

September 18, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the matter of
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant
Unit Nos. 1 and 2
Independent Spent Fuel Storage Installation

Docket # 72-26-ISFSI

DOCKETED
USNRC

September 18, 2006 (9:18am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**MOTION BY SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB,
AND PEG PINARD FOR PARTIAL RECONSIDERATION OF CLI-06-23**

I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.323 and 2.345, the San Luis Obispo Mothers for Peace, Santa Lucia Chapter of the Sierra Club, and Peg Pinard ("Petitioners") hereby move the Commissioners of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") for reconsideration of CLI-06-23, an Order issued by the Commission on September 6, 2006. Petitioners request reconsideration of the portion of CLI-06-23 that denies Petitioners' request to declare invalid Pacific Gas & Electric Company's ("PG&E")'s permit for an independent spent fuel storage installation ("ISFSI") on the site of the Diablo Canyon nuclear power plant, and (b) enjoin PG&E from loading spent fuel into the ISFSI unless and until the NRC has completed an environmental impact statement ("EIS") that addresses the environmental impacts of an intentional attack on the ISFSI as required by the U.S. Court of Appeals for the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) ("*Mothers for Peace*"). Reconsideration is warranted because the Ninth Circuit has issued its mandate,

which reverses the NRC's decision to issue the permit to PG&E. (A copy of the mandate is attached as Exhibit 1.) Accordingly, the Commission should comply with the mandate by declaring that PG&E's license is revoked and enjoining PG&E from loading spent fuel into the ISFSI until the NRC completes the remanded proceeding for implementation of the National Environmental Policy Act ("NEPA").¹

II. FACTUAL BACKGROUND

As discussed in Petitioners' Motion at 3, on December 11, 2003, Petitioners submitted a Petition for Review to the Ninth Circuit, asking for reversal of the NRC's decisions approving issuance of a permit for PG&E's ISFSI on the ground that they violated the Atomic Energy Act, NEPA, and the Administrative Procedure Act. On March 15, 2004, Petitioners filed their initial brief, also asking the Court to reverse the NRC's licensing decisions and remand the case to the Commission.

On June 2, 2006, in *Mothers for Peace*, the Ninth Circuit held that the Environmental Assessment ("EA") for the Diablo Canyon ISFSI "is inadequate and fails to comply with NEPA's mandate." 449 F.3d at 1035. The Court "grant[ed] the petition as to that issue" and remanded the case to the NRC "for further proceedings consistent with this opinion." *Id.* Thus, the Court granted Petitioners' request to reverse the NRC's

¹ Petitioners do not seek reconsideration of the portion of CLI-06-23 which refuses to declare that PG&E proceeds with construction of the ISFSI at the risk of having its permit denied or having to change the design and construction of the ISFSI if required by the NRC as a result of the remanded NEPA process, because CLI-06-23 effectively granted the requested relief by acknowledging that PG&E proceeds with construction at its own financial risk. CLI-06-23, slip op. at 3.

decision to issue PG&E's ISFSI license for failure to comply with NEPA.²

On July 5, 2006, Petitioners filed a motion requesting the Commission to take two actions necessary to preserve the integrity of the remanded NEPA review process: (a) enjoin PG&E from loading spent fuel into the Diablo Canyon ISFSI and (b) declare that PG&E is doing construction work on the ISFSI at the risk of its permit being denied or having to change the ISFSI design and construction after the NEPA process is complete. Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and Injunctive Relief With Respect to Diablo Canyon ISFSI ("Petitioners' Motion").

In response, PG&E argued that in *Mothers for Peace*, "the Court did *not* enjoin, set aside, or suspend the [Diablo Canyon Power Plant] ISFSI license issued by the NRC based on the agency's NEPA finding." Answer of Pacific Gas and Electric Company to Motion for Declaratory and Injunctive Relief at 3 (July 17, 2006) ("PG&E Response") (emphasis in original). The Staff argued that Petitioners' Motion was premature because the mandate had not yet issued. 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 at 3 (July 17, 2006).

In CLI-06-23, the Commission responded to Petitioners' Motion by holding that there was "no urgent reason" to consider now the validity of PG&E's ISFSI license and

² The Court denied Petitioners' Petition for Review with respect to separate claims under the Atomic Energy Act. 449 F.3d 1025-1028. Those claims are not relevant here.

