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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Ivan Selin, Chairman
Kenneth C. Rogers
Forrest J. Remick
E. Gail de Planque

In the Matter of:	
HENRY ALLEN, DIANE MARRONE, and SUSAN SETTINO.	OI Docket No. 1-92-037R

MEMORANDUM AND ORDER

CLI-94-08

I. Introduction.

This matter is before the Commission on a joint motion filed by three individuals ("petitioners") who are employees of either Five Star Products, Inc. ("FSP"), or Construction Products Research, Inc. ("CPR"). Each petitioner seeks to quash an NRC subpoena issued by the NRC's Office of Investigations ("NRC-OI"). The subpoenas require each respective individual to appear at a specified time and place to testify in an NRC investigation. In addition, FSP and CPR ("the employers") have also submitted a joint motion to quash the three subpoenas. While we are not convinced that the employers have standing to participate in this subpoena proceeding, we have exercised our discretion and docketed the employers' motion. After reviewing the parties' arguments, we deny the motions to quash and enforce the subpoenas for the reasons stated below.

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II. Factual Background.

A. Introduction.

The factual background underlying this matter is set forth at some length in an earlier decision involving a related but separate NRC-OI investigation. See Five Star Products, Inc. and Construction Products Research, Inc., CLI-93-23, 38 NRC 169, 174-76 (1993) ("CLI-93-23"). Accordingly, we will repeat only the basic essentials here.

Briefly, FSP and CPR are two closely related companies located in Fairfield, Connecticut. Both companies are owned by Babcock & King, Inc., and the two companies share a common office building and have several officers in common. For example, Mr. H. Nash Babcock is the President of CPR and the Vice President of FSP. His son, Mr. William N. Babcock, is the President of Babcock & King, Inc., the President of FSP, and the Vice President of CPR. For approximately twenty years, FSP has sold grout and structural concrete products to the nuclear industry while CPR performed testing services for FSP.

Prior to August 25, 1992, FSP had advertised that its products had been produced consistent with the NRC's requirements in 10 C.F.R. Part 50, Appendix B ("Appendix B") and 10 C.F.R. Part 21 ("Part 21"). Because an understanding of those regulations is essential to understanding this case, we will present a brief overview of them at this point.

B. Appendix B.

Under Appendix B, Criterion II, NRC nuclear power plant and fuel reprocessing plant licensees must establish a Quality Assurance ("QA") program to ensure that equipment and materials that are purchased for use in the "safety-related" systems of a nuclear power plant are suitable for their intended use.[1] Vendors -- or "suppliers" -- of products that are to be used in the construction of nuclear power plants may also establish QA programs which meet the guidelines of Appendix B. The certification by a supplier that its products have been produced in accordance with a licensee approved Appendix B QA program is significant because an NRC licensee may then purchase those products and install them in safety-related plant systems without being required to perform additional testing on them.

However, if an NRC licensee purchases products while relying on vendor/supplier certification, the purchaser must audit (or inspect) the supplier's "QA" program, which supports that certification, to ensure that the program complies with Appendix B. See Appendix B, Criterion VII. However, if an NRC licensee purchases products for installation in a safety-related

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[1]The term "safety-related" is generally used to describe systems, structures, or components that are designed to remain functional or to assure required safety functions in the event of an emergency. Those required safety functions include assuring (1) the integrity of the reactor coolant pressure boundary; (2) the capability to shutdown the reactor and maintain it in safe shutdown; and (3) the capability to prevent or mitigate the consequences of accidents that could result in potential offsite exposures comparable to those set forth in 10 C.F.R. §100.11. See 10 C.F.R. Part 100, Appendix A, Criterion III(c).

system from a supplier who does not have an approved Appendix B QA program, the licensee must then qualify those products itself under its own QA program, which generally means testing the products to demonstrate that they are suitable for their intended use.

In this case, FSP had established a QA program which had been audited and "approved" by several NRC licensees (while being rejected by others) and the NRC Staff has obtained copies of some of those audits. CPR had also established a QA program, although it is not clear to the NRC Staff (1) whether that program had been audited by anyone other than FSP and (2) whether FSP had indeed actually audited the CPR QA program.

C. Part 21.

The NRC has established the regulations in Part 21 to implement section 206 of the Energy Reorganization Act ("ERA"). Part 21 requires that suppliers of "basic components" must have in place a system for reporting to the NRC any defects discovered in those components and a system for maintaining records of such defects. A "basic component" is defined as

> a plant structure, system, component or part thereof necessary to assure (i) the integrity of the reactor coolant pressure boundary; (ii) the capability to shut down the reactor and maintain it in a safe shutdown condition, or (iii) the capability to mitigate the consequences of accidents which could result in potential offsite exposures comparable to those referred to in [10 C.F.R.] §100.11[.]"

