

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of) **Docket No.** _____
)
U.S. DEPARTMENT OF ENERGY)
)
(High Level Waste Repository))
)

PROTECTIVE ORDER

Upon application of the United States Department of Energy (“DOE”) and the Staff of the United States Nuclear Regulatory Commission (“NRC Staff”) for a Protective Order to protect classified National Security Information, Restricted Data, and Formerly Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. 2162 and 2231; Executive Orders 13292 and 12958, as amended; and to supplement, but in no way supersede, 10 C.F.R. Part 2, Subpart I or any other regulation or statute; and in order to protect the national security, and good cause having been shown,

IT IS HEREBY ORDERED THAT

- (1) This Order shall apply to the Parties¹ in this proceeding, and their Counsel, Representatives and any other persons acting on their behalf in connection with this proceeding.
- (2) As used in this Protective Order:
 - (a) "Classified Information" refers to any information that qualifies as National Security Information, as defined by Executive Order 12958, as amended, Restricted Data (“RD”) or Formerly Restricted Data (“FRD”), as defined in 42 U.S.C. 2014(y) and 2162 and 10 C.F.R. Part 1045, as determined by the originating agency, which has not been declassified by the United States Federal Government (“Government”). This includes classified Naval Nuclear Propulsion Information or any other information deemed classified in

¹ NRC and DOE (including the Naval Nuclear Propulsion Program) are the agencies originating the Classified Information at issue in this Protective Order, and protection of Classified Information by NRC and Department of Energy (DOE) Personnel are governed by federal requirements and internal NRC and DOE Directives. See e.g., NRC Management Directive 12.2, “Classified Information Security Program”; DOE Manual 470.4-4, “Information Security”; DOE Order 475.2, “Identifying Classified Information.” Accordingly, the provisions of this Protective Order do not apply to NRC or DOE Personnel.

accordance with law and regulations. A party must assume that notes, memoranda, work product, etc. that are based—even in part—upon Classified Information, are also classified until a qualified Derivative Classifier certifies otherwise.

- (b) "Counsel" refers to all lawyers representing or assisting in the representation of a Party in this proceeding, together with their paralegal, secretarial, clerical and other support staff.
- (c) "Document" refers to any written or graphic matter, or other means of preserving thought or expression, including, but not limited to, writings, correspondence, contracts, memoranda, handwritten notes, applications, notebooks, books, studies, surveys, graphs, charts, calculations, analyses, drawings, reports, computer printouts or matter stored on computer or on computer disk, tape recordings, photographs, microfilm, microfiche, transcripts, diary entries, and desk calendar entries, whether originals or copies, however produced or reproduced. It also includes any tangible objects, including, but not limited to, mockups, models, devices, or any other object that could be inspected.
- (d) "DOE Personnel" refers to all personnel employed by, under contract to, or assigned to the U.S. Department of Energy who are involved in this proceeding, including any stenographic reporters and videographers engaged in such proceedings retained by the Department of Energy.
- (e) "Facility Security Officer" ("FSO") refers to a U.S. citizen, with an access authorization equivalent to, or higher than, the facility where the FSO is located, assigned the responsibility of administering the requirements of a security protection program within a secure facility.
- (f) "Naval Nuclear Propulsion Information" ("NNPI") is defined in NAVSEAINST 5511.32C and includes "all information, classified or unclassified, concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of Naval nuclear powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities." The disclosure of this information is restricted by Federal Statutes, regulations, and directives, including NAVSEAINST 5511.32C.
- (g) "NRC Personnel" refers to all personnel employed by, under contract to, or assigned to the NRC who are involved in this proceeding, including any stenographic reporters and videographers engaged in such proceedings.
- (h) "Party" or "Parties" refers to: (1) the DOE and the NRC Staff; (2) the State of Nevada; (3) any affected unit of local government, and any affected Indian Tribe, (as those terms are defined by section 2 of the Nuclear Waste Policy Act of 1982, as amended (42 U.S.C. 10101)), which may not have yet Petitioned to Intervene in the licensing proceeding, provided that each of the foregoing has made substantial and timely compliance with 10 C.F.R. 2.1003; (4) any other governmental entity which has filed a Petition to Intervene and has made

substantial and timely compliance with 10 C.F.R. 2.1003, and (5) a person who is admitted to the proceeding in accordance with 10 C.F.R. 2.309 or 2.315(c).

