

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

**Before Administrative Judges:
Thomas S. Moore, Chairman
Alex S. Karlin
Alan S. Rosenthal**

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))	November 12, 2008

DOE CLARIFICATION REGARDING ACCESS TO CLASSIFIED INFORMATION

This filing clarifies the United States Department of Energy’s (“DOE”) position regarding whether it is necessary to be a United States citizen in order to access classified information in the High Level Waste Repository licensing proceeding.

On November 5, 2008, in response to the PAPO Board’s Order,¹ the DOE submitted a joint proposed Case Management Order governing classified information. In its transmittal, DOE stated that there was only one area of disagreement between it and the State of Nevada:² in summary, whether a non-United States citizen can have access to classified information other than Restricted Data (“RD”). On November 10, 2008, the State of Nevada and the NRC Staff memorialized their positions with the PAPO Board.³

¹ Order (Schedule for Filing Joint Proposed Orders) (Oct. 9, 2008).

² NRC Staff counsel raised this same disagreement via email to counsel for DOE on November 5, 2008. The Staff’s email, however, was received while DOE was filing the joint proposed Case Management Order and, thus, was not reviewed until DOE had already completed its filing.

³ State of Nevada’s Explanation Of Its Disagreement With Proposed Sixth Case Management Order (Nov. 10, 2008); NRC Staff’s Comment on Draft Sixth Case Management Order (Nov. 10, 2008).

DOE has considered the NRC Staff's and Nevada's November 10 filings, and provides the following clarification:

- (1) DOE and Nevada agree that it is necessary to be a United States citizen to view classified information that is RD. The NRC staff stated that a non-United States citizen could have access to RD pursuant to a government-to-government agreement. The NRC Staff also clarified that these restrictions apply to Formerly Restricted Data ("FRD"). *DOE agrees that it is necessary to be a United States citizen to have access to RD or FRD, except when such access is pursuant to a government-to-government agreement entered into in accordance with the Atomic Energy Act of 1954, as amended.*
- (2) All of the classified information relevant to the High Level Waste Repository licensing proceeding that has been generated (and is expected to be generated) by the Naval Nuclear Propulsion Program ("NNPP")—whether it is RD or National Security Information ("NSI")—can only be viewed by a United States citizen because it is also Naval Nuclear Propulsion Information ("NNPI"). The PAPO Board has already recognized that only United States citizens may access NNPI, even when unclassified. *See Third Case Management Order, slip.op. at 8 (Aug. 30, 2007) ("Access to specific documents that contain NNPI will be granted once the requester has established (i) a need to know the NNPI and (ii) that the requester is a United States citizen.")*.
- (3) DOE (defined here to be distinct from the NNPP) expects to generate classified information that is NSI. Under Section 7 of the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10106, DOE is not required to "release or disclose to any

person or to the Commission [] any classified national security information.”

However, DOE agrees that a non-United States citizen could, once granted a clearance and a need-to-know, access DOE’s NSI that has been submitted to the NRC as part of the licensing process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing pleading styled **DOE CLARIFICATION REGARDING ACCESS TO CLASSIFIED INFORMATION** have been served upon the following persons on November 12, 2008 through the Electronic Information Exchange.

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