

July 17, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF RESPONSE TO MOTION BY SAN LUIS OBISPO MOTHERS FOR
PEACE, SIERRA CLUB, AND PEG PINARD FOR DECLARATORY AND
INJUNCTIVE RELIEF WITH RESPECT TO DIABLO CANYON ISFSI

INTRODUCTION

On July 5, 2006, San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard (“the Petitioners”) filed a motion for declaratory and injunctive relief (“Motion”), requesting that the Commission enjoin Pacific Gas & Electric Company (“PG&E” or “the Licensee”) from loading spent fuel into an independent spent fuel storage installation (“ISFSI”) at the Diablo Canyon Nuclear Power Plant (“Diablo Canyon”) in San Luis Obispo, California. The Petitioners also seek a declaratory judgment from the Commission notifying the Licensee that a recent Ninth Circuit decision has effectively revoked PG&E’s license for the ISFSI. The NRC staff (“Staff”) hereby files its response and, for the reasons discussed below, respectfully requests that the Petitioners’ Motion be dismissed.

BACKGROUND

On December 21, 2001, PG&E filed an application for a materials license authorizing storage of spent nuclear fuel in a dry cask storage system at an ISFSI to be constructed at the Diablo Canyon site. “Letter from Lawrence F. Womack, PG&E, to the U.S. Nuclear Regulatory Commission,” Dec. 21, 2001. The Petitioners filed a request for a hearing. “Petition of San

Luis Obispo County Supervisor Peg Pinard and Avila Valley Advisory Council for Leave to Intervene and Request for a Hearing,” May 22, 2002; “Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, et al.,” May 22, 2002; “Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, et al.,” July 18, 2002. Among the proposed contentions was one alleging that the Staff’s environmental review of the proposed ISFSI pursuant to the National Environmental Policy Act of 1969 (“NEPA”) should consider the environmental impacts of terrorism. The Atomic Safety and Licensing Board (“Board”), as relevant to the instant petition, rejected the contention, and the Commission affirmed on review, ruling that NEPA does not require a terrorism review and that an environmental impact statement (EIS) is not the proper forum in which to conduct a terrorism analysis. *Pacific Gas & Elec. Co. (Diablo Canyon Power Plant)*, CLI-03-01, 57 NRC 1, 6-8 (2003).

The Petitioners filed a petition for review before the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the Commission’s determination that NEPA does not require an analysis of the environmental impact of terrorism and remanded the issue for further proceedings before the Commission. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (9th Cir. 2006). The Ninth Circuit recently extended the deadline to file a request for a rehearing *en banc* until August 31, 2006. Ordinarily, the mandate does not issue until seven days after the rehearing is denied or after the rehearing time expires. Fed. R. App. Proc. 41(b).

In spite of the fact that the mandate has not issued, the Petitioners filed their Motion before the Commission. The Motion argues that the factors to be considered before issuing a preliminary injunction; namely, the likelihood of success on the merits, the likelihood of irreparable harm to the petitioners absent an injunction, the likelihood of harm to other parties, and the public interest; weigh in favor of granting injunctive and declaratory relief. See Motion at 5, citing *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). However,

as discussed below, because the mandate has not yet issued, the Motion is untimely. In addition, the Petitioners have not shown that the factors to be considered before issuing a preliminary injunction weigh in their favor.

DISCUSSION

Once the Ninth Circuit's mandate is issued, absent a stay pending further review, it will be fully effective and must be implemented. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772 (1977). Until that time however, the Commission is bound by the current regulations and NRC adjudicatory decisions. *Cf. Id.*; *see also Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 & 2), LBP-82-53, 16 NRC 196, 205 (1982). On October 15, 2003, the Commission rejected the Petitioners' final petition for review, terminating the adjudication,¹ and, on March 26, 2004, issued the license. "Materials License No. SNM-2511 for the Diablo Canyon ISFSI," 69 Fed. Reg. 15,910 (March 26, 2004). The license issuance marked the final agency action on the license application. *See* 5 U.S.C. § 704. Because, any remand proceedings necessitated by the Ninth Circuit's decision will not be framed by the Commission until the mandate issues, the Petitioners' Motion is premature. Therefore, it should be dismissed without prejudice.

In addition, at the present time, the Petitioners have not shown that the balance of factors to be considered before granting injunctive relief is in their favor. Before granting injunctive relief, the Commission must consider: (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury to the petitioner; (3) the likelihood of harm to other parties; and (4) where the public interest lies. *Midland*, ALAB-395, 5 NRC at 778-79; 10 C.F.R. § 2.343(e) (balancing factors for grant of a stay). Of these four factors, the most important is the potential for irreparable harm to the petitioner. *Alabama Power Co.* (Joseph M. Farley Nuclear

¹ *Pacific Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185 (2003).

Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981). In order to warrant issuance of a stay the injury to the movant must be "both certain and great." *Cuomo v. NRC*, 772 F2d 972, 976 (D.C. Cir. 1985); *see also Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant)*, CLI-01-11, 53 NRC 370, 392-93 (2001). To show likelihood of success on the merits, it is not enough simply to present grounds for an appeal. *Id.* Rather, when the showing on the other three factors is weak, the moving party must show that there is an overwhelming chance of success on the merits. *Id.*

Here, the Petitioners have not made a showing that they are likely to succeed on the merits and have not shown that they are likely to suffer irreparable harm absent injunctive relief. Without these two factors, they also have not shown that the public interest lies in their favor. The Petitioners' claim that they are likely to succeed on the merits of their claim that the NRC's NEPA analysis must address terrorism rests on the recent Ninth Circuit decision. However, as discussed above, because the mandate has not yet issued from the Ninth Circuit, the Commission's current regulations and adjudicatory decisions remain in effect. Currently the Commission has ruled that there is no need to address the environmental impacts of terrorism through a NEPA analysis. *See Diablo Canyon*, CLI-03-01, 57 NRC at 6-8. There also has been no determination on this issue from the Supreme Court. Therefore, the Petitioners cannot claim that they are likely to succeed on the merits of their ultimate claim regarding the NRC's NEPA analysis.

The Petitioners also cannot claim that they are likely to suffer immediate irreparable harm absent an injunction. The NRC has stated, as the Petitioners note in their Motion, that spent fuel will not be ready to be loaded into casks at the ISFSI until November 2007. *See* Motion at 5, *citing* "Declaration of Charles E. Mullins In Support of Motion for Extension of Time Within Which to File a Petition for Rehearing *En Banc*," June 29, 2006 (Attached as Exhibit A). No permanent harm will occur at the facility until spent fuel is loaded, and, while the date for

loading remains uncertain and remote, the Petitioners cannot claim imminent irreparable harm. The Petitioners' other argument, that any changes at the site during continued construction may prejudice future terrorism-related NEPA review, is unavailing. Motion at 7-8. First, as the mandate has not yet issued, it is not yet certain that any further NEPA analysis will ever be necessary. Second, the Petitioners have only made a vague claim that in the course of construction the Licensee "may make substantial alterations to the Diablo Canyon site . . . that are difficult or very expensive to change at a later date," but has offered no clear examples of such changes, nor have the Petitioner explained how financial outlays on the part of the Licensee could prejudice the Staff's NEPA analysis. They have provided no information by reference to supporting materials in the record that would provide any credible factual support for a conclusion that any pending actions by the licensee would inhibit any NEPA analysis that might theoretically be required of the Staff. The Petitioners, therefore, have shown no imminent irreparable harm absent the injunction.

Finally, the Petitioners argue that "the public interest favors granting of a stay in order to protect the integrity of the NEPA decision-making process." Motion at 8. However, notwithstanding the Ninth Circuit decision, the EA for the Diablo Canyon ISFSI was properly performed under the Commission's current interpretation of its regulations. As the EA was performed in accordance with current law, the Petitioners have not shown that the NEPA process has been corrupted, and, therefore, the public interest will not be harmed if an injunction is not granted.

Based on the foregoing, the injunctive relief requested should be denied.

CONCLUSION

Until the mandate issues from the Ninth Circuit, the Petitioners' Motion is premature. In addition, the Petitioners have failed to show that the balance of factors to be considered before granting injunctive relief weighs in their favor. Therefore, the Petitioners' Motion should be denied.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Margaret J. Bupp". The signature is written in a cursive style with a large initial "M".

Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 17th day of July, 2006

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, et al.,)
)
Petitioners,)
)
v.) No. 03-74628
)
U.S. NUCLEAR REGULATORY COMMISSION)
and the UNITED STATES OF AMERICA,)
)
Respondents,)
)
PACIFIC GAS AND ELECTRIC COMPANY,)
)
Intervenor.)
)

**DECLARATION OF CHARLES E. MULLINS IN SUPPORT OF
MOTION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR
REHEARING OR REHEARING EN BANC**

1. I am a senior attorney in the Office of the General Counsel, U.S. Nuclear Regulatory Commission (NRC). I have had chief responsibility for the above-captioned lawsuit since it was filed in 2003. I drafted the government's appellate brief and I presented oral argument before a panel of this Court on October 17, 2005.

2. On June 2, 2006, a panel of this Court issued its decision in this case. Pursuant to Fed. R. App. P. 35(c) and 40(a)(1), a petition for rehearing or rehearing *en banc* is currently due on July 17, 2006. We are seek 45 additional days to seek rehearing. If our motion is granted, the new deadline would be August 31, 2006.

3. The panel decision raises a significant issue that may well warrant further review. The panel held that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4437, requires the NRC to consider the environmental impacts of a potential terrorist attack when

determining whether to issue a license for an independent spent fuel storage facility at the Diablo Canyon Nuclear Power Plant, near San Luis Obispo, California. The panel's NEPA-terrorism ruling may extend to other (non-NRC) government facilities and programs. We need additional time to assess how the panel's decision would affect the NRC licensing process in particular and the government in general. The NRC and the Justice Department are consulting several other federal agencies on the panel decision's practical effects.

