

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'S ANSWER TO CONTENTIONS
SUBMITTED BY SAN LUIS OBISPO MOTHERS FOR PEACE

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July 13, 2007

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In the Matter of)	
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PACIFIC GAS & ELECTRIC CO.)	Docket No. 72-26-ISFSI
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(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation))	ASLBP No. 02-801-01-ISFSI

NRC STAFF'S ANSWER TO CONTENTIONS
SUBMITTED BY SAN LUIS OBISPO MOTHERS FOR PEACE

INTRODUCTION

Pursuant to 10 C.F.R. § 2.714 (c), the staff of the Nuclear Regulatory Commission ("Staff") hereby responds to the Late-Filed Contentions submitted by San Luis Obispo Mothers for Peace ("SLOMFP"), on June 28, 2007. As more fully set forth below, the Staff opposes the admission of the SLOMFP's proposed contentions.

BACKGROUND

On December 21, 2001, Pacific Gas and Electric Company ("PG&E" or "Licensee") applied for a license, pursuant to 10 C.F.R. Part 72, to possess spent fuel and other radioactive materials associated with spent fuel in an independent spent fuel storage installation ("ISFSI"), to be constructed and operated at the Licensee's Diablo Canyon Power Plant ("DCPP") site. On April 22, 2002, the Commission published a "Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for a Hearing for a Materials License for the Diablo Canyon Independent Spent Fuel Storage Installation" 67 Fed. Reg. 19,600.¹

¹ Since the notice of hearing was published before the effective date of the "new" rules, February 13, 2004, the "old" rules of procedure will govern any hearing on this supplemental environmental assessment, unless otherwise directed by the Commission. Accordingly, the references in this pleading are to the "old" rules in effect at the time of the hearing notice. 69 Fed. Reg. 2181 (January 14, 2004).

In response to the Notice, requests for a hearing and petitions to intervene were filed on May 8, 2002 by Lorraine Kitman; on May 22, 2002 and July 8, 2002 by Peg Pinard and Avila Valley Advisory Council; and on May 22, 2002 by SLOMFP as lead petitioner for Cambria Legal Defense Fund, Central Coast Peace and Environmental Council, Environmental Center of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter of the Sierra Club, and the Ventura County Chapter of the Surfrider Foundation, ("SLOMFP, et al."). On July 19, 2002, in accordance with the Atomic Safety and Licensing Board's ("Board") Initial Prehearing Conference Order of June 6, 2002, SLOMFP filed several contentions. One of the proposed contentions asserted that the Staff's environmental review of the ISFSI should consider the environmental impacts of terrorism pursuant to the National Environmental Policy Act of 1969 ("NEPA"). 42 U.S.C. §§ 4321-4437. The Board rejected this 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. Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1, 6-8 (2003). On March 22, 2004, the NRC issued Materials License SNM-2511 ("Materials License"), which authorized PG&E to "to receive, possess, store, and transfer spent fuel and associated radioactive materials resulting from the operation of the Diablo Canyon Power Plant in an independent spent fuel storage installation to be located on the plant site in San Luis Obispo County, California," for a term of 20 years. Letter from John D Monninger to Lawrence F. Womack, ADAMS Accession No. ML040780207.

Following the Commission's decision, the SLOMFP 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). PG&E then petitioned the Supreme Court for writ of

certiorari, which was denied on January 16, 2007. *Pac. Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, 127 S.Ct. 1124 (U.S. 2007). Subsequent to the Supreme Court's denial of certiorari, the Commission issued a Memorandum and Order ("Order") on February 26, 2007, which established a schedule for complying with the Ninth Circuit's decision that terrorism be considered as part of the Staff's NEPA analysis in this proceeding. *Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Indep. Spent Fuel Storage Installation)*, CLI-07-11, 65 NRC 148, 149-51 (2007). The Commission directed the Staff to "prepare a revised environmental assessment in accordance with the NRC's regulations – addressing the likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack." *Id.* at 149. The Supplemental Environmental Assessment ("EA") and Draft Finding of No Significant Impact ("FONSI") was published in the Federal Register on May 31, 2007 and provided interested persons 30 days to provide public comments. 72 Fed. Reg. 30,398. Pursuant to the Commission's Order, late filed contentions were filed by SLOMFP on June 28, 2007, *San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement, corrected June 29, 2007* ("Petition"). The Staff now submits its response to SLOMFP's proposed contentions.

DISCUSSION

A. Contention Requirements in NRC Proceedings

Pursuant to 10 C.F.R. § 2.714, a contention must specify the particular issue of law or fact which the petitioner seeks to litigate, and must contain: (1) "a brief explanation of the bases of the contention"; (2) "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing . . . [and] references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion" (3) "sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact [and] references to the specific portions of the application . . . that

the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief."² 10 C.F.R. § 2.714(b)(2)(i-iii). Additionally, the contention must be one which, if proven, would entitle the petitioner to relief. See 10 C.F.R. § 2.714(d)(2)(ii).³ These requirements are not intended to force a hearing petitioner to prove its case at the contention stage of a proceeding. See *Yankee Atomic Electric Co. (Yankee Nuclear Power Station)*, CLI-96-7, 43 NRC 235, 248-49 (1996). Therefore, the proffered contention should be viewed in a light most favorable to the hearing petitioner. See *Id.*, *Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155 (1991). But, while a proffered contention may be viewed in a light favorable to the hearing petitioner, if any one of the above requirements is not met, the contention must be rejected. See *Id.*

