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OFFICE OF SECRETARY  
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ADJUDICATIONS STAFF

October 18, 2010

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

In the Matter of  
  
SHAW AREVA SAMS  
  
Mixed Oxide Fuel Fabrication Facility  
Possession and Use License

Docket No. 70-3098-MLA  
  
ASLBP No. 07-856-02-MLA-BD01

**INTERVENORS' MOTION FOR ISSUANCE OF  
AN ORDER ESTABLISHING PROCEDURES FOR PUBLIC DISCLOSURE  
OF INFORMATION AND REDACTION OF SENSITIVE DOCUMENTS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.323, 2.319(g), and 2.390(f), Intervenors (Nuclear Watch South, Blue Ridge Environmental Defense League, and Nuclear Information and Resource Service) hereby request the Atomic Safety and Licensing Board ("ASLB") to issue an order governing public disclosure of information and redaction of sensitive documents presented to the ASLB and issued by the ASLB in this proceeding.

As requested by the ASLB in its order of September 16, 2010, this motion reflects the parties' efforts to reach agreement on a process by which information inappropriately designated as sensitive unclassified security information ("SUNSI") can be released to the public. Intervenors' counsel circulated this motion in draft to counsel for Shaw Areva MOX Services, Inc. ("SAMS"), and the U.S. Nuclear Regulatory Commission ("NRC") Staff and received written comments. The parties also had several telephone conferences about the motion. Therefore the motion reflects agreement among the parties on most of the ASLB actions requested by Intervenors.

With respect to some issues, however, the parties were not able to agree. For instance, the parties appear to disagree about the applicability of 10 C.F.R. § 2.390(b)(6) to this proceeding. Instead of filing a joint motion, therefore, they agreed that Intervenors should file this motion and SAMS and the Staff would respond, identifying and explaining their areas of disagreement.

## **II. BACKGROUND**

The Intervenors have submitted four contentions that relate to SAMS' Fundamental Nuclear Material Control Plan ("FNMCP").<sup>1</sup> Pursuant to 10 C.F.R. § 2.390(d)(1), the FNMCP and other documents that discuss material control and accounting ("MC&A") issues, including correspondence between SAMS and the Staff regarding the FNMCP, are considered to be proprietary information and must be withheld from public disclosure unless they are redacted pursuant to 10 C.F.R. § 9.19. Under NRC policy, MC&A information is also protected from public disclosure as Sensitive Unclassified Security Information ("SUNSI"). *See South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4), LBP-10-02, 72 NRC \_\_\_, slip op. at 5-7, n.30 (January 20, 2010).

Because Intervenors' contentions discussed the substantive content of the FNMCP and SAMS' exemption application, Intervenors did not submit any of their contentions on the public docket. Instead, Intervenors submitted their contentions only to

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<sup>1</sup> On March 22, 2010, Intervenors submitted Contention 8, which challenged SAMS' application for an exemption from the NRC's material control and accounting ("MC&A") regulations for the proposed mixed oxide fuel fabrication facility ("MFFF"). Intervenors withdrew the contention on May 24, 2010, after receiving notice that SAMS had withdrawn its exemption application. On July 26, 2010, Intervenors submitted Contentions 9, 10, and 11, which assert that SAMS has failed to satisfy the NRC's MC&A regulations and therefore should be denied a license.

the ASLB, the Secretary's office, and the other parties in accordance with the ASLB's Protective Order of December 31, 2008. In submitting their contentions, however, the Intervenor noted that they intended to seek disclosure of as much information as possible through redaction of the documents. *See* cover letters from Diane Curran to Michael Farrar, et al., dated March 22, 2010, and July 26, 2010. Intervenor also filed, on the public docket, notices that they had filed a protected pleading. *See id.*

SAMS submitted its responses to Contentions 9, 10, and 11 under the Protective Order. Shaw Areva SAMS LLC's Answer to Intervenor's Motion for Admission of Contentions 9, 10, and 11 (August 23, 2010). SAMS also filed, on the public docket, notice that it had filed a protected Answer. *See id.* In responding to all of the Intervenor contentions, however, the NRC Staff has submitted its responses to Intervenor's contentions on the public docket. NRC Staff Response to Petitioner's Motion for Admission of Contentions 9, 10, and 11, Etc. at 12-13 (August 23, 2010).

As noted in SAMS' September 8, 2010 motion to close the upcoming oral argument regarding Contentions 9, 10, and 11, Intervenor did not object to SAMS' motion based on their understanding that SAMS and the NRC Staff would work with the Intervenor to develop a process to release information to the extent that such information is determined to have been inappropriately protected as SUNSI. *Id.* at 3. *See also* ASLB Order (Rescheduling Oral Argument) at 2 (September 16, 2010). Thereafter, the parties have held several discussions and have agreed upon a set of principles and procedures to govern the disclosure of publicly releasable information. These principles and procedures are set forth in Section III below.