PG&E's right to load spent fuel into its ISFSI, because (a) the Ninth Circuit had not yet issued its mandate, (b) the Court had given the Commission "maximum procedural leeway" on remand, (c) the Supreme Court has extended the deadline for filing a petition for certiorari until the end of September, and (d) PG&E has stated that it will not be ready to load fuel into the ISFSI until November of 2007. CLI-06-23, slip op. at 2. The Commission also asserted that "as the litigation moves forward or terminates, the 'equities' that traditionally govern stays or injunctive relief may change." *Id.*, slip op. at 3, quoting *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-8, 63 NRC 235, 237-38 and nn.4-7 (2006). Commissioner Jaczko dissented from the decision, urging that the "NEPA terrorism issue" is a "significant matter" that should be addressed expeditiously in a NEPA analysis. CLI-06-23, slip op. at 5.

On September 12, 2006, the Court issued its mandate, stating that Petitioners' petition for review of the NRC's licensing decision is "hereby **GRANTED** in part; **DENIED** in part; **REMANDED**." *Id.* at 2 (emphasis in original).

III. ARGUMENT

The Commission should reconsider CLI-06-23 because the issuance of the mandate by the Ninth Circuit has eliminated any reason that may have existed for postponing the granting of Petitioners' motion for declaratory and injunctive relief. The Court's decision in *Mothers for Peace* is now "the law of the case" and must be obeyed by the NRC. *Vizcaino v. Microsoft Corporation*, 173 F.3d 713, 719 (9th Cir. 1999)

(mandate enforceable in inferior court); *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940) (mandate enforceable in administrative agency for correction of legal errors). Moreover, under F.R.A.P. 41, only the issuance of a stay can forestall the effectiveness of the mandate; the fact that the time has not expired for seeking Supreme Court review of the Ninth Circuit's decision is irrelevant.

The NRC must now obey "both the letter and the spirit" of the Court of Appeals' holding that the EA issued in support of the Diablo Canyon ISFSI was inadequate to satisfy NEPA. *Vizcaino*, 173 F.3d at 719, quoting *Delgrosso v. Spang & Co.*, 903 F.2d 234, 240 (3d Cir. 1990), *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3rd Cir. 1985). The Court has explicitly granted Petitioners' Petition for Review with respect to their NEPA claim that the decision authorizing PG&E's ISFSI license should be reversed for failure to conduct an adequate environmental analysis, and therefore has effectively revoked PG&E's license.³

Even if the Court had not explicitly granted Petitioners' request for reversal of the NRC's licensing decision for the PG&E ISFSI, NRC regulations would require that

3 PG&E cites *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 n.27 (3rd Cir. 1989) and *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-89-15, 30 NRC 96, 98 (1985), in support of its argument that the Court's decision in *Mothers for Peace* had no effect on the validity of PG&E's license. PG&E's Response at 8 nn.18 and 19. The *Limerick* case is inapposite, however, because the Petitioners in that case did not ask the Court of Appeals to "enjoin, set aside, suspend, or determine the validity of the grant of an operating license to Limerick." 869 F.2d at 741 n.27, quoted in PG&E's Response at 8. Here, in contrast, Petitioners repeatedly asked the Court to reverse the NRC's licensing decisions for the Diablo Canyon ISFSI.

PG&E's permit must be revoked. Pursuant to 10 C.F.R. § 51.101(a), the NRC's issuance of a license to operate a nuclear facility is predicated on the lawful completion of a NEPA review.⁴ Now that the Court has determined that the NRC's NEPA review was inadequate to satisfy NEPA, PG&E's permit no longer has a valid legal basis.

Moreover, the "procedural leeway" claimed by the Commission (slip op. at 2) pertains to the method by which the NRC conducts the remanded NEPA proceeding, not the question of whether PG&E's permit is valid. 449 F.3d at 1035. And there are no "equities" to be balanced (*id.*) in determining the validity of the permit; either it is valid or it is not valid. The only context in which a balancing of the equities might be relevant would be if the NRC or PG&E had requested a stay of the mandate. Absent such a request, the mandate must be enforced.

