

July 18, 2007

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

July 19, 2007 (7:48am)

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**SAN LUIS OBISPO MOTHERS FOR PEACE'S  
MOTION FOR LEAVE TO REPLY TO PG&E'S AND NRC STAFF'S  
OPPOSITIONS TO SLOMPF'S CONTENTIONS  
AND REQUEST FOR A HEARING  
REGARDING DIABLO CANYON  
ENVIRONMENTAL ASSESSMENT SUPPLEMENT**

San Luis Obispo Mothers for Peace ("SLOMPF") hereby requests leave to reply to the responses in opposition to its contentions that the U.S. Nuclear Regulatory Commission ("NRC") Staff and Pacific Gas and Electric Co. ("PG&E") have submitted: NRC Staff's Answer to Contentions Submitted by San Luis Obispo Mothers for Peace (July 13, 2007) and Pacific Gas and Electric Company's Response to Proposed Contentions (July 9, 2007).

Although the NRC's regulations do not specifically provide an opportunity for replies to responses to contentions, the NRC has long required that where a ruling on a hearing request or other pleading may result in the dismissal of a party's case, in fairness the party should be allowed to reply to oppositions to its pleading. *Houston Lighting and Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-5465, 10 NRC 521, 525 (1979); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-81-18, 14 NRC 71, 72-73 (1981). More recently, the Commission recognized the importance of allowing a reply by codifying the requirement in its revised procedural

regulations. 10 C.F.R. § 2.309(h), in Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,240 (January 14, 2004). While the new regulation became effective after this case commenced and therefore does not apply as a technical matter, the Commission should apply the underlying principle and allow SLOMFP an opportunity to reply to the NRC Staff and PG&E.

Undersigned counsel is authorized to state that the NRC Staff does not object to this motion provided SLOMFP's reply is narrowly focused on the legal or logical arguments presented in the applicant/licensee or NRC Staff answer. Undersigned counsel believes that this reply meets the Staff's requirement. Counsel does not know PG&E's position as of the filing of this reply.

Respectfully submitted,



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**I. INTRODUCTION**

As demonstrated in San Luis Obispo Mothers for Peace's ("SLOMPF's") contentions of June 28, 2007,<sup>1</sup> the Supplement to the U.S. Nuclear Regulatory Commission ("NRC") Staff's Environmental Assessment ("EA") Supplement for the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI") completely fails to document or explain the basis for its conclusion that intentional attacks on the ISFSI would have no significant environmental impacts. Therefore the EA Supplement is inadequate to satisfy the National Environmental Policy Act's ("NEPA's") fundamental requirement that an agency's finding of no significant impact must be sufficiently supported and explained to demonstrate that the Staff made a "fully informed and well-considered" determination of no significant impacts. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9<sup>th</sup> Cir. 1998), cert. denied sub nom.

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<sup>1</sup> San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement (June 28, 2007; corrected June 29, 2007) ("Contentions").

*Malheur Lumber Co. v. Blue Mountain Biodiversity Project*, 527 U.S. 1003 (1999). In apparent reliance on hidden assumptions, the EA Supplement also ignores credible attack scenarios that could result in significant impacts to the environment.

Both the NRC Staff and Pacific Gas & Electric Co. (“PG&E”) oppose admission of SLOMFP’s contentions, on the general grounds that (a) in order to protect sensitive security-related information from public disclosure, the NRC Staff was entitled by law to prepare an environmental analysis as vague and unsubstantiated as the EA Supplement, and (b) in any event, the EA Supplement did provide enough information to allow a meaningful evaluation of the environmental impacts of intentional attacks on the Diablo Canyon ISFSI. NRC Staff’s Answer to Contentions Submitted by San Luis Obispo Mothers for Peace (July 13, 2007) (“NRC Staff Response”); Pacific Gas and Electric Company’s Response to Proposed Contentions (July 9, 2007) (“PG&E Response”). In neither respect have the Staff and PG&E shown that SLOMFP’s contentions fail to raise a genuine and material dispute of fact or law regarding the adequacy of the EA Supplement to satisfy NEPA. Thus, the contentions are admissible under 10 C.F.R. § 2.714(b).<sup>2</sup>

## **II. DISCUSSION**

### **A. General Arguments by the NRC Staff**

In arguing the inadmissibility of all of SLOMFP’s contentions, the NRC Staff repeatedly makes two arguments: first, that the contentions are inadmissible as a matter of law because the NRC was entitled to protect the withheld information from public disclosure; and second that as a factual matter, the information disclosed by the Staff was

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<sup>2</sup> With the exception of Contentions 3 and 5, neither the Staff nor PG&E objects to the admission of any contention on the ground that it is late-filed.

sufficient to allow SLOMFP to evaluate whether the NRC had taken a hard look at the environmental impacts of an intentional attack on the proposed ISFSI. The first argument is incorrect as a matter of law, and the second argument merely shows the existence of a genuine and material factual dispute between the parties which warrants admission of the contentions.

