



Nuclear Regulatory Commission staff (Staff) hereby supplements its comments made at oral argument.<sup>3</sup>

### DISCUSSION

In its brief in support of the motion for protective order, General Atomics (GA) raised the issue of the protective order agreed to by the Staff in the *Diablo Canyon* proceeding.<sup>4</sup> The issue was raised by the Board during oral argument. Tr. at 181. Although referral for investigation was not an issue in that case, which concerned the production of one document to the intervenor,<sup>5</sup> there were subsequent actions by the Staff concerning the possible foreclosure of the Staff's responsibility to make a referral. Soon after the protective order was issued by the *Diablo Canyon* licensing board, the Staff moved to amend the order. *See Motion to Amend Protective Order (Governing Non-Disclosure of INPO Report)*, August 17, 1993, attached hereto as Exhibit 1. The proposed amendment would have eliminated any apparent and unintended limitation on the Staff's responsibility

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<sup>3</sup> The Board also gave the parties the opportunity to address whether a paragraph concerning Freedom of Information Act requests for the materials covered by the protective order should be included in the protective order. On February 3, 1994, Staff counsel received a facsimile transmission of a proposed Stipulated Supplemental Motion for Protective Order from counsel for General Atomics. The Staff has not had the opportunity to review the language of the proposed paragraph and cannot, at this time, determine whether it can consent to the proposed language.

<sup>4</sup> General Atomics' Brief in Support of the Motion for a Protective Order, at 2, December 22, 1994.

<sup>5</sup> Nuclear Regulatory Commission Staff's Reply to General Atomics' Brief in Support of Motion for Protective Order, at 2-3, January 6, 1995.

to refer any appropriate matter to the EDO, OI and OIG.<sup>6</sup> See Exhibits 1, 2 and 3.<sup>7</sup> The position asserted by the Staff in *Diablo Canyon* is not inconsistent with its position here, wherein the Staff is asserting that the responsibility for referral is in the sole purview of the Staff.

During oral argument, the Board cited *Virginia Electric and Power Co.* (North Anna Nuclear Power Station, Units 1 and 2), ALAB-555, 10 NRC 23 (1979). Tr. at 192. In that case, a non-party, Westinghouse Electric Corporation, moved for a protective order limiting use of certain proprietary information to the review of one issue in the proceeding and limiting access to those within the Commission actively involved in the review. *North Anna*, ALAB-555, 10 NRC at 25. Despite misgivings regarding the deficiencies in Westinghouse's affidavit in support of the motion for protective order, which caused the Appeal Board to specifically state that the decision would have no precedential effect, the Appeal Board granted the request for the order because "no party has interposed an objection." *Id.* at 28. As pointed out to the Board at oral argument, the *North Anna* case was decided before the creation and formal commencement of

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<sup>6</sup> While the Staff believes that the language it has proposed for paragraph 7 is the most accurate reflection of the Commission's policy regarding the flow of information, the Staff would be agreeable, as in the *Diablo Canyon* case to, at most, a condition that the Staff notify the board, *ex parte* and *in camera*, that a referral has been made.

<sup>7</sup> There was no ruling on the Staff's Motion to Amend the Protective Order by the licensing board, and the case is no longer pending before the licensing board. The case is now pending before the Commission pursuant to 10 C.F.R. § 2.786(a).

operations of the Office of Investigations,<sup>8</sup> the creation of the NRC Office of Inspector General,<sup>9</sup> and the publication of Management Directive 8.8 or NRC Manual Chapter NRC-0517.<sup>10</sup> The organization of the NRC offices and the Commission policies and Management Directives which govern actions of NRC employees and the interpretation of the Atomic Energy Act and regulations have changed considerably since the issuance of the *North Anna* decision, thus affording it very little, if any, precedential value in the present case.

