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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

May 14, 2008

**ORDER GRANTING NRC STAFF'S UNOPPOSED MOTION FOR SUMMARY DISPOSITION
OF SAN LUIS OBISPO MOTHERS FOR PEACE'S CONTENTION 1(b)**

In this case, San Luis Obispo Mothers for Peace (SLOMFP) raised several contentions challenging the NRC Staff's Supplemental Environmental Assessment (EA) that analyzed the environmental impacts that would result from a terrorist attack on a proposed Independent Spent Fuel Storage Installation (ISFSI) at the Diablo Canyon Nuclear Power Plant site. On March 27, 2008, the Commission issued an order directing me to resolve a single contention – Contention 1(b) – which alleges that the NRC Staff (1) failed to provide source documents or information underlying its environmental analysis, and (2) failed to identify appropriate Freedom of Information Act (FOIA) exemptions for the Staff's withholding decisions. On April 18, 2008, the NRC Staff filed a motion seeking summary disposition of Contention 1(b). See NRC Staff's Motion for Summary Disposition of SLOMFP's Contention 1(b) (Apr. 18, 2008) [hereinafter NRC Staff Summary Disposition Motion].

On April 26, SLOMFP filed a response stating that it did not oppose the NRC Staff's motion. See SLOMFP's Response to NRC Staff's Motion for Summary Disposition of Contention 1(b) (Apr. 26, 2008) [hereinafter SLOMFP Response to Summary Disposition

Motion]. SLOMFP's response does not pretermite my inquiry, however, because the NRC Staff must show it is entitled to summary disposition even in the absence of SLOMFP's opposition (*infra* Part II.A.2). As discussed below, the Staff has satisfied this burden, and its motion for summary disposition is therefore granted.

I. BACKGROUND

A. Adjudicative History of Contention 1(b)

In December 2001, Pacific Gas and Electric Co. (PG&E) applied for a license under 10 C.F.R. Part 72 to construct and operate an ISFSI for dry cask storage of spent nuclear fuel at its Diablo Canyon Nuclear Power Plant site. Pursuant to the National Environmental Policy Act (NEPA), the NRC Staff reviewed the application and issued an EA.¹ Meanwhile, in response to a notice of opportunity for hearing published by the NRC Staff (67 Fed. Reg. 19,600 (Apr. 22, 2002)), SLOMFP petitioned for a hearing, and its petition included several proffered contentions alleging that the NEPA analysis improperly failed to consider environmental impacts of a terrorist attack. The then-presiding Licensing Board denied SLOMFP's NEPA-terrorist contentions, and it referred its decision to the Commission (LBP-02-23, 56 NRC 413 (2002)). The Commission accepted the referral and affirmed the Board's rejection of the contentions (CLI-03-01, 57 NRC 1 (2003)).

¹ NEPA has the dual goals of requiring an agency "to consider every significant aspect of the environmental impact of a proposed action[, and] ensur[ing] that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process" (*Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal citation omitted)). In furtherance of these goals, NEPA requires federal agencies to prepare an environmental impact statement (EIS) prior to any major federal action significantly affecting the environment (42 U.S.C. § 4332(2)(C)). An EIS must include, *inter alia*, a detailed statement on the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the proposal is implemented, and alternatives to the proposed action (*ibid.*). If the agency is uncertain whether an action is a major federal action significantly affecting the environment, it must first prepare an environmental assessment (EA) (40 C.F.R. § 1501.4). No EIS is necessary if the EA concludes with a "finding of no significant impact," which briefly presents the reasons why the proposed action will not significantly impact the environment (40 C.F.R. §§ 1501.4(e), 1508.13; *see Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-58 (2004)).

The United States Court of Appeals for the Ninth Circuit reversed (SLOMFP v. NRC, 449 F.3d 1016 (9th Cir. 2006), cert. denied, 127 S. Ct. 1124 (2007)). The Ninth Circuit held that the Commission's refusal to consider the environmental effects of a terrorist attack was inconsistent with the requirements of NEPA, and it remanded for further proceedings (449 F.3d at 1028, 1035).