- (i) "Proceeding Security Officer" or "PSO" refers to the person or persons designated by the NRC, in a separate order, to assist the presiding officer and Parties with security procedures, classification, and safeguards to be observed pursuant to 10 CFR 2.904.
 - (j) "Representatives" of a Party refers to its officers, employees and all employees of any independent contractors, expert witnesses, and consultants furnishing services related to the Party's involvement in this proceeding, including its Counsel.
- (3) No Party, Representative of a Party, or Counsel can have access to Classified Information in this proceeding unless such Party, Representative, or Counsel has the appropriate security clearance and has a need to know the Classified Information.
 - (4) This Protective Order does not govern the process for acquiring security clearances for access to Classified Information. Access to Classified Information is governed by 10 C.F.R. Part 2 Subpart I. Each Party, Representative of a Party or Counsel who expects to have a need to know (Classified Information in connection with this proceeding and who does not otherwise have an appropriate security clearance should begin the process to obtain the appropriate access authorization (security clearance) with the NRC in accordance with 10 C.F.R. 2.905(c), and as described in the NRC Personnel Security Program Handbook 12.3.
 - (5) This Protective Order does not govern the process for appealing from any denial for a security clearance or denial of access to Classified Information. In accordance with 10 C.F.R. 2.905(h), an originating agency may deny access to Classified Information in accordance with its regulations and procedures. If the originating agency denies access to Classified Information, the person denied access may petition for access pursuant to the originating agency's regulations and procedures.
 - (6) Access under this Protective Order to Classified Information, including but not limited to any classified notes, memoranda, or work product based thereon, shall only be had and used for purposes of this proceeding, including any appeals therefrom.
 - (7) The following procedures shall apply to requests for access to Classified Information:
 - (a) A Party seeking Classified Information shall submit to the PSO a statement describing the Classified Information to which access is desired, the level of classification applicable for that information, the reason why access to the information is requested, the names of the individuals for whom access is requested, social security number or any other information required by the PSO to confirm that the individuals have the appropriate security clearance, and a sworn statement, in the form attached hereto as Exhibit A, signed by each such person, duly notarized, certifying that such person:
 - i. Has read this Protective Order and agrees to be bound by all of its terms and conditions; and

- ii. Irrevocably submits his or her person to the jurisdiction of the NRC for the purpose of securing compliance with the terms and conditions of this Protective Order.
 - (b) The documents required to be submitted to the PSO for access to Classified Information under this Protective Order shall be submitted to the PSO no less than 20 calendar days prior to the proposed date for access. Material submitted to the PSO shall be via overnight mail. The Party making the submittal shall file a Notice to be served on all Parties, identifying the individuals who are seeking access.
 - (c) The PSO will verify the appropriate clearance level for all individuals for whom access is requested and forward a Request for Visit or Access Approval (attach/reference appropriate VAL form) to the facilities at which access is requested.
 - (d) The PSO will forward the documents described in subparagraph (7)(a) to the appropriate originating agency's Facility Security Officer and the originating agency's Counsel, no later than five (5) calendar days after receipt of the Request. The PSO will verify clearances to the originating agency so that it can make a determination to grant or deny access. In accordance with 10 C.F.R. § 2.905(h), the originating agency shall have ten (10) calendar days after receipt of the documents to make a "need to know" determination and grant or deny the proposed access by the individual.
- (8) Prior to the deposition of any witness who may be shown or asked about Classified Information in a deposition, deposing Counsel shall provide written notice to the originating agency's Counsel (and to Counsel of record for all other Parties) no later than 20 calendar days prior to the date of the deposition via overnight mail. The Party seeking to conduct a deposition shall comply with the requirements of paragraphs 7(b), (c) and (d).
- (a) The Party responsible for the Secure Facility where the classified deposition will take place must ensure—through written confirmation from the PSO or a written Visitor Access Form completed by a the Security Officer for the Party, or a combination of both—that all individuals attending the deposition have been authorized to have access, including the court reporter. Any equipment the court reporter uses in recording, transcribing and otherwise preparing a transcript of the deposition testimony must be approved for use in handling Classified Information. Anyone who does not have the appropriate clearance or need to know must be excluded. For any person who has not previously been given access to the Classified Information that will be addressed in the deposition pursuant to the terms of this Protective Order, the Party with whom that person is affiliated must submit the information required by subparagraph (7)(a) to the PSO, and the PSO will verify clearances to the originating agency. The originating agency's Counsel shall notify Counsel of record to the requesting Party of any objection by the Government or its designees to the proposed access by said individuals within 10 calendar days of receipt of the notice.

