

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Units 1
and 2)

Docket Nos. 50-275-LR and 50-323-LR

ASLBP No. 10-900-01-LR-BD01

February 25, 2011

MEMORANDUM AND ORDER

(Concerning Protective Order and Non-Disclosure Agreement)

This memorandum and order addresses the issuance of a protective order and non-disclosure agreement to govern the mandatory disclosure, use, and dissemination of documents in this proceeding that a party claims contain "Protected Information" as that term is defined in the protective order. Pursuant to the attached protective order and non-disclosure agreement, parties shall be permitted access to such documents upon the conditions set forth therein.

On September 15, 2010, the Board issued an initial scheduling order (ISO),¹ in which the Board noted that the law requires that each party to this proceeding disclose all documents relevant to the admitted contentions, except those documents for which a claim of privilege or protected status is made. ISO § II.A (citing 10 C.F.R. § 2.336). In the case of documents claimed to be privileged or protected, the party must list such documents on a privilege log. Id.

¹ Initial Scheduling Order (Sept. 15, 2010) (unpublished).

§ II.A.3 (citing 10 C.F.R. § 2.336(a)(3)). The ISO covers a number of case management matters relevant to these mandatory disclosure requirements, including the scope of disclosure, id. § II.A.4, certain exemptions from disclosure, id. § II.A.4, and the procedures to be followed in handling disclosure disputes and motions to compel, id. § II.C. These requirements continue to govern this proceeding.

In addition, the ISO directed the parties to confer with one another for the purpose of discussing and developing a joint proposed protective order and non-disclosure agreement for the “handling (and redaction) of documents that are listed on the privilege logs.” Id. § II.B. The ISO stated that, pursuant to an agreement among the parties, “the parties shall not be required to produce privilege logs for documents claimed to qualify for the attorney-client, attorney work product, or deliberative process privileges.” Id. § II.A.3. However, as also agreed by the parties, the ISO specified that they “shall produce, as part of their mandatory disclosures, privilege logs covering any documents claimed to qualify for protected status as security related information and/or as protected information under 10 C.F.R. § 2.390(a)(1), (3), and (4) and (d)(1).” Id. § II.A.3. The ISO also required that “[e]ach privilege log shall identify the statute or regulation that provides the legal basis for the claimed privilege, and shall provide, for each document listed, sufficient information for the other parties, and the Board, to assess the validity of the claim of privilege or protected status.” Id. § II.A.3.

Pursuant to the ISO, the parties jointly submitted a proposed protective order and non-disclosure agreement on November 9, 2010.² Although the proposed protective order contains a number of useful proposals, the Board found it to be problematic. First, it did not seem to reflect certain important ISO instructions, e.g., the requirement, both in the ISO and in the regulations, to identify the legal and statutory basis for any claim that a document should be protected. Second, the proposed protective order used important terms that were undefined,

² Joint Motion for Protective Order (Attach.) (Nov. 9, 2010) (Proposed PO).

e.g., “sensitive unclassified non-safeguards security information.”³ Proposed PO at 2. Third, the proposed protective order contained certain definitions that the Board finds confusing or circular, e.g., “‘Protected Materials’ means materials . . . designated by such party as ‘Protected Materials.’” Proposed PO at 2. Fourth, the proposed protective order purported to cover attorney-work product information, whereas the parties have agreed that attorney-work product need not be disclosed or listed on a privilege log. Compare Proposed PO at 5 with ISO § II.A.3. Fifth, the proposed protective order specified dispute resolution procedures that appear inconsistent with the ISO procedures. Compare Proposed PO at 7 with ISO § II.C. Sixth, the NRC Staff was exempted from the obligations of the proposed protective order, Proposed PO at 2, even though the Staff might hold many documents that are subject to the mandatory disclosure requirements of 10 C.F.R. § 2.336(b). These are only a few examples of the Board’s difficulties with the proposed protective order.

