

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

U.S. DEPARTMENT OF ENERGY

(High Level Waste Repository:
Pre-Application Matters)

Docket No. PAPO-00

ASLBP No. 04-829-01-PAPO

February 20, 2009

MEMORANDUM AND ORDER

(Revisions to the Joint Proposed Sixth Case Management Order)

On January 16, 2008, the Pre-License Application Presiding Officer (PAPO) Board received the Revised Case Management Order Governing Classified Information (RCMO), protective order, and non-disclosure agreement requested by the Board at the December 2, 2008 case management conference.¹ The RCMO addressed concerns raised by this Board over language in the original proposed Joint Case Management Order governing the State of Nevada's access to classified information. Upon reviewing the RCMO, we determined, however, that there are certain areas that remain unaddressed by the RCMO and for that reason, we are calling on the parties to confer and to come to agreement on the logistical aspects of Nevada's access to classified information.

Part I of this Order contains proposed changes to specific provisions of the RCMO. We request that the DOE, the NRC Staff, and the State of Nevada review the proposed changes and inform the Board in writing of any objections within 21 days of this Order. Any filing objecting to the proposed changes should fully explain the basis of the objection and, if

¹ See Letter from Alex S. Polonsky, DOE Counsel, to PAPO Board, encl. (Jan. 16, 2009).

appropriate, provide alternative proposed language correcting the problem. Part II of this Order sets forth a number of matters upon which the three parties should confer and propose language to be added to the RCMO to resolve such matters. The proposed amendments also shall be filed within 21 days of this Order.

I. Proposed changes

- a. RCMO Page 5, B. – If Nevada or its Representatives have knowledge that any person has obtained unauthorized access to Classified Information in this proceeding, or that a document containing Classified information has been lost or misplaced, Nevada shall provide immediate written notice to the PSO and the DOE about the unauthorized access. This notice is in addition to any other reporting obligations that each individual has who holds a security clearance. *If DOE has knowledge that any person has obtained unauthorized access to Classified Information in this proceeding, then it may seek appropriate relief from an appropriate Atomic Safety and Licensing Board or the Commission. Nothing in this order precludes DOE from seeking relief elsewhere to protect the Classified Information from further unauthorized dissemination.*
- b. RCMO Page 8, C.3. - Within seven business days after such written motion has been filed only the DOE may file a response to the motion, along with any supporting affidavits or other accompanying evidence. *The Board may direct the NRC Staff to respond to the motion.* Submission of supporting affidavits or other accompanying evidence that contain Classified Information must be submitted in camera to the Board. The response to the motion may also address whether the Board has authority to resolve the issues in question.
- c. RCMO Page 9, V.b. - Classified filings shall be filed with the PSO and served only on the NRC and DOE because they are the only Parties that have Secure Facilities. *The PSO will transmit copies of all classified filings to the Board.* An

unclassified statement of the classified filing should, if practicable, be submitted with the Classified Information in accordance with 10 C.F.R. § 2.910.

II. Issues to be resolved by DOE, Staff, and Nevada

DOE, Staff, and Nevada should confer and reach agreement on the following matters.

DOE should draft appropriate amendments to the RCMO, circulate them to the Staff and Nevada and then file them as joint proposed amendments.

- a. In the first Construction Authorization Board (CAB) Case Management Orders for the HLW proceeding, the CABs set 30 days as a reasonable time to file a new or amended contention based on the availability of subsequently filed information, absent a timely request for an extension.² Do the parties intend to follow this deadline for classified information, and if not, what provision allowing adequate time for Nevada to gain access to, review, and formulate contentions or other pleadings from classified information should be included in the RCMO?
- b. What are the services and equipment that will be provided to Nevada for reviewing and producing contentions or other pleadings based upon Classified Information at the Secure Facilities of DOE and the NRC?
- c. Who will bear the cost of services and equipment necessary for Nevada's access to Classified Information, i.e., facility space for review of classified information, computers, and any other materials necessary to produce contentions?
- d. How will the derivative work product of Nevada be fully protected from personnel of DOE and NRC?
- e. RCMO - Page 11, Reservation of Rights – Does the reservation of rights provision also need to include the NRC Staff? Is there any reason why it would ever need to include Nevada?

² See CAB Case Management Order 1 (Jan. 29, 2009).

- f. RCMO - Page 8, VAL FORMS – Should the parties attach copies to the RCMO of the relevant VAL forms to be used?

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Thomas S. Moore, Chairman
ADMINISTRATIVE JUDGE

/RA/

Alex S. Karlin
ADMINISTRATIVE JUDGE

/RA/

Alan S. Rosenthal
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 20, 2009

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (REVISIONS TO THE JOINT PROPOSED SIXTH CASE MANAGEMENT ORDER) have been served upon the following persons by Electronic Information Exchange.

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DOCKET NO. PAPO-00
LB MEMORANDUM AND ORDER
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