

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 5456

DOCKETED 01/23/03

COMMISSIONERS

SERVED 01/23/03

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In the Matter of)
)
)
PACIFIC GAS & ELECTRIC CO.)
)
(Diablo Canyon Power Plant Independent)
Spent Fuel Storage Installation))
_____)

Docket No. 72-26-ISFSI

CLI-03-01

MEMORANDUM AND ORDER

The Licensing Board, in a recent ruling on standing, admissibility of contentions, and admission of interested governmental entities in this independent spent fuel storage installation (“ISFSI”) licensing proceeding, referred its decision on one environmental contention and portions of three other contentions to the Commission.¹ We accept the Board’s referral and affirm its rejection of the contentions.

I. BACKGROUND

Pacific Gas & Electric Co. (“PG&E”) filed an application on December 21, 2001, for a materials license authorizing construction and operation of a dry storage cask ISFSI to be located at its Diablo Canyon Power Plant (“DCPP”) site. In response to a notice of opportunity for hearing, the Secretary of the Commission received petitions to intervene from numerous

¹ See *Pacific Gas & Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)*, LBP-02-23, 56 NRC ____ (Dec. 2, 2002).

petitioners.² The San Luis Obispo Mothers for Peace, acting as lead petitioner, submitted five technical and three environmental contentions. The County of San Luis Obispo (“County”), previously granted governmental participant status, submitted one environmental and two technical issues.³ The Board heard oral argument on the issues of standing of the petitioners and admissibility of their contentions on September 10-11, 2002. In addition to the lead petitioner, the Board found that the Santa Lucia Chapter of the Sierra Club, San Luis Obispo Cancer Action Now, Peg Pinard, the Avila Valley Advisory Council, and the Central Coast Peace and Environmental Council have standing.⁴ We shall refer to the admitted intervenors collectively as “SLOMFP.” The Board granted governmental participant status to the California Energy Commission and the Avila Beach Community Services District, but denied the request of the Diablo Canyon Independent Safety Committee.

The Board admitted one of SLOMFP’s five technical contentions for litigation in this proceeding and rejected SLOMFP’s three environmental contentions. In accordance with 10 C.F.R. § 2.730(f), the Board referred its rulings regarding the sabotage and terrorism aspects of SLOMFP’s three environmental contentions and San Luis Obispo County’s environmental issue

²In addition, five entities sought leave to participate as interested governmental entities pursuant to 10 C.F.R. § 2.715(c) : “The presiding officer will afford representatives of an interested State, county, municipality, Federally-recognized Indian Tribe, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate witnesses, and advise the Commission without requiring the representative to take a position with respect to the issue.” Of the five requests, only that of the County of San Luis Obispo is relevant to today’s decision.

³See *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), unpublished Memorandum and Order (Establishing Schedule for Identification of Issues by Interested Governmental Entities; Limited Appearance Participation) (Aug. 7, 2002). The Board also granted governmental participant status to the Port San Luis Harbor District. See *id.*

⁴The Board also determined that the following groups had not demonstrated standing: the Environmental Center of San Luis Obispo, Cambria Legal Defense Fund, Santa Margarita Area Residents Together, San Luis Obispo Chapter of Grandmothers for Peace International, Nuclear Age Peace Foundation, and the Ventura County Chapter of the Surfrider Foundation.

to the Commission for further consideration and action as appropriate.⁵ We accept the Board's referral and affirm the Board's denial of admission of the contentions, albeit for different reasons than those the Board expressed.

II. DISCUSSION

A. The Referred Terrorism Issues⁶

SLOMFP's three environmental contentions address, at varying levels of prominence, the threat of terrorism. Contention EC-1, the primary terrorism contention, states: "The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI."⁷ SLOMFP believes that PG&E's environmental report should evaluate a range of alternatives to the proposed ISFSI, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks.

The Board found the contention inadmissible because it "directly challenge[s] the Commission's rules regarding destructive acts of malice or insanity by enemies of the United States. . . . [C]ontentions that question existing NRC regulations are inadmissible as a matter of law."⁸ Thus, the Board relied in part on 10 C.F.R. § 2.758(a), which prohibits adjudicatory

⁵See *id.* at ___, slip op. at 63. See also 10 C.F.R. § 2.730(f): "When in the judgment of the presiding officer prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense, the presiding officer may refer the ruling promptly to the Commission"

⁶We recently denied the direct request of the San Luis Obispo Mothers for Peace and several other petitioners to suspend this proceeding pending completion of the Commission's comprehensive review of measures to protect against terrorist attack. See *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC ___ (Nov. 21, 2002).

⁷"Supplemental Request for Hearing and Petition to Intervene by [SLOMFP]" at 24 (July 18, 2002).

