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USNRC

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

July 17, 2006 (2:14pm)

BEFORE THE COMMISSION

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

ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO  
MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

On July 5, 2006, San Luis Obispo Mothers for Peace, et al. (collectively, "Petitioners")<sup>1</sup> filed a Motion for "declaratory and injunctive relief" with respect to Materials License No. SNM-2511, issued by the Nuclear Regulatory Commission ("NRC") to Pacific Gas and Electric Company ("PG&E") on March 22, 2004.<sup>2</sup> That license authorizes PG&E, under 10 C.F.R. Part 72, to possess spent fuel (and related radioactive materials) generated at the Diablo Canyon Power Plant ("DCPP") at an independent spent fuel storage installation ("ISFSI") to be constructed at the DCPP site. Petitioners' Motion is motivated by the recent Ninth Circuit Court of Appeals decision that would remand the licensing matter to the NRC for further proceedings

<sup>1</sup> The Petitioners include the San Luis Obispo Mothers for Peace ("SLOMFP"), the Santa Lucia Chapter of the Sierra Club, and Peg Pinard.

<sup>2</sup> See "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and Injunctive Relief With Respect to Diablo Canyon ISFSI" (July 5, 2006) ("Motion").

under the National Environmental Policy Act (“NEPA”) on the potential for environmental impacts from a terrorist attack on the DCPD ISFSI.

In accordance with 10 C.F.R. § 2.323, PG&E hereby responds in opposition to Petitioners’ Motion. As set forth below, the Court’s mandate has yet to issue and, when it does issue, the Court’s decision will not “invalidate” PG&E’s license. Furthermore, Petitioners can show no immediate or irreparable injury from either construction or operation of the ISFSI. And, in fact, granting the requested relief likely would injure PG&E and its customers and would contravene the public interest. Accordingly, there is no basis for the extraordinary equitable relief sought and the Motion should be denied.

## II. BACKGROUND

Following resolution of all issues in the ISFSI licensing proceeding before the NRC on October 15, 2003,<sup>3</sup> Petitioners filed a petition with the U.S. Court of Appeals for the Ninth Circuit seeking review of two Commission orders issued in this proceeding.<sup>4</sup> Petitioners argued that the Commission erroneously declined to hold a hearing on whether the environmental impacts of terrorist attacks and other “acts of malice or insanity” against the ISFSI should be addressed in an Environmental Impact Statement (“EIS”) under NEPA — and that the agency violated the Atomic Energy Act of 1954, as amended (“AEA”), NEPA, and the Administrative Procedure Act (“APA”) by declining to hold a hearing on proposals to improve the security of DCPD before approving the ISFSI license. Petitioners did not seek a stay of the NRC licensing action pending judicial review from either the Commission or the Court of Appeals. Nor did they argue to the Ninth Circuit — as they now argue to the NRC — that

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<sup>3</sup> See *Pacific Gas and Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-12, 58 NRC 185 (2003).

<sup>4</sup> See CLI-03-1, 57 NRC 1 (2003); CLI-02-23, 56 NRC 230 (2002).

PG&E's ISFSI license is invalid and that injunctive relief is warranted. Rather, Petitioners sought only additional hearings at the NRC to address the alleged procedural violations of the AEA's public hearing requirement, the APA's notice and comment provisions, and NEPA's "hard look" requirement.

In the decision issued on June 2, 2006, the Court of Appeals denied the petition for review as to the claims under the AEA and APA.<sup>5</sup> Among other things, the Court held that the NRC's reliance on its prior resolution of a legal issue through adjudication (*i.e.*, its prior opinion in CLI-02-25) did not violate the AEA or APA. The Court also affirmed the NRC's denial of a hearing on security measures for DCPD as a whole. Relative to the NEPA claim, the Court held that "the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy a reasonableness review," and remanded the matter to the NRC.<sup>6</sup> Notwithstanding, the Court did *not* enjoin, set aside, or suspend the DCPD ISFSI license issued by the NRC based on the agency's NEPA finding.

Petitioners now request that the Commission itself take that action. Specifically, in their Motion, Petitioners ask the Commission to take three actions:

- (1) Declare that the license issued to PG&E on March 22, 2004, is invalid and therefore confers no authority for the possession of spent fuel or the construction of the ISFSI;
- (2) Declare that PG&E proceeds with the construction of the Diablo Canyon ISFSI at the risk that a new permit may be denied, or that it may have to change the design and construction of the ISFSI in response to the NRC's environmental review of the impacts of attacks on the facility;<sup>7</sup> and

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<sup>5</sup> See *San Luis Obispo Mothers for Peace, et al. v. Nuclear Regulatory Comm'n*, No. 03-74628 (9th Cir. June 2, 2006) ("San Luis Obispo").