**1. Applicable legal principles require the EA Supplement to disclose relevant information or justify its exemption from disclosure.**

The NRC Staff argues that under the “principle” established in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) and *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1034-35 (9th Cir. 2006), cert. denied sub. nom. *Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace*, 127 S.Ct. 1124 (2007), any deficiency in the EA Supplement is excused by the legal necessity of protecting sensitive security-related information from public disclosure.<sup>3</sup>

In making this argument, the Staff completely ignores other important principles of NEPA and NRC regulatory policy for use of protected information in licensing decisions, which do not permit the Staff’s wholesale and unjustified refusal to disclose the basis for the EA Supplement. In particular:

- Making federal agencies accountable to the public for their environmental decisions is one of the cardinal purposes of NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
- NEPA requires that agencies must consider the environmental impacts of their decisions to the “fullest extent possible.” 42 U.S.C. § 4332(2)(C).

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<sup>3</sup> NRC Staff Response at 6-8. PG&E makes a similar argument at pages 6-7 of its Response.

- Agency decisions to withhold information from an EA or EIS are governed by the Freedom of Information Act (“FOIA”). *Weinberger*, 454 U.S. at 412, citing 42 U.S.C. § 4332(2)(C).
- As the NRC has recognized, the FOIA is “a statute whose basic purpose reflects a philosophy of full agency disclosure unless information falls under one of the nine clearly delineated statutory exemptions.” SECY-05-0091, Memorandum from Karen D. Cyr, NRC General Counsel, to the Commissioners, re: Task Force Report on Public Disclosure of Security-Related Information (May 18, 2005), Attachment: Report on Public Disclosure of Security-Related Information at 4, citing *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976).
- Under the FOIA, the NRC must segregate and release information that is not specifically exempted from disclosure. 10 C.F.R. § 9.19. This requirement stems from the legal principle that “whenever possible, sensitive information must be disentangled from nonsensitive information to allow for the release of the latter.” *Ellsberg. V. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983).
- In addition, any government claim to an exemption must be specific and it must be justified. 10 C.F.R. § 9.27(b).
- There is no exemption in the FOIA for information that identifies the existence of a document, such as the title, author, and date. In fact, this information is segregable under 10 C.F.R. § 9.19.
- The NRC recognizes that in order for members of the public to meaningfully exercise their right to participate in NRC licensing decisions as guaranteed by the Atomic Energy Act (“AEA”), they must have “access to information about the

design and operation of regulated facilities or materials.” SECY-04-0191, Memorandum from Luis A. Reyes, Executive Director for Operations, to the Commissioners, re: Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure at 2 (October 19, 2004). The rights to meaningful participation and access to information must be balanced against the NRC’s goal of withholding “information that could reasonably be expected to be useful to potential adversaries.” *Id.*

- In licensing hearings, NRC regulations allow interested parties to seek access to relevant classified and safeguards information under appropriate procedural protective measures. 10 C.F.R. §§ 2.744(e), 2.905(b)(1).
- In order to give interested parties a meaningful opportunity to seek access to classified and safeguards documents, it is essential for the NRC to provide basic identifying information. Otherwise, the parties unfairly are forced to guess what is being withheld.
- Unlike the *Weinberger* case, which involved classified information that the government completely withheld from any members of the public, *see* 454 U.S. at 146-47, in this case the NRC Staff has shared much of the withheld information in the EA Supplement with nuclear licensees and nuclear industry lobbyists. Thus, it would be extremely unfair for the NRC to hide the information from the public to the extent of refusing even to identify the information so that it could be requested in the discovery process.

The broad access that the NRC granted the nuclear industry to its post-9/11 security reviews is demonstrated in contemporaneous Commission

correspondence. For example, in a November 5, 2001, letter, Samuel J. Collins, then-Director of the NRC's Office of Nuclear Reactor Regulation ("NRR"), informed a senior official at the Nuclear Energy Institute ("NEI") that NEI employee Ronald Rose could not only "receive and store" safeguards information at an NEI facility, but that he could share it with unnamed NEI personnel; and that no further NRC authorization was needed for the distribution of the safeguards information by Mr. Rose.<sup>4</sup> On January 23, 2003, the Staff also noticed a closed meeting on the revised design basis threat ("DBT"), to which NEI employees and other "to be determined" members of the nuclear industry were invited to discuss safeguards issues.<sup>5</sup> The Commission also gave NEI officials "need-to-know" status allowing them to review safeguards documents for the general purpose of "efficiently and expeditiously obtaining industry-wide comments on Commission policy issues involving nuclear facility and materials security."<sup>6</sup> As noted with approval by then-Chairman Diaz, as of September 2003, the NRC Staff began to hold "weekly" closed meetings with NEI and other nuclear industry representatives, "to discuss security, contingency, and training and qualification plan changes needed to support compliance with the April 29, 2003, design basis threat order."<sup>7</sup> The letter also emphasizes that the Commission "is committed to

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<sup>4</sup> Letter from Samuel J. Collins, NRR, to Ralph Beedle, NEI (November 5, 2001).

<sup>5</sup> NRC Meeting Notice re: Closed Meeting to Discuss Questions and Responses from the January 9, 2003, Design Basis Threat (DBT) Meeting and Requested Written Input Provided by Representatives from Licensed Power Reactor Facilities, the Nuclear Industry, and State and Federal Agencies (January 23, 2003).