10 C.F.R. §21.3(a)(1). The NRC considers the grout and structural cement supplied by FSP to be "basic components" to the extent they are tested by CPR and certified by FSP as fit to be

installed by NRC licensees in safety-related systems without further examination. In addition, the definition of a "basic component" includes

> safety related design, analysis, inspection, testing, fabrication, replacement parts, or consulting services that are associated with the component hardware whether these services are performed by the component supplier or others.

10 C.F.R. §21.3(a)(3) (emphasis added). Thus, the testing services supplied by CPR also constitute a "basic component" of a plant in which FSP's products have been installed in a safety-related system.

In addition, Part 21 also requires a supplier of "basic components" to (1) post appropriate notices, 10 C.F.R. §21.6; (2) allow NRC inspections, 10 C.F.R. §21.41; and (3) maintain specified records. 10 C.F.R. §21.51. Furthermore, those entities who are subject to Part 21 must ensure that all procurement documents, such as purchase orders, specify that the provisions of Part 21 apply. 10 C.F.R. §21.31.

D. FSP's Commercial Practices.

As indicated by documents obtained by the NRC Staff, FSP generally transacted business by responding to purchase orders submitted to it by NRC licensees. A purchase order contains a complete description of the product desired by the purchaser. The purchase orders submitted to FSP usually specified that the materials to be supplied were to comply with the NRC regulations in both Part 50, Appendix B, and Part 21.

Generally, FSP would first obtain the products that it planned to sell in response to the purchase order from its own suppliers and then submit them to CPR for testing. CPR would test these materials in accordance with CPR's QA program, which was allegedly audited by FSP to determine if CPR's program met the requirements of Appendix B. Following this testing, and the reporting of the test results to FSP, FSP would supply the materials to the NRC licensee along with documentation (a "Certificate of Compliance") stating that the materials conformed to the purchase order requirements which, as we noted above, generally included compliance with both (1) the licensee's approved Appendix B QA program and (2) Part 21. Thus, as we also noted above, the certification signified to NRC licensees that they could install these products without further testing, assuming that the licensees had adequately audited the implementation of FSP's QA program. Presumably, FSP relied upon CPR's test results in issuing its Certificate of Compliance.

E. The August 1992 Inspection.

During the summer of 1992, the NRC's technical staff ("NRC Staff") received a confidential allegation from Mr. Edward Holub, a CPR employee, that CPR had failed to test safety-related materials in accordance with FSP's QA program and applicable industry standards. Based upon this allegation, the NRC Staff became concerned that FSP was perhaps selling substandard materials to NRC licensees for use in safety-related systems.

Accordingly, the NRC Staff conducted an inspection at the FSP/CPR facility on August 18 and 19, 1992.

The NRC Staff has alleged that during this inspection, FSP and CPR officials refused to allow the NRC inspectors to have unfettered access to company records or to visit the CPR laboratory. On August 25, 1992, FSP advised its customers who were NRC licensees that it would no longer supply safety-grade materials and that it was discontinuing its Appendix B QA Program. On September 1, 1992, the NRC Staff and United States Marshals seized numerous documents relating to FSP's and CPR's QA Programs. This seizure was conducted under the authority of a criminal search warrant issued by the United States District Court for the District of Connecticut on August 28, 1992. The NRC Staff requested and received the assistance of the Office of the United States Attorney for the District of Connecticut in obtaining the search warrant.

F. Current NRC Activities.

The NRC Technical Staff is currently reviewing FSP's and CPR's QA programs and FSP's sale of safety-related materials to the nuclear industry to determine if either FSP, CPR, or any NRC licensees violated NRC regulations during the period FSP was selling products certified as complying with Appendix B and Part 21. In addition, the NRC's Office of Investigations ("NRC-OI") is conducting two separate investigations which are related to these events. First, NRC-OI has initiated Investigation No. 1-92-037R, which has two main functions. The

first function of this investigation is to support the Staff's review of the sale of products by FSP to NRC licensees and to determine (1) whether NRC licensees adequately audited FSP's and CPR's QA programs; (2) whether NRC licensees provided the NRC with correct information concerning the materials installed in safety-related plant systems and whether those materials should be removed from NRC-licensed plants; and (3) whether FSP and/or CPR maintained adequate Appendix B QA programs. The second function of the investigation is to determine if there was a violation of NRC regulations by either FSP or CPR during the NRC Staff inspection in August of 1992.

Second, NRC-OI initiated Investigation No.-1-93-027R after the U.S. Department of Labor made an initial finding that CPR terminated Mr. Holub in retaliation for his raising safety concerns to the NRC. This second NRC-OI investigation seeks to determine if CPR deliberately violated the NRC's whistleblower protection provision by firing Mr. Holub when it discovered that he had informed the NRC of his safety concerns.

