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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

KEEP YELLOWSTONE NUCLEAR FREE, ENVIRONMENTAL DEFENSE INSTITUTE, and DAVID MCCOY Plaintiffs, v. UNITED STATES DEPARTMENT OF ENERGY and STEVEN CHU, SECRETARY, UNITED STATES DEPARTMENT OF ENERGY Defendants.	)	Civil No. 06-CV-205-D MOTION TO ALTER OR AMEND JUDGMENT

DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT AND/OR FOR RELIEF FROM JUDGMENT

Defendants respectfully move, pursuant to Federal Rules of Civil Procedure 59(e) and 60(b), to reconsider its September 28, 2009 Order and to grant summary judgment for Defendants. *See* Docket No. 48, 49. For the reasons explained in the attached memorandum, the agency has subsequently designated portions of the disputed documents as unclassified,

controlled nuclear information, which is protected from public disclosure.

Dated: October 13, 2009

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT AND/OR FOR RELIEF FROM JUDGMENT

TABLES OF CONTENTS

PAGE(s)

TABLES OF AUTHORITIES. ii

INTRODUCTION..... 1

FACTUAL BACKGROUND. 2

ARGUMENT. 4

I. A CHANGE IN DESIGNATION OF THE DOCUMENTS JUSTIFIES GRANTING A MOTION FOR RECONSIDERATION. 4

II. THE WITHHELD INFORMATION IS PROPERLY DESIGNATED UCNI AND IS EXEMPTED FROM DISCLOSURE..... 7

A. The Atomic Energy Act is a FOIA Exemption 3 Statute. 7

B. The Redacted Information is Properly Designated as UCNI. 9

CONCLUSION. 16

TABLE OF AUTHORITIES

CASES **PAGE(S)**

American Jewish Congress v. Kreps,
574 F.2d 624 (D.C. Cir. 1978). 7

Anderson v. Dep't of Health and Human Services,
907 F.2d 936 (10th Cir. 1990). 9

Arizona Public Service Co. v. EPA,
562 F.3d 1116 (10th Cir. 2009). 9

Auer v. Robbins,
519 U.S. 452 (1997). 9

Baltimore Gas & Elec. Co. v. NRDC,
462 U.S. 87 (1983). 10

Billington v. Dep't of Justice,
301 F. Supp. 2d 15 (D.D.C. 2004). 7

Browning-Ferris Indus. v. Muszynski,
899 F.2d 151 (2d Cir. 1990). 10

Brumark Corp. v. Samson Resources Corp.,
57 F.3d 941 (10th Cir. 1995). 4

Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.,
909 F.2d 1437 (10th Cir. 1990). 5

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984). ..... passim

Church of Scientology Int'l v. DOJ,
30 F.3d 224 (1st Cir. 1994). 10

Citizens for Peace in Space v. City of Colorado Springs,
477 F.3d 1212 (10th Cir. 2007). 10

Computer Professionals for Social Responsibility v. U.S. Secret Service,
72 F.3d 897 (D.C. Cir. 1996). 6

Dep't of the Interior v. South Dakota,
519 U.S. 919 (1996). 5

Dep't of the Navy v. Egan,
484 U.S. 518 (1988). 10

FDIC v. United Pacific Ins. Co.,
152 F.3d 1266 (10th Cir. 1998). 5

Fed. Power Comm'n v. Florida Power & Light Co.,
404 U.S. 453 (1972). 10

Franklin v. Massachusetts,
505 U.S. 788 (1992). 10

Fund for Animals v. Williams,
311 F. Supp. 2d 1 (D.D.C. 2004), *aff'd* 428 F.3d 1029 (D.C. Cir. 2005). 5

Humanitarian Law Project v. U.S. Dep't of Treasury,
484 F. Supp. 2d 1099 (C.D. Cal. 2007), *aff'd* 578 F.3d 1133 (9th Cir. 2009). 5

International Bhd. of Teamsters v. Daniel,
439 U.S. 551 (1979). 5

Maier v. EPA,
114 F.3d 1032 (10th Cir. 1997). 6

Morley v. C.I.A.,
508 F.3d 1108 (D.C. Cir. 2007). 10

NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc,
55 F.3d 74 (2nd Cir. 1995). 5

