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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
Before the Administrative Judges:

Ivan W. Smith, Chairman
Dr. Richard F. Cole
Kenneth A. McCollom



In the Matter of)	Docket Nos. 50-443-OL
)	50-444-OL
PUBLIC SERVICE COMPANY)	(Off-Site EP)
OF NEW HAMPSHIRE, <u>ET AL.</u>)	
)	
(Seabrook Station, Units 1 and 2))	April 5, 1989

MASSACHUSETTS ATTORNEY GENERAL'S MOTION TO
COMPEL PRODUCTION OF DOCUMENTS FROM FEMA

The Massachusetts Attorney General ("Mass AG") hereby moves for an order compelling FEMA to produce certain documents identified by it as responsive to discovery requests of the Mass AG but withheld on the basis of a claim of privilege. In support of his motion the Mass AG states as follows:

1. On October 19, 1988 the Mass Ag filed his First Request for the Production of Documents to FEMA. Request No. 2 read as follows:

2. Any and all documents generated or received by FEMA concerning the adequacy of the SPMC, including but not limited to internal and external communications.

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On January 9, 1989 (and again on February 6, 1989) the Mass AG faxed a letter to FEMA requesting documents relevant to the Seabrook exercise. This letter is attached as Exhibit 1.

2. On March 6, 1989 FEMA faxed a list of documents it was withholding from production in response to the Mass AG's January letter. This list is attached as Exhibit 2.

3. Counsel for FEMA and the Mass AG's office have engaged in negotiations concerning further production of the documents identified on Exhibit 2. As a result of these discussions FEMA has agreed to produce the document identified as No. 66. (FEMA incorrectly stated that this document had already been produced.) Further, the Mass AG and FEMA have identified 4 groups or categories of documents which are still at issue between the parties. These categories are as follows:

1) Documents prepared prior to the exercise which concern the issue whether the SPMC at that time was advanced enough to permit meaningful exercise as an emergency plan: 12, 13, 25, 37 and 47;

2) Documents which reflect comments by individuals on drafts of the FEMA Post-Exercise Report: 15-18, 20, 22, 30, 31 and 70;

3) Documents concerning the destruction by FEMA of exercise-related materials: 23 and 72;

4) Miscellaneous documents: 21 and 68.

4. FEMA should produce each of the documents identified in the four categories above. The documents in category one are actually relevant to the FEMA review and evaluation of the SPMC qua plan. Documents detailing in what ways the SPMC was not complete enough prior to the June 1988 exercise to be meaningfully exercised are relevant to the development and evolution of FEMA's judgment concerning the adequacy of the SPMC as a plan.

5. The documents described in category two reflecting comments and input into the FEMA exercise report are relevant and should be produced. FEMA has destroyed all early drafts of that report and further has discarded all of the supporting materials of those evaluators who observed and critiqued the exercise performance first-hand. In this circumstance not only is FEMA appearing in this proceeding with a barebones judgment concerning whether emergency preparedness at Seabrook is adequate but FEMA has taken affirmative steps to ensure that the Intervenor's are not even able to probe and examine the skeletal support this judgment might have. If documents do exist that reflect the contemporaneous concerns of those reviewing the draft exercise report as it became finalized, these documents should be produced.

6. The two documents identified in category three, concerning the destruction of exercise related documents should be produced. Each of those documents is discussed in some detail below.

- A. Memorandum from Joseph Flynn to Grant Peterson concerning the preservation of documents dated December 29, 1988 (number 23 on the list).

FEMA has made no cognizable claim of attorney-client privilege as to this memo. It is axiomatic that the communication conveyed to the attorney by the client must be confidential in order for the privilege to apply. See generally, Wright & Miller, Federal Practice and Procedure: §2017 (1970). It follows that attorney-client correspondence which is not confidential cannot be withheld under the aforementioned privilege. For example, the privilege does not extend to correspondence which contains advice based upon public rather than confidential information. Community Savings and Loan Assoc. v. Federal Home Loan Bank Board, 68 F.R.D. 378, 382 (E.D. Wisc. 1975); Congoleum Industries, Inc. v. GAF Corporation, 49 F.R.D. 82, 85-86 (E.D. Pa. 1969). To the extent that the Flynn memo sets forth opinion or advice regarding the interpretation of FEMA's own regulations as to document retention, that memo cannot be construed as a privileged document. See Wright & Miller, § 2017 at 137.

- B. Memorandum from Richard Donovan to Joseph Flynn regarding the December 13, 1988 Motion in Limine of the Mass AG concerning the destruction of exercise-related documents dated December 16, 1987 (hereinafter, "Donovan Memo").

The attorney-client privilege not only does not attach to any and every communication between an attorney and her client, it can be intentionally or unwittingly waived. As to the Donovan memo, such a waiver could not have been more clear. The attached excerpts from the deposition of Mr. Donovan on January 11, 1989, show that he described in detail the substance of communications between himself and attorney Flynn regarding the subject matter of the withheld document (namely, the destruction of FEMA exercise related documents). See Exhibit 3, transcript of deposition of Richard Donovan at 154-156, 161-162, 164, 167, 170, 172-177. In addition, Donovan's attorney specifically stated that there was no claim of attorney-client privilege being made as to communications pertaining to the destruction of these documents. (Deposition at 155). Mr. Donovan did not object. Id. After having already testified as to the matter of the destruction of documents, Mr. Donovan can not now be heard to assert the privilege. See Smith v. Montgomery County, 573 F. Supp. 604, 610 (D. Md. 1983) (where government officials made statements in deposition about legal advice provided to them by government attorneys pertaining to challenged practices, subsequent reliance on the privilege is waived). See also, Morrill v. Becton, Dickinson & Co., 564 F. Supp. 1099, 1109 (E.D. Mo. 1983) (where defendant's general counsel testified as to privileged documents and defendant made no objection, the privilege was deemed waived).

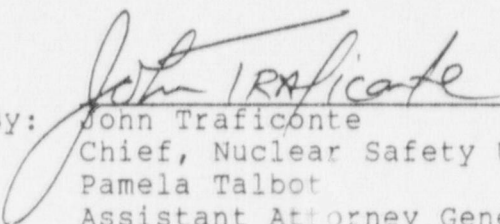
7. Both of the "miscellaneous" documents identified in category four (Nos. 21 and 68 on the list) appear to be relevant and should be produced. Document No. 21 appears to contain factual material sent to Mr. Donovan during the period in which he was finalizing FEMA's Report on the adequacy of the SPMC. Document 68 (which has been partially produced and is attached as Exhibit 4) is a contemporaneous report by Donovan to a superior which identifies planning issues of significance at Seabrook. As such it is a document that the Mass AG needs to probe the basis of the FEMA review of the SPMC and to establish in what fashion FEMA may have resolved issues in planning that it had at one time identified but which do not appear in any way in the final report.

For all of the reasons set forth above this Board should grant the Mass AG's motion to compel production by FEMA of the documents discussed above.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
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DATED: April 5, 1989



THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF THE ATTORNEY GENERAL

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OFFICE OF SECRETARY
DOCKETING & SERVICE
January 9, 1989 BRANCHBY TELEFAXH. Joseph Flynn, Esq.
Assistant General Counsel
Federal Emergency Management Agency
500 C Street, S.W.
Washington, D.C. 20472RE: Discovery regarding June 1988 Graded
Exercise for Seabrook

Dear Joe:

In summary of our preliminary discussions regarding exercise discovery, I had proposed that a group of FEMA evaluators/observers be made available for interviews by our office. All but one of those individuals are associated with Argonne National Laboratories ("ANL"). My proposal was that I travel to ANL and, over a day or two, have a series of sessions with the relevant individuals. (As I noted, I have selected those evaluators/observers who appear to have been stationed at those locations which would have permitted them to observe exercise events of most relevance to the Mass AG's exercise contentions.) One of the conditions that you mentioned in response to this proposal was that Mr. Donovan be present during those interviews so that he would be aware of this record as it develops. This condition may well be a sticking point: my counter-proposal is that these interviews be stenographically recorded so that Mr. Donovan can simply review the record after the fact. We have tentatively discussed the week of January 23 for this discovery.