During oral argument, the Board asked whether a requirement that the Staff seek the Board's approval before referring any matter to OI or OIG would be a problem or cause harm to the interest of the Staff in pursuing an investigation. Tr. at 196, 209, 210. One of the areas of harm cited by the Staff was delay of the investigation. Tr. at 196. The Board responded by assuring the Staff that there could be a 24-hour turnaround on any such request, thus negating the Staff's claim of possible harm. Tr. at 196, 210.

The Staff submits that any delay could harm a potential investigation. If the Board should disagree with the Staff's assessment of the need for investigation, further delay

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<sup>8</sup> OI formally commenced operations on July 19, 1982. "Functions; Office of Investigations," 49 Fed. Reg. 16760 (1984).

<sup>9</sup> The Office of the Inspector General was established on April 17, 1989. "Statement of Organization and General Information; Minor Amendments," 54 Fed. Reg. 53312 (1989).

<sup>10</sup> NRC-0517, the predecessor of Management Directive 8.8, was published June 20, 1987.

would be engendered while the Staff filed pleadings and sought relief from the Commission.

Moreover, if the Board were to take action in this area, it would be placing itself in the position of judging whether it is reasonable to initiate an investigation, a matter which is not within the Commission's delegation of limited jurisdiction to the Board. It is, after all, the *Staff's* obligation, authority, and duty to make the determination whether a matter requires investigation or referral for investigation.

During oral argument, the Board also asked whether it would be required to decide the jurisdiction issue prematurely if the Staff were permitted to refer matters for investigation. Tr. at 203-206. The simple answer to that question is: no. The NRC has asserted that it has jurisdiction to impose obligations on GA. GA, although disputing the extent of NRC jurisdiction to take such action, has acceded to the procedural jurisdiction of the NRC for the purpose of answering the Staff's order and litigating, *inter alia*, the issue of the NRC's subject matter jurisdiction over GA. In so acceding, it is submitting itself to the agency's jurisdiction for the purpose of deciding this issue, and to the NRC regulations, policies and Board rulings concerning litigation before the Commission, including discovery issues. It is clear that full discovery can and should continue unless and until the issue of the Commission's jurisdiction over GA is determined against the Staff. *See e.g., Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-11, 40 NRC 55, 62 (1994); *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-7 (1994); *Eaton v. Dorchester Dev., Inc.*,

692 F.2d 727, 729 (11th Cir. 1982), and the cases cited therein. The fact that GA will be subject to full discovery (and possible investigation if wrongdoing is discovered) does not required this tribunal to make a premature decision regarding the subject matter jurisdiction of the NRC. That issue can be decided once the Board has "compile[d] a record and conduct[ed] a factual inquiry on whether GA has '*de facto* control' over SFC's daily activities . . . and is thereby subject to the Commission's jurisdiction." *Sequoyah Fuels*, CLI-94-11, 40 NRC at 62.

GA has not given up any of its rights. It has asserted that certain materials which it must produce in discovery should be afforded confidential treatment, and that is the sole reason why the materials are being protected. There is nothing inherently unfair or wrong in sharing this information, if necessary, with OI or OIG such that it requires monitoring by this Board. In fact, the sharing of information between criminal and civil matters has been approved. *See, e.g., Securities and Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980).

Finally, it should be emphasized that the issue under discussion here--whether the Staff should be permitted to refer matters to the Office of Investigations (OI) or the Office of Inspector General (OIG), without being required to obtain the approval of the Board--concerns the agency's ability and responsibility to investigate potential wrongdoing. Issues of wrongdoing, especially those with potential civil or criminal

implications, are of great significance to the NRC.<sup>11</sup> *See, e.g.*, Atomic Energy Act of 1954, as amended, § 221(b), 42 U.S.C. 2271. Potential criminal wrongdoing could require referral to the Department of Justice (DOJ) for violations of the Atomic Energy Act and other statutes. The Director of OI is required to report all suspected criminal violations to DOJ (or other appropriate agencies). "Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice," 53 Fed. Reg. 50317 (1988).<sup>12</sup> Thus, the free flow of information to OI and OIG is essential to the NRC's ability to fulfill its obligations and responsibilities under the Atomic Energy Act, including the investigation and possible institution of enforcement actions, to ensure the integrity of agency programs, and to ensure DOJ's ability to fulfill its duties and obligations to investigate and prosecute criminal violations of federal law. *See Dresser, supra*, 628 F.2d 1368.