<sup>6</sup> *Id.*, slip op. at 6096.

<sup>7</sup> This requested action is arguably inconsistent with the first requested action, insofar as the first relates to continued construction of the ISFSI. The inconsistency appears to

- (3) Enjoin PG&E from loading spent fuel into the ISFSI unless and until the NRC has completed an EIS regarding the environmental impacts of attacks on the ISFSI and has issued a valid license to PG&E.

Motion at 9-10. Petitioners, however, cite no NRC rules of procedure authorizing “declaratory” or “injunctive” relief. Indeed, the Commission has previously noted that its rules do not provide for enforcement-type “injunctions” against licensees, and that an “emergency request for an injunction more appropriately should be viewed as akin to a petition for enforcement under 10 C.F.R. § 2.206.”<sup>8</sup> Nonetheless, for purposes of this response, PG&E treats Petitioners’ Motion as a request to stay or suspend the effectiveness of PG&E’s already-issued license pending resolution of the remanded NEPA issue.

### III. ARGUMENT

As shown below, Petitioners’ Motion should be denied for three reasons. First, it is premature given that the Court’s mandate has not yet issued. Second, even if the mandate had issued, Petitioners are simply wrong in suggesting that the Court’s decision casts doubt on the validity of PG&E’s duly-issued license. Third, in any event, Petitioners have utterly failed to demonstrate that a stay is needed to prevent irreparable injury, and the other considerations that control the availability of a stay or other equitable relief — including the harm to PG&E, its customers, and the public interest — also all weigh heavily *against* a stay.

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belie the Petitioners’ own lack of conviction regarding the demand for an injunction barring construction.

<sup>8</sup> *Nuclear Fuel Servs., Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 245 (2003) (denying request that the NRC enjoin construction of buildings by a licensee).

A. Until the Court's Mandate Issues, the Ninth Circuit's Decision Does Not Require the NRC to Take Any Particular Action, Let Alone the Actions Requested by Petitioners

The core of Petitioners' argument, which is relegated to a footnote in their Motion, is that the Ninth Circuit's June 2, 2006, decision invalidated PG&E's license. Motion at 6, n.3. Indeed, Petitioners assert that "PG&E now stands in the shoes of an applicant for an ISFSI license, not a licensee." In Petitioners' view, PG&E's license does not "constitute a valid instrument" or authorize storage of spent fuel in the DCPD ISFSI because the Court remanded for further proceedings under NEPA. *Id.*

Assuming that Petitioners' reasoning were correct — which, as discussed further below, it clearly is not — the Ninth Circuit's decision could have no such effect at this juncture. Specifically, the Court's "mandate" has yet to issue, a fact that Petitioners themselves concede. Motion at 8-9. Under the Federal Rules of Appellate Procedure, the mandate is the certified copy of the final judgment and is, in effect, the order that makes the decision effective.<sup>9</sup> In this case, the Court's mandate will not issue, at the earliest, until early September 2006.<sup>10</sup> If and until

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<sup>9</sup> See FED. R. APP. P. 41(a); *York Int'l Bldg., Inc. v. Chaney*, 527 F.2d 1061, 1066 (9th Cir. 1975); see also *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978) ("The effect of the mandate is to bring the proceedings in a case on appeal in our Court to a close and to remove it from the jurisdiction of this Court, returning it to the forum whence it came.")

<sup>10</sup> By rule, the court's mandate does not issue until seven calendar days after the time to file a petition for rehearing expires, or until seven calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing *en banc*, or motion for stay of mandate, whichever is later. FED. R. APP. P. 41(b). As here, in civil cases in which a federal agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time. FED. R. APP. P. 40(a)(1). In this case, the court has extended the time to file a petition for rehearing by 45 days at the Government's request, such that the deadline for seeking rehearing is now August 31, 2006. A timely rehearing petition would *automatically* further stay the issuance of the mandate. Fed. R. App. P. 41(d)(1). Upon motion, the court's mandate also may be stayed pending an application to the U.S. Supreme Court for a writ of certiorari. See FED. R. APP. P. 41(d)(2).

that happens, the Commission is not required to take *any* action in response to the Ninth Circuit's decision.<sup>11</sup>

Accordingly, irrespective of its merits, Petitioners' Motion for "declaratory" and "injunctive" relief is not ripe for consideration. The Court's decision presently has no effect whatsoever on the DCPD ISFSI license.

