UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

PDR

January 24, 1986

The Honorable Edward J. Markey, Chairman
Subcommittee on Energy Conservation and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Our November 27, 1985 letter to you regarding earthquakes and emergency planning in the Diablo Canyon licensing proceeding included the following paragraph:

> Next, you allege that the Commission has made two suspect "legal assertions": (1) that there is a difference between considering information and relying on the same information; and (2) that it is acceptable to consider off-the-record information during the decisionmaking process so long as such information is not relied on in making the final decision. Your letter requests a legal memorandum in support of the Commission's view. We will provide such a memorandum in the near future when it is completed by the General Counsel and reviewed by the Commission.

The General Counsel's legal memorandum which we promised to provide to you is enclosed.

Commissioner Asselstine believes that the conclusion expressed in the OGC memo overstates the applicable caselaw.

Sincerely,

Nunzio J. Palladino

Enclosure:
OGC Legal Memorandum

cc: Rep. Carlos Moorhead

January 21, 1986

LECAL ANALYSIS BY THE GENERAL COUNSEL

SUBJECT: NUCLEAR REGULATORY COMMISSION CONSIDERATION OF EXTRA-RECORD INFORMATION DURING THE DIABLO CANYON LICENSING PROCESS WHEN NO RELIANCE WAS PLACED ON SUCH INFORMATION IN THE AGENCY'S FINAL DECISION

Case law demonstrates clearly that it is not reversible error for an agency to consider extra-record information during the decison-making process as long as the agency does not rely on such information in making the decision.

The legal acceptability of agency consideration of extra-record information during the decision-making process where no reliance is placed on such information in the decision is best demonstrated by examination of court decisions where an agency did rely finally upon extra-record evidence.[1] An instructive case is Seacoast Anti-Pollution

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[1]The position of the Nuclear Regulatory Commission is that the Commission's decision in the Diablo Canyon licensing proceeding, that neither NRC regulations nor special circumstances required consideration of the effects of earthquakes on emergency planning, did not rely on any extra-record information.

League v. Costle, 572 F.2d 872 (1st Cir. 1978), cert. denied, 439 U.S. 824 (1978). In Seacoast, the Administrator reviewed a decision of a Regional Administrator concerning an exemption request. To aid in his review, the Administrator appointed a technical panel which prepared a report based, in part, on information not in the administrative record. The Administrator ultimately reversed the Regional Administrator's decision. Petitioners in Seacoast objected both to the use of the panel by the Administrator and to the fact that the panel's report included extra-record information. The First Circuit found no problem in the use of an expert panel but noted that "[a] different question is presented...if the agency experts do not merely sift and analyze but also add to the evidence properly before the Administrator." 572 F.2d at 881. The court examined the Administrator's decision to determine whether he had, in fact, relied upon such information and whether the petitioners had suffered substantial prejudice as a result. Answering those questions in the affirmative, the court remanded the decision but in so doing explicitly gave the Administrator the option "of trying to reach a new decision not dependent on the panel's supplementation of the record." 572 F.2d at 882.

The court gave the Administrator the opportunity to reach a new decision based strictly on the record evidence. Thus,

in effect, the court found that it was acceptable for the agency to consider extra-record information during the decision-making process as long as it did not rely on it in making the final decision after remand.

This parallels the rule that is applied to consideration of other kinds of inadmissible evidence; that is, if the record evidence supports the agency's decision, then consideration of extra-record evidence is not reversible error. In Consolidated Gas Supply Corp. v. Federal Energy Regulatory Commission, 606 F.2d 323 (D.C. Cir. 1979), the District of Columbia Circuit considered allegations that the Federal Energy Regulatory Commission ("FERC") improperly considered as evidence an unaccepted provision of a settlement proposal both in its decision on the merits and in its denial of rehearing. There was no question that the unaccepted provision was "considered" in the sense it was filed with the Commission. As in Seacoast, the concern of the court was not the agency's consideration of this material but rather the use made of this information in the agency's decisions. The court found no evidence of improper use in the merits decision but did find that this material had been relied on in the denial of rehearing. However, inasmuch as the improper supporting evidence was only cited as additional proof, the court determined that the same result would have obtained absent this evidence and, accordingly,

that the error was nonprejudicial. See also Braniff Airways, Inc. v. Civil Aeronautics Board, 379 F.2d 453, 466 (D.C. Cir. 1967) ("[T]he possibility of prejudice from the admission of incompetent evidence may be dispelled by showing that the matter involved was not relied on").

The "substantial prejudice" standard for determining when agency consideration of extra-record information vitiates the decision remains current. See Republic Airlines, Inc. v. Civil Aeronautics Board, 756 F.2d 1304, 1320, (8th Cir. 1985) (no substantial prejudice shown where extra-record evidence was "merely cumulative or illustrative"); Carstens v. Nuclear Regulatory Commission, 742 F.2d 1546, 1558 (D.C. Cir. 1984) (court refused to presume prejudice where Licensing Board had given limited reliance to improperly admitted evidence); Papago Tribal Utility Authority v. Federal Energy Regulatory Commission, 723 F.2d 950, 955 (D.C. Cir. 1983) (no substantial prejudice where petitioners had sufficient notice of agency's intended use of extra-record evidence).

In sum, the case law indicates clearly that considering, but not relying on extra-record evidence is not reversible error.