As a mentioned, there is also a group of documents that I want to officially request with the understanding that FEMA may not have possession of some of them. This request is divided into three parts: 1. documents generated prior to the exercise; 2. documents generated during the exercise; and 3. documents generated after the exercise. I understand that you intend to make available to me some documents at the outset of the Donovan deposition tomorrow. The following list is not intended to be a request for any additional production prior to that deposition.

A. Generated Prior to June Exercise

1. All drafts and the final version of the Control Cell Plan(s) used for the 1988 Seabrook Exercise (the "Exercise").
2. All correspondence, memoranda, and other records of communications regarding the preparation and/or content of the Control Cell Plan(s) for the Exercise.
3. All instructions, documents, evaluation criteria, and information concerning the Exercise given to federal evaluators, controllers, and observers prior to and/or during the Exercise. This includes instructions, documents, and information provided at training sessions and/or meetings.
4. All communications or other documents concerning the hypothetical accident scenario to be used, the scope of the Exercise, and the extent of play (apart from the Exercise Report and the seven-volume "scenario").
5. All correspondence and documents concerning the scope, methodology, and implementation of FEMA's evaluation of Exercise events, including the "mini-scenarios" and drills occurring on June 27-30, 1988.
6. All documents and information concerning the Exercise or concerning roles, functions, duties, or events expected to occur during the Exercise, that were provided by FEMA, the NRC, or NHY to federal evaluators, simulators, controllers, observers, members of the Regional Assistance Committee, other FEMA or NRC personnel, or any other persons at any time prior to the exercise.
7. All documents and information concerning what evaluators should, could, or might do with (1) the original Exercise Evaluation Forms, (2) copies of these forms, and (3) any personal written notes of the Exercise.

B. Generated During The Exercise

1. Any and all Exercise Evaluation Forms in the possession of FEMA which have not been discarded or destroyed, including those which have been retained by any of the observers or evaluators assisting FEMA in evaluating the Exercise.
2. Any Exercise notes recorded by FEMA evaluators, controllers, and observers during the Exercise.
3. All Objective Data Forms or other forms generated during or after the Exercise.

4. All logs generated or maintained by each and every evaluator, controller, observer, or other FEMA or NRC personnel, during or subsequent to the Exercise, including all appendices, comments, and summaries which are a part thereof.

5. All documents telefaxed or otherwise delivered during the Exercise from Exercise players to those simulating state or local government officials or other organizations at the FEMA Control Cell(s), and all documents telefaxed or otherwise delivered from those in the Control Cell(s) to Exercise players.

6. All audio and/or video recordings, or transcripts of recordings, of conversations Exercise players had with those in the FEMA Control Cell(s) during the Exercise.

7. All documents, including notes and logs, describing or pertaining to discussions before, during, and after the Exercise between FEMA/NRC evaluators, controllers, and observers and:

a) Exercise players; and

b) NHY controllers and evaluators, or other NHY personnel or contractors.

8. All photographs of events occurring during the Exercise.

9. All reproductions of "status boards" as they existed throughout the Exercise.

10. All time lines prepared by players, evaluators, controllers, or observers of any events occurring during the Exercise.

11. All charts, graphs, maps, diagrams, drawings, or physical evidence pertaining to events which occurred during the Exercise.

12. All information and documents describing or concerning any communications during the Exercise, apart from formal controller messages contained in the seven-volume scenario, between (a) NHY controllers, evaluators, observers, or other NHY personnel or contractors, and (b) Exercise players.

C. Generated After The Exercise

1. Any and all documents (other than GM Ex-1 and GM EX-3) which describe what the purpose of FEMA's exercise evaluation process is.

2. FEMA's Exercise Evaluation Methodology referred to on page 2 of the Exercise Report.

3. All summaries, notes, or other documents which reflect the consolidation of Exercise observations and other matters that took place at the meeting(s) the FEMA/NRC evaluators, controllers, and observers held during the evenings of Day 1 and Day 2 of the Exercise and after the Exercise concluded.

4. All draft Narrative Summaries developed by Team Members for each assigned objective.

5. All Group Leaders' summaries of field interviews.

6. All consolidated Narrative Summaries developed by Group Leaders (Mass and NH) after meeting with Team Members.

7. All consolidated EEM's delivered by Group Leaders for NHY-ORO and New Hampshire EOC Team Leader review.

8. All Team Reports prepared by the NHY-ORO and New Hampshire EOC Team Leaders.

9. Any and all documents, including notes, which reflect the RAC Chairman's input, advice, or instructions at any of the steps in the preparation of the final Team Reports.

10. All documents containing factual or evaluative information, or suggestions, prepared after the Exercise by Exercise players or NHY evaluators, controllers, or observers and submitted to federal evaluators.

11. All other information, communications, or documents provided to federal evaluators after the Exercise to be used in developing their evaluations.

12. All other documents, summaries, notes, logs, time lines, evaluations, comments, critiques, or reports concerning the Exercise and prepared after the Exercise by federal evaluators, controllers, or observers.

13. All documents concerning the RAC Chairman's "critique" of the exercise, including such critique and all portions and drafts thereof.

14. All documents, including minutes, transcripts, summaries, or notes, concerning any meetings at which the FEMA Report, drafts thereof, or conclusions proposed to be, or actually contained in, that Report, were discussed.

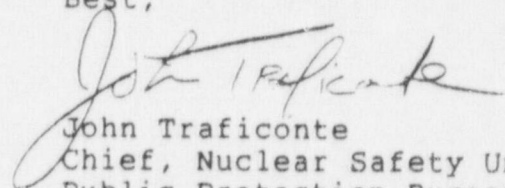
15. All documents, including minutes, transcripts, summaries, or notes, concerning any meetings at which FEMA evaluations, critiques, or comments on the exercise were discussed.

16. All correspondence, memoranda, or other records of communications about drafts of and/or the final Exercise Report between FEMA and

- a) the State of New Hampshire;
- b) New Hampshire Yankee;
- c) federal evaluators, Team Leaders, Group Leaders, and EOC Leaders; and
- d) members of the Regional Assistance Committee.

17. All correspondence, memoranda, or other records of communications about drafts of and/or the final Exercise Report between Richard W. Donovan and FEMA Headquarters.

Best,



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ARF/tam

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TO:

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Company/Agency: MASSAG, Nuclear Safety Unit
Office Symbol: _____
FAX Number: _____

FROM:

Name: H Joseph Flynn
Telephone Number: (202) 646-4102

REMARKS: Advance copy of list of documents withheld.

[Signature]

P. 2

FEMA DOCUMENTS WITHHELD FROM PRODUCTION TO MASSACHUSETTS ATTORNEY GENERAL

The following is a list of documents located by FEMA in response to the January 9, 1989 informal discovery request of the Massachusetts Attorney General for production of various documents regarding the June 1988 graded exercise for Seabrook, and withheld from production. The basis for non-production is stated for each item.