⁸LBP-02-23, 56 NRC at ___, slip op. at 42.

challenges to NRC rules,⁹ and in part on 10 C.F.R. § 50.13, which provides that an applicant for a license to construct and operate a production or utilization facility “is not required to provide for design features or other measures for the specific purpose of protection against the effects of . . . attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person.”¹⁰

Because EC-1 is an environmental contention based on the National Environmental Policy Act (“NEPA”)¹¹ rather than a safety contention, SLOMFP argued that 10 C.F.R. § 2.758 is not applicable. The Board, however, reasoned that “the rationale for 10 C.F.R. § 50.13 [is] as applicable to the Commission’s NEPA responsibilities as it is to its health and safety responsibilities.”¹² The Board thus found contention EC-1 inadmissible, but referred its ruling to the Commission.¹³

⁹ “[A]ny rule or regulation of the Commission, or any provision thereof . . . is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial or renewal licensing . . .” 10 C.F.R. § 2.758(a).

¹⁰10 C.F.R. § 50.13. Although section 50.13 does not, on its face, apply to an ISFSI, an applicant for an ISFSI must describe physical security protection plans, which must meet the requirements set forth in 10 C.F.R. § 73.51. Adopting section 73.51 in 1998, the Commission specifically rejected a requirement that ISFSIs be protected against malevolent attacks by land-based or airborne vehicles. See “Final Rule: Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste,” 63 Fed. Reg. 26,955, 26,956 (May 15, 1998).

¹¹See 42 U.S.C. §§ 4321 *et. seq.*

¹²LBP-02-23, 56 NRC at ___, slip op at 43, quoting *Long Island Lighting Co. (Shoreham Nuclear Power Station)*, ALAB-156, 6 AEC 831, 851 (1973) and citing *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-37, 54 NRC 476, 487 (2001), *referral accepted*, CLI-02-03, 55 NRC 155 (2002).

¹³See LBP-02-23, 56 NRC at ___, slip op. at 43. In making the referral, the Board alluded to the Commission’s ongoing comprehensive review of NRC’s safeguards and physical security programs in the wake of the Sept. 11, 2001 terrorist attacks. Moreover, the Commission, at the time of the Board’s referral, was considering terrorism contentions we had agreed to review in four other cases. See *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, LBP-01-37, 54 NRC 476 (2001) (denying admission of terrorism contention and referring issue to the Commission), *referral accepted*, CLI-02-03, 55 NRC 155 (2002); *Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station Units 1 & 2)*,

Contention EC-2 asserts that PG&E has failed to fully describe the purposes of the proposed ISFSI or to evaluate all reasonably associated environmental impacts and alternatives. SLOMFP's focus in this contention is its allegation that PG&E might have an unstated purpose for the proposed ISFSI; *i.e.*, to provide spent fuel storage capacity during a license renewal term for the Diablo Canyon units. The Board found the contention inadmissible, but noted that, in several of the contention's bases, SLOMFP repeated arguments concerning acts of destruction or sabotage that were discussed in support of EC-1. Therefore, the Board referred its ruling on admissibility of contention EC-2 to the Commission "to the extent destruction and sabotage matters are proffered in support of admission."¹⁴

In Contention EC-3, SLOMFP asserts that PG&E has failed to evaluate the environmental impacts of transporting fuel away from the proposed ISFSI at the end of its license term. SLOMFP claims that the ER must consider impacts of such transportation, including sabotage and terrorist attacks against transportation casks. The Board rejected contention EC-3 but, as with EC-2, referred its ruling to the Commission "to the extent terrorism and sabotage matters are proffered in support of its admission."¹⁵

Similar to SLOMFP's EC-1, the County's environmental issue asserted that the environmental report does not contain an adequate analysis of alternatives. Specifically, in its sub-issue regarding alternative sites and associated security measures, the County argues that

LBP-02-04, 55 NRC 49 (2002) (certifying terrorism issue to the Commission), *certification accepted*, CLI-02-06, 55 NRC 164 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403 (2001), *reconsideration denied*, Unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-04, 55 NRC 158 (2002); and *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC 131 (2002) (denying admission of terrorism contention and referring contention to the Commission), *referral accepted* CLI-02-05, 55 NRC 161 (2002).

¹⁴LBP-02-23, 56 NRC at ___, slip op. at 46.

¹⁵*Id.* at ___, slip op. at 49.

PG&E did not consider vulnerability to offshore attacks when it selected the site for the proposed ISFSI. Because this sub-issue “appears to challenge the Commission’s rules regarding acts of destruction and sabotage,” the Board denied it as a matter of law, but made the terrorism aspects of the issue part of its referral to the Commission.¹⁶

B. The Commission’s Ruling

We accept the Board’s referral of the terrorism issues in SLOMFP’s three environmental contentions and the County’s environmental sub-issue and affirm the result the Board reached.

