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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)
)
Pacific Gas and Electric Co.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))

Docket No. 72-26-ISFSI
ASLBP No. 02-801-01-ISFSI

RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO ISSUES PROFFERED BY
THE COUNTY OF SAN LUIS OBISPO AND THE PORT SAN LUIS HARBOR DISTRICT

I. INTRODUCTION

On August 7, 2002, the Atomic Safety and Licensing Board ("Licensing Board") issued a Memorandum and Order requiring interested governmental entities to submit, by August 21, 2002, any proposed issues for hearing in addition to those already proffered by the San Luis Obispo Mothers for Peace, *et al.*¹ On August 19, 2002, the Port San Luis Harbor District ("District") submitted a response to the Order identifying additional issues the District wishes to raise in this proceeding.² On August 21, 2002, San Luis Obispo County ("County") submitted a response identifying its proposed issues.³ In accordance with the schedule established by the Licensing Board in its August 7 Order, Pacific Gas and Electric Company

¹ See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation), slip op. Aug. 7, 2002 ("August 7 Order").

² See Response of Port San Luis Harbor District to Atomic Safety and Licensing Board Order of August 7, 2002, dated August 19, 2002 ("District Response").

³ See Subject Matter Upon Which the County of San Luis Obispo Desires to Participate Pursuant to 10 C.F.R. § 2.715(c), dated August 21, 2002 ("County Response").

Template = SECY-049

SECY-02

("PG&E") herein responds to the submissions of both the District and the County (collectively, the "governmental participants") as to the admissibility of their proffered issues. As discussed further below, neither the District nor the County has identified an admissible issue. Accordingly, all proposed issues proffered by the governmental participants in this proceeding should be rejected.

II. STANDARDS FOR ADMISSIBILITY OF ISSUES

Once admitted to a proceeding, a governmental participant must comply with all procedural rules and is subject to the same requirements as parties appearing before the Licensing Board. *See Gulf States Utils. Co.* (River Bend Station, Units 1 & 2), ALAB-444, 6 NRC 760, 768 (1977); *Pub. Serv. Co. of N.H.* (Seabrook Station, Units 1 & 2), LBP-90-12, 31 NRC 427, 430-31, *aff'd in part on other grounds*, ALAB-934, 32 NRC 1 (1990). Accordingly, any new issue set forth by a participating governmental entity must "be framed with sufficient detail and preciseness" to define the "concrete issues which are appropriate for adjudication in the proceeding." *See Diablo Canyon*, August 7 Order, slip op. at 2; *citing River Bend*, ALAB-444, 6 NRC at 768-69 (quoting 10 C.F.R. § 2.714(a), then the provision setting forth the requirements for the submission of contentions). In essence, new issues set forth by an entity seeking to participate under 10 C.F.R. § 2.715(c) must meet the requirements for admissible contentions. *See generally* 10 C.F.R. § 2.714(b); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), LBP-99-14, 49 NRC 238, 258 (1999).

Under 10 C.F.R. § 2.714(b)(2), a contention "must consist of a specific statement of the issue of law or fact to be raised or controverted." Additionally, each contention must be accompanied by:

- (i) A brief explanation of the bases of the contention.

- (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
- (iii) Sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application that the petitioner disputes and the supporting reasons for each dispute.

10 C.F.R. § 2.714(b)(2). *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2 & 3), CLI-99-11, 49 NRC 328, 333 (1999); *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996). It follows from the above that, to be admissible, a contention must be within the scope of the proceeding. *See also Ariz. Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), LBP-91-19, 33 NRC 397, 411-12, *appeal denied on other grounds*, CLI-91-12, 34 NRC 149 (1991); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Units 2 & 3), LBP-01-10, 53 NRC 273, 280 (2001).

III. DISCUSSION

A. Port San Luis Harbor District

1. *District EP-1: Adequacy of the DCPD Emergency Response Plan*⁴

The District raises only one issue, concerning the adequacy of the Diablo Canyon Power Plant (“DCPD”) Emergency Response Plan (“ERP”). Specifically, the District believes that the current ERP is “outdated” and requires “re-examination.” The District identifies five particular “concerns,” or bases, for this belief:

- (1) The District contends that there are areas of the twelve Protective Action Zones (including the Avila Valley) that have “poor or non-existent [sic] radio reception” for the radio frequencies used by the

⁴ The District does not title its contention. For ease of reference, we designate the proposed issue EP-1, in accordance with the categories for proposed contentions delineated in the Board’s June 6 Initial Prehearing Order.

local Emergency Alert System radio stations. (District Response at 2.)