B. Issuance of the Court's Mandate Will Not Invalidate PG&E's License for the Diablo Canyon ISFSI

As noted above, Petitioners' Motion rests on the erroneous premise that the Ninth Circuit's decision effectively invalidates PG&E's license for the Diablo Canyon ISFSI. Even if the mandate had already issued, Petitioners' argument that PG&E no longer "holds a valid license" would be entirely without merit. No precedent is cited for this principle and, indeed, it is in fact abundantly clear that a NEPA "violation" does *not* automatically invalidate a license.

This conclusion follows from *Amoco Production Co. v. Village of Gambell*, in which the U.S. Supreme Court held, specifically in the context of environmental litigation, that injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course," but instead requires a finding of "irreparable injury and inadequacy of legal remedies."<sup>12</sup> In *Amoco*, the Court overturned a Ninth Circuit decision in which the court of appeals had found that "[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the

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<sup>11</sup> Cf. *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 784 (1977) (quoting *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station) and *Consumers Power Company* (Midland Plant, Units 1 & 2), CLI-76-14, 4 NRC 163, 166 (1976)) ("[A]s the Commission has stated in no uncertain terms, *upon issuance of the mandate* the court's 'decision [becomes] fully effective and binding on the Commission, and it must proceed to implement it.'") (emphasis added).

<sup>12</sup> See *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)).

environmental impacts of a proposed action.”<sup>13</sup> The Court rejected that presumption as “contrary to traditional equitable principles” and concluded that the environment “can be fully protected without this presumption.”<sup>14</sup> Stated differently, NEPA does not provide a specific remedial standard that supplants a court’s (or the Commission’s) equitable powers.<sup>15</sup>

With this context, it is clear that Petitioners’ argument reflects a fundamental misunderstanding of the Court’s ruling. While the Court’s decision remands CLI-03-1 to the NRC for further consideration, the decision, by its terms, does *not* enjoin, set aside, or suspend any Commission order or license, notwithstanding the Court’s statutory authority to take such action.<sup>16</sup> Petitioners never requested such relief from the Commission or the Court of Appeals, never attempted to make the requisite equitable showing under *Amoco*, and no injunctive relief

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<sup>13</sup> *Id.* at 544-45 (quoting *People of Gambell v. Hodel*, 774 F.2d 1414, 1423 (1985)) (emphasis in original).

<sup>14</sup> *Id.* at 545. Quoting *Romero-Barcelo*, the Court also stated that “[t]he ‘grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law.’” *Id.* at 543.

<sup>15</sup> Numerous circuit courts have concluded that NEPA remedies are governed by traditional principles of equity. See, e.g., *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991); *Sierra Club v. Marsh*, 872 F.2d 497, 502-504 (1st Cir. 1989); *Town of Huntington v. Marsh*, 884 F.2d 648, 651 (2d Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Nat’l Audubon Soc’y v. Navy*, 422 F.3d 174, 201 (4th Cir. 2005), *Charter Township of Huron v. Richards*, 997 F. 2d 1168, 1175 (6th Cir. 1993); *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988); *Sierra Club v. Hodel*, 848 F.2d 1068, 1097 (10th Cir. 1988).

<sup>16</sup> The Hobbs Act gives the court of appeals “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of . . . of all final orders” of the NRC made reviewable by Section 189 of the AEA, as amended. See 28 U.S.C. §§ 2342(4), 2349(a); 42 U.S.C. § 2239. Additionally, actions for judicial review of agencies’ compliance with NEPA are governed by the review provisions of the APA, 5 U.S.C. § 701 *et seq.* See *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 90 (1983). The APA directs the reviewing court to “compel agency action unlawfully withheld or unreasonably delayed,” and to “hold unlawful and set aside agency action, findings, and conclusions” found to be unsupported or contrary to law. 5 U.S.C. §§ 706(1) and (2).

was granted. Petitioners are now in no position to claim that the license is invalid or that the NRC should issue an injunction.

