



Friends of the Earth

FOI/PA REQUEST

Case No.: 2015-0070
Date Rec'd: 12/1/14
Specialist: So
Related Case: _____

November 28, 2014

FOIA/Privacy Officer
U.S. Nuclear Regulatory Commission
Mailstop: T-5 F09
Washington, DC 20555-0001
FOIA.resource@nrc.gov

Re: FOIA request for PG&E Supplemental Analyses reviewed by Differing Professional Opinion (DPO) Ad Hoc Review Panel (DPO Panel) on March 5, 2014

Dear NRC FOIA/Privacy Officer:

On behalf of Friends of the Earth (FoE), I write to request the release of records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and applicable Nuclear Regulatory Commission ("NRC") regulations at 10 C.F.R. §9.11 et seq.

Friends of the Earth (FoE) is a nonprofit organization founded in 1969, with more than 316,600 members and activists in every state in the country. FoE uses policy analysis and advocacy to work for a healthier and just world. For forty years FoE has campaigned to reduce the health and environmental risks of nuclear power. FoE is engaged in information dissemination, public education, and advocacy on the health and environmental risks of electricity generation from nuclear power. We have a website, email lists, blogs, and other forms of mass communication with our members and the general public for the express purpose of disseminating information about important environmental issues.

I. Description of Records Sought

We ask that the NRC provide the "supplemental analysis"¹ submitted by

¹ The term "supplemental analysis" is used herein to mean any records submitted by PG&E to the NRC in March 2014 containing seismic information about Diablo Canyon Nuclear Power Plant. This information includes, but is not limited to:

- Reanalyzed ground motions for the Los Osos, San Luis Bay, and Shoreline faults
- Additional calculations that were developed by PG&E to allow for direct comparison of potential ground-motions in the 2011 Shoreline report to the ground motions used in the FSARU analysis.
- Calculations of in-structure acceleration response spectra

PG&E to the NRC Differing Professional Opinion (DPO) Ad Hoc Review Panel (DPO Panel) in March 2014, and all documents related thereto. According to the "DPO Case File for DPO-2013-002" made publicly available by the NRC on September 10, 2014, the NRC DPO panel reviewed this "supplemental analysis"² on March 5, 2014. We ask for all of the information reviewed by the panel on March 5, 2014 in addition to any other information that was submitted by PG&E that was part of or related to this "supplemental analysis." We also request any communications between NRC and PG&E, and any internal communications within NRC, related to this supplemental analysis, including any request for it and any discussion of it, between July 18, 2013 and November 28, 2014.

II. Request for Justification of Any Denials and Segregation of Non-Exempt Portions

In an executive order titled "Memorandum for the heads of executive departments and agencies" published in the Federal Register on May 21, 2012 Barack Obama stated that:

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

our democracy, the

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed

to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

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- Information about the scaling relationship developed for this analysis

² The "supplemental analysis" requested herein includes the "additional information" or "additional calculations" referred to in the following excerpts from section 4.2 and 4.21 of the Dissenting Professional Opinion in the "DPO Case File for DPO-2013-002" made publicly available by the NRC on September 10, 2014:

As discussed in section 4.2.1, in March 2014, PG&E developed additional information to allow direct comparison of the ground motions in the 2011 Shoreline report to those used in the FSARU to design and license the plant (section 4.2)

and:

On 5 March 2014, Panel members reviewed additional calculations that were developed by PG&E to allow for direct comparison of potential ground-motions in the 2011 Shoreline report to the ground motions used in the FSARU analyses. PG&E calculated in-structure acceleration response spectra as the basis for comparison, as these spectra already were available for the ODE and HE from FSARU section 3.7 analyses (section 4.21)

All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

Given the above Presidential order, the NRC should release all documents relevant to this request, irrespective of whether any exemption could be claimed. If, however, any part of this request is denied, please cite the specific exemptions upon which the NRC relies in refusing to release the documents and identify which specific records are being withheld and which exemption is claimed for each (i.e., provide a detailed Vaughn index). Further, since the Freedom of Information Act provides that the remainder of a file must be released if only portions are exempt from disclosure, we request that we be provided with all non-exempt portions.

III. Request for a Fee Waiver

We ask that NRC waive all fees for search and production of the records described above. FOIA dictates that requested records be provided without charge "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 10 C.F.R. § 9.39(a) and 10 C.F.R. § 9.41(c). The requested disclosure meets these requirements. The request also meets the criteria of 10 C.F.R. § 9.41(d) and demonstrates the required factors listed in 10 C.F.R. § 9.41 (b).

