



October 31, 2014

Mark Satorius, Executive Director for Operations  
U.S. Nuclear Regulatory Commission  
Washington, D.C. 20555  
By e-mail to: [Mark.Satorius@nrc.gov](mailto:Mark.Satorius@nrc.gov)

**FOIA/PA REQUEST**  
Case No.: 2015-0001A  
Date Rec'd: 11/3/14  
Specialist: Burkhalter  
Related Case: 2014-0372

SUBJECT: *Appeal of FOIA/PA 2014-0372*

Dear Mr. Satorius:

On behalf of San Luis Obispo Mothers for Peace (“SLOMFP”), and pursuant to the Freedom of Information Act (“FOIA”) (5 U.S.C. § 552) and applicable Nuclear Regulatory Commission (“NRC”) regulations 10 C.F.R. §§ 9.29 and 9.6, I hereby appeal NRC’s failure to make a complete or meaningful response to SLOMFP’s August 5, 2014, FOIA Request No. FOIA/PA 2014-0372. In FOIA/PA 2014-0372, SLOMFP requested ten sets of documents related to a 2010 report by Dr. Robert Sewell regarding the risk of a tsunami at the Diablo Canyon nuclear power plant site.<sup>1</sup> SLOMFP appeals the NRC’s failure to provide virtually any of the documents requested in paragraphs 2 through 6 and 8 through 10 of FOIA/PA 2014-0372. SLOMFP does not appeal the NRC’s response to the first and seventh sets of requested documents, which are described in paragraphs 1 and 7, respectively.

### **Timeliness of Appeal**

This FOIA appeal is timely, because it is being filed within 30 days of the date on which the FOIA Office mailed its FOIA Response.

NRC regulations allow 30 days from the date of a FOIA response for administrative FOIA appeals. 10 C.F.R. § 9.29(a). In this case, the FOIA Response is dated September 26, 2014. Inexplicably, however, the FOIA Response was not mailed to SLOMFP until October 1, 2014, five days later. (A copy of the postmarked envelope is attached as Exhibit 1.) SLOMFP did not receive it until October 2.

SLOMFP respectfully submits that the timing requirements in the NRC’s FOIA regulations are based on a presumption of fairness and regularity. Thus, for example, NRC counts the time for its own response to a FOIA appeal to start on the date that the FOIA Officer actually receives the appeal. *See* 10 C.F.R. § 9.29(d). By the same token, it is fair and reasonable to expect that a FOIA requester will be given a full 30 days -- or at least most of that period -- to submit an administrative FOIA appeal. Where the agency delays sending its FOIA Response, it is only fair to measure the time period from the date the FOIA response was mailed. SLOMFP’s appeal is

<sup>1</sup> A copy of SLOMFP’s FOIA Request is attached as Exhibit 2.

timely because it is being filed within 30 days of October 1, when the FOIA Response was mailed.<sup>2</sup>

### Grounds for Appeal of FOIA Response

Despite SLOMFP's provision of a substantial amount of documentation of the existence and nature of the documents requested in paragraphs 2 through 6 and 8 through 10 (including ADAMS Accession Numbers for all documents cited), the Staff has disclosed virtually none of the requested documents. Instead, the Staff has simply sent SLOMFP the publicly available documents cited by SLOMFP in FOIA 2014-0372. It does not appear that the NRC made any effort to identify the requested documents, let alone make a determination of whether they were subject to disclosure under the FOIA. As a result, the FOIA Response amounts to a denial.

**Paragraph 2.** In paragraph 2 of FOIA/PA 2014-0376, SLOMFP requested “[c]orrespondence from management of the Center for Nuclear Waste Regulatory Analyses (“CNWRA”), written between March 17, 2004 and February 27, 2006, regarding a November 22, 2003, report by Dr. Robert L. Sewell entitled “A Preliminary Numerical Study of the Hazard from Local Landslide Tsunami Scenarios at the Diablo Canyon Site in Central California” (“Sewell Report”).” FOIA/PA 2014-0376 at 1. To assist in the identification of this correspondence, SLOMFP explained that the requested correspondence is described as follows in an internal NRC memorandum dated February 27, 2006:

*Subsequent correspondence from CNWRA management has confirmed that the draft report has not been accepted by CNWRA and has not gone through the CNWRA quality assurance process. Thus, the draft report's technical basis is not supported by CNWRA.*

FOIA/PA 2014-0376 at 1 (emphasis added) (quoting Memorandum from Michael E. Mayfield, NRR to E. William Brach, NMSS to re “Disposition of Draft Report Entitled, “A Preliminary Numerical Study of the Hazard from Local Landslide Tsunami Scenarios at the Diablo Canyon Site in Central California” (Feb. 27, 2006) (“2/27/06 Mayfield Memo”) (ML060460441)).