Piper v. Dep't. of Justice,
374 F. Supp. 2d 73 (D.D.C. 2005). 7

Riverkeeper, Inc. v. Collins,
359 F.3d 156 (2d Cir. 2004). 14

San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission,
449 F.3d 1016 (9th Cir. 2006). 14

Schanen v. Dep't of Justice,
798 F.2d 348 (9th Cir. 1985). 7

Servants of Paraclete v. Does,
204 F.3d 1005 (10th Cir. 2000). 4, 5

TNS, Inc. v. N.L.R.B.,
296 F.3d 384 (6th Cir. 2002). 10

Virginia Sunshine Alliance v. Nuclear Regulatory Commission,
509 F. Supp. 863 (D.D.C. 1981), *aff'd* 669 F.2d 788 (D.C. Cir. 1981). 7

White v. IRS,
707 F.2d 897 (6th Cir. 1983). 10

STATUTES AND REGULATIONS

5 U.S.C. § 552(b)(3). 7, 10

42 U.S.C. § 2168. ..... passim

RULES AND REGULATIONS

10 C.F.R. pt. 1017. ..... passim

10 C.F.R. § 1004.10(b)(3). 8

10 C.F.R. § 830.204(b)(3). 3

INTRODUCTION

In light of the extraordinary national security interest in non-disclosure of the nuclear information contained in the disputed documents in this case, Defendant United States Department of Energy ("DOE") has taken action subsequent to final judgment to designate portions of the disputed documents as unclassified controlled nuclear information ("UCNI"). Although information related to this reactor has not been designated UCNI since 1992, it falls well within the statutory and regulatory definitions of UCNI, and the assessment of risk today is necessarily different than it was in 1992. UCNI is protected from disclosure by the Atomic Energy Act and Exemption Three of the Freedom of Information Act ("FOIA").

Government agencies are necessarily dynamic and free to re-consider previous policy judgments in order to adapt to changing factual and legal landscapes. Although the government continues to assert Exemptions 2 and 7(F), DOE has also designated the information such that it is now protected by Exemption 3.[1] DOE has also engaged its security experts in yet another intensive line-by-line review of the documents in order to determine if any additional information can be made public without rendering the facility vulnerable to terrorist attack. Some additional information has been released and is therefore no longer in dispute. Defendants regret any inconvenience that this new designation causes the Court. The public interest, however, compels the government to take every available measure to protect information which, if disclosed, could harm the nation's security. Defendants respectfully request that the Court reconsider its final judgment in light of the fact that the remaining redacted portions of the documents now contain UCNI and are therefore exempt from

[1]At this time, the government wishes to preserve those Exemptions for a possible appeal. Accordingly, it asserts Exemptions 2, 3, and 7(F) over all of the redacted material still in dispute. The instant motion for reconsideration relates only to Exemption 3 because only Exemption 3 has not previously been argued.

disclosure under FOIA.

FACTUAL BACKGROUND

In 2005, Plaintiffs Keep Yellowstone Nuclear Free ("KYNF"), Environmental Defense Institute and David McCoy submitted a series of FOIA requests seeking a large volume of material related to the safety and security of the Advanced Test Reactor ("ATR") at Idaho National Laboratory, the largest and most powerful nuclear test reactor in the world. The requests encompassed a voluminous document called the Upgraded Final Safety Analysis Report ("UFSAR"). DOE has since produced a large volume of material but withheld portions of the UFSAR that describe accident scenarios and provide hazard assessments for the nuclear reactor because a knowledgeable terrorist could use these scenarios and assessments to sabotage the nuclear reactor.[2] In September 2007, there were four portions of documents remaining in dispute:

- Chapter 15 of the UFSAR;
- Chapter 15 of the 1998 UFSAR;
- The HAD-3 Emergency Management Hazards Assessment for the Reactor Technology Complex;
- Engineering Design File 4394 Update of ATR Break Spectrum and Direct Damage LOCA Frequency Analyses.