A. Subject of the request relates directly to the operations or activities of the government

The records requested herein pertain to the activities of the NRC in regulating critical seismic safety issues at the Diablo Canyon Nuclear Power Plant. The NRC Ad Hoc Review Panel (DPO Panel) heavily relied upon this supplemental analysis in its recently publicized decision to reject the allegations made in the DPO by NRC Senior Resident Inspector Dr. Michael Peck regarding seismic safety and operability issues at Diablo Canyon Nuclear Power Plant. The March 2014 analysis was conducted by the NRC's licensee PG&E and submitted to the NRC for review pursuant to its regulatory function. NRC is a government agency. The requested records thus directly concern "the operations or activities of the government." *See* 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 9.41(d)(1).

B. Contribution to an understanding of the subject by the public is likely to result from disclosure.

The requested records are "likely to contribute" to the public's understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. § 9.41(d)(2). There is intense public concern about the NRC regulation of the Diablo

Canyon Nuclear Plant.

The allegations raised by NRC Expert Michael Peck are very serious and have already produced significant news coverage because of the issues raised. The NRC DPO Final Decision relies heavily on information that is currently inaccessible to the public, so in order to understand this decision, the public needs access to the information on which it is based. Therefore, transparency is essential in this case.

The records requested shed light on a matter of considerable public interest and concern: NRC's actions, contacts and assessments have received worldwide attention. This is demonstrated by the following examples of media coverage:

- <http://www.latimes.com/local/lanow/la-me-ln-diablo-canyon-earthquake-20140825-story.html>
- <http://www.sfgate.com/business/article/Petition-seeks-closure-of-Diablo-Canyon-nuclear-5714455.php>
- <http://www.cbsnews.com/news/california-earthquake-expert-urges-nuclear-plant-closure-over-threat/>
- <http://www.sacbee.com/2014/09/06/6683447/other-view-is-diablo-canyon-nuclear.html>
- <http://www.pacbiztimes.com/2014/08/29/editorial-earthquake-worries-rattle-future-of-diablo-canyon/>
- <http://www.reuters.com/article/2014/08/27/us-nuclear-earthquake-diablocanyon-idUSKBN0GR1XL20140827>

Public understanding of NRC's actions regarding Diablo would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate NRC's recent and future decision-making procedures around ensuring maximum public safety. Disclosure would also help the public to better understand and evaluate NRC's actions regarding the legally binding safety regulations established for the operability of Diablo Canyon.

C. Extent to which the requester has a commercial interest that would be furthered by disclosure of the requested agency records; and whether that commercial interest exceed the public interest in disclosure

Friends of the Earth is a nonprofit environmental organization with no commercial interest in obtaining the requested information. Rather, we intend to use the requested information to inform the public, so the public can meaningfully participate in reducing the public health, environmental, and safety risks posed by the Diablo Canyon Nuclear Power Plant. We believe that transparency about the information relied upon in the NRC's response to serious allegations about Diablo's safety and operability is essential to its obligation "to protect public health and safety, the environment, and the common defense and security."

"Congress amended FOIA to ensure that it be 'liberally construed in favor of waivers for noncommercial requesters,'" *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003); We wish to serve the public by reviewing, analyzing and disclosing newsworthy and presently non-public information about NRC and PG&E relations regarding Diablo Canyon's seismic safety. Any communication by NRC with PG&E regarding seismic safety relates to a matter of considerable public interest and concern because the public is possibly at risk of a nuclear disaster if an earthquake were to happen today. Disclosure of the requested records will contribute significantly to public understanding of the true operability of Diablo Canyon, associated threats to human health and the environment, and the NRC's regulatory options.

Friends of the Earth thus satisfies the criteria of 10 C.F.R. § 9.41(d). We further demonstrate below each of the eight factors required by NRC under 10 C.F.R. § 9.41(b) to evaluate whether a fee waiver is appropriate for this request.

D. Describe the purpose for which the requester intends to use the requested information.

We intend to use the requested information to understand and analyze how the NRC DPO Panel came to its recent DPO Decision in order to evaluate its validity and the degree to which it prioritizes public safety and the law. We intend to make such understanding and analysis available to our members and the general public.

E. Explain the extent to which the requester will extract and analyze the substantive content of the agency records.

Our members and attorneys will carefully analyze the requested information to ensure that the March 2014 analysis done by PG&E and accepted and relied upon by the NRC is in compliance with existing regulations and legally binding safety measures, namely Diablo Canyon's Current Licensing Basis (CLB). Without these records, the public is unable to evaluate for itself whether or not NRC's DPO Decision is in compliance with the CLB.

F. Describe the nature of the specific activity or research in which the agency records will be used and the specific qualifications the requester possesses to utilize information for the intended use in such a way that it will contribute to the public understanding.