Instead of identifying and disclosing the requested correspondence, the NRC sent SLOMFP a copy of the publicly available 2/27/06 Mayfield Memo quoted in SLOMFP's FOIA request. The FOIA Response gives no indication that any attempt was made to identify or locate the “[s]ubsequent correspondence” identified in the 2/27/06 Mayfield Memo, let alone make a determination of whether such documents were subject to disclosure under the FOIA. Thus, the Response amounts to a denial.

**Paragraph 3.** In paragraph 3 of FOIA/PA 2014-0376, SLOMFP requested the following document: Memorandum from John Moninger, NMSS to NRR (with copy to RES) transmitting draft report entitled “A Preliminary Numerical Study of the Hazard from Local Landslide

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<sup>2</sup> In the alternative, should you determine this appeal is not timely, for the reasons discussed above we request that you grant a five-day extension of the time period to correspond with the five-day delay in the mailing of the agency's FOIA Response.

Tsunami Scenarios at the Diablo Canyon Site in Central California” (Feb. 3, 2005). FOIA/PA 2014-0376 at 2. In order to assist the FOIA Office in locating this document, SLOMFP pointed out that the requested document is referred to in several publicly available documents: the 2/27/06 Mayfield Memo; a Memorandum from James R. Hall, NMSS, to Brian E. Thomas, NMSS, re: Summary of Internal Meeting with NRR and RES to Discuss Contractor Report on Tsunami Hazards Analysis (May 5, 2005) (ML051290085) (“5/5/05 Hall Memo”); and an e-mail from Nilesh Chokshi to Patrick Hilland and Joseph Giitter re: Request to Re-open my Earlier Tsunami Assessment Recommendations (March 23, 2011) (ML1318A100) (“3/23/11 Chokshi E-mail”). FOIA/PA 2014-0376 at 2.

Instead of disclosing the requested document, the NRC sent SLOMFP two of the publicly available documents that SLOMFP had already described in its FOIA request: the 2/27/06 Mayfield Memo and the 5/5/05 Hall Memo. The FOIA Response gives no indication that any attempt was made to locate or release the specific document requested by SLOMFP; nor does the FOIA Response state that the document was intentionally withheld. Thus, effectively it is a non-response.

**Paragraph 4.** In paragraph 4 of FOIA/PA 2014-0376, SLOMFP requested the following document: Memorandum (or other correspondence) from the Seismic Issues Technical Advisory Group (SITAG) to Michele G. Evans (Nov. 17, 2005). In order to assist the FOIA Office in locating this document, SLOMFP pointed out that the requested document is referred to in a publicly available Memorandum from Andrew J. Murphy, SITAG, to Michele G. Evans, NRR (Jan. 17, 2006) (“1/17/06 Murphy Memo”) (ML060170114). SLOMFP also pointed out that the 1/17/06 Murphy Memo identifies the requested document and asserts that the requested document contains SITAG’s evaluation of the Sewell Report. Finally, SLOMFP noted that the requested November 17, 2005 SITAG memorandum is distinct from the “updated” version of that memorandum attached to the Murphy Memo.

Instead of disclosing the requested document, the NRC sent SLOMFP the publicly available 1/17/06 Murphy Memo. The FOIA Response gives no indication that any attempt was made to locate or release the specific document requested by SLOMFP; nor does the FOIA Response state that the document was intentionally withheld. Thus, effectively it constitutes a denial.