1. 1988 FEMA Exercise Evaluation Methodology [already produced].
2. 2/10/88 - Draft FEMA Guidance Memorandum EX-3 [deliberative process privilege].
3. 4/88 - Draft FEMA Exercise Evaluation Methodology [deliberative process privilege].
4. 5/16/88 - Richard Donovan (FEMA Reg. X) to Ihor Husar (FEMA Reg. II) and Joe Hayes (FEMA Reg. I), memorandum re "FEMA Control Cell Plan for the Evaluation of Utility Off-Site REP Exercise," and draft control cell plan [deliberative process privilege].
5. 5/16/88 - Richard Donovan (FEMA Reg. X) to Ihor Husar (FEMA Reg. II), draft FEMA Controller Plan for the Evaluation of Utility Offsite Preparedness [deliberative process privilege].
6. 3/3/88 - Draft memorandum from FEMA Assoc. Director Grant C. Peterson to FEMA Regional Directors, re Guidelines for Regions to Use in Implementing NUREG-0654/FEMA-REP-1, Rev.1, Supp.1 with Qualifying Exercises [deliberative process privilege].
7. 4/29/88 - First draft of Exercise Evaluation Methodology [deliberative process privilege].
8. 5/9/88 - Second draft of Exercise Evaluation Methodology [deliberative process privilege].
9. 5/11/88 - Richard Donovan (FEMA Reg. X) to Ihor Husar (FEMA Reg. II), draft FEMA Controller Plan for the Evaluation of Utility Offsite Preparedness [deliberative process privilege].
10. 5/16/88 - Richard Donovan (FEMA Reg. X), Draft Control Cell Plan for the Evaluation of Utility Offsite Plans and Preparedness in Graded Exercises for Nuclear Power Plants [deliberative process privilege].
11. 5/23/88 - Richard Donovan (FEMA Reg. X), Draft Control Cell Plan for the Evaluation of Utility Offsite Plans and Preparedness in Graded Exercises for Nuclear Power Plants [deliberative process privilege].
12. 2/26/88 - Letter from Argonne National Laboratory (a FEMA contractor) to Edward Thomas (FEMA Reg. I), re draft listing of items needed to be addressed by New Hampshire and Maine for the Seabrook Exercise [deliberative process privilege].

13. Intra-agency memoranda re the determination of list of inadequacies that should be addressed in the New Hampshire plan prior to an exercise, including: 4/4/88 - Henry Vickers (Reg. I Director) to Richard W. Krimm (FEMA Asst. Assoc. Dir.); 3/16/88 draft for review by FEMA HQ of letter to Richard H. Strome (NH) from Edward Thomas and Jack Dolan (Reg. I); draft HQ comments on 5/16/88 draft; 3/15/88 - Thomas to Krimm [deliberative process privilege].
14. undated rough drafts and notes of Robert Turner (FEMA HQ Emergency Management Specialist) re New Hampshire pre-exercise actions [deliberative process privilege].
15. 7/15/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re comments on 7/15/88 draft exercise report [deliberative process privilege].
16. 8/4/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), re draft exercise report [deliberative process privilege].
17. 7/29/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re comments on 7/29/88 draft exercise report [deliberative process privilege].
18. 7/30/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re comments on 7/30/88 draft exercise report [deliberative process privilege].
19. 8/2/88 - Draft exercise report [already in possession of Massachusetts Attorney General's office].
20. 9/15/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re 8/2/88 and 8/12/88 versions of the draft exercise report [deliberative process privilege].
21. 8/24/88 - Letter from Idaho National Engineering Laboratory [FEMA contractor] to Richard Donovan (FEMA Reg. X) re consideration of report of Seabrook total population exposure [deliberative process privilege].
22. 11/4/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.) and other FEMA officials, re draft report "Status of Corrective Actions for 1988 Seabrook Exercise" [deliberative process privilege].
23. 12/29/88 - Memorandum from H. Joseph Flynn (FEMA attorney) to Grant C. Peterson (FEMA Assoc. Dir.), re preservation of documents [attorney/client privilege].
24. 5/26/88 - Memorandum from Richard Donovan (FEMA Reg. X) to FEMA HQ and Regions, re FEMA controllers for the Shoreham and Seabrook exercises [deliberative process privilege].

List of FEMA documents withheld from production to
Massachusetts Attorney General, page 2.

25. 5/26/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re Seabrook Exercise: Exercise Impediments [deliberative process privilege].
26. 5/26/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re review of proposed objectives and extent of play for Seabrook qualifying exercise, and attachment of proposed objective matrix for exercise [deliberative process privilege].
27. 7/28/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), June 1988 Seabrook evaluator assignments [already produced].
28. 7/2/88 - Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), FEMA preliminary exercise findings for State of Maine [deliberative process privilege].
29. 7/2/88 - Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), FEMA preliminary exercise findings for New Hampshire Yankee Offsite Response Organization [deliberative process privilege].
30. 7/25/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re 7/25/88 draft exercise report [deliberative process privilege].
31. 8/2/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Henry Vickers (FEMA Reg. I Dir.), "Progress Report on Exercise Report and Plan Review for the Seabrook Site," pages 3 and 4 withheld from production [deliberative process privilege].
32. 7/30/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re 7/30/88 draft exercise report [deliberative process privilege].
33. 6/3/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), "Status Report: Seabrook Exercise" [deliberative process privilege].
34. 6/14/88 - Memorandum from Eleanor Castle (FEMA Reg. X) to FEMA HQ, addresses of Seabrook exercise evaluators [privacy of third parties].
35. 5/26/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re proposed objectives and extent of play for Seabrook exercise [deliberative process privilege].
36. 6/21/88 - Evaluators and assignments for Seabrook exercise [deliberative process privilege].
37. 3/18/88 - Memorandum from Edward Thomas (FEMA Reg. I) to Henry Vickers (FEMA Reg. I Dir.), re Seabrook [deliberative process privilege].

list of FEMA documents withheld from production to
Massachusetts Attorney General, page 3.

38. 4/22/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), re Seabrook exercise objectives [deliberative process privilege].
39. 4/29/88 - Draft memorandum from Richard W. Krimm (FEMA Asst. Assoc. Dir.) to Richard Donovan (FEMA Reg. X), responding to Donovan's memorandum of 4/22/88 [deliberative process privilege].
40. 4/28/88 - Memorandum from Richard W. Krimm (FEMA Asst. Assoc. Dir.) to Henry Vickers (FEMA Reg. I Dir.), re Seabrook exercise [deliberative process privilege].
41. 4/12/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Argonne National Laboratory, re 4/20/88 meeting to discuss proposed exercise scenario, extent of play, and Exercise Evaluation Methodology [deliberative process privilege].
42. 5/9/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re revised draft FEMA Controller Plan [deliberative process privilege].
43. 5/16/88 - Memorandum from Grant C. Peterson (FEMA Assoc. Dir.) to Henry Vickers (FEMA Reg. I Dir.), re proposed schedule for completion of milestones for Seabrook [deliberative process privilege].
44. 5/27/88 - Hand-written memorandum from Margaret Lawless (FEMA HQ Radiological Emergency Preparedness Program) to FEMA HQ REP staff members, requesting REP review of proposed Seabrook exercise objectives [deliberative process privilege].
45. 5/6/88 - Memorandum from Joseph Hayes [FEMA Reg. I] to Craig Wingo [FEMA HQ], re Seabrook exercise staffing and exercise evaluation methodology [deliberative process privilege].
46. 4/28/88 - Memorandum from Richard W. Krimm (FEMA Asst. Assoc. Dir.) to Henry Vickers (FEMA Reg. I Dir.), re Seabrook exercise [deliberative process privilege].
47. 5/88 - Memorandum from Richard W. Krimm (FEMA Asst. Assoc. Dir.) to FEMA HQ REP staff, re briefing Grant C. Peterson (FEMA Assoc. Dir.) on Seabrook and Shoreham issues [deliberative process privilege].
48. 5/23/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re schedule for completion of milestones for Seabrook [deliberative process privilege].
49. 3/11/88 - Memorandum from Edward Thomas (FEMA Reg. I) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), re Region I REP Travel Fund requirements in FY'88 [deliberative process privilege].

