

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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USNRC

'95 JUL 14 P4:22

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

|                            |   |                         |
|----------------------------|---|-------------------------|
| In the Matter of           | ) |                         |
|                            | ) |                         |
| SEQUOYAH FUELS CORPORATION | ) | Docket No. 40-8027-EA   |
| GENERAL ATOMICS            | ) |                         |
|                            | ) | Source Material License |
| (Gore, Oklahoma Site       | ) | No. SUB-1010            |
| Decontamination and        | ) |                         |
| Decommissioning Funding)   | ) |                         |

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NRC STAFF'S BRIEF IN SUPPORT OF PARTIAL REVERSAL OF LBP-95-05

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July 14, 1995

SECY-020

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NRC STAFF'S BRIEF IN SUPPORT OF PARTIAL REVERSAL OF LBP-95-05

INTRODUCTION

Pursuant to the Commission's Order of June 29, 1995 (Commission Order) the staff of the Nuclear Regulatory Commission (Staff) hereby submits its brief in support of partial reversal of the Atomic Safety and Licensing Board (Board's) "Memorandum and Order (Ruling on Motion for Protective Order)," LBP-95-05, \_\_\_ NRC \_\_\_, slip op. (April 18, 1995) (Order). In that decision, the Board granted a motion for a protective order submitted by Sequoyah Fuels Corporation (SFC) that controls the dissemination and use of certain information obtained through the discovery process. The Staff contests a paragraph of the protective order, which prohibits the disclosure of protected material by the Staff to NRC offices that are not involved in this litigation without first obtaining the approval of the Board.<sup>1</sup>

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<sup>1</sup> SFC's version of paragraph 7 originally proposed in SFC's motion for a protective order additionally provided that the Staff could release the protected material with the consent of the party whose material is being disclosed. *See* SFC's Motion for Protective Order (Dec. 2, 1994). The Board, however, in granting SFC's motion, decided to strike that provision from paragraph 7 of the final protective order. Order at 22.

The Staff submits that paragraph 7 of the protective order interposes the Board between the Staff and the Office of Investigations (OI) and the Office of the Inspector General (OIG), creating a situation whereby members of the Staff may be unable to perform their responsibilities. Therefore, the Staff requests that the Commission reverse, in part, the Board's Order and direct that the Staff's proposed language be substituted for the language approved by the Board.<sup>2</sup>

### BACKGROUND

On October 15, 1993, the Staff issued an order to Sequoyah Fuels Corporation (SFC) and General Atomics (GA) which, *inter alia*, directed that SFC and GA are jointly and severally liable for certain decommissioning funding responsibilities for the SFC facility in Gore, Oklahoma. 58 Fed. Reg. 55,087 (1993). SFC and GA filed timely requests for a hearing, and a Board was established to preside in the proceeding. 58 Fed. Reg. 63,406 (1993).

In connection with answering Staff discovery requests, SFC filed a motion for a protective order for certain information. *See* Motion for Protective Order (Dec. 2, 1994). The parties had reached an agreement as to all but one of the terms of a protective order. Paragraph 7 of the proposed order, regarding the possible disclosure

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<sup>2</sup> The Staff in its proposed paragraph 7 listed the NRC Executive Director for Operations (EDO) as well as OI and OIG as those offices that may receive protected material. Inasmuch as the Board's Order allows the EDO to be entitled to protected material, the focus of the Staff's appeal is the ability of the Staff to provide protected material to OI and OIG. *See* Order at 14 ("SFC does concede that the EDO's supervisory responsibilities are involved in all NRC litigation and to the extent of any involvement in this proceeding, that office is entitled to the privileged information discussed herein.").

of confidential material by the Staff to other offices within the NRC not involved in the litigation, could not be resolved by the parties.

The Staff opposed SFC's version on the grounds that it would interfere with the legitimate exercise of the Staff's duties and that it would interpose the Board between the Staff and its investigative offices.<sup>3</sup> *See* Nuclear Regulatory Commission Staff's Response to Sequoyah Fuels Corporation's Motion for Protective Order (Dec. 23, 1994). On April 18, 1995, the Board issued a divided decision ruling on the protective order. The majority ruled in favor of SFC. Judge Bollwerk, in his dissenting opinion, disagreed with the merits of the majority's position, and in particular with the Board's "incursion into a regulatory area in which it has no authority or expertise." Order at 38.