On remand, the Commission directed the NRC Staff to prepare a revised EA addressing the likelihood of a terrorist attack on the Diablo Canyon ISFSI and the potential consequences of such an attack (CLI-07-11, 65 NRC 148, 149 (2007)). The Commission directed the Staff to base its analysis, to the extent practicable, on "information already available in agency records, and consider in particular the Commission's [design-basis threat (DBT)]² for power plant sites and other information on the ISFSI design, mitigative, and security arrangements bearing on likely consequences, consistent with the requirements of NEPA [and] the Ninth Circuit's decision" (id. at 150) (footnote added and omitted). The Commission stated that the NRC Staff should make "public as much of its revised environmental analysis as feasible," recognizing, however, that it "may prove necessary to withhold some facts underlying the Staff's findings and conclusions," such as classified national security information or safeguards information (id. at 150-51).

Pursuant to the Commission's direction, the NRC Staff in May 2007 published a Draft Supplemental EA for public comment. In June 2007, SLOMFP proffered five contentions challenging the Draft Supplemental EA, but before the Commission ruled on the admissibility of these contentions, the NRC Staff in August 2007 issued the Final Supplemental EA. In

² Although NRC regulations require nuclear reactor power plant security plans to provide protection against the DBT of radiological sabotage (10 C.F.R. §§ 50.34(c) & (d), 73.55(a)), this requirement does not extend to a specifically licensed ISFSI like the one involved here (CLI-07-11, 65 NRC at 150 n.10). However, where – as here – an ISFSI is located at a reactor site, the reactor plant licensee typically includes protection of the ISFSI within the reactor plant's security plan. Consistent with that approach, PG&E amended its reactor security plan to cover protection of the ISFSI (ibid.).

November 2007, the NRC Staff issued an addendum to the EA augmenting the Reference Document List, which lists the sources used by the Staff in its preparation of the EA (10 C.F.R. § 51.30(a)(2)).

Following publication of the Final Supplemental EA, the Commission directed the parties to file pleadings as to the effect, if any, of the Final EA on SLOMFP's pending contentions. In October 2007, SLOMFP responded that its five proffered contentions remained valid and should be admitted.

Only one of SLOMFP's proffered contentions – Contention 1(b) – is relevant here. On January 15, 2008, the Commission admitted Contention 1(b) “to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions” (CLI-08-01, 67 NRC ___, ___ (slip op. at 19) (Jan. 15, 2008)). In an effort to have the NRC Staff redress these alleged deficiencies, the Commission directed the Staff to prepare:

a complete list of the documents on which it relied in preparing its [EA, i.e., a Reference Document List], together with a Vaughn Index³ (or its equivalent) for any document for which the Staff claims a FOIA exemption Releasable documents (or releasable portions of documents), if any, should be turned over to the other parties at that time. The other parties may respond to the NRC Staff's Vaughn Index (or detailed affidavit) We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and the public record.

Id., slip op. at 18 (footnote added). The Commission stated that any documents exempt from disclosure under FOIA would not be released (ibid.), because under the terms of NEPA, agencies are authorized to withhold NEPA documents if they fall within a FOIA exemption (id., slip op. at 16-17).

³ The term “Vaughn Index” derives from Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), where the court established a procedure for facilitating litigation in FOIA cases. Namely, when an agency's withholding of documents is disputed in FOIA litigation, the agency will ordinarily provide what has become known as a “Vaughn Index,” which identifies the documents withheld, the FOIA exemptions claimed, and an explanation of why each document falls within the claimed exemption (Vaughn, 484 F.2d at 823-25).

Pursuant to the Commission's direction, the NRC Staff on February 13, 2008 filed a Reference Document List and a Vaughn Index, and it released documents that it determined were not exempt from disclosure under FOIA. See NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index (Feb. 13, 2008). On February 15, 2008, the NRC Staff filed an addendum to the Vaughn Index, listing a Department of Homeland Security (DHS) document it had inadvertently failed to justify withholding. Although the Staff refrained from producing that document on the ground that DHS was the originator, the Staff provided a website for obtaining the document directly from DHS. See Addendum to NRC Staff's Response to Commission Order to Provide Reference List and Vaughn Index (Feb. 15, 2008).