- (b) It is possible that deponents may give answers during an unclassified deposition that disclose Classified Information. Counsel may not, however, initiate such disclosure by asking questions or using documents containing Classified Information without proper authorization in accordance with this Protective Order. If a deponent gives answers that disclose Classified Information, Counsel shall not ask follow-up questions of the deponent that contain Classified Information that was previously disclosed by the deponent until authorized in accordance with this Protective Order.
 - (c) Transcripts of deposition testimony that may contain classified information must be reviewed by the PSO or PSO designee and identified and marked as containing Classified Information, if applicable. All portions of transcripts of deposition testimony that contain Classified Information shall be bound separately and labeled "Classified Information," and if filed with the NRC, shall be filed in accordance with this Protective Order. Counsel for the Party on whose behalf Classified Information may be presented, quoted, or referred to shall make arrangements to ensure that the portions of the transcripts of deposition testimony containing Classified Information are properly identified and marked.
- (9) Six months after an authorized Party has been granted access to Classified Information pursuant to this Protective Order, that Party shall submit to the PSO the name, business address, business telephone number, and security clearance level of all its Representatives who have been given access to Classified Information. A Party shall update this submittal every six months and provide similar information concerning all additional Representatives who have been provided access to Classified Information in the intervening six months.
 - (10) A Party and its Representatives shall disclose the substance or contents of any Classified Information only to persons who have an "L" or higher security clearance and who are granted access (which includes an authorized need to know determination) pursuant to this Protective Order.
 - (11) If any Party or its Representative has knowledge that any person has obtained unauthorized access to Classified Information that is protected by this Protective Order, the Party shall provide written notice to the PSO and the federal agency originating the Classified Information about the unauthorized access. This notice is in addition to any other reporting obligations that each individual has who holds a security clearance. Any unauthorized access or public release of Classified Information, regardless of when such unauthorized access or release occurs, does not relieve anyone from complying with this Protective Order.
 - (12) All documents selected for copying during a site visit to access Classified Information, or generated by a Party or its Representatives, during such a visit, whether marked or unmarked, will be screened and appropriately marked by the Facility Security Officer, or a classifying official authorized by the originating agency, prior to leaving the classified space. Documents that are screened and determined to contain no Classified Information will be appropriately marked and turned over to the requesting Party. Documents that are determined to contain Classified Information will be appropriately classified and marked and will be released to the

requesting Party within ten days only if the Party has an approved classified storage facility as described in paragraphs (14) and (16) of this Protective Order.

- (13) Except as provided in paragraphs (14), (16), and (18), Classified Information shall at all times be kept secure at a Government location which has a facility for storage of the appropriate level and category of classified material. Depositions conducted in accordance with Paragraph (8) shall only occur in a secure facility under this paragraph.
- (14) Documents containing Classified Information may be transferred from the possession of the originating agency provided that the information is properly controlled and protected pursuant to standards set out in the National Industrial Security Program (“NISPO”) DOD 5220.22-M for National Security Information and DOE M 470.4-4, *Information Security*, for Restricted and Formerly Restricted Data:
 - (a) A Party and its Representatives shall maintain all documents that contain Classified Information, including any notes, excerpts, or materials based thereon and all copies thereof, in a facility that has an appropriate clearance granted by the NRC and/or DOE for storage of such Classified Information in accordance with the provisions of this Protective Order.
 - (b) A Party shall provide a specific plan for approval by the NRC and/or DOE which demonstrates compliance with applicable regulations, and must obtain written approval from the originating agency prior to transfer of such documents from the originating agency’s possession. The plan submitted by a Party shall comply with the provisions of subparagraphs (16)(a) and (b) of this Protective Order.
 - (c) All documents containing Classified Information, including any notes or materials based thereon, that are released to a Party shall be maintained separately from other documents and items by that Party, and access to such documents shall be permitted only to those persons granted access pursuant to paragraphs (4) and (7) of this Protective Order.
- (15) Persons permitted to inspect documents containing Classified Information pursuant to this Protective Order may make written notes of the documents and their contents. However, notes, excerpts, photographs, or logs taken from any documents containing Classified Information shall be reviewed for classification and marked with the appropriate classification markings by a DOE or NRC approved derivative classifier and shall not be disseminated or disclosed in any manner or form to any person not authorized to review or inspect the same, and shall be subject to the provisions of this Protective Order. Such notes, excerpts, photographs, or logs will be maintained under appropriate security conditions as set forth in this Protective Order. No person permitted to inspect documents containing Classified Information shall copy or reproduce any parts of said documents or their contents in any manner or form, except as provided in this Protective Order. No Party waives any privilege applicable to notes, including work product, or other materials they generate by giving them to the PSO, NRC, or DOE for classification review. Those reviewing a Party’s documents for classification may only discuss the contents of privileged documents with Counsel or Representative of the generating Party.