**Paragraph 5.** In paragraph 5 of FOIA/PA 2014-0376, SLOMFP requested: “[a]ll records of interactions between SITAG and NRC managers, including Michele G. Evans regarding the Nov. 17, 2005 evaluation described in par. 5 above.”<sup>3</sup> FOIA/PA 2014-0376 at 2. SLOMFP pointed out that these interactions are referred to in the 1/17/06 Murphy Memo, which states that “SITAG has interacted with you and other NRC managers and identified the need to update the [Nov. 17, 2005] evaluation.” *Id.* SLOMFP also pointed out that the interactions in question took place between Nov. 17, 2005 and Jan. 17, 2006. *Id.*

Instead of disclosing the requested documents, the NRC sent SLOMFP the publicly available 1/17/06 Murphy Memo. The FOIA Response gives no indication that any attempt was made to

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<sup>3</sup> The reference to “paragraph 5 above” was erroneous and should have been “paragraph 4.”

identify or locate the documents requested by SLOMFP, let alone determine whether they were subject to disclosure under the FOIA. Thus, effectively it is a non-response.

**Paragraph 6.** In paragraph 6 of FOIA/PA 2014-0376, SLOMFP requested:

All documents reflecting consideration by NRC of the Sewell Report in licensing proceedings or other safety determinations or assessments for the Diablo Nuclear Power Plant and/or ISFSI, as reflected in the following statements made in an e-mail message from Jessica Kratchman, Project Manager for the Japan Lessons-Learned Project Directorate, to David Weisman, re: REPLY: Tsunami threat and Diablo Canyon vs NRC report (June 12, 2014) (“Kratchman E-mail”)<sup>4</sup>:

Diablo Canyon has been deemed safe to operate based on our current understanding of potential external hazards for the site and the design and construction of the facility. This determination considered input from a large collection of research and licensing efforts in addition to the Sewell report.

\* \* \*

Please be assured that the current safety assessment has considered not only the Sewell report but research and input from numerous sources and experts.

\* \* \*

However, [the Sewell Report], even in its draft form, was appropriately considered during NRC licensing reviews for Diablo Canyon.

FOIA/PA 2014-0376 at 2. Despite SLOMFP’s documentation of NRC Staff assertions that the Sewell Report has been considered in certain specific NRC licensing proceedings, the FOIA Response does not identify or disclose a single document in response to this request. Nor does the FOIA Response state that no documents could be located. Thus, effectively it constitutes a denial.

**Paragraph 8.** In paragraph 8 of FOIA/PA 2014-0376, SLOMFP requested “[a]ll documents which have evaluated the usefulness of the Sewell Report for regulatory purposes since the NRR dropped it from further consideration in February 2006.” FOIA/PA 2014-0376 at 3. In order to assist the FOIA Office in locating these documents, SLOMFP cited the 2/27/06 Mayfield Memo. *Id.*

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<sup>4</sup> A copy of the Kratchman E-mail was included as an attachment to the FOIA Request.



The FOIA Response gives no indication that any attempt was made to locate documents responsive to this aspect of FOIA/PA 2014-0376, let alone determine whether such documents were subject to disclosure under the FOIA. Thus, effectively it constitutes a denial.

**Paragraph 9.** In paragraph 9 of FOIA/PA 2014-0376, SLOMFP requested “[a]ll correspondence between the NRC and any non-NRC party or parties (other than CNWRA) regarding the Sewell Report.” While some correspondence from the year 2014 is provided in the FOIA Response, the FOIA Response gives no indication as to whether the NRC Staff searched its files for all other years since the Sewell Report was prepared. Given the lack of evidence that the Staff has done any search at all for most of the documents requested in FOIA/PA 2014-0376, we request that you provide a representation as to whether the NRC has, in fact, attempted to locate documents responsive to paragraph 9 of the FOIA request.

**Paragraph 10.** In paragraph 10 of FOIA/PA 2014-0376, SLOMFP requested “[a]ll correspondence between CNWRA and any non-CNWRA party or parties (other than NRC) regarding the Sewell Report.” No documents at all are provided in response to this aspect of FOIA/PA 2014-0376, and the FOIA Response does not state whether any attempt was made to identify or locate the requested documents. Given the lack of evidence that the Staff has done any search at all for most of the documents requested in FOIA/PA 2014-0376, we request that you provide a representation as to whether the NRC has, in fact, attempted to locate documents responsive to this part of the FOIA request.

Thank you for your consideration. I look forward to your response within 20 working days, as required by NRC regulations.

Sincerely,

/s/

Diane Curran

[dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

Counsel to SLOMFP

Cc: Nina Argent, FOIA Officer, [foia@nrc.gov](mailto:foia@nrc.gov)