

DOCKETED
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Docket No. 40-8027-EA

Source Material License
No. SUB-1010

BACKGROUND

The NRC staff (Staff) does not, for the purpose of this Response, take issue with any of the statements made in the Motion, which correctly states the narrow controversy regarding the proposed protective order. The parties have agreed that a protective order is desirable in this case and have agreed to all but one paragraph of the Proposed Order, *i.e.*, paragraph 7. Specifically, the paragraph 7 proposed by SFC and General Atomics would require the Staff to seek the consent of the party supplying the protected discovery

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material, or the approval of the Board before referring a matter disclosed in the materials to the Office of Investigations (OI), the Inspector General (OIG) or the Executive Director for Operations (EDO).¹ The Staff is opposed to such a requirement in that it would interfere with the legitimate exercise of its duties.² The Staff, therefore, requests that the Board enter a protective order containing the language of paragraph 7 proposed by the Staff and supported by Native Americans for a Clean Environment (NACE) and the Cherokee Nation.

¹ SFC's and General Atomic's proposed paragraph 7 reads:

Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from using such material as is appropriate in the legitimate exercise of their respective duties, provided that they shall not disclose such materials to any individual not authorized to receive material under this Protective Order *without first obtaining either the consent of the party whose Protected Discovery Material is being disclosed or the approval of the Licensing Board.* (emphasis supplied).

² The language proposed by the Staff for paragraph 7 is as follows:

Nothing in this Protective Order shall prevent NRC Staff authorized to receive Protected Discovery Material from disclosing such to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff, but such NRC Staff shall inform each of the foregoing to whom Protected Discovery Material is disclosed that the material was obtained from documents covered by this Protective Order. Notwithstanding any other provision contained in this Protective Order, the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, or their staff may use or refer such Protected Discovery Materials as is appropriate in the legitimate exercise of their respective duties.

DISCUSSION

If information is disclosed in discovery which leads the Staff to conclude that referral to the EDO, OI or OIG is warranted, then it is the Staff's obligation to provide that information without interference to the appropriate agency officials and investigative bodies.

The language for paragraph 7 proposed by SFC and General Atomics would prohibit Commission employees from disclosing material to "any individual not authorized to receive material under the Protective Order" without the consent of the party whose material is being disclosed or the approval of the Board. Proposed Order at 2-3. This language encompasses disclosures made to the EDO, the Director of OI, the OIG, and their staffs. The vital role of these offices to assure public health and safety and to protect against fraud, abuse, and wrongdoing; the Commission's longstanding policy against restrictions of the free flow of communications; and the need for the Commission to be able to rely on the judgment, advice, and knowledge of its employees which requires the unfettered ability to communicate with the foregoing offices, militate against acceptance of the language proposed by SFC and General Atomics.

The EDO is the chief staff officer of the NRC, with overall responsibilities for supervising and coordinating policy development and operational activities of all Staff offices, notably including the Office of Investigations. 10 C.F.R. § 1.31(b). He is also responsible for implementing Commission policy directives pertaining to these offices. *Id.* As the most senior staff member whose responsibilities include supervision

of the staff offices, there should be no limitations on the Staff's ability to provide information to him. To place such restrictions would adversely affect and interfere with the Staff's ability to protect the public health and safety. Restricting the EDO's ability to gather information would also interfere with the Staff's ability to administer and enforce the AEA and the Commission's regulations and orders. In fact, important health and safety matters are routinely brought to the attention of the EDO.

In addition, it is a significant duty of the Staff to consult with the EDO regarding pending cases, including discussions of information received during discovery. It is important that the Staff be able to fully inform the EDO of developments in pending matters because the EDO plays an important role in formulating Staff positions in these cases.

Section 161 of the Atomic Energy Act of 1954, as amended (AEA), authorizes the Commission to conduct investigations and obtain such information "as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder." 42 U.S.C. § 2201(c). Pursuant to its authority under the AEA, the Commission has vested OI with the authority to conduct investigations of licensees, applicants, their contractors or vendors, including the investigation of all allegations of wrongdoing by other than NRC employees and contractors.³ 10 C.F.R. § 1.36(a).