- (16) Documents containing Classified Information, including any notes, memoranda, or similar work product relating thereto, may be transferred from the premises described in paragraphs (13) or (14) only as follows:
- (a) Not less than 30 days prior to the proposed transfer, Counsel for the Party proposing to transfer the information shall provide the PSO, and the originating agency's Facility Security Officer, through respective originating agency's Counsel, with a written notice:
 - i. Naming the proposed document custodian, who shall have the necessary security clearance and whose responsibility it shall be to ensure that all documents are stored and maintained consistent with this Protective Order;
 - ii. Identifying the documents to be transferred;
 - iii. Listing the facility to which it is proposed that such documents be transferred; and
 - iv. Specifying and providing evidence of all clearances or approvals that the facility has received for storage of documents containing Classified Information or related analyses, notes, or excerpts.
 - v. The 30 days notice may be reduced by the FSO for good cause.
 - (b) Unless the originating agency advises Counsel of record for the Party requesting the transfer that the originating agency objects to the proposed transfer of Classified Information within 10 calendar days after the submission of the written notice to which reference is made in subparagraph (16) (a) above, the transfer may occur as described in the notice, provided, however, that documents containing Classified Information including any notes, memoranda, or work product based thereon, shall at all times thereafter be maintained by the custodian at the location referenced in the subparagraph (16) (a)(iii) above, and shall be kept secure and maintained separately from other documents and things regularly maintained by the proposed document custodian, and access to such document shall be permitted only to those persons approved for access pursuant to paragraph (4) of this Protective Order.
- (17) Classified Information shall not be discussed in any area in which persons not authorized to possess such information may overhear such discussions or in the vicinity of any electronic devices capable of hearing or recording those conversations (i.e., cell phones, cameras, tape recorders, other recording devices, etc.). Classified Information shall not be discussed or transmitted over any standard commercial telephone instruments or non-secure communication systems. Classified Information shall not be discussed, transmitted, or processed in any manner on any computer, word processing system, copy machine, or fax that has not been specifically approved by DOE or NRC.
- (18) Until further Order of the NRC, all pleadings, briefs, memoranda, and other papers to be submitted to and filed with the NRC containing Classified Information ("classified

filings”) shall be submitted to the PSO and served on Parties who have an approved Secure Facility (and, therefore, can possess classified information). The PSO will provide, to each Party who has a Secure Facility, the classified mailing address of each other Party who has a Secure Facility, so that the Party submitting a classified filing can properly serve the classified filing on the other parties who are authorized to possess that filing. The Party submitting the classified filing also must simultaneously file through the EIE an unclassified notice which will notify the other parties of the classified filing. The EIE notice must provide an unclassified description of the classified filing to give the Parties the general nature (e.g., Petition, Motion to Dismiss, Answer, or transcript) and general scope (e.g., “challenging TSD Section [X.X.X]”) of the filing. The EIE notice shall not include on the Certificate of Service any classified mailing addresses. All classified filings submitted to the PSO and served on cleared Parties in accordance with this paragraph shall be placed in two sealed envelopes or other containers, by the Party submitting the document. The inner envelope or container shall be marked front and back indicating the level of classification (and category if RD or FRD) of its contents. The form annexed hereto as Exhibit B shall be attached to the outside of the inner envelope or container and shall contain:

- (a) The words "Classified Information"
- (b) The caption of this proceeding
- (c) The name of the Party on whose behalf the document is being filed, and the names of Counsel of record for that Party
- (d) The following statement:

"This envelope [or other container] contains classified information. It is sealed and is not to be opened nor its contents displayed or revealed except in accordance with U.S. Nuclear Regulatory Commission Protective Order CLI-__."
- (e) An unclassified statement of the classified filing should be submitted with the Classified Information in accordance with 10 C.F.R. § 2.910.
- (f) An outer envelope that is addressed to the PSO at the designated address shall be marked with the words “To Be Opened by the Addressee Only.” The outer envelope must not indicate that its contents contain Classified Information.
- (g) All classified filings must be reviewed, marked and appropriately packaged (including double wrapping) when being transmitted outside the facility or location where it was generated or obtained to another approved facility or location in accordance with NRC and DOE regulations, as applicable. This includes new documents generated from classified discussions or other classified documents.
- (h) A Party who does not have a Secure Facility, but who has representatives who possess an appropriate security clearance, may contact the PSO to arrange to review the classified filing at an NRC Secure Facility.