Defendants argued that the redacted portions of those documents were exempt from disclosure under FOIA. First, Defendants argued that Exemption "high" 2 justifies withholding because the documents are predominantly internal and their disclosure risks circumvention of federal statutes or regulations. Specifically, information about potential vulnerabilities and internal safety

[2]Accident scenarios relate to the contractor's obligation to"[e]valuate normal, abnormal, and accident conditions, including consideration of natural and man-made external events, identification of energy sources or processes that might contribute to the generation or uncontrolled release of radioactive and other hazardous materials, and consideration of the need for analysis of accidents which may be beyond the design basis of the facility." 10 C.F.R. § 830.204(b)(3). Hazard assessments relate to the requirement that the contractor "[p]rovide a systematic identification of both natural and man-made hazards associated with the facility" and "[d]erive hazard controls necessary to ensure adequate protection of workers, the public, and the environment." *Id.* § 830.204(b)(2), (4).

and security processes could be used to defeat those procedures in a terrorist attack. Second, Defendants argued that Exemption 7(F) applies because the documents are compiled for the purposes of fulfilling DOE's law enforcement responsibility to ensure the safety and security of the reactor from all threats; and that their release poses a significant threat to the safety of others because the information and analyses could be used to sabotage the reactor. In short, Defendants explained that a knowledgeable terrorist could use these accident scenarios as instructions for causing a nuclear meltdown. *See* Docket Nos. 22, 30.

In September 2007, the Court rejected the application of FOIA Exemption 2 because it found that the documents were insufficiently internal and rejected Exemption 7(F) because it found that the records were not investigatory. Slip Op. at 8, 15. The Court nonetheless ordered *in camera, ex parte* production of the documents and interviewed the expert declarants from the Idaho National Laboratory. On September 14, 2009, the Court re-affirmed its earlier opinion and ordered production of the remaining documents.[3] *See* Docket No. 48. The Court instructed that Defendants could re-review the documents in order to redact "specific details pertaining to the location of certain systems or equipment and their identifiers where such redaction will not meaningfully interfere with the Plaintiff's independent review and analysis." *See* Docket No. 48. The Court ordered production of the documents that remain in dispute within ten calendar days. On October 5, 2009, the Court granted Defendants' unopposed motion for a 60-day stay of the Order.

After entry of judgment, DOE reassessed the protections afforded these documents in light of the Court's order and the extraordinary national security interest in protecting the ATR from

[3]That order was inadvertently not filed by the Clerk. Accordingly, it was belatedly filed on September 28, 2009, along with an order explaining the discrepancy and noting that the time for compliance ran from September 28, 2009. *See* Docket Nos. 48, 49.

attack. Declaration of Karl Hugo, Classification Officer for DOE Idaho Operations Office, dated October 13, 2009, ¶¶ 5, 12-13. The documents have not previously been treated as UCNI, and information related to the ATR has not been treated as UCNI since 1992, but DOE has now determined that redacted portions of these documents fall within the statutory definition of UCNI. *Id*. ¶ 12. Specifically, the following topic was added to the list of topics designated as UCNI:

> Information concerning fixed process equipment in the Advanced Test Reactor within the Idaho National Laboratory, an UCNI utilization facility, such as that contained in floor plans, models, diagrams, blueprints, photos, authorization basis documentation, or other documents or material which:
>
> Reveals detailed design, design-related operational information, or identifying/locational information concerning piping, valves, wiring, power supplies, etc., which if sabotaged could cause major damage, extensive downtime, defeat of emergency or back-up systems, a significant dispersal of radioactive material, or a significant hazardous process material release...UCNI.

Hugo Decl.¶ 14 & Exhibit 8. The Classification Officer then made a detailed, line-by-line review to reassess the risks posed by the redacted portions of these documents. This has resulted in an even narrower set of redactions (with respect to each Exemption) consistent with the agency's assessment of the risk to national security.

