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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Richard A. Meserve, Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555

RE: **Proposed Independent Spent Fuel Storage Installation at Diablo Canyon Nuclear Power Plant**

Dear Chairman Meserve:

These comments concern Pacific Gas and Electric Company's ("PG&E") application for permission to construct and operate an independent spent fuel storage installation ("ISFSI") at its Diablo Canyon Power Plant ("DCPP") site in San Luis Obispo, California. The safety of that plant, and the full evaluation of the measures taken to handle and store spent nuclear fuel at the site, is of great importance to every Californian.

In response to an April 2002 notice of opportunity for hearing, a number of civic organizations and government agencies filed petitions to intervene in PG&E's license application proceedings before the Atomic Safety and Licensing Board ("ASLB"). The petitioners submitted a number of factual contentions challenging PG&E's application, and asked the ASLB to schedule public hearings on those contentions. On December 2, 2002, a panel of the ASLB decided that public hearings will be held on only one of the factual contentions raised by the petitioners, and narrowed the scope of the one factual contention on which such a hearing will be held. (Pacific Gas and Electric Co. Diablo Canyon Power Plant (Independent Spent Fuel Storage Installation) (December 2, 2002) Docket No. 72-26-ISFSI, 56 NRC _ (hereafter "Panel Decision").) The ASLB, moreover, referred its decision on one environmental contention, and portions of several other contentions, to the Nuclear Regulatory Commission ("NRC"). The NRC accepted the Board's referral and affirmed its rejection of the contentions. (Pacific Gas and Electric Co. Diablo Canyon Power Plant (Independent Spent Fuel Storage Installation) (January 23, 2003) Docket No. 72-26-ISFSI, ___ NRC___ (hereafter "NRC Decision").)

The Attorney General of the State of California has reviewed the Panel Decision and the NRC Decision and find them deficient and troubling. With respect to several of the petitioners' contentions, the ASLB panel acknowledged that the petitioners had submitted substantial evidence that the proposed ISFSI presents a significant safety issue, but ruled nonetheless that public hearings will not be held on the issue. Moreover, in evaluating petitioners' environmental contentions, the panel relied exclusively on NRC regulations that, in the panel's view, obviate any need for public hearings on those contentions, without carefully evaluating whether the

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National Environmental Policy Act (42 U.S.C. § 4321 et seq.) ("NEPA") requires hearings on those contentions. Finally, in its determination of the referred contentions regarding the environmental consequences of potential acts of terrorism directed against the proposed ISFSI, the NRC relied on a flawed understanding of NEPA and an assumption about the likelihood of such acts of terrorism that is at odds with statements made by the President, the Secretary of Defense and the Secretary of Homeland Security. Accordingly, we request that the NRC order public hearings on the significant safety and environmental issues raised by the petitioners, as set forth more fully in this letter.

The Attorney General offers the analysis of the Panel Decision and the NRC Decision contained in this letter, and requests that the NRC order public hearings on the safety and environmental issues raised by the petitioners, pursuant to his independent authority to represent the public interest under the California Constitution, common law and statutory law. Along with other State of California agencies,[1] the Attorney General has the power and responsibility to take all necessary measures to protect the health and safety of the people of California, and to protect the natural resources of the state from pollution, impairment or destruction. (See Cal. Const. Art. V, §13; Cal. Gov. Code §§ 12511, 12600-12; D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 14-15.)

The proposed expansion of DCPP's spent fuel storage facility is inherently risky. DCPP is sited in a seismically active area. Both the power generation and spent fuel storage facilities at DCPP present targets for cataclysmic acts of terrorism and sabotage. The eventual transportation of spent fuel from DCPP on the highways of California poses the danger of release of nuclear waste to the environment. The public has the right to ask that every reasonable measure be taken to minimize these risks, and the right to know that every such measure has been taken. As such, the safety and environmental risks inherent in the proposed expansion of DCPP's spent fuel storage facility must – to the extent consistent with plant security – be evaluated carefully and publicly. This is nothing more than what Congress intended in adopting NEPA. (See 42 U.S.C. § 4331(b) (establishing goals of national environmental policy).)