We intend to use the requested information to educate our members about the validity of the information relied upon in NRC's decision in response to the allegations raised by Dr. Peck in the DPO. The validity of that information and resulting decision is central to the ongoing licensing reviews for Diablo Canyon (both the license renewal proceeding and the *de facto* license amendment proceeding). Dissemination of this information will occur to our members through news releases, blog posts, emails, or other electronic media or legal filings on behalf of the organizations in the licensing proceedings.

FoE is qualified to analyze and disseminate the requested information, as demonstrated by FoE's multi-decade campaigning on nuclear energy issues, particularly with respect to Diablo Canyon. Most recently, FoE successfully petitioned the Commission to establish a license amendment proceeding for the San Onofre Nuclear Generating Station. FoE's advocacy in that case increased awareness and engagement by the public on a critical issue of safety that ultimately resulted in the licensee's decision to permanently close the plant.

G. Describe the likely impact on the public's understanding of the subject as compared to the level of public understanding of the subject before disclosure

It is presently unclear whether PG&E and the NRC are being transparent about the safety risks presented by the Shoreline and other newly discovered faults or new evidence about previously known faults. The requested information will aid Friends of the Earth staff and members in determining whether the regulator has adequately and independently examined the risks without undue influence from the licensee.

H. Describe the size and nature of the public audience to whose understanding a contribution will be made.

FoE has over 300,000 members across the country. Many of its members are engaged in the safety issues presented by Diablo Canyon. FoE keeps an up-to-date website and often releases press statements on important developments in the safety of Diablo Canyon, such as the issues raised in this request. National newspapers such as the LA Times often pick up the releases. FoE's analysis of the requested information could therefore reach anyone with a computer and an internet connection.

I. Describe the intended means of dissemination to the general public

The means by which we intend to disseminate the information yielded by this FOIA request are described above in *F*. In addition, if the requested documents reveal that the NRC has not attended adequately to the risk of a seismic activity on the Shoreline and other newly discovered faults near Diablo Canyon, we will evaluate whether to raise the issue in the licensing proceedings.

J. Indicate if public access to information will be provided free of charge or provided for an access fee or public education.

Public access to the requested information will be provided completely free of charge.

K. Describe any commercial or private interest the requester or any other party has in the agency records sought

Friends of the Earth is a non-profit organization whose sole purpose in requesting the documents is to educate ourselves, our members, and the general public regarding the seismic risks at Diablo Canyon. We plan to publish the requested information in correspondence with our members and supporters and to post the information on our website. The requested materials will not be used for our commercial use or gain.

IV. Willingness to Pay Fees Under Protest

Please provide the records requested above irrespective of the status and outcome of your evaluation of our fee category assertion and fee waiver request. In order to prevent delay in NRC's provision of the requested records, we state that we will, if necessary and under protest, pay fees in accordance with NRC's FOIA regulations at 10 C.F.R. § 9.33 for all or a portion of the requested records. Please consult with us, however, before undertaking any action that would cause the fee to exceed **\$100.00**. Such payment will not constitute any waiver of our right to seek administrative or judicial review of any denial of its fee waiver request and/or rejection of its fee category assertion.

V. Conclusion

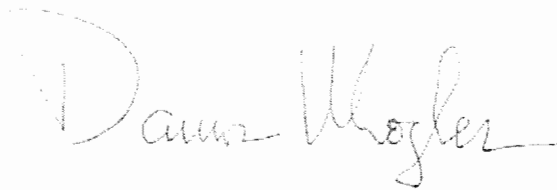
We trust that, in responding to this request, NRC will comply with all relevant deadlines and other obligations set forth in FOIA and NRC's FOIA regulations. *See, e.g.,* 5 U.S.C. § 552(a)(6); 10 C.F.R. § 9.25.

Please produce the records above by emailing or mailing them to me at the FoE office address listed below. Please produce them on a rolling basis; at no point should NRC's search for--or deliberations concerning--certain records delay the production of others that NRC has already retrieved and elected to produce. In the event that NRC concludes that some of the records requested above may already be publicly available, we will be happy to discuss those conclusions.

Please respond within 20 business days, as provided by 5 U.S.C. § 552(a)(6)(A)(i). If you have any questions regarding this request, please contact me at (202) 587-5242.

Thank you for your prompt attention to this request.

Sincerely,

A handwritten signature in cursive script that reads "Damon Moglen". The signature is written in dark ink and is positioned above the typed name and contact information.

Damon Moglen
Senior Strategic Advisor, Climate and Energy Program
Friends of the Earth
1100 15th St NW
Washington, DC 20005
(202) 222-0708
dmoglen@foe.org

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