50. 5/25/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), re FEMA controllers for Seabrook exercise [deliberative process privilege].
51. 5/26/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re Seabrook exercise impediments [deliberative process privilege].
52. 5/18/88 - Memorandum from Richard W. Krimm (FEMA Asst. Assoc. Dir.) to Henry Vickers (FEMA Reg. I Dir.), re available personnel to serve as Seabrook exercise evaluators [deliberative process privilege].
53. 4/22/88 - Memorandum from Idaho National Engineering Laboratory (FEMA contractor) to Joseph Hayes (FEMA Reg. I), re review of Seabrook exercise scenario and offsite objectives [deliberative process privilege].
54. 4/26/88 - Memorandum from Richard Donovan (FEMA Reg. X) to William Cumming (FEMA attorney), re review of Region I comments on Seabrook exercise objectives [deliberative process and attorney/client privileges].
55. 4/24/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re draft Status of Extent of Play for Exercise of the SPMC [deliberative process privilege].
56. 4/18/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re draft Seabrook Exercise Controller Plan [deliberative process privilege].
57. 5/25/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re draft exercise matrices [deliberative process privilege].
58. 5/16/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Joseph Hayes (FEMA Reg. I) and Ihor Husar (FEMA Reg. II), re draft FEMA control cell plan [deliberative process privilege].
59. 6/4/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re exercise scenario and evaluator materials [deliberative process privilege].
60. 5/25/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re Seabrook exercise staffing [deliberative process privilege].
61. 6/1/88 - Letter from Argonne National Laboratory to Richard Donovan (FEMA Reg. X), re Seabrook exercise evaluator assignments and evaluator packets [deliberative process privilege].
62. 6/3/88 - Letter from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re Seabrook exercise status report [deliberative process privilege].

63. 4/8/88 - Memorandum from Edward Thomas (FEMA Reg. I) to RAC and REP Task Force, re review of proposed Seabrook exercise scenario/objectives [deliberative process privilege].
64. 5/26/88 - Memorandum from Henry Vickers (FEMA Reg. I Dir.) to Grant C. Peterson (FEMA Assoc. Dir.), re Region I review of proposed Seabrook exercise objectives and extent of play [deliberative process privilege].
65. 6/3/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Henry Vickers (FEMA Reg. I Dir.) and Richard W. Krimm (FEMA Asst. Assoc. Dir.), re review of Seabrook exercise scenario [deliberative process privilege].
66. 4/25/88 - Letter from Richard Donovan (FEMA Reg. X) to Donald W. Connors (Reg. I American Red Cross representative), re REP exercises and exercise objectives for congregate care center preparedness [already produced].
67. 4/22/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Richard W. Krimm (FEMA Asst. Assoc. Dir.), re review of proposed Seabrook exercise objectives [deliberative process privilege].
68. 3/2/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Dr. Joan C. Hock (FEMA HQ, Chief, Technological Hazards Div.), re Seabrook Site Visit: Status Report and Issues [7-page letter - pages 1-3 and first half of page 4 produced, last half of page 4 and remaining pages redacted] [deliberative process privilege].
69. 4/88 - Draft REP Exercise Manual, part 1 [deliberative process privilege].
70. 8/4/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Reg. I RAC Members and Seabrook Exercise Team Leaders, re review of 8/2/88 draft exercise report [deliberative process privilege].
71. 5/23/88 - Letter from Richard Donovan (FEMA Reg. X) to NRC, re draft Control Cell Plan for the Evaluation of Utility Offsite Plans and Preparedness in Graded Exercises for Nuclear Power Plants [deliberative process privilege].
72. 12/16/88 - Memorandum from Richard Donovan (FEMA Reg. X) to H. Joseph Flynn (FEMA attorney), re Mass AG motion regarding the FEMA Post-Exercise Evaluation Assessment Report dated December 13, 1988 [attorney/client privilege].
73. 4/22/88 - Memorandum from Richard Donovan (FEMA Reg. X) to William Cumming (FEMA attorney), re 4/1/88 exercise objectives and extent of play meeting [attorney/client privilege].
74. 4/25/88 - Memorandum from Richard Donovan (FEMA Reg. X) to William Cumming (FEMA attorney), re draft letter to Henry Vickers (FEMA Reg. I Dir.) regarding detail to Region I for Seabrook activities [attorney/client privilege].

75. 4/26/88 - Draft Offsite Federal Control Plan for June 7-9 Shoreham Nuclear Power Station Graded Exercise [deliberative process privilege].
76. 4/15/88 - Memorandum from Richard Donovan (FEMA Reg. X) to Joseph Hayes (FEMA Reg. I), re Seabrook exercise issues [deliberative process privilege].

1 Q. Did that come back and become part of the
2 compilation of documents that you then discarded?

3 A. Right.

4 Q. So, you don't have those either?

5 A. That's correct.

6 Q. You mentioned -- and I just wanted to
7 touch base actually with your counsel -- you
8 mentioned that the news conferences were recorded,
9 do you have tapes of those?

10 A. Yes, I do.

11 MR. TRAFICONTE: I just want to
12 refer you, Joe, to, if you look on page two of
13 Exhibit Two, I think we asked for -- maybe we
14 didn't.

15 MR. FLYNN: I understand your
16 request to include those tapes.

17 MR. TRAFICONTE: It would be --

18 MR. HUNTINGTON: Were they
19 transcribed?

20 THE WITNESS: It was transcribed to
21 the extent they were transcribed in the Exercise
22 Report.

23 Q. All right. Now, in your declaration at
24 paragraph seven you state that this is your normal

1 practice, then you go on to say at the end, "I
2 consulted with the Office of General Counsel
3 several times before doing so and was advised that
4 it was not improper to do so."

5 Can you explain to us why you consulted
6 with the Office of General Counsel?

7 A. First of all, I'm part of the FEMA
8 headquarters team, it's available to me to call
9 upon for advice and resource, and in accepting
10 this assignment, they made staff available to
11 assist me with any questions I had as I proceeded
12 with the review of the plan and management of the
13 Exercise Evaluation process, et cetera, and I had
14 been constantly advised by the Office of General
15 Counsel to follow my normal practice as I have
16 done in Region X without any exceptions and the
17 strength in my behavior would be consistent with
18 whatever I'd done with whatever I'd said.

19 Q. Had you ever been involved in an exercise
20 review and report that was litigated before?

21 A. No.

22 Q. Let me withdraw that. Well, did FEMA
23 headquarters, were they aware that your
24 involvement with exercise review in the past had

1 not involved a litigated exercise?

2 A. Well --

3 Q. Let me withdraw that, I'm not sure you can
4 testify as to what they are or are not aware of,
5 let me just withdraw it.

6 Again, I understand general counsel was
7 available to you to consult with, my question was
8 what motivated you to consult with them prior to
9 discarding these documents?

10 A. I wanted to find out if it was still
11 proper and acceptable for me to follow my normal
12 practice, I was advised that there was nothing
13 constraining me from not following my normal
14 practice.

15 Q. Your testimony here mentioned that you
16 consulted with the Office of General Counsel
17 several times, was it on different days?

18 A. Several times over a period of months.

19 Q. Over a period of months?

20 MR. FLYNN: If you don't mind --

21 MR. TRAFICONTE: Before we -- you're
22 not claiming attorney/client?

23 MR. FLYNN: No. The point I was
24 about to raise is my own recollection is that I

1 raised the issue in the first instance at the time
2 of the exercise, so if you are asking him why he
3 brought the subject up, your premise may be
4 incorrect.