<sup>6</sup> Letter from Nils J. Diaz, NRC Chairman, to Joe F. Colvin, NEI President and Chief Executive Officer (June 19, 2003).

<sup>7</sup> Letter from Nils J. Diaz, NRC Chairman, to Joe F. Colvin, NEI President and Chief Executive Order, attached as Exhibit 4. Commission records also show that the

the continued exchange of information and ideas between the NRC and authorized stakeholders on security topics.”<sup>8</sup> Thus, having given the nuclear industry broad access to safeguards information, it is neither legal nor fair for the NRC to deny SLOMFP even enough information that would allow SLOMFP to request access to the information.

Under these governing principles, the provision of an unintelligible summary of an environmental analysis is not excused by unsupported and vague assertions that “much” of the Staff’s analysis “either depends upon or has some reference to” documents that are exempt from public disclosure under the FOIA, or that the Staff disclosed “as much of its revised environmental analysis as feasible.” NRC Staff Response at 7-8. As required by both NEPA and the FOIA, the Staff must present an understandable analysis that defines its terms and explains its analytical processes, or justifies the failure to provide specific pieces of information by claiming an exemption to the FOIA.

As discussed above, the Staff must also disclose all reasonably segregable portions of the analysis. In addition, the Staff must identify its references, and provide access to those references unless they are specifically exempted from

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Commission itself has held numerous closed meetings on security issues, attended by officials from NEI, the National Research Council (an arm of the National Academies), and representative of nuclear licensees. *See, e.g.*, Presiding Officer’s Statement regarding July 11, 2002, meeting on security issues (attended by four National Research Council officials) (July 15, 2002); Presiding Officer’s Statement regarding January 14, 2003, meeting on security issues (attended by five NEI officials) (January 17, 2003); Presiding Officer’s Statement regarding March 3, 2003, meeting on security issues (attended by six NEI officials and eleven other nuclear utility representatives) (March 17, 2003); Presiding Officer’s draft Statement regarding May 14, 2003, meeting on security issues (attended by seven NEI officials and eight other nuclear utility representatives) (undated draft).

<sup>8</sup> *Id.* at 1.

disclosure by the FOIA. Segregable portions of reference documents must also be released. Because it has failed to honor or even address these principles, the Staff has established no legal basis for dismissing SLOMFP's contentions.<sup>9</sup>

**2. The Staff Response establishes the existence of material factual disputes with respect to the adequacy of EA Supplement.**

Throughout its response to SLOMFP's contentions, the NRC Staff repeatedly concedes that it did not disclose all of the information relied on in its environmental analysis, but asserts that it disclosed as much information as possible under the federal laws and regulations requiring protection of sensitive security-related information, and that in any event it disclosed enough information to allow a meaningful review of the EA Supplement. For instance:

- In responding to Contention 1, which challenges the adequacy of the EA Supplement to describe types of attacks that were considered plausible” or disregarded as “remote and speculative,” the NRC Staff states that “[a]lthough the Staff could not provide all the details of referenced background documents

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<sup>9</sup> PG&E misconstrues NEPA and applicable case law in arguing that the “substantial procedural discretion” afforded to NRC by the Court of Appeals in responding to the Court’s remand allowed NRC to take anything less than a “hard look” in evaluating the environmental impacts of an intentional attack on the Diablo Canyon ISFSI. PG&E Response at 7. While the NRC may have had discretion to choose the manner in which to respond to the Court’s decision, once it undertook to conduct an environmental analysis it accepted a nondiscretionary duty to comply with NEPA “to the fullest extent possible.” 42 U.S.C. § 4332(2)(C).

PG&E also selectively quotes from the Ninth Circuit’s decision in order to argue that “the focus of the remand was for the NRC to address the views of SLOMFP,” and that therefore SLOMFP may make no other claims aside from seeking to have its views considered. *Id.* This argument is contradicted by the Court’s holding that the NRC’s justification for failing to prepare an environmental analysis of the impacts of an attack on the Diablo Canyon ISFSI was irrational, and that therefore the NRC must “fulfill its responsibilities under NEPA.” 449 F.3d at 1035.

and analyses due to the sensitive nature of the information, the general methodology and analyses relied upon were referenced.” NRC Staff Response at 9-10.

- Similarly, the Staff asserts that its analyses comply with NEPA “to the extent possible without divulging Classified Information . . .” *Id.* at 10.
- The Staff also claims that the EA Supplement addresses “specific threats,” but it also states that “the level of detail” regarding these threats “was limited by the sensitive nature of the materials underlying the analyses.” *Id.*
- The Staff’s use of the phrase “such as” to describe examples of threats considered also indicates that the threats identified in the EA Supplement were only a subset of credible threats. *Id.*
- In response to Contention 1’s assertion that the EA Supplement did not provide qualitative information on how attack scenarios were selected, the Staff asserts that “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.” *Id.* at 12.
- In response to Contention 1’s complaint that the EA Supplement did not discuss its analytical methods by addressing certain procedural questions, the Staff asserts that “[m]ost of this information was omitted because it is designated as Safeguards Information or SUNSI or Classified Information.” NRC Staff Response at 15. Simultaneously, the Staff effectively asserts that

the procedural questions are meaningless or irrelevant to the EA Supplement.