We have already enforced a subpoena that was issued in this second NRC-OI investigation and sought records related to Mr. Holub's termination. See Five Star Products, CLI-93-23, 38 NRC 169 (1993). However, CPR has refused to comply with the subpoena and the NRC has sought enforcement of that subpoena in the U.S. District Court for the District of Connecticut. The dispute now before us centers on three subpoenas issued in the first NRC-OI investigation, No. 1-92-037R.

III. Analysis.[2]

A. Applicable Statutes and Regulations.

In section 161c of the Atomic Energy Act ("AEA") of 1954, as amended, Congress explicitly provided that the NRC

> is authorized ... to make such studies and investigations, obtain such information ... as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act, or in the administration and enforcement of this Act, or any regulations or orders issued thereunder. For such purposes, the Commission is authorized ... by subpoena to require any person to appear and testify or appear and produce documents, or both at any designated place.

42 U.S.C. §2201(c) (emphasis added). Section 11s of the AEA, in turn, defines "person" as "(1) any individual ...." 42 U.S.C. §2014(s).[3]

In section 206 of the Energy Reorganization Act ("ERA"), as amended, Congress provided that

> Any individual director, or responsible officer of a firm ... supplying the components of any facility or activity which is licensed or otherwise regulated pursuant to the [AEA], or pursuant to the [ERA], who obtains information reasonably indicating that such facility or activity or basic components supplied to such facility or activity (1) fails to comply with the [AEA], or any applicable rule, regulation, order, or license of the Commission relating to substantial safety hazards, or (2) contains a defect which could create a substantial safety hazard, as defined by regulations ... shall immediately notify the Commission of such failure to comply, or of such defect ...."

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[2]We have consistently treated a motion to quash or modify an NRC Staff or NRC-OI subpoena using procedures analogous to those used in resolving a motion under 10 C.F.R. §2.720(f). Joseph J. Macktal, CLI-89-12, 30 NRC 19, 20 (1989).

[3]Petitioners are clearly "persons" within the meaning of section 161c of the AEA and as defined in section 11s of the AEA and we do not read petitioners to argue to the contrary.

42 U.S.C. §5846(a). In addition, Congress authorized the Commission "to conduct such reasonable inspections and other enforcement activities as needed to ensure compliance with the provisions of this section." 42 U.S.C. §5846(d). The Commission has adopted regulations implementing section 206 of the ERA. These regulations can be found in 10 C.F.R. Part 21 and have been described above.

In general, an agency subpoena is enforceable if (1) the subpoena is for a proper purpose authorized by Congress; (2) the information sought is clearly relevant to that purpose and adequately described; (3) the information is not yet in the possession of the agency; and (4) statutory procedures have been followed in the subpoena's issuance. United States v. Powell, 379 U.S. 48, 57-58 (1964); United States v. Comley, 890 F.2d 539, 541 (1st Cir. 1989) (enforcing an NRC subpoena). Neither the petitioners' motion nor the employers' motion (1) alleges that the information sought is inadequately described; (2) challenges the service of the subpoena; or (3) alleges that the information sought is in the possession of the agency. Accordingly, we will limit our discussion to whether the subpoenas are issued for a proper purpose authorized by Congress. We will review the issues raised in the petitioners' motion and in the employers' motion seriatim.

B. Petitioners' Motion To Quash.

1. The NRC Has Authority To Conduct This Investigation.

As we have noted in other subpoena cases, the NRC Staff has the responsibility to review and resolve questions regarding public health and safety. Richard E. Dow, CLI-91-09, 33 NRC 473, 478 (1991). Cf. Joseph J. Macktal, CLI-89-12, 30 NRC 19, 24-25 (1989). Based upon the allegations of Mr. Holub and a preliminary analysis of documents recovered during the search on September 1, 1992, the NRC Staff has reason to believe that NRC licensees may have installed non-conforming material in safety-related systems in their nuclear power plants and may have failed to provide true and correct information to the NRC, the agency charged by Congress to protect the public health and safety. In addition, the NRC Staff has reasonable grounds to believe that violations of NRC regulations may have occurred during the Staff's inspection of August, 1992. As we noted in the Dow case, "[T]o deny [the Staff] the opportunity to gather relevant information for these undeniably proper purposes would be to thwart its effort to better execute its responsibilities." Dow, CLI-91-09, 33 NRC at 478, quoting United States v. McGovern, 87 F.R.D. 590, 593 (M.D. Pa. 1980).