- (2) The District contends that current evacuation time estimates do not use the best available science. Rather, the District claims that the "Avila Beach Traffic Circulation Study" should be used to simulate a full evacuation in the Avila Valley. (District Response at 3.)
- (3) The District contends that accident risk assumptions used to support the ERP in the 1970s "may have been under-played," therefore rendering the ERP "unreliable." (District Response at 3.)
- (4) The District contends that demographics and the vehicle escape routes in the Avila Valley have changed since the ERP was adopted. Specifically, the District states that the original population projections within the 50-mile emergency planning zone ("EPZ") are no longer valid and should be re-assessed. In addition, the District states that a secondary road once identified as an emergency escape route no longer exists. (District Response at 3.)
- (5) The District contends that population shifts in the EPZs "are not correctly recognized in the ERP." Specifically, the District argues that, during "three-day summer weekend holiday[s]," the transient population within the EPZs "skyrockets," and emergency personnel and staging areas are limited and "can not [sic] realistically accommodate this type of population." (District Response at 3.)

The District's proposed contention challenges several elements of the DCPD ERP.

However, such a challenge cannot be addressed in this proceeding. As the District implicitly concedes in its Response, 10 C.F.R. § 72.32(c) bars any challenge to the ERP in an ISFSI licensing proceeding. The regulation provides:

For an ISFSI that is (1) located on the site, or (2) located within the exclusion area as defined in 10 CFR part 100, of a nuclear power reactor licensed for operation by the Commission, the emergency plan required by 10 CFR 50.47 shall be deemed to satisfy the requirements of this section.

In the 1995 Statements of Consideration promulgating this rule, the Commission clearly stated the reasoning supporting the rule:

The analysis of potential onsite and offsite consequences of accidental releases associated with the operation of an ISFSI is contained in NUREG-1140. This evaluation shows that the maximum dose to a member of the public offsite due to an accidental release of radioactive materials would not exceed 1 rem effective dose equivalent, which is within the EPA Protective Action Guides or an intake of 2 milligrams of soluble uranium (due to chemical toxicity). *Thus, the consequences of worst-case accidents involving an ISFSI located on a reactor site would be inconsequential when compared to those involving the reactor itself. Therefore, current reactor emergency plans cover all at- or near-reactor ISFSI's.*

Final Rule, Emergency Planning Licensing Requirements for Independent Spent Fuel Storage Facilities (ISFSI) and Monitored Retrievable Storage Facilities (MRS), 60 Fed. Reg. 32,420, 32,431 (June 22, 1995)(emphasis added). It is clear that the District's concerns go to the adequacy of the current power plant ERP and are therefore barred by 10 C.F.R. § 72.32(c).⁵

Consistent with the notice of opportunity for hearing in this matter, this proceeding is also limited to matters relating *to the construction and operation of the proposed ISFSI*.⁶ In its Initial Prehearing Order, the Licensing Board specified as follows with respect to contentions on the subject of emergency planning:

Emergency Planning — primarily concerns issues relating to matters discussed or referenced in the revised DCPD Emergency Plan *as it relates to the proposed ISFSI and associated portions of the PG&E ISFSI license application.*

⁵ The District does not request a waiver of application of Section 72.32(c) for this particular proceeding pursuant to 10 C.F.R. § 2.758(b). Indeed, nowhere in its Request has the District identified anything approaching "special circumstances" with respect to this proceeding that would demonstrate that application in this proceeding of Section 72.32 would not serve the purposes for which it was adopted, and thus demonstrate the propriety of such a waiver.

⁶ See Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation, 67 Fed. Reg. 19,600, 19,601 ("Contentions shall be limited to matters within the scope of the action under consideration"). The action under consideration, in turn, is the application to store spent fuel in a dry cask storage system at DCPD for a twenty-year period. *Id.* at 19,600.

Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), Memorandum and Order (Initial Prehearing Order), slip op. at 3 (June 6, 2002)(emphasis added). The District does not, however, challenge the revised DCPD ERP *as it relates to the ISFSI*. Rather, the District's issue is a general concern that the assumptions on which the ERP is based may be outdated. The specific bases listed above are in no way limited to the ISFSI or to any revisions in the ERP related to the ISFSI. The proposed contention, and each of its bases, in reality address ongoing operational matters related to updating the ERP and are beyond the scope of this proceeding.

The District is not, however, without avenues in which to address concerns related to the emergency plan. For example, Appendix E to 10 C.F.R. Part 50 requires that each licensee conduct a "full participation" emergency preparedness exercise every two years. *See* 10 C.F.R. Part 50, Appendix E, § F.2.C.⁷ As an interested local entity, the Harbor District is entitled to participate in these biennial exercises and raise concerns in connection with the ERP at that time. In addition, changes to a Part 50 power reactor emergency plan may be made at any time, pursuant to 10 C.F.R. § 50.54(q).⁸ Any interested party is free to approach PG&E, the NRC, or other appropriate government agencies to express concerns and pursue possible plan changes to be addressed through the plan change process. Finally, to the extent that the District's concerns implicate compliance issues, it may, at any time, file a request for enforcement (or other) action

⁷ "Full participation" in this context means that appropriate offsite local and State authorities, in addition to the licensee, test major observable portions of the onsite and offsite emergency plans, as well as mobilization of state, local and licensee personnel and other resources in order to verify the capability to respond to the defined accident scenario. *Id.* at § F.2.A. n.4.

⁸ That provision states, in pertinent part: "The nuclear power reactor licensee may make changes to these [emergency] plans without Commission approval only if the changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the standards of § 50.47(b) and the requirements of appendix E to this part."

pursuant to 10 C.F.R. § 2.206. *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 n.4 (2001)(“[s]afety questions not properly raised in an adjudication may nonetheless be suitable for NRC consideration under its public petitioning process, 10 C.F.R. § 2.206); *Power Auth. of N.Y.* (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-01-14, 53 NRC 488, 552 n. 231 (2001)(example of same). However, as discussed above, this proceeding is not the vehicle for updating emergency plans and is not the proper forum for broad emergency preparedness concerns. The District’s issue cannot be accepted for litigation.

B. County of San Luis Obispo

1. *County TC-1: Corporate Identity and Structure of the Applicant*

In its first proposed issue, the County argues that the Application “fails to adequately identify the identity and organizational structure of the Applicant.” (County Response at 3.) Specifically, the County contends that the information provided by PG&E in the Application to satisfy 10 C.F.R. § 72.22(d)⁹ is insufficient in light of the pending Chapter 11 proceeding and PG&E’s Plan of Reorganization. The County contends that PG&E should not be permitted to apply for a license that “may be transferred to an unknown corporate entity.” (County Response at 4.) The County also contends that an evaluation of the applicant’s corporate structure should only be done following confirmation of a reorganization plan by the Bankruptcy Court. (*Id.*)

⁹ Section 72.22(d) requires, in pertinent part, that an applicant for a Part 72 license state in its application whether it is acting as an agent or representative of another person in filing the application. If so, the applicant must identify the principal and information required by that section (including identity of officers and directors, state of incorporation, etc.) with respect to the principal.

This proposed issue essentially restates concerns raised in SLOMFP proposed Contentions TC-2 and TC-3, and should be rejected for the reasons discussed in PG&E's Response to SLOMFP's proposed contentions.¹⁰ The County's argument that PG&E is applying for a license for (or would transfer the license to) "an unknown corporate entity" is simply incorrect and overly dramatic. The County does not present a contention with any factual or legal basis, or one for which any relief could be granted in this proceeding.¹¹

As stated in the Application, PG&E is the applicant for the Part 72 license.¹² PG&E is an electric utility subject to economic regulation by the California Public Utilities Commission ("CPUC"). Information required to meet 10 C.F.R. § 72.22 with respect to PG&E is provided in the Application. The County is certainly correct that PG&E's Plan of Reorganization is pending before the Bankruptcy Court. As discussed in greater detail in PG&E's Response, implementation of the Plan of Reorganization would result in the transfer of DCPD and the ISFSI to new licensees.¹³ However, the financial and other issues germane to those prospective licensees are already being reviewed by the NRC in connection with the proposed DCPD license transfer. The contention that the identity and corporate structure of the

¹⁰ See Response of Pacific Gas and Electric Company to Supplemental Request for Hearing and Petition to Intervene of San Luis Obispo Mothers for Peace et al., dated August 19, 2002, at 19-34 ("PG&E Response").