² In its 1989 statement of considerations (SOC) discussing changes made to the contention requirements of 10 C.F.R. § 2.714, the Commission stated that the rule is consistent with Federal court decisions which require the hearing petitioner to "make a minimal showing that material facts are in dispute, thereby demonstrating that an 'inquiry in depth' is appropriate." 54 Fed. Reg. 33,168, 33,171 (August 11, 1989) (rulemaking amending 10 C.F.R. § 2.714), *aff'd sub nom. Union of Concerned Scientists v. NRC*, 920 F.2d 50 (D.C. Cir. 1990) (*citing Conn. Bankers Ass'n v. Bd of Governors*, 627 F.2d 245 (D.C. Cir. 1980)); See also *Ga. Inst. of Tech. (Ga. Tech. Research Reactor)*, CLI-95-12, 42 NRC 111, 118 (1995). Disputes under the rule should be considered "material" if their resolution would "make a difference in the outcome of the licensing proceeding." 54 Fed. Reg. at 33,172.

In its SOC, the Commission explained that the adopted provisions "require the intervenor to read the pertinent portions of the license application, including the Safety Analysis and the Environmental Report, state the applicant's position and the petitioner's opposing view." 54 Fed. Reg. at 33,170. During this contention filing stage, the factual support necessary to demonstrate a genuine dispute "need not be in affidavit or formal evidentiary format and need not be of the quality necessary to withstand a summary disposition motion." *Id.*; see also *Ariz. Pub. Serv. Co. (Palo Verde Nuclear Generating Station, Unit Nos. 1, 2, and 3)*, CLI-91-12, 34 NRC 149, 155 (1991). Additionally, the contention rule does not shift the ultimate burden of proof on whether a license should be issued from an NRC applicant to a hearing petitioner. 54 Fed. Reg. at 33,171.

In this case, where there are late-filed contentions, the party proffering the contentions must also meet the requirements of 10 C.F.R. § 2.714(a)(1)(i)-(v). These provisions require that the Commission:

[determine] that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d)(1) of this section:

- i. Good cause, if any, for failure to file on time.
- ii. The availability of other means whereby the petitioner's interest will be protected.
- iii. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- iv. The extent to which the petitioner's interest will be represented by existing parties.
- v. The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

10 C.F.R. § 2.714(a)(1)(i)-(v). However, simply meeting these requirements does not entitle petitioners to a hearing, they still must satisfy the admissibility requirements of 10 C.F.R.

§ 2.714. *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-001, 51 NRC 1, 5 (2000).

In this instance, the Staff is satisfied that the SLOMFP have met the good cause criterion of the late-filed contention requirements for Proposed Contentions 1 through 4, by filing their proposed contentions within 30 days of the publication of the Supplemental EA. The Staff, however, is not satisfied that Proposed Contention 5 meets all of the late-filed contention requirements. For proposed contentions 1 through 4, the SLOMFP have established good cause by meeting the three requirements set forth in *Public Service Co. of New Hampshire* (Seabrook station, Units 1 and 2), ALAB-737, 18 NRC 168, 172 n.4 (1983), *citing Duke Power Co.* (Catawba Nuclear station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983). SLOMFP'S Proposed Contentions 1 through 4: (1) are "wholly dependent" upon the content of the Supplemental EA; (2) could not have been advanced prior to the release of the

Supplemental EA; and (3) were promptly tendered. *Id.* Since good cause has been established for proposed Contentions 1 through 4, lesser weight is therefore given to the other factors. Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-82-63, 16 NRC 571, 589 (1982); Tex. Utilities Generating Co. (Comanche Peak steam Electric station, Units 1 and 2), LBP-83-75A, 18 NRC 1260, 1261 (1983); Consumers Power Co. (Midland Plant, Units 1 and 2), LBP-84-20, 19 NRC 1285, 1292 (1984). The Staff believes that a balancing of the factors weighs in favor of admission of the SLOMFP'S proposed Contentions 1 through 4.⁴ *Id.* Despite having passed a balancing of the late-filed contention factors test, SLOMFP must still satisfy the requirements of 10 C.F.R. § 2.714 for admission of a contention for proposed Contentions 1 through 4. Proposed Contention 5 is not admissible because it fails to meet the late-filed contention requirements of 10 C.F.R. § 2.714 (a); the Staff's evaluation of Proposed Contention 5 appears later in this Answer.

B. SLOMFP'S Proposed Contentions

On June 28, 2007, SLOMFP submitted five contentions challenging the sufficiency of the Staff's review of the environmental impacts of a successful terrorist attack on the proposed Diablo Canyon ISFSI. Each contention is discussed below, *seriatim*.

Contentions Discussing Protected Information

A number of SLOMFP's proposed contentions concern the Staff's use of protected information in its analysis. In the following paragraphs, the Staff addresses the general principles regarding the use of protected information in a NEPA context; this discussion does not appear in the sections devoted to the individual proposed contentions. In this Supplemental

⁴ The Staff notes that the presiding officer must also balance the lateness factors "even where all the parties to the proceeding have waived their objections and agreed, by stipulation to the admission of late-filed contentions. *Commonwealth Edison Co.* (Braidwood Nuclear Power station, Units 1 and 2), CLI-86-8, 23 NRC 241, 251 (1986). See *Boston Edison Co.* (Pilgrim Nuclear Power station), ALAB-816, 22 NRC 461, 466 (1985).

EA, much of the Staff's analysis either depends upon or has some reference to documents that are designated Safeguards Information ("SGI"); Sensitive Unclassified Non-safeguards Information (SUNSI); or classified information as specified in Executive Order 12958 as amended by Exec. Order No. 13,292 ("Classified"). See *generally* 10 C.F.R. § 2.790.⁵

Therefore, much of the technical information which underlies the Staff's EA must be protected from disclosure to members of the public under the Federal requirements, statutes, and NRC regulations and procedures that restrict the dissemination of this information.