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<sup>11</sup> If GA disagrees with the scope and direction of any investigation initiated by this agency, it has several avenues of relief, such as resisting or moving to quash any investigative subpoenas. In any event, such matters would not be heard by this Board, but by a different tribunal. Thus, GA would be protected from possible agency overreaching and does not need the protection of this Board.

<sup>12</sup> The OIG is required to report any suspected Federal criminal violations directly to the Attorney General, without notice to other agency officials. The Inspector General Act, 5 U.S.C. App. 3, § 4(b)(2)(d). *See also U.S. Nuclear Regulatory Comm'n v. Federal Labor Relations Auth.*, 25 F.3d 229, 233-34 (4th Cir. 1994).

CONCLUSION

The NRC Staff respectfully requests that the Licensing Board adopt the proposed protective order with the Staff's proposed paragraph 7.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Susan L. Uttal". The signature is fluid and cursive, with the first name being the most prominent.

Susan L. Uttal  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 3rd day of February 1995

August 17, 1993

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-275 OLA-2
PACIFIC GAS & ELECTRIC CO.	)	50-323 OLA-2
	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	(Construction Period Recovery)

MOTION TO AMEND PROTECTIVE ORDER  
(Governing Non-Disclosure of INPO Report)

INTRODUCTION

On August 3, 1993, the Atomic Safety and Licensing Board issued a Protective Order governing the disclosure and use of excerpts from a report prepared by the Institute of Nuclear Power Operations (INPO) titled, "Evaluation of Diablo Canyon Power Plant," dated July 1990 (INPO Report). The INPO Report is a confidential document, accorded restricted distribution by INPO and Pacific Gas and Electric Company (PG&E). Under the aforementioned Protective Order,<sup>1</sup> the INPO document was made available to named persons designated by San Luis Obispo Mothers for Peace (SLOMFP), Intervenor herein, and named persons designated by the NRC Staff. The Staff, in this motion, seeks to clarify that the Order does not put any general limitation on the Staff examining the

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<sup>1</sup> "Memorandum and Order (Granting Discovery Request/Referring Ruling to Commission)," LBP-93-13, July 19, 1993, (Discovery Order).

Exhibit 1.

subject INPO Report or any person from bringing a safety problem to the attention of cognizant NRC officials.

### DISCUSSION

In accordance with paragraph no. 3 of the Memorandum and Order (Protective Order Governing Non-Disclosure of INPO Report), dated August 3, 1993, disclosure of information in the INPO report, "Evaluation of Diablo Canyon Power Plan," dated July 1990, is limited to specifically identified individuals and "no disclosure shall be made other than for purposes directly related to the hearing to be held in conjunction with this proceeding."

The foregoing language may suggest an unintended limitation in preventing NRC Staff members identified in the Order from bringing to the attention of other appropriate NRC officials information that raises an important safety concern that may be disclosed in those reports or that the persons named in the protective order may not bring to the attention of the Inspector General or other NRC law enforcement officials information gleaned from the reports. Accordingly, the Staff respectfully moves that the Board add a footnote to paragraph no. 3 providing:

This Order shall not be interpreted as preventing the persons authorized to receive protected documents from disclosing information obtained therefrom to the NRC Executive Director for Operations, the NRC

Director of the Office of Investigations, or the NRC Inspector General, but shall inform such official that the information was obtained from documents covered by this protective order.<sup>2</sup>

Respectfully submitted,



Edwin J. Reís  
Deputy Assistant General Counsel  
for Reactor Licensing

Dated at Rockville, Maryland  
this 17th day of August 1993

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<sup>2</sup> If the Board wished, the amended Order could also require that the Board be informed promptly of such disclosure.