¹¹ See *Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station)*, CLI-93-3, 37 NRC 135, 142 (1993)(a contention may be refused if, even if proven, it would be of no consequence to the proceeding because it would not entitle the petitioner to relief).

¹² See Application § 1.4 ("PG&E . . . makes this application on its own behalf. PG&E is not acting as an agent or representative of any other person").

¹³ See also PG&E Letter DIL-02-008 from L. Womack, PG&E, to the NRC Document Control Desk, "Supplemental General and Financial Information — 10 CFR 72.22," dated June 7, 2002.

applicant are not adequately described should be dismissed from this proceeding without further consideration.

Moreover, the County argues that “evaluation of the licensee’s corporate structure should only be done if the reorganization plan has been confirmed.” (County Response at 4.) This proposed issue also does not raise a factual or legal dispute with respect to the Application. It is merely an attempt to revive earlier requests for a stay of this proceeding, which were denied by the Licensing Board in a Memorandum and Order dated July 15, 2002.¹⁴ Neither fact nor logic supports a delay. The Application is clear. PG&E’s status is clear. The implications of these matters can be addressed. The facts of the Plan of Reorganization are also known and are being addressed in the license transfer review. To the extent any future decision in the bankruptcy proceeding bears on the instant proceeding or operation of the ISFSI, the County could raise that matter at the appropriate time through appropriate regulatory processes. The request for stay should again be denied.

2. *County TC-2: Adequacy of Applicant’s Financial Qualifications*

In proposed Issue TC-2, the County contends that PG&E has provided insufficient information to “make an informed decision about the licensee’s financial qualifications” and satisfy the requirements of 10 C.F.R. § 72.22(e). As “bases” for this issue, the County contends that (1) PG&E “speculates” that it or its successor will be in a position to borrow sufficient funds to cover the costs of constructing the ISFSI, and in its view the “credit worthiness and borrowing capabilities of PG&E or its successor cannot be ascertained or assured” (County Response at 6);

¹⁴ *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-15, 56 NRC __ (slip op. July 15, 2002). Also, the Commission in the Part 50 license transfer case denied similar requests for a stay. *See Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant, Units 1 & 2), CLI-02-16, 55 NRC __, slip op. at 3-5 (June 25, 2002).

and (2) PG&E seeks to avoid financial qualifications requirements “by representing that it is an electric utility.” (*Id.*) The County argues that PG&E should not be “relieved” of financial qualifications requirements on this basis, because the ISFSI licensee will not be an electric utility if PG&E’s reorganization plan is implemented. (*Id.*)

This proposed issue restates contentions raised by SLOMFP in its proposed Contentions TC-2, bases c and d, and TC-5. PG&E has responded to the issues raised in those proposed contentions in detail, and will not reiterate that discussion here. See PG&E Response at 25-30; 40-43. For the reasons discussed in the PG&E Response, the County’s version of the issue does not present a genuine dispute with respect to a material issue of law or fact and should be rejected as well.

The County does not attempt to dispute the specific financial qualifications information in the Application. It is not even clear whether the County is referring to the financial qualifications of current PG&E or the proposed transferee under the Plan of Reorganization. The arguments amount, again, to no more than a request for a stay pending the bankruptcy resolution.

Moreover, the County generally makes only bare assertions that “any representations” regarding financial qualifications for constructing, operating, and decommissioning the ISFSI are “based on speculation regarding the restructuring of PG&E.” Such bare assertions are insufficient to constitute an admissible contention. See *Yankee Rowe*, CLI-96-7, 43 NRC at 248 (“for a contention to be admissible, a petitioner must refer to the specific portion of the license application being challenged, state the issue of fact or law associated with that portion, and provide a “basis” of alleged facts or expert opinions, together with references to specific sources and documents that establish those facts or expert opinions”).

The County states that it “expects to explore” the financial qualifications issue in a hearing. (County Response at 6.) However, under NRC rules, there must be an admissible issue before there is any exploration in a hearing.

