

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

_____)	Docket No. PAPO-001
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD01
(High-Level Waste Repository))	May 30, 2008
_____)	

**U.S. DEPARTMENT OF ENERGY’S PARTIALLY UNOPPOSED MOTION FOR
PROTECTIVE ORDER GOVERNING CLASSIFIED INFORMATION**

The U.S. Department of Energy (“DOE”) expects to submit to the NRC its License Application (“LA”) for a high-level waste repository at Yucca Mountain, Nevada, in June 2008. A small portion of the LA contains classified information related to naval spent nuclear fuel, for which the special procedures contained in 10 CFR Part 2, Subpart I, would govern. DOE will allow access to classified information to certain authorized individuals after DOE submits the LA next month, but only if the Commission has issued a suitable Protective Order. Accordingly, there is some urgency that a Protective Order be issued.

DOE is submitting this request to the Commission and not to the Pre-License Application Presiding Officer (“PAPO”) Board or Advisory PAPO Board for three reasons. First, those Boards currently lack the authority to issue a Protective Order that governs handling of Classified Information in the Yucca Mountain licensing proceeding. Accordingly, only the Commission can enter this Order in a timeframe to allow access next month. Second, the handling of Classified Information implicates national security to which the Commission should be directly involved. And third, DOE expects that the Commission’s imprimatur on this Order—rather than a Board’s—will reduce litigation over its interpretation and implementation,

particularly with the issue Nevada raises (discussed below).

To streamline Commission issuance of a Protective Order, and to comply with the consultation requirement in 10 CFR § 2.323(b), DOE has already consulted and received approval on the attached proposed Protective Order's language from the NRC Staff, Churchill County, Esmeralda County, Lander County, Mineral County, and the Nuclear Energy Institute. Lincoln County and Eureka County take no position. The State of Nevada has one concern, with Nye County and the State of California concurring. DOE did not receive a response from others.

The only potential party to identify specific concerns with the proposed Protective Order's language is the State of Nevada. Nevada contends that the NRC can reverse a DOE or Navy determination that a document contains classified information. Nevada appears to have no other significant objection to entry of the proposed Protective Order.

DOE does not agree with Nevada's interpretation. As a matter of federal law, it is well established that both the DOE and the Department of Defense are authorized to make classification determinations, and that whether information has been properly classified is within the discretion of their agencies.¹ Federal courts have granted great deference to an Executive Branch agency's determination that information is classified. In Department of the Navy v. Egan, 484 U.S. 518, 527, 529 (1988), the Supreme Court used strong language in committing classification decisions to the Executive Branch, finding that:

The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to

¹ See e.g., 42 U.S.C. § 2162 (classification and declassification of restricted data and formerly restricted data); 42 U.S.C. § 10106 ("Nothing in this chapter shall require the release or disclosure to any person or to the Commission of any classified national security information"); Exec. Order No. 12,958, "Classified National Security Information," 60 Fed. Reg. 19,825 (Apr. 20, 1995), as amended by Exec. Order No. 13,292, "Further Amendment To Executive Order 12958, As Amended, Classified National Security Information," 68 Fed. Reg. 15,315 (Mar. 25, 2003); Exec. Order No. 12,968, 60 Fed. Reg. 40,245, "Access To Classified Information," (Aug. 2, 1995). See generally 50 U.S.C. § 783 (making it a criminal offense to distribute information designated classified by the President); 50 U.S.C. §§ 2406, 2511 (Naval Nuclear Propulsion Program responsibilities).

classify and control access to information . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

* * *

[T]he protection of classified information must be committed to the broad discretion of the agency responsible

There is extensive caselaw affirming the holding in Egan that classification decisions are within the discretion of the *originating* Executive Branch agency. DOE is not aware of any legal authority that allows for judicial or independent agency review of a classification determination.² DOE requests that the Commission resolve this issue now by issuing the Protective Order.

Respectfully submitted,

Signed (electronically) by Alex S. Polonsky

Donald J. Silverman
Thomas A. Schmutz
Thomas C. Poindexter
Paul J. Zaffuts
Alex S. Polonsky
Lewis M. Csedrik
Counsel for the U.S. Department of Energy
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, D.C. 20004

Mary B. Neumayr
Martha S. Crosland
George W. Hellstrom
Nicholas P. DiNunzio
U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue, SW
Washington, DC 20585

Dated in Washington, D.C.
this 30th of May, 2008

² Because the NRC defers to the originating agency for granting access to classified information, *see* 10 CFR § 2.905(h)(2), it follows that the NRC must defer to the originating agency for determining that the information is classified in the first instance. To do otherwise would allow the NRC to circumvent the access determination by announcing that the documents to be viewed are not classified in the first instance.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

_____)	Docket No. PAPO-001
In the Matter of)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD01
(High-Level Waste Repository))	May 30, 2008
_____)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing U.S. DEPARTMENT OF ENERGY'S PARTIALLY UNOPPOSED MOTION FOR PROTECTIVE ORDER GOVERNING CLASSIFIED INFORMATION have been served upon the following persons on May 30, 2008 through the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop-T-3 F23
Washington, DC 20555-0001
Thomas S. Moore, Chair
Administrative Judge
E-mail: tsm2@nrc.gov