9 II. Hodgdon / Rafferty / Jorgensen /  
McDonald / Clark / Reid / F / Parler

August 30, 1993

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
PACIFIC GAS AND ELECTRIC CO.	)	Docket Nos. 50-275-OLA
	)	Docket Nos. 50-323-OLA
(Diablo Canyon Nuclear Power	)	
Plant, Units 1 and 2)	)	(Construction Period Recovery)
	)	

PACIFIC GAS AND ELECTRIC COMPANY'S  
RESPONSE TO MOTION TO AMEND PROTECTIVE ORDER

On August 17, 1993, the NRC Staff filed a Motion<sup>1/</sup> to amend the Protective Order<sup>2/</sup> issued in this proceeding with respect to a report prepared by the Institute of Nuclear Power Operations ("INPO"). The Protective Order provides, for a limited set of individuals, access to the INPO report contingent upon certain conditions and upon those individuals signing an affidavit of non-disclosure. The NRC Staff asks that the Protective Order be clarified by adding a new footnote to paragraph 3, providing as follows:

This Order shall not be interpreted as preventing the persons authorized to receive protected documents from disclosing

<sup>1/</sup> "Motion to Amend Protective Order (Governing Non-Disclosure of INPO Report)," August 17, 1993.

<sup>2/</sup> "Memorandum and Order (Granting Discovery Request/Referring Ruling to Commission)," LBP-93-13, July 19, 1993.

Exhibit 2

information obtained therefrom to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, but shall inform such official that the information was obtained from documents covered by this protective order.

The INPO report is a confidential document, accorded restricted distribution by INPO and Pacific Gas and Electric Company ("PG&E"). The report is also subject to the protection provided by the "Memorandum of Agreement Between the Institute of Nuclear Power Operations and the U.S. Nuclear Regulatory Commission" ("Memorandum of Agreement"), dated October 21, 1991. PG&E does not oppose the NRC Staff's Motion. However, this position is premised on the assumption that the Memorandum of Agreement applies to any disclosure of information to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General. The suggested

footnote should be revised by adding a sentence at the end as follows:

Such officials are subject to the Memorandum of Agreement between NRC and INPO dated October 21, 1991, and will treat any confidential information in accordance with its provisions.

Respectfully submitted,

  
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Dated in Washington, DC  
this 30th day of August, 1993

September 14, 1993

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	Docket Nos. 50-275 OLA-2
PACIFIC GAS & ELECTRIC CO.	)	50-323 OLA-2
	)	
(Diablo Canyon Nuclear Power Plant, Units 1 & 2)	)	(Construction Period Recovery)

NRC STAFF REPLY TO PG&E'S RESPONSE  
TO STAFF'S MOTION  
TO AMEND PROTECTIVE ORDER

INTRODUCTION

On August 17, 1993, the NRC Staff filed a "Motion to Amend Protective Order," by which it sought to amend the protective order that governs the disclosure and use of excerpts from a report prepared by the Institute of Nuclear Power Operations (INPO) titled, "Evaluation of Diablo Canyon Power Plant," dated July 1990 (INPO Report, hereafter). The INPO Report is a confidential document, accorded restricted distribution by INPO and Pacific Gas and Electric Company (PG&E). Under this Protective Order,<sup>1</sup> the INPO Report was made available to persons designated by San Luis Obispo Mothers for Peace (SLOMFP), Intervenor herein, and persons designated by the NRC Staff. In the Motion to Amend, the Staff sought clarification that the Order does not generally place any limitation on the Staff examining the INPO Report or any person from bringing

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<sup>1</sup> "Memorandum and Order (Protective Order Governing Non-Disclosure of INPO Report)," dated August 3, 1993; *see also* "Memorandum and Order (Granting Discovery Request/Referring Ruling to Commission)," LBP-93-13, July 19, 1993.

