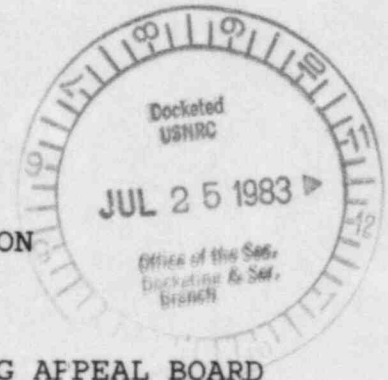


RELATED CORRESPONDENCE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION



BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of)
PACIFIC GAS AND ELECTRIC COMPANY) Docket No. 50-275 O.L.
Diablo Canyon Nuclear Power Plant) Docket No. 50-323 O.L.
Units Nos. 1 and 2) (Reopened Hearing --
Design Quality
Assurance)

MOTION OF LICENSEE
TO COMPEL PRODUCTION OF DOCUMENTS
BY GOVERNOR DEUKMEJIAN

Pursuant to 10 CFR § 2.740(f)(1), Licensee moves the presiding member of this Board, and members thereof, for an order compelling Governor Deukmejian to fully respond to Licensee's document production request previously served on the Governor on June 10, 1983. The response of the Governor was served on July 15, 1983.

The Governor has objected to several interrogatories on the blanket ground that the documents requested are all work-product and were made in preparation

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U.S. NUCLEAR REGULATORY COMMISSION
DOCKETING & SERVICE BRANCH
OFFICE OF THE SECRETARY
OF THE COMMISSION

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1 for litigation and not discoverable under the provisions of
2 10 CFR § 2.740(b)(2).

3 As to any document for which a privilege was to be
4 claimed the document production request specifically asked
5 that the Governor identify the document, describe its
6 nature, and identify its author, its addressee, and its
7 custodian. (First Document Discovery Request by Pacific Gas
8 and Electric Company to Governor Deukmejian, page 2, lines
9 1-22).

10 The Governor has failed to provide such
11 information to which Licensee is clearly entitled.

12 By slight of pen, counsel for the Governor also
13 has deftly excluded any documents which preceded January 3,
14 1983. Licensee's document request, as do the issues of the
15 motion to reopen, extends farther back in time and extends
16 also to individuals other than this particular Governor.
17 Correspondence, notes and the like of other representatives
18 of the Governor, made prior to January 3, 1983, clearly fall
19 within Licensee's request.

20 21 PRODUCTION REQUESTS

22 Request No. 1.

23 All writings you have taken at all meetings
24 between the NRC and/or PG&E and/or companies involved in the
25 Independent Design Verification Program (IDVP) from
26 October 1, 1981 to the present.

1 Response:

2 This request is objected to as requesting material
3 that is attorney work product and not discoverable under the
4 NRC Rules of Practice, 10 C.F.R. section 2.740(b)(2). All
5 writings requested were made by attorneys or consultants
6 working at the direction of attorneys, were made in
7 preparation for litigation, and contain the mental
8 impressions, conclusions, and opinions of the authors.

9 Request No. 2.

10 All documents relating to Diablo Canyon design or
11 design quality assurance prepared by PG&E, the IDVP, or the
12 NRC, having comments, notes, or the like on them and any
13 writings prepared by or for you discussing, commenting on or
14 otherwise referring to those documents.

15 Response:

16 This request is objected to on the following
17 grounds. All documents requested are on file in this case
18 and are fully available to PG&E. Insofar as the request
19 seeks notes, comments, and the like written on these
20 documents by counsel or their employees or seeks writings
21 discussing or commenting on these documents, the request
22 seeks material that is work product and not discoverable
23 under the NRC Rules of Practice 10 C.F.R. Section
24 2.740(b)(2). Any and all such writings were made by counsel
25 or by consultants to or employees of counsel working at
26 counsel's direction, were made in preparation for

1 litigation, and contain the mental impressions, legal
2 theories, conclusions, and opinions of the authors.

3 Request No. 3.

4 All documents relating to Diablo Canyon design or
5 design quality assurance not produced in response to Request
6 No. 2 which have been prepared or reviewed by or for you.