On May 3, 1995, the Staff filed a petition for review of LBP-95-05 before the Commission. GA and SFC filed their respective timely answers in opposition to the Staff's petition. On June 29, 1995, the Commission issued an order undertaking review and directed that the parties consider in their briefs whether "there are protective devices other than the one imposed by the Licensing Board, including 10 C.F.R. § 2.790, that would be workable and effective." Commission Order at 3. The Commission also asked the parties to address "whether SFC and GA have a legal entitlement to protection of their confidential information from disclosure to NRC investigatory and enforcement staff not involved in the litigation." *Id.*

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<sup>3</sup> The Staff's position was supported by Native Americans for a Clean Environment and the Cherokee Nation, intervenors in this proceeding.

## ARGUMENT

### **Summary of Argument**

The Staff submits that paragraph 7 of the protective order interposes the Board between the Staff and its investigatory and enforcement offices in a manner exceeding its authority to regulate the course of the proceeding.<sup>4</sup> Further, in deciding the scope of protective orders using Rule 26(c) of the Federal Rules of Civil Procedure and decisions thereunder as guidance, the Board did not give appropriate weight to the importance of the free flow of information in the context of intra-agency communications vital to fulfilling agency functions.

#### **I. The Board is Exceeding Its Authority in Interposing Itself Between the Staff and Staff Investigatory Offices**

Licensing boards have authority to issue orders to protect a party responding to discovery requests against disclosure of a trade secret or other confidential research, development or commercial information. 10 C.F.R. § 2.740(c). Licensing boards can order that the information not be disclosed or be disclosed only in a designated way. *Id.* However, the exercise of the Board's authority, including the authority to regulate the course of the proceeding and the conduct of the participants, is limited to the jurisdiction delegated by the Commission -- in the instant proceeding, to determine the issues raised in the Staff's October 15, 1993 Order and to hold an evidentiary hearing. *See* 10 C.F.R. §§ 2.718 and 2.721; *see also Commonwealth Edison Co.* (Zion Station, Units 1 and 2),

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<sup>4</sup> The powers of the presiding officer are set forth in 10 C.F.R. § 2.718. This regulation provides, in part, that the presiding officer has the power to "[r]egulate the course of the hearing and the conduct of the participants." 10 C.F.R. § 2.718(e).



ALAB-616, 12 NRC 419, 426 (1980) (Board's jurisdiction is limited by the Commission's notice of hearing); *Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 386 (1978) (board's jurisdiction in construction amendment proceeding was limited to issues on which board must make findings under regulations and were included in the notice of consideration of amendment issuance).

The Board's authority does not extend to exercising control over the initiation of investigations and enforcement actions regarding violations of the Atomic Energy Act of 1954, as amended (AEA), for it is the Staff's duty to make such determinations. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-82-31, 16 NRC 1236, 1238 (1982) (Commission's regulations do not confer the authority on licensing boards to impose a civil penalty -- that authority rests with the Director of Nuclear Reactor Regulation, the Director of Nuclear Material Safety and Safeguards, and the Director, Office of Inspection and Enforcement).

The Staff's investigative authority is derived from section 161 of the AEA, which provides that in the performance of its functions, the Commission is authorized to conduct investigations and obtain 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 this authority, 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 those other than NRC employees and contractors. 10 C.F.R. § 1.36(a).

The Inspector General Act of 1978, 5 U.S.C. app. § 1, *et seq.* (1978) established independent and objective units to prevent and detect fraud and abuse in government. 5 U.S.C. app. § 1.<sup>5</sup> Thus, 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." 10 C.F.R. §§ 1.12(c) and (d). The OIG keeps the Commission and Congress fully informed about fraud, abuse, and other serious deficiencies in the NRC's programs and operations. 10 C.F.R. § 1.12(g). The Board does not have authority to direct or supervise the Staff in connection with the initiation and conduct of these investigatory duties. *See Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-825, 22 NRC 785, 790 (1985) (powers of the board are limited to those delegated by Commission).