The Attorney General's comments regarding the Panel Decision's disposition of the specific contentions raised by the petitioners are as follows:

San Luis Obispo Mothers for Peace ("SLOMFP") Technical Contention ("TC") - 1. In SLOMFP TC-1, the civic organization petitioners contend that the seismic analysis presented by PG&E in support of its application fails to consider a number of the significant seismic features of the Diablo Canyon area. As a result, these petitioners contend that the design of the proposed ISFSI is neither reasonable nor conservative in protecting public health and safety from the effects of an earthquake. In analyzing this contention, the ASLB panel acknowledged that "in other circumstances, the showing made by SLOMFP regarding its contention TC-1 might be sufficient to establish the requisite materiality..." (Panel Decision, slip op. at pp. 30-31). The

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[1]The analysis offered and the requests made in this letter are offered and made on behalf of the Attorney General and not on behalf of any other California agency or office.

panel went on to conclude, however, that:

> [F]or a co-located ISFSI, the applicant does not write on a clean slate relative to any seismic requirements. Absent an exemption or new information sufficient to alter the original site evaluation finding, the [Design Earthquake Figure] for the nuclear facility is what the ISFSI applicant must use. As a consequence, a contention challenging the seismic qualifications of such a co-located ISFSI facility must necessarily provide not only a basis to indicate that there are specific concerns about the elements used to calculate the nuclear power plant seismic design criteria, but also a showing that, given those concerns, the reactor facility [Design Earthquake Figure] itself is now inaccurate to some meaningful degree. In this instance, despite having provided information concerning the first consideration, by failing to make any showing regarding the latter point, SLOMFP has failed to put forth an admissible contention.

(*Id*. at pp. 31-33). This is a surprising analysis. The ASLB panel, first, all but concedes that the civic organization petitioners had raised sufficient concerns about the elements used to calculate DCPP's seismic design criteria to warrant a public hearing "in other circumstances" (e.g., a hearing on plant siting). But then the panel announces, for the first time, that those petitioners must satisfy a second element: they must submit evidence that explicitly (*Id*. at p. 32, fn. 7) calls into question the facility Design Earthquake Figure. Having thus raised the bar, the panel then faults those petitioners for having failed to submit such explicit evidence, and rejects their request for a public hearing.

Given the panel's acknowledgment that the civic organization petitioners had successfully raised specific concerns about the elements used to calculate DCPP's seismic design criteria, and given the extreme seriousness of the safety issues inherent in nuclear power plant/ nuclear waste storage facility seismic design, the NRC should authorize a public hearing on this matter. At a minimum, the NRC should remand this contention to the panel, with an instruction that the panel allow the civic organization petitioners the opportunity to satisfy the second part of the test announced by the panel, i.e., to show that there is sufficient evidence of the inaccuracy of the reactor facility's Design Earthquake Figure as to warrant a public hearing.

SLOMFP TC-2. The gravamen of this contention is that PG&E has failed to demonstrate that it is financially able to cover the costs of constructing, operating and decommissioning the proposed ISFSI. The ASLB panel found this contention sufficiently substantiated to warrant a public hearing. The ASLB panel, however, narrowed the scope of the hearing to exclude, among other things, evidence regarding the likelihood that this office will prevail in its billion dollar unfair business practices litigation against PG&E's parent. We believe that the civic organization petitioners can demonstrate that the California Attorney General's Office has a strong likelihood of succeeding in that litigation. As such, evidence of that likelihood of success should be considered in the public hearing on SLOMFP TC-2.

SLOMFP EC-1. In SLOMFP EC-1, the civic organization petitioners contend that PG&E's Environmental Report is inadequate because it fails to contain any discussion of the environmental impact of acts of terrorism or sabotage directed against the proposed ISFSI. The ASLB panel ruled that SLOMFP EC-1 does not raise an issue on which a public hearing must be held, because "[c]urrent NRC regulations do not require licensees to plan for or to design their facilities to protect against all acts of destruction or sabotage." (Panel Decision, slip op. at p. 42). The panel, moreover, brushed aside SLOMFP's argument that NEPA requires a public hearing on the Environmental Report's failure to address potential acts of terrorism or sabotage directed against the proposed ISFSI, even if NRC regulations do not:

> In our view, however, whether contention SLOMFP EC-1 is characterized as a safety contention or as an environmental issue statement is of no moment, because "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." [Citations].

(Id. at 43). The ASLB panel's application to NEPA of an exemption to the obligation that an applicant bears to conduct a complete environmental analysis, which exemption was created by regulation by the NRC for its own licensing procedures, is inappropriate and contrary to the clear congressional purpose in enacting NEPA. Indeed, the D.C. Circuit previously struck down regulations adopted by the NRC's predecessor, the Atomic Energy Commission, that sought effectively to exempt the Commission from its obligations under NEPA. (Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission (D.C. Cir. 1971) 449 F. 2d 1109 (J. Skelly Wright, J.).)