On February 20, 2008, SLOMFP filed with the Commission a challenge to the NRC Staff's filing, arguing – as relevant here – that the Reference Document List improperly failed to list all the sources upon which the Staff relied in preparing the EA, and that the Vaughn Index improperly failed to identify, or to provide justifications for withholding, all redacted information (SLOMFP'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 at 2-7 (Feb. 20, 2008) [hereinafter SLOMFP Response to Vaughn Index]).

By Order dated March 27, 2008, the Commission acknowledged that the following claims embedded in Contention 1(b) remained unresolved:

- (i) The NRC Staff included Document 8 (SECY-04-0222, Decision-Making Framework for Materials and Test Reactor Vulnerability Assessments (Nov. 24, 2004)) in the Document Reference List, but Document 8 on its face is not applicable to ISFSIs. SLOMFP claims that the Staff's inclusion of SECY-04-0222 means that another document linking that document to ISFSIs has been left off the List.
- (ii) SLOMFP claims that the "Risk Analysis and Management for Critical Assets Protection" (RAMCAP) methodology referred to in SECY-04-0222 should have been included in the Document Reference List.

- (iii) SLOMFP claims that certain activities mentioned in SECY-04-0222 – such as participation in DHS vulnerability reviews – generated documents the NRC Staff should have included in the Document Reference List.
- (iv) SLOMFP argues that the context of the redaction of two phrases on page 5 of SECY-04-0222 suggests that the NRC Staff is improperly withholding “secret law” on how to conduct its analysis.
- (v) SLOMFP points to places in SECY-04-0222 where the NRC Staff made redactions but failed to provide a corresponding FOIA exemption in the Vaughn Index.

CLI-08-05, 67 NRC __, __ (slip op. at 3-4) (Mar. 27, 2008). Rather than reviewing these “document-intensive claims” itself, the Commission directed me to resolve them, “focusing in particular on the FOIA exemption justifications and the completeness of the NRC Staff’s [Reference Document List]” (id., slip op. at 4). The Commission stated that Contention 1(b) should be resolved on an “expedited basis” and, absent unanticipated circumstances, a decision should be issued by May 30 (ibid.).

On April 2, 2008, I convened a telephone conference call with the parties, and we crafted an expedited schedule that provided for the filing of all pleadings by the first week in May so that, if warranted, oral argument could be heard during the week of May 5. See Scheduling and Case Management Order for Adjudication of Contention 1(b) (Apr. 4, 2008) (unpublished).

B. The NRC Staff’s Motion for Summary Disposition

On April 18, 2008, the NRC Staff filed a motion for summary disposition accompanied by two affidavits. The first affidavit was executed by three NRC employees – one individual who supervised the EA’s preparation, and two individuals who participated in its preparation (NRC Staff Summary Disposition Motion, Attachment 1 at 1). These affiants explained how the Document Reference List was compiled, informed why specific documents were included and excluded, and attested that the List “includes all documents . . . which the Staff relied upon directly or used as guidance during the development of the Supplemental EA” (id. at 2).

The NRC Staff's second affidavit was executed by an NRC employee who is a Senior Project Manager for the NRC Safeguards Information Program (NRC Staff Summary Disposition Motion, Attachment 2 at 1). The affiant attested that, following a thorough review of SECY-04-0222, he determined that two previously redacted phrases could be released consistent with public safety (id. at 2). He also certified that, aside from these two redactions, all the remaining information in SECY-04-0222 that was "reasonably segregable from information exempt from disclosure was released, and that the FOIA exemptions invoked by the Staff were proper" (ibid.).⁴

Based on these affidavits, the NRC Staff argued it had demonstrated as a factual matter that (1) the Document Reference List was complete, and (2) the information in SECY-04-0222 that the Staff declined to disclose was permissibly withheld pursuant to FOIA exemptions. See NRC Staff Summary Disposition Motion at 8-11. Accordingly, argued the Staff, summary disposition of Contention 1(b) was appropriate.