The County makes one superficial assertion regarding the ability of PG&E or its successor to finance safe construction and operation of the ISFSI through borrowed funds. However, this assertion ignores the Application and reality. As stated in the Application (at 4, § 1.5), and as discussed fully in PG&E’s Response to SLOMFP’s similar issues, as long as PG&E is the applicant/licensee, the funds necessary to cover the costs of designing, constructing, and operating the ISFSI will derive from electric rates and from electric operating revenues. *See* Decision 02-04-016, Opinion Adopting Revenue Requirements for Utility Retained Generation, 2002 WL 988148 (Cal. P.U.C. Apr. 4, 2002), slip op. at 23-25. With respect to PG&E’s successor under the Plan of Reorganization, financial qualifications are established in the license transfer application. The County has not shown that in either situation the ISFSI would involve debt financing, or that access to the financial markets is relevant to the Application. Therefore, there is no basis whatsoever for this aspect of the proposed contention.

The County claims that PG&E is attempting to “avoid” financial qualifications requirements based on its current electric utility status. This assertion is, however, also baseless. PG&E is a rate-regulated utility and is not trying to avoid any required evaluation. PG&E has presented the facts on numerous occasions. *If* PG&E’s proposed reorganization Plan is confirmed by the Bankruptcy Court, and *if* the Part 50 license transfer is approved by the NRC, and *if* the Plan is implemented, *then* PG&E will amend the Part 72 Application such that Electric Generation LLC (“Gen”) would become the applicant/licensee. In that situation, capital and operating costs related to DCPD and the ISFSI would be covered by revenues from merchant

sales of electricity. Indeed, ISFSI expenses, which constitute only a small part of DCPPE expenses, are inherently addressed as operating and maintenance costs (not capital expenses) in the financial projections submitted in conjunction with the Part 50 license transfer application. Those matters are beyond the present scope of review and are subject to review in the Part 50 license transfer context.¹⁵ In total, the County does not present *any* coherent factual or legal basis to challenge either PG&E's electric utility status, PG&E's ability to cover ISFSI expenses through rates, or even Gen's prospective, post-transfer ability to cover costs through operating revenues. This proposed issue is not admissible.

3. *County EC-1: Adequacy of Alternatives Analysis*

The County contends, in its proposed Issue EC-1, that PG&E's Environmental Report ("ER") does not satisfy the requirements of 10 C.F.R. § 51.45 because the ER does not, according to the County, contain an adequate discussion or analysis of (1) alternative sites from a security perspective, and (2) alternative security plans and additional emergency response responsibilities. (County Response at 8.) Neither sub-issue is admissible in this proceeding. The issues are essentially a repackaging of proposed SLOMFP Contention EC-1.

Like SLOMFP, the County is attempting to bootstrap terrorism-related security issues into the proceeding by utilizing the National Environmental Policy Act ("NEPA"). As discussed in the PG&E Response,¹⁶ the County's arguments exceed the scope of what is required by NEPA and therefore lack a legal basis. Moreover, to the extent that the County claims that the proposed ISFSI is vulnerable to potential terrorist attacks, the proposed sub-contention is an

¹⁵ See *La. Energy Servs., L.P.* (Claiborne Enrichment Center), LBP-91-41, 34 NRC 332, 341 (1991) ("It would be inappropriate for the Board to litigate an issue that is directly before the Commission.").

¹⁶ See PG&E Response at 43-50.

impermissible challenge to the Commission's regulations governing ISFSI safeguards and security. Whether in the guise of an environmental contention or otherwise, a contention such as this — seeking security measures and evaluations of beyond-design-basis security threats — goes beyond current regulations and cannot be admitted.

As noted in the PG&E Response, the issue regarding whether NEPA dictates any analysis of terrorist attacks in environmental reports has been addressed by several NRC licensing boards and is currently before the Commission on review. The Commission's resolution of that question will apply to this County issue as well. Moreover, regardless of that outcome, PG&E will be required to respond to any security requirements that result from the NRC's ongoing, comprehensive reassessment of its security requirements and programs. In the meantime, the NRC has a longstanding policy barring contentions which are (or are about to become) the subject of general rulemaking by the Commission. *See Oconee*, CLI-99-11, 49 NRC at 345.

