

Environmental Defense Institute

Troy, Idaho 83871-0220

Director
Office of Hearings and Appeals
HG-1 U.S. L'Enfant Plaza Bldg.
U.S. Department of Energy
1000 Independence Ave, SW
Washington, DC 20585-1615

Sent via U.S. Certified Mail

**RE: Freedom of Information Appeal
Concerning Department of Energy Idaho Operations Office Response to Freedom of Information
Act Request from Environmental Defense Institute and Keep Yellowstone Nuclear Free
(10-032) (OM-PA-10-063)**

September 30, 2010

Dear Director,

On behalf of the Environmental Defense Institute, Inc. (EDI) and Keep Yellowstone Nuclear Free, Inc. (KYNF) (“Requestors”) I respectfully submit this Freedom of Information Act (FOIA) appeal to the Office of Hearings and Appeals (OHA) and pursuant to 10 C.F.R 1004.8 .

Requestor’s FOIA filed with DOE Idaho Operations Office (DOE/ID) (IOO) FOIA Officer dated 6/23/10 remains in negation limbo in terms of actual release of requested documents. DOE/ID has released some requested documents as listed in their FOIA Reply (10-032) (OM-PA-10-063) dated 9/3/10 (see attached Exhibit B). On advice from DOE/ID FOIA Officer and given the legal time limitation of 30 days imposed on Requestors, we are obliged to file this Appeal in order to meet the legal deadline. Requestors therefore ask that the Office of Hearings and Appeals direct DOE/ID to immediately release all the documents requested in their entirety.

I. EDI/KYNF FOIA Request

On June 23, 2010 Requestors filed a FOIA with DOE/ID Freedom of Information Office – attached as Exhibit A. Requestors are seeking information relating to the DOE owned and operated by Battelle Energy Alliance (BEA) Advanced Test Reactor (ATR) operating, environmental and health safety reports – a matter of significant public attention and concern. The ATR is a 45 year-old nuclear reactor located at the Idaho National Laboratory (INL).

On September 18, 2010, Requestors filed with DOE/ID FOIA Office, a Supplemental Reply to DOE/ID FOIA Response (10-032) (OM-PA-10-063) dated 9/3/10. This Requestor Supplemental Reply is attached as Exhibit C offers additional clarification to our original 6/23/10 FOIA.

II. DOE/ID Response

On September DOE/ID FOIA mailed to EDI a Response (10-032) (OM-PA-10-063) dated 9/3/10 that is hereto attached as Exhibit B. DOE/ID's Response outlines the current FOIA status as of 8/25/10.

III. Relief Requested:

Requestors seek a complete copy of all documents identified in hereto attached Exhibits A and C that have not been released by DOE/ID. Additionally, Requestors find DOE/ID 9/3/10 Response as non-responsive and inadequate; Specifically, in DOE/ID response;

* Section I.1 states; "(a). Current version of SAR is being reviewed; (b.) EHA-50 is being reviewed; (d.) A search for responsive documentation beyond what was provided in 2008-2009 is ongoing.

Requestors' response; In Section I.1 (a), (b) and (d) above, DOE/ID acknowledges that current versions of these documents exist, however offer no explanation of the review process or timeline.

* Section I.1 (c) above states; "Design Basis Reconstitution' is the name of an effort under the Life Extension Program, it is not a document."

Requestors' response; DOE/ID is acknowledging that 'Design Basis Reconstitution' is an effort under the 'Life Extension Program – so a due diligence response would be to provide a copy of the 'Life Extension Program where this "effort" is discussed. Additionally, requestors are cognizant of – for example but not limited to – PL-534 "ATR Design Reconstitution Program Plan" and current updates.

* Section I.1 (e) above states; " Facility Certification Reports are no longer required, none have been prepared since FCR-29."

Requestors response; We accept DOE/ID assertion.

* Section I, 2 states; "Responsive USQs are currently being identified."

Requestors' response; DOE/ID acknowledges that current versions of these documents exist, however DOE/ID offer no rationale for why it takes so long for them to be "identified."

* Section I.3.a states; "There were no ATR 'emergency shutdowns' due to any condition or event."

Requestors' response; We are cognizant of (and cite as an example but not limited to) INL Reactor Outage Procedure and Documentation (Identifier DOP 7.2.7) and Shift Record Sheets (2/5/08) and later current reports. The release of these documents is necessary proof as to the absence of scrams and the verification of the DOE/ID statement. Additionally, we are cognizant of DOE/ID Occurrence Reports showing that there were apparently seventeen ATR shutdowns between 2007 and 8/16/10.

* Section I.3.b states; "There is no responsive documentation beyond what was provided in 2008-2009."

Requestors' response; We are cognizant of DOE/ID 7/21/10 News Release titled "Annual report shows potential INL radiation doses well below safe regulatory limits" that specifically states; "Operations at the Advanced Test Reactor, an operating nuclear reactor at the INL, resulted in a dose of 0.00796 mrem and is about 11.6% of the total INL site dose." DOE/ID is acknowledging the existence of the current INL NESHAP report, so clearly there is "responsive documentation" available.