*Id.*

- In response to Contention 1's assertion that the EA Supplement failed to explain how the Staff's AEA-based reviews were relevant to its NEPA review, the Staff acknowledges that "some specifics of the Staff's analysis are designated as Safeguards Information, or SUNSI, or Classified Information," but asserts that "the qualitative discussion the staff has provided is sufficient for SLOMFP to delineate specific disagreements and supporting basis for a contention . . ." *Id.* at 16.
- In response to Contention 1's assertion that the EA Supplement fails to explain how its assumptions were conservative or representative, the Staff states that it "cannot disclose all of the details of the security assessments given the need to protect the sensitive nature of the information," yet also claims to have provided sufficient information to address SLOMFP's concerns. NRC Staff Response at 17.

The Staff's arguments show that SLOMFP has raised genuine and material disputes regarding the adequacy of the Staff's rationale for withholding material information from the EA Supplement, because the Staff has completely failed to provide specific information regarding the nature of the withheld information or to attempt to justify withholding it. In addition, SLOMFP has raised a genuine and material factual dispute regarding the question of whether the information the Staff did provide is adequate to support a meaningful review.

**B. Specific Contentions**

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

Contention 1 asserts that:

The EA violates NEPA and NRC and Council on Environmental Quality (“CEQ”) implementing regulations because it fails to 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. Therefore, the EA fails to justify the Staff’s decision not to prepare an EIS for the facility.

Contentions at 3.

**a. NRC Staff arguments**

In subsection (a)(i) of Contention 1, SLOMFP asserts that 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. Contentions at 5. While the Staff vaguely asserts that “the general methodology and analyses relied upon were referenced,” the claim only underscores the existence of a genuine and material factual dispute between the parties. NRC Staff Response at 10. The Staff also asserts that the EA Supplement provides “reference to specific threats” (*id.*), but does not state whether these examples constitute the universe of threats examined in the EA Supplement or explain what was the NRC’s analytical process for identifying credible threats and evaluating their consequences.<sup>10</sup> Again, the Staff does

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<sup>10</sup> In addition, the Staff does not explain how its failure to provide an accounting of all types of attacks it considered is consistent with the Commission’s policy of disclosing that information in other regulatory contexts. For instance, in the proposed design basis threat (“DBT”) rule, the Commission stated that “it is important for the public to be informed of the types of attacks against which nuclear power plants and Category I fuel cycle facilities are required to defend.” Proposed Rule, Design Basis Threat, 60 Fed. Reg. 67,380, 67,382 (November 7, 2005). While the Diablo Canyon

not provide enough information to show that the contention raises no genuine or material dispute.

In subsection (a)(ii) of Contention 1, SLOMFP criticizes the EA Supplement for failing to explain the meaning of the word “plausible.” Contentions at 6. In response, the Staff does not dispute the fact that the EA Supplement fails to explain the meaning of the term “plausible.” Instead, the Staff argues that SLOMFP should be able to figure it out by evaluating the “examples” of plausible attacks given in the EA Supplement. NRC Staff at 10-11. The Staff’s argument only serves to demonstrate the existence of a genuine and material factual dispute between the parties. SLOMFP is entitled to litigate the question of whether the identification of a few examples is sufficient to illustrate the methodology that was used by the Staff. In SLOMFP’s view, the Staff’s approach requires inappropriate guesswork. A factual dispute also exists because the Staff completely fails to respond to the concern raised by SLOMFP that the Staff finished its so-called analysis of plausibility before it evaluated a number of factors that appear to be relevant to the determination of plausibility, thereby raising fundamental questions about how the Staff interprets the term. Contentions at 5-6.

In subsection (a)(iii) of Contention 1, SLOMFP asserts that the EA Supplement is inadequate because it fails to provide criteria for distinguishing between attacks that are “remote and speculative” and attacks that are “plausible.” Contentions at 6. The NRC

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ISFSI does not constitute a nuclear power plant or a Category I fuel cycle facility, the principle is equally applicable to all types of facilities. Moreover, as discussed in Dr. Thompson’s expert report, the NRC has stated that the Diablo Canyon security plan would apply to the Diablo Canyon ISFSI. Thompson, *Assessing Risks of Potential Malicious Actions at Commercial Facilities: The Case of a Proposed Independent Spent Fuel Storage Installation at the Diablo Canyon Site* at 29 (June 27, 2007) (“Thompson Report”). Presumably, the security plan is based on the DBT.

Staff responds that it did “provide qualitative information on how the scenarios were selected.” NRC Staff Response at 11-12. But the language of the EA Supplement quoted by the NRC Staff in support of this assertion (Staff Response at 12) contains no explanation whatsoever regarding the criteria the Staff used to determine what types of attacks were plausible versus what types of attacks were remote and speculative. Thus, the Staff has failed to show the absence of a genuine and material factual dispute about the adequacy of the EA Supplement.

