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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/25/02

BEFORE THE COMMISSION

In the Matter of

PACIFIC GAS & ELECTRIC CO.

(Diablo Canyon ISFSI)

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Docket No. 72-26-ISFSI

ASLBP No. 02-801-01-ISFSI

NRC STAFF'S RESPONSE TO PETITION FOR SUSPENSION OF
THE INDEPENDENT SPENT FUEL STORAGE INSTALLATION LICENSING PROCEEDING
AT THE DIABLO CANYON POWER PLANT SITE

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Counsel for NRC Staff

September 24, 2002

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INTRODUCTION

On September 9, 2002, petitioners Avila Valley Advisory Council ("AVAC"), Peg Pinard, San Luis Obispo Mothers for Peace, Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers for Peace International, San Luis Obispo Cancer Action Now, Santa Lucia Chapter of the Sierra Club, San Luis Obispo Chapter of the Surfrider Foundation,¹ and Ventura County Chapter of the Surfrider Foundation ("SLOMFP, et al.") jointly filed a Petition with the Commission requesting that it step in and suspend the adjudicatory proceeding pending before the Atomic Safety and Licensing Board regarding the application of Pacific Gas & Electric Company ("PG&E" or "applicant") for an Independent Spent Fuel Storage Installation ("ISFSI") at the Diablo Canyon Power Plant ("DCPP") site.²

¹ San Luis Obispo Chapter of the Surfrider Foundation has not previously been identified as a petitioner in this proceeding and thus, has no status to ask that any action be taken in this proceeding. Hereafter, when the Staff refers to "SLOMFP, et al, the San Luis Obispo Chapter of the Surfrider Foundation is not included.

² See Petition by [AVAC], [SLOMFP, et al], and Peg Pinard for Suspension of ISFSI
(continued...)

The request to immediately suspend this proceeding is predicated on the September 11, 2001 terrorist attack, which, SLOMFP, et al. contents, have created an ongoing threat of additional attacks which must be evaluated before this proceeding should continue. See Petition to Suspend, at 1-2. The Petitioners have not provided any reason to believe that an immediate suspension of this proceeding is required in order to protect public health and safety. For the reasons discussed below, the Commission should deny the Petition to Suspend.³

BACKGROUND

On December 21, 2001, PG&E applied for a specific license, pursuant to 10 C.F.R. Part 72, to possess spent fuel and other radioactive materials associated with spent fuel in an ISFSI to be constructed and operated at the applicant's DCPD site. The Commission published a "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 (April 22, 2002). In response to the Notice, requests for hearing and petitions to intervene were filed on May 8, 2002 by Lorraine Kitman; on May 22, 2002 and July 8, 2002 by Peg Pinard and Avila Valley Advisory Council; and on May 22, 2002 by SLOMFP, et. al. Following Staff's and PG&E's responses to the petitions, and in accordance with the Atomic Safety and Licensing Board's ("Board") Initial Prehearing Conference Order of June 6, 2002 ("June 6 Order"), the Petitioners, acting with SLOMFP as their lead, submitted proposed contentions on July 18, 2002, challenging the adequacy of PG&E's application for a license for an ISFSI at the DCPD. Staff and

²(...continued)

Licensing Proceeding Pending Comprehensive Review of Adequacy of Design and Operation Measures To Protect Against Terrorist Attack and Other Acts of Malice or Insanity" ("Petition to Suspend").

³ Petitioners failed to cite a regulation under which this Petition is filed. Hence, the Staff reply is being filed today, 15 days following service, because the Staff concluded that 10 C.F.R. § 2.730 presented the most appropriate regulatory section for determining the response time.

applicant responded to the filings⁴ and on September 10 and 11, 2002, the Board held a prehearing conference at which the participants clarified their positions on standing and the admissibility of the proposed contentions. Just prior to the prehearing conference, on September 9, 2002, Petitioners submitted this Petition to Suspend the proceeding, and the Staff now submits its response to the Petition.

DISCUSSION

I. Necessary Legal Basis to Support Suspension is Lacking

Petitioners fail to cite a pertinent regulation under which this Petition is filed, but rather cite only to broad provisions of the Atomic Energy Act (“AEA”) which reference the Commission’s obligation to ensure that licensing actions are not inimical to the common defense and security, and are protective of public health and safety. Petition to Suspend, at 1. Petitioners assert that “PG&E’s proposed ISFSI, if carried out under current safety regulations, would be inimical to the common defense and security and would constitute an unreasonable risk to public health and safety, because it would compound the significant and unacceptable risk already posed by the current facility’s vulnerability to terrorist attack or other acts of malice or insanity.” Petition to Suspend, at 11. If the Commission should determine that suspension is unnecessary, Petitioners argue that, in the alternative, “the Commission should order that the scope of the licensing proceeding be expanded to allow the consideration of interim measures that will provide adequate protection to public health and safety and the common defense and security while longer-term measures are put in place.” Petition to Suspend at 11-12.