7 Response:

8 Insofar as this request seeks material prepared by
9 or at direction of counsel, in preparation for litigation,
10 and containing the mental impressions, legal theories, and
11 conclusions of the authors, the request is objected to on
12 the ground that the documents are work product and not
13 discoverable under the NRC Rules of Practice, 10 C.F.R.
14 Section 2.740(b)(2).

15 The Governor has received some letters from
16 private citizens or groups discussing design quality
17 assurance at Diablo Danyon [sic], and will produce these in
18 Sacramento if requested to do so.

19 Request No. 4.

20 All documents that contain calculations, analyses
21 or computer programs performed by or for you regarding the
22 design of Diablo Canyon structures, systems or components.

23 Response:

24 Other than documents objected to in the response
25 to Request No. 2, above, no such documents exist.

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1 Request No. 5.

2 All correspondence or records of meetings or
3 telephone conversations between Mr. Hubbard (or his
4 associates) and Dr. Rosette [Sic.] (or his associates)
5 related in any way to design of structures, systems, or
6 components at Diablo Canyon.

7 Response:

8 This request is objected to as calling for
9 materials that are work product and not discoverable under
10 the NRC Rules of Practice, 10 C.F.R. Section 2.740(b)(2).
11 All meetings between Mr. Hubbard and Dr. Roesset took place
12 in the presence of counsel, and notes of such meetings were
13 taken by or at direction of counsel, in preparation for
14 litigation, and contain the mental impressions, legal
15 theories, opinions, and conclusions of the authors.

16 Request No. 6.

17 All notes, calculations, meeting minutes, computer
18 outputs, drawings or other writings prepared by MHB
19 Technical Associates or Dr. Rosette [sic.] or any other of
20 your technical consultants related in any way to design or
21 design quality assurance at Diablo Canyon.

22 Response:

23 All documents requested have been requested and
24 objected to previously.

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1 Argument:

2 Basic to the scope of discovery is the premise
3 that a party is entitled to information which appears
4 reasonably calculated to lead to admissible evidence. 10
5 CFR § 2.740(b)(1). Notwithstanding the claim of the
6 Governor that Licensee has requested documents which may be
7 privileged, facts as to the description of such documents,
8 their origin, their addressee, their author, and their
9 present custodian are facts which are discoverable. 10 CFR
10 § 2.740(b)(2) provides protection only for "documents and
11 tangible things." Ford v. Phillips Electronic Instruments
12 Co. 82 F.R.D. 359, 360 (D.C. B. 1979). Courts have
13 consistently held that the work product concept furnishes no
14 shield against discovery, by interrogatories or by
15 deposition, of the facts that the representative of a party
16 has learned, or the persons from whom he has learned such
17 facts, or the existence or nonexistence of documents, even
18 though the documents themselves may not be subject to
19 discovery. In re Intern. Systems 2nd Controls Corp.
20 Securities 91 F.R.D. 552, 561 (D.C. Tex 1981). U.S. v.
21 Glaxo Group Ltd. D.C.D.C. 1969 302 F. Supp. 1, 17; 8 Wright
22 and Miller § 2023, page 194. Absent identification and
23 description as requested by Licensee, it is not even
24 possible for Licensee or this Board to ascertain whether the
25 information contained within the documents was actually
26 prepared for litigation or whether it could be readily

1 obtained from some other source. As to the documents,
2 themselves, some may be discoverable. Documents and
3 tangible things which are not trial preparation material are
4 routinely discoverable. Peterson v. U.S. 52 F.R.D.317, 320
5 (D.C. Ill, 1971).

6 Licensee would also respectfully point out that
7 the issues at hand involve an extremely complex subject
8 matter. Where, for example, the use of computers is
9 involved regardless of whether an expert is involved,
10 Licensee may be entitled to access to calculations or
11 computer outputs under modern theory:

12 "In order to prepare to defend against
13 the conclusions that are said to flow
14 from these efforts, the discovering
15 party not only must be given access to
16 the data that represents the computer's
17 'work product,' but he also must see the
18 data put into the computer, the programs
19 used to manipulate the data produced the
20 conclusions, and the theory or logic
21 employed by those who planned and exe-
22 cuted the experiment." 8 Miller &
23 Wright § 2218, page 660.