In subsection (a)(iv) of Contention 1, SLOMFP criticizes the EA Supplement for appearing to rely on an AEA-based analysis of the adequacy of PG&E’s protective measures against the DBT, rather than a broader NEPA-based analysis of threats that are reasonably foreseeable despite their low probability. Contentions at 6. Similarly, in subsection (a)(vi) of Contention 1, SLOMFP challenges the EA Supplement for its failure to explain how a general analysis of licensee compliance with AEA-based security regulations and orders has any relevance to a NEPA determination of whether environmental impacts are significant. Contentions at 8. In response, the Staff appears to contend that under CLI-07-11, the DBT is co-extensive with reasonably foreseeable but low-probability attacks as a matter of law. NRC Staff Response at 13, 16. The Staff also asserts that SLOMFP has failed to show a basis for the distinction between the two standards. *Id.* at 13.<sup>11</sup>

The Staff’s assertions are nonsensical. The words of the two standards themselves demonstrate that the Commission has two different standards for AEA-based security requirements and NEPA evaluations. The AEA-based standard calls for

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<sup>11</sup> PG&E makes essentially the same argument at page 10 of its Response.

protective measures against a hypothetical threat that the NRC considers reasonable or feasible for the licensee to defend against. Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705, 12,713 (March 19, 2007). The NEPA standard, in contrast, is not based on the capabilities of the licensee but on the foreseeability of the threat. On their faces, the standards are different. By instructing the Staff to consult materials it had already prepared, the Commission cannot be presumed to have also instructed the Staff to disregard the NEPA standard for evaluating the significance of environmental impacts.

In subsection (a)(v) of Contention 1, SLOMFP criticizes the EA Supplement for its poor description of the analytical steps taken by the NRC in evaluating threat scenarios in 2002. Contentions at 7. The Staff claims that the contention does not satisfy 10 C.F.R. § 2.714 because it does not reference the specific portions of the EA Supplement questioned by SLOMFP. Staff Response at 13. The Staff's assertion is incorrect. The contention provides quotations from page 6 of the EA Supplement at page 6. Contentions at 7.

The Staff also claims that SLOMFP misconstrues the EA Supplement by presuming that the Staff conducted a security analysis in 2002. NRC Staff Response at 14. According to the Staff, "there was no '2002 analysis.'" *Id.* Instead, the Staff issued "orders" in 2002, and completed "security assessments" in 2006. *Id.*

The Staff's argument provides an excellent example of the confusion created by (a) the vague prose used in the EA Supplement and (b) the EA's lack of any documentary references. SLOMFP's assumption that the Staff conducted some kind of analysis in 2002 was based on the statement in the EA Supplement 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.

EA Supplement at 6 (emphasis added). In the next paragraph, the EA Supplement states that 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.” *Id.* at 7. Taken together, these two statements imply that shortly after issuing the 2002 security orders, the Staff conducted a generic security assessment for ISFSIs, which was followed by another generic review and site-specific analysis sometime later – thus giving the impression that the Staff conducted multiple security assessments over time. But the NRC Staff’s Response indicates that there was only one set of security assessments, completed in 2006. Whether due to gross carelessness or an intent to mislead, the Staff’s lack of precision, combined with its failure to support its assertions with any references to documented studies, raises fundamental questions about the veracity of the entire EA Supplement.

In subsection (a)(vii) of Contention 1, SLOMFP challenges the EA Supplement for its failure to describe how the Staff’s determination that assumptions used in generic assessments were “representative” or “conservative” was factored into the Staff’s NEPA analysis. Contentions at 8. The Staff argues that this aspect of the contention is inadmissible because the contention failed to provide a “minimal factual and legal foundation” for SLOMFP’s concerns. NRC Staff Response at 16-17. Due to the differing characteristics of an AEA-based and NEPA-based analysis, assumptions that are conservative or representative for an AEA-based analysis may not be conservative or representative for a NEPA-based analysis. But neither the EA Supplement nor the NRC Staff’s response addresses this issue.

In subsection (a)(viii), SLOMFP asserts that the EA Supplement fails to provide any analysis of the radiological impacts of threat scenarios. Contentions at 8-9. The Staff claims that it did perform such an analysis. NRC Staff Response at 18, citing EA Supplement at 7. But the portion of the EA Supplement cited by the NRC Staff merely states the Staff's conclusion that the dose would likely be below 5 rem. The EA Supplement provides no explanation for this conclusion. For instance, the conclusion appears to be based on the assumption that no credible scenario would result in a large-area penetration of the spent-fuel canister or a penetration accompanied by ignition of fuel cladding, but the EA Supplement fails to acknowledge this assumption or explain why it was made.

Subsection (b) of Contention 1 challenges the EA Supplement for its failure to reference its sources of scientific data. Contentions at 9-10. The NRC Staff argues that "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." NRC Staff Response at 18. But the Staff does not explain what is sensitive about information concerning the title, date, a general description of the content of a sensitive security document, or identification of the FOIA exemption under which the NRC claims the right to withhold the content of the document. This is segregable information that should be released for purposes of complying with the FOIA and maintaining the NRC's accountability for its decision to withhold information.