The petitioners allege that the NRC does not have statutory authority to conduct the investigation in which the NRC-OI subpoenas are issued because the NRC does not have jurisdiction over either FSP or CPR, the petitioners' employers. Motion to Quash at 2. In support of this argument, petitioners rely upon

the brief filed by FSP and CPR in their motion to quash the subpoenas in the second NRC-OI investigation. Motion to Quash at 1-2. Briefly, petitioners argue that the NRC regulations cited in the subpoena cannot apply to their employers. Accordingly, they seem to infer, the NRC is barred from compelling them to answer questions in any investigation. We find petitioners' arguments both irrelevant and unconvincing.

a. This Investigation Has Safety Implications That Are Clearly Within The NRC's Jurisdiction.

Quite simply, the validity of these subpoenas do not depend on our having "licensing" jurisdiction over FSP or CPR. It is clear that the NRC licensees who installed FSP's products in reliance upon FSP's certification were -- and still are -- subject to NRC's jurisdiction. Moreover, the quality of the products -- or "components" -- installed in a nuclear power plant, especially those products or components installed in "safety-related" systems, is a subject well within the jurisdiction of the NRC. Thus, the NRC has the authority to investigate whether NRC licensees correctly audited FSP's QA program (and by extension, CPR's QA program), whether those licensees correctly informed the NRC about the quality of the materials installed in their nuclear power plants under their Appendix B QA program, and whether those materials were in fact produced in accordance with appropriate safety standards.

The NRC may subpoena any person who it reasonably believes has information relating to those issues, regardless of where or for whom that person works. Here, the NRC Staff has reason to

question the quality of the products sold by FSP to NRC licensees and NRC-OI has reason to believe that these three individuals may have some knowledge about the sale of these materials to NRC licensees, the type of materials sold to those licensees, and the nature of FSP's QA program and whether NRC licensees audited it correctly. That is all the justification that NRC-OI needs to issue these subpoenas.

b. The NRC Has Jurisdiction Over FSP and CPR To The Extent They Were Suppliers of "Basic Components."

We also find that FSP and CPR are subject to the NRC's jurisdiction to the extent that FSP sold products to NRC licensees under a certification that those products were produced in accordance with an approved Appendix B QA program based upon CPR's testing under its own QA program.[4] As we noted above, FSP certified to its customers that its products were prepared in accordance with both an approved Appendix B QA program and with Part 21. In addition, FSP's advertising literature informed potential customers since approximately 1981 that its products were prepared in compliance with an approved Appendix B QA program.

Moreover, FSP's act of discontinuing its Appendix B QA program cannot remove it or CPR from NRC jurisdiction regarding

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[4]We have already held that we have jurisdiction over FSP and CPR under Section 211 of the ERA at least to extent that FSP and CPR supplied products and services (either directly or indirectly) to NRC licensees that allegedly meet the requirements of Appendix B and Part 21. See Five Star Products, CLI-93-23, supra.

any acts committed before August 25, 1992, during which time it was a "supplier" of safety-related products to NRC licensees and CPR was engaged in testing those products. Otherwise, a supplier of safety-related materials could simply discontinue its Appendix B program in response to a pending investigation, insulating itself from liability and preventing the NRC from obtaining information related to the installation of material in safety-related systems at nuclear power plants.[5] Accordingly, petitioners' argument that it is now a supplier of "commercial grade" materials and that Part 21 does not apply to suppliers of "commercial grade" materials is irrelevant. While FSP and CPR may not now supply "safety grade" materials to NRC licensees, they did supply that quality of materials at the time in question.[6]

c. The Investigation Focuses On Issues Within The NRC's Proper Jurisdiction.

As we noted above, the investigation in which these subpoenas are issued (1-92-037R) specifically targets these issues. First, this investigation supports the technical Staff's

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[5]And as we pointed out in CLI-93-23, the discontinuation of the Appendix B QA program does not remove either FSP or CPR from the NRC's jurisdiction over those activities that "relate back" to the employers' actions while they were supplying safety-related products to NRC licensees. See CLI-93-23, 38 NRC at 179-80.

[6]In our view, the Staff has the authority to review the installation of any product that is related to the safe operation of a nuclear power plant, even if that product is a "commercial grade" product that is "dedicated" and then installed by the licensee. However, in this case, FSP was clearly providing "safety grade" products to NRC licensees.

review of FSP's sale of safety-related products to the nuclear industry and any violations of either Appendix B or Part 21 that may have arisen from either the sale or the installation of non-conforming materials that were certified as meeting the requirements of Appendix B and Part 21. The investigation seeks to determine, inter alia, (1) if NRC licensees conducted appropriate audits of FSP's and CPR's QA programs; (2) if the NRC should require its licensees that have installed materials supplied by FSP to remove them from safety-related systems and (3) if FSP wrongly certified that its products were produced in accordance with Appendix B and Part 21.

