

DRAFT PROPOSED JOINT PROTECTIVE ORDER FOR COMMENT

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PRE-LICENSE APPLICATION PRESIDING OFFICER BOARD

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))

PROPOSED MEMORANDUM AND ORDER
(Protective Order)

A. This Protective Order governs the disclosure and use of protected material, as defined in Paragraph B, produced in this proceeding.¹ Notwithstanding any order terminating this proceeding, this Protective Order shall remain in effect until specifically modified or terminated by the Pre-license Application Presiding Officer Board ("PAPO Board"), another Presiding Officer in this proceeding, or the Commission.

B. The term "protected material" means:

1. documentary material, as defined by 10 C.F.R. § 2.1001, in any form (including

¹ **[NRC STAFF PROPOSAL]** *The provisions of this Protective Order do not apply to NRC employees, contractors, or consultants with respect to protected material that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g. information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Disclosure of such protected material is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this Protective Order do apply to NRC employees, contractors, or consultants with respect to protected material that NRC would not be entitled to receive except by virtue of an Order in this proceeding.*

[DOE PROPOSAL] The provisions of this Protective Order do not restrict use by NRC employees, contractors, or consultants of material that the NRC receives apart from its role as a litigant in this proceeding (e.g. information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to the NRC in support of a requested licensing action). Rather, NRC's use of such material is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this Protective Order do apply to NRC employees, contractors, or consultants with respect to protected material that NRC receives solely by virtue of an Order in this proceeding.

electronic form) produced by a participant² in this proceeding and designated by the participant producing it as protected material;³

2. any information contained in or obtained from protected material;
3. notes of protected material;⁴
4. copies of protected material; and
5. any other material that is made subject to this Protective Order by the PAPO

Board, another Presiding Officer in this proceeding, or the Commission;

C. The term “protected material” does not include any material that a participant obtains through any other lawful means outside of this Protective Order.

D. The participant producing protected material shall mark it on each page as “PROTECTED MATERIAL.” Individuals with access to protected material pursuant to this Order may make copies of and take notes on the protected material, but such copies and notes become protected material and must be marked on each page as “PROTECTED MATERIAL.”

E. Only participants and counsel, consultants, assistants, and others representing a participant, who have executed the attached Non-Disclosure Declaration may have access to

² The term "participant" means any party, potential party, or interested governmental participant, as defined by 10 C.F.R. § 2.1001, that is entitled, under an order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission, to receive documents in this proceeding subject to this Protective Order and Non-Disclosure Declaration.

³ A participant may designate as protected material any documentary material that it believes, in good faith, is subject to a privilege under 10 C.F.R. § 2.1006 or under any order of the PAPO Board, another Presiding Officer in this proceeding, or the Commission. A determination that documentary material is subject to a privilege shall be reviewed and approved by counsel for the participant or by a designated representative of a participant appearing *pro se*. A participant's designation of protected material is subject to challenge in accordance with Paragraph K, below. Protected material does not include classified information, safeguards information, unclassified controlled nuclear information, and any similarly sensitive unclassified information; such information is to be covered by a separate Protective Order in this proceeding.

⁴ “Notes of protected material” means memoranda, handwritten notes, or any other form of information (including electronic form) that copies or discloses information in protected material.

protected material.⁵ Only a participant authorized to receive protected material under this Protective Order may request access to protected material. After receiving protected material, a participant may provide protected material to its counsel, consultants, assistants, and other representatives authorized to receive protected material under this Protective Order. Protected material shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except to the minimum number of counsel, consultants, assistants, or other participant representatives who are engaged in the conduct of this proceeding and who need to know the information in order to carry out their responsibilities in this proceeding.

F. Participants, and counsel, consultants, assistants, and others representing a participant, who receive any protected material shall maintain its confidentiality as required in the attached Non-Disclosure Declaration, the terms of which are hereby incorporated in this Protective Order.

G. Participants, and counsel, consultants, assistants, and others representing a participant, who receive any protected material shall take all reasonable precautions necessary to ensure that protected material is not distributed to unauthorized persons. Reasonable precautions include maintaining all protected material in a secure place and limiting access to that material to persons authorized to receive such material. Any person who receives protected material shall take all reasonable precautions to ensure that persons under their supervision or control comply with this Protective Order.

