

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 04/16/08
SERVED 04/16/08

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judge:

E. Roy Hawkens, Presiding Officer

In the Matter of

PACIFIC GAS and ELECTRIC CO.

(Diablo Canyon Power Plant Independent
Spent Fuel Storage Installation)

Docket No. 72-26-ISFSI

ASLBP No. 08-860-01-ISFSI-BD01

April 16, 2008

ORDER

(Directing Staff To Provide Statement Regarding In Camera Review)

On April 4, 2008, I issued a Scheduling and Case Management Order that, consistent with the Commission's directive in CLI-08-05, established a road map for the expedited resolution of Contention 1(b).¹ The April 4 Order failed, however, to address in camera review. This Order remedies that omission.

Pursuant to the April 4 Order, the NRC Staff is scheduled to file a Motion for Summary Disposition by April 18, 2008. The NRC Staff is hereby directed to provide a statement in that Motion as to whether in camera review of redacted information or sealed declarations will be necessary. If the NRC Staff believes in camera review will be necessary, it will specify those documents that require such review, and it will provide a proposed schedule and a detailed procedure for the conduct of such review. If such review is needed, it should be completed no later than May 9.

In making its determination regarding the necessity vel non of in camera review, the NRC Staff should be mindful of the following principles. First, in cases (like this) that challenge

¹ Scheduling and Case Management Order for Adjudication of Contention 1(b) (Apr. 4, 2008) (unpublished).

the adequacy of a Vaughn Index, tribunals are permitted to issue summary disposition rulings solely on the basis of a public government affidavit that (1) is executed by an individual with the requisite experience and expertise, (2) identifies the redacted information, (3) identifies the applicable FOIA exemption, and (4) provides a detailed and particularized explanation of why the redacted information falls within the claimed exemption.² Second, in camera review of redacted information or sealed declarations ought to occur only in the “exceptional case” and only after “the government has submitted as detailed public affidavits . . . as possible.”³ The reason the government is expected, in the first instance, to submit highly detailed public affidavits justifying application of a FOIA exemption is to “restore, to the extent possible, a traditional adversarial proceeding by giving the party seeking the documents a meaningful opportunity to oppose the government’s claim of exemption” and, concomitantly, to provide the tribunal with the benefit of “informed advocacy upon which the fairness of adversary proceedings depends.”⁴

Consistent with the above principles, the NRC Staff should address the putative inadequacies in its Vaughn Index through the use of public affidavits that, consistent with governing case law (supra note 2) and regulations (10 C.F.R. §§ 2.323, 2.710 (2008)), explain with detail and particularity why the redacted information falls within the claimed FOIA

² See Lion Raisins Inc. v. United States Dep’t of Agric., 354 F.3d 1072, 1082 (9th Cir. 2004) (citing Vaughn v. Rosen, 484 F.2d 820, 823-25 (D.C. Cir. 1973)); accord, e.g., Citizens Comm’n On Human Rights v. FDA, 45 F.3d 1325, 1328-29 (9th Cir. 1995); Keys v. United States Dep’t of Justice, 830 F.2d 337, 349 (D.C. Cir. 1987); Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982); Abbotts v. NRC, 766 F.2d 604, 606 (D.C. Cir. 1985).

³ Lion Raisins Inc., 354 F.3d at 1083 (quoting Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983)). Cf. Hayden v. NSA, 608 F.2d 1381, 1387 (D.C. Cir. 1979) (“[w]hen the agency meets its burden by means of affidavits, in camera review [of records] is neither necessary nor appropriate”).

⁴ Lion Raisins Inc., 354 F.3d at 1083-84 (citing Wiener v. FBI, 943 F.2d 972, 979 (9th Cir. 1991)).

exemption. Specifically, the NRC Staff's public affidavits should address the intervenor's claims that several redactions suggest a wrongful withholding on the basis of "secret law."⁵ The NRC Staff should recommend in camera review only if it is unable to provide a public affidavit that adequately justifies its objection to disclosures without compromising the confidentiality of the withheld information.⁶

The intervenor, San Luis Obispo Mothers for Peace, and the applicant, Pacific Gas and Electric Co., may respond to the NRC Staff's statement regarding the need for in camera review in their answers to the NRC Staff's Motion for Summary Disposition.

It is so ORDERED.⁷

BY THE PRESIDING OFFICER⁸

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 16, 2008

⁵ See San Luis Obispo Mothers for Peace's Response to NRC Staff's Vaughn Index, Request for Leave to Conduct Discovery Against NRC Staff, Request for Access to Unredacted Reference Documents, and Request for Procedures to Protect Submission of Sensitive Information at 5-6 (Feb 20, 2008) [hereinafter SLOMFP Response]; see also CLI-08-05 (slip op. at 4) (Mar. 27, 2008).

Additionally, the NRC Staff should provide a detailed discussion addressing SLOMFP's assertion that the Staff has redacted information without supplying a corresponding FOIA exemption. See SLOMFP Response at 6-7; see also CLI-08-05 (slip op. at 3-4).

⁶ Lion Raisins Inc., 354 F.3d at 1084.

⁷ This Order does not relieve the NRC Staff of its obligation to provide detailed affidavits addressing with particularity the several deficiencies that SLOMFP alleges exist in the Reference Document List. See SLOMFP Response at 2-5; see also CLI-08-05 (slip op. at 3-4).

⁸ Copies of this Order were sent this date by Internet e-mail to counsel for: (1) Pacific Gas and Electric Co.; (2) San Luis Obispo Mothers for Peace; and (3) the NRC Staff.

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Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (DIRECTING STAFF TO PROVIDE STATEMENT REGARDING IN CAMERA REVIEW) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution.

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[Original signed by Nancy Greathead]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of April 2008