Finally, PG&E's prediction that the ISFSI will not be ready to accept spent fuel until November 2007 does not justify postponing the issuance of an injunction against loading of spent fuel into the Diablo Canyon ISFSI. The Court's issuance of the mandate establishes that the invalidity of PG&E's license is now the *status quo*, and must be

4 10 C.F.R. § 51.101(a) provides that:

Until a record of decision is issued in connection with a proposed licensing or regulatory action for which an environmental impact statement is required under § 51.20, or until a final finding of no significant impact is issued in connection with a proposed licensing or regulatory action for which an environmental assessment is required under § 51.21: (1) No action concerning the proposal may be taken by the Commission which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives.

By loading fuel into the Diablo Canyon ISFSI, PG&E would irradiate the storage casks and thereby foreclose the consideration of alternatives.

enforced. A declaration by the Commission of the invalidity of PG&E's permit is all the more important because PG&E refuses to acknowledge that the Court's decision has any effect on the permit's vitality. *See* discussion, *supra*, at 3. Clearly, PG&E considers itself entitled to load spent fuel into the ISFSI without further authorization by the NRC or notice to the public. Given the extremely low likelihood that PG&E would notify Petitioners if it were about to load spent fuel into the ISFSI, Petitioners would have no timely or effective way to seek an injunction. Thus, in order to carry out its responsibility to enforce and obey the Court's mandate, the Commission must immediately enjoin PG&E from loading spent fuel into the Diablo Canyon ISFSI.

IV. CONCLUSION

For the foregoing reasons, Petitioners request the Commission to reconsider CLI-06-23 and immediately take the following actions:

1. Declare that the *Mothers for Peace* decision has invalidated PG&E's permit for the possession of spent fuel at the Diablo Canyon ISFSI;
- 2 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.

Respectfully submitted,



Diane Curran

Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street N.W., Suite 600
Washington, DC 20036
202/328-3500
FAX: 202/328-6918
e-mail: dcurran@harmoncurran.com

September 18, 2006

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR
PEACE; et al.,

Petitioners,

PACIFIC GAS AND ELECTRIC
COMPANY,

Intervenor,

v.

NUCLEAR REGULATORY
COMMISSION; et al.,

Respondents.

No. 03-74628

JUDGMENT

Upon Petition for Review of and Order of the
Nuclear Regulatory Commission

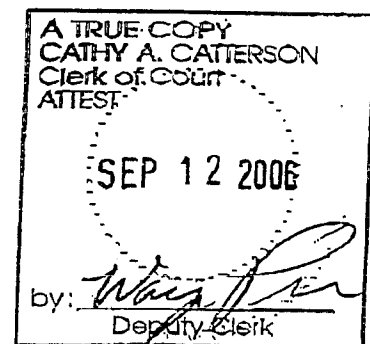
This cause came on to be heard on the Transcript of the Record from the Nuclear
Regulatory Commission and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that
the petition for review of the said decision of the Nuclear Regulatory Commission

FILE COPY

in this cause be, and hereby is **GRANTED** in part; **DENIED** in part; **REMANDED**.

Filed and entered 06/02/06



CERTIFICATE OF SERVICE

I certify that on September 18, 2006, copies of the foregoing Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Reconsideration of CLI-06-23 were served on the following by first-class mail and/or fax as indicated below:

Office of the Secretary (original and two copies)
Rules and Adjudications Branch
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, MD 06825
Also by fax to: 301-415-1101

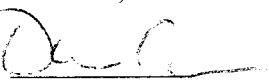
David A. Repka, Esq.
Martin J. O'Neill, Esq.
Winston & Strawn, LLP
1700 K Street N.W.
Washington, D.C. 20006-3817
Also by fax to: 202-282-5100

William V. Manheim, Esq.
Antonio Fernandez, Esq.
Pacific Gas & Electric Co.
77 Beale Street B30A
San Francisco, CA 94105
Also by fax to: 415-973-5520

Margaret J. Bupp, Esq.
Office of General Counsel
Mail Stop o-15D21
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Also by fax to: 301-415-3725

Timothy McNulty, Esq.
Office of County Counsel
County Government Center Room 386
San Luis Obispo, CA 93408

Kenneth Alex, Esq.
California Department of Justice
1515 Clay Street, 20th Floor
Oakland, CA 94612-0550


Diane Curran