ARGUMENT

I. A CHANGE IN DESIGNATION OF THE DOCUMENTS JUSTIFIES GRANTING A MOTION FOR RECONSIDERATION

Courts grant timely motions to reconsider brought under Fed. R. Civ. P. 59(e) based on (1) an intervening change in the controlling law, (2) new evidence previously unavailable, or (3) the need to correct clear error or prevent manifest injustice. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Brumark Corp. v. Samson Resources Corp*., 57 F.3d 941, 948 (10th Cir. 1995). A Court may also grant extraordinary relief from judgment under Rule 60(b) under more

restrictive circumstances, including *inter alia*, "mistake, inadvertence, surprise, or excusable neglect," "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b)" or "any other reason that justifies relief." Fed. R. Civ. P. 60(b); *see also Bud Brooks Trucking, Inc. v. Bill Hodges Trucking Co.*, 909 F.2d 1437, 1440 (10th Cir. 1990). As the Tenth Circuit has recognized, "Rule 60(b) provides courts with a grand reservoir of equitable power to do justice in a particular case," and a "district court accordingly has substantial discretion to grant relief as justice requires." *FDIC v. United Pacific Ins. Co.*, 152 F.3d 1266, 1272 (10th Cir. 1998).

Although 59(e) is not an appropriate vehicle for raising issues that could have been raised previously, *Servants of the Paraclete*, 204 F.3d at 1012, a change in agency policy or decision is precisely the sort of change in law that permits reconsideration. *See, e.g., Humanitarian Law Project v. U.S. Dep't of Treasury*, 484 F. Supp. 2d 1099, 1103-04 (C.D. Cal. 2007), *aff'd* 578 F.3d 1133 (9th Cir. 2009) (granting reconsideration based on change in agency policy); *Fund for Animals v. Williams*, 311 F. Supp. 2d 1, (D.D.C. 2004), *aff'd* 428 F.3d 1029 (D.C. Cir. 2005) (granting 59(e) motion where Fish and Wildlife Service issued new finding that addressed the deficiency in its previous explanation, and rendered moot Plaintiff's complaint); Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d* § 2810.1 (courts will provide relief if it is no longer equitable for an order to be enforced because of subsequent legislation, a change in decisional law, a change in operative facts, or clear error); *see also NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc*, 55 F.3d 74, 78 (2nd Cir. 1995) (allowing reconsideration and remand to agency after final judgment and appeal because of new agency policy); *Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996) (Supreme Court remanded case based on DOI's promulgation of new regulation after Eight Circuit ruled against it). A federal agency must be free to reconsider its previous positions within the scope of its

statutory authority. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, (1984) (upholding change in agency interpretation of statute); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 566 n. 20 (1979) ("deference is a product both of an awareness of the practical expertise which an agency normally develops, and of a willingness to accord some measure of flexibility to such an agency as it encounters new and unforeseen problems over time."); *Maier v. EPA*, 114 F.3d 1032, 1040 (10th Cir. 1997).

The present circumstances justify granting such relief. The agency has reassessed its previous policy of not treating certain information related to the ATR as UCNI, creating a change in applicable facts and law to be applied. Courts have granted reconsideration in FOIA cases even where the government asserts an exemption for the first time after summary judgment. In *Computer Professionals for Social Responsibility v. U.S. Secret Service*, 72 F.3d 897 (D.C. Cir. 1996), the D.C. Circuit found in a FOIA case that reconsideration was warranted based on facts not presented to the district court prior to final judgment because of the importance of the issues and the interests of third parties in non-disclosure of certain sensitive information. The circumstances presented here are even more compelling. The motion on reconsideration in *Computer Professionals* was based entirely on facts that were known to the agency at the time of the original motion. The motion in the instant case, however, is based on a new agency decision to designate the information pursuant to its Congressionally authorized power to withhold such information, as explained in Part II below. Although this Court has rejected DOE's claimed FOIA exemptions as a legal matter, the Court has also expressed concern about the potential security implications of its ruling. *See, e.g.*, Slip Op. dated Sept. 24, 2007, at 15 ("the Court is faced with the burden of balancing weighty considerations. The Court is mindful that disclosure of highly specific information regarding the ATR has the potential to circumvent the security and safety measures designed to protect the ATR from attack.");

September 14, 2009 Order at 2 (allowing redactions of particularly sensitive information even though the Court found no legal basis for such redactions). The compelling public interest in the security of the reactor justifies both a reconsideration of agency policy and reconsideration of the Court's Order on that basis.[4]

