UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 03/27/08
SERVED 03/27/08

COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
PACIFIC GAS and ELECTRIC CO.	)	Docket No. 72-26-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

CLI-08-05

ORDER

Today's decision relates to Contention 1(b). In CLI-08-01, we admitted that contention "to the extent that it alleges that the [NRC] Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA [Freedom of Information Act] exemptions for [the Staff's] withholding decisions."[1] We directed the Staff to submit a "complete list" of the source documents for its environmental assessment, along with a "*Vaughn* index (or its equivalent)" explaining the FOIA basis for withholding any documents or portions of documents.[2]

The NRC Staff has now filed its Reference Document List and *Vaughn* index.[3] The Staff also filed an addendum to this submission.[4] The Staff's Reference Document List contains

[1] *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC ___ (Jan. 15, 2008), slip op. at 19.

[2] *Id.,* slip op. at 18.

[3] *NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 13, 2008) (Staff Reference Response).

twenty-one documents, and the *Vaughn* index lists redactions to these documents, plus the FOIA exemption that the Staff believes applies to each redaction (the Staff variously applies exemptions 1, 2, and 3, depending upon the nature of the information). The addendum to the Staff's submission corrects an omission in the *Vaughn* index by filling in the basis for withholding one of the documents.[5]

San Luis Obispo Mothers for Peace (SLOMFP) filed a response to the Staff's filing.[6] The response argued that the *Vaughn* index "is both incomplete and inadequate," that the Staff is unlawfully withholding "secret law" with respect to at least one document, that the Commission should grant SLOMFP access to unredacted documents under a protective order, and that SLOMFP should be given the opportunity to make additional discovery requests to the NRC Staff based on information in the redacted documents that the Staff has provided.[7]

Because by law disclosure of documents under NEPA is expressly governed by FOIA,[8] we decided in CLI-01-08 not to give SLOMFP NEPA-based access to documents exempt from

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[4] *Addendum to NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index* (Feb. 15, 2008) (Staff Addendum).

[5] Staff Addendum. The Department of Homeland Security (DHS) is the originator of Reference 4. The Staff provides a link to a DHS website regarding obtaining the document directly from DHS.

[6] *San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against the NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information* (Feb. 20, 2008) (SLOMFP Response).

[7] SLOMFP Response at 1-2.

[8] CLI-08-01, slip op. at 16-17, citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981) and *Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989). *See also State of Mo. ex rel. Shorr v. U.S. Army Corps of Engineers,* 147 F.3d 708, 710-11 (8th Cir. 1998).

disclosure under FOIA,[9] thereby rejecting SLOMFP's suggestion that we grant access "under appropriate protective measures."[10] To the extent SLOMFP now seeks reconsideration on the access question — SLOMFP uses the word "reconsideration" in the caption to the section of its response (Section IV) that discusses this issue — our practice is that such petitions be filed within ten days of the decision.[11] CLI-08-01 was issued on January 15, 2008, so the ten-day petition for reconsideration period has long since expired. In any event, SLOMFP has not made a showing of "compelling circumstance, such as the existence of a clear and material error in a decision, which could not have been reasonably anticipated."[12] SLOMFP's implicit petition for reconsideration is denied.

The balance of SLOMFP's response provides details regarding its challenge to the completeness of the Staff's Reference Document List and the adequacy of the Staff's *Vaughn* index. SLOMFP looks particularly at Document 8 (SECY-04-0222, *Decision-Making Framework for Materials and Test Reactor Vulnerability Assessments* (Nov. 24, 2004)) and infers that including this document, which on its face is not applicable to independent spent fuel storage installations (ISFSIs), may mean that another document linking Document 8 to ISFSIs has been left out of the Document Reference List. SLOMFP questions whether follow-up activities referred to in Document 8 — such as participation in DHS vulnerability reviews — generated

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[9] CLI-08-01, slip op. at 18 ("We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and the record. Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents").

[10] *San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement* (June 28, 2007) (SLOMFP Petition) at 10. Pacific Gas and Electric Company responded to this filing with one of its own: *Pacific Gas & Electric Company's Opposition to San Luis Obispo Mothers for Peace Requests for Leave to Conduct Expanded Discovery and for Access to Unredacted Documents* (Feb. 26, 2008).

[11] *See* 10 C.F.R. § 2.771(a).

[12] CLI-06-27, 64 NRC 399, 400 (2006). *See also* 10 C.F.R. § 2.771(b); CLI-06-27, 64 NRC at 400 n.5, 401 n.6.

documents that the Staff should have listed as references. SLOMFP also asks whether the "Risk Analysis and Management for Critical Assets Protection" methodology referred to in Document 8 as developed for DHS by the American Society of Mechanical Engineers should have been included as a reference document. SLOMFP also points to places in Document 8 where the Staff made redactions but failed to provide a corresponding FOIA exemption in its *Vaughn* index, and argues that the context of some redactions suggests that the Staff is withholding "secret law" on how to conduct its analysis, which should have been disclosed under FOIA.[13]

Rather than review these document-intensive claims ourselves, we direct the previously-designated presiding officer to resolve them, focusing in particular on the FOIA exemption justifications and the completeness of the NRC Staff's reference list. The presiding officer has full authority to use all appropriate adjudicatory tools, including consulting with parties, setting schedules, requesting further briefs, calling for summary disposition motions, holding oral argument, and reviewing documents *in camera*. We expect the presiding officer to resolve all outstanding FOIA issues — in other words, to resolve Contention 1(b) — on an expedited basis. Absent unanticipated circumstances, we expect a decision no later than May 30, 2008. We will entertain petitions for review of the presiding officer's final decision on Contention 1(b) under our usual standards.[14]

In his discretion and only if absolutely necessary to ensure a complete record and a fair decision, the presiding officer may allow limited discovery. But we remind him (and the parties)

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[13] SLOMFP Response at 2, 5-7, citing *Hardy v. Bureau of Alcohol, Tobacco & Firearms*, 631 F.2d 653, 657 (9th Cir. 1980).

[14] *See* 10 C.F.R. § 2.786.

that discovery "is sparingly granted" in FOIA litigation[15] — which ordinarily is resolved on summary disposition without discovery and without evidentiary trials or hearings.

IT IS SO ORDERED.

For the Commission

/RA/

Andrew L. Bates
Acting Secretary of the Commission

Dated at Rockville, Maryland,
this 27th day of March, 2008

Commissioner Jaczko respectfully dissents, in part:

I disagree with the Commission's decision to only allow the presiding officer to resolve the FOIA issues associated with Contention 1(b). I believe the Commission should have also allowed the presiding officer to determine whether there is a need to grant access through an appropriate protective order to documents exempt from disclosure under FOIA, as the agency has done in previous adjudicatory hearings.

[15] *Public Citizen Health Research Group v. FDA*, 997 F.Supp. 56, 72 (D.D.C. 1998). *See also Wheeler v. Central Intelligence Agency*, 271 F.Supp.2d 132, 139 (D.D.C. 2003) ("Discovery is generally unavailable in FOIA actions."); *Simmons v. U.S. Dept. of Justice*, 796 F.2d 709, 711-12 (4th Cir. 1986) ("the district court has the discretion to limit discovery in FOIA cases and to enter summary judgment on the basis of agency affidavits in a proper case").

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(Diablo Canyon Power Plant,	)	
Independent Spent Fuel Storage	)	
Installation)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION ORDER (CLI-08-05) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of March 2008