



**Friends of
the Earth**

FOIA/PA REQUEST

Case No.: 2015-0071
Date Rec'd: 12/1/14
Specialist: So
Related Case:

November 28, 2014

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

Re: FOIA Request for records about Dr. Michael Peck's Dissenting Professional Opinion in regard to Diablo Canyon Units 1 and 2

Dear NRC FOIA/Privacy Officer:

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

Friends of the Earth (FoE) is a nonprofit organization founded in 1969, with more than 316,600 members and activists in every state in the country. FoE uses policy analysis and advocacy to work for a healthier and just world. For forty years FoE has campaigned to reduce the health and environmental risks of nuclear power.

I. Description of Records Sought

We ask that the NRC provide all records¹ dated between and including July 18, 2013 to September 22, 2014 in NRC's possession, custody, or control that mention, refer to, are about, or are related to the "Dissenting Professional Opinion" (DPO) submitted to the NRC by former Diablo Canyon Power Plant Senior Resident Inspector Dr. Michael Peck on July 18, 2013 in regard to operations of the Diablo Nuclear Power Plant, Units 1 and 2. The requested records include, but are not limited to, any internal communication² within the NRC (including NRC Commissioners and NRC Staff) and any communication between the NRC and Pacific Gas and Electric Company "PG&E" regarding the DPO.

Our request includes but is not limited to records involving internal and external communication by, with, from, or among the following NRC representatives:

- NRC Executive Director of Operations, **Mark Satorius**
- NRC Senior Public Affairs Officer of Region IV, **Victor Dricks**
- NRC Region IV Public Affairs Officer, **Lara Uselding**
- NRC Area IV Regional Administrator, **Marc Dapas**
- NRC Area IV Deputy Regional Administrator, **Kriss Kennedy**
- NRC Area IV Office of Investigations Field Office Special Agent in Charge, **John Oglesby**
- NRC Area IV Reactor Projects Branch A, Chief, **Wayne Walker**
- NRC Office of Nuclear Reactor Regulation Project Manager **Susan Abraham**
- NRC Office of Nuclear Reactor Regulation Division of Safety Systems Director **Timothy McGinty**
- Previous NRC Office of Nuclear Reactor Regulation Director, **Eric J. Leeds**
- NRC Office of Nuclear Reactor Regulation Technical Assistant, **Trent Wertz**
- NRC Office of Nuclear Reactor Regulation Japan Lessons-Learned Division Director, **David Skeen**
- NRC Office of Nuclear Reactor Regulation Deputy Director for Reactor Safety Programs, **Jennifer Uhle**
- NRC Office of New Reactors Director, **Glenn Tracy**
- NRC Office of New Reactors Deputy Director, **Gary Holahan**
- NRC Division of Operating Reactor Licensing, Senior Project Manager, **Balwant Singal**
- NRC Region IV Reactor Projects Division Deputy Director, **Troy Pruett**
- NRC Reactor Projects Branch A Chief, **Wayne Walker**
- NRC Office of Enforcement, Differing Profession Opinions Program Manager, **Renee Pederson**
- NRC Office of Enforcement Director, **Roy Zimmerman**
- NRC Office of Public Affairs, Director, **Eliot Brenner**
- NRC Office of Public Affairs, Public Affairs Officer, **Scott Burnell**
- NRC Acting Chief for Plant Licensing Branch IV-1, Division of Operating Reactor Licensing, **Eric Oesterle**
- NRC Plant Licensing Branch 4-1, Division of Operating Reactor Licensing, Branch Chief, **Michael Markley**

¹ The term "records" is used herein to mean anything denoted by the use of that word or its singular form in the text of FOIA. The term includes correspondence of any kind, minutes of meetings, memoranda, notes, emails, letters, cards, telegrams, teletypes, briefing papers, cables, forms, diaries, schedules, chronological data, meeting and teleconference agendas, notices, facsimiles, charts, tables, presentations, orders, filings, receipts, printed matter, checks, statements, agreements, any evidence of telephone communication, any audio, aural, visual, or video item, including without limitation all cassette tapes, compact disks, digital video disks, microfiche, pictures, photographs, or videotapes, and any writings (handwritten, typed, electronic, or otherwise produced, reproduced, or stored).

² The term "communication" must be given the broadest possible meaning and includes comments, emails,

courtesy copies of emails, messages, notes, data sets, calendars, personal digital assistant entries, any record of telephone communication, any other agency record involving communication and/or record of communications, as well as the above-mentioned items considered "records" if and when they mention, are related to, have been, or are going to be, shared or communicated between PG&E and NRC representatives.