II. THE WITHHELD INFORMATION IS PROPERLY DESIGNATED UCNI AND IS EXEMPTED FROM DISCLOSURE

A. The Atomic Energy Act is a FOIA Exemption 3 Statute

FOIA exempts from disclosure information prohibited from disclosure by another federal statute where the statute either "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). It is clear that the nondisclosure provisions of the Atomic Energy Act fall within Exemption 3(B). *See, e.g., Virginia Sunshine Alliance v. Nuclear Regulatory Commission*, 509 F. Supp. 863, 864 (D.D.C. 1981), *aff'd* 669 F.2d 788 (D.C. Cir. 1981) ("Section 147 of the Atomic Energy Act, which was enacted on June 30, 1980, is the applicable (b)(3) statute in this case."); *see also American Jewish Congress v. Kreps*, 574 F.2d 624 (D.C. Cir. 1978) (describing Atomic Energy Act as within the scope of Exemption 3). The Atomic Energy Act directs the Secretary of Energy to prescribe regulations and issue orders so as to prohibit disclosure of certain categories of unclassified information, including information pertaining to "the design of production facilities or utilization facilities" and "security measures (including security plans, procedures, and equipment) for the physical protection of (i) production

[4] *See also Schanen v. Dep't of Justice*, 798 F.2d 348, 349 (9th Cir. 1985) (reversing denial of Rule 60(b) motion and preventing release of documents that, based on a review of in camera submissions, would endanger the lives of DEA agents and confidential informants); *Piper v. Dep't. of Justice*, 374 F. Supp. 2d 73, 78-79 (D.D.C. 2005); *Billington v. Dep't of Justice*, 301 F. Supp. 2d 15 (D.D.C. 2004).

or utilization facilities, (ii) nuclear material contained in such facilities, or (iii) nuclear material in transit." 42 U.S.C. § 2168(a)(1).

The Act further provides that the Secretary shall make such orders or prescribe regulations "only if and to the extent that the Secretary determines that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security of by significantly increasing the likelihood of (A) illegal production of nuclear weapons, or (B) theft, diversion, or sabotage of nuclear materials, equipment, or facilities." 42 U.S.C. § 2168(a)(2). In making this determination, the Secretary should "apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security." *Id*. at § 2168(a)(4). It further directs that such orders are reviewable in FOIA cases. *Id.* at § 2168(d).

By order and by publication in the Federal Register, the Secretary has promulgated implementing regulations and a handbook containing detailed instructions how to identify and handle UCNI and delegating his authority to do so. *See* 10 CFR pt. 1017 (implementing regulations); DOE Order 471.1A (order dated June 30, 2000) (attached to Hugo Declaration as Exhibit 7); DOE Manual 471.1-1 (Manual dated June 30, 2000) (attached to Hugo Declaration as Exhibit 6). These regulations have been further distilled into a General Guideline listing topics considered to be UCNI. *See* Unclassified Controlled Nuclear Information, General Guideline 5 (dated February 2004) (attached to Hugo Declaration at Exhibit 5) . This guideline is not comprehensive and the Manual allows future topics can be added to the list. *See* Manual at I-7. A determination that material is UCNI must be affirmatively made by the Secretary or his/her designee. In order to be identified as UCNI, the information must meet five criteria laid out by regulation: First, the information must be "Government information;" second, the information must concern "atomic energy defense

programs;" third, the information must fall within the scope of at least one of the three subject areas eligible to be UCNI; fourth, the information must meet "the adverse effect test;" and fifth, the information must not be exempt from being UCNI. 10 C.F.R. § 1017.7.