**b. PG&E's response**

PG&E argues that Contention 1 is based on a “faulty view of the standard for assessing an EA,” because it “incorrectly presumes that a court of appeals in a NEPA context would review every supporting study and methodology, to independently validate the agency’s conclusion.” PG&E Response at 8. The standard of review is described in *Marsh v. Ore. Natural Res. Council, Inc.*, 490 U.S. 360, 377(1989), where the Supreme Court held that a reviewing court “must be able to independently review the record in order to satisfy itself that the agency has made a reasoned decision based on its evaluation of the evidence.” See also *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1988), where the U.S. Court of Appeals for the Ninth Circuit found that a court should be able to review an agency’s NEPA decision without “second guessing” the agency’s “scientific conclusions.” Here, the EA Supplement is so vague and confusing that a reviewing court would be reduced to first-guessing what the NRC Staff did.<sup>12</sup>

PG&E also argues that the EA Supplement adequately addressed the Staff’s methodology for determining the plausibility and consequences of an attack because it provided a summary and a framework. PG&E Response at 9. This response does not address SLOMFP’s detailed criticisms regarding the lack of information in the EA Supplement. Therefore it does nothing more than confirm that the parties have a genuine and material factual dispute regarding the adequacy of the EA Supplement.

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<sup>12</sup> Moreover, contrary to PG&E’s suggestion at page 8, the lack of adequate “underpinnings” for the Staff’s EA Supplement constitutes adequate legal grounds for its rejection as inadequate to satisfy NEPA. SLOMFP was not required to carry the Staff’s burden of proof by demonstrating that the NRC Staff had overlooked significant impacts. In any event, SLOMFP’s Contention 3 makes precisely that case, setting forth significant environmental impacts which were inexplicably ignored in the EA Supplement.

PG&E also argues that the Council on Environmental Quality's ("CEQ's") regulations cited in Contention 1 "do not apply directly to the NRC to the extent that agency has not expressly adopted those regulations." PG&E Response at 10, citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743 (3rd Cir. 1989). But Executive Order 1191, 3 C.F.R. § 123-124, directs federal agencies to "comply with the regulations issued by the Council except where such compliance would be inconsistent with statutory requirements," and the NRC has not disavowed the CEQ regulations cited in SLOMFP's contentions as inconsistent with NEPA. To the contrary, the NRC has its own regulation requiring the citation of sources (10 C.F.R. § 51.30(a)(2)), and the NRC claims to consider low-probability but reasonably foreseeable environmental impacts. *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 388 n.8 (2001).

In addition, PG&E argues that the NRC Staff need not explain the meaning of the word "plausible," but may use it in its "ordinary sense." PG&E Response at 10. The trouble with this argument is that it ignores the evidence presented by SLOMFP that the EA Supplement uses the word in a way that doesn't make ordinary sense. Contentions at 5.

**2. Contention 2: Reliance on hidden and unjustified assumptions.**

Contention 2 asserts that "[t]he EA Supplement fails to satisfy NEPA because the NRC's decision not to prepare an EIS is based on hidden and unjustified assumptions." In the basis of the contention, SLOMFP identifies two hidden assumption that appear to affect the results of the EA Supplement. First, the EA Supplement appears to assume that the environmental impacts of an attack on a spent fuel storage cask would be insignificant

if they do not result in early fatalities. Contentions at 10-12. The EA Supplement also appears to assume that the environmental impacts of an attack on a spent fuel storage cask would be reduced to the point of insignificance by unspecified emergency planning upgrades. *Id.* at 12.

The Staff denies that the potential for early fatalities was the “sole” criterion for ruling out accident scenarios from consideration in the EA Supplement, although conceding that the potential for early fatalities was indeed a criterion. NRC Staff Response at 19. That response misrepresents the EA Supplement. In describing the generic security assessments that were conducted for ISFSIs, the EA Supplement mentions only one indicator of radiological consequences, namely the potential for early fatalities: “In addition, NRC made conservative assessments of consequences, to assess the potential for early fatalities.” EA Supplement at 6. The only reasonable interpretation of that statement is that other indicators of radiological consequences were ignored. As discussed in SLOMFP’s contention, reliance on the potential for early fatalities as a consequence indicator is absurd. Contentions at 11-12. The Staff’s Response establishes a genuine and material dispute between the parties, and thus the contention is admissible.

The Staff’s decision to rule out attacks that do not cause early fatalities appears to be consistent with a secret Commission policy for materials licensees. According to the NRC’s Inspector General (“IG”), the NRC approved and withheld from public disclosure a SECY Paper and Staff Requirements Memorandum (“SRM”) containing a Commission policy to measure the success of terrorist attacks against NRC-licensed materials facilities by whether the attacks would result in early deaths. OIG-06-A-22, Audit Report, Audit

of NRC's Process for Releasing Commission Decision Documents at 1, 16 (September 8, 2006). The policy rules out other impacts such as economic and environmental consequences and latent deaths. *Id.* As discussed in the IG Report, the SECY paper and associated SRM appear to establish NRC policies that affect the public, and therefore should be published as required by the FOIA. *Id.* at 16-17. The Commission should release these documents to the public, along with any related documents that extend the policy to other types of facilities.