4. The panel decision is a plausible candidate for further review on rehearing or rehearing *en banc* not only because of its potentially broad impact, but also because the decision is unprecedented. It appears inconsistent with decisions from several other courts of appeals rejecting claims that NEPA requires a study of the impacts of terrorism, sabotage, or deranged criminal intervention.¹ The panel decision also seems at odds with prior decisions of this Court² and the Supreme Court.³

5. The Solicitor General of the United States must approve the filing of all petitions for rehearing *en banc* in which the United States of America participates. See 28 C.F.R. § 0.20(b). As I've noted, the determination whether the United States should pursue rehearing *en banc* in this case requires extensive consultation among several government departments and agencies

¹ *See Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1988); *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984); *City of New York v. U.S. Dept. of Transportation*, 715 F.2d 732, 750 (2d Cir. 1982), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984). *See also Mid-States Coalition for Progress v. STB*, 345 F.3d 520, 542 (8th Cir. 2003).

² *See Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004); *No Gwen Alliance v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988).

³ *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

and a careful analysis of the basis of the panel's decision and related case law. That process has been slowed in this case because the Main Building at the Department of Justice in Washington is currently closed due to flooding, and will remain closed for a full work week or more. This greatly complicates intra-government communications on litigation matters.

6. In addition, throughout this litigation I have been the government's primary attorney, and I am the only government attorney fully familiar with the procedural and factual record and the legal issues. However, since March 6, 2006, I have been on a special assignment or "detail" to the Appellate Staff, Civil Division, of the Department of Justice. That detail will continue for two more months.

7. At the Department of Justice I am currently assigned to prepare briefs for the United States in the following cases: (1) *Mamikonyan v. Alberto Gonzales*, No. 05-76689 (9th Cir.); and (2) *Acosta Farms v. Department of Agriculture*, No. 06-12832 (11th Cir.). These briefs are due on July 10 (we are seeking an extension of time) and August 28, respectively. I am also assigned to prepare an appeal recommendation for the Solicitor General in *Horizon Lines v. United States of America*, No. 06-5165 (D.C. Cir.), where a protective notice of appeal has already been filed and docketed, and the appeal recommendation is due on July 10.

8. Intervenor, Pacific Gas and Electric Company (PG&E), has consented to our request for an extension of time. Petitioners have not. But Petitioners would not be unduly prejudiced by the granting of our Motion. To store spent fuel at the proposed new storage facility at issue in this lawsuit, PG&E will have to remove that fuel from Diablo Canyon's spent fuel pools and place it in approved dry casks. However, both the NRC staff and counsel for PG&E have informed me that PG&E will not be ready to load fuel into the dry casks until at least November,

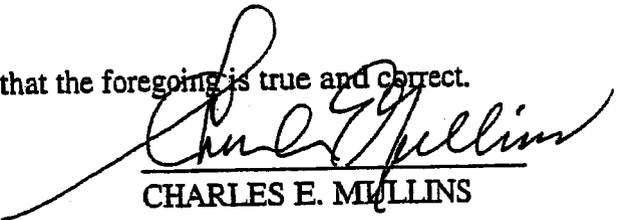
2007. In short, under any scenario, the new facility will contain no radioactive material for at least seventeen more months.. In addition, the NRC staff has informed me that the NRC has issued a license amendment (unchallenged by Petitioners) allowing PG&E to store more spent fuel in its existing wet pools, if necessary, thus postponing the need to use the new dry cask storage facility.

9. The NRC and the United States are acting diligently in reviewing the panel decision. We seek 45 days of additional rehearing time because the current July 17 rehearing deadline does not allow enough time to complete our ongoing multi-agency consultative process. In addition, if the Solicitor General authorizes the United States to seek rehearing *en banc*, I need adequate time to draft and file a petition.

10. We have sought no prior extensions of rehearing time. I will make every effort to file the government's rehearing petition, if it is authorized, within the time we are requesting in this motion.

For the foregoing reasons, counsel respectfully requests an extension of forty-five (45) days, to and including August 31, 2006, within which to file a petition for rehearing or rehearing *en banc*.

I declare under penalty of perjury that the foregoing is true and correct.


CHARLES E. MILLINS

Done at Rockville, Maryland
this 29th day of June, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully Submitted,


Margaret J. Bupp
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 17th day of July, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	
PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
)	
(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 "NRC STAFF RESPONSE TO MOTION BY SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, AND PEG PINARD FOR DECLARATORY AND INJUNCTIVE RELIEF WITH RESPECT TO DIABLO CANYON" and "NOTICE OF APPEARANCE" for Margaret J. Bupp 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 17th day of July, 2006.

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