In addition, the Board has some concern that the protective order proposed by the parties would cast too broad a cloak of secrecy over adjudicatory proceedings that are required to be public. NRC regulations governing our adjudications mandate that “all hearings will be public.” 10 C.F.R. § 2.328. There are only two exceptions to this public visibility, neither of which applies here.⁴ Likewise, the regulations mandate that “[e]xcept as limited by section 181

³ We note, inter alia, that the term “sensitive unclassified non-safeguards security information” or “SUNSI” as used in the proposed protective order is confusingly different from the term used in COMSECY-05-0054, the NRC’s “Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)” issued on October 26, 2005. (ADAMS Accession No. ML052520181). The proposed protective order and the NRC Policy use the same acronym (“SUNSI”) to cover different terms.

⁴ A Board may exclude the public from an adjudicatory hearing in only two circumstances. First, the public may be excluded “as may be requested under section 181 of the Act.” 10 C.F.R. § 2.328. That section deals with “proceedings or actions which involve Restricted Data, defense information, safeguards information protected from disclosure under the authority of section 147 or information protected from disclosure under the authority of section 148.” 42 U.S.C. § 2231. “SUNSI” is not covered by section 181 of the Atomic Energy Act (AEA). The second situation in which an adjudicatory hearing can be closed is if the Commission orders it. 10 C.F.R. § 2.328. Neither exception applies here.

of the Act or order of the Commission, the transcript [of Atomic Safety and Licensing Board hearings] will be available for inspection in the agency's public records system." 10 C.F.R. § 2.327(b). Again, neither exception applies. These regulations reflect NRC's strong policy in favor of openness and transparency.⁵ We agree.⁶

Accordingly, the Board crafted a revised protective order and on February 3, 2011 provided it to the parties and offered them an opportunity to submit written comments, suggestions, and objections. Notice of Planned Protective Order (Feb. 3, 2011) (unpublished). The Intervenor and the Staff provided such comments and the Applicant informed the Board that it had no comments.

⁵ Tennessee Valley Authority (Bellefonte Nuclear Plant, Units 1 and 2), CLI-10-26, 72 NRC ___, ___ n.23 (slip op. at 5 n.23) (Sept. 29, 2010); cf. Enhancing Public Participation in NRC Meetings; Policy Statement, 67 Fed. Reg. 36920, 36920 (May 28, 2002).

⁶ "The principle that justice cannot survive behind walls of silence has long been reflected in the Anglo-American distrust for secret trials." Sheppard v. Maxwell, 384 U.S. 333, 349 (1966); see also South Texas Project Nuclear Operating Co. (South Texas Project Units 3 and 4), LBP-10-02, 71 NRC ___, ___ (slip op. at 13-17) (Jan. 29, 2010), rev'd on other grounds, CLI-10-24, 72 NRC ___, ___ (slip op. 16-20) (Sept. 29, 2010).

After due consideration of the comments and suggestions of the parties, the public interest in an open and public hearing, and the practical and efficient conduct of this proceeding, the Board hereby issues the attached protective order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE
/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE
/RA/

Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2011

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February 25, 2011

PROTECTIVE ORDER

This protective order governs the mandatory disclosure, use, and dissemination of documents in this proceeding that a party claims contain "Protected Information" as that term is hereinafter defined. Pursuant to this protective order, parties shall be permitted access to such documents upon the conditions set forth herein.

I. DEFINITIONS

For purposes of this protective order, the following definitions apply.

- A. The term "Disclosing Party" means the party required to make mandatory disclosure pursuant to 10 C.F.R. § 2.336.
- B. The term "document" means any medium (electronic, paper, or of any other kind) that contains or stores any information, including text, data, audio, video, computer software or

computer modeling information.⁷ The term “document” shall be interpreted consistently with the scope of disclosure specified in ISO § II.A.4.

C. The term “Non-Disclosure Agreement” means the Non-Disclosure Agreement that is Attachment A to this order.

D. The term “party” means the Applicant, the Intervenors, or the NRC Staff.⁸

E. The term “Protected Document” means any document that contains Protected Information, including both documents provided by a Disclosing Party and derivative documents generated by the Receiving Party that copy or contain Protected Information, such as notes of Protected Information. Unless otherwise specified or required by the context, the term “Protected Document” refers to a version of a document that has not been redacted to remove the Protected Information.

