



October 8, 2013

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

FOIA/PA REQUEST  
Case No.: 2014-0002A  
Date Rec'd: 10/9/13  
Specialist: Blaney  
Related Case: 2013-0240

SUBJECT: *Appeal of FOIA/PA 2013-240*

Dear Mr. Satorius:

On behalf of San Luis Obispo Mothers for Peace ("SLOMFP"), and pursuant to the Freedom of Information Act ("FOIA") (5 U.S.C. § 552) and applicable Nuclear Regulatory Commission ("NRC") regulations in 10 C.F.R. Part 9, I hereby appeal NRC's effective failure to respond to SLOMFP's May 7, 2013, request for documents related to spent fuel storage risks.<sup>1</sup> While we submitted the FOIA Request over five months ago, the NRC has produced only two documents in response: a press release and a related document that NRC was about to issue for public comment. Not a single additional document has been produced. We reasonably consider the NRC's failure to produce anything other than two public documents -- that were intended for widespread public release in any event -- to constitute an effective denial of our request.

We also request your immediate review of this appeal, because it is time-sensitive. The requested documents are necessary to our effective and meaningful participation in two major ongoing NRC regulatory proceedings with time-limited opportunities for public participation: (a) the process for public comment on the proposed Waste Confidence Decision rule and Draft Waste Confidence Generic Environmental Impact Statement (comments due November 27, 2013);<sup>2</sup> and (b) the NRC's evaluation of expedited transfer of spent fuel from storage pools at operating reactors (NRC Staff recommendation to Commissioners scheduled for October 11, 2013 and Commission decision scheduled for late 2013).<sup>3</sup>

### Statutory and Regulatory Background

Under 10 C.F.R. § 9.25(a), the NRC has twenty working days in which to take action on a request for agency documents. In "unusual circumstances," NRC may provide written notice of its intention to take up to ten additional days to respond.<sup>4</sup> In "exceptional" circumstances, the

<sup>1</sup> Attachment 1, Letter from Diane Curran to NRC FOIA/PA Officer ("FOIA Request").

<sup>2</sup> Notice and request for comment re: Draft Waste Confidence Generic Environmental Impact Statement, 78 Fed. Reg. 56,621 (Sept. 13, 2013); proposed rule, Waste Confidence – Continued Storage of Spent Nuclear Fuel, 78 Fed. Reg. 56,776 (Sept. 13, 2013).

<sup>3</sup> Notice and request for comment re: Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a US Mark I Boiling Water Reactor, 78 Fed. Reg. 39,781 (July 2, 2013).

<sup>4</sup> 10 C.F.R. § 9.25(b).



NRC may give the requester an opportunity to narrow the search so that it can be complied with in the regulatory time frame, or may seek the requester's agreement to an alternative time frame.<sup>5</sup>

If the NRC denies a FOIA request, it may be appealed to the Executive Director for Operations ("EDO").<sup>6</sup> If the agency fails to respond to the request within the regulatory period, the requester may treat the failure to respond as a denial, and appeal it to the EDO; or may sue the NRC in Federal District Court.<sup>7</sup>

### **Factual Background**

On May 7, 2013, in preparation for its participation in the upcoming Waste Confidence rulemaking and EIS commenting process and the NRC's proceedings for consideration of expedited transfer of spent fuel from reactor pools, SLOMFP submitted its FOIA Request. The FOIA request sought the identification and release of documents in the following categories:

- All records relating to research, assessments, or studies conducted since January 2007 regarding the accident risks (including accidents caused by unintentional events and attacks) posed by wet or dry storage of spent nuclear reactor fuel;<sup>8</sup>
- All records of the assertedly "significant additional analyses" of spent fuel pool risks, performed since September 11, 2001, that "support the view that the risk of a successful terrorist attack (i.e., one that results in an SFP zirconium fire) is very low;"<sup>9</sup> and
- NRC's "site evaluations of every [spent fuel pool] in the United States," referred to in 73 Fed. Reg. at 46,208.<sup>10</sup>

SLOMFP also requested a waiver of search and copying fees.<sup>11</sup> In support of its waiver request, SLOMFP noted that it intended to use the requested documents in commenting on the Waste Confidence EIS, which was scheduled for issuance in September 2013.<sup>12</sup> SLOMFP did not request expedited treatment of its request, however, because it was submitting the request so far in advance of the publication date for the Draft GEIS.

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<sup>5</sup> 10 C.F.R. § 9.25(c).

<sup>6</sup> 10 C.F.R. § 9.29(a).

<sup>7</sup> 10 C.F.R. § 9.25(j).

<sup>8</sup> FOIA Request at 1.