### III. DISCUSSION

As a foundation for its order, Intervenors request the ASLB to recognize that maximizing public disclosure of non-sensitive information related to the regulatory process is an important and longstanding NRC policy. *See* NRC's Open Government Plan, Revision 1.1 at 6 (June 7, 2010). "Since its creation in 1975, the NRC has viewed openness as a critical element for achieving the agency's mission to regulate the Nation's civilian use of radioactive materials and thereby protect people and the environment." *Id.* at 1. The NRC has identified broad access to public hearings as a "key information dissemination channel." *Id.* at 7.

The ASLB should also recognize that the NRC must "appropriately balance [its] desire to maintain the openness of NRC's regulatory processes with the need to protect the public from possible terrorist threats." SECY-04-0191, Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors From Public Disclosure at 1 (Oct. 19, 2004). The NRC protects SUNSI from public disclosure because such disclosure could "reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals."<sup>2</sup>

In order to ensure an appropriate balance between the NRC's policies of maximizing public disclosure of nonsensitive information and protecting SUNSI from

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<sup>2</sup> COMSECY-05-0054, Attachment 2, NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (Oct. 26, 2005). *See also* NRC Management Directive 12.6, NRC Sensitive Unclassified Information Security Program (Dec. 20, 1999); NRC Regulatory Issue Summary 2005-31, Control of Security-Related Sensitive Unclassified Non-Safeguards Information Handled by Individuals, Firms, and Entities Subject to NRC Regulation of the Use of Source, Byproduct, and Special Nuclear Material (Dec. 22, 2005).

public disclosure in this case, Intervenor request the ASLB to take or require the following measures:

A. Intervenor request the ASLB to “limit its use of protected information so that its issuances, to the greatest extent possible, can be placed in the public record of the proceeding.” *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-00-06, 51 NRC 101, 135 (2000). The ASLB should also require the parties to endeavor to do the same, although the NRC Staff is in a better position than Intervenor and SAMS to distinguish between SUNSI and non-SUNSI material. The Staff’s response to Contentions 9, 10, and 11, which publicly summarizes the contentions without providing the details that might render the response SUNSI or proprietary information, is an example of the NRC Staff’s implementation of this policy. *See* NRC Staff Response to Contentions 9-11 at 12-13.<sup>3</sup>

B. Intervenor request the ASLB to provide that for any order or decision that it issues under the Protective Order, it will issue simultaneous public notice that the order

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<sup>3</sup> The Commission recently raised the issue of the authority of licensing boards to direct the Staff to redact SUNSI documents. *See South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC \_\_\_, slip op. at 13, n.53 (Sept. 29, 2010) (“we need not reach the question of the Board’s authority to direct the Staff to redact the document”); *id.* slip op. at 25, n.99 (“The Board raised several questions concerning the Staff’s apparent practice of withholding in their entirety documents containing SUNSI, as well as the potential impact of this practice on our adjudicatory proceedings. The Board’s concerns are not without force; we intend to look further into these questions outside of the adjudicatory process.”).

The *South Texas* decision does not appear to affect the ASLB’s authority to require the Staff to submit entire pleadings in publicly releasable form where possible. In addition, the decision does not affect the ASLB’s own authority under 10 C.F.R. §§ 2.390(b)(6) to redact documents submitted in a licensing proceeding. *See Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 1), ALAB-696, 16 NRC 1245, 1261 (1982) (interpreting 10 C.F.R. § 2.790(b)(6) (the predecessor to 10 C.F.R. § 2.390(b)) allowed it to resolve disputes over designation of proprietary information at the conclusion of a merits proceeding.)

or decision has been issued and a brief summary of the subject matter, containing only public, non-SUNSI, non-proprietary information.

C. Similarly, Intervenors request the ASLB to require that for any pleading or piece of correspondence that is submitted to the ASLB in accordance with the Protective Order, the party shall simultaneously provide public notice of the pleading in the form of a public cover letter and certificate of service, which should be sent to the Secretary's office by e-mail and first-class mail, as the parties have done thus far in this proceeding. *See also Private Fuel Storage*, 51 NRC at 135.

D. As recognized in *Private Fuels Storage*, it is generally impractical to require extensive redactions of pleadings and decisions immediately upon their submittal. *See* 51 NRC at 135. In that case, the ASLB stated that the Board and the parties should wait until the end of the merits proceeding to resolve any disputes over the protected nature of information. *Id.* *See also Point Beach*, 16 NRC at 1261. Given (a) the public interest in receiving timely information regarding the subject matter of licensing hearings and (b) the importance of adjudicatory decisions in the licensing process, however, Intervenors request the ASLB to endeavor to issue redacted versions of substantive decisions involving SUNSI or proprietary information as soon as possible after those decisions are made. Such decisions would include, for instance, rulings on the admissibility of contentions, motions to dismiss, and summary disposition motions; and merits decisions.