Second, the NRC-OI investigation seeks to determine the facts surrounding the inspection conducted on August 18 and 19, 1992, and if any NRC regulations were violated by FSP, CPR, or their employees during that inspection. Under section 206(d) of the ERA and 10 C.F.R. §§21.41 and 21.51, the NRC had the authority to inspect the FSP/CPR premises and records. The NRC Staff reports that its inspectors were not allowed full and unfettered access to FSP's records and were not allowed any access to the CPR laboratory in the basement of the FSP/CPR building. The NRC-OI investigation is a proper step in documenting the NRC Staff's inspection efforts. In addition, the Staff also indicates that FSP or CPR personnel may have supplied false or incomplete information to the NRC inspectors during the inspection. Again, the NRC-OI investigation is the proper first step toward documenting that allegation.

d. The Regulations Cited In The Subpoena Are Not Inappropriate For This Investigation.

The subpoenas inform the petitioners that they have been asked "to testify in the matter of potential violations of NRC regulations including, but not limited to, 10 C.F.R. 50.5, 10 CFR 21.41, and 10 CFR 50.9 relating to activities at [FSP]." In response, the petitioners argue that the regulations cited in the subpoenas issued by NRC-OI cannot be applicable to them or their employers and are incapable of supporting the investigation.[7] However, as we noted earlier, assuming arguendo that petitioners' employers were not under NRC jurisdiction does not, in and of itself, mean that the subpoenas should be quashed. Moreover, the regulations cited in the NRC-OI subpoenas are clearly applicable to this investigation.

Initially, petitioners argue that 10 C.F.R. §50.9 cannot support their questioning by the NRC because this provision applies only to "licensees" or "applicants," which cannot include either FSP or CPR. However, as we noted above, the NRC has authority to question persons with relevant knowledge regardless of their employment. After all, just because a regulation does not apply to a witness' employer does not mean that a witness does not possess "relevant, competent or material" information subject to a subpoena. For example, NRC licensees are required

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[7]We do not read the petitioners to argue that the subpoenas do not give them adequate notice of the information expected of them. However, that argument is generally made in response to a subpoena for documents, not in response to a subpoena for testimony. The subpoenas at issue do not require the respondents to produce documents.

to provide "complete and accurate" information regarding many of the activities they conduct. One of the purposes of this investigation is to determine if NRC licensees correctly audited FSP's and CPR's QA programs and whether any information they discovered should have been reported to the NRC. The petitioners may have knowledge of the licensees' review of FSP's and CPR's QA programs and other actions by NRC licensees that are required to be reported. Thus, the subpoena's reliance upon 10 C.F.R. §50.9 is appropriate within the context of this investigation.

In addition, the petitioners argue that 10 C.F.R. §21.41 cannot apply to this investigation because Part 21 does not apply to suppliers of "commercial grade" materials. But while Part 21 does exempt suppliers of commercial grade materials "to the extent that they supply commercial grade items[,]" see 10 C.F.R. §21.7, it is beyond dispute that FSP and CPR supplied "safety-grade" materials at the time of the NRC Staff's inspection. Thus, petitioners' employers are not exempt from the requirements of Part 21 for the purposes of this investigation.

Finally, as the petitioners admit, 10 C.F.R. §50.5 clearly applies to "suppliers" and their employees. Petitioners' argument that it should not apply in this case is premised on an argument that both FSP and CPR supply only "commercial grade" products. However, the regulation itself does not contain such a limitation -- as the petitioners concede. Moreover, as we just noted, it is clear that prior to August 25, 1992, FSP and CPR supplied "safety-grade" materials, not solely "commercial grade"

materials. Thus, any action by either FSP or CPR relating to the sale of those materials prior to that date is a fair subject of an NRC investigation.

2. The Existence Of Parallel NRC and DOJ Investigations Does Not Require The Subpoenas To Be Quashed.

Petitioners also argue that the subpoenas should be quashed because they are possible victims of a "civil discovery process [that is] being used in order to obtain information for the purposes of a criminal proceeding." Motion to Quash at 3. In CLI-93-23, in response to a similar allegation by petitioners' employers, we stated that the NRC had not referred this matter to the Department of Justice. See CLI-93-23, 38 NRC at 186. Both petitioners (and their employers) now reassert that we have referred the matter and that therefore the subpoena should be quashed. See also Employers' Motion to Quash, discussed infra, at 8-9 and n.4. In order to clear up any confusion, we have separately asked both NRC-OI and the U.S. Attorney's Office to advise us of their handling of this matter.

In response, the U.S. Attorney's Office for the District of Connecticut has advised us that while NRC-OI had not formally referred the matter to it for prosecution (at the time of its response), the U.S. Attorney's Office opened its own investigative file on this case when it assisted the NRC Staff in obtaining the criminal search warrant for the FSP/CPR facilities in August of 1992. However, the U.S. Attorney's Office has also informed us that it has not presented the matter to a grand jury

and no federal grand jury has initiated an investigation on its own.