19 Counsel for the Governor has sought to universally
20 immunize all documents from discovery. Just because certain
21 information may be contained in the files of counsel or a
22 representative of a party does not, in itself, make such
23 information work product. As the U. S. Supreme Court stated
24 in the landmark case of Hickman v. Taylor (1947) 329 U. S.
25 495, 511, 67 S.Ct. 385, 394:

26 ///

1 Where relevant and non-privileged facts
2 remain hidden in an attorney's file and
3 where production of those facts is es-
4 sential to the preparation of one's
5 case, discovery may properly be had.
6 Such written statements and documents
7 might, under certain circumstances, be
8 admissible in evidence or give clues as
9 to the existence or location of relevant
10 facts. Or they might be useful for
11 purposes of impeachment or corrobora-
12 tion. And production might be justified
13 where the witnesses are no longer avail-
14 able or can be reached only with
15 difficulty.

9 Licensee acknowledges the immunity of work-product set forth
10 in 10 C.F.R. 2.740(b)(2). However, notwithstanding such
11 rule, documents containing relevant information are subject
12 to review by this Board in camera:

13 Our ruling that opinion work product is
14 discoverable only in rare and extra-
15 ordinary circumstances does not shield
16 these materials from judicial scrutiny.
17 An attorney may be ordered to deliver
18 his opinion work product to the court
19 for in camera inspection. In re
20 Fish & Neave, 519 F.2d 116 (8th Cir.
21 1975); see United States v. Nixon 418
22 U.S. 683, 713-14, 94 S.Ct. 3090, 41
23 L.Ed.2d 1039 (1974). The court can
24 categorize the material according to its
25 nature and issue any discovery orders
26 that are justified under Rule 26(b)(3),
giving due protection to those portions
containing an attorney's mental
impressions, opinions and legal
theories. Furthermore, our ruling does
not undermine the integrity of the
fact-finding process. Under Rule
26(b)(3), any relevant facts contained
in non-discoverable opinion work product
are discoverable upon a proper showing.
Advisory Committee's Notes to Rule
26(b)(3), 48 F.R.D. 487, 501 (1975);
see 8 C. Wright & A. Miller, Federal
Practice and Procedure § 2023, at 194-96

1 (1970). (In re Murphy 560 F.2d 326,
2 336-337, n. 20, (8th Cir. 1977)).

3 Finally, the Governor has failed to satisfy the
4 necessary procedural requirements in order to claim the
5 workproduct privilege.

6 A proper claim of privilege requires a
7 specific designation and description of
8 the documents within its scope as well
9 as precise and certain reasons for pre-
10 serving their confidentiality. Unless
11 the affidavit is precise to bring the
12 document within the rule, the Court has
13 no basis on which to weigh the applica-
14 bility of the claim of privilege. An
15 improperly asserted claim is no claim at
all. . . . In short, a party resisting
disclosure on the ground of attorney-
client privilege must by affidavit show
sufficient facts as to bring the
identified and described document within
the narrow confines of the privilege.
International Paper Co. v. Fibreboard
Corp. 63 F.R.D. 88, 94 (D.Del. 1974).

16 Accordingly, Counsel for the Governor should not, with the
17 waive of a pen, be able to cloak all documents in his
18 possession or in the possession of the representative of the
19 Governor from review or production especially without
20 describing and fully identifying those documents for
21 Licensee and the Board.

22 CONCLUSION

23 Licensee respectfully requests that the Board order
24 the Governor and his representatives to deliver documents
25 requested or in the alternative that the Governor fully
26 respond to the instructions of the request and identify,

1 describe, and locate each such document for which immunity
2 is claimed.
3

4 Respectfully submitted,

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25 By /s/ Bruce Norton
26 Bruce Norton

21 DATED: July 20, 1983.
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23
24
25
26

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY)
)
Diablo Canyon Nuclear Power Plant,)
Units 1 and 2)
)

Docket No. 50-275
Docket No. 50-323

CERTIFICATE OF SERVICE

The foregoing document(s) of Pacific Gas and Electric Company has (have) been served today on the following by deposit in the United States mail, properly stamped and addressed:

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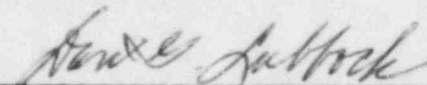
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Date: July 21, 1983


Pacific Gas and Electric Company

*Hand delivered on July 21, 1983,
by Bruce Norton. Others mailed
same date.