The circumstances here mirror those encountered by the Third Circuit in *Limerick Ecology Action, Inc. v. Nuclear Regulatory Comm'n.*<sup>17</sup> In that case, the court of appeals remanded the issue of severe accident mitigation design alternatives (“SAMDA”) to the NRC for further consideration under NEPA, but allowed the underlying agency action (issuance of a full power license for the Limerick plant) to remain in place during the remand proceedings. The court explained its choice of remedy as follows:

We also note that 28 U.S.C. § 2342(4) (1982) gives us “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of . . . of all final orders of the [Nuclear Regulatory] Commission made reviewable by section 2239 of title 42.” *In this case, however, the petitioners are not asking us to enjoin, set aside, suspend, or determine the validity of the grant of an operating license to Limerick Units 1 and 2. Rather, they ask us to remand to the Commission and order it to hold evidentiary hearings on issues the Commission should have, but failed to, consider under NEPA.*<sup>18</sup>

On remand in *Limerick*, the Commission emphasized this point when the petitioners subsequently asked the Commission to stay or suspend licensing of Limerick Unit 2 in response to the court’s decision. The Commission noted that “the Court did not revoke the operating license for Unit 1, nor did it modify or vacate the Licensing Board’s decision authorizing full power operation of both units.”<sup>19</sup> The Commission firmly concluded that “the Third Circuit’s

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<sup>17</sup> 869 F.2d 719 (3d Cir. 1989). See also *State of Minnesota v. Nuclear Regulatory Comm'n*, 602 F.2d 412, 418 (D.C. Cir. 1979) (remanding for further consideration “the specific problem isolated by petitioners” but declining to stay or vacate license amendments so as not to “effectively shut down the plants”).

<sup>18</sup> *Id.* at 741 n. 27 (emphasis added).

<sup>19</sup> *Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2)*, CLI-89-15, 30 NRC 96, 98 (citing LBP-85-25, 22 NRC 101 (1985)).

decision, *by its own terms, had no impact upon the effectiveness* of the Licensing Board’s initial decision authorizing the issuance of an operating license for Limerick Unit 2.”<sup>20</sup>

Like the petitioners in *Limerick*, Petitioners here did not ask the Court for any relief beyond a remand for further proceedings on a NEPA-related issue — and no such relief was granted. Accordingly, the premise for the present Motion — that the ISFSI license is invalid — is hyperbolic and wrong.

C. The Court’s Ruling that the NRC Failed to Comply With NEPA In One Limited Respect Does Not Justify Injunctive Relief

Petitioners fail to demonstrate any irreparable harm or equitable considerations that would support the extraordinary relief requested. Petitioners contend, incorrectly, that “load[ing] fuel into the ISFSI before completion of the remanded NEPA review violate[s] NEPA’s fundamental principle that environmental impacts must be weighed in an EIS *before* federal action is taken.” Motion at 6. Similarly incorrect is Petitioners’ contention that Section 72.40(b) precludes construction activities “before the NRC’s NEPA review is complete.” *Id.* Petitioners’ two assertions — both erroneous — cannot justify declaratory or injunctive relief.

As discussed above, even when a court finds an agency to be in violation of NEPA, injunctive relief does not automatically follow.<sup>21</sup> For its part, the Ninth Circuit has acknowledged that an equitable balancing of harms test applies.<sup>22</sup> Only if irreparable environmental injury is found to be “sufficiently likely” may the balance of harms possibly favor

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<sup>20</sup> CLI-89-15, 30 NRC at 101 (emphasis added).

<sup>21</sup> *See, e.g., Nat’l Audubon*, 422 F.3d at 202 (stating that “a court should not automatically enjoin agency action whenever it finds a NEPA violation,” and “must balance the harms particular to each case” in assessing requests for injunctive relief).