F. The term “Protected Information” means information that qualifies for one or more of the following privileges recognized and established by law:

1. Information compiled by the NRC or any government agency for law enforcement purposes, including investigation or allegation information, provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(7);

⁷ See Progress Energy Florida, Inc. (Combined License Application for Levy County Nuclear Power Plant, Units 1 and 2), LBP-10-23, 72 NRC ___, ___ (slip op. at 8-9) (Dec. 22, 2010).

⁸ Although the Staff is covered by this protective order and required to make its disclosures in accordance herewith, the provisions of this order do not restrict the use by NRC counsel, witnesses, employees, consultants and others representing the NRC Staff of documents containing Protected Information that the NRC is entitled to receive apart from its role as a litigant in this proceeding (e.g., documents containing information required to be submitted to the NRC by statute, regulation, or license condition or information submitted to or acquired by the NRC in support of a requested licensing action or in fulfillment of its regulatory responsibilities). Rather, NRC’s use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25. The provisions of this protective order apply to NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff with respect to (a) the use and management of documents containing Protected Information that NRC receives solely pursuant to 10 C.F.R. § 2.336 and this protective order, and (b) the disclosure of documents in the Staff’s possession, custody or control that contain Protected Information.

2. "Trade secrets and commercial or financial information" that is "privileged or confidential," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(4) and meets the criteria of 10 C.F.R. § 2.390(b)(4)(i)-(v);
3. "Correspondence and reports to or from the NRC which contain information or records concerning a licensee's or applicant's physical protection, classified matter protection, or material control and accounting program for special nuclear material not otherwise designated as Safeguards Information or classified as National Security Information or Restricted Data," provided that it qualifies for the exemption specified at 10 C.F.R. § 2.390(d)(1);
4. Information submitted in confidence to the NRC by a foreign source, 10 C.F.R. § 2.390(d)(2);
5. Information specifically exempted from disclosure by the Privacy Act, 5 U.S.C. § 552a, provided that it qualifies for the exemption at 10 C.F.R. § 2.390(a)(3); or
6. Internal NRC information that qualifies for the exemption specified at 10 C.F.R. § 2.390(a)(2).

G. The term "Protected Information" does not include:

1. Information that qualifies as safeguards information under 42 U.S.C. § 2167 and 10 C.F.R. § 73.22(a);⁹
2. Information that qualifies as national security information or restricted data under 10 C.F.R. Part 2, Subpart I;¹⁰

⁹ The term "sensitive unclassified non-safeguards information" or "SUNSI," as hereinafter defined, necessarily excludes safeguards information. However, this case may involve safeguards information because admitted Contention EC-4 concerns the environmental impact associated with a terrorist attack on the Diablo Canyon reactor. If safeguards information arises in this case, then appropriate procedures will be implemented.

¹⁰ There is no indication that this case involves any national security information or restricted data, i.e., "classified information." Meanwhile, SUNSI, by its very name, i.e., sensitive unclassified non-safeguards information, excludes classified information. If national security information or restricted data arises in this case, the parties should promptly notify the Board

3. Information that qualifies as attorney work product, attorney-client communications, or deliberative process information;¹¹ and

4. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this protective order or in violation of other applicable legal obligations of non-disclosure.

H. The term “Qualified Reviewer” means a person who has signed the Non-Disclosure Agreement¹² and who is:

1. A Representative;

2. An attorney, paralegal, or other employee associated with a law firm representing a party;

3. An official or employee of a party;

4. A consultant, employee of a consultant, expert, or other person (whether paid or unpaid) retained by a party or a party’s law firm to assist, advise, or testify on behalf of a party in this proceeding;

5. A person designated as a Qualified Reviewer by the Board or the Commission;

6. Court reporters or information technology personnel engaged for depositions or to record proceedings;¹³ or

and appropriate procedures, such as those set forth in 10 C.F.R. Part 2, Subpart I (“Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information”) will be implemented.

