

**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,

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Dated in Washington, D.C.
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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.

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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.

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