- (19) Whenever Classified Information is or may be presented, quoted, or referred to in any hearing in this proceeding, including any appeals, and subject to the provisions of paragraph (5) above, Counsel for the Party on whose behalf the Classified Information is or may be presented, quoted, or referred shall make arrangements or, when appropriate, request the NRC to make arrangements, to ensure that only persons qualified under this Protective Order have access to such information, are present during such presentation, quotation, or reference, and that all portions of transcripts containing such information are bound separately, labeled "Classified Information" and filed in accordance with the provisions of paragraph (18) above. Specific arrangements for handling Classified Information at the hearing will be resolved as a pre-hearing matter held in camera.
- (20) Nothing in this Order shall relieve any person from safeguarding NSI, RD, or FRD in accordance with applicable provisions of the laws of the United States and rules, regulations or orders of any government agency.
- (21) The Parties and their Representatives are advised that direct or indirect unauthorized disclosure, retention, or negligent handling of Classified Information reasonably could, at a minimum, be expected to cause damage to the national security of the United States or be used to advantage a foreign nation. The purpose of this Protective Order is to ensure that the Parties and their Representatives will never divulge such information disclosed to them to anyone who is not authorized to receive it in conformity with this Protective Order without prior written NRC or DOE approval.
- (22) The Parties and their Representatives are further advised that any unauthorized disclosure of Classified Information may constitute violations of United States criminal law, including, but not limited to, the provisions of Title 18, United States Code, Sections 793, 794, and 798; and Title 42, United States Code, Section 2274. In addition, anyone who violates the terms of this Protective Order may be charged with contempt and may be subject to civil and/or criminal penalties. Persons are further advised that any breach of this Protective Order may result in the termination of their access to Classified Information as well as access by the Party with whom they are affiliated.
- (23) All Classified Information to which a Party and its Representatives obtain access under this Protective Order is now and will forever remain the property of the United States Government. Upon the final conclusion of this proceeding, including any appeals:
- (a) Each Party shall assemble and hand-deliver to the originating agency's Facility Security Officer all copies of documents containing Classified Information it has obtained under this Protective Order, including any produced in response to any and all discovery requests, as well as any notes, memoranda, computer disks, or tapes, or work product based on or otherwise containing or analyzing said information.
 - (b) The NRC shall return all documents containing Classified Information to the originating agency, including any Classified Information expunged from the

record of the proceeding in accordance with 10 C.F.R. 2.913.

- (24) A Party's improper or unauthorized production or disclosure of a classified document during the course of this proceeding, or failure to protect the document in accordance with this Order, shall not constitute a waiver of the classified nature of the document. This includes an improper or unauthorized release by the originating agency.
- (25) A copy of this Protective Order shall issue forthwith to Counsel for the Parties to this proceeding who shall advise their respective clients of the contents of this Protective Order, as well as furnish their respective clients with a copy of this Protective Order. Counsel for any Parties who subsequently intervene in these proceedings and who seek access to Classified Information are also required to furnish a copy of this Protective Order to their clients and to advise them of the contents.
- (26) Nothing contained in this Protective Order shall be construed as a waiver of any rights or regulations of an originating agency.

IT IS SO ORDERED

For the Commission

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland

this _____ day of June, 2008

EXHIBIT A

AGREEMENT

I have received, read, and understand the Protective Order to protect Classified Information, entered by the U.S. Nuclear Regulatory Commission, in the matter of U.S. Department of Energy (High Level Waste Repository) entered on _____, 2008 (CLI-___), and I agree to be bound by and comply with the provisions thereof and irrevocably consent to the jurisdiction of the NRC for purposes of securing compliance with this Protective Order.

Signature

Printed or Typed Name

Date

EXHIBIT B

THIS ENVELOPE (OR OTHER CONTAINER) CONTAINS CLASSIFIED INFORMATION. IT IS SEALED AND IS NOT TO BE OPENED EXCEPT BY AUTHORIZED INDIVIDUALS IN A SECURE FACILITY APPROVED BY THE U.S. NUCLEAR REGULATORY COMMISSION OR THE U.S. DEPARTMENT OF ENERGY. ITS CONTENTS MAY NOT BE DISPLAYED OR REVEALED EXCEPT BY NRC ORDER CLI-__.

The information contained in this envelope or other container has been filed by the Party identified below:

Party: _____

Counsel: _____