Although the ASLB panel concluded that neither NRC regulations nor NEPA require a public hearing on SLOMFP EC-1, the panel referred its ruling on that contention to the NRC, in light of the NRC's ongoing review of nuclear facility security programs following the events of September 11, 2001. The NRC accepted the referral and affirmed the ASLB panel's rejection of SLOMFP EC-1, quoting the NRC's conclusion, in another matter, that "the possibility of a terrorist attack...is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." (Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation) (December 18, 2002) CLI-02-__, 56 NRC ___ (hereafter "Private Fuel Storage"), slip op. at p. 11, as quoted in the NRC Decision, slip op. at pp. 6-7.)[2] We believe that the conclusion reached by the NRC in Private Fuel Storage, its companion cases, and the NRC Decision is flawed, and will not survive judicial scrutiny. Accordingly, the NRC should reconsider the determination set forth in the NRC Decision, and order a full public hearing in this matter on SLOMFP EC-1.

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[2]The NRC reached a similar conclusion in three cases decided with Private Fuel Storage: Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Unit 3) (December 18, 2002) CLI-02-__, 56 NRC __; Duke Cogema Stone & Webster (Savannah River Mixed Oxidide Fuel Fabrication Facility) (December 18, 2002) CLI-02-__, 56 NRC __; and Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2)(December 18, 2002) CLI-02-__, 56 NRC __.

In Private Fuel Storage, the NRC advances four arguments in support of its position that the possibility of a terrorist attack on a licensed facility is simply too speculative and too far removed from the consequences of agency action to require NEPA analysis. First, Private Fuel Storage posits that the risk of a terrorist attack is not "a natural or inevitable byproduct of licensing" a nuclear facility. (Private Fuel Storage, slip op. at pp. 7-8.) This assertion completely ignores the obvious fact that licensing a nuclear facility, whether a reactor, a spent fuel pool, or a dry cask spent fuel storage facility, near a community both makes the community a more likely terrorist target and makes the consequences of a successful terrorist attack far more devastating to the community.

Second, Private Fuel Storage reasons that "the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable." (Private Fuel Storage, slip op. at p.13.) This assertion ignores statements made by senior government officials that further terrorist attacks on the United States, as devastating as those that occurred on September 11, 2001, are inevitable, and that nuclear facilities, in general, are likely targets.[3] At the very least, these statements indicate that it is reasonably foreseeable that a terrorist attack will be attempted against at least one American nuclear facility. To argue that, because we do not know when or where that attempt will take place, we need not consider the likelihood and consequences of a terrorist attack on every nuclear facility, at the time it is licensed, is to foreclose public discussion of a threat that senior government officials have determined to be substantial.

Third, Private Fuel Storage contends that the risk of a terrorist attack on a nuclear facility is a "worst case scenario" and is thus is exempt from NEPA scrutiny. This assertion, again, ignores statements made by senior government officials that serious terrorist attacks on the United States are inevitable, that nuclear power plant are potential targets for attack, and that attacks on American nuclear power plants have already been planned. As such, the potential for a terrorist attack is precisely like the potential for an earthquake -- a matter indisputably subject to NEPA analysis. Terrorist attacks, like earthquakes, will occur -- the only question is whether "ground zero" will be a nuclear power plant.

[3]In his State of the Union Address on January 9, 2002, President Bush noted that U.S. intelligence agencies had uncovered plans of U.S. nuclear power plants at Al-Qaeda terrorist bases in Afghanistan, indicating that attacks on those facilities had been planned. "We have found diagrams of American nuclear power plants and public water facilities, detailed instructions for making chemical weapons, surveillance maps of American cities, and thorough descriptions of landmarks in America and throughout the world," said the President. (Gertz, "Nuclear Plants Targeted," The Washington Times, January 31, 2002.) On January 31, 2002, Defense Secretary Donald Rumsfeld said that the U.S. Armed Forces must prepare for potential surprise attacks that could be worse than those inflicted on the United States on September 11, 2001. "These attacks could grow vastly more deadly than those we suffered on September 11, 2001," said Rumsfeld. (CNN, MSNBC, January 31, 2002.) The same day, the NRC released an alert that it had issued to the nation's nuclear power plants on January 23, 2002. The NRC alert warned of the potential for an attack by terrorists who planned to crash a hijacked jetliner into a nuclear facility. While the NRC alert stressed that the threat of a kamikaze plane attack was not corroborated, the alert said that "the attack was already planned" by three suspected Al-Qaeda operatives "already on the ground," who were trying to recruit non-Arabs for the terrorist mission. (Bazinet and Sisk, "N-Plant Attacks Feared," The New York Daily News, February 1, 2002.) On May 14, 2002, Gordon Johndroe, a spokesman for the Office of Homeland Security, noted that "[W]e know that Al-Qaeda has been gathering information and looking at nuclear facilities and other critical infrastructure as potential targets." (The Washington Times, May 14, 2002.)