PG&E supported the NRC Staff's motion for summary disposition. See PG&E's Answer in Support of NRC Staff Motion for Summary Disposition of Contention 1(b) (Apr. 28, 2008).

C. SLOMFP's Response to the NRC Staff's Motion for Summary Disposition

SLOMFP responded that it did "not oppose summary disposition of Contention 1(b)" (SLOMFP Response to Summary Disposition Motion at 3). With regard to the completeness of the Document Reference List, SLOMFP stated that the "Staff has now provided an adequate listing of the reference documents on which it relied for the draft and final supplements to its [EA] for the proposed Diablo Canyon ISFSI. Therefore SLOMFP considers that aspect of

⁴ On April 18, 2008, the NRC Staff also filed a second addendum to the Vaughn Index, disclosing releasable portions of an NRC document that was listed as a reference in the Addendum to the Supplemental EA, but was inadvertently omitted from the Vaughn Index. See Second Addendum to the Staff's Response to Commission Order to Provide Reference List and Vaughn Index (Apr. 18, 2008); see also NRC Staff Summary Disposition Motion, Attachment 1 at 4-5.

Contention 1(b) to be resolved” (*id.* at 1). With regard to the propriety of the Staff’s reliance on FOIA exemptions to withhold certain information in SECY-04-0222, SLOMFP stated that, “without conceding that the Staff has fully complied with [FOIA] in its decisions regarding the redaction of reference documents and its explanations for those redactions, SLOMFP does not seek additional public disclosure of information in the reference documents” (*id.* at 3).⁵

II. DISCUSSION

A. Legal Standards

1. **Standards Governing Disclosure of NEPA Information** As relevant here, an EA must include a Reference Document List that “identifi[es the] sources used” (10 C.F.R. § 51.30(a)(2)). NRC guidance instructs the NRC Staff to list in an EA “[a]ll references (*i.e.*, sources used) used in the preparation of the EA . . . including those cited in the text of the EA and those that were not specifically cited but served as useful guidance during document development” (NUREG-1748, “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs” § 3.4.12 (Aug. 2003)).

Regarding the public disclosure requirements of an agency’s NEPA analysis, Congress has established that the EIS (*supra* note 1) “shall be made available . . . to the public as provided by [FOIA]” (42 U.S.C. § 4332(2)(C)). Thus, if information underlying an EIS is exempt from public disclosure pursuant to one of the nine exemptions in FOIA (5 U.S.C. § 552(b)), an agency need not disclose that information. As a matter of logic, public disclosure of an EA is likewise governed by FOIA (CLI-08-01, slip op. at 16). This conclusion is compelled by *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139 (1981), where the

⁵ Prior to submitting its response to the NRC Staff’s summary disposition motion, SLOMFP had requested permission to conduct additional discovery with regard to Contention 1(b). *See* SLOMFP’s Motion for Leave to Conduct Supplemental Discovery (Apr. 10, 2008). SLOMFP withdrew its motion for discovery, however, when it declined to oppose the Staff’s motion for summary disposition of Contention 1(b). *See* SLOMFP Response to Summary Disposition Motion at 3. SLOMFP’s discovery request has thus been rendered moot.

Supreme Court stated that an agency may “withhold public disclosure of *any* NEPA documents, in whole or in part, under the authority of an FOIA exemption” (*id.* at 143) (emphasis added). See also Hudson River Sloop Clearwater, Inc. v. Dep’t of the Navy, 891 F.2d 414, 420 (2d Cir. 1989) (citing Weinberger, 454 U.S. at 145) (“Congress, in enacting § 102(2)(C) [of NEPA], had already set the balance between the public’s need to be informed and the government’s need for secrecy”). The NRC Staff’s obligation to disclose NEPA documents in this case is thus governed by FOIA.⁶

Ordinarily, when access to documents is disputed in FOIA litigation, the “government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption” (Lion Raisins Inc. v. U.S. Dep’t of Agric., 354 F.3d 1072, 1082 (9th Cir. 2004)). This is usually accomplished by the agency’s preparation of a Vaughn Index (*supra* note 3) and explanatory affidavits that are sufficiently detailed to support a tribunal’s plenary assessment of the validity of a claimed exemption. See Lion Raisins Inc., 354 F.3d at 1082-83.