In contrast, NEPA fundamentally requires public disclosure of environmental assessments. Where, as here, the technical basis for an agency's analysis is based upon protected information, the agency may conduct limited NEPA proceedings, which will satisfy an agency's obligations under NEPA, while preserving the confidentiality of protected information. *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 102 S.Ct. 197 (1981).

The use of protected information does not prevent the Staff from meeting its obligations under NEPA. As the Ninth Circuit noted in *San Luis Obispo Mothers for Peace v. NRC*, "[t]o the extent that . . . certain information cannot be publicized, as in *Weinberger*, other statutory purposes continue to mandate NEPA's application." 449 F.3d at 1034, *citing* 454 U.S. 139. Even though NEPA does apply in this case, the NRC's concerns regarding public access to certain information "explain why a *Weinberger*-style limited proceeding might be appropriate." *Id.* at 1034-35. In *Weinberger*, the Supreme Court held that NEPA "§102(2)(C) contemplates that . . . a federal agency might have to include environmental considerations in its

⁵ SGI is protected under the authority of section 147 of the Atomic Energy Act, 42 U.S.C. § 2167. See 10 C.F.R. § 73.21. SUNSI is protected pursuant to NRC internal policy. NRC Policy for Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information at 2-3, <http://www.nrc.gov/reading-rm/doc-collections/commission/comm-secy/2005/2005-0054comscy-attachment2.pdf>. Classified information is protected pursuant to Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) amended by Exec. Order No. 13,292, 68 Fed. Reg. 15,315 (Mar. 25, 2003); 10 C.F.R. § 2.905; 10 C.F.R. § 95.35.

decisionmaking process, yet withhold public disclosure of any NEPA documents, in whole or in part.”⁶ 454 U.S. at 143.

The situation contemplated by the Supreme Court and the Ninth Circuit is exactly what occurred when the Staff prepared the Supplemental EA. As directed by the Commission, the Staff relied on “as much public information as practicable” and made “public as much of its revised environmental analysis as feasible.” 65 NRC at 150. However, as the Commission recognized might occur, it was necessary to withhold some of the information underlying the Staff’s findings and conclusions as SGI, SUNSI or Classified information. *Id.* Nevertheless, although some of this underlying protected information cannot be disclosed to the public, the staff provided enough information in the EA to explain the rational for its conclusions. SLOMFP’s contentions, while noting that certain information is not included in the EA, do not provide any basis for an argument that the information that is in the EA is inadequate to explain the fundamental rational for the Staff’s EA and FONSI determinations.. Even though the Staff used protected information in its analysis, the Supplemental EA can still meet the requirements of NEPA, as contemplated by the Supreme Court in *Weinberger* and the Ninth Circuit in *San Luis Obispo Mothers for Peace, supra*.

⁶ The Staff recognizes that the Court refers specifically to EISs, however, in this instance the Staff believes that the holding of *Weinberger* can be extended to EAs--the use of protected information in an EA should not subject those documents to a lesser standard of protection than would be applied if the same materials had been used in the development of an EIS.

Contention 1: Failure to define terms, explain methodology, or identify scientific sources.⁷

SLOMFP's Contention 1 claims that the NRC Staff's analysis violates "NEPA and NRC and CEQ implementing regulations" in that it does not "document the basis for the NRC Staff's determination that the environmental impacts of intentional attacks on the Diablo Canyon ISFSI are insignificant, by failing to define its terms, explain its methodology, or identify its scientific sources." Petition at 3. SLOMFP argue that the purpose of providing a "basis for evaluating the impacts" of this action is to "protect a plaintiff's ability to challenge an agency action," and "to allow a court to review an agency's NEPA decision without second guessing the agency's scientific conclusions." *citations omitted. Petition at 4.*

As discussed further below, SLOMFP have failed to identify a genuine dispute on a material issue of law or fact within the scope of this proceeding; therefore, this proposed contention and all its sub-parts should not be admitted, in accordance with the requirements of 10 C.F.R. § 2.174(b)(2)(iii).

a. Failure to define terms or explain methodology

i. The EA fails to provide a clear description of the NRC's process for identifying plausible or credible attack scenarios and assessing their consequences to determine whether they are significant. The EA does not describe the types of attack scenario that the NRC considered in preparing the EA, the types of attack scenario that were disregarded or why the NRC considered or disregarded any particular scenario.

SLOMFP, in this instance, have asserted that the Staff did not provide a sufficient description of the NRC's process for selecting and analyzing the types of attack to be considered or the consequences of those attacks. Petition at 5. Although the Staff could not

⁷ The Staff notes that Petitioners appear to have split this contention into a number of "sub-contentions," each dealing with one of the three issues identified in the initial contention. These "sub-contentions" will be addressed in separate sections of the Staff's response.

provide all the details of referenced background documents and analyses due to the sensitive nature of the information, the general methodology and analyses relied upon were referenced. See, Supplemental EA at 5-7. As discussed above, the Staff's analyses complies with the requirements of NEPA to the extent possible without divulging Classified Information, which is allowable under the circumstances outlined in *Weinberger* and summarized by the Ninth Circuit. 449 F.3d at 1034.