⁴ See “NRC Staff’s Response to Contentions Submitted by San Luis Obispo Mothers for Peace, *et al.*, Peg Pinard and Avila Valley Advisory Council” filed August 19, 2002; and “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.*” filed August 19, 2002.

The Staff submits that the immediate suspension of the adjudicatory proceeding on the ISFSI would be warranted only if it were necessary to protect public health and safety,⁵ or if a failure to issue an immediate suspension would be inimical to the common defense and security.⁶ Contrary to Petitioners' assertion, the Atomic Energy Act (AEA) provisions Petitioners cite (sections 57, 69 and 81, 42 U.S.C. §§ 2077, 2099, and 2111) do not provide a legal foundation for their argument.⁷ See *Petition to Suspend*, at 7. The NRC case law Petitioners rely upon is similarly irrelevant with respect to the question of whether the asserted ongoing threat of additional terrorist attacks warrants the immediate suspension of the ISFSI proceeding.⁸ Nevertheless, the Staff does not dispute that the Commission's inherent supervisory authority over ongoing adjudicatory proceedings – which includes its power to fully or partially assume the functions of a board – also includes the right to suspend a proceeding should it find that such action is warranted. See, e.g., Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998).

⁵ See, e.g., *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 173-74 (2000) (suspension of license transfer proceeding was not warranted in the absence of "immediate threats to public health and safety requiring such a drastic course of action"); and see 10 C.F.R. § 72.40(a)(13), which provides that an ISFSI license will be issued only upon a finding that there is reasonable assurance that the activities authorized by the license can be conducted without endangering the health and safety of the public.

⁶ See 10 C.F.R. 72.40(a)(14) which provides that, prior to issuing an ISFSI license, the Commission must find that the issuance of the license will not be inimical to the common defense and security.

⁷ Sections 57(c), 69, and 81 of the AEA provide that the Commission shall not issue a license for special nuclear material, source material, or byproduct material if the issuance of the license would be inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public. While these provisions broadly authorize the Commission to establish appropriate substantive requirements governing the possession and use of nuclear materials, which have been codified in the Commission's regulations, none of the provisions provide support for the relief Petitioners seek here -- the Commission's intercession in and suspension, or in the alternative, broadening of, the current proceeding.

⁸ The majority of cases cited by Petitioners allegedly support their argument that the appropriate forum for this discussion is with the Commission, rather than with the established Licensing Board. Petitioners are not able to cite any cases which support the relief they currently request.

The AEA confers broad responsibility and authority on the NRC in regard to implementing the statute's provisions, giving the NRC wide latitude on how best to meet the objectives set forth by Congress. See *Siegal v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968), citing *Power Reactor Development Co. v. International Union of Electrical, etc. Workers*, 367 U.S. 396 (1961). The Commission is fully aware of the events of September 11, 2001 and, as the Petitioners appear to recognize (Petition to Suspend, at 16-21), is taking action to assess the need to take those events into consideration as they may affect the licensing and regulation of nuclear facilities and materials and consistent with the Commission's responsibility to assure protection of public health and safety.⁹

While the events of September 11 are without question, significant, Petitioners have provided no reason to believe that any imminent danger to public health and safety would result from a continuation of adjudicatory proceedings relating to the proposed ISFSI at the Diablo Canyon Nuclear Power Plant. For national security concerns to justify the extraordinary step of immediately suspending this ISFSI proceeding, a showing must be made that such concerns constitute an immediate and specific threat at the site of the proposed ISFSI facility. Petitioners have not established that such a threat now exists. Suspending the proceeding now is not warranted, given that the proceeding is still in its early stages and no license can be granted until the proceeding is concluded.¹⁰ Merely raising hypothetical and prospective safety questions does

⁹ See, e.g., *All Operating Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-026, slip op. Feb. 25, 2002, 67 Fed. Reg. 9792-01, March 4, 2002; *All Decommissioning Power Reactor Licensees*, Order Modifying Licenses (Effective Immediately), EA-02-077, slip op. Mar. 25, 2002, 67 Fed. Reg. 37879-02, May 30, 2002; *Honeywell Int'l, Inc.* (Metropolis Works Facility, Metropolis, Ill.), Order Modifying License (Effective Immediately), EA-02-025, slip op. Mar. 25, 2002, 67 Fed. Reg. 16128-01, April 4, 2002; *Gen. Elec. Co.* (Morris Operation), Order Modifying License (Effective Immediately), EA-02-078, slip op. May 23, 2002; *United States Enrichment Corp.* (Portsmouth Gaseous Diffusion Plant, Portsmouth, Oh.), Order Modifying License (Effective Immediately), EA-02-018, slip op. June 17, 2002.

¹⁰ See 10 C.F.R. § 2.764(a).

not create the type of urgent situation which might justify the immediate suspension of the ISFSI proceeding.