¹¹ The ISO notes that, pursuant to an agreement among the parties, “the parties shall not be required to produce privilege logs for documents claimed to qualify for the attorney-client, attorney work product, or deliberative process privileges.” ISO § II.A.3.

¹² Although the NRC Staff has chosen to be a party to this proceeding and is subject to the terms of this protective order, individual members of the NRC Staff and Staff counsel need not sign the Non-Disclosure Agreement in order to be a Qualified Reviewer. This is because the NRC Staff and its counsel, (like the Board and its staff) are Federal government employees and are thus subject to other stringent sanctions for the unauthorized disclosure of the Protected Information or Protected Documents. See e.g., Trade Secrets Act, 18 U.S.C. § 1905.

¹³ Court reporters retained by the Board do not need to sign the Non-Disclosure Agreement.

7. Any other individual that the Disclosing Party and Receiving Party agree, in writing, may serve as a Qualified Reviewer.

I. The term “Receiving Party” means the party to whom the mandatory disclosure pursuant to 10 C.F.R. § 2.336 must be made.

J. The term “Redacted Protected Document” means a version of a Protected Document that is complete except for the words, sentences, or paragraphs that actually consist of the Protected Information.¹⁴

K. The term “Representative” means the attorney or other authorized representative of a party who has entered a notice of appearance in accordance with 10 C.F.R. § 2.314. In case of a pro se party, the pro se individual is deemed the Representative.

L. The term “sensitive unclassified non-safeguards information” or “SUNSI” is defined in NRC’s current interim “NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information” as “any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals.”¹⁵ The SUNSI Policy lists seven categories of information that comprise SUNSI. Id. However the SUNSI Policy does not expand upon or create any new category of legally privileged or confidential information that is exempt from discovery or from mandatory disclosure under 10 C.F.R. §§ 2.336 or 2.390(a)(1)-

¹⁴ The Freedom of Information Act, 5 U.S.C. § 552(b)(9), mandates that “any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt.” See also 10 C.F.R. § 9.19(b); South Texas Project Nuclear Operating Co. (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC __, __ n.99 (slip op. at 25 n.99) (Sept. 29, 2010).

¹⁵ NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 1 (ADAMS Accession No. ML052990146), forwarded as attachment to COMSECY-05-0054, Policy Revision: Handling, Marking and Protecting Sensitive Unclassified Non-safeguards Information (SUNSI) (Oct. 26, 2005) (ADAMS Accession No. ML052520181) (SUNSI Policy).

(9). See South Texas, CLI-10-24, 72 NRC at ___ (slip op. at 4) (“The SUNSI Policy does not change any of the statutory, regulatory, or other obligations of the agency with respect to the handling of information.”). SUNSI is not a separate legal privilege, but is a catchall term, created by NRC to cover several statutory or regulatory privileges.¹⁶ Merely identifying a document as “SUNSI” does not, in itself, (1) satisfy the requirement that the privilege claimant “identify the statute or regulation that provides the legal basis for the claimed privilege,” ISO § II.A.3; (2) provide “sufficient information for assessing the claim of privilege or protected status of the document” as required by 10 C.F.R. § 2.336(a)(3) and (b)(5); or (3) qualify the information as Protected Information or the document as a Protected Document hereunder. A privilege claimant must identify one of the specific privileges listed in Section I.F, above in order for information to be deemed Protected Information hereunder, and must provide sufficient information to support that claim.