³ OI has the authority to make appropriate referrals to the Department of Justice and to issue subpoenas as appropriate for the conduct of investigations. 10 C.F.R. §§ 1.36(c) and (e). *See also* AEA, 42 U.S.C. § 2271(b).

It is therefore essential that the flow of information to OI not be impeded. Moreover, it is important to note that the EDO and OI, and their staffs are subject to the non-disclosure regulations of 10 C.F.R. § 2.790 and/or 10 C.F.R. §§ 9.17 and 9.25, and could be subject to penalties for the unauthorized disclosure of protected material. *See, e.g.,* 18 U.S.C. § 1905.

The Inspector General Act of 1978, 5 U.S.C. app. § 1, *et seq.* (1978) (the IGA) established independent and objective units to prevent and detect fraud and abuse in government. 5 U.S.C. app. § 1. The establishment of an Inspector General for the NRC was incorporated into the IGA in 1988. 5 U.S.C. app. § 8B. The OIG is authorized to "investigate possible irregularities or alleged misconduct of NRC employees and contractors" and is authorized to conduct and report on "investigations and inquiries, as necessary, to ascertain and verify the facts with regard to the integrity of all NRC programs and operations."⁴ 10 C.F.R. §§ 1.12(c) and (d). The OIG keeps the Commission and the Congress informed about fraud, abuse, and other serious deficiencies in the NRC's programs and operations and is responsible, in this regard, for investigating alleged or suspected wrongdoing by NRC employees or contractors. 10 C.F.R. § 1.12(g). Each Inspector General is appointed by the President, with the advice and consent of the Senate and may be removed from office by the President. 5 U.S.C. app. § 3(a).

⁴ The IGA also circumscribes public disclosure of information held by the OIG. 5 U.S.C. app. § 8D(e).

Vital to the investigatory roles of OI and OIG is the free flow of information from the Commission's employees to these offices. Indeed, with respect to OIG, Congress has provided in section 7(a) of the IGA that:

The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.⁵

5 U.S.C. app. § 7(a).

Paragraph 7 of the Proposed Order could restrict the flow of information and have a chilling effect on Staff members who may discover questionable matters amid the discovery materials covered under the Proposed Order.⁶

The duties and responsibilities of NRC employees are set forth in the Commission's Management Directive System. Commission employees have a duty to report all allegations of wrongdoing by licensees, licensee employees, contractors, etc., to OI. Management Directive 8.8, "Management of Allegations." Office Directors and Regional Administrators are required to refer allegations "where there is a reasonable basis for belief of wrongdoing" and which require investigation by OI. Management

⁵ "Establishment" as used in the IGA includes the Nuclear Regulatory Commission. 5 U.S.C. app. § 11(b).

⁶ The IGA further prohibits any employee in authority "to take or threaten to take any actions against any employee as a reprisal for making a complaint or disclosing information to an Inspector General" 5 U.S.C. app. § 7(c). As discussed below, the chilling effect of such language proposed by SFC and General Atomics would serve as a threat to those employees subject to the Protective Order and would hinder the free flow of information.

Directive 8.8 § 0517-033(f). *See also* Management Directive 8.8, app. 0517, Part III, "Guidance for Initiation, Establishment of Priorities and Termination of Investigations," § B.1. The Staff is also required to meet with OI before the decision is made to refer a matter for investigation. Management Directive 8.8, app. 0517, Part III, § B.2.a. If the staff determines that a senior level official of an applicant or licensee has made a material false statement, not only must the Staff refer the matter to OI, but the EDO must also inform the Commission. *Id.* at § G.