B. The Redacted Information is Properly Designated as UCNI

Here Congress has specifically described information that is exempt from disclosure and has intentionally delegated power to an agency with expertise in the subject to implement such nondisclosure. *See* 42 U.S.C. § 2168. The agency has acted pursuant to that authority by issuing regulations pursuant to notice and comment and by following its own guidelines. *See* 10 C.F.R. pt. 1017. Under general principles of administrative law, the agency is entitled to deference in its interpretation of an ambiguous statute that it is charged with administering, so long as the agency's interpretation is reasonable. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Arizona Public Service Co. v. EPA*, 562 F.3d 1116, 1123 (10th Cir. 2009). Under *United States v. Mead Corp.*, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. 218, 226-27 (2001). Moreover, "[A]n agency's interpretation of [its own regulations] is ... controlling unless plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

The Tenth Circuit has declined to accord *Chevron* deference to an agency's interpretation of an Exemption 3 statute in the past, *see Anderson v. Dep't of Health and Human Services*, 907 F.2d 936 (10th Cir. 1990), explaining that Exemption 3(A) required a Congressional finding that material be "specifically exempted" and that general FOIA principles favor disclosure, *id.* at 951n.19. The Atomic Energy Act is distinguishable from the statute at issue there because it "establishes criteria

for withholding" under Exemption 3B, *see* 5 U.S.C. § 552(b)(3)(B), and explicitly delegates authority to the agency to interpret those criteria. *See* 42 U.S.C. § 2168(a)(2). Such a clear and specific delegation of power should qualify for *Chevron* deference. *See also Church of Scientology Int'l v. DOJ*, 30 F.3d 224, 235 (1st Cir. 1994) (finding that, "agency decisions to withhold material under Exemption 3 are entitled to some deference"); *White v. IRS*, 707 F.2d 897, 900-01 (6th Cir. 1983) (holding that agency interpretation of Exemption 3 statute was "neither arbitrary nor capricious"). At the very least, deference to the DOE's assessment of the threat to national security is appropriate; the agency's assessment of the risk from disclosure of nuclear secrets is uniquely Executive Branch expertise. *See Morley v. C.I.A.* 508 F.3d 1108, 1126 (D.C. Cir. 2007) ("Given the special deference owed to agency affidavits on national security matters, [Plaintiff]'s specific challenges to various documents are insufficient to show that summary judgment on Exemption 3 was inappropriate."); *see also Dep't of the Navy v. Egan,* 484 U.S. 518, 530 (1988) (stating that "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (acknowledging the "principle of judicial deference that pervades the area of national security.") *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007) (same). Deference is also due where, as here, the decision involves highly technical subject matter within the expertise of the agency. *See Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983); *Fed. Power Comm'n v. Florida Power & Light Co.*, 404 U.S. 453, 463 (1972); *TNS, Inc. v. N.L.R.B.*, 296 F.3d 384, 398 (6th Cir. 2002) ("In general, courts have held that scientific regulatory agencies such as the NRC should be given extreme deference within their area of expertise."); *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151, 160 (2d Cir. 1990) ("Courts should be particularly reluctant to second-guess agency choices involving scientific disputes

that are in the agency's province of expertise.").

Prior to the judgment in this case, information related to the ATR was not treated as UCNI, and it is not listed in the General Guideline. *See* Hugo Decl. ¶¶12-14. Over 15 years ago, DOE decided not to treat information related to the ATR as UCNI based on the threat assessment at the time. *Id.* ¶ 12.[5] Following the judgment in this case, however, the Classification Officer was asked to make a new assessment as to whether or not the information was UCNI. Hugo determined that the redacted portions of the disputed documents are in fact UCNI. *Id*. This designation of material as UCNI requires new security measures associated with handling of the documents, but the potentially catastrophic harm threatened by possible public disclosure of the design details of the reactor warrants the additional security. Hugo Decl. ¶¶ 10, 12-15. A new assessment of the information and of today's security risks reveals that the redacted information clearly falls within the prohibition of disclosure under the Atomic Energy Act. *Id.* ¶¶ 7-11.

The appropriate authority has determined that the redacted portions of the UFSAR should be treated as UCNI because it is government information concerning atomic energy defense programs and pertaining to the design of a utilization facility – the ATR– and because public dissemination of these documents significantly increases the likelihood of sabotage on the ATR, its materials or facilities.[6] Hugo Decl. ¶ 7-11. The agency's regulations are entitled to deference under

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[5]In 1992, DOE ceased reprocessing spent nuclear fuel. Because the most pressing security concerns were associated with reprocessing, it was deemed unnecessary to continue protecting information related to the ATR as UCNI. In 1992, DOE also believed that such information would be exempt from public disclosure. *See* Hugo Decl. ¶ 12. It is unsurprising that the security and threat assessment has changed since 1992.