II. TERMS AND CONDITIONS OF PROTECTIVE ORDER

- A. The Disclosing Party shall disclose Protected Information and Protected Documents in accordance with this order.
- B. The Receiving Parties and Qualified Reviewers shall manage and protect the confidentiality of Protected Information and Protected Documents in accordance with this order.
- C. If the Representative for the Disclosing Party in good faith believes that (1) a document qualifies as a Protected Document, (2) the Protected Information in the document has, in fact, been kept in confidence, and (3) that the document and the Protected Information therein is not publically available or found in public sources, then the Disclosing Party may designate the

¹⁶ Executive Order 13556, “Controlled Unclassified Information,” discourages “ad hoc, agency-specific policies, procedures and markings” of information asserting that such policies have led to an “inefficient, confusing patchwork” and “unclear or unnecessarily restrictive dissemination policies.” 75 Fed. Reg. 68675, 68675 (Nov. 4, 2010). The order restricts the use of agency-specific policies and mandates that in order to restrict access to information, executive departments and agencies must “identify the basis in law, regulation or Government-wide policy” that justifies the restriction. Id.

document as such a Protected Document, and shall mark it and list it as specified in the following Section D. Unless this designation is disputed and overturned, the designated document shall be deemed to qualify as a Protected Document and shall be protected as such in accordance with the terms and conditions of this order.

D. The Disclosing Party shall:

1. Prominently and conspicuously mark each page of the Protected Document, including the cover page, with the word “PROTECTED DOCUMENT,” “PROTECTED,” “CONFIDENTIAL” or words of similar import, and
2. List each Protected Document on a privilege log that shall be provided to all parties of this proceeding,¹⁷

E. If a party requests a Protected Document then the Disclosing Party shall, within ten (10) days, provide a copy of that document to the Representative of that party (i.e., the Receiving Party) provided it has a Qualified Reviewer. Such requests shall be filed within sixty (60) days of the listing of the Protected Document on the privilege log and, in any event, no later than (10) days after the deadline for filing rebuttal testimony pursuant to 10 C.F.R. § 2.1207(a)(2). The Representative of the Receiving Party shall be responsible for distributing the Protected Document to the Receiving Party’s other Qualified Reviewers. The Receiving Party and its Representative and Qualified Reviewers shall hold such documents in confidence and in compliance with the terms and conditions of this order.¹⁸

F. If a party requests a Redacted Protected Document (e.g., for the filing of a public pleading herein, or for use by persons who are not Qualified Reviewers), then the Disclosing Party shall,

¹⁷ As specified above, the privilege log shall provide sufficient information for assessing the claim that the document or relevant portion of the document is entitled to be treated as protected.

¹⁸ This order, and the good faith representation and designation of documents as Protected Documents, serves in lieu of the requirement for marking and for an affidavit under 10 C.F.R. § 2.390(b) and allows the Staff to receive Protected Documents and to protect their confidentiality under FOIA.

within twenty (20) days of the request, redact the Protected Document and provide that party with the Redacted Protected Document. Such requests shall be filed within sixty (60) days of the listing of the Protected Document on the privilege log or thirty (30) days after receipt of the unredacted version of the Protected Document pursuant to the preceding paragraph, whichever is later, and in any event no later than ten (10) days after the deadline for filing rebuttal testimony pursuant to 10 C.F.R. § 2.1207(a)(2).

G. Only Qualified Reviewers may have access to Protected Documents and they shall only be used as necessary for the conduct of this proceeding.¹⁹ Protected Documents shall not be disclosed in any manner to any person except (1) the Board and its staff, and (2) Qualified Reviewers who need to know the information contained in the Protected Documents in order to assist the party or otherwise carry out their responsibilities in this proceeding. Qualified Reviewers may make notes of Protected Information, but such notes constitute Protected Documents subject to the terms of this order.

H. Qualified Reviewers shall maintain the confidentiality of the information contained therein as required in the Non-Disclosure Agreement, the terms of which are incorporated herein.

I. The Receiving Parties shall maintain the Protected Documents in a secure place; shall limit access to Protected Documents to the Qualified Reviewers; and shall take all reasonable precautions necessary to assure that Protected Documents and the Protected Information are not distributed to unauthorized persons.

J. Subject to Section V below, the Receiving Parties, and their Qualified Reviewers, shall be entitled to retain filings, official transcripts and exhibits in this proceeding that contain Protected Documents or Protected Information, provided that the Receiving Party and its Qualified Reviewers shall not disclose the portions of those filings, transcripts and exhibits containing

¹⁹ Alternatively, if NRC Staff is amenable, a Party may make Protected Documents available to NRC Staff, for inspection at the Party's offices, in lieu of physically delivering the Protected Documents to the possession or custody of the NRC Staff.

