

January 24, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

January 24, 2007 (2:29pm)

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

PACIFIC GAS AND ELECTRIC COMPANY MOTION
FOR PROMPT COMMISSION ACTION

I. INTRODUCTION

This matter is presently before the Commission on remand from the Ninth Circuit Court of Appeals.¹ The mandate for that decision issued on September 12, 2006, and on January 16, 2007, the parties were notified that the United States Supreme Court has denied the petition of Pacific Gas and Electric Company ("PG&E") for a writ of certiorari. In accordance with 10 C.F.R. § 2.323, PG&E now respectfully seeks action by the NRC to set the path forward in this proceeding. Given its strong interest in promptly resolving the issues raised by the Court of Appeals, PG&E specifically requests that the Commission issue an order to delineate the issues, the procedures to be followed, and the schedule for completion. Such an order will reduce uncertainty and assure that the issues will be resolved on a schedule that will allow the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI") to open on a schedule to support operation of the Diablo Canyon Power Plant.

¹ See *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) ("*SLOMFP*").

II. BACKGROUND

The Commission previously held in this proceeding that the National Environmental Policy Act (“NEPA”) does not require, as a matter of law, that the environmental assessment (“EA”) for the Diablo Canyon ISFSI include an assessment of the risk of terrorist attacks on the facility (implicitly extending that conclusion to an assessment of either the probability or consequences of terrorist attacks).² The Ninth Circuit agreed with the NRC that “whether NEPA requires consideration of the environmental impacts of a terrorist attack is primarily a legal [issue].”³ Thus, the NRC’s determination was reviewed against a “reasonableness” standard. The Court of Appeals concluded that the NRC’s “categorical” determination was not reasonable. The Court held:

The appropriate inquiry is therefore whether such attacks are so “remote and highly speculative” that NEPA’s mandate does not include consideration of their potential environmental effects.

The NRC responds by simply declaring without support that, as a matter of law, “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.” 56 NRC at 349. In doing so, the NRC failed to address Petitioners’ factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack because (1) the presence of the Storage Installation would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack. We conclude that it was unreasonable for the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation and on the entire Diablo Canyon facility as too “remote and highly speculative” to warrant consideration under NEPA.⁴

² *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1 (2003); *see also Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

³ *SLOMFP*, 449 F.3d at 1028.

⁴ *Id.* at 1030.

The Court of Appeals therefore ultimately held that the EA was inadequate, and remanded for further agency proceedings. Importantly, the Court specifically acknowledged the NRC's concerns regarding security risks inherent in addressing terrorism issues. The Court held that these concerns would not excuse NEPA's application to security sensitive issues, but — citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) — nonetheless recognized that “security considerations may permit or require modification of some of the NEPA procedures.”⁵ The Court even suggested, by way of example, that a process in which the public contributes information to the decision-making process would fulfill both the information gathering and the public participation functions of NEPA. As in *Weinberger*, information could be submitted and factored into the decisionmaking, even if the NEPA results are not publicized or adjudicated.⁶

III. DISCUSSION

Consistent with its obligations under the Nuclear Waste Policy Act, and consistent with its obligations to the electricity consumers of California, PG&E is constructing the Diablo Canyon ISFSI to provide on-site storage capacity for used nuclear fuel to support continued operation of the Diablo Canyon power plant through its current licensed term. Storage of spent fuel at the ISFSI is PG&E's preferred storage option for operational, safety, and security reasons. PG&E had planned to begin loading fuel at the ISFSI in November 2007; those plans have now been revised to the summer of 2008.⁷ Accordingly, there is time for the Commission to fairly

⁵ *Id.* at 1034.

⁶ *Id.*

⁷ As the Commission has already held, the Court of Appeals decision does not preclude construction of the ISFSI and does not stay operation of the facility. However, the NRC has indicated a willingness to reconsider the “equities” as events move forward. *Pacific*

resolve the remanded issues, utilizing the procedural flexibility afforded by the Court of Appeals. Nonetheless, so long as the remanded issues are unresolved, uncertainty remains surrounding the Diablo Canyon ISFSI and the power plant. And time must be allowed for any further judicial challenges to any action the Commission ultimately takes on the remanded issue. Prompt action and clear direction are therefore necessary.

The Commission in this proceeding recently acknowledged that “[w]e have not yet resolved the procedures that, consistent with the Court’s decision, would govern the handling of the remanded proceeding.”⁸ Now that the Supreme Court has declined review of the NEPA/terrorism issue, PG&E strongly believes that the Commission must act expeditiously to resolve the uncertainty. PG&E seeks a clear path forward with respect to:

- the issues to be considered;
- the procedures to be followed; and
- the schedule for resolution.

Each of these is discussed briefly below.