[6]The Office of Nuclear and National Security Information determined that the topic constituted UCNI, based on the recommendation of Karl Hugo. Hugo Decl. ¶ 14. Declarant Karl Hugo conducted the line-by-line review of the disputed documents and determined that individual portions of those documents fell within the topic. *Id.* ¶ 15.

Chevron, and the agency's interpretation of its own regulations is controlling unless plainly erroneous.

First, the redacted information is "government information." By regulation government information "means any fact or concept, regardless of its physical form or characteristics, that is owned by, produced by or for, or otherwise controlled by the United States Government, including such facts or concepts that are provided by the Government to any person, including persons who are not employees of the Government." 10 C.F.R. § 1017.4. The redacted information was created jointly by the DOE and its contractors who operate the ATR. The information is directly controlled by DOE. *See* Hugo Decl ¶ 7.

Second, the redacted information concerns "atomic energy defense programs." Such programs include "[g]overnment activities, equipment, and facilities that are capable of . . . [p]roducing, using, or transporting nuclear material that could be used in nuclear weapons or military-related utilization facilities." 10 C.F.R. § 1017.4. The ATR and its equipment are capable of using nuclear material that could be used in nuclear weapons or military-related utilization facilities. *See* Hugo Decl. ¶¶ 8-9.

Third, the redacted information falls within the subject matter protected as UCNI because it pertains to the design of a utilization facility. *See* 10 C.F.R. § 1017.8. "Utilization facilities" are further defined by regulation to include:

> Any equipment or device, or any important component part especially designed for such equipment or device, except for a nuclear weapon, that is peculiarly adapted for making use of nuclear energy in such quantity as to be of significance to the common defense and security or in such manner as to affect the health and safety of the public. For the purposes of this part, such equipment or devices include . . . Government research reactors.

10 C.F.R. § 1017.4. The ATR is an important government research reactor, that if compromised,

could cause a release of significant quantities of radioactive material, thereby affecting the health and safety of the general public. *See* Hugo Decl. ¶¶ 9-10; *see also* Declaration of Joel M. Trent, filed January 8, 2007 with Docket No. 22). ¶¶ 5-8, 23-24 (describing uses of ATR and potential consequences of attack).

Fourth, the redacted information meets the adverse effect test in the Atomic Energy Act and the regulations. *See* 42 USC § 2168(a)(2); 10 C.F.R. § 1017.10.[7] The material that has been redacted contains information that could be used by a terrorist to cause an accident and exacerbate the consequences of such an accident through sabotage, resulting in a significant adverse effect on the health and safety of the public. The compromise of this information could significantly increase the likelihood of theft, diversion or sabotage at the ATR, because it would enable an adversary to understand the means to cause the most damage to the ATR. *See* Hugo Decl. ¶¶ 4, 10. This assessment is wholly consistent with the previously filed declaration of Joel Trent, Administrator of the Emergency Management Program at Idaho National Laboratory, who explained that terrorists

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[7]DOE regulations specifically exclude certain kinds of information from being UCNI, including:

> (a) Information protected from disclosure under section 147 of the Atomic Energy Act (42 U.S.C. 2167) that is identified as Safeguards Information and controlled by the United States Nuclear Regulatory Commission;
> (b) Basic scientific information (i.e., information resulting from research directed toward increasing fundamental scientific knowledge or understanding rather than any practical application of that knowledge);
> (c) Radiation exposure data and all other personal health information; and,
> (d) Information concerning the transportation of low level radioactive waste.

10 C.F.R. § 1017.11. The disputed information is not safeguards information, basic scientific information, radiation exposure data or information concerning the transportation of low-level radioactive waste. Hugo Decl. ¶ 11.

could readily use the information related to accidents and hazard assessments to attack the reactor:

> The easiest way to determine how to damage a reactor is to look at the safety envelope and accident analysis for the reactor, and then to determine the best way to bypass or defeat the engineered safeguards that can cause a small accident, and to make that small accident bigger. Because of the need to demonstrate safety, most of the work has already been done for a terrorist if such safety information were to be released. The Safety Analysis Report and related documents at issue in this litigation (referred to collectively as the "SAR") contain details regarding the operation of the reactor and the engineered safety features and procedures used to mitigate accidents. In other words, the SAR, due to its safety analysis, contains everything a terrorist needs -- the safety envelope, the accident analysis, and the engineered safeguards that can be bypassed to cause a small accident, and those that can be bypassed to make the small accident bigger.