Protected Documents or Protected Information, except pursuant to a court order, or agreement with the Disclosing Party.

K. The Receiving Party and Qualified Reviewer may not use Protected Information to give any person or competitor of any party a commercial advantage.

L. A Qualified Reviewer may disclose Protected Information or Protected Documents to any other Qualified Reviewer.

M. In the event that any Qualified Reviewer to whom Protected Information or Protected Documents has been disclosed ceases to be engaged in this proceeding, or is employed or retained for a position whose occupant is not qualified as a Qualified Reviewer, then access to Protected Information and Protected Documents shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Agreement shall continue to be bound by the provisions of that agreement and this order.

N. Attorneys who serve as the Representative of the Receiving Party or as a Qualified Reviewer are responsible for using reasonable efforts to ensure that persons under their supervision or control comply with this order. If an attorney meets the foregoing requirement, then he or she shall not be held liable for violations of this order by a party or other Qualified Reviewer.

O. If a party files a timely objection to the listing or designation of a document as a Protected Document then, ten (10) days after the objection, the protections of this order shall automatically cease to apply to that document, unless the Disclosing Party has, within that ten (10) day period, filed a motion, with a supporting affidavit specifying those portions of the Protected Document that should be protected and demonstrating that the information in the Protected Document qualifies as Protected Information.

P. If the Disclosing Party has filed a motion under the preceding paragraph then, pending a ruling by the Board, the Protected Documents in question shall continue to be protected in accordance with this Protected Order and Non-Disclosure Agreement.

Q. Unless the Board otherwise specifies, if the Board rules, at any time, that all or part of any document or information claimed to be protected does not qualify as a Protected Document or Protected Information, then that document or information shall nevertheless continue to be protected under this order for ten (10) days from the date of issuance of the ruling and, if the party seeking protection files an interlocutory petition for review or requests that the issue be certified to the Commission, for an additional ten (10) days. The parties do not waive any rights they may have to seek additional administrative or judicial remedies after the Board's decision or the Commission's denial of any appeal thereof.

R. The Representative of a Receiving Party intending to file or submit any pleading, testimony, exhibit, or correspondence in this proceeding that contains a Protected Document or Protected Information shall notify the Representative of the Disclosing Party in writing, as soon as the Receiving Party is aware of the intended use of the Protected Document and, to the fullest extent possible, no less than five (5) working days prior to the date of the intended filing.

S. All pleadings, testimony, exhibits, and correspondence filed in the adjudicatory record of this proceeding that contain Protected Information derived from a Protected Document shall:

1. Be provided to the NRC's Electronic Information Exchange (EIE) for service, but shall be excluded from the public docket for this proceeding by selecting the non-public "Protective Order" filing option on the EIE website;
2. Include an attached cover sheet identifying the pleading, testimony, exhibit, or correspondence as containing a Protected Document or Protected Information derived therefrom, and a cover letter that describes the contents of the pleading or correspondence without reference to such information, and, in the subject line of the EIE filing, a statement that the electronic filing contains Protected Information;
3. Specifically designate, by highlighting, marginalia, or other appropriate markings, the portion of the pleading, testimony, exhibit or correspondence, that contains a Protected Document or Protected Information derived therefrom;

4. Be served only on the Board, the Board's law clerks, the NRC's Office of the Secretary, and the individuals on the E-Filing public document service list who are also Qualified Reviewers;²⁰ and

5. Be accompanied by a Redacted Public Document or version of the pleading, testimony, exhibit and/or correspondence with the Protected Information redacted, unless the Representative of the party filing the pleading, testimony, exhibit and/or correspondence certifies, in good faith, that such a redacted version cannot be prepared without undue burden or expense.²¹ The Redacted Public Document shall likewise be E-Filed.

T. Each party shall file with the NRC's Office of the Secretary a list of the individuals on the E-Filing public document service list who are also Qualified Reviewers and who therefore may receive filings pursuant to this protective order.