<sup>22</sup> *See Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1496 (9th Cir. 1995) (citing *Amoco*, 480 U.S. at 541, 544-45).

the issuance of an injunction to *protect the environment*.<sup>23</sup> In the analogous *Limerick* proceeding, the Commission described the test, as applied in NRC proceedings, as follows:

[I]f a court decision mandates the issuance of a stay, a stay must issue. . . . Where, as here, however, the court's decision did not require a stay, two types of inquiry are called for in considering whether a stay will be granted: (1) a traditional balancing of the equities and (2) consideration of any likely prejudice to further decisions that might be called for by the remand. *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 521 (1977).<sup>24</sup>

The Commission considered a request for "injunctive" relief for alleged environmental harm in the *Hydro Resources* proceeding.<sup>25</sup> There, the Commission denied a petition for review of a presiding officer's interlocutory order denying a stay request filed by various petitioners. In that proceeding, the NRC Staff had issued a license under 10 C.F.R. Part 40 to Hydro Resources, Inc. ("HRI") to conduct an *in situ* uranium mining and milling operation in New Mexico. The petitioners challenged the presiding officer's rejection of their request to stay the effectiveness of HRI's license pending both a health-and-safety hearing on the

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<sup>23</sup> *Amoco*, 480 U.S. at 545. In this regard, Petitioners' recitation of the standard for "stays" in *Virginia Petroleum Jobbers' Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1951), is misplaced. The latter test has been applied by the Commission only in ruling on requests for stays *pending judicial review*. Petitioners here made no such request.

<sup>24</sup> CLI-89-15, 30 NRC at 100. NRC precedent suggests that, in applying this test in the NEPA context, the Commission may consider such factors as: (1) the extent of the NEPA violation; (2) the timeliness of objections; (3) the likelihood that significant adverse impacts would occur pending resolution of the remanded issues; (4) the effect of the delay; (5) the need for the project; (6) whether reasonable alternatives will be foreclosed by continued construction; (7) the possibility that the cost-benefit balance would be tilted through increased investment; and (8) general public policy concerns. See *Consumers Power Co.* (Midland Plant, Units 1 and 2), LBP-77-57, 6 NRC 482, 484 (1977), *aff'd*, ALAB-458, 7 NRC 155 (1978).

<sup>25</sup> See *Hydro Res., Inc.* (2929 Coors Road, Suite 101, Albuquerque, NM 87120), CLI-98-8, 47 NRC 314 (1998).

application and an historic property review pursuant to Section 106 of the National Historic Preservation Act (“NHPA”).

The petitioners argued that the NRC Staff’s alleged failure to comply with Section 106 of the NHPA “implies” the “irreparable” injury necessary for interlocutory review and injunctive relief.<sup>26</sup> Petitioners relied on a district court decision in which the court analogized the NHPA to NEPA. *See Colorado River Tribes v. Marsh*, 605 F.Supp. 1425, 1439-40 & n.11 (C.D. Calif. 1985). The Commission was not persuaded, and concluded that “Petitioners are required to *show* the threat of irreparable harm, not merely to ‘imply’ it.”<sup>27</sup> Of most relevance here, the Commission added that:

More fundamentally, *Colorado River’s* holding that a statutory violation equates to a showing of irreparable injury cannot be squared with the current state of the law as reflected in two Supreme Court environmental law decisions, *Weinberger v. Romero-Bacelo*, 456 U.S. 305 (1982), and *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531(1987). The more recent of these decisions, *Amoco*, expressly rejected a Ninth Circuit holding — essentially identical to Petitioners’ argument — that “[i]rreparable damage is *presumed* when an agency fails to evaluate thoroughly the environmental impact of a proposed action” and “only in rare circumstances may a court refuse to issue an injunction when it finds a NEPA violation.”<sup>28</sup>

Citing decisions by six circuit courts, the Commission stated that “[n]umerous cases hold that a plaintiff seeking injunctive relief must prove irreparable harm, and that mere violation of NEPA or other environmental statutes is insufficient to merit an injunction.”<sup>29</sup>

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<sup>26</sup> CLI-98-8, 47 NRC at 322.

<sup>27</sup> *Id.* (emphasis in original).

<sup>28</sup> *Id.* at 322-23 (emphasis in original).

<sup>29</sup> CLI-98-8, 47 NRC at 323 n. 13 (citations omitted).

The Petitioners here do not establish any legitimate, irreparable harm from continued construction or operation of the ISFSI.<sup>30</sup> Certainly no harm results — from potential terrorist attacks or otherwise — merely from the continued *construction* of the ISFSI. Petitioners offer no reason to believe otherwise. Instead, they assert that “10 C.F.R. § 72.40(b) provides that a license to possess spent fuel ‘may be denied if construction of the proposed facility begins before a finding approving issuance of the license with any appropriate conditions to protect environmental values.’” Motion at 6. Citing CLI-03-3, Petitioners re-characterize this qualified, permissive language to claim that continued ISFSI construction would “run afoul” of Section 72.40(b)’s “warning that a *license applicant* should not build an ISFSI” before the NRC completes all aspects of its NEPA review. Motion at 6-7 n.3 (emphasis added). Petitioners, however, misread the regulation, and their argument is contrary to precedent.