E. With respect to redaction of pleadings submitted by the parties, however, Intervenors do not seek an order requiring immediate redaction of documents. Pursuant to 10 C.F.R. § 2.390(b)(6), Intervenors would wait until the conclusion of any merits

proceeding or the dismissal of the contentions to seek redactions or public disclosure of pleadings and licensing correspondence. In the meantime, Intervenors would use the NRC's Freedom of Information Act ("FOIA") procedures to request redacted versions of licensing correspondence and pleadings, including materials related to the FNMCP.

Given that the NRC's FOIA program is administered by the NRC Staff, which is a party to this proceeding, Intervenors would not consider the FOIA process to constitute an equivalent substitute for the Board's exercise of its authority under 10 C.F.R. § 2.390(b)(6). Thus, Intervenors would reserve their right to seek redaction or disclosure of pleadings if the FOIA process did not result in timely or adequate disclosures.

F. In order to ensure that the ASLB has adequate resources to discharge the elements of its order, Intervenors request the Board to designate a representative to assist with the categorization of information as SUNSI, as has been done in other licensing proceedings. *See* Transcript, *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4) at 557 (Nov. 13, 2009); Transcript, *Luminant Generation Company, LLC* (Comanche Peak Nuclear Power Plant, Units 3 and 4) at 479-482 (Nov. 12, 2009); Order (Regarding November 13, 2009, Oral Argument), *South Texas Project Nuclear Operating Co.* (South Texas Project Units 3 and 4) (Nov. 10, 2009) (requiring the Staff to bring to the hearing an expert in categorization of sensitive information).

#### **IV. CONCLUSION**

For the foregoing reasons, Intervenors request the ASLB to establish the elements of this motion in an order.

Respectfully submitted,



Diane Curran

HARMON, CURRAN, SPIELBERG, & EISENBERG, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

202-328-3500

Fax: 202-328-6918

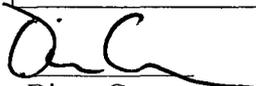
e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

October 18, 2010

## CERTIFICATE OF SERVICE

I certify that on October 18, 2010, copies of Intervenor's Motion for Issuance of an Order Establishing Procedures for Public Disclosure of Information and Redaction of Sensitive Documents were served on the following parties by e-mail and first-class mail:

Secretary of the Commission Rulemakings and Adjudications Staff U.S. Nuclear Regulatory Commission Mail Stop: 0-16C1 Washington, DC 20555 <a href="mailto:hearingdocket@nrc.gov">hearingdocket@nrc.gov</a>	Lawrence G. McDade Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Mail Stop: T-3 F23 Washington, DC 20555 <a href="mailto:lglm1@nrc.gov">lglm1@nrc.gov</a>
Michael C. Farrar, Chairman Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Mail Stop: T-3 F23 Washington, DC 20555 <a href="mailto:mcf@nrc.gov">mcf@nrc.gov</a>	Dr. Nicholas G. Trikouros Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Mail Stop: T-3 F23 Washington, DC 20555 <a href="mailto:ngt@nrc.gov">ngt@nrc.gov</a>
Donald J. Silverman, Esq. Anna V. Jones, Esq. Timothy P. Matthews, Esq. Morgan, Lewis & Bockius 1111 Pennsylvania Avenue N.W. Washington, D.C. 20004 <a href="mailto:anna.jones@morganlewis.com">anna.jones@morganlewis.com</a> <a href="mailto:dsilverman@morganlewis.com">dsilverman@morganlewis.com</a> ; <a href="mailto:agutterman@morganlewis.com">agutterman@morganlewis.com</a>	Kimberly Ann Sexton, Esq. Brett Michael Klukan, Esq. Catherine Scott, Esq. Office of the General Counsel U.S. Nuclear Regulatory Commission Mail Stop: 0-15D21 Washington, DC 20555 <a href="mailto:Kimberly.sexton@nrc.gov">Kimberly.sexton@nrc.gov</a> <a href="mailto:Catherine.marco@nrc.gov">Catherine.marco@nrc.gov</a> <a href="mailto:Brett.Klukan@nrc.gov">Brett.Klukan@nrc.gov</a>
Katie Tucker, Law Clerk Atomic Safety & Licensing Board U.S. Nuclear Regulatory Commission Washington, DC 20555 <a href="mailto:mxc7@nrc.gov">mxc7@nrc.gov</a>	Glenn Carroll Nuclear Watch South P.O. Box 8574 Atlanta, GA 31106 <a href="mailto:Atom.girl@mindspring.com">Atom.girl@mindspring.com</a>
Louis A. Zeller Blue Ridge Environmental Defense League P.O. Box 88 Glendale Springs, NC 28629 <a href="mailto:bredl@skyvbest.com">bredl@skyvbest.com</a>	Mary Olson Nuclear Information & Resource Service P.O. Box 7586 Asheville, NC 28802 <a href="mailto:maryolson@main.nc.us">maryolson@main.nc.us</a>

  
 Diane Curran