Contrary to the premise of the contention, the Staff, in its Supplemental EA, does provide reference to specific threats examined as part of its review and its analyses of the consequences of a successful terrorist attack on the DCPD ISFSI. See, Supplemental EA at 5-6. Specifically, the Staff "examined specific threats, such as a land-based vehicle bomb, ground assault with the use of an insider, and water-borne assaults." *Id.* at 5. While the level of detail was limited by the sensitive nature of the materials underlying the analyses, the Staff disclosed sufficient information to describe its general methodology. Notwithstanding SLOMFP's desire that the Staff disclose additional information, the protection of sensitive security information is required by law and, as recognized by the Ninth Circuit, cannot be disclosed even to satisfy NEPA. Therefore, SLOMFP's dissatisfaction with the amount of information which can be disclosed does not raise a litigable contention.

ii. **The reader is given no explanation of what the NRC means by the word "plausible."**

Despite SLOMFP's claims to the contrary, the EA does explain "plausible" as used in the Staff's analyses. A detailed examination of the Supplemental EA shows that the term "plausible" is only used in the context of "plausible threat scenarios." See, Supplemental EA at 6 and 7. The Supplemental EA provides examples of "plausible threat scenarios considered in the generic security assessments for ISFSIs[, which] included a large aircraft impact similar in magnitude to the attacks of September 11, 2001, and ground assaults using expanded adversary characteristics consistent with the design basis threat for radiological sabotage for

nuclear power plants.” *Id.* at 7. Since the reader is provided with examples of the types of threats the NRC considers to be plausible, SLOMFP cannot claim that “the reader is given no explanation” of the meaning of the word plausible. Further, SLOMFP have provided no legal or factual basis for requiring definitions of specific terms of their choice when such examples are provided so that the reader knows what scenarios were considered and can understand the overall context of the staff evaluation. Having failed to allege any valid basis for challenging the EA, SLOMFP have failed to meet the requirements for admission of this contention under 10 C.F.R. § 2.714(b).

- iii. **Just as the Pa’ina Irradiator EA rules out attack scenarios that are “remote or speculative”, it is reasonable to infer that the Diablo Canyon EA does the same. . . . [N]either the Diablo Canyon EA nor the Pa’ina Irradiator EA provides any description of the criteria used by the NRC to distinguish between scenarios that are “plausible” and those that are “remote and speculative.” Given that the NRC has asserted the probability of an intentional attack on a nuclear facility “cannot be reliably quantified” it is important for the EA to provide qualitative criteria for determining whether attacks are remote and speculative.**

As an initial matter SLOMFP’s criticism of the Staff’s EA for the Pa’ina Irradiator in a completely separate proceeding cannot be a supporting basis to show that a genuine dispute exists with the applicant on a material issue of law or fact in *this* ISFSI proceeding. SLOMFP should not be allowed to use this forum to raise issues outside the scope of this proceeding. *Carolina Power and Light Company* (Shearon Harris Nuclear Power Plant, Units 1-4), ALAB-526, 9 NRC 122, 124 n.3 (1979); *See also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-93-23, 38 NRC 200, 206 (1993). Being completely different facilities, there are, no doubt, differences in the analyses and type of information that underlay these two EA’s. SLOMFP’s references do not in any way explain the Pa’ina irradiator EA’s relevance to the DCP facility and the location at issue in this proceeding.

With respect to this proceeding, SLOMFP’s representation of the EA as not having provided qualitative information on how the scenarios were selected is not accurate. In fact, the EA states that:

Plausible threat scenarios considered in the generic security assessments for ISFSIs included a large aircraft impact similar in magnitude to the attacks of September 11, 2001, and ground assaults using expanded adversary characteristics consistent with the design basis threat for radiological sabotage for nuclear power plants . . . [and further states that]. Following issuance of the 2002 security orders for ISFSIs, NRC used a security assessment framework as a screening and assessment tool, to determine whether additional security measures, beyond those required by regulation and the security orders, were warranted for NRC-regulated facilities, including ISFSIs. Initially, NRC screened threat scenarios to determine plausibility. For those scenarios deemed plausible, NRC assessed the attractiveness of the facility to attack by taking into account factors such as iconic value, complexity of planning required, resources needed, execution risk, and public protective measures.

Supplemental EA at 6, 7. The staff maintains that this is exactly the type of qualitative assessment contemplated in the Commission's February 26, 2007 Order in this proceeding. 65 NRC 148. Again, while the Staff could not provide all the details of the manner in which these assessments were made, the Staff did provide an explanation of its process and conclusions to satisfy its NEPA obligations. SLOMFP have chosen to claim no analysis of the scenarios selected exists, when, in fact, the EA has described such a qualitative analysis to the extent practicable without including Classified Information. Without additional support, or even a direct discussion of why this qualitative discussion is inadequate, SLOMFP have not met the admissibility requirements of 10 C.F.R. §2.714; therefore, this contention should not be admitted.

- iv. **The EA does not describe any analysis performed by the NRC Staff for the specific purpose of complying with NEPA. . . . The scope of threat scenarios covered by the AEA-based standard of reasonable protection or the Design Basis Threat rule's standard of requiring defense "against which a private security force can reasonably be expected to defend" is narrower than the scope of scenarios covered by the NEPA standard of reasonable foreseeability. The EA fails to demonstrate that the NRC considered the wider scope of scenarios required by NEPA. citations omitted.**

The Staff performed its analysis in accordance with the Commission's instructions in the Order, which directed the Staff to "base its revised environmental analysis on information already available in agency records, and consider in particular the Commission's DBT for power plant sites and other information on the ISFSI design, mitigative, and security arrangements

bearing on likely consequences, consistent with the requirements of NEPA, the Ninth Circuit's decision and the regulations for the protection of sensitive and safeguards information.”

65 NRC at 150. This information included, among other things, the security assessments for ISFSI's which considered all threat scenarios considered to be plausible. EA Supplement at 6.