Issues: The issues to be considered are those stated by the Ninth Circuit as set forth above. The Court’s decision focused exclusively on the threshold issue of the probability of a terrorist attack on the Diablo Canyon ISFSI or power plant (because of the presence of the ISFSI). The Court in effect remands to the NRC “to address Petitioners’ factual contentions” on

Gas and Electric Co. (Diablo Canyon Power Plant, Independent Spent Fuel Storage Installation), CLI-06-23, slip op. at 3 (September 6, 2006). *Cf. Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982)(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.”).

⁸ *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Independent Spent Fuel Storage Installation), CLI-06-27, slip op. at 4 (Nov. 9, 2006).

the increase in risk of a terrorist attack.⁹ The Court's decision leaves open the possibility that — once those “factual contentions” are addressed and the NRC has developed a record on the point — the agency may conclude that the possibility of a terrorist attack *at this specific facility* is too “remote and highly speculative” to warrant further consideration under NEPA.¹⁰ The Court's decision by no means requires the NRC to either analyze or adjudicate issues of consequences of terrorist attacks, at least at the threshold. The Court's decision therefore also does not require an assessment of mitigation measures or design alternatives in a full EA or environmental impact statement, at least initially. The proper sequence of issues is discussed further below in the context of the procedures to be adopted to move forward on a site-specific basis.

Procedures: Given that the remanded issue addresses only dry cask storage at Diablo Canyon, PG&E believes that a site-specific process is the most focused and appropriate approach to address the remanded issue. However, PG&E continues to be concerned with the security implications of handling sensitive information. The Commission has recognized those implications in its prior decisions on the NEPA/terrorism issue, and certainly the Ninth Circuit decision does not deny the legitimacy of the concerns. PG&E strongly supports procedures similar to those alluded to in the *Weinberger* case, as referenced by the Court of Appeals. In *Weinberger* the Supreme Court suggested that the Navy could prepare an environmental impact

⁹ *SLOMFP*, 449 F. 3d at 1030.

¹⁰ *Id.* As PG&E has previously observed, the NRC has in fact previously addressed the “risk” issue in its legal determination on the NEPA/terrorism issue in the *PFS* decision. Based on the government-wide efforts to address air transportation safety in the aftermath of the September 11 attacks, the Commission stated its best guess that the probability of a hijacked jumbo jet hitting one ISFSI and causing catastrophic effects “is actually minuscule.” *PFS*, CLI-02-25, 56 NRC at 351.

statement on a proposal to store nuclear weapons for internal, decision-making purposes only.¹¹ The report would not be required to be disclosed. The Ninth Circuit in this matter certainly suggested that *Weinberger* stands for the proposition that security sensitive matters need not be “publicized or adjudicated”.¹²

If the Commission contemplates a site-specific *adjudicatory* proceeding (despite the suggestion of the Ninth Circuit and *Weinberger*), there must be a process placing an initial burden on the intervenors to state "factual contentions" with supporting basis. The Court of Appeals directed that the NRC consider the “factual contentions” of the intervenors on the two probability questions quoted above. The Court of Appeals in this context clearly contemplated intervenors *contributing* to the record, rather than sitting back to eventually (and merely) challenge conclusions of the agency in a published EA. A review of the actual "factual contentions" filed by the intervenors in this case to date reveals a dearth of “factual contentions” or any other information on the alleged increase in *probability of a terrorist attack* at Diablo Canyon as a result of the presence of an operational ISFSI.¹³

Indeed, the NEPA/terrorism contentions in this proceeding, which have been at issue on appeal, were bare legal assertions. The basis for those contentions consisted of a discussion of general terrorism risks, based on newspaper articles from several years ago, with no particular connection to Diablo Canyon. Beyond that, the basis discussion focused on alternatives to dry cask storage and design alternatives that would presume an increased risk.

¹¹ *Weinberger*, 454 U.S. at 145 (“the public’s interest in ensuring that federal agencies comply with NEPA must give way to the Government’s need to preserve military secrets”).

¹² *SLOMFP*, 449 F.3d at 1034.

¹³ The intervenors’ supplemental request for hearing and petition to intervene, with proposed contentions, was filed on July 18, 2002.

Accordingly, there is a threshold showing that still must be addressed: is there any meaningful information to be contributed by the intervenors on the remanded issue as framed by the Court of Appeals? Addressing this question should be the first step in any procedure going forward. This step alone may prove sufficient to resolve the matter, without awaiting the development of NRC Staff review documents.

Assuming the intervenors can meet a critical threshold burden of going forward, the Commission may then properly focus, at least initially, on the *probability* issue remanded by the Court of Appeals, as discussed above. In this regard, the Commission should duly direct that the issue in this proceeding is *not* whether there is a generalized risk of a terrorist attack on a nuclear facility. Rather, the issue is whether there is a meaningful probability of a terrorist *air* attack on this *particular* facility.¹⁴ PG&E recognizes that — depending on the specifics of any “factual contentions” — an assessment of consequences might be warranted. However, there is no reason to assume that such an inquiry is required by the Court of Appeals decision. Conversely, the process can and should retain sufficient flexibility to allow such an assessment at the front end to establish the lack of meaningful “risk,” if such an approach is determined to be necessary to promptly resolve the remanded issue.¹⁵

¹⁴ Compare *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F. 3d 520, 544 (8th Cir. 2003).