<sup>9</sup> *Id.* at 2 (quoting The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46, 207 (Aug. 8, 2008)).

<sup>10</sup> *Id.* at 2.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 4.

By letter dated May 8, 2013, the NRC acknowledged receipt of the FOIA Request, assigned it a docket number, and notified SLOMFP that it had waived search and copying fees.<sup>13</sup>

Around the same time, at the request of Gerald McClellan of the NRC's FOIA staff, SLOMFP narrowed the scope of its request as follows:

The scope of the request covers all relevant records that include documented research, assessments, and studies written between September 11, 2001 through 7 May 2013 on the topics of spent fuel accident events, spent fuel accident risks, spent fuel sabotage risks, and the Extended Storage Collaboration Program. The definition of "record" will remain as noted in your request and is clarified to exclude non-substantive e-mails that were produced by keyword searches based on search terms such as spent fuel, dry storage, and spent nuclear fuel, but address purely budgetary, personnel, travel and (or) internal NRC administrative matters.<sup>14</sup>

According to Mr. McClellan, this narrowing would allow NRC to "provide the most responsive and timely response."<sup>15</sup>

On June 26, 2013, SLOMFP received a partial response to its FOIA Request.<sup>16</sup> The response identified only two documents: a press release and a draft technical report comparing accident risks posed by spent fuel storage in pools and dry casks: Draft Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a US Mark I Boiling Water Reactor (June 2013) ("Draft Consequence Study").

Several days later, the NRC published a Federal Register notice of the availability of the Draft Consequence Study and requested comments by July 1, 2013.<sup>17</sup> The issues on which the NRC sought comment included the subject matter of SLOMFP's FOIA Request, *i.e.*, accident risks posed by pool storage and dry storage of spent fuel.

On September 13, 2013, the NRC published public notice of the availability of the Waste Confidence DGEIS and requested comments by November 27, 2013.<sup>18</sup> Like the Draft Consequence Study, the subject matter of the Waste Confidence DGEIS included the same issues covered by SLOMFP's FOIA Request: accident risks posed by pool storage and dry storage of spent fuel.

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<sup>13</sup> Attachment 2, Letter from Donna L. Sealing, FOIA/Privacy Act Officer, to Diane Curran, re: FOIA/PA-2013-00240.

<sup>14</sup> Attachment 3, e-mail exchange between Gerald McClellan and Diane Curran (May 21 and May 29, 2013).

<sup>15</sup> *Id.*

<sup>16</sup> Attachment 4.

<sup>17</sup> *See* note 3.

<sup>18</sup> *See* note 2.



Since receiving the NRC's June 26, 2013, first partial response to its FOIA Request, SLOMFP has received no further responses from the NRC.

On October 3, 2013, undersigned counsel spoke to NRC FOIA officer Stephanie Blaney, who said the FOIA office has received several boxes of documents from the NRC technical staff that are responsive to SLOMFP's FOIA Request, but has not had time to review them due to a backlog of FOIA requests related to the Fukushima accident.

### **Discussion**

Under 10 C.F.R. § 9.5(a), the NRC had until June 5, 2013 (twenty working days after receipt of SLOMFP's FOIA Request) to provide a response. By narrowing the scope of its request, as provided by 10 C.F.R. § 9.5(c), SLOMFP had a particularly reasonable expectation of receiving a timely FOIA response. Even anticipating some further delay in the NRC's response to SLOMFP's FOIA Request, SLOMFP reasonably expected to receive a complete response within five months, *i.e.*, by the end of September. But despite the acknowledged existence of several boxes of responsive documents, SLOMFP has received no substantive document other than one that NRC noticed in the Federal Register and widely circulated for public comment several days later. SLOMFP respectfully submits that this effectively constitutes no response at all.

Because NRC failed to respond to SLOMFP's FOIA Request within the regulatory period, SLOMFP is treating it as a denial, and therefore appeals it pursuant to 10 C.F.R. § 9.29(a). Given (a) the relevance of the requested documents to pending and time-limited proceedings on the Waste Confidence GEIS, the Waste Confidence proposed rule, and the NRC's consideration of whether to expedite removal of spent fuel from pools at operating reactors; and (b) SLOMFP's timeliness in filing the FOIA request well in advance of when those proceedings were scheduled to take place, SLOMFP respectfully requests you to undertake an expedited review of this appeal and order the release of the requested documents within twenty working days. If the documents are not received within the allotted time, SLOMFP may elect to exercise its right to seek judicial review.

Please do not hesitate to contact me if you have any questions about this appeal.

Sincerely,

/s/

Diane Curran  
Counsel to San Luis Obispo Mothers for Peace

Cc: Allison Macfarlane, NRC Chairman