Thus, SLOMFP have provided no grounds for the claim that the Staff failed to consider all reasonable foreseeable terrorist threats. For example, the Staff specifically looked at “a large aircraft impact similar in magnitude to the attacks of September 11, 2001,” a threat that is clearly beyond “the Design Basis Threat rule's standard of requiring defense “against which a private security force can reasonably be expected to defend” Supplemental EA at 7, Petition at 6-7. Thus, contrary to SLOMFP's claim, the Staff did not limit its environmental analysis to threats against which nuclear reactors are expected to defend but, instead, included all plausible threat scenarios.

SLOMFP's implication that the Staff did not perform any analysis in developing the supplemental environmental analysis is also incorrect. To the contrary, the Supplemental EA describes, additional analysis performed by the NRC Staff. For the purpose of completing the Supplemental EA, “[t]he NRC staff reviewed the analyses done for the ISFSI security assessments, and compared the assumptions used in these generic assessments to the relevant features of the Diablo Canyon ISFSI. Based on this comparison, the staff determined that the assumptions used in these generic security assessments, regarding the storage cask design, the source term . . . and the atmospheric dispersion, were representative, and in some cases conservative, relative to the actual conditions at the Diablo Canyon ISFSI.” Supplemental EA at 7.

As noted above, the Staff did perform an analysis of the terrorist threats to the DCPD ISFSI for the purposes of the Supplemental EA. Although SLOMFP allege that the scope of the scenarios considered by the Staff in the Supplemental EA “is narrower than the scope of scenarios covered by the NEPA standard of reasonable foreseeability”, they provide no bases

for this conclusion that can support admission of a contention. Petition at 7. Without sufficient information to establish the existence of a genuine dispute on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(iii), this contention should not be admitted.

v. **To the extent that the EA describes the analytical steps taken by the NRC in its 2002 analysis, the process is poorly described.**

SLOMFP challenge the sufficiency of the Staff's 2002 analysis by noting that the "description raises many questions that go unanswered in the EA Supplement." Petition at 7. However, SLOMFP do not provide sufficient information to show the existence of a genuine dispute of law or fact exists, as required by 10 C.F.R. § 2.714(b)(2)(iii). Without "references to the specific portions" of the Supplemental EA, which the SLOMFP find inadequate, and the "supporting reasons for each dispute," SLOMFP have not met their burden under 10 C.F.R. § 2.714(b) to proffer an admissible contention. Further, the Staff notes that the SLOMFP have misunderstood the Staff's analysis in this matter--there was no "2002 analysis." Instead the Supplemental EA references the Commission's 2002 *Orders*, which were issued to "all licensees of operating ISFSIs to make mandatory the voluntary actions taken by those licensees in response to the Commission's advisories, and to implement additional security enhancements identified in NRC's ongoing comprehensive review of its safeguards and security programs and requirements." Supplemental EA at 5. In addition to the security assessments performed for ISFSIs, which were completed in 2006 and referred to by the Staff in the Supplemental EA, the Staff is engaged in an "ongoing consideration of safeguards and security requirements," to ensure that the Commission continues to have "high assurance that public health and safety and the environment, and the common defense and security, continue to be adequately protected in the current threat environment." *Id.* at 7. Therefore, pursuant to the requirements of 10 C.F.R. § 2.714, this contention should not be admitted.

This contention lists five types of procedural questions that SLOMFP claim were omitted from the Supplemental EA:

- Why isn't the attractiveness of the facility to attack a plausibility consideration? If attractiveness of the facility is not a plausibility consideration, then how does the NRC define plausibility?
- How is "iconic value" determined?
- By what standard did the NRC evaluate "complexity of planning required," "resources needed," and "execution risk?"
- What are "public protection measures?" Do they constitute security plans, emergency planning or something else? How are "public protection measures" relevant to the "attractiveness of the facility?" How is the criterion of "public protection measures: different than "execution risk?"
- Did the NRC avoid discussing significant impacts by assuming that public protection measures would prevent the attacks? Such an assumption would defeat a key purpose of an environmental assessment, which is to evaluate scenarios that are low in probability but credible, *i.e.*, scenarios for which "protective measures" can be circumvented or do not exist.

Petition at 7-8.

Most of this information was omitted because it is designated as Safeguards Information or SUNSI or Classified Information. As discussed above, the Staff's NEPA obligation does not allow discussion of sensitive security information in environmental documents that the Staff is required to protect from public disclosure. In any event, the fact that SLOMFP can craft questions about issues that cannot or were not discussed in an EA (whether because of concerns for Classified Information or because SLOMFP simply have a question on something that was discussed) is not the standard for admission of a contention. SLOMFP have the obligation to identify how the EA is deficient in meeting NEPA and NRC requirements and the bases for their view. The mere identification of what the SLOMFP would like to be in the EA is not the standard for admitting a contention and holding a hearing.

- vi. **The NRC Staff fails to explain how this general analysis of licensee compliance with Atomic Energy Act-based security regulations and orders has any relevance to a NEPA determination of whether environmental impacts are significant.**

In developing the Supplemental EA, the Staff followed the Commission's direction to use information already available in agency records to the extent practicable. In doing so, the Staff considered analyses of potential terrorist threats to determine their plausibility and potential consequences to determine the potential environmental impacts. This process is explained in the EA. Specifically, the Staff provided a discussion of how it reviewed the existing analysis for the purposes of this Supplemental EA, how it determined that the assumptions used in the security assessment analyses were representative and, in some cases, conservative for the proposed Diablo Canyon ISFSI. Supplemental EA at 7. SLOMFP do not explain why this discussion is inadequate, but rather summarily make a statement that there is no discussion of relevance while providing no facts disputing the staff's analysis to the extent delineated in the EA. Therefore, SLOMFP have not identified a deficiency in the EA or raised a disputed issue of fact or law on which they base their contention, as required by 10 C.F.R. § 2.714(b).