U. At any hearing or conference in this proceeding in which Protected Information is discussed, the discussion, argument and/or testimony concerning the Protected Information shall be given in camera or under other suitable conditions as this Board may establish, and the record of that portion of the hearing and any transcript thereof shall be withheld from distribution to the public. It shall be the duty of the party who intends to discuss or present testimony concerning Protected Information to notify the Board and the parties that such testimony or statement will contain Protected Information, prior to the testimony or statement being made.²²

²⁰ There is no requirement that a Qualified Reviewer be on the E-Filing public document service list. Indeed, it is preferable to restrict the service list to the Representatives (who are Qualified Reviewers) and for the Representative to then distribute the Protected Document to the other Qualified Reviewers working on the matter.

²¹ If the party filing the pleading, testimony, exhibit and/or correspondence is not the Disclosing Party (i.e., the party that originally claimed that the document contains Protected Information, then the filer should contact the Disclosing Party and request that it provide the redacted version of the document.

²² Similarly, a party who wishes to serve a document upon the Board only, i.e., an in camera filing, may do so in the E-Filing system by choosing "Legal-In Camera Filing" from the document drop down list.

V. Protected Documents shall remain available until the date that an order terminating this proceeding is no longer subject to judicial review. The parties shall, within fifteen (15) days of that date, return the Protected Documents to the Representative of the Disclosing Party, or shall destroy that material, except that copies of filings, transcripts, and exhibits in this proceeding that contain either Protected Documents or Protected Information may be retained if they are maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. Within the fifteen (15) day time period, the Representative of each Receiving Party shall submit to each Disclosing Party an affidavit stating that, to the best of his or her knowledge, all of the foregoing materials have been returned or destroyed, or, if filings, transcripts, exhibits, or notes in this proceeding, will be maintained in a secure place such that no distribution of the information to unauthorized individuals will occur. To the extent that such filings, transcripts, exhibits, and notes are not returned or destroyed, they shall remain subject to the provisions of this protective order.

W. Counsel, consultants, employees, or any other individuals representing a Receiving Party who have reason to believe that Protected Documents might have been lost or misplaced or may have otherwise become available to unauthorized persons during the pendency of this proceeding shall notify the Board and counsel for the Disclosing Party promptly of their concerns and the reasons for them.

X. Any violation of the terms of this protective order or a non-disclosure agreement executed in furtherance of this order may result in the imposition of such sanctions as the Board may deem appropriate, including but not limited to (1) referral of the violation to appropriate bar associations or other disciplinary authorities, (2) ordering the return of all Protected Documents, or (3) dismissing or narrowing any admitted contention related to the Protected Information or Protected Documents.

Y. The Board may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding. Each party has the right to move to amend this protective order.

Z. Nothing in this protective order shall prevent any party from seeking public disclosure of any Protected Document or Protected Information in accordance with any other NRC regulatory procedures (e.g., 10 C.F.R. Part 9) or other applicable law (e.g., the Freedom of Information Act). Nor shall this protective order preclude any party from independently seeking, through discovery in any other administrative or judicial proceeding, any Protected Document or Protected Information produced in this proceeding under this protective order. In addition, if documents identified in this proceeding as Protected or some or all of the information contained in such documents comes into the possession of or is known by any party independently of the Protected Document produced in this proceeding, use of that document or information in this proceeding, without compliance with the terms of this protective order, shall not be a violation of the terms of this protective order. The party asserting independent knowledge of the contents of Protected Documents or independent access to such documents shall have the burden of proving that such information was independently obtained in the event that the Disclosing Party asserts that disclosure of such information or document was a violation of this order.

AA. The Board will resolve any disputes arising under this protective order in accordance with the dispute resolution procedures specified in the ISO. Regardless of whether the disclosure

dispute arises in the context of a motion to compel or a motion for protection under this order or otherwise, the party asserting that a document is a Protected Document or that information is Protected Information bears the burden of proof. See ISO § II.C.1.