¹⁵ As a comparison, in the NRC licensing matter for the proposed Private Fuel Storage ISFSI in Utah, the NRC adjudicated certain air crash hazards. The litigation was conducted in two phases — a probability phase and then (since a threshold was not met) a consequences phase. This model certainly could apply in the present matter and would be consistent with the issue remanded by the Court of Appeals. However, if — as the facts are developed — it would be more expeditious to consider “risk” in one phase, PG&E would support that approach. It is simply premature to decide that issue now without knowing the intervenors’ “contribution.”

Finally, PG&E understands that the issue remanded by the Court of Appeals does not necessarily need to be resolved on a site-specific basis. The NRC has previously reviewed environmental issues under NEPA through Generic Environmental Impact Statements and/or rulemakings. Examples include the "waste confidence" rule,¹⁶ 10 C.F.R. Part 54 environmental issues related to license renewal, and fuel cycle impacts addressed for power reactors in 10 Part 51, Table S-3. Accordingly, the Commission has the clear discretion to address this issue on a generic basis for power plants or co-located ISFSIs, or both.¹⁷ Certainly consistent with the guidance on procedures provided by the Court of Appeals in this matter, a generic process would allow intervenors the opportunity to *contribute* on the issue at hand. PG&E does not object to a rulemaking to the extent that the rulemaking process adopted is efficient and leads to a timely resolution (including time for any appellate review) consistent with PG&E's operational requirements.¹⁸

Schedule: As previously noted, the issues in this proceeding should ideally be resolved on a schedule that will eliminate any uncertainty for PG&E and its customers related to the plans to load fuel at the ISFSI in 2008. An expeditious resolution would also allow time for resolution of subsequent judicial proceedings prior to PG&E reaching the capacity of its present wet storage

¹⁶ This rule addressed a NEPA issue remanded by the Court of Appeals to the NRC in *State of Minnesota v. NRC*, 602 F.2d 412 (1979). Specifically, the Court of Appeals for the D.C. Circuit remanded two plant licensing actions to the NRC to consider the timing and availability of an off-site waste storage solution and whether waste can be safely stored at plant sites until an off-site solution becomes available.

¹⁷ It is also axiomatic that the decision to proceed by either adjudication or rulemaking "lies primarily on the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see also Kansas Gas and Electric Co.* (Wolf Creek Generating Station, Unit 1), CLI-99-19, 49 NRC 441, 467 (1999).

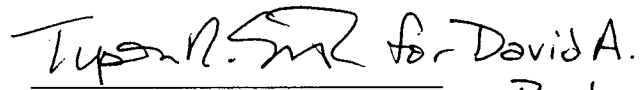
¹⁸ Issues that are subject to a rulemaking can, of course, be removed from site-specific adjudication. *See Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999).

racks at the Diablo Canyon power plant. The Commission has frequently stated its policy and commitment to the expeditious resolution of licensing proceedings.¹⁹ Accordingly, a schedule of 12 months or less should be realistic for a focused issue of the type remanded by the Court of Appeals.²⁰

V. CONCLUSION

For the foregoing reasons, PG&E requests that the Commission promptly issue an order setting forth the issues, procedures, and schedule for resolution of the remanded NEPA matter.

Respectfully submitted,


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Dated in Washington, District of Columbia
this 24th day of January 2007

¹⁹ See, e.g., *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 24 (1998) (reiterating the Commission's "commitment to the expeditious compilation of adjudicatory proceedings"); *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-03, 59 NRC 10, 17-18 (2004).

²⁰ Unlike the posture of a scheduling request in another recent case, PG&E is seeking action early in the remanded hearing. See *USEC, Inc.* (American Centrifuge Plant), LBP-06-___, slip op. at 4 (Dec. 22, 2006) (denying USEC's motion to accelerate the mandatory hearing schedule).

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CERTIFICATE OF SERVICE

I hereby certify that copies of the "PACIFIC GAS AND ELECTRIC COMPANY TO MOTION FOR PROMPT COMMISSION ACTION" has been served as shown below by electronic mail, this 24th day of January 2007. Additional service has also been made this same day by deposit in the United States mail, first class, as shown below.

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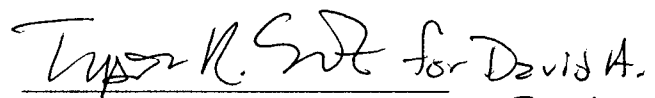
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