While some specifics of the Staff's analysis are designated as Safeguards Information, or SUNSI or Classified Information, the qualitative discussion the staff has provided is sufficient for SLOMFP to delineate specific disagreements and supporting bases for a contention, which they have not done in proposing this contention-

- vii. **The NRC fails to explain how [its] determination [that the assumptions from the generic security assessments were representative or conservative] was factored into a NEPA analysis.**

In this instance, the SLOMFP have failed to provide supporting reasons for their dispute with the Supplemental EA, instead simply concluding that the "NRC fails to explain how that determination was factored into a NEPA analysis." Petition at 8. Without further explanation of how the Staff failed to satisfy its obligations under NEPA, the SLOMFP have not established the

existence of a genuine dispute on a material issue of law or fact. Without “at least some minimal factual and legal foundation,” SLOMFP’S proposed contention cannot be admitted. *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3) CLI-99-11, 49 NRC 328, 334 (1999). In fact, the Supplemental EA does qualitatively discuss the referenced conservatism, noting that :

. . . [B]ecause of the specific characteristics of the spent fuel authorized for storage at the Diablo Canyon ISFSI (lower burnup fuel), and the greater degree of dispersion of airborne radioactive material likely to occur at the site, any dose to affected residents nearest to the Diablo Canyon site will tend to be much lower than the doses calculated for the generic assessments.

Supplemental EA at 7. Because the Staff cannot disclose all of the details of the security assessments given the need to protect the sensitive nature of the information, the fact that SLOMFP would prefer this information to be publicly disclosed does not present a legitimate contention. Since SLOMFP have not met the requirements of 10 C.F.R. § 2.714(b)(2)(iii), this contention should not be admitted.

- viii. **The EA Supplement fails to provide any analysis of the radiological impacts of threat scenarios, including any documented estimate of the radiation dose arising from release of radioactive material. The only statement may be the EA Supplement is that the dose “would likely be below 5 rem.”**

SLOMFP’s claim in this contention is unsupported. As SLOMFP note in the next sentence of their Petition, the EA explains that the dose resulting from a terrorist attack on an ISFSI “would likely be below 5 rem.” Petition at 8-9. Further, the premise of the contention, a question of omission of an analysis, is inaccurate as the Supplemental EA does discuss the Staff’s analysis:

The NRC staff reviewed the analyses done for the ISFSI security assessments, and compared the assumptions used in these generic assessments to the relevant features of the Diablo Canyon ISFSI. Based on this comparison, the staff determined that the assumptions used in these generic security assessments, regarding the storage cask design, the source term (amount of radioactive material released), and the atmospheric dispersion, were representative, and in some cases conservative, relative to

the spent fuel authorized for storage at the Diablo Canyon ISFSI (lower burnup fuel), and the greater degree of dispersion of airborne radioactive material likely to occur at the site, any dose to affected residents nearest to the Diablo canyon site will tend to be much lower than the doses calculated for the generic assessments. Based on these considerations, the dose to the nearest affected resident, from even the most severe plausible threat scenarios - the ground assault and aircraft impact scenarios discussed above - would likely be below 5 rem. In many scenarios, the hypothetical dose to an individual in the affected population could be substantially less than 5 rem, or none at all. In some situations, emergency planning actions could provide an additional measure of protection to help mitigate the consequences, in the unlikely event that an attack were attempted at the Diablo Canyon ISFSI.

Supplemental EA at 7.

Since the Staff clearly did perform an analysis, as shown above, SLOMFP's proposed contention is invalid on its face and no supporting facts are provided that would meet the admissibility requirements of 10 C.F.R. § 2.714(b)(2). Again, to the extent that SLOMFP is seeking disclosure of more detailed and specific information as to the manner in which the Staff's performed this analysis, this would require disclosure of the details of the Staff's security assessments which contain sensitive information the Staff is require to protect from public disclosure. Therefore, this contention should not be admitted.

b. Failure to reference sources of scientific data

SLOMFP claim that under NEPA "the NRC is required to disclose the technical basis for its determination that the environmental impacts of licensing the Diablo Canyon ISFSI are insignificant . . . [and that the] public is also entitled to review that technical basis." Petition at 10. In actuality, this is a restatement of SLOMFP's claim that the Staff must disclose the basis for the Supplemental EA to the public. As the Staff has noted above, the underlying information supporting the Staff's assessment of the impacts of a terrorist attack on the Diablo Canyon ISFSI is sensitive security information which must be protected from public disclosure. As recognized by the Ninth Circuit, and the Commission in directing the Staff to prepare the EA, the Staff's compliance with NEPA does not require public disclosure of protected information.

SLOMFP's belief that supporting documents which contain protected information should be publicly reviewed is not consistent with the Staff's obligation to ensure protection of this information and therefore cannot support a litigable contention.

Contention 2: Reliance on hidden and unjustified assumptions.