First, PG&E already has received an NRC license. Consequently, Petitioner’s reliance on Section 72.40(b) — a pre-license provision — is entirely misplaced.

Second, CLI-03-3, the very decision upon which Petitioners rely, establishes that the existence of outstanding environmental issues does *not* automatically preclude construction of the facility at issue. In that case the Commission considered a request to enjoin construction of buildings prior to the issuance of the first of three license amendments requested by Nuclear Fuel Services, Inc., a Part 70 licensee. The petitioners argued that the NRC needed to prepare an EIS for the entire project, and that construction could not proceed prior to completion of the EIS. Much like Petitioners here, they asserted that allowing construction to go forward would “influence the NRC’s decisionmaking process regarding the proposed [] project, by committing

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<sup>30</sup> It is not apparent, and PG&E does not concede, that a Part 72 license is even necessary for construction of the facility. The license provides authority for possession and storage of spent fuel at the facility.

resources to a preordained course of action before the agency decided whether to prepare an EIS that evaluates the impacts of that course of action or reasonable alternatives.”<sup>31</sup> The Commission in CLI-03-3 flatly rejected the petitioners’ arguments and request for an injunction. The Commission explained that, “*while not absolutely barring preclicensing construction*, NRC rules provide a disincentive to early construction by raising the possibility of ultimate denial of the license application should an applicant move forward precipitously, despite open environmental issues.”<sup>32</sup> (In their Motion, Petitioners omit the italicized language.) The Commission thus drew “a distinction between those actions [the Commission] can discourage by [its] authority over licensing, and those actions [it] prevent[s] outright.”<sup>33</sup> Accordingly, Section 72.40(b) does not in any way prevent outright the continued construction of the DCPD ISFSI.

The Motion is similarly flawed with respect to PG&E’s ability to commence *operation* of the Diablo Canyon ISFSI.<sup>34</sup> In fact, the Commission spoke directly to this issue in the *Limerick* proceeding discussed above. There, the Commission determined that a stay was not

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<sup>31</sup> *Nuclear Fuel Servs.*, CLI-03-3, 57 NRC at 243.

<sup>32</sup> *Id.* at 247 (emphasis added). In this regard, the Commission emphasized that “NFS therefore commits construction resources at its own financial risk.” *Id.* at 248. Here too PG&E proceeds at its own financial risk.

<sup>33</sup> *Id.* at 250. Consistent with *Amoco*, the Commission also found that “[i]n the absence of a compelling threat of immediate and irreparable injury to the Petitioners from NFS’s construction activities, an extraordinary Commission ‘injunction’ order is unwarranted.” *Id.* The Commission noted that the petitioners nowhere indicated how they might suffer “immediate environmental harm simply as a result of new building construction within the boundaries of NFS’s existing site,” including any “any *direct* environmental impacts to them from the construction process, e.g., dust, noise, etc., or from the mere buildings themselves.” *Id.* (emphasis added).

<sup>34</sup> *Cf. Pub. Serv. Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-90-3, 31 NRC 219, 230 (stating that there is no “clear, nondiscretionary duty on the part of the Licensing Board to delay full power authorization pending the completion of remand proceedings or resolution of all pending matters”).

necessary because the eventual licensing of the facility was not an issue in the remand.<sup>35</sup> The Commission noted that the further NEPA analysis required by the court related only to consideration of possible additional cost-effective reductions of environmental impacts.<sup>36</sup> Because plant operation would not delay or foreclose the necessary NEPA analysis, and because a delay in operation would be costly to the applicant (and potentially to ratepayers in the future), the Commission declined to stay the license. The Commission subsequently noted that:

The instant case is unusual in that, while all contested safety issues have been fully heard and resolved, NEPA issues remain pending for hearing before the Licensing Board as a result of the Court's remand. However, NEPA itself does not always require resolution of all contested environmental issues and completion of the entire NEPA review process before the license can issue. *See* 40 C.F.R. § 1506.1.<sup>37</sup>

The Commission's reasoning in *Limerick* parallels that of the Fourth Circuit in its recent *National Audubon* decision. In rejecting a broadly framed request for injunctive relief, the Court, citing the same CEQ regulation cited by the Commission in *Limerick*, stated:

We have cautioned, however, that a NEPA injunction "should be tailored to restrain no more than what is reasonably required to accomplish its ends." [citation omitted] Violation of NEPA is not always cause to enjoin all agency activity while the agency completes its required environmental analysis. If this were the case, 40 C.F.R. § 1506.1(a) would be rendered superfluous. The subsection's specific prohibition only on activities that cause environmental harm or "[l]imit the choice of reasonable alternatives" compels the conclusion that activities do exist which do not have such effects and may proceed while an EIS is pending.<sup>38</sup>

In the present case, Petitioners have failed to demonstrate *any* threat of environmental injury from operation of the ISFSI. The remanded issue relates to the potential

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<sup>35</sup> CLI-89-15, 30 NRC at 100 (citing CLI-89-10).

<sup>36</sup> *See id.*

<sup>37</sup> CLI-89-17, 30 NRC 105, 110 (1989).

<sup>38</sup> *Nat'l Audubon*, 422 F.3d at 201 (4th Cir. 2005).

environmental impact of a terrorist attack on the ISFSI. Any harm that *might* result would therefore follow only from a speculative attack on the ISFSI. Thus, at bottom, Petitioners' alleged harm is the mere *risk* of an attack on a facility that will not even begin to receive spent fuel for storage until at least November 2007.

It is well established that an award of injunctive relief "can and should be predicated only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are *actual and imminent*."<sup>39</sup> Put another way, "a threat of irreparable injury must be proved, not assumed, and may not be postulated *eo ipso* on the basis of procedural violations of NEPA."<sup>40</sup> Operation of the ISFSI would not, in and of itself, cause imminent, irreparable injury, and therefore no injunctive relief is warranted.

Furthermore, allowing PG&E to continue with ISFSI construction and eventually to load fuel would not "create the type of option-limiting harm that NEPA seeks to prevent." *Nat'l Audubon*, 422 F.3d at 202. The goals of NEPA are realized through a set of procedures that require an agency to evaluate environmental consequences of federal decisions and provide for broad dissemination of relevant environmental information. Although these procedures require the NRC to take a "hard look" at environmental consequences, they do not dictate any

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<sup>39</sup> *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 755 (2d Cir. 1977) (emphasis added); see also *Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (stating that harm alleged must be both certain and immediate, rather than speculative or theoretical); *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974-76 (D.C. Cir. 1985) (finding likelihood of alleged radiological harm from nuclear plant operation too small to constitute irreparable harm).

<sup>40</sup> *Town of Huntington v. Marsh*, 884 F.2d. at 651-54.

particular result.<sup>41</sup> There is no showing by Petitioners that the NEPA process on the specific (and narrow) remanded issue is compromised by construction or use of the ISFSI.

There can also be no doubt that a balancing of the equities militates overwhelmingly *against* the issuance of an injunction. First, as discussed above, Petitioners did not ask the Court of Appeals to set aside or suspend the Commission's decision to issue a license to PG&E. As the *Midland* Appeal Board observed, a "utility hardly can be faulted for exercising its rights under presumptively valid construction permits which the opposing parties had not even asked be stayed pendente lite."<sup>42</sup>

Moreover, Petitioners' request for "injunctive" relief is inexcusably dilatory.<sup>43</sup> Petitioners could have argued to the Board, the Commission, and the Court of Appeals that the agency's failure to conduct a terrorism review as part of its NEPA analysis rendered PG&E's license invalid. Petitioners also could have requested a stay pending judicial review first from the Commission, and then from the Court of Appeals, over two years ago. Again, they did not do so. The Motion now is simply too late.

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<sup>41</sup> *Stryker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam); see also, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989) ("NEPA itself does not . . . mandat[e] particular results, but simply prescribes the necessary process for preventing uninformed — rather than unwise — agency action."). Given NEPA's purely procedural nature, and the fact that the NRC has already conducted AEA-based reviews of physical security requirements, and the Court's dismissal of Petitioners' AEA-based issues, it seems unlikely that the Commission would impose additional design, construction, or operational requirements on PG&E as a result of any proceedings on remand in this case.

<sup>42</sup> *Midland*, 7 NRC at 171.

<sup>43</sup> Cf. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-84-53, 20 NRC 1531, 1545-47 (1984) (citing intervenors' "dilatory failure" to raise issues or "lack of diligence" as one of the "equities involved").