5 Q. Do you recall a conversation with your
6 counsel -- do you recall a conversation with
7 Attorney Flynn at the time of the exercise --

8 A. Yes.

9 Q. -- concerning the retention of these
10 documents?

11 A. He asked me what my process was, I went
12 over in depth as I have this morning with you what
13 my process was.

14 Q. And did you at that time inform him that
15 your normal practice would be at some point in the
16 future to discard these documents?

17 A. Yes, I did.

18 Q. What did he say to you?

19 A. That if something -- something to the
20 effect that unless there was -- I asked about the
21 legality of it and he raised the issue unless
22 there was an order that prescribed me to retain
23 them, there was nothing illegal or improper for me
24 to do other than to follow my normal practice.

1 Q. Well, did it occur to you, as a result of
2 your discussions with counsel, that there may well
3 be a concern or a problem created through or as a
4 result of the discarding of these documents?

5 A. My position in our exercise evaluation
6 process is for the participants and for FEMA's
7 evaluation of the participants demonstrated
8 behavior. I believe the process calls for an
9 agreement as to the facts and an agreement on the
10 issues. I've always taken a premise in my job
11 since the NRC expects a report from FEMA to put
12 together the most factual and accurate report to
13 the extent that I can. Once the document -- the
14 draft documents, working tools, are incorporated
15 in this report, then this report becomes the
16 document and the tools become superfluous to that
17 process.

18 Q. Well, I appreciate that perspective,
19 Mr. Donovan, but my question was did you become
20 aware through consultation with counsel that your
21 discarding of those working documents could lead
22 to a problem with regard to the exercise
23 litigation?

24 A. It wasn't my perception it could lead to a

1 problem, it could lead to the possibility of an
2 inquiry.

3 Q. You were aware before you did it that it
4 could lead to a possibility, at least, into this,
5 into this matter?

6 A. Well that's a paraphrase.

7 Q. And it may be a bad one. What I'm
8 searching for is really your motivation, if you
9 were aware that there was a downside to doing this
10 and it sounds to me like your testimony is that
11 you were at least somewhat aware that there might
12 be a downside to doing this, what was the
13 motivator, what was the upside to discarding these
14 documents?

15 A. Following my normal process.

16 Q. But, Mr. Donovan, in this instance, the
17 only difference would be that in a corner of your
18 office you'd have a pile of documents that now you
19 don't have, isn't that the only difference between
20 following your normal practice and not following
21 your normal practice?

22 A. From your perspective, yes.

23 Q. How about from your perspective?

24 A. From my perspective the process relies on

1 consolidation of data into two legs, one being
2 significant logs, one being narrative summaries,
3 those documents are produced in the draft report
4 and in the final report and are the perspective
5 that the participants and/or any regulatory
6 interest that are based upon not in the draft
7 material.

8 MR. FLYNN: I think your question,
9 John, is if the cost of keeping the documents was
10 some minor inconvenience, why not have done that?

11 Q. That's another way of putting the same
12 question. That was really the thrust of it, at
13 least that question was based on your perceptions
14 of the downside of destroying them versus the
15 benefits that you were going to gain from doing
16 it, and I'm not enlightened on that subject, I
17 appreciate that you have a certain conception and
18 view of the relationship between the working
19 documents and the final draft, that, I understand,
20 I'm asking you a different question. On the one
21 hand you would have retained them and they'd take
22 up space in your office, that's a cost that in the
23 world that I live in in light of the Seabrook case
24 is not very great.

1 What's the benefit to you of having
2 discarded those documents, why bother to do it?

3 A. I'm following my normal process, I'm not
4 doing anything different than I would do at any
5 other time.

6 Q. All right.

7 MR. TRAFICONTE: Off the record.

8 (There was a discussion off
9 the record.)

10 A. The other point I can add, you consider it
11 an inconvenience, perhaps you have lots of office
12 space, I don't, my office makes your office look
13 like a palace, I trip over paper every day. They
14 joke about me that I have three, three-foot in
15 baskets and I have stacks of paper on tables two
16 to three feet high and I was literally tripping
17 over this paper, and we had two concerns, we put
18 it on word processing, we sent that word
19 processing disc to Argonne to load into an NBI
20 system, and once that was in, that was the main
21 reason, until we were guaranteed that it was on
22 the word processing system that we were going to
23 use to publish the final report from, and after
24 the draft went out and the draft comments come

1 back on the draft, if there's issues that cause me
2 to go back and look to see if for some reason we
3 didn't type a page in loading it, and once that
4 process is gone through, there was no benefit to
5 me retaining the documents.

6 Q. All right. So, going back to your
7 testimony where you talk about consulting with the
8 Office of General Counsel several times, is it
9 your testimony that the several times stretch out
10 over a period of months, one time at or near the
11 time of the exercise and I take it there was a
12 later consultation with counsel?

13 A. Yes. We discussed a lot of issues over
14 several months. One, of course, of the issues was
15 being responsive in support of FEMA's position
16 that we will expedite to the extent possible the
17 production of a final Exercise Report.

18 Q. What I'm curious about is the several
19 times that you testified to here. I had read that
20 initially -- to be completely candid with you, I
21 had read that to mean that you had called Attorney
22 Flynn perhaps in the morning and you had a
23 consultation with him and perhaps on the afternoon
24 of the same day you called again, that would be

1 several times?

2 A. No, it was a period over several months
3 where I advised the Office of General Counsel that
4 unless directed to do otherwise, I was going to
5 follow my normal process and once I felt that the
6 report was out in final form and through all the
7 appropriate channels, I was going to take action
8 to discard the documents.

9 Q. Do you remember the date of the last
10 conversation along those lines?

11 A. Between September 4th and 5th.

12 Q. And September 7 when you discarded?

13 A. Right.

14 Q. Did you say you did it on September 7th?

15 A. I started sometime after September --

16 Q. After, okay. Did you want to complete --

17 A. No. I was just going to say it took
18 greater than the capacity of the trash can so it
19 took several days for the documents to disappear.

20 Q. Okay. As you sit here today, have you
21 taken any steps, you, yourself, taken any steps to
22 determine whether copies of all or portions of the
23 documents that you discarded exist?

24 A. I know in my mind of the documents that I

1 have in my custody that I discarded all of them.

2 Q. No, that I understand.

3 A. Then I described to you the process we
4 went through to check out the evaluators.

5 Q. You did?

6 A. From the exercise process.

7 Q. Let me give you an example, I now
8 understand much better than I did what you
9 discarded and where they came from. Mr. Keller,
10 for example, may very well have kept a copy of the
11 package of material, vis a vis the EOC, or his
12 team report, if you will, he may have made a copy,
13 provided you the original and retained a copy,
14 that's a possibility, have you made inquiry of him
15 in that regard?

16 A. Yes, I have, and the answer is no.

17 Q. Okay. Similarly, did you make such
18 inquiry of other team leaders and -- global team
19 leaders and subteam leaders?

20 A. Several, not exclusively but several.

21 Q. Several inquiries?

22 A. Right.

23 Q. And it turned up no each time?

24 A. That's correct.

1 Q. I take it that you made these inquiries
2 sometime after the date of a motion which I don't
3 know if you've reviewed, a motion filed by the
4 Massachusetts Attorney General in regard to these
5 documents?

6 A. Yes.

7 Q. Now, who in the Office of General Counsel
8 did you actually consult with in addition to
9 Attorney Flynn, anyone?

10 A. Attorney Cumming, but mostly Attorney
11 Flynn.

12 Q. Okay.

13 A. Up to May I had access to both, from May
14 on it was designated that Mr. Flynn would be my
15 point of contact unless he was not available.

16 Q. All right. Who else, if anyone, knew that
17 you intended or that you had an intention to
18 discard these documents?

19 A. Program officers that I work with in FEMA
20 headquarters.

21 Q. In FEMA headquarters?

22 A. Right.

23 MR. FLYNN: Excuse me, there is an
24 invocation in your question and the last series of

1 answers that Mr. Cumming knew about this issue.