Commission employees have a duty to report wrongdoing or possible wrongdoing by NRC employees or contractors to the OIG. Management Directive 7.4 § 0702-031, "Notification and Investigation of Misconduct," requires all employees to report all allegations of misconduct by NRC employees and contractors to the director of their office. Management Directive 7.4, "Reporting Suspected Wrongdoing and Processing of OIG Referrals," requires office and division directors to report all complaints of wrongdoing and misconduct by NRC employees or contractors to the OIG.⁷

Whether to refer a matter for investigation is an independent responsibility of the Staff, unrelated to the Staff's involvement in this proceeding. As such, the Staff respectfully maintains that the Board does not have jurisdiction to direct or supervise the Staff in the conduct of that responsibility. *See New England Power Company* (NEP, Units 1 and 2), LBP-78-9, 7 NRC 271, 278-80 (1978). In *New England Power*, the

⁷ *See also* Executive Order No. 12674, Part I, (k), 54 Fed. Reg. 15159 (1989), which requires federal employees to disclose waste, fraud, and the like, to the appropriate authorities.

Licensing Board discussed the limits of its jurisdiction in the face of an intervenor's request that the Board order the Staff to suspend review of a license application, the preparation of a draft environmental impact statement (EIS) and all review and analyses of the applicant's proposal. The Board said that its powers were limited to those delegated to it by the Commission. *New England Power*, LBP-78-9, 7 NRC at 279. The Board noted that responsibility for the processing and review of applications for construction and operation of nuclear plants and the preparation of Staff documents (e.g., the EIS) has been delegated to and are made independently by the Staff, "and licensing boards have no role or authority in their preparation." *Id.* The Board further noted that 10 C.F.R. § 2.718 concerned the powers of the Board to conduct a hearing, and is not "an all-purpose delegation of power to licensing boards to control or direct the work of the Staff in carrying out its primary responsibilities." *Id.* at 279-80.

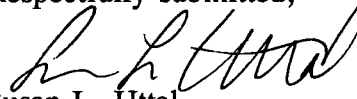
The Board in this case has been delegated jurisdiction by the Commission to determine the issues raised by the Staff's October 15, 1993 Order and to hold an evidentiary hearing. In exercising its jurisdiction, the Board has been given authority to take the actions specified in 10 C.F.R. §§ 2.718 and 2.721. These actions include, *inter alia*, regulating the course of the proceeding but do not include directing the Staff with regard to its ability to perform its independent regulatory responsibilities. As stated above, the AEA vests the Commission with authority to conduct investigations and obtain information as deemed necessary to, *inter alia*, further the enforcement of the Act. *See infra* pp. 3-4. The Commission has delegated this responsibility to OI and has vested


the EDO with the responsibility of supervising OI. This Board does not have jurisdiction to direct any aspect of the Staff's exercise of this independent and primary responsibility, or to supervise the manner in which Commission employees refer information to OI or OIG for possible investigation.⁸

CONCLUSION

Based upon the foregoing, the Staff respectfully requests that the Board issue a protective order containing the paragraph 7 proposed by the Staff, and supported by NACE and the Cherokee Nation. The Staff further requests that the Board deny SFC's motion insofar as it requests the Board to issue a protective order containing SFC and General Atomics' proposed paragraph.

Respectfully submitted,


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Catherine L. Marco
Counsel for NRC staff

Dated at Rockville, Maryland
this 23rd day of December 1994

⁸ Indeed, given that matters referred to OI or OIG relate to wrongdoing, it would be inappropriate, to say the least, for the Staff to seek the consent of a possible subject of any investigation before being permitted to refer the matter.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
SEQUOYAH FUELS CORPORATION)	Docket No. 40-08027-EA
GENERAL ATOMICS)	
)	Source Material License
(Gore, Oklahoma Site Decontamination)	No. SUB-1010
and Decommissioning Funding))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SEQUOYAH FUELS CORPORATION'S MOTION FOR PROTECTIVE ORDER" in the above-captioned matter have been served on the following by deposit in the United States mail, first class, or as indicated by asterisk through deposit in the Nuclear Regulatory Commission's internal mail system or as indicated by a double asterisk by facsimile or as indicated by a triple asterisk by electronic mail this 23rd day of December 1994.

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