Although the Board disagrees with the view that the provision in its Order regarding its approval of referrals in its Order constitutes directing and supervising the Staff in the conduct of its responsibilities, the effect of the Staff having to approach the Board after determining that information obtained during discovery should be provided to either OI or OIG gives the Board a close oversight role over those matters referred. A decision of what is reasonable to refer to OI and OIG may involve determinations of policy and judgment, which, as elucidated by the dissent, is not within the expertise of the Board. As Judge Bollwerk stated:

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<sup>5</sup> The establishment of an Inspector General for the NRC was incorporated into the Inspector General Act in 1988. 5 U.S.C. app. § 8B.

Besides requiring that the Board assess whether the information the staff would disclose is reasonably relevant to some purported wrongdoing, . . . the Board necessarily must also judge whether the staff's concern about purported wrongdoing is itself "reasonable." This, in turn, involves the Board in determining whether an agency investigation or enforcement action should be initiated or pursued, an executive judgment wholly outside the range of the adjudicatory experience and expertise of the Board.

Order at 44. The Board, therefore, by serving as review authority over potential matters to be referred to investigatory offices, would be going beyond its authority to regulate the course of the proceeding and the conduct of the participants therein. *See* 10 C.F.R. § 2.718(e).

II. The Board Did Not Give Appropriate Weight to the Importance of the Free Flow of Information in the Context of Intra agency Communications

The issue of whether the Staff should be permitted to refer matters to OI or OIG, without being required first 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 importance to the NRC. *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 AEA and other statutes. The Director of OI is required to report all suspected criminal violations to the DOJ or other appropriate agencies.<sup>6</sup>

Memorandum of Understanding Between the Nuclear Regulatory Commission and the

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<sup>6</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. § 4(b)(2)(d). *See also U.S. Nuclear Regulatory Comm'n v. Federal Labor Relations Auth.*, 25 F.3d 229, 233-343 (4th Cir. 1994).

Department of Justice, 53 Fed. Reg. 50,317 (1988). Further, with respect to OIG, Congress has provided in section 7(a) of the Inspector General Act 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.<sup>7</sup>

5 U.S.C. app. § 7(a).

The free flow of information to OI and OIG is essential to the NRC's ability to fulfill its obligations and responsibilities under the AEA, 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. The Board's approved version of paragraph 7 potentially restricts the flow of information to these offices and has a chilling effect on Staff members who may discover referable information while reviewing protected material. Thus, the NRC's ability to fulfill the foregoing obligations and responsibilities may be seriously hindered.

In its Order, the Board determined that the investigatory powers of the agency would be inappropriately enhanced should protected discovery materials be provided to OI and OIG. Order at 13. The Board emphasized that OI and OIG have extensive investigatory powers, and the agency has the ability to make a variety of demands for information from licensees. *Id.* While it is true that OI and OIG have substantial

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<sup>7</sup> "Establishment" as used in the Inspector General Act includes the Nuclear Regulatory Commission. 5 U.S.C. app. § 11(b).

investigative abilities, investigative efforts often originate from a licensee's or other person's submittal, in the context of normal regulatory activities, of information to the Staff, which the Staff subsequently brings to the attention of OI or OIG. It is only after such initial information is brought to OI or OIG that these offices may be able to utilize these other tools. Without the ability to bring matters to the attention of the offices that have the means to resolve them, the agency's extensive powers to develop and investigate, as well as uncover, those matters would be of little use.<sup>8</sup>

III. Management Directives Clearly Articulate NRC Policy with Respect to Referral of Matters of Wrongdoing

NRC employees have an obligation under the NRC Management Directives to refer all potential matters of wrongdoing to the appropriate offices, *i.e.*, OI and OIG. Management Directive 8.8, "Management of Allegations," and NRC Manual Chapter NRC-0517 and its appendix are mandatory for the Staff. 8 *Management Directives, United States Nuclear Regulatory Commission*, Chapter 8.8, Manual Chapter NRC-0517-

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<sup>8</sup> In its Order, the Board states that private litigants' devices, such as discovery, should not be used "as reinforcements" for federal prosecutors. Order at 11. Further the Board admonishes against the practice of seeking confidential information through discovery in order to coerce settlement. Order at 11-12. The Staff's purpose in preserving its ability to refer matters found in protected documents to its investigative offices is not to coerce settlement or reinforce a federal prosecution. Currently, there is no open investigation or prosecution against either SFC or GA which the protected material could "reinforce." Indeed, the Staff has no expectation that the material would reveal a matter that should be referred to OI or OIG. The Staff's interest rests not with reinforcing a prosecution or forcing a settlement, but with protecting its own internal channels of referring potential wrongdoing. Moreover, there is no blanket prohibition on referring matters derived from civil discovery to criminal authorities; nor is there an absolute bar on the ability of criminal authorities to obtain such information. *See SEC v. Dresser Industries*, 628 F.2d 1368 (D.C. Cir. 1980) (en banc), *cert. denied*, 449 U.S. 993 (1980).