Additional points germane to the proposed sub-issues are discussed below.

- a. County EC-1.A. The ER Fails to Adequately Consider and Analyze Alternative Sites and Associated Security Measures.

The County contends that PG&E's discussion of alternative sites in the Environmental Report is inadequate, and should have included "other significant factors," including "vulnerability to offshore attacks," in selecting "the most reasonable location" for the ISFSI. (County Response at 9.) In particular, the County argues that PG&E does not include evaluations of security-related features for alternative sites, as required by 10 C.F.R. § 72.94.

As discussed above, to the extent this contention attempts to impose beyond-design-basis security requirements on PG&E under the guise of NEPA analysis, it is inadmissible in this proceeding. In addition, however, there is no legal basis in 10 C.F.R.

§ 72.94 for the issue. Section 72.94 requires a siting evaluation of external nearby, man-induced hazards; it is not a security requirement.¹⁷ Hazards within the scope of the rule are generally construed to include hazards posed by such facilities as dams, factories, mines, or airports. For DCP, external man-induced events were specifically evaluated as part of the original siting effort for the plant. *See* 10 C.F.R. §§ 50.34(a)(1)(i); 100.20.¹⁸ Under 10 C.F.R. § 72.40, the siting evaluation for DCP, including the consideration of the man-induced factors, is not reopened in connection with the licensing of the co-located ISFSI. Section 72.40(c) provides:

For facilities that have been covered under previous licensing actions including the issuance of a construction permit under part 50 of this chapter, a reevaluation of the site is not required except where new information is discovered which could alter the original site evaluation findings. In this case, the site evaluation factors involved will be reevaluated.

¹⁷ Section 72.94 provides as follows, with respect to siting a Part 72 facility:

- (a) The region must be examined for both past and present man-made facilities and activities that might endanger the proposed ISFSI or MRS. The important potential man-induced events that affect the ISFSI or MRS design must be identified.
- (b) Information concerning the potential occurrence and severity of such events must be collected and evaluated for reliability, accuracy, and completeness.
- (c) Appropriate methods must be adopted for evaluating the design basis external man-induced events, based on the current state of knowledge about such events.

¹⁸ 10 C.F.R. Part 100 was amended in 1996 to include the specific provision regarding man-related hazards. Prior to this amendment, external man-induced hazards were evaluated pursuant to 10 C.F.R. §§ 100.3; 100.10(b). That evaluation included an analysis of such external hazards. *See* "Safety Evaluation by the Directorate of Licensing, U.S. Atomic Energy Commission, in the Matter of Pacific Gas and Electric Company, Diablo Canyon Nuclear Power Station, Units 1 and 2, San Luis Obispo County, California, Docket Nos. 50-275 and 50-323," dated October 16, 1974, at § 2.2, "Nearby Industrial, Transportation and Military Facilities."

Section 72.94 falls under Subpart E, "Siting Evaluation Factors," and is thus under the purview of Section 72.40(c). Accordingly, reconsideration of "design-basis external man-induced events," facilities and activities is barred in this proceeding. The County has not identified any new information which could alter the original site evaluation findings and trigger a re-evaluation. The proposed sub-issue constitutes an impermissible challenge to the NRC's regulations. *See* 10 C.F.R. § 2.758; *see Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-87-12, 26 NRC 383, 394-95 (1987).¹⁹

b. County EC-1.B. The ER Fails to Consider and Analyze Alternative Security Plans and Emergency Planning Responsibilities.

In this sub-issue, the County argues that (1) PG&E should be required to analyze whether alternative security measures addressing the possibility that the ISFSI may be a target of offshore attack should be included in the DCPD Security Plan; and that (2) the ERP should be reviewed so that the County may determine whether it is prepared to "fulfill its increased responsibilities under PG&E's emergency plan once the ISFSI is in operation." (County Response at 10.)