For its part, NRC-OI has advised us that it has now -- for all practical purposes -- formally referred the matter to the U.S. Attorney while this Order was being prepared.[8] While NRC-OI has not issued a referral letter in this case, NRC-OI and the U.S. Attorney's Office have held significant discussions about the case and the U.S. Attorney has instituted a preliminary investigation. However, the U.S. Attorney's Office has not yet made a final determination regarding a possible criminal investigation and, as we noted above, it has not yet referred this matter to a Grand Jury.

The three individual petitioners themselves -- as opposed to the corporate employers and the corporate management -- are not considered to be subjects of either the NRC investigation or the DOJ investigation at this time. Furthermore, it remains important to continue to develop information -- especially testimonial information -- in order to identify any possible regulatory violations. However, assuming arguendo that one or

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[8]Under a Memorandum of Understanding with the Department of Justice ("DOJ"), NRC-OI is the proper office of the NRC to refer matters to DOJ for possible criminal prosecution. See 53 Fed. Reg. 50317 (Dec. 14, 1988). Under normal procedures, NRC-OI does not formally refer matters for possible prosecution until it completes an investigation and prepares a report. In most cases, it is only then that NRC-OI provides that report to the DOJ with a formal letter requesting review of the matter for possible prosecution. However, in special circumstances, NRC-OI may advise either the DOJ or the local U.S. Attorney (or both) of the circumstances surrounding a case. In addition, NRC-OI may request an early determination of prosecutorial merit.

more of the petitioners is a potential target of a criminal investigation, it is clear that the law does not require that these subpoenas be quashed at this time. Case law clearly holds that a criminal referral, in and of itself, does not require a government agency to suspend its civil investigation. Accordingly, even though NRC-OI has referred this case to the U.S. Attorney for possible prosecution, that fact, in and of itself, does not require us to quash the subpoenas before us at this time.

Over twenty years ago the Supreme Court upheld the concept of allowing parallel civil and criminal investigations to proceed in a case involving the Food and Drug Administration ("FDA"). See generally United States v. Kordel, 397 U.S. 1 (1970). In that case, the FDA served civil interrogatories on the defendants after it seized allegedly misbranded drugs. Shortly thereafter, before the defendants answered the interrogatories, the FDA referred the case to the Department of Justice for criminal prosecution. The trial court refused to stay the civil investigation and refused to suppress the defendants' answers to the interrogatories and those answers were later admitted in the criminal trial. 397 U.S. at 3-6.

The Supreme Court not only upheld the convictions but also approved the trial court's decision not to stay the agency's civil investigation.

> The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But

> a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a government agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.

397 U.S. at 11.

In this case, the petitioners -- as supported by their employers -- rely on Donaldson v. United States, 400 U.S. 517 (1971), and United States v. LaSalle National Bank, 437 U.S.298 (1978), for the proposition that all civil investigations must cease after a referral to the Department of Justice for possible prosecution. However, as we show below, those cases do not require that result here.

In Donaldson, the Supreme Court addressed the question of when a permissible summons in an I.R.S. civil investigation became impermissible because of a possible future criminal prosecution. The Donaldson Court noted that the use of agency subpoenas "has been approved, even where it is alleged that its purpose is to uncover crime, if no criminal prosecution as yet has been instituted." 400 U.S. at 532-33 (footnote omitted) (citations omitted). But the Donaldson Court noted that "where the sole objective of the investigation [was] to obtain evidence for use in a criminal prosecution, the purpose [was] not a legitimate one and enforcement may be denied." 400 U.S. at 533 (emphasis added). Thus, the Court limited the prohibition on the use of civil process "to the situation of a pending criminal

charge or, at most, of an investigation solely for criminal purposes." Id. (emphasis added). The Court further refined its test in United States v. LaSalle National Bank, 437 U.S. 298 (1978), where the Court held that the use of a civil summons (or subpoena) was presumptively invalid after the IRS had formally referred the case to the U.S. Department of Justice for a criminal prosecution. 437 U.S. at 311-13.[9]

However, subsequent cases have distinguished Donaldson and LaSalle from Kordel on the basis of the difference between the functions of the IRS and the functions of other regulatory agencies. For example, courts have held that other regulatory agencies have ongoing regulatory functions that may not be delayed. As the D.C. Circuit noted in a case involving the Securities and Exchange Commission ("SEC"),

> [u]nlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose.