2. Standards Governing Summary Disposition Challenges in FOIA cases routinely are resolved on the basis of summary judgment pleadings. See, e.g., Wickwire Gavin, P.C. v. U.S. Postal Serv., 356 F.3d 588 (4th Cir. 2004); Cooper Cameron Corp. v. U.S. Dep’t of Labor, 280 F.3d 539 (5th Cir. 2002); Minier v. CIA, 88 F.3d 796 (9th Cir. 1996); Lewis v. IRS, 823 F.2d 375 (9th Cir. 1987).

⁶ Although SLOMFP does not oppose summary disposition of Contention 1(b), it nevertheless asserts that, “as a general matter, under the Atomic Energy Act . . . , the NRC was *required* to give SLOMFP access to the [redacted information in the NEPA] reference documents under a protective order” (SLOMFP Response to Summary Disposition Motion at 3) (emphasis added). To be sure, nothing prevents an agency from exercising its informed discretion to provide a litigant with sensitive information under a protective order. But SLOMFP’s assertion that the NRC was *required* to disclose such information ignores NEPA’s unambiguous language (42 U.S.C. § 4332(2)(C)), and disregards compelling precedent (Weinberger, 454 U.S. at 143).

In NRC adjudicatory proceedings, summary disposition motions – which are the functional equivalent of summary judgment motions (Advanced Med. Systems, Inc. (One Factory Row, Geneva, Ohio), CLI-93-22, 38 NRC 98, 102 (1993)) – are addressed in 10 C.F.R. § 2.710, which states that summary disposition shall be granted if the “filings in the proceeding . . . together with the statements of the parties and the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a decision as a matter of law” (10 C.F.R. § 2.710(d)(2)).

The moving party bears the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact (Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The non-moving party cannot rest on the mere allegations or denials of a pleading, but must “go beyond the pleadings and by [the party’s] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial” (id. at 324) (internal quotation marks omitted). The tribunal must examine the evidence in the light most favorable to the non-moving party (Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

Where, as here, the non-moving party declines to oppose a motion for summary disposition, the moving party is not perforce entitled to a favorable judgment. The moving party “has the burden to show that he is entitled to judgment under established principles; and if he does not discharge that burden then he is not entitled to judgment. No defense to an insufficient showing is required.” Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Units 1 & 2), ALAB-443, 6 NRC 741, 754 (1977) (internal quotation marks omitted); accord Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970) (“[w]here the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment

must be denied even if no opposing evidentiary matter is presented”) (internal quotation marks omitted); Private Fuel Storage, L.L.C. (ISFSI), LBP-99-33, 50 NRC 161, 165 (1999) (same).

B. Analysis

Contention 1(b) challenges: (1) the completeness of the Reference Document List; and (2) the adequacy of the Vaughn Index. As discussed below, I conclude that the NRC Staff has met its burden of showing – as a matter of fact and law – that these challenges lack merit and, accordingly, that its motion for summary disposition of Contention 1(b) should be granted.⁷

1. The NRC Staff’s Affidavit Demonstrates that the Reference Document List is Complete Contention 1(b)’s challenge to the completeness of the Reference Document List arose from the following inferences that SLOMFP drew from SECY-04-0222. First, because SECY-04-0222 – which is included in the Reference Document List – does not appear to apply to ISFSIs, SLOMFP theorized that the NRC Staff may have failed to reference a document linking SECY-04-0222 to ISFSIs. Second, SLOMFP conjectured that the Staff may have improperly failed to reference the RAMCAP methodology, which was mentioned in SECY-04-0222. Third, SLOMFP hypothesized that certain activities mentioned in SECY-04-0222 may have generated documents that the Staff failed to include on the List. See SLOMFP Response to Vaughn Index at 3-5.