Trent Decl. ¶ 17. A terrorist attack on the ATR has the potential to harm numerous individuals through radiation exposure, as well as to cause significant loss of livelihood, damage to the environment, and public panic. (Trent Decl. at ¶¶ 23, 24). In sum, the accident scenarios and hazard assessments could be used by a knowledgeable adversary as an instructional manual for causing and exacerbating a nuclear accident by sabotage.[8]

The appropriate classifying official has made this determination on a line-by-line basis with respect to each of the four documents at issue. The Hugo Declaration includes a detailed description of the types of information redacted from each document on a page-by-page basis and the risks

[8]Moreover, such attacks are a very real threat. Nuclear reactors, such as the ATR, are appealing terrorist targets, and release of the withheld information could make the ATR an even more appealing target. (Trent Decl. at ¶¶ 25-29). *See also San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1030-31 (9th Cir. 2006) (finding that possibility of terrorist attack on nuclear storage facility is not remote or highly speculative); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 159 (2d Cir. 2004) (discussing threats against nuclear facilities after September 11, 2001); George Bunn, et al., *Research Reactor Vulnerability to Sabotage by Terrorists*, 2003 Journal of Science and Global Security 85, 94-95 (http://cisac.stanford.edu/publications/research_reactor_vulnerability_to_sabotage_by_terrorists/) (discussing attractiveness of research reactors as terrorist target; noting that chance of success of external attack on reactors "would be greatly enhanced with the help of an insider who could supply design and security information, deactivate alarm systems and/or disable emergency safety systems.").

associated with disclosure of each. Hugo Decl. ¶¶ 15-19.[9] First, the UFSARs contain accident analyses that an adversary could use to create and exacerbate an accident. *Id.* ¶¶16, 17. For example, the redacted portions of the UFSAR include information describing the damage caused by dropping a fuel cask because the details of the accident and the means used to contain it could be used by an adversary to create and exacerbate exactly such an accident. *Id.* ¶¶16(f), 17(e). Second, the HAD-3 contains accident scenarios that would allow an adversary to identify and exploit worst-case scenarios. *Id.* ¶ 18. For example, some redacted information describes functions, process descriptions, and locations of vital systems that are important to safety and security of the facility that would assist an adversary in targeting crucial systems. *Id.* ¶ 18(p). Finally, the redacted portions of EDF-4394 include detailed information on reactor coolant pipes that could be used by an adversary to choose the pipes that would cause the most significant loss of coolant and the largest release. Hugo Decl. ¶ 19.

The result of this recent reassessment is a narrower assertion of all of the Exemptions.[10] The Exemptions could be asserted more broadly, especially as UCNI, but the agency experts have attempted to narrow the assertion of every Exemption only to that information which is absolutely critical. No one could reasonably question that its "unauthorized dissemination could reasonably be expected to result in a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of the . . . sabotage of nuclear

[9]Some of the descriptions of the redacted information are necessarily generalized because a more specific description of the redacted information would reveal that information that constitutes UCNI. Hugo Decl. ¶ 15.

[10]These redactions are nonetheless more extensive than those allowed by the Court's September 14, 2009 Order. First, the redactions are made without regard to whether or not they would impede Plaintiffs' review of the document. Second, information other than locations or identifiers is redacted where, for example, such information would allow a knowledgeable reader to discern design details falling within the definition of UCNI.

material, equipment, or facilities." *See* 10 C.F.R. § 1017.10; *see also* 42 U.S.C. § 2168(a). The unredacted versions of these documents are still in the Court's possession for its *ex parte, in camera* review as may be deemed appropriate.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court reconsider its previous ruling and grant summary judgment for the Defendant.

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