Further, in contrast to the lack of immediate harm to Petitioners, PG&E stands to suffer considerable injury if ISFSI operation were to be delayed. PG&E has licensed alternatives for storage of spent fuel through 2010-11. However, any uncertainty with respect to storage beyond that timeframe necessitates expensive contingency planning. The unavailability of dry storage capacity at that time could force PG&E to cease power production at Diablo Canyon, which provides about 10 percent of the baseload electricity for the entire State of California.

Finally, completion and operation of the ISFSI on schedule is plainly in the public interest. On the broadest level, PG&E's license permits the company to store spent fuel consistent with the Nuclear Waste Policy Act of 1982, as amended ("NWPA"), 42 U.S.C. § 10101, *et seq.* From a public health and safety standpoint, PG&E prefers that the spent fuel be stored in the ISFSI rather than in the spent fuel pool. From a fiscal standpoint, any prolonged disruption in the plant's operation, caused by a lack of adequate spent fuel storage capacity, would adversely impact California ratepayers and consumers of electricity by affecting the cost and availability of electricity within the State.

At bottom, assuming that the matter is not appealed further and that the Court's mandate eventually issues, the NRC will be obligated to resolve the remanded issue by some process that it selects, in its discretion, consistent with NEPA and NRC regulations.<sup>44</sup> Indeed, the Ninth Circuit noted that "[t]here remain open a wide variety of actions that the Commission may take on remand."<sup>45</sup> The agency is not obligated to reach a particular result that conditions the license or compels further action to mitigate the terrorist threat. The Court's decision will obligate the NRC only to fully consider the remanded issue. There is no basis whatsoever for the

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<sup>44</sup> See CLI-76-14, 4 NRC at 166 n.1 (stating that the Commission has "broad discretion in implementing judicial mandates").

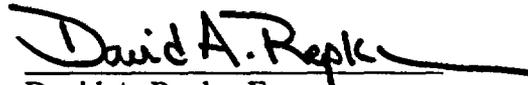
<sup>45</sup> *San Luis Obispo*, slip op. at 6096.

claim that continued construction or even operation of the ISFSI will harm the environment or undermine the integrity of the NEPA process on the remanded issue. In the meantime, PG&E can lawfully act under the license, commit construction resources at its own financial risk, and — when ready — store spent fuel in a safe manner.

IV. CONCLUSION

For the reasons above, the Commission should deny Petitioners' Motion.

Respectfully submitted,



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Dated in Washington, District of Columbia  
this 17<sup>th</sup> day of July 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

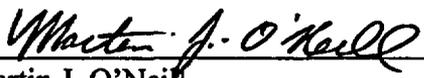
BEFORE THE COMMISSION

In the Matter of: )  
Pacific Gas and 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 captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Supreme Court of Texas  
Name of Party: Pacific Gas and Electric Company

  
\_\_\_\_\_  
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Winston & Strawn LLP  
Counsel for Pacific Gas and Electric Company

Dated at Washington, District of Columbia  
this 17<sup>th</sup> day of July, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

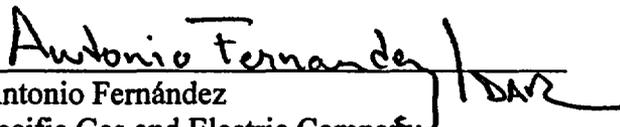
BEFORE THE COMMISSION

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Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
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Spent Fuel Storage Installation) )

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this 17<sup>th</sup> day of July, 2006

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
 )  
Pacific Gas and Electric Co. ) Docket No. 72-26-ISFSI  
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Spent Fuel Storage Installation) )

CERTIFICATE OF SERVICE

I hereby certify that copies of the "ANSWER OF PACIFIC GAS AND ELECTRIC COMPANY TO MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF" and a "NOTICE OF APPEARANCE" for Martin J. O'Neill and for Antonio Fernández have been served as shown below by electronic mail, this 17<sup>th</sup> day of July 2006. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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

Atomic Safety and Licensing Board Panel  
U.S. Nuclear Regulatory Commission  
Mail Stop T-3F23  
Washington, DC 20555-0001

Office of Commission Appellate Adjudication  
U.S. Nuclear Regulatory Commission  
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A handwritten signature in black ink that reads "David A. Repka". The signature is written in a cursive style with a long horizontal line extending to the right from the end of the name.

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& Electric Company