2 MR. TRAFICONTE: He said may. Do
3 you want to resolve that?

4 MR. FLYNN: I don't know if that's
5 the case. Did you speak to Bill Cumming about the
6 issue of the disposal of the documents?

7 THE WITNESS: No, I had all my
8 conversations with you.

9 MR. TRAFICONTE: That's what I
10 understood from his testimony.

11 MR. FLYNN: I wasn't sure that it
12 was clear on the record.

13 Q. Who at FEMA headquarters was aware of your
14 intentions in this regard?

15 A. Do you want names or position?

16 Q. Both.

17 A. Mr. Wingo, Miss Lawless, Miss Turner, to
18 my knowledge.

19 Q. As far as you know, when did they know you
20 had this intention?

21 A. From before the exercise.

22 Q. Okay. Had you --

23 A. I repeat, I explained my normal process to
24 headquarters, FEMA, Region I, so that the regional

1 director was aware, the Office of General Counsel,
2 they were all aware of my process, and I kept
3 mentioning my process several times and there was
4 no mistake.

5 Q. When you described your process to these
6 individuals, did the description of your process
7 include the penultimate paragraph which was when
8 it's all done, the documents --

9 A. Yes.

10 Q. You just discard these documents, that's
11 what you've done in the past?

12 A. I've done four exercises since this
13 exercise, I've followed the same practice just as
14 I have for the 50 some-odd exercises before.

15 Q. Other than Seabrook you've never been
16 involved as RAC Chairman and a responsible party
17 in a litigated or contested --

18 A. As I said, I was involved in another
19 exercise but it was not in the Exercise Report.

20 Q. Did any of these individuals that you
21 disclosed this to say anything to you about, well,
22 let's not do it this time, let's just keep those
23 things over in the corner, did anybody say
24 anything like that?

1 A. No.

2 (There was a discussion off
3 the record.)

4 Q. Do you want to go ahead and supplement an
5 answer, you're free to do that?

6 A. Well, Mr. Flynn pointed out that our first
7 conversation which was during the week of the
8 exercise, the potential downside would be that
9 someone would doubt the credibility of my Exercise
10 Report, and I explained to him how I felt my
11 process brought agreement at several levels with
12 the evaluators who were reporting to me that week
13 and brought agreement and consensus from the
14 participants who were being exercised and it's
15 always been my experience that you cannot accuse a
16 participant of doing something if they did not do
17 it or if they did it at a different time, that
18 they will come back very hard and firm and provide
19 us facts to disprove our perception, and by using
20 both processes I felt I could produce a factual
21 report.

22 I felt FEMA's again responsibility was to
23 provide a report to the Nuclear Regulatory
24 Commission, not to provide 15 cubic feet of raw

1 data. The report has passed the scrutiny of the
2 designated supervisors and team leaders and group
3 leaders I had in the evaluation effort and passed
4 the scrutiny of the participants who were
5 evaluated.

6 Q. Omitted from the people who it's passed
7 the scrutiny of, however, is the actual evaluation
8 team, it remains a fact that other team leaders
9 and group leaders who did the actual evaluations
10 have the opportunity to review this after it's
11 reached either its draft or final form?

12 A. That's a fact. But, my normal process,
13 also, is not to mail a draft out to each and every
14 evaluator. I used my management system, I assign
15 responsibilities to certain people and I expect
16 more of them in return, and part of that return
17 responsibility is for them to review the document
18 in its draft stage.

19 Q. Did you understand on or about September
20 the 7th that interveners in the Seabrook case were
21 going to be filing contentions in regard to the
22 June exercise?

23 A. I understood that it was a possibility.

24 Q. You knew that was going to happen?

1 A. (Witness nods head.)

2 Q. Did you know that your report and I think
3 it's fair to say that both your draft and your
4 final version was a triggering condition for the
5 submission of those contentions, did you know
6 that?

7 A. Not specifically, no.

8 Q. Okay.

9 A. I only understood, as Mr. Flynn had
10 advised me, that again the Nuclear Regulatory
11 Commission asked us to expedite the production of
12 our report in the final form which meant the final
13 report goes to the Nuclear Regulatory Commission,
14 and what happened with that report from that point
15 on, whether it was to be used by an intervener or
16 not, I did not know.

17 Q. Did you know when you discarded these
18 documents that interveners conceivably could have
19 a right to request a production of documents
20 similar to those from you?

21 A. No, in fact, it was my perception of the
22 opposite.

23 Q. It was your understanding that the
24 documents that we're talking about would not be

1 producible, I mean, the interveners would not
2 have --

3 A. My reading of the -- I have it here -- the
4 FEMA NRC Memorandum of Understanding has specific
5 words that state that FEMA is not subject to
6 discovery. My interpretation as a layman of that
7 meant that the only documents that were subject to
8 discovery were the official reports.

9 Q. As a layman.

10 A. I even asked Mr. Flynn, when Mr. Flynn
11 advised me in mid-November or whatever it was that
12 I was under a board order not to destroy any
13 further documents which said to me that they are
14 not a department justice official, I said prove it
15 to me, why do I have to abide by an order of
16 another federal employee, and he proved it to me.

17 MR. FLYNN: I didn't object to the
18 question as I could have, the objection being that
19 it called for a legal conclusion because I
20 understood that the question was simply probing
21 his impression or his understanding.

22 MR. TRAFICANTE: That's all I want.

23 MR. FLYNN: Yes, and I want the
24 record to be clear that we're not taking legal

1 advice from Mr. Donovan.

2 Q. Were you aware -- I think you became
3 involved in Seabrook on the last day of 1987, if
4 my memory serves me, you received a memo from
5 Mr. Vickers telling you you were going to be
6 appointed the chief of the Seabrook problem. Were
7 you aware during the course of 1988 of depositions
8 that were taking place in the Seabrook litigation
9 involving FEMA personnel?

10 A. I was aware of some of the deposition
11 process that was taking place for the New
12 Hampshire plan and FEMA's position on the New
13 Hampshire plan, but I was not involved.

14 Q. I understand that. Did you understand
15 that interveners were taking the depositions of
16 FEMA personnel?

17 A. I received copies of some depositions that
18 were taken in March.

19 Q. Fine.

20 A. I received, I believe, those in April or
21 May, but what time I got around to reading them
22 was later than that.

23 Q. Were there any communications between you
24 and general counsel's office, Mr. Flynn, in

1 writing regarding the discarding of documents?

2 A. No, there was not.

3 Q. Either way, from you to him?

4 A. No.

5 Q. Did Mr. Flynn tell you that the documents
6 would be requested in the discovery process on the
7 exercise?

8 A. I don't believe -- he said the possibility
9 existed, that's my impression or interpretation of
10 our discussion.

11 Q. And he told you that there was the
12 possibility that the documents would be sought in
13 discovery on the exercise?

14 A. Yes.

15 Q. And you knew that, that there was that
16 possibility prior to your decision to follow your
17 normal practice?

18 A. (Witness nods head.)

19 MR. FLYNN: Give an audible
20 response.

21 A. Yes.

22 Q. Other than Mr. Flynn, did you discuss your
23 decision to destroy these documents with anyone
24 else before or after you did so?

1 A. I advised members of FEMA headquarters on
2 several occasions that I was going to follow my
3 normal process and discard the documents when the
4 report was officially transmitted to the Nuclear
5 Regulatory Commission unless directed to do
6 otherwise.

7 Q. Those discussions you have already
8 testified to. Did you have any other more
9 specific discussions or conversations with FEMA or
10 for that matter with anybody other than Mr. Flynn
11 at or near the time that you made the decision to
12 discard these documents?