05.051. Manual Chapter NRC-0517-03.033(f) requires all Office Directors and Regional Administrators to "refer all matters *where there is a reasonable basis for belief of wrongdoing and for which the staff determines an investigation is necessary to determine whether regulatory action is required*, except those involving NRC employees or NRC contractors, to the Office of Investigations . . . ." (emphasis in original). *See also* Manual Chapter 0517, "Guidance for Initiation, Establishment of Priorities and Termination of Investigations," Part III, § B.1. Manual Chapter NRC-0517-33.033(m) requires all Office Directors and Regional Administrators to "notify OI when the staff is aware of a matter which could potentially involve wrongdoing by licensees, vendors, or their contractors." The Staff is 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 similar duty to report wrongdoing or possible wrongdoing by NRC employees or contractors to 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 respective offices. 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 OIG. *See* Executive Order No. 12674, Part I, (k), 54 Fed. Reg. 15,159 (1989), which

requires federal employees to disclose waste, fraud, and the like, to the appropriate authorities. *See also* 28 U.S.C. § 535(b) (any information relating to violations of title 18 involving government employees shall be expeditiously reported by the head of the agency to the Attorney General). In light of the broad, unqualified nature of the Management Directives, the Board was in error to conclude that they were not sufficiently clear as to whether the Commission intended that they apply to information received in the discovery process. *Id.* at 15-16.

The Board, in its Order, concludes that the Staff's position with respect to its obligations pursuant to the Management Directives is untenable for several reasons. Order at 14. The Board's reasons are as follows: 1) management directives are required to be adopted by all federal agencies as an internal management system for communicating objectives and other information to employees; 2) the Management Directives at issue do not explicitly refer to "allegations of wrongdoing based on protected confidential information solicited through the discovery process"; and 3) the Management Directives exclude from the definition of "allegation" those matters being handled by formal hearing processes. Order at 14-15.<sup>9</sup>

The Board's first concern, that the management directives are internal agency management systems for communicating with employees, does not alter the requirement

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<sup>9</sup> The Board mentions that "there is no evidence of wrongdoing in this case, nor hint of how evidence of such derived from protected discovery material transforms itself into allegations, as contemplated by the management directive cited." Order at 16. Although the Staff does not expect to find information contained in the protected material that would warrant referral, discovery in this proceeding is still ongoing and may bring new information to light.

that NRC employees comply with them. The Management Directives affect the manner in which the Staff is required to apply the rules and regulations, and, as a consequence may affect how the Staff may deal with a licensee or member of the public. The Board makes much of the fact that the Management Directives are not regulatory requirements; however, they are no less valid or binding on the Staff. As the dissent states:

Judicial authority suggests, however, that in determining how an agency allocates responsibility for internal handling of comments produced pursuant to legal process, agency policy guidelines can provide the necessary direction.

Order at 40 n.4. Under the circumstances, then, the Board's ruling creates an unwarranted tension between an employee's reporting obligation under the Management Directives (along with the possibility of administrative action for noncompliance) and adherence to the protective order.

The Board's concern that the Management Directives do not specifically provide for disclosing materials in instances where the material was provided pursuant to a discovery request does not recognize that there may be instances which are not specifically covered in the Management Directives that require a member of the Staff to provide information to OI or OIG. The broad language in the Management Directives pertaining to disclosure is sufficient to apply to numerous circumstances -- among them the disclosure of information obtained through discovery.