* Section I.3.c and d states: "A search for responsive documentation beyond what was provided in 2008-2009 is ongoing."

Requestors' response; Stating that the search is ongoing is insufficient given the timeline of the EDI/KYNF's initial FOIA request.

* Section I.3.e states; “There is no responsive documentation beyond what was provided in 2008-2009.”

Requestors’ response; We are cognizant of responsive reports. For example, but not limited to, NE-ID-BEA-ATR-2010-003 report about an “air leak” inside the ATR containment structure.

* Section I.3.f states; “There is no responsive documentation beyond what was provided in 2008-2009.”

Requestors’ response; We are cognizant of responsive reports. For example but not limited to, NE-ID-BEA-ATR-2007-0025 report about a “power failures” at the ATR.

* Section I.3.h. states; “There is no responsive documentation that addresses this assertion.”

Requestors’ response; We are cognizant of responsive reports. For example - but not limited to - an April 2008 declassified ATR report that puts the “Effective Point Power Limit” at 428 MW, which is 71% over the 250 MW operational power limit - reported in Idaho National Laboratory, Doc. No. CCN-213422, April 22, 2008, Advanced Test Reactor Cycle 142A-1 Core Safety Assurance Package, page 20. Also see ATR power at 428 MW, January 31, 2008, CCN-212539, page 20.

* Section I.3.m states; “Enclosed are two responsive documents.”

Requestors’ response; We find this incomplete and insufficient. We are cognizant of (and cite as an example but not limited to) “ATR Material Condition Assessment Report for PCS and Reactor Vessel, NISYS Corp. prepared for Battelle Energy Alliance, LLS, NISYS 1255, December 2007” as relevant reports on effects on aging on structural integrity. EDI/KYNF is requesting all responsive documents.

* Section I.4 states; “No responsive documents exist”

Requestors’ response; This is unfounded and contrary to 10 C.F.R. Section 1004.4(d) (3). We are cognizant of (and cite an example but not limited to) “Leak-Before-Break Evaluations for ATR Primary Coolant Systems, MPR Associates Engineering, prepared for Battelle Energy Alliance, LLC, MPR-3088, December 2007” as independent engineering reports for the period 2006 to present available for release under our FOIA request.

* Section I.5 states; “The request for ‘Engineering Design File reports’ is too broad; taken literally, it would involve thousands of pages of material.”

Requestors’ response; We are cognizant of the potential volume of material requested. Numerous previous individual FOIA involved “thousands of pages” Requestors were successful in reviewing them.

* Section II states; “You requested ‘all internal reports cited/referred to in the DOE-Idaho Bi-Weekly Operations Summary/INL Updates. On July 11, 2010, I sent you an email with the internet address website [<http://www.hss.energy.gov/csa/analysis/orps/finalorps/orps.html>] that would allow you to access the cited internal reports. In response, you indicated that all the requested information was not available on the site. The reports that are currently available via the OPPS database represent all that have been issued as final. The additional 2010 reports cited in the DOE Idaho Bi-Weekly Operations Summary (per your email of 8/12/10) are draft documents that have not been reviewed/approved for issuance as final reports; they will be available on the website as soon as that process is complete.”

Requestors’ response; Again, DOE/ID acknowledges that current versions (adequately final to post on DOE Operations Summary) of these documents exist, however offer no rationale for why it takes so long to “review” them and post on DOE’s website.

IV. Previous Rulings:

Office of Hearings and Appeals rulings on previous Requestors' petitions include: Case Nos. TFA-0298, TFA-0128, TFA-0177 and TFA-0156.

V. Relevant Authority:

10 C.F.R. Section 1004.8 Appeal of initial denials (a) Appeal to Office of Hearings and Appeals states; "When the Authorized Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees consistent with Section 1004.9, the requester may, within 30 calendar days of this request, appeal the determination to the Office of Hearings and Appeals."

10 C.F.R. Section 1004.4(d) (3) states; "If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester will be so notified."

VI. EDI/KYNF June 23, 2010 FOIA Still Pending

Requestors wish to remind OHA that our 6/23/10 FOIA to DOE/ID is still pending, now over three months since it was filed. Therefore, we reiterate our request that OHA direct DOE/ID to release these documents in their entirety.

Respectfully submitted,

Chuck Broschious
Environmental Defense Institute
edinst@tds.net
208-835-5407

James T. Powell
Executive Director
Keep Yellowstone Nuclear Free
james@yellowstonenuclearfree.com
307-699-5439

Attachments:

- Exhibit A; Environmental Defense Institute and Keep Yellowstone Nuclear Free joint FOIA to DOE/ID dated 6/23/10;
- Exhibit B; DOE/ID FOIA Response (10-032) (OM-PA-10-063) dated 9/3/10;
- Exhibit C; Environmental Defense Institute and Keep Yellowstone Nuclear Free joint FOIA Supplemental Request to DOE/ID dated 9/18/10.

cc: via email; Clayton Ogilvie (ogilivc@id.doe.gov) DOE/ID FOIA Officer
Mark Sullivan, attorney for Requestors