13 A. Other parties in FEMA headquarters were,
14 also, informed in that week of September --

15 Q. That week, okay.

16 A. I believe the same three individuals.

17 Q. Mr. Wingo, Miss --

18 A. Miss Lawless and Miss Turner were aware of
19 my intentions.

20 Q. Now, we're going to do one more set of
21 questions and then we'll take a break. If I could
22 direct your attention to paragraph eight of
23 Exhibit Number Three. In this portion of your
24 declaration, you make reference to Guidance

1 Memorandum 16. Did you review Guidance Memorandum
2 16 at any time during the week to ten days prior
3 to your discarding these documents?

4 A. I reviewed Guidance Memorandum 16 several
5 times over the last year, realizing that it was
6 the expectation of FEMA, Region I, and still as a
7 matter of record that I maintain the record for
8 Seabrook until I transferred that responsibility
9 back to Region I.

10 Q. All right. So that you had occasion over
11 the last year in your role and based on your
12 involvement in the Seabrook matter to review
13 GM-16?

14 A. Right, and, also, to review Freedom of
15 Information regulations as codified in FEMA's
16 portions.

17 Q. Oh, you have, that was something I was
18 going to turn to in a minute. Before we do that,
19 let's nail down GM-16. The more precise question
20 was did you have occasion to review that
21 memorandum at or near the time that you discarded
22 these documents?

23 A. Within 30 days.

24 Q. Prior?

1 A. Right.

2 Q. And based on your review, in part, of that
3 memorandum, you felt that what you were doing was
4 in conformity --

5 A. Was consistent with the agency's policy
6 for maintaining public documents for a REP site.

7 Q. During your conversations with either
8 Mr. Flynn or with the three individuals at
9 headquarters, was any of the discussion focused on
10 or did it touch on Guidance Memorandum 16?

11 A. Not specifically, I believe the focus of
12 the discussion was what is the official record,
13 what documents need to be an official record and
14 are my actions consistent with my interpretation
15 of the language that the agency has used to
16 describe as the official record.

17 Q. Well, you said that you had reviewed your
18 own agency's FOIA regulations, and did you make
19 that review at or near the time that you went
20 ahead and discarded these documents?

21 A. Yes, I did.

22 Q. And do you recall reviewing 44 CFR Section
23 5.3 at that time?

24 A. Yes, I do.

1 Q. All right. Did you make that review prior
2 to your decision?

3 A. Within 30 days.

4 Q. Prior?

5 A. Prior.

6 Q. And did you make your decision based on
7 some judgment that you reached concerning the
8 interpretation of the language in Section 5.3?

9 A. I felt that the definitions used in that
10 particular section of FEMA's federal regulations
11 were consistent with the language used in Guidance
12 Memorandum 16 with regard to public records.

13 Q. I'm going to show, and I have a quote of a
14 portion of Section 5.3 which you can just read, I
15 don't want to read it to you, I've got my finger
16 in the beginning part of it, I'll read it into the
17 record in a second.

18 (Pause.)

19 Q. Is this your memory of what the language
20 of -- let me withdraw that.

21 You decided that based on your
22 understanding of this Section 5.3 of 44 CFR that
23 it was permissible under FEMA's regulations to
24 discard those documents. To put it your way, you

1 reached the decision, did you not, that these
2 documents were not appropriate for preservation as
3 that phrase is used in Section 5.3?

4 A. I reached my decision based on Guidance
5 Memorandum 16, 44 CFR 350 and the FOIA language.
6 It was my interpretation of the language based on
7 the consultations since each region has a --
8 formally, the retention of these documents, first
9 of all, is at the discretion of the regional
10 director, and if you read it in its entirety, it
11 says the regional director unless, and specifies
12 some specific order, leaves the discretion to the
13 program office as to which documents are retained
14 and what documents are discarded, and my
15 interpretation of the definition of records is
16 that it is a report and in this case it was our
17 Exercise Report.

18 Q. Did you have conversations with Mr. Flynn
19 and the three other individuals at FEMA
20 headquarters regarding the proper interpretation
21 of Section 5.3 of the regulations?

22 A. No, I did not, that specific federal
23 regulation doesn't call for a consultation.

24 Q. Well, it may not call for a consultation,

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Federal Emergency Management Agency

Region X

Federal Regional Center

Bethel, Washington 98021-9796

March 2, 1988

Memorandum for: Dr. Joan C. Hoek
 Chief, Technological Hazards Division, SL-NT-TH
Richard W. Donovan
 From: Richard W. Donovan
 RAC Chairman for the Review of Seabrook Plan for
 Massachusetts Communities

Subject: Seabrook Site Visit: Status Report and Issues

The purpose of this memorandum is to brief you on my trip to Seabrook and discussions that were held. I attempted to brief you last Friday but missed you each time I called. I briefed Mr. Sanders in his capacity as acting NT-TH and this memorandum will bring FEMA HQ up-to-date.

In accordance with the conference call between Dave McLoughlin, Richard Krimm and myself on February 18, I continued to follow the normal FEMA review process as prescribed by 44CFR350, guidance memorandum GM 16 (Standard Reviewing and Reporting Procedures) and GM 17 (Joint Exercise Procedures). That conference call and follow-up discussions with you on February 17 authorized me to (1) release the draft FEMA Review and Evaluation of the Seabrook Plan for the Massachusetts Committees to the Regional Director, FEMA RI, and the FEMA RI RAC; (2) authorized me to brief the New Hampshire Yankee organization (NHY) on the status of our review; and (3) authorized me to be responsive to requests from NHY for technical assistance. Note: Dave McLoughlin requested that R. Krimm document the above two authorizations in writing to me and as of yet, I have not received any written authorization(s) from FEMA HQ.

Following is a list of particulars and issues relating to my site visit, briefings on the Draft Review and evaluation, and discussions relating to the current scheduled exercise (5/23/88).

- At the public meeting on 12/22/87, Mr. Krimm committed FEMA to complete the review and evaluation of the Seabrook Plan for Massachusetts Communities in 4 months with the review date commencing on 1/4/88.
- In the NHY's letter of 9/18/87, 12/18/87, 12/30/87, 2/12/88, 2/16/88, 2/19/88 and in the statements at the 12/22/87 public meeting, NHY has consistently requested NRC and FEMA to accommodate a two track process; e.g., plan review and spring 1988 graded exercise.
- At the 12/22/87 public meeting, Mr. Stello (NRC) said that the Federal Government would accommodate NHY's request for two track(s). FEMA did not object to Mr. Stello's statement.
- On 1/7/88, C. Wingo (FEMA HQ) requested that I develop a plan review schedule to accommodate the 5/1/88 milestone and inform him on 1/8/88 of my schedule.
- On 1/8/88, I informed FEMA HQ that I would produce a first draft to the RAC by 2/19, a second draft to the RAC by 3/10, a RAC meeting 3/28-4/1, and a final review and evaluation to FEMA HQ by 4/15/88.