SLOMFP claim that the EA supplement fails to satisfy NEPA because the Staff's decision not to prepare an EIS is based on "hidden and unjustified assumptions." Petition at 10-11. SLOMFP's supporting basis appears two-fold---first, that the Staff assumed a finding of no significant impacts because it concluded that an attack on the DCNPP ISFSI would not result in early fatalities. Second, that "the potential for early fatalities" is the sole criterion employed to ". . . screen out consideration of any threat scenarios that cause impacts other than early fatalities." Petition at 11. A review of the Supplemental EA, however, reveals that the Staff addressed these and other issues throughout the Supplemental EA to make that determination. For example, the Staff explained that no significant impacts would result because even from the most severe threat scenarios, the dose to the nearest affected resident would likely be below the 5 rem limit set in 10 C.F.R. § 72.106(b). Supplemental EA at 7. Further, the Staff's discussion does not limit itself to early fatalities, but explains generally that expected doses for several other scenarios would be substantially less than 5 rem or none at all to an individual in the affected population. Supplemental EA at 7. The Staff also addresses "the potential for early fatalities" as an additional consideration combined with other factors to determine the need for additional security measures at the facility, not to rule out other threat scenarios that cause other types of impacts. Supplemental EA at 6. What SLOMFP characterize as "hidden and unjustified assumptions" are explained throughout the EA; therefore, SLOMFP have not identified any support for a claim that the EA is premised on misleading or unjustified conclusions. 10 C.F.R. § 2.714(b)(2)(iii).

With regard to SLOMFP's allegation that the EA does not satisfy NEPA because of a failure to specify emergency planning measures, SLOMFP misunderstand the Staff's

explanation in the Supplemental EA. The Staff does not offer emergency planning measures as a tool to “mitigate the impacts of an attack” on the ISFSI, as claimed by SLOMFP.

Petition at 12. On the contrary, the Staff explained that: “In some situations, emergency planning actions could provide an additional measure of protection to help mitigate the consequences, in the unlikely event that an attack were attempted at the Diablo Canyon ISFSI.”

Supplemental EA at 7. This assessment considers emergency planning measures as an additional level of protection, not as the only measure to mitigate the impacts of an attack as implied by SLOMFP. Thus, the SLOMFP have failed to identify the existence of a genuine dispute on a material issue of law or fact and the contention therefore should not be admitted. 10 C.F.R § 2.714(b)(2)(iii).

Contention 3: Failure to consider credible threat scenarios with significant environmental impacts. In violation of NEPA and CEQ regulation 40 C.F.R. § 1502.22(b)(3), the EA fails to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment.

SLOMFP’S proposed Contention 3 fails to provide any foundation for SLMFP’s claim that the Staff failed to account for credible threat scenarios that would result in significant environmental consequences. To the contrary, the EA explains that the Staff considered all threat scenarios that were considered plausible. In fact, the EA states: “. . . NRC screened threat scenarios to determine plausibility. For those scenarios deemed plausible, NRC assessed the attractiveness of the facility to attack by taking into account factors such as iconic value, complexity of planning required, resources needed, execution risk, and public protective measures. Supplemental EA at 6. As part of its generic security assessments of ISFSIs, the Staff “examined specific threats, such as land-based vehicle bomb, ground assault with the use of an insider, and water-borne assaults.” Supplemental EA at 5. Further, the Staff explained that to “provide high assurance that a terrorist act will not lead to significant radiological consequences, NRC has analyzed plausible threat scenarios and required enhanced security

measures to protect against the threats, and has developed emergency planning requirements, which would mitigate potential consequences for certain scenarios.” *Id.* at 6.

With regard to claims made by Dr. Thompson that there could be large potential consequences of a terrorist attack, the Staff cannot publicly disclose how it analyzed specific threat scenarios or their consequences because of the sensitive nature of the security assessments. Therefore, it would not be appropriate for the Staff to respond, in a public NEPA document, to claims regarding specific threat scenarios. While SLOMFP, or any potential Intervenor, may speculate as to what the Staff may or may not have considered in its threat assessments, mere speculation is not sufficient to support a contention in a hearing. Further, such speculation should not be permitted to lead to a public airing of the details of the Staff’s threat analysis. Absent any foundation for SLOMFP’s allegation that the Staff failed to consider plausible threat scenarios which would have significant environmental consequences, this contention fails to meet the requirements of 10 C.F.R. § 2.714(b)(2) and therefore should not be admitted.

Contention 4: Failure to address National Infrastructure Protection Plan. The EA fails to comply with NEPA and NRC implementing regulations because it fails to address homeland-security strategy, the principles of protective deterrence, or the opportunities that the NIPP has identified for incorporating protective features into the design of infrastructure elements.

SLOMFP’s proposed Contention 4 should not be admitted because it fails to raise an issue within the scope of this proceeding – which is the Staff’s compliance with NEPA in addressing terrorism in response to the Ninth Circuit remand. In proposed Contention 4, SLOMFP claim that the EA “fails to comply with NEPA and NRC implementing regulations because it fails to address homeland-security strategy, the principles of protective deterrence or the opportunities that the NIPP has identified for incorporating protective features into the design of infrastructure elements.” Petition at 14. As support for this assertion, SLOMFP states that because the NRC is a signatory of the NIPP, it is responsible for demonstrating that its environmental analysis is consistent with the NIPP. *Id.* at 15.