SEC v. Dresser Industries, 628 F.2d 1368, 1380 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

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[9]However, the LaSalle Court held that even where the district court had found that the individual IRS investigator was using the civil investigation to uncover evidence of criminal violations (prior to a formal referral), that fact would not, in and of itself, transform the investigation from a civil investigation into a criminal investigation. Instead, the party opposing the subpoena must demonstrate that the agency's sole purpose was to gather information of a criminal nature. 437 U.S. at 313-17.

The Second Circuit has adopted this same reasoning in upholding an FDA civil investigation that was conducted in parallel with a criminal investigation. United States v. Gel Spice Co., 773 F.2d 427, 432-33 (2d Cir. 1985) (citing cases). As the Second Circuit noted in that case,

> the mere existence of a pending recommendation for criminal prosecution to the DOJ does not mean that evidence obtained by the FDA during inspections conducted subsequent to the recommendation was improperly obtained. Civil and criminal enforcement may proceed simultaneously.

773 F.2d at 434 (citing Kordel). In fact, one court has specifically enforced a subpoena in an NRC investigation even though a separate grand jury proceeding into the same event was ongoing. United States v. McGovern, 87 F.R.D. 582, 584 (M.D. Pa. 1980) ("The fact that there is an on-going grand jury investigation simultaneously with the NRC investigation is not sufficient reason, in and of itself, to stop the NRC investigation.").

In this case, there is no grand jury investigation, much less an indictment.[10] Moreover, the NRC, like the SEC in Dresser Industries and the FDA in Kordel and Gel Spice, must be able to investigate regulatory compliance and possible violations of its regulations without delay. The NRC is the agency charged by Congress to ensure that nuclear power plants are constructed with adequate safeguards to protect the public health and safety.

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[10]We agree that if the grand jury issues an indictment in this case, the Staff and NRC-OI should stay any non-emergency phases of their inquiries.

In this case, the NRC is investigating, among other issues, whether its licensees installed substandard or non-conforming materials in their nuclear power plants and whether those licensees correctly audited FSP's QA program. The NRC should not have to await the conclusion of a possible criminal proceeding to continue this investigation. Dresser Industries, supra.

Obviously, there clearly are "non-criminal" purposes for this investigation. For example, the NRC is investigating the quality of the materials sold to NRC licensees and installed in the safety-related systems of their plants. Thus, it is clear that the NRC is not conducting this investigation for the sole purpose of developing a criminal case against either the petitioners or their employers (whose claims we address below). Accordingly, even applying the Donaldson and LaSalle criteria, we find no grounds to quash the three subpoenas before us.

C. The Employers' Motion To Quash.[11]

1. The Employers' Right To Participate.

The Commission has received a pleading from the petitioners' employers entitled "Motion to Quash" ("Employers' Motion") arguing that the Commission should quash these three subpoenas to their employees. Generally, the pleading retraces arguments

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[11]The Employers have requested oral argument before the Commission. Employers' Motion at 12, n.5. Oral argument before the Commission is discretionary in all cases. Cf. 10 C.F.R. §2.763. We find nothing in the pleadings before us to indicate how oral argument would assist us in reaching a decision. Joseph J. Macktal, CLI-89-12, supra, 30 NRC at 23, n.1. Accordingly, the employers' request for oral argument is denied.

raised in our previous case, see CLI-93-23, supra, and recites the same arguments raised by the petitioners themselves, with one exception which we note later. However, the pleading does not state a jurisdictional ground for its filing.[12] Nevertheless, we will exercise our discretion and consider the issues raised by the employers.

In their pleading, the employers raise two distinct issues: (1) the possible overlapping of the parallel NRC and DOJ investigations and (2) the questioning of one of the petitioners who allegedly possesses privileged information. We have already discussed above the issue regarding parallel investigations conducted by NRC-OI and the Department of Justice. Accordingly, we turn to the issue of privileged information in the possession of one of the witnesses.

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[12]Because the subpoenas are directed to the employees, not to the employers, it is not clear what right the employers have to be heard in this matter. Clearly, they are not "parties" to the subpoenas. Furthermore, technically speaking, the NRC's intervention standards in 10 C.F.R. §2.714 do not apply to this proceeding because this "proceeding" is not a proceeding under Part 2, Subpart G, of the Commission's rules. Likewise, 10 C.F.R. §2.715 is not generally applicable as codified.

The Supreme Court addressed the issue of intervention in a subpoena "proceeding" in Donaldson. The Donaldson Court held that while a party against whom possible evidence was sought did not have a right to intervention, that party could seek permissive intervention in a subpoena enforcement proceeding. 400 U.S. at 529-30. However, the Donaldson Court noted that the better place to challenge any evidence recovered by the government in response to a civil subpoena was by challenging introduction of that evidence in any subsequent enforcement proceeding. See 400 U.S. at 531.