- The purpose of my site visit was to determine the adequacy of facilities, equipment and resources identified in the Seabrook Plan for Massachusetts Communities and to brief the NHY on the issues identified in the draft FEMA Review and Evaluation of the Seabrook Plan.
- On 2/23, I briefed FEMA Region I (Mr. Vickers, Mr. Warren, Mr. Horak, and Mr. Dolan) on the issues identified in the draft FEMA Review and Evaluation. Mr. Vickers confirmed that he wanted me to be the responsible person for all aspects of the exercise evaluation process regarding the Seabrook Plan for Massachusetts Communities and that RI staff would be responsible for the New Hampshire and Maine evaluation/exercise process in the graded exercise. I requested Mr. Vickers and staff to join me later in the week when I briefed the NHY on the issues in the draft FEMA Review and Evaluation.
- I and my staff visited the American Red Cross and determined that they were a non-participating organization.
- I and my staff visited the Yankee Atomic Laboratory where we were joined by NRC HQ and Region I staff.
- On 2/24/88, I and my staff conducted an initial meeting with NHY organization where we reviewed the items and facilities we wished to visit, and I established two meetings: 2/25 to review the draft review, and 2/26 to discuss outstanding issues. We proceeded to visit the Joint Media Center, the NHY ORO EOC, the Beverly Reception Center, the MS-1 Primary Hospital, the North Andover Reception Center, and the Staging area that day. A special briefing was given to us on the Status of Preparedness for Special Populations that evening. Separately and parallel to our visits (briefing and discussion), a member of my staff conducted a verification of the Letter of Agreement (Planning Standard C) with the 44 different concerns between 2/24-26.
- On 2/25 we received a briefing and status report on the revised A & N system. Note, NHY stated that the FEMA REP 10 design report and request for formal evaluation would be mailed by 3/1/88. We received a detailed briefing on the status of the Ingestion Exposure Data Base; we received a status report on the Congregate Care Center preparedness efforts. I gave a radiological scenario to NHY staff and I requested the staff to perform a plume and ingestion dose projection based on the scenario. We observed and evaluated this dose projection process. We visited the EBS Station, received a briefing on the status of preparedness, and discussed the status of preparedness.
- During the afternoon, I gave a briefing on inadequacies identified in the FEMA Draft Review and Evaluation. Based on the observations and evaluations made during my visit, I added 4 inadequacies to the 39: E5, I7, I10, J10h, M4. Note, since I10 had already been rated inadequate, but for different reasons, the revised total number of inadequacies is 43. I had requested a copy of FEMA HQ's briefing (2/18 script) to NRC HQ in order to verify that I had properly categorized the inadequacies into the two groups. Note, only NRC HQ and NRC RI and my staff had access to the FEMA HQ script. The only question raised by NHY was in response to the briefing on the inadequacy was A1b; e.g., remove Mode 3 from their plan. I informed

them that FEMA HQ had insisted on this element be rated inadequate and would not consider the plan in compliance with the criteria unless Mode 3 was removed. For the record, I do not consider element A1b inadequate because Mode 3 is in the plan. I informed NHY that FEMA's position was that group 1 inadequacies had to be corrected before FEMA would agree to a graded exercise. Mr. Vickers and Mr. Dolan (Region I) attended the briefing session and several questions were raised regarding the preparedness status of New Hampshire and Maine: e.g., whether there were any similar impediments in preparedness to the scheduled exercise. Region I's position was that there were no impediments in New Hampshire or Maine to a graded exercise to be held in May, 1988.

- That evening, we visited two transfer dispatch points, Plum Island, and the Parker River Wildlife Refuge.
- On 2/26, we received a briefing on the training program and progress to date, on MS-1 backup hospital, and on ambulance arrangements. I requested NHY to provide documentation on the Congregate Care arrangements, MS-1 backup hospital procedure, ambulance procedure, good faith training attempts for non-participating organization, parking lot sizes, and the completed ingestion pathway data base.
- On 2/26, I met with NRC HQ and NRC R1 to discuss issues and schedules related to FEMA's plan review and exercise preparation process. I note that 44CFR350 establishes policy for FEMA Regions to follow. In addition, GM 16 and GM 17 set specific requirements: e.g., GM 16 establishes the procedure and process for FEMA Region(s) to review plans, to maintain files, and to report findings to FEMA HQ. This process is documented in the Overview of the REP Program, SL-NT memorandum, 10/22/87. Under GM 16, the Region is to prepare and maintain a complete site specific file by jurisdiction of the Region's findings. When the Region had completed its review or when FEMA HQ's requests on interim finding, the Regional Director will issue a report on the Region's review and evaluation.

GM 17 established the procedure, exercise process, and the standardized FEMA approach for evaluating FEMA graded exercise. GM 17 assigns the RAC chairman the responsibility for interfacing with exercise participants and establishing exercise dates, schedules for meetings, critiques, etc. GM Ex-2 established guidelines for the FEMA Regional Director to allocate FEMA resources for REP exercises. GM Ex-2 establishes the initial 44CFR350 exercise as the highest priority.
- I discussed the schedules for plan review and exercise processing with NRC R1 and NRC HQ. I discussed and received the FEMA R1 Regional Director's approval on these schedules in accordance with 44CFR350, GM 16, and GM 17.
- On 2/26, I conducted an exit briefing with NHY. The FEMA R1 Regional Director and the NRC HQ representative contributed to my briefing as appropriate. I presented the two schedules referenced above (see Attachment A). I discussed the fact that FEMA HQ and NRC HQ were in the process of issuing GM Ex-3 and a supplement to GM Ex-3. I indicated that the supplement to GM Ex-3 should specify an additional objective to the existing 35 objectives and that the Ex-3 supplement should specify that the

initial graded exercise for this type of situation (non-participating organization) would require that 34 of the 36 exercise objectives be demonstrated.

- Following the exit interview, NHY senior management (President of NHY), requested a separate meeting with Mr. Vicker, NRC HQ, and myself. They requested a postponement of the graded exercise for the week of 5/23 to the week of 6/23. Mr. Vickers suggested that they meet the schedule milestones for O & L's and scenario submission that I outlined for the exercise process in the exit interview in order to allow additional time for coordination, review, etc.
- I requested Mr. Vickers to inform Region II of the exercise date change since it may impact them. I advised him that I would inform FEMA HQ of the exercise date change.
- On 2/28, in your absence, I informed Mr. Sanders (acting for you) of Seabrook's request for change in exercise date, and FEMA RI's concurrence.

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ATTACHMENT A**FEMA Schedule(s)
by R. Donovan****A. FEMA Plan Review and Evaluation Milestones**

- * 1st Draft by 2/19.
- * Site Visit 2/23-2/26.
- * 2nd Draft by 3/10.
- * RAC Meeting 3/28-4/1.
- * Final Review to FEMA HQ by 4/15.
- * FEMA Finding to NRC HQ by 5/1.

Note, these milestones meet the commitment made by Richard Krimm to NRC and NHY on 12/22/87 and my commitments to Mr. Vickers and FEMA HQ on 1/8/88.

B. FEMA/NRC Exercise Process and Milestone

- * Assumption: NHY exercise 5/23-26/88.
- * Objectives and Limitations to FEMA RI and NRC RI by 3/7/88.
- * FEMA RI: NRC RI Review and Approval of Objectives and Limitation by 3/22/88.
- * Scenario to FEMA RI and NRC RI by 4/6/88.
- * FEMA RI and NRC RI review, comment, and approval of scenario by 4/21/88.
- * Exercise during the week of 5/23/88.

These milestones are in accordance with the policy of GM 17 (and GM EX-3). Note, GM EX-3 says that the GM 17 milestones stay in effect for 1988.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



In the Matter of)

PUBLIC SERVICE COMPANY)
OF NEW HAMPSHIRE, ET AL.)

(Seabrook Station, Units 1 and 2))

) Docket Nos. 50-443-OL
) 50-444-OL
) (Off-Site EP)

) April 5, 1989
)

CERTIFICATE OF SERVICE

I, John Traficante, hereby certify that on April 5, 1989, I made service of the within MASSACHUSETTS ATTORNEY GENERAL'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM FEMA by first class mail to:

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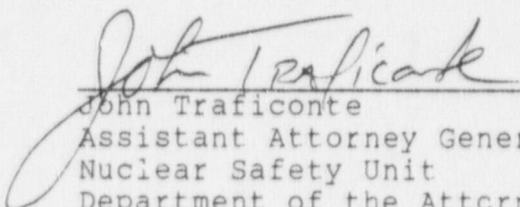
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