of whether a given page actually contained OUO information. While either interpretation is useful depending on the circumstances and should be allowed, the intent is unclear. DOE recommends the following alternative language to address this: In addition, the words “Official Use Only” (or ‘OUO’ if space is limited) must be placed on those pages that contain the OUO information, although it also is permissible to similarly mark every page of a document that contains OUO information.

15. Appendix B, Page 3, addition of new paragraph after Paragraph D.5. Add the following paragraph: “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.” This method is allowed and is the same as the equivalent requirement concerning UCNI.

16. Appendix C, Paragraph D.4, Page 2. Replace “UNCI” with “UCNI.”

17. Appendix C, Paragraph D.5, Page 3. Delete the following language: “or an individual...being transmitted.” Add the following paragraph: “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.” Hand-carrying a document should not be included in the “Transmission by Mail” paragraph.

Respectfully submitted,

U.S. DEPARTMENT OF ENERGY

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Dated August 1, 2007

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

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THIRD CASE MANAGEMENT ORDER
CERTIFICATE OF SERVICE

I certify that copies of the foregoing THE DEPARTMENT OF ENERGY'S COMMENTS ON THE PROPOSED THIRD CASE MANAGEMENT ORDER in the above captioned proceeding have been served on the following persons on August 1, 2007 by Electronic Information Exchange.

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