Finally, Private Fuel Storage reasons that NEPA analysis of the risk of terrorist attack on a nuclear facility is precluded by security considerations. The Ninth Circuit, however, has held that there is no "national defense" exception to NEPA. (No GWEN Alliance of Lane County v. Aldridge (9th Cir. 1988) 855 F.2d 1380, 1384; accord, Concerned About Trident v. Rumsfeld (2d Cir. 1977) 555 F.2d 817, 823.) Obviously, any written analysis of the possibility and consequences of a terrorist attack on a nuclear facility, such as the proposed ISFSI at DCPP, and any public hearing on the measures to be taken to reduce that risk and minimize those consequences, will have to be carefully conducted to prevent the disclosure of sensitive security information. But this does not mean that the NRC need not carefully analyze the nature and extent of the risk faced by the public in the event of a terrorist attack on a proposed nuclear facility, nor does it mean that the public should be completely precluded from participating in the NRC's decision as to whether to license a particular facility in the face of such an identified risk and likely harmful consequences. In Weinberger v. Catholic Action of Hawaii (1981) 454 U.S. 139, 143 [102 S.Ct. 197, 201, 70 L.Ed.2d 298], for example, the "[Supreme] Court held that the Navy must consider [the] environmental effects of constructing a nuclear weapons dump in Hawaii, but need not publish the portions of an environmental impact statement which would jeopardize national secrets." (No GWEN Alliance of Lane County v. Aldridge, *supra*, 855 F.2d 1380, 1384.)

The NRC should reconsider its rejection of SLOMFP EC-1, and order a full public hearing on that contention while establishing procedures for those hearings that preclude the dissemination of sensitive security information.

SLOMFP EC-2. To the extent that the analysis of SLOMFP EC-1 set forth in the NRC Decision also applies to SLOMFP EC-2 (which, among other things, contends that the proximity of the existing spent fuel storage pools at DCPP to the proposed ISFSI will make DCPP's spent fuel storage facilities a more inviting target for acts of terrorism or sabotage), the NRC should reconsider its decision, and order public hearings on SLOMFP EC-2.

SLOMFP EC-3. In SLOMFP EC-3, the civic organization petitioners contend that PG&E's Environmental Report fails to evaluate the reasonably foreseeable environmental impact of transporting spent fuel away from the proposed ISFSI at the end of its license term, either to a repository or to another interim storage site. The ASLB panel concluded that this contention does not warrant a public hearing because NRC regulations do not require an analysis of the environmental impacts of expanded activities at a nuclear facility where a siting analysis has been conducted for the facility as part of a previous licensing action. (Panel Decision, slip op. at p. 49). The ASLB panel's decision, however, is deeply flawed: it assumes (without any analysis) that the NRC regulation assertedly allowing licensed, sited facilities to increase storage capacity without analyzing the transportation effects of such increased storage somehow exempts the facility from NEPA's requirement that such an analysis be conducted. Indeed, courts have held that one of the purposes of NEPA is to prevent the unanalyzed piecemeal expansion of federal or federally-licensed facilities, such as that sought by PG&E. (E.g., *City of Tenakee Springs v. Clough* (9th Cir. 1990) 915 F. 2d 1308, 1312 (NEPA requires analysis of cumulative impacts); see also 40 C.F.R. §§ 1508.7 and 1508.25 (2002) (defining the scope of an agency's proposed action for NEPA purposes to include the potential cumulative impact of the action when

considered with previously approved actions and reasonably foreseeable or other proposed future actions).) The NRC should order a full public hearing on this contention.

San Luis Obispo County ("SLOC") EC-1. In SLOC EC-1, the government entity petitioners raise, among other things, the same facility security issues as SLOMFP EC-1 and SLOMFP EC-2. Accordingly, for the reasons set forth above, the NRC should reconsider the conclusion it reached in the NRC Decision, and order a public hearing on SLOC EC-1.

The civic organizations and government entities that have sought intervention in PG&E's licensure proceedings have raised important questions regarding the safety and security of PG&E's proposed ISFSI. If the public is to have confidence in PG&E's operation of any spent fuel storage facility approved for Diablo Canyon, or, indeed, in PG&E's operation of the power plant itself, and if the public is to have confidence in the NRC permitting process, these issues must be analyzed publicly on their technical merits. The NRC should order public hearings on the critical safety and environmental issues raised by the petitioners in this matter.

The Attorney General appreciates your thoughtful consideration of this letter.

Sincerely,

KEVIN JAMES
Deputy Attorney General

For BILL LOCKYER
Attorney General

cc: NRC No. 72-26-ISFSI Service List
Senator Bruce McPherson
Assembly Member Abel Maldonado