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

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

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

our democracy, the

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

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

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

III. Request for a Fee Waiver

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

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

The records requested herein pertain to the activities of the NRC in regulating seismic safety at the Diablo Canyon Nuclear Power Plant and addressing serious allegations brought forth from within the agency. NRC is a government agency. The requested records thus directly concern "the operations or activities of the government." See 5 U.S.C. § 552(a)(4)(A)(iii); 43 C.F.R. § 9.41(d)(l).

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

The requested records are "likely to contribute" to the public's understanding of government operations and activities. 5 U.S.C. § 552(a)(4)(A)(iii); 10 C.F.R. § 9.41(d)(2). There is intense public concern about the NRC's regulation and licensing actions regarding Diablo Canyon Nuclear Plant. The allegations raised by Dr. Peck in the DPO about the NRC's licensing procedures for Diablo Canyon have been widely publicized.

The records requested will shed light on the validity of Dr. Peck's allegations regarding the seismic safety and legal operability of Diablo Canyon by providing an understanding of the intent and logic behind the NRC's final Appeal Decision revealed on September 10, 2014. Because it regards public safety, it is a matter of considerable public interest and concern: NRC's actions, contacts and assessments regarding the seismic safety of Diablo Canyon have received worldwide attention. This is demonstrated by the following examples of media coverage:

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

Public understanding of NRC's actions regarding Diablo would be significantly enhanced by disclosure of the requested records. Disclosure would help the public to more effectively evaluate NRC's recent and future decisions. Disclosure would also help the public to better understand and evaluate NRC's actions regarding the safety and operability of Diablo Canyon.

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

FoE is a nonprofit environmental organization with no commercial interest in obtaining the requested information. Rather, we intend to use the requested information to inform the public, so the public can meaningfully participate in the public health, environmental, and safety risks posed by the Diablo Canyon Nuclear Power Plant. We believe that transparency of the relationship between the NRC and its licensee is essential to the NRC's obligation "to protect public health and safety, the environment, and the common defense and security."

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

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

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

We intend to use the requested information to understand and analyze the context, logic, and intent of NRC communications regarding Dr. Peck's allegations detailed in the DPO in order to ensure that NRC is adequately prioritizing public safety and is in accordance with the law. We intend to make such understanding and analysis available to their members and the general public. Where relevant, we may also use the requested information in licensing proceedings for Diablo Canyon, to which they are a party.

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

FoE members and attorneys will carefully analyze the requested records to evaluate the series of actions that have been taken by the NRC since the submission of the DPO in July 2013. We will analyze each record requested to understand what factors within and outside the NRC led to its DPO Appeal Decision on September 10.

We will ensure that those factors were in accordance with NRC's obligation to regulate independently, prioritize public safety, and the law.

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

We intend to use the requested information to educate our members about the validity of Dr. Peck's allegations and NRC's September 10 Appeal Decision. The surrounding communication and records related to the DPO are central to the ongoing licensing reviews for Diablo Canyon (both the license renewal proceeding and the *de facto* license amendment proceeding). The information found in these records will be disseminated to our members through news releases, blog posts, emails, or other electronic media or legal filings on behalf of the organizations in the licensing proceedings.

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

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

Currently, the public does not have much of a contextual basis for understanding the recent NRC DPO Appeal Decision. Through access to the requested records, the public will be able to assess, analyze, and potentially challenge NRC's Decision. However, without the necessary understanding of the context, logic, and intent behind NRC's Decision (which will likely be revealed by the requested records addressing the DPO), this understanding is impossible.

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

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

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

The means by which we intend to disseminate the information yielded by this FOIA request are described above in *F*. In addition, if the requested documents reveal a partiality by the NRC towards the licensee, or another indication of disregard for public safety and the law, we will evaluate whether to raise the issue in the licensing proceedings.

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

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

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

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

IV. Willingness to Pay Fees Under Protest

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

V. Conclusion

We trust that, in responding to this request, NRC will comply with all relevant deadlines and other obligations set forth in FOIA and NRC's FOIA regulations. *See,*

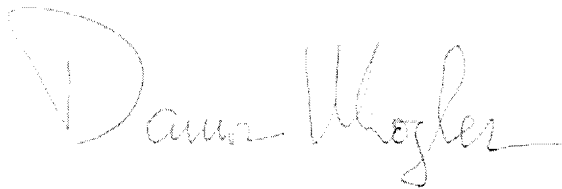
e.g., 5 U.S.C. § 552(a)(6); 10 C.F.R. § 9.25. .

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

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

Thank you for your prompt attention to this request.

Sincerely,

A handwritten signature in cursive script, reading "Damon Moglen". The signature is written in dark ink on a white background.

Damon Moglen
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