SLOMFP's argument fails to raise any litigable issue in this proceeding. First, the fact that the NRC is a signatory to the document does not in any way indicate that NEPA requires a demonstration that the security measures for the Diablo Canyon ISFSI comport with the NIPP. To the contrary, the Staff's NEPA analysis is not the forum for a review of the security measures in place at the ISFSI. Rather, the Staff need only disclose the environmental impact of the ISFSI, as currently licensed, to comply with NEPA. In addition, SLOMFP's claim that the Staff must demonstrate that the principles encompassed in the NIPP have been considered is completely unsupported. It is not enough to make these types of naked assertions; the SLOMFP must refer to the *actual requirements* of NEPA.⁸

Although framed as an environmental contention, it is clear that SLOMFP's actual purpose in raising this contention is to litigate the adequacy of the national security measures that have been taken to protect commercial nuclear facilities from terrorist attacks. Indeed, Dr. Thomson's expert report states that the EA is deficient because it does not "discuss the homeland-security strategy, principles of protective deterrence or the opportunities the NIPP has identified for incorporating protective features into the design of infrastructure elements." *Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: "The Case of a Proposed Independent Spent Fuel Storage Installation at the Diablo Canyon Site"* at 38. These are issues that are clearly outside the scope of this proceeding and should be rejected by the Commission.

⁸ The NIPP "Recogniz[es] that each [critical infrastructure and key resource ("CI/KR")] sector possesses its own unique characteristics, operating models, and risk landscape, [therefore] HSPD-7 designates Federal Government [Sector-Specific Agencies ("SSAs")] for each of the CI/KR sectors." National Infrastructure Protection Plan (NIPP) of 2006 at 19 available at http://www.dhs.gov/xprevprot/programs/editorial_0827.shtm. SSA's have the primary responsibility for their sector's compliance with NIPP. *Id.* at 19. In addition to their leadership role, "DHS serves as the SSA for 10 of the CI/KR sectors identified in HSPD-7 . . . [including] *Commercial Nuclear Reactors* [emphasis added]." *Id.* at 18

Contention 5: Failure to consider vulnerability of ISFSI in relation to the entire Diablo Canyon spent fuel storage complex.

This proposed contention argues that the EA fails to comply with NEPA because it does not consider the impacts the existing high-density pool storage system for spent fuel at the Diablo Canyon nuclear plant. Petition at 15-16. To cure this alleged deficiency, SLOMFP argue that the Staff should prepare an EIS discussing cumulative impacts of spent fuel storage – to include the vulnerability of the spent fuel pool to a terrorist attack. *Id.* However, the Staff considered the cumulative impacts under NEPA in the original EA for the facility, albeit without considering terrorism. Because the Staff determined in the Supplemental EA that terrorism will result in no significant environmental impact, the original cumulative impacts determination remained unchanged and cumulative impacts were not addressed again in the Supplement EA.

SLOMFP's failure to raise this contention when the original EA was issued precludes them from satisfying the "good cause" requirement for raising a late-filed contention. 10 C.F.R. § 2.714(a)(1)(i); 18 NRC at 172 n.4 (1983) *citing* 17 NRC at 1045. Proposed Contention 5 is: (1) not "wholly dependent" upon the content of the Supplemental EA ; and (2) the Supplemental EA did not introduce any new, much less significant, information regarding the spent fuel pool. *Id.* Because the good cause factor is entitled to the most weight in determining whether a late filed contention is admissible, SLOMFP must make a compelling showing on the remaining factors. 10 C.F.R. § 2.714(a)(1)(ii)-(v) provide the additional factors that must be evaluated in considering a late filed contention. These factors direct the presiding officer to consider:

- ii. The availability of other means whereby the petitioner's interest will be protected.
- iii. The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- iv. The extent to which the petitioner's interest will be represented by existing parties.

- v. The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

The Staff believes that SLOMFP has failed to make the required showing with regard to these factors. SLOMFP have other means to protect their interests relating to the spent fuel pool through the NRC's regulatory process, by requesting a hearing on license amendments that impact the spent fuel pool, the 10 C.F.R. § 2.206 process or the NRC's rulemaking process. Intervenor's proposed contention regarding spent fuel storage cannot be "reasonably expected to assist in developing a sound record" regarding the DCCP ISFSI, which is the subject of this proceeding, because it relates to the consequences of events at the Diablo nuclear reactor. Finally, the admission of this proposed contention would broaden the issues of this proceeding beyond those within the scope of this proceeding – which relate to the environmental impacts of the Diablo ISFSI. Therefore, the Staff believes that Intervenor has not met the late-filed contention requirements of 10 C.F.R. § 2.714(a), and this contention should not be admitted.

This contention should also be rejected as yet another attempt by SLOMFP to litigate issues which are outside the scope of this proceeding. The environmental impacts of the Diablo Canyon nuclear reactor and its spent fuel pool are beyond the scope of the licensing proceeding, which concerns the Diablo Canyon ISFSI, as recognized by the Licensing Board when SLOMFP attempted to raise this issue in the previous licensing proceeding. In rejecting that contention, the Board stated:

The notice of opportunity for hearing for this proceeding indicated that at issue is PG&E's application for a Part 72 license to possess SNF and other radioactive materials associated with an SNF dry cask storage system at an ISFSI. See 67 Fed. Reg. at 19,600. Environmental impacts regarding spent fuel pool fires thus are, on their face, beyond the scope of this licensing proceeding, at least absent a demonstration of how an issue associated with wet storage is applicable here, which SLOMFP has not provided.

Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation, LBP-02-23. 56 NRC 413, 451 (2002). SLOMFP should not be allowed to use this forum to raise issues outside the scope of this proceeding. *Id.* 9 NRC at 124 n.3; See also 38 NRC at 206.

CONCLUSION

Based on the above discussion, the Staff objects to the admission of the SLOMFP'S proposed contentions.

Respectfully submitted,

/RA/

Lisa B. Clark
Counsel for the NRC Staff

Dated at Rockville, MD
this 13th day of July, 2007

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))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO CONTENTIONS SUBMITTED BY SAN LUIS OBISPO MOTHERS FOR PEACE, et al.," in the above-captioned proceedings have been served on the following by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 13th day of July, 2007.

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