The NRC Staff addressed these claims in a detailed affidavit that was executed by three NRC employees who were personally involved in preparing the EA, including James Randall Hall, who is the Project Manager for the Diablo Canyon ISFSI and who has over twenty-five

⁷ The detailed public affidavits submitted by the NRC Staff permit me to resolve the issues presented without resorting to in camera review of redacted information or sealed declarations. See Lion Raisins Inc., 354 F.3d at 1083 (in camera review of redacted information or sealed declarations ought to occur only in the “exceptional case” after the “government has submitted as detailed public affidavits . . . as possible”) (quoting Doyle v. FBI, 722 F.2d 554, 556 (9th Cir. 1983)).

years of service with the NRC.⁸ The Staff's affidavit convincingly rebutted each of the three speculative concerns in Contention 1(b) regarding the completeness of the EA.

First, the NRC Staff explained that, although SECY-04-0222 was not specific to ISFSIs, the document applied to broad categories of NRC licensees, including ISFSIs (NRC Staff Summary Disposition Motion, Attachment 1 at 2). The Staff declared that it was necessary to include SECY-04-0222 in the Reference Document List because discrete aspects of the framework assessment methodology outlined in SECY-04-0222 were applied to ISFSIs (*ibid.*). In particular, the Staff attested that it "refer[red] to the consequence evaluation criteria in SECY-04-0222 (and its enclosures) when developing the set of assumptions used to calculate the estimated dose to the nearest resident to the Diablo Canyon ISFSI," and the Staff provided an affidavit to SLOMFP and the Commission containing a detailed explanation of how the dose was calculated (*id.* at 2-3). By explaining with clarity and specificity why it included SECY-04-0222 on the Reference Document List, the Staff negated the suggestion in Contention 1(b) that the Staff may have failed to reference a document linking SECY-04-0222 to ISFSIs.

The NRC Staff likewise negated the suggestion that the RAMCAP methodology – which was mentioned in SECY-04-0222 – may have improperly been omitted from the Document Reference List. The Staff acknowledged that the RAMCAP methodology "informed the NRC's development of the framework assessment methodology in 2004" (NRC Staff Summary

⁸ The other two affiants are (1) Shana R. Helton, Nuclear Engineer/Dose Assessment Specialist, Division of Spent Fuel Storage and Transportation, and (2) Paul Kelley, Jr., Security Specialist with the Materials, Waste, and International Security Branch. Ms. Helton and Mr. Kelley participated in the preparation of the Supplemental EA under the superintendence of Mr. Hall. See NRC Staff Summary Disposition Motion, Attachment 1 at 1.

In reviewing the experience and expertise of all the NRC Staff's affiants, I discerned nothing that would cause me to question their qualifications or trustworthiness to attest to the factual matters at issue in Contention 1(b). To the contrary, the undisputed record shows that they were eminently qualified to address these matters. Their experience and expertise, coupled with their detailed and specific affidavits, lend special weight to their statements and conclusions. Cf. Lion Raisins Inc., 354 F.3d at 1080 (court observes that affiant's "experience lends considerable weight to his testimony").

Disposition Motion, Attachment 1 at 4). However, the Staff attested that it “did not expressly adopt the RAMCAP or any other methodology,” and that the RAMCAP methodology was “not relied on by the Staff when developing the Supplemental EA for the Diablo Canyon ISFSI” (ibid.). The Staff’s explanation demonstrates that the Staff acted properly in not including the RAMCAP methodology on the Reference Document List.

Finally, the NRC Staff cogently refuted the conjectural assertion that certain activities mentioned in SECY-04-0222 may have generated documents that the NRC Staff omitted from the List. The Staff affirmatively declared that the Reference List “includes all documents . . . which the Staff relied upon directly or used as guidance during the development of the Supplemental EA” (NRC Staff Summary Disposition Motion, Attachment 1 at 2).⁹ Additionally, the Staff attested that “[a]ll input from other agencies which was relied upon or used as guidance in the development of the Supplemental EA is contained in the documents in the Reference List” (id. at 4). See also id. at 2 (Staff certifies that in compiling the List, it “attempted to err on the side of being overly inclusive to ensure that the List was complete”).