The Staff does not deny that the EA Supplement identifies emergency planning as a mitigative measure, but asserts that SLOMFP has failed to identify the existence of a genuine and material dispute because emergency planning is an "additional" mitigative measure. Staff Response at 20. Given that the EA Supplement does not identify any other mitigative measures, it is difficult to understand what the Staff means by this assertion. Are there other mitigative measures that the Staff considered in secret? Why does the fact that the Staff considered more than one mitigative measure absolve the Staff from the responsibility to explain in what respect it considered emergency planning to be a mitigative measure? The Staff's Response raises more questions than it answers, and thereby shows the existence of a genuine and material factual dispute between the parties regarding the adequacy of the EA Supplement to address the alleged mitigative measure of emergency planning.

**3. Contention 3: Failure to consider credible threat scenarios with significant environmental impacts.**

Contention 3 asserts that:

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.

Contentions at 12. In opposing admission of Contention 3, the NRC Staff does not deny the existence of a dispute, but merely asserts that it cannot discuss all aspects of the dispute in public because of the “sensitive nature” of its security assessments. NRC Response at 21. This does not constitute a good reason for dismissing the contention, but only a possible reason for conducting a closed hearing. As discussed above in Section II.A, the EA Supplement should identify the assessments on which it relies, the FOIA exemption claimed, and its reasons for invoking the FOIA exemption. This will allow SLOMFP and the Commission to evaluate whether the assessments or some part of them should be withheld and, if so, whether the hearing should be held under a protective order.

PG&E argues that SLOMFP simply “presumes” the likelihood of a successful attack on the Diablo Canyon ISFSI, rather than demonstrating that it is credible. PG&E Response at 14. PG&E ignores the fact that the attack characteristics described in the contention establish its credibility. In particular, the attack could be accomplished by a relatively small group of individuals, using weapons that are readily available to sub-national groups. Contentions at 13. As discussed in the Thompson Report at 22-23, the NRC recognized these characteristics as indicia of credibility in its 1994 vehicle bomb rule.

PG&E also asserts that the contention is immaterial because “the NRC has established physical security requirements precisely intended to protect against radiological sabotage of the type posited by Dr. Thompson.” PG&E Response at 14. As discussed above with respect to Contention 1, however, the AEA-based security standard to which licensees must design their security plans is quite different from the NEPA

standard of evaluating the environmental impacts of attacks that have low likelihood but are reasonably foreseeable. In any event, PG&E gives no indication that it has implemented design measures to protect the storage canisters from penetration and fuel cladding ignition by the types of devices posited in SLOMFP's contention and Dr. Thompson's report. If the NRC were to prepare an EIS on the impacts of attacks on the Diablo Canyon ISFSI, it would be reasonable to consider such measures.

PG&E also argues that a balancing of the late-filing factors weighs against admission of the contention, because SLOMFP and Dr. Thompson are not qualified to making a meaningful contribution to the record regarding the likelihood of a successful attack on the facility. Dr. Thompson's declaration and curriculum vitae establish that he is a qualified expert in the area of nuclear risk assessment, including risks of intentional attacks on nuclear facilities. As stated in his declaration, he has extensive experience in nuclear facility risk analysis and has prepared numerous oral and written presentations on the vulnerability of nuclear facilities to acts of malice of insanity. Declaration of Dr. Gordon Thompson in Support of San Luis Obispo Mothers for Peace's (SLOMFP's) Contentions Regarding the Diablo Canyon Environmental Assessment Supplement, pars. 4-11. Examples of his presentations are listed in his curriculum vitae. In any event, PG&E has not challenged the important factor of SLOMFP's good cause for Contention 3 due to the previous unavailability of the EA Supplement. *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1045 (1983).

**Contention 4: Failure to address National Infrastructure Protection Plan (NIPP)**

Contention 4 asserts 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 [National Infrastructure Protection Plan (“NIPP”)] has identified for incorporating protective features into the design of infrastructure elements.

Contentions at 14-15. The NRC Staff and PG&E oppose the admission of this contention, arguing that NEPA does not require the EA Supplement to discuss the NIPP. NRC Staff Response at 21-22, PG&E Response at 18-20. But it is well-established that NEPA requires federal agencies to evaluate all environmental impacts of their actions, not just the impacts that are regulated under their own governing statutes. *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113 (9th Cir. 2005). As the Court held in that case:

Although the Corps' permitting authority is limited to those aspects of a development that directly affect jurisdictional waters, it has responsibility under NEPA to analyze all of the environmental consequences of a project. Put another way, while it is the development's impact on jurisdictional waters that determines the scope of the Corps' permitting authority, it is the impact of the permit on the environment at large that determines the Corps' NEPA responsibility. The Corps' responsibility under NEPA to consider the environmental consequences of a permit extends even to environmental effects with no impact on jurisdictional waters at all.