Exhibit 3

a safety problem to the attention of cognizant NRC officials. On August 30, 1993, PG&E filed a response to the Staff's Motion to Amend in which it suggested the addition of certain language. For the reasons discussed, the Staff objects to adding this language and urges the Licensing Board to amend the Protective Order as detailed below.

#### BACKGROUND

In accordance with paragraph No. 3 of the Memorandum and Order (Protective Order Governing Non-Disclosure of INPO Report), dated August 3, 1993, disclosure of information in the INPO report, "Evaluation of Diablo Canyon Power Plant," dated July 1990, is limited to specifically identified individuals and "no disclosure shall be made other than for purposes directly related to the hearing to be held in conjunction with this proceeding."

In its Motion to Amend, the NRC Staff argued that the foregoing language might suggest an unintended limitation which might prevent NRC Staff members identified in the Order from bringing to the attention of other appropriate NRC officials information that raised an important safety concern that might be disclosed in those reports.

As noted above, on August 30, 1993, Pacific Gas and Electric Company responded to the NRC Staff's Motion to Amend the Protective Order. PG&E did not oppose the NRC Staff's Motion, but their position was premised on the assumption that the Memorandum of Agreement between INPO and the NRC applies to any disclosure of information to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General. PG&E suggested that the subject footnote should be revised by appending a sentence at the end as follows:

Such officials are subject to the Memorandum of Agreement between NRC and INPO dated October 21, 1991, and will treat any confidential information in accordance with its provisions.

### DISCUSSION

The NRC Staff does not agree with the addition of PG&E's suggested language. The Licensee's response to the NRC Staff's Motion is stated to be "premised on the assumption that the Memorandum of Agreement applies to any disclosure of information to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General." The intent of this statement is unclear. However, the Staff emphasizes that the Memorandum of Agreement is applicable to information provided to the NRC Staff under the Memorandum. The language requested by the NRC Staff in its Motion to Amend the Protective Order merely clarifies the NRC's responsibilities under the August 3, 1993, Protective Order. The Memorandum provides that the NRC will control distribution of INPO proprietary information, consistent with the law, from unauthorized disclosure. The NRC believes that there is no intent in the Memorandum to restrict NRC disclosures authorized by law. Moreover, the Memorandum provides that the NRC may depart from its terms whenever "it deems it necessary or appropriate to do so in the discharge of its regulatory responsibilities. . . ." Thus, the Memorandum is consistent with the Protective Order but neither controls the other. Both are governed by the Staff's overriding duty to disclose important health and safety information.

MOTION

Wherefore, the NRC Staff respectfully moves the Board to adopt the language that the Staff requested in its August 17, 1993, Motion to Amend Protective Order as follows:

This Order shall not be interpreted as preventing the persons authorized to review<sup>2</sup> protected documents from disclosing information obtained therefrom to the NRC Executive Director for Operations, the NRC Director of the Office of Investigations, or the NRC Inspector General, but such persons disclosing such information shall inform such official that the information was obtained from documents covered by this protective order.<sup>3</sup>

Respectfully submitted,

*Ann P. Hodgdon*

Ann P. Hodgdon  
Counsel for NRC Staff

*Ann P. Hodgdon  
for*

Arlene A. Jorgensen  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 14th day of September 1993

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<sup>2</sup> In reviewing this matter, it came to the Staff's attention that there were typographical errors in the version of the proposed footnote included in the Staff's motion of August 17th. Those errors are here corrected, as indicated by bold and underlining.

<sup>3</sup> If the Board wished, the amended Order could also require that the Board be informed promptly of such disclosure.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

'95 FEB -6 A8:17

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) )

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NUCLEAR REGULATORY COMMISSION STAFF'S SUPPLEMENT TO ORAL ARGUMENT REGARDING 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 3rd day of February 1995.

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