To the extent that this proposed issue attempts to impose additional security or emergency response requirements on PG&E under the guise of NEPA analysis, it is not admissible in this proceeding. There is no legal basis under NEPA for the relief requested. Furthermore, NEPA aside, the County's proposed issue also lacks the factual basis necessary for the admission of a contention. *See* 10 C.F.R. § 2.714(b)(2)(ii). With regard to the Security Plan, the County has shown no basis for its generalized concern that an ISFSI at DCPD "may well

¹⁹ The County has neither attempted to request a waiver of application of § 72.40(c), pursuant to 10 C.F.R. § 2.758(b), nor made the showing that "special circumstances" exist such that application of the regulation would not serve the purpose for which it was adopted.

present an attractive target for attack.” While the County also contends (at 10) that it is not “clear” that PG&E considered “the increased security training that would be required by siting the ISFSI at Diablo Canyon, and contends that the Security Plan should be made available for review, the County ignores the Application. The Application addresses the changes to security training resulting from placement of a proposed ISFSI at DCP. See Application § 7.0, and Attachment D, “Training Program;” Safety Analysis Report at § 9.3. The County does not challenge the adequacy of the discussion presented in the Application, and, therefore, does not present a genuine dispute with respect to any material issue of fact or law.²⁰ See also *Sacramento Mun. Util. Dist. (Rancho Seco Nuclear Generating Station)*, LBP-93-23, 38 NRC 200, 246 (1993)(holding that a contention “simply alleg[ing] that some matter ought to be considered does not provide the basis for an admissible contention”). Thus, this issue need not be considered further in this proceeding.²¹

With respect to emergency response, the County contends that the ERP should be made available for review because the County “needs to determine whether it is prepared to fulfill its increased responsibilities under PG&E’s emergency plan once the ISFSI is in operation.” (County Response at 10.) The County does not explain why it would not have

²⁰ It appears that the County’s concern is rooted in the cost associated with any additional security training that the County may provide to its employees as a result of the addition of the proposed ISFSI. Any issues associated with the allocation costs associated with security or emergency response incurred by participating governmental agencies are beyond the scope of this proceeding.

²¹ Revisions to the DCP Physical Security Plan, the Safeguards Contingency Plan, and the Security Training and Qualification Plan in connection with the proposed ISFSI have been proposed to the NRC in an amendment request to the DCP Part 50 facility operating license. See PG&E Letter DIL-01-003 from L.F. Womack, PG&E, to NRC Document Control Desk, “DCP Security Program Revisions and Exemption Requests,” dated December 21, 2001. Because the proposed changes contain safeguards information, PG&E requested that they be withheld from public disclosure and controlled pursuant to 10 C.F.R. §§ 2.790 and 73.21. See Application, at § 9.0.

access to this information as part of its ongoing emergency planning responsibilities.²² Nonetheless, the DCPPE Emergency Plan has been made available for review, as Attachment B to the Part 72 ISFSI Application.²³ No challenge is made to that information. Likewise, the County does not identify what additional responsibilities it expects related to an ISFSI co-located at the power plant.

In any event, for the reasons discussed above with respect to District EP-1, this proposed issue is not admissible in this proceeding, because (1) generalized challenges to the DCPPE ERP are barred in this proceeding by NRC regulations;²⁴ and (2) the County does not challenge specifically any aspect of the ERP *as it relates to the ISFSI*. The County articulates a generalized need to determine its responsibilities under the ERP, primarily related to beyond-design-basis security events. The County does not proffer any concerns relating to matters discussed in the revised ERP as it relates to the ISFSI. The proposed issue is barred by 10 C.F.R. § 72.32(c) and should be rejected.²⁵

²² The County itself states that it is the “lead agency responsible for emergency preparedness in the vicinity of Diablo Canyon.” (County Response at 10.)

²³ Moreover, Attachment B includes a table, entitled “Synopsis of ISFSI-Related Changes,” which sets forth the changes made to the Emergency Plan in connection with the Part 72 Application.

²⁴ The County has not attempted to request a waiver of application of the relevant regulations pursuant to 10 C.F.R. § 2.758, or make the showing that “special circumstances” exist such that application of the regulations would not serve the purpose for which they were adopted.

²⁵ Like the District, the County is free to raise any concerns related to the DCPPE ERP at any time. The County is certainly entitled to participate in the “full participation” biennial emergency preparedness exercises required by 10 C.F.R. Part 50, Appendix E, and may, at any time, raise compliance issues through a 10 C.F.R. § 2.206 petition for NRC action.

III. CONCLUSION

For the reasons set forth above, neither the County's nor the District's proposed issues should be admitted.