The Board also states that the Management Directives exclude from the definition of "allegation" those matters being handled by formal hearing processes. Order at 15. Manual Chapter NRC-0517-04.043 is the only section which contains any reference to



allegations of wrongdoing which arise during formal agency processes, such as hearings. These allegations, if not resolved within the hearing process, "shall be subject to treatment under this chapter [Manual Chapter NRC-0517]." Therefore, any information regarding wrongdoing discovered by the Staff during review of discovery documents, unless resolved by the hearing itself, would be subject to the requirements of Manual Chapter NRC-0517, and the Staff would be required to report them. It is, in fact, more likely that in the event that OI or OIG substantiated wrongdoing based on information referred to it, any enforcement action would be independent of the instant proceeding and, therefore, the wrongdoing is not likely to be resolved in this proceeding.<sup>10</sup> In *Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3)*, CLI-86-1, 23 NRC 1 (1986), in ruling on a motion to reopen the record, the Commission addressed the authority of the Appeal Board to seek, on its own initiative, information developed by OI regarding a matter not then in controversy among the parties. The Commission, citing to its Policy Statement on Investigations, Inspections, and Adjudicatory Proceedings, 49 Fed. Reg. 36,032 (1984), held that the Staff's duty to provide investigatory information to an adjudicatory board "come[s] into play only when the Staff or OI have information 'which is considered material and relevant to any *issue in*

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<sup>10</sup> The Board finds debatable the Staff's conclusion that the excluding from the definition of allegation "matters being handled by more formal processes such as . . . hearing boards" concerns matters only related to the proceeding. Order at 15. According to the Board, the Commission could have stated in more specific terms that the definition of allegations "covers information received from whatever source, including protective orders, had it intended to do so." *Id.* Although the Commission did not so state, neither did the Commission conversely provide that the obligation to refer matters did not apply with respect to any matter uncovered in discovery.

*controversy in the proceeding.*” *Id.* at 7. Here, the process envisioned by the language proposed by the Staff comports fully with *Waterford*. The Staff expects that if it obtains information warranting referral to OI or OIG, it will promptly do so. At the same time, the Staff will keep the Board (or Commission) informed of such matters, even matters not in controversy.

IV. Protective Devices Other Than the One Imposed by the Licensing Board, Including 10 C.F.R. § 2.790, That Would be Workable and Effective

The Commission’s regulations at 10 C.F.R. § 2.790 pertain to public disclosure and do not appear to relate to the concern at issue -- the referral of protected material to the internal agency offices of OI and OIG. To the extent that information of the type that would be protected under section 2.790 also includes information the Staff determines should be sent to OI or OIG, then it will be protected in accordance with section 2.790. With respect to other protective devices, the Staff has indicated a willingness to notify the Board in an *ex parte, in camera* manner (or the Commission, as suggested by Judge Bollwerk, *see* Order at 48-49) that the referral has been made. *See* Order at n.9; NRC Staff’s Supplement to Oral Argument Regarding Motion For Protective Order (Feb. 3, 1995) at n.6. Although such a notice would take place after the fact of a referral, it does serve to keep the Board apprised of those matters referred and would not interpose the Board between the Staff and OI and OIG.

V. Whether SFC and GA have a Legal Entitlement to Protection of Their Confidential Information From Disclosure to NRC Investigatory and Enforcement Staff not Involved in the Litigation

The Staff is unaware of any legal entitlement SFC and GA have to protection of their confidential information from disclosure to NRC investigatory and enforcement staff once that material has been provided the Staff. Provisions contained in 10 C.F.R. § 2.790 and other forms of privilege do not apply to the flow of material within the agency. Further, as discussed above, the Management Directives, which govern the agency's internal use of information, require the referral of certain types of material, rather than prohibit it. As set forth above, circumstances have been recognized in which information derived from civil discovery may be referred to criminal authorities. *See supra* p.9, n.8.

CONCLUSION

In view of the foregoing, the Staff submits that paragraph 7 of the protective order exceeds the scope of the Board's authority, is inconsistent with the Commission's policies on the referral of matters internally, and, thus, is in error. Therefore, the Staff respectfully requests that the Commission reverse, in part, the Board's Order and direct that the Staff's proposed language for paragraph 7 of the protective order be substituted for the language approved by the Board.

Respectfully submitted,

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Steven R. Hom  
Counsel for NRC Staff

Dated at Rockville, Maryland  
this 14th day of July 1995

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN SUPPORT OF PARTIAL REVERSAL OF LBP-95-05" 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 on this 14th day of July 1995.

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