H. Protected material shall remain available to all participants until the later of the date that an order terminating this proceeding is no longer subject to judicial review, or the date that any other Commission proceeding relating to the protected material is concluded and no longer

⁵ A copy of each executed Non-Disclosure Declaration will be served on the PAPO Board or other Presiding Officer in this proceeding. Other participants need not be served with a copy of executed Non-Disclosure Declarations, but will be provided notice, at the time of filing, of the number of such declarations filed with the PAPO Board or other Presiding Officer.

subject to judicial review. Absent further order, the participants shall, within fifteen (15) days of the later date described above, return the protected material (excluding notes of protected material) to the participant that produced it, or shall destroy the information, except that copies of filings, official transcripts, and exhibits in this proceeding that contain protected material, and notes of protected material may be retained, if they are maintained in a secure place.⁶ Within such time period, each participant shall also submit to the producing participant an affidavit stating that, to the best of its knowledge, all protected material and all notes of protected material have been returned or have been destroyed or, if retained, will be maintained in accordance with the above. To the extent protected material is not returned or destroyed, it shall remain subject to the provisions of this Protective Order.

I. From the time that an individual who has received protected material under this Protective Order no longer qualifies as a participant, as defined in footnote 2 above, or counsel, consultant, or representative of a participant, that individual shall within 15 days return or destroy protected material in accordance with Paragraph H and submit an affidavit that it has done so,

J. All copies of all documents filed in this proceeding that disclose information contained in protected material shall be filed and served in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission.

K. Nothing in this Protective Order shall prevent any participant from challenging the designation of material as protected. Such a challenge shall be conducted and resolved in accordance with procedures set out by the PAPO Board, another Presiding Officer in this proceeding, or the Commission

⁶ Destruction of protected material shall include the destruction of electronic storage media (e.g. computer diskette or compact disk) containing protected material. This shall also include permanent removal of the protected material from the hard drives of electronic media on which it has been processed, using Secure Clean PC software or its equivalent.

L. Participants, and counsel, consultants, assistants, or any other individual representing a participant, who have reason to suspect that protected material may have been lost or misplaced or that protected material has otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the PAPO Board, or other appropriate Presiding Officer in this proceeding, promptly of those suspicions and the reasons for them.

M. Each participant that receives protected material under this Protective Order shall keep a record that identifies all documents containing protected material received by that participant (including counsel, consultants, assistants, and others representing the participant) and shall account for those documents on an annual basis. No later than 12 months after a participant first receives protected material under this Protective Order, that participant shall file a list of the documents that it has received under this Protective Order, including the Licensing Support Network Accession number of each document, and indicate the maximum number of persons given access to protected material received by the participant in this proceeding. This first accounting shall be served, via Electronic Information Exchange, on the PAPO Board, or other Presiding Officer, and those on the service list for this proceeding. Each subsequent accounting shall contain the same information and shall be served in the same manner at intervals not to exceed 12 months.

N. Any violation of the terms of this Protective Order or a Non-Disclosure Declaration executed in furtherance of this Protective Order may result in the imposition of sanctions as the PAPO Board, another Presiding Officer in this proceeding, or the Commission may deem appropriate. Such sanctions may include, but are not limited to, refusal to consider a filing by the offending participant; denial of the right to receive documents under this or any other protective order in this proceeding; denial of the right to cross-examine or present evidence; refusal to allow the counsel, consultant, or other representative of a participant to participate in this proceeding; dismissal of one or more of a participant's contentions; or dismissal of the

participant from the proceeding. In addition, sanctions may include referral of the violation to appropriate bar associations and/or other disciplinary authorities, including the U.S. Department of Justice for criminal prosecution, if appropriate.

O. The PAPO Board, another Presiding Officer in this proceeding, or the Commission may alter or amend this Protective Order as circumstances warrant at any time during the course of this proceeding. The participants shall be afforded notice and an opportunity to be heard before any such alteration or amendment comes into effect.

It is so ORDERED.

The Pre-License Application
Presiding Officer Board

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
U.S. DEPARTMENT OF ENERGY)
)
(High-Level Waste Repository))

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that access to protected material is provided to me pursuant to the terms and restrictions of the Protective Order, dated _____; that I have been given a copy of and have read this Protective Order; and that I agree to be bound by it. I understand that the contents of any protected material, as defined in that Protective Order, shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this Declaration or the Protective Order, which incorporates the terms of this Declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the PAPO Board, another Presiding Officer in this proceeding, or the Commission may deem to be appropriate. Such sanctions may include, but are not limited to, refusal to consider a filing by the offending participant; denial of the right to receive documents under this or any other protective order in this proceeding; denial of the right to cross-examine or present evidence; refusal to allow the counsel, consultant, or other representative of a participant to participate in this proceeding; dismissal of one or more of a participant's contentions; or dismissal of the participant from the proceeding. In addition, sanctions may include referral of the violation to appropriate bar associations and/or other disciplinary authorities, including the U.S. Department of Justice for criminal prosecution, if appropriate.

WHEREFORE, I do solemnly agree to protect such protected material as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed): _____

Title: _____

Representing: _____

Signature: _____

Date: _____