G. Paul Bollwerk, III
Administrative Judge
E-mail: gpb@nrc.gov

Paul S. Ryerson
Administrative Judge
E-mail: paul.ryerson@nrc.gov

Alex S. Karlin
Administrative Judge
E-mail: ask2@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov
Emile L. Julian, Esq.
E-mail: elj@nrc.gov
Andrew L. Bates
E-mail: alb@nrc.gov
Rebecca L. Gitter
E-mail: rll@nrc.gov
Evangeline S. Ngbea
E-mail: esn@nrc.gov
Linda Lewis
linda.lewis@nrc.gov

U.S. Department of Energy
Office of General Counsel
1551 Hillshire Drive
Las Vegas, NV 89134-6321

E.Roy Hawkens
Administrative Judge
E-mail: erh@nrc.gov

Alan Rosenthal
Administrative Judge
E-mail: axr@nrc.gov

Anthony C. Eitreim, Esq.
Chief Counsel
E-mail: acel@nrc.gov

James M. Cutchin: jmc3@nrc.gov
Joseph Deucher: jhd@nrc.gov
Margaret Parish: map4@nrc.gov
Marcia Carpentier: mxc7@nrc.gov
Lauren Bregman: lrb1@nrc.gov
Zachary Kahn: zxk1@nrc.gov
Erika LaPlante: eal1@nrc.gov
Emily Krause: eik@nrc.gov
William J. Froehlich: wjfl@nrc.gov

Daniel J. Graser
LSN Administrator
E-mail: djg2@nrc.gov

ASLBP HLW Adjudication
E-mail:
ASLBP_HLW_Adjudication@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Public Affairs
Mail Stop-O-2A13
David McIntyre
E-mail: dtm@nrc.gov

George W. Hellstrom, Esq.
E-mail: george.hellstrom@ymp.gov
Timothy Gunter
E-mail: timothy_gunter@ymp.gov

U.S. Department of Energy
Office of General Counsel
1000 Independence Avenue S.W.
Washington, DC 20585

Martha S. Crosland, Esq.
E-mail: Martha.crosland@hq.doe.gov
Angela M. Kordyak, Esq.
E-mail: angela.kordyak@hq.doe.gov
Mary Neumayr
E-mail: mary.neumayr@hq.doe.gov
Nicholas DiNunzio
E-mail: nick.dinunzio@rw.doe.gov

Nuclear Waste Project Office
1761 East College Parkway, Suite 118
Carson City, NV 89706

Robert Loux
E-mail: bloux@nuc.state.nv.us
Steve Frishman, Tech. Policy Coordinator
E-mail: steve.frishman@gmail.com

**U.S. Nuclear Regulatory Commission
Office of the General Counsel**

Mail Stop O-15D21
Washington, DC 20555-0001

Andrea L. Silvia, Esq.

E-mail: alc1@nrc.gov

Mitzi A. Young, Esq.

E-mail: may@nrc.gov

Marian L. Zobler, Esq.

E-mail: mlz@nrc.gov

Daniel W. Lenehan, Esq.

dwl2@nrc.gov

Jessica Bielecki, Esq.

jab2@nrc.gov

Janice E. Moore, Esq.

janice.moore@nrc.gov & jem@nrc.gov

Margaret J. Bupp, Esq.

mjb5@nrc.gov

OGCMailCenter

E-mail: OGCMailCenter@nrc.gov

**Inyo County (CA) Yucca Mountain Nuclear
Waste Repository Assessment Office**

Inyo County
163 May St.
Bishop, CA 93514

Chris Howard

GIS/LAN Administrator

E-mail: choward@inyowater.org

Egan, Fitzpatrick & Malsch, PLLC

Counsel for the State of Nevada

The American Center at Tysons Corner

8300 Boone Boulevard, Suite 340

Vienna, VA 22182

Charles J. Fitzpatrick, Esq.

E-mail: cfitzpatrick@nuclearlawyer.com

Laurie Borski, Paralegal

E-mail: lborski@nuclearlawyer.com

Martin G. Malsch, Esq.

E-mail: mmalsch@nuclearlawyer.com

Susan Montesi

E-mail: smontesi@nuclearlawyer.com

Nevada Nuclear Waste Task Force

Alamo Plaza, 4550 W. Oakley Blvd.
Suite 111

Las Vegas, NV 89102

Judy Treichel, Executive Director

E-mail: Judynwtf@aol.com

**Nuclear Information and Resource Service
(NIRS)**

6930 Carroll Ave., Suite 400

Takoma Park, MD 20912

Kevin Kamps

E-mail: kevin@nirs.org

**Carter Ledyard & Milburn, LLP
Counsel for Lincoln County**

1401 Eye Street, N.W.
Suite 300

Washington, DC 20005

Barry S. Neuman, Esq.