2. A Petitioner's Alleged Possession of Privileged Information Does Not Require Her Subpoena To Be Quashed.

The employers argue that the subpoena to at least one of the petitioners, Ms. Settino, should be either quashed or modified because she possesses privileged information in the form of both attorney-client communications and attorney work-product materials.[13] Employers' Motion at 2. Although the employers have failed to provide any legal discussion of the matter, this issue is not difficult to resolve. We are not aware of any case -- and none has been cited by the employers -- that stands for the proposition that the mere "possession" of privileged information creates a bar to testimony in a civil regulatory proceeding. If such were the case, a potential witness could immunize themselves against a subpoena simply by "obtaining" privileged information. Accordingly, we find that the employers' assertion is clearly not grounds to quash the subpoena.

Moreover, the Commission is under no duty to "not learn" an item of information just because it may be privileged. If Ms. Settino -- or any other employee -- wishes to provide the Commission with relevant information that also happens to be

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[13]There is some question whether sharing an otherwise privileged communication with Ms. Settino may have waived that privilege. "[V]oluntary disclosure to a third party of purportedly privileged communications has long been considered inconsistent with assertion of the privilege." Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1424 (3rd Cir. 1991). The employers describe Ms. Settino as "Mr. Babcock's Assistant and secretary ..." Employers' Motion at 2. Thus, it is not clear how Ms. Settino gained any knowledge of privileged information. However, that can be determined during her interview, if necessary.

privileged, that is a matter between Ms. Settino and her employer, not between the employer and the NRC. Witnesses reveal information covered by a privilege at their own peril -- subject, of course, to the protection of any applicable laws.[14]

A witness -- like Ms. Settino -- may assert the attorney-client privilege to prevent revealing (1) a communication (2) made in confidence (3) between an attorney (4) and a client (5) for the purpose of seeking or obtaining legal advice. See generally 8 J. Wigmore, Evidence, pp. 541-42 (McNaughton rev, 1961). Without specifically ruling on the issue, we will assume for purposes of this argument that the privilege applies when the client is a corporation. E.g., Upjohn Co. v. United States, 449 U.S. 383, 390 (1981) (citation omitted). If so, the privilege belongs to the client and can only be waived by that client (here, the employer), not the employee (here, the petitioner).

However, the privilege protects only the disclosure of "communications," not the disclosure of "facts" by those who communicated with the attorney. Upjohn, 449 U.S. at 395-96 (1981) (citing cases).[15] Thus, while Ms. Settino (or any other

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[14]For example, a witness who provides safety information that also happens to be privileged may be protected as a whistleblower by section 211 of the Energy Reorganization Act.

[15]"The client cannot be compelled to answer the question, 'what did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney." Upjohn, 449 U.S. at 396, quoting Philadelphia v. Westinghouse Electric Corp., 205 F.Supp. 830, 831 (E.D. Pa. 1962).

(continued...)

employee) may not be compelled by OI to testify about privileged communications with the company's attorney, she may be compelled to testify regarding other communications and any "facts" that she may know as a result of her employment at either FSP or CPR.

Ms. Settino has the right to be represented by her own counsel when she responds to the subpoena and her counsel may advise her if a question calls for the disclosure of privileged information. The OI investigators should (1) determine if areas of privileged communications exist and (2) honor Ms. Settino's assertion of the privilege in response to specific questions, where applicable. We can review any disputes over this issue if and when they arise. See, e.g., Five Star Products, CLI-93-23, 38 NRC at 185-86.

Finally, the employers' reference to "work-product material" is irrelevant. The "work-product" doctrine, as defined in Hickman v. Taylor, 329 U.S. 495 (1947), and incorporated into the Federal Rules, protects (1) documents and tangible things otherwise discoverable; (2) prepared in anticipation of litigation; (3) by the party or their attorney. See Fed. R. Civ. P. 26(b)(3). The subpoena issued to Ms. Settino does not require her to produce documents; thus, the subpoena does not call upon her to surrender any "work-product" material.

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[15](...continued)
This privilege extends only to communications with the employer's attorney, not to communications with the employer.

IV. Summary.

In summary, we deny the request to quash the NRC-OI subpoenas issued to Henry Allen, Diane Marrone, and Susan Settino. We hereby establish the new date for compliance with the subpoenas as three weeks from the date of this Order, unless the petitioners and NRC-OI negotiate a mutually agreeable alternative date.

It is so ORDERED.

For the Commission[16],

JOHN C. HOYLE
Acting Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of June, 1994.

[16]Commissioner Remick was not present for the affirmation of this order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

HENRY ALLEN, DIANE MARRONE AND
SUSAN SETTINO

Docket No.(s) 1-92-037R

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM M&O (CLI-94-8)--6/17/94 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
17 day of June 1994

Emile L. Julian
Office of the Secretary of the Commission