We recently decided similar issues in four other cases in four different contexts: *Private Fuel Storage* (a dry cask independent spent fuel storage installation), *Savannah River* (a mixed oxide fuel fabrication facility), *Millstone* (expansion of the spent fuel storage pool capacity at a commercial reactor site), and *McGuire/Catawba* (license renewal for four commercial reactors).¹⁷ In each of these settings, we considered whether NEPA requires the NRC, in rendering licensing decisions, to consider the impacts of terrorism. We held that NEPA does not require a terrorism review, and that an environmental impact statement is not the appropriate format in which to address the challenges of terrorism.

In the lead *Private Fuel Storage* case, involving a large away-from-reactor ISFSI, we detailed four principal reasons for our holding. First, the “possibility of a terrorist attack ... is speculative and simply too far removed from the natural or expected consequences of agency

¹⁶See *id.* at ___, slip op. at 60.

¹⁷See *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC __ (Dec. 18, 2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC __ (Dec. 18, 2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit No. 3), CLI-02-27, 56 NRC __ (Dec. 18, 2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC __ (Dec. 18, 2002).

action to require a study under NEPA,” which is confined to “manageable” inquiries.¹⁸ Second, the risk of a terrorist attack at a nuclear facility cannot be adequately determined.¹⁹ As a practical matter, attempts to evaluate that risk even in qualitative terms are likely to be meaningless and consequently of no use in the agency’s decision making. Third, NEPA does not require a “worst case” analysis, which “creates a distorted picture of a project’s impacts and wastes agency resources.”²⁰ Lastly, NEPA’s public process is not an appropriate forum for considering sensitive security issues. In this regard we noted, “NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable.”²¹ For the same reasons, we affirm the Board’s rejection of SLOMFP’s contention EC-1, the terrorism-related portions of contentions EC-2 and EC-3, and the County’s environmental issue.²²

Our decision today rests entirely on our understanding of NEPA and of what means are best suited to dealing with terrorism. Nonetheless, our conclusion comports with the practical realities of spent fuel storage and the Congressional policy to encourage utilities to provide for

¹⁸ See *Private Fuel Storage*, CLI-02-25, 56 NRC ___ at 11, and n. 33, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

¹⁹ See *id.* at ___, slip op. at 13-14, and references cited therein.

²⁰ See *id.* at ___, slip op. at 15; see generally *id.* at ___, slip op. at 15 -18, and references cited therein.

²¹ *Id.* at ___, slip op. at 20; see *id.* at ___, slip op. at 18-22 and references cited therein.

²² We need not decide the applicability of the rationale for 10 C.F.R. § 50.13 to the Commission’s NEPA responsibilities. We note that “[t]he provision grew out of a policy judgment by the Atomic Energy Commission that it was our nation’s ‘settled tradition’ to ‘look[] to the military’ for defense against enemy attacks, and that it was ‘impracticable’ to expect a ‘civilian industry’ to provide the necessary defense.” *Millstone*, CLI-02-27, 56 NRC at ___, slip op. at 3, n. 7 (quoting *Siegel v. AEC*, 400 F. 2d 778, 782 (D.C. Cir. 1968)). As in *Private Fuel Storage*, *Savannah River*, *Millstone*, and *McGuire/Catawba*, our decision today “rest[s] on general principles regarding the scope of NEPA, [and] we do not reach the application of section 50.13 as applied to the terrorism contentions that are raised in [this] case.” *Millstone* at 3, n. 7.

spent fuel storage at reactor sites pending construction of a permanent repository.²³ Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the proposed ISFSI.²⁴

Although we decline to consider terrorism in the context of NEPA, the Commission is devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials. The NRC Staff is conducting a comprehensive review of our security and safeguards measures, including measures concerning interim spent fuel storage at power reactor sites. We have also instituted interim upgrades in security requirements for our licensees, and we are working with numerous other government agencies to meet and minimize the threat of terrorism.

III. CONCLUSION

We *accept* the Board's referral of the terrorism aspects of four environmental contentions and issues and *affirm* the Board's decision to reject consideration of the terrorism issues presented in this proceeding.

IT IS SO ORDERED.

For the Commission²⁵

²³ See Nuclear Waste Policy Act, 42 U.S.C. §§ 10,131 *et seq.*; *Millstone*, CLI-02-27, 56 NRC at ___, slip op. at 5.

²⁴ See *Millstone*, CLI-02-27, 56 NRC at ___, slip op at 5. *Cf. McGuire/Catawba*, CLI-02-26, 56 NRC at ___, slip op. at 7. ("Particularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities."); *Pacific Gas & Electric Co.* (Diablo Canyon Power Plants, Units 1 and 2), CLI-02-16, 55 NRC 317, 343 (2002) (terrorist attacks are neither caused by nor result from the proposed license transfers).

²⁵ Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of January, 2003.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
PACIFIC GAS AND ELECTRIC CO.) Docket No. 72-26-ISFSI
DIABLO CANYON POWER PLANT)
)
(Independent Spent Fuel Storage)
Installation))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-03-01) have been served upon the following persons by U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 23rd day of January 2003