E-mail: neuman@clm.com

Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708

Michael A. Bauser, Esq.

E-mail: mab@nei.org

Ellen C. Ginsberg, Esq.

E-mail: ecg@nei.org

Anne W. Cottingham

E-mail: awc@nei.org

Ross Dixon & Bell
Counsel for the State of Nevada
2001 K. Street N.W. , Suite 400
Washington, DC 20006

Merrill Hirsh, Esq.

E-mail: mhirsh@rdbl原因.com

**Counsel to Eureka County and Lander
County, Nevada**

1726 M Street N.W., Suite 600
Washington, D.C. 20036

Diane Curran

E-mail: dcurran@harmoncurran.com

NWOP Consulting, Inc.

1705 Wildcat Lane
Ogden, UT 84403

Loreen Pitchford, LSN Coordinator

For Churchill County, Eureka County, and
Lander County

E-mail: lpitchford@comcast.net

Clark County (NV) Nuclear Waste Division
500 S. Grand Central Parkway
Las Vegas, NV 98155

Engelbrecht von Tiesenhausen

E-mail: evt@co.clark.nv.us

Phil Klevatorick

E-mail: klevatorick@co.clark.nv.us

Clark County, Nevada
500 South Grand Central Parkway
Las Vegas, NV 89106

**Elizabeth A. Vibert, Deputy District
Attorney**

E-mail: VibertE@co.clark.nv.us

**Churchill County, Eureka County, Lander
County, Mineral County, and Esmeralda
County**

Robert F. List, Esq.

1975 Village Center Circle, Suite 140
Las Vegas, NV 89134-6237

E-mail: rlist@armstrongteasdale.com

Yucca Mountain Project Licensing Group
DOE/BSC

Regulatory programs
1180 North Town Center Dr.
Las Vegas, NV 89144

Jeffrey Kriner

E-mail: jeffrey_kriner@ymp.gov

Hunton & Williams, LLP
Counsel for the U.S. Department of Energy
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

W. Jeffrey Edwards, Esq.
E-mail: jedwards@hunton.com

Kelly L. Faglioni, Esq.
E-mail: kfaglioni@hunton.com

Donald P. Irwin, Esq.
E-mail: dirwin@hunton.com

Stephanie Meharg
E-mail: smeharg@hunton.com

Edward P. Noonan, Esq.
E-mail: enoonan@hunton.com

Audrey B. Rusteau
E-mail: arusteau@hunton.com

Michael R. Shebelskie, Esq.
E-mail: mshebelskie@hunton.com

Pat Slayton
E-mail: pslayton@hunton.com

Belinda A. Wright
E-mail: bwright@hunton.com

White Pine County
City of Caliente
Lincoln County
Jason Pitts
E-mail: jayson@idtservices.com

Nye County (NV) Regulatory/ Licensing Adv.
18160 Cottonwood Road. # 265
Sunriver, OR 97707
Malachy Murphy, Esq.
E-mail: mrmurphy@chamberscable.com
Zoie Choate, Secretary
E-mail: zchoate@co.nye.nv.us
Sherry Dudley, Administrative Technical Coordinator
E-mail: sdudley@co.nye.nv.us

Timbisha Shoshone Tribe
Frederick and Peebles, LLP
1001 Second St.
Sacramento, CA 95814

Darcie Houck
dhouck@ndnlaw.com
John Peebles
jpeebles@ndnlaw.com
Joe Kennedy
chairperson@timbisha.org

California Department of Justice
Susan Durbin
susan.durbin@doj.ca.gov
Brian Hembacher
brian.hembacher@doj.ca.gov
Timothy Sullivan
Timothy.Sullivan@doj.ca.gov

California Energy Commission
1516 9th Street
Sacramento, CA 95814
Kevin W. Bell
kwbell@energy.state.ca.us

Talisman International, LLC
1000 Potomac St., NW
Suite 200 Washington, DC 20007
Patricia Larimore, Senior Paralegal
E-mail: plarimore@talisman-intl.com

Office of Administrative Services
City of Las Vegas, Nevada
Barbara Durham
Email: dvdurbarbara@netscape.com
Liane Lee
Email: lilee@LasVegasNevada.gov
Margaret Plaster
E-mail: mplaster@LasVegasNevada.gov

OCAAMAIL
E-mail: OCAAMAIL@nrc.gov

Jeffrey D. VanNiel
E-mail: nbrjdv@gmail.com

Adria T. Byrdsong
atb1@nrc.gov

Andrea Cermano
andrea.cermano

Ray Crouse
rcw2@nrc.gov

Ron Deavers
rxd@nrc.gov

Karin Francis
kxf4@nrc.gov

Nancy Greathead
nsg@nrc.gov

Christine Pierpoint
cmp@nrc.gov

Susan Rives
susan_rives@ymp.gov

Tom Ryan
tpr@nrc.gov

Andrew Welkie
axw5@nrc.gov

Signed (electronically) by Alex S. Polonsky
Alex S. Polonsky