Respectfully submitted,

A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style and is underlined with a single horizontal line.

David A. Repka, Esq.
Brooke D. Poole, Esq.
WINSTON & STRAWN
1400 L Street, N.W.
Washington, DC 20005-3502

William V. Manheim, Esq.
Richard F. Locke, Esq.
PACIFIC GAS & ELECTRIC COMPANY
77 Beale Street, B30A
San Francisco, CA 94105

ATTORNEYS FOR PACIFIC GAS &
ELECTRIC COMPANY

Dated in Washington, District of Columbia
this 4th day of September 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)
)
Pacific Gas and Electric Co.) Docket No. 72-26-ISFSI
)
(Diablo Canyon Power Plant Independent) ASLBP No. 02-801-01-ISFSI
Spent Fuel Storage Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the "RESPONSE OF PACIFIC GAS AND ELECTRIC COMPANY TO ISSUES PROFFERED BY THE COUNTY OF SAN LUIS OBISPO AND THE PORT SAN LUIS HARBOR DISTRICT" have been served as shown below by electronic mail, this 4th day of September 2002. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

Administrative Judge G. Paul Bollwerk, III
Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: gpb@nrc.gov

Administrative Judge Peter S. Lam
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: psl@nrc.gov

Administrative Judge Jerry R. Kline
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop T-3F23
Washington, DC 20555-0001
e-mail: jrk2@nrc.gov
kjerry@erols.com

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop O-16C1
Washington, DC 20555-0001

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff
(original + two copies)
e-mail: HEARINGDOCKET@nrc.gov

Diane Curran, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
e-mail: dcurran@harmoncurran.com

Lorraine Kitman
P.O. Box 1026
Grover Beach, CA 93483
e-mail: lorraine@bejoseeds.com
l.kitman@bejoseeds.com

Seamus M. Slattery, Chairman
Avila Valley Advisory Council
P.O. Box 58
Avila Beach, CA 93424
e-mail: Jslat1@aol.com

Klaus Schumann
Mary Jane Adams
26 Hillcrest Drive
Paso Robles, CA 93446
e-mail: jayklaus@email.msn.com

James B. Lindholm, Jr., Esq.
County Counsel for San Luis Obispo County
County Government Center
1050 Monterey Avenue, Room 386
San Luis Obispo, CA 93408
e-mail: jlindholm@co.slo.ca.us

San Luis Obispo Mothers for Peace
P.O. Box 164
Pismo Beach, CA 93448
e-mail: beckers@thegrid.net
jzk@charter.net

Karen D. Cyr, Esq.
Stephen H. Lewis, Esq.
Angela B. Coggins, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Mail Stop O-15D21
Washington, DC 20555-0001
e-mail: OGCMailCenter@nrc.gov
shl@nrc.gov
abc1@nrc.gov

Peg Pinard
714 Buchanan Street
San Luis Obispo, CA 93401

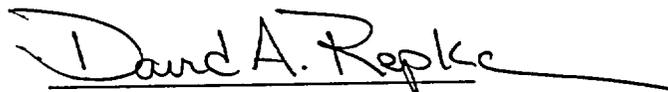
Thomas D. Green, Esq.
Thomas D. Waylett, Esq.
Adamski, Moroski & Green LLP
444 Higuera Street, Suite 300
San Luis Obispo, CA 93401-3875
e-mail: green@adamskimoroski.com
waylett@adamskimoroski.com

Robert K. Temple, Esq.
2524 N. Maplewood Avenue
Chicago, IL 60647
e-mail: nuclaw@mindspring.com

Barbara Byron
Nuclear Policy Advisor
California Energy Commission
1516 Ninth Street, MS 36
Sacramento, CA 95814
e-mail: Bbyron@energy.state.ca.us

Darcie L. Houck, Staff Counsel
California Energy Commission
Chief Counsel's Office
1516 Ninth Street, MS 14
Sacramento, CA 95814
e-mail: Dhouck@energy.state.ca.us

Robert R. Wellington, Esq.
Robert W. Rathie, Esq.
Wellington Law Offices
857 Cass Street, Suite D
Monterey, CA 93940
e-mail: info@dcisc.org


David A. Repka, Esq.
Counsel for Pacific Gas
& Electric Company