It is so ORDERED.

FOR THE ATOMIC SAFETY AND LICENSING
BOARD

/RA/

Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
February 25, 2011

ATTACHMENT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of

PACIFIC GAS & ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Units 1
and 2)

Docket Nos. 50-275-LR and 50-323-LR

ASLBP No. 10-900-01-LR-BD01

NON-DISCLOSURE AGREEMENT

Under penalty of perjury under the laws of the United States, I hereby certify pursuant to 28 U.S.C. § 1746 that (1) access to Protected Documents and Protected Information is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's protective order, dated February 25, 2011, in this proceeding; (2) I have been given a copy and have read said protective order; and that I agree to be bound by it; (3) I understand and agree that I will hold Protected Documents and Protected Information, and any notes or copies thereof, in confidence and in accordance with the terms and requirements of the protective order; and (4) I acknowledge that a violation of this agreement or the protective order, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of such sanctions as the Board, the Commission, or a court of competent jurisdiction may deem to be appropriate.

WHEREFORE, I do solemnly agree to protect such Protected Documents and Protected Information as may be disclosed to me in this NRC proceeding, in accordance with the terms of this agreement.

Signature

Name (printed)

Title/Identification

Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275-LR and 50-323-LR
)
(Diablo Canyon Nuclear Power Plant,)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB MEMORANDUM AND ORDER (CONCERNING PROTECTIVE ORDER AND NON-DISCLOSURE AGREEMENT) (LBP-11-05) have been served upon the following persons by the Electronic Information Exchange.

U.S. Nuclear Regulatory Commission
Atomic Safety and Licensing Board Panel
Mail Stop: T-3F23
Washington, DC 20555-0001

Alex S. Karlin, Chair
E-mail: alex.karlin@nrc.gov

Nicholas G. Trikouros
E-mail: nicholas.trikouros@nrc.gov

Paul B. Abramson
E-mail: pba@nrc.gov
paul.abramson@nrc.gov

Jonathan Eser, Law Clerk
E-mail: jonathan.eser@nrc.gov

U.S. Nuclear Regulatory Commission
Office of Commission Appellate Adjudication
Mail Stop: O-16C1
Washington, DC 20555-0001
OCA Mail Center
E-mail: ocaamail@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Washington, DC 20555-0001

Edward L. Williamson, Esq.
E-mail: edward.williamson@nrc.gov

Susan Uttal, Esq.
E-mail: susan.uttal@nrc.gov

Maxwell Smith, Esq.
E-mail: Maxwell.smith@nrc.gov

Lloyd Subin, Esq.
E-mail: lloyd.subin@nrc.gov

Megan Wright, Esq.
E-mail: megan.wright@nrc.gov

Brian Newell, Paralegal
E-mail: bpn1@nrc.gov
OGC Mail Center
E-mail: OGCMailCenter@nrc.gov

U.S. Nuclear Regulatory Commission
Office of the Secretary of the Commission
Mail Stop: O-16C1
Washington, DC 20555-0001
Hearing Docket
E-mail: hearingdocket@nrc.gov

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LB MEMORANDUM AND ORDER (CONCERNING PROTECTIVE ORDER AND NON-
DISCLOSURE AGREEMENT) (LBP-11-05)

Winston & Strawn, LLP
Counsel for PG&E
101 California Street
San Francisco, CA 94111-5802

David A. Repka, Esq.
E-mail: drepka@winston.com
Tyson Smith, Esq.
E-mail: trsmith@winston.com
Carlos Sisco, Senior Paralegal
E-mail: CSisco@winston.com

Harmon, Curran, Spielberg, and Eisenberg
Counsel for San Luis Obispo Mothers
For Peace
1726 M Street, N.W., Suite 600
Washington, DC 20036

Diane Curran, Esq.
dcurran@harmoncurran.com

San Luis Obispo Mothers for Peace
1123 Flora Road
Arroyo Grande, CA 93420

Jill ZamEk, Esq.
jzk@charter.net

[Original signed by R. L. Giitter _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 25th day of February 2011.