I conclude that the NRC Staff has shown that the Reference Document List includes all documents the Staff relied upon or used as guidance during the development of the Supplemental EA. Stated in the negative, the Staff has convincingly shown that those documents that were not included on the List did not need to be included, because they were not relied upon or used as guidance. The Staff is therefore entitled to summary disposition of Contention 1(b) to the extent it challenges the completeness of the Reference Document List.

⁹ The NRC Staff explained that in compiling its sources for the Reference Document List, it “included in the scope of what was ‘relied upon’ and ‘guidance’ those documents specifically considered by the Staff in developing the statements, characterizations, and determinations in the Supplemental EA” (NRC Staff Summary Disposition Motion, Attachment 1 at 2).

2. The NRC Staff's Affidavit and Vaughn Index Demonstrate that the FOIA

Withholdings are Justified Contention 1(b) also raises the following two challenges regarding the Vaughn Index: (1) the NRC Staff's redaction of two phrases on page 5 of SECY-04-0222 was improper; and (2) the NRC Staff's redaction of Table 1 from Attachment 2 of SECY-04-0222 was unexplained in the Vaughn Index and therefore improper. See SLOMFP Response to Vaughn Index at 6-7.

The NRC Staff addressed these allegations in a detailed affidavit that was executed by Bernard Stapleton, who is an authorized NRC classifier and who has been a Senior Program Manager for the NRC Safeguards Information Program for five years (NRC Staff Summary Disposition Motion, Attachment 2 at 1). Mr. Stapleton's affidavit negated the two claims in Contention 1(b) regarding the validity of redactions in SECY-04-0222.¹⁰

First, in Attachment 3 to its Summary Disposition Motion, the NRC Staff disclosed the two phrases that had been redacted from page 5 of SECY-04-0222. Mr. Stapleton explained that this material previously had been withheld pursuant to FOIA Exemption 2 (see infra note 11) because the Staff believed the redactions contained "internal NRC analysis of a specific security feature which would aid an adversary if disclosed" (NRC Staff Summary Disposition Motion, Attachment 2 at 2) (quoting Vaughn Index at 130). Mr. Stapleton attested, however, that on "further review of those two redactions, [he had] determined that they are not of such a sensitive nature that they cannot be released" (ibid.). The Staff's release of this material renders moot the assertion that the redactions were improper under FOIA.

With regard to the concern that the NRC Staff's unexplained redaction of Table 1 from Attachment 2 of SECY-04-0222 was improper under FOIA, Mr. Stapleton stated that Table 1 –

¹⁰ Mr. Stapleton also has authored several NRC guidance documents involving classified and sensitive topics. Prior to joining the NRC, he worked as a National Security Advisor in the Department of Energy's classification office. See NRC Staff Summary Disposition Motion, Attachment 2 at 1. As mentioned supra note 8, the undisputed record indicates Mr. Stapleton is eminently qualified to attest to the matters addressed in his affidavit.

which is entitled “Activity-Specific Attractiveness Category Ranking Matrix” – is redacted from page 3 of Attachment 2 to SECY-04-0222. He further stated that the Staff withheld the Table under FOIA Exemption 2 because it contains “NRC Staff guidance for using the framework methodology to estimate potential consequences” that, if disclosed, could aid an adversary seeking to breach security measures that protect nuclear materials (NRC Staff Summary Disposition Motion, Attachment 2 at 2) (quoting Vaughn Index at 131).¹¹ Mr. Stapleton explained that the “matrix [in Table 1] is used by the Staff as part of its assessment of the attractiveness of certain scenarios to adversaries. The Table contains specific parameters placed into the matrix including iconic value, complexity of planning, resources needed, execution risk, and public protection measures.” He attested that, based on his review, he “believe[d] that if the information in the Table were disclosed, it would provide adversaries with additional information to form sabotage scenarios based on how the United States protects potential targets” containing nuclear materials (NRC Staff Summary Disposition Motion, Attachment 2 at 2). In my judgment, Mr. Stapleton’s particularized explanation for the redaction of Table 1 – viewed against the backdrop of his experience and expertise – provides ample basis for concluding that, as a factual matter, Table 1 is exempt from disclosure under FOIA