Further, as stated above, the Commission has initiated various generic efforts related to the events of September 11, with potential applicability to a range of nuclear facilities.¹¹ While the Commission has directed the Staff to review the NRC's safeguards and physical security program in light of the September 11 terrorist attacks, it is appropriate that the Commission should also continue to perform its statutory responsibilities for the licensing and regulation of nuclear facilities and materials in a timely and deliberate manner.¹² The NRC's review and adjudication of pending applications should not be disrupted -- particularly where, as here, Petitioners have not established that adjudication of the ISFSI proceeding would have any adverse impact on public health and safety.¹³ The Petition to Suspend should, therefore, be denied.

Moreover, while Petitioners argue in the alternative, that should the Commission decide suspension of the proceeding is unnecessary, the Commission should broaden the scope of the current proceeding to allow consideration of DCCP site-wide interim measures, such Commission action is unnecessary. In the event that the Commission's review of the September 11 events leads it to conclude that it should modify its license requirements, it may do so at any time by rule, regulation or order; and it may make such requirements applicable both to applicants and licensees of nuclear facilities -- including the ISFSI, if necessary or appropriate.¹⁴ Depending upon the

¹¹ See *supra*, fn. 9.

¹² See, e.g., *Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3)*, CLI-99-11, 49 NRC 328, 339 (1999), citing *Duke Power Co. (Catawba Nuclear Station)*, CLI-83-19, 17 NRC 1041, 1048 (1983) (finding "a substantial public interest in efficient and expeditious administrative proceedings").

¹³ Cf. 10 C.F.R. § 2.788(e) (to stay a decision or action of the presiding officer, movant must show irreparable harm or likelihood of success on the merits).

¹⁴ See, e.g., Atomic Energy Act of 1954, as amended, sec. 161b, 42 U.S.C. § 2201(b);
(continued...)

nature and timing of any new regulations, the Petitioners may have an opportunity to file late contentions or reopen the record; and even if the ISFSI has already received its license, the NRC can order that the facility be backfit where it is necessary to protect public health and safety.¹⁵ Thus, the Staff submits broadening the scope of the current proceeding is unnecessary.

II The Petition to Suspend is Procedurally Defective

While the Staff does not deny the Commission's inherent supervisory authority to intervene in proceedings should it determine such intervention necessary,¹⁶ Petitioners' request that the Commission suspend the ISFSI proceeding is nonetheless procedurally defective. As explained in the Commission's regulations at 10 C.F.R. § 2.730(a), because this matter is presently pending before a Licensing Board, this Petition should first be filed with that Board. The presiding officer then has the authority to refer a Board ruling or certify a Board question to the Commission if the presiding officer deems such referral or certification necessary to prevent detriment to the public interest or unusual delay or expense. See 10 C.F.R §§ 2.718(i), 2.730(f).

Moreover, if this petition, in the alternative, is viewed as a request for a stay of a presiding officer's decision, this request is also defective insofar as it raises issues heretofore not raised before the Licensing Board in this proceeding and thus, not a result of any licensing board action. The Commission has previously explained that "[t]he provision for 'stays' in the Commission's regulations, by its terms, applies only to "a decision or action of a presiding officer... ." *Texas Utilities Electric Company* (Comanche Peak Steam Electric Station, Unit 2), CLI-93-2,

¹⁴(...continued)
10 C.F.R. §§ 2.202, 72.44(b)(2) and 72.60.

¹⁵ See, e.g., 10 C.F.R. §§ 2.714, 2.734 and 72.62.

¹⁶ As noted *supra*, the Commission's inherent supervisory authority over ongoing adjudicatory proceedings includes its power to fully or partially assume the functions of a board, and includes the right to suspend a proceeding should it find that such action is warranted. See, Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998).

37 NRC 55, 58 (1993). Where petitioners do not relate their stay request to any action in the proceeding under review, the request for stay is more properly a petition for immediate enforcement action under 10 C.F.R. § 2.206. *Id.*

CONCLUSION

For the reasons set forth above, the Staff respectfully submits that the Petitioners have shown no reason to believe that an immediate suspension of proceedings concerning the proposed ISFSI at the DCPP is warranted at this time. Additionally, Commission expansion of the scope of this proceeding is unnecessary. Accordingly, the Staff opposes the Petition to Suspend and recommends that it be denied.

Respectfully submitted,

/RA/

Angela B. Coggins
Counsel for NRC Staff

Dated at Rockville, Maryland
this 24th day of September, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
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PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
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(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S RESPONSE TO PETITION FOR SUSPENSION OF THE INDEPENDENT SPENT FUEL STORAGE INSTALLATION LICENSING PROCEEDING AT THE DIABLO CANYON POWER PLANT SITE" have been served upon the following persons by United States mail, first class, or through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 24th day of September, 2002.

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Dated at Rockville, Maryland
this 24th day of September, 2002