*Id.* at 1122. NRC regulation 10 C.F.R. § 51.71(d) also requires that an EIS must give “[d]ue consideration” to “compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection.” Here, as a signatory to the NIPP, the NRC has committed to “[s]upport NIPP concepts, frameworks and processes, and carry out their assigned functional responsibilities” to the extent they are consistent with NRC’s own programs. Letter of Agreement, National Infrastructure Protection Plan (2006). Thus, consistent with NEPA and NRC regulations, the EA Supplement should address the NIPP.

PG&E is incorrect in claiming that as a practical matter the EA Supplement addresses the requirements of the NIPP. PG&E Response at 19-20. As discussed in Dr. Thompson's Report at page 34, the type of storage module proposed for the Diablo Canyon ISFSI may be a robust structure for purpose of resistance to natural forces, but not in terms of its ability to withstand penetration by weapons available to sub-national groups. And the only discussion of mitigative measures in the EA Supplement is an extremely vague and inadequate reference to emergency planning. *See* Contention 1. Thus, PG&E has not established the absence of a genuine and material legal and factual dispute with respect to Contention 4.

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

Contention 5 asserts that:

The EA fails to comply with NEPA because it does not consider the significant cumulative impacts of the proposed ISFSI in relation to the impacts of the existing high-density pool storage system for spent fuel at the Diablo Canyon nuclear plant. The NRC Staff should prepare an EIS that discusses the cumulative impacts of spent fuel storage at the Diablo Canyon site, including the vulnerability of both the ISFSI and the spent fuel storage pools to attack. The EIS should also consider alternatives for mitigating those impacts, such as using the ISFSI to reduce the density of fuel storage in the pool.

Contentions at 15-16. The NRC Staff does not deny that under NEPA, the NRC's environmental analysis for the Diablo Canyon ISFSI must address the cumulative impacts of the proposed ISFSI. NRC Staff Response at 23-24. But the Staff argues that the NRC did address cumulative impacts in the original EA for the ISFSI, and SLOMFP's failure to raise the issue with respect to the original EA bars it from raising it here. *Id.*

The NRC Staff's analysis of the good cause standard is incorrect. There can be no doubt that it would have been futile for SLOMFP to challenge the adequacy of the original EA to address the cumulative environmental impacts of intentional attacks on the proposed ISFSI and the fuel pools. The NRC did not acknowledge its legal obligation to consider the environmental impacts of intentional attacks until it issued the EA Supplement. Thus, Contention 5 is "wholly dependent" on the issuance of the EA Supplement. *Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2)*, ALAB-737, 18 NRC 168, 172 n.4 (1983).<sup>13</sup>

The Staff also relies on the Licensing Board's decision in the original licensing proceeding that the environmental impacts of the Diablo Canyon nuclear power plant and its spent fuel pools are outside the scope of this proceeding. NRC Staff Response at 24, citing LBP-02-23, 56 NRC 413, 451 (2002). SLOMFP respectfully submits that the Licensing Board was incorrect, and that NEPA requires consideration of the cumulative impacts of spent fuel storage at the Diablo Canyon site, taking into consideration both the impacts of the proposed ISFSI "when added to other past, present, and reasonably foreseeable future actions." *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-04-01, 53 NRC 31, 60 (2001), citing 40 C.F.R. § 1508.7.

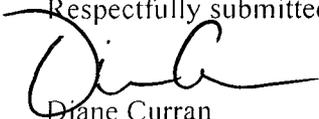
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<sup>13</sup> PG&E's argument that a balancing of the other factors in the late-filing standard weigh against admission of the contention is completely without merit. SLOMFP has demonstrated that its expert is highly qualified to contribute to the record on the subject. See Thompson Declaration and curriculum vitae. Moreover, the fact that litigation of Contention 5 may broaden or delay the proceeding is not the fault of SLOMFP but of PG&E and the NRC, who continually resisted consideration of the environmental impacts of intentional attacks in their environmental analyses. Finally, the possibility that at some future date SLOMFP may have an opportunity to challenge the NRC's environmental analysis with respect to a spent fuel pool-related license amendment does not excuse the NRC from offering SLOMFP a hearing on the cumulative impacts of spent fuel storage in this proceeding.

### III. CONCLUSION

For the foregoing reasons, the Staff's and PG&E's objections to the admissibility of SLOMFP's contentions are without merit. The Commission should admit the contentions and hold a formal adjudicatory hearing on the adequacy of the EA Supplement to consider the environmental impacts of intentional attacks on the proposed Diablo Canyon ISFSI.

Respectfully submitted,



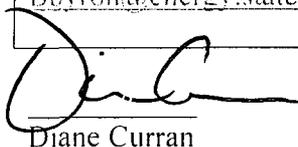
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July 18, 2007

## CERTIFICATE OF SERVICE

I certify that on July 18, 2007, copies of the foregoing San Luis Obispo Mothers for Peace's Reply to PG&E's and NRC Staff's Oppositions to SLOMFP's Contentions And Request For a Hearing Regarding Diablo Canyon Environmental Assessment Supplement and motion for leave to file the same were served on the following by first-class mail and/or e-mail as indicated below:

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