¹¹ FOIA Exemption 2 authorizes an agency to withhold “matters that are . . . related solely to the internal personnel rules and practices of an agency” (5 U.S.C. § 552(b)(2)). In Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir. 1980), the Ninth Circuit held that this exemption extended to the Bureau’s “Raids and Searches” manual, because Congress did not intend to force agencies to release “law enforcement materials, disclosure of which may risk circumvention of agency regulation” (*id.* at 657). Thereafter, in Dirksen v. U.S. Dep’t of HHS, 803 F.2d 1456 (9th Cir. 1986), the Ninth Circuit applied Hardy to hold that FOIA Exemption 2 extended to Medicare processing guidelines, because to “turn such [information] over to those who are the subject of regulatory supervision is to dig a den for the fox inside the chicken coop” (*id.* at 1459) (quoting Ginsburg, Feldman, & Bress v. Fed. Energy Admin., 591 F.2d 717, 730 (D.C. Cir.), *aff’d en banc and per curiam by an equally divided court*, 591 F.2d 752 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)). Based on the rationale in Hardy and Dirksen, I have no difficulty concluding that NRC records are protected from disclosure under FOIA Exemption 2 to the extent they contain internal analytic guidance, operating rules, or practices, the disclosure of which would aid terrorists or saboteurs seeking to circumvent security measures designed to protect nuclear materials.

Exemption 2. Cf. Center for Nat'l Sec. Studies v. U.S. Dep't of Justice, 331 F.3d 918, 928 (D.C. Cir. 2003) (in reviewing the validity of a withholding under any FOIA exemption, deference must be accorded to the executive in its area of expertise "so long as the government's declarations raise legitimate concerns that disclosure would impair national security"), cert. denied, 540 U.S. 1104 (2004).

Finally, although Contention 1(b) did not challenge other redactions from SECY-04-0222, Mr. Stapleton declared that he reviewed the entire document, and he certified that "all of the information reasonably segregable from information exempt from disclosure was released, and that the FOIA exemptions invoked by the Staff were proper" (NRC Staff Summary Disposition Motion, Attachment 2 at 2). I conclude, based on the Vaughn Index and the detailed explanations contained in Mr. Stapleton's affidavit, that the NRC Staff has satisfied its burden of establishing valid bases for the redactions from SECY-04-0222 and, accordingly, that summary disposition on this aspect of Contention 1(b) is appropriate.

III. CONCLUSION

For the foregoing reasons, I conclude that the NRC Staff has shown that no genuine issue of material fact exists regarding the following: (1) the Staff disclosed all documents on which it relied or which it used as guidance in developing the Supplemental EA (supra Part II.B.1); and (2) the challenged redactions in SECY-04-0222 have either been released, or they have been explained with sufficient detail by a qualified NRC affiant to demonstrate they were properly withheld under a FOIA exemption (supra Part II.B.2). The NRC Staff is therefore entitled to summary disposition of Contention 1(b) as a matter of law, and its motion for

summary disposition of Contention 1(b) is granted. SLOMFP's request for discovery with regard to Contention1(b) is moot (supra note 5).

It is so ORDERED.

BY THE PRESIDING OFFICER¹²

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, Maryland
May 14, 2008

¹² 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.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of

CROW BUTTE RESOURCES, INC.)

) Docket No. 40-8943-MLA

)
In-situ Leach Uranium Recovery Facility,)
Crawford, Nebraska)

)
(License Amendment for the North Trend)
Expansion Area))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB ORDER (FOLLOWING UP ON MATTERS ADDRESSED AT MAY 8, 2008, TELEPHONE CONFERENCE, AND RAISED BY PETITIONER DEBRA WHITE PLUME) have been served upon the following persons by U.S. Mail, first class, or through NRC internal distribution.

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Docket No. 40-8943-MLA
LB ORDER (FOLLOWING UP ON MATTERS ADDRESSED AT MAY 8, 2008,
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Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of May 2008