UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Dale E. Klein, Chairman
Gregory B. Jaczko
Peter B. Lyons

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

CLI-08-01

MEMORANDUM AND ORDER

Last February, we issued an order scheduling further proceedings in this adjudication on a license application for an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California.[1] Our order directed the NRC Staff to prepare a revised environmental assessment. We asked the Staff to address "the likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack."[2] The Staff's draft revised environmental assessment supplement[3] prompted San Luis Obispo Mothers for Peace (SLOMFP) to request a hearing and to file five proposed contentions.[4] Both the Pacific Gas and Electric Company (PG&E)[5] and the NRC Staff[6]

[1] *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007).

[2] *Id*. at 149.

[3] *Supplement to the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation*, 72 Fed. Reg. 30,398 (May 31, 2007) (Draft EA Supplement).

[4] *San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing Regarding Diablo Canyon Environmental Assessment Supplement* (June 28, 2007) (SLOMFP Petition),

Footnote continued…

opposed all five proposed contentions as inadmissible. SLOMFP replied with counterarguments to PG&E's and the Staff's positions.[7]

Before we acted on SLOMFP's contentions, the NRC Staff issued its final supplemental environmental assessment, which took into account public comments.[8] The Commission directed the parties to file pleadings addressing the effects, if any, of the Staff's final environmental supplement on this adjudication.[9] SLOMFP responded that its proposed contentions remained valid.[10] PG&E[11] and the NRC Staff[12] again opposed SLOMFP's

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with attachment: Thompson, Gordon R., *Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Spent Fuel Storage Installation at the Diablo Canyon Site* (June 27, 2007) (Thompson Report).

[5] *Pacific Gas and Electric Company's Response to Proposed Contentions* (July 9, 2007) (PG&E Response).

[6] *NRC Staff's Answer to Contentions Submitted by San Luis Obispo Mothers for Peace* (July 13, 2007) (Staff Response).

[7] *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* (July 18, 2007) (SLOMFP Reply).

[8] *Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation* (Aug. 2007) (Final EA Supplement), available as ADAMS Accession No. ML072400303.

[9] *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Spent Fuel Storage Installation), unpublished Order (Sept. 11, 2007) (Supplementary Pleadings Order), available as ADAMS Accession No. ML072540093.

[10] *San Luis Obispo Mothers for Peace's Response to NRC Staff's Supplement to the Environmental Assessment and Finding of No Significant Impact for the Diablo Canyon Independent Spent Fuel Storage Installation* (Oct. 1, 2007) (SLOMFP Petition II), with attachment: Thompson, Gordon R., *Declaration by Dr. Gordon R. Thompson Regarding the NRC Staff's August 2007 Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI)* (Oct. 1, 2007) (Thompson Report II).

[11] *Pacific Gas and Electric Company's Response to Commission Order and San Luis Obispo Mothers for Peace Filing on the Final Environmental Assessment Supplement* (October 11, 2007) (PG&E Response II).

[12] *NRC Staff's Response to San Luis Obispo Mothers for Peace's Response to Commission Order and Supplement to Final Environmental Assessment* (Oct. 11, 2007) (Staff Response II).

contentions, and SLOMFP filed a reply.[13] Today, we decide that limited portions of two SLOMFP contentions (Contentions 1(b) and 2) are admissible, and that the remainder are not.

I. BACKGROUND

In *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), *cert. denied,* 127 S.Ct. 1124 (2007), the United States Court of Appeals for the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" in this licensing proceeding was unreasonable under the National Environmental Policy Act (NEPA). The Ninth Circuit remanded the "NEPA-terrorism" question to the Commission for "further proceedings consistent with this opinion."[14] Today's consideration of SLOMFP's five proposed NEPA-terrorism contentions depends solely on the Ninth Circuit's remand in this particular proceeding and is limited to this proceeding. As indicated in a series of decisions earlier this year, we respectfully disagree with the Ninth Circuit's view that NEPA demands a terrorism inquiry,[15] and are litigating the issue in other Circuits.[16]

As we noted in our February scheduling order, "[t]he Ninth Circuit explicitly left to our discretion the precise manner in which we undertake a NEPA-terrorism review on remand, with respect to both our consideration of the merits and the procedures we choose to apply."[17] With

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[13] *San Luis Obispo Mothers for Peace's Reply to PG&E and NRC Staff's Responses to SLOMFP Response to Commission Order* (Oct. 12, 2007) (SLOMFP Reply II).

[14] 449 F.3d at 1035.

[15] *See* CLI-07-11, 65 NRC at 149 n.5, *AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007); *Nuclear Management Co., L.L.C.* (Palisades Nuclear Plant), CLI-07-9, 65 NRC 139, 140-41 (2007); *System Energy Resources, Inc.* (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 NRC 144, 145 (2007).

[16] *Ohngo Gaudadeh Devia v. NRC*, Nos. 05-1419, 05-1420, & 06-1087 (D.C. Cir.) (currently held in abeyance); *New Jersey Dept. of Environmental Protection v. NRC*, No. 07-02271 (3d Cir.).

[17] CLI-07-11, 65 NRC at 149. The Court said: "Our identification of the inadequacies in the agency's NEPA analysis should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis. There remain open to the agency a wide variety of actions it may take on remand, consistent with its statutory and regulatory requirements." 449 F.3d at 1035.

respect to procedural rules, all of the parties to this proceeding agree that we should apply our pre-2004 Part 2 procedural rules, since the proceeding began prior to the applicability of our new Part 2 regulations.[18] As a result, all references in this decision are to our former Part 2 rules. Also, as PG&E notes, in its original incarnation this proceeding was held under the special hybrid proceedings in Part 2, Subpart K. Subpart K applies where invoked by a party,[19] and both PG&E and the NRC Staff invoked Subpart K originally.[20] PG&E requests that, if contentions are admitted in this remanded proceeding, Subpart K again be used.[21] In view of our decision today, we grant PG&E's renewed request and will apply Subpart K to this proceeding.

II. DISCUSSION AND ANALYSIS

A. Application of Late-Filed Contention Standards

Our late-filed contention standards, pre-2004 rules, were set out in 10 C.F.R. § 2.714(a)(1). Before a petition to admit a late-filed contention can be granted, the following five factors must be balanced:

(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.

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[18] *See* SLOMFP Petition at 1 n.1; PG&E Response at 2 n.6; Staff Response at 1 n.1. In 2004, we altered Part 2 in significant respects.

[19] *See* 10 C.F.R. § 2.1101.

[20] *See Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-25, 56 NRC 467, 471 (2002).

[21] PG&E Response at 2 n.6.

The first factor — whether good cause exists to excuse the late-filing of the contention — is the most important factor.[22] If "good cause" is not shown, a petitioner "must make a 'compelling' showing" on the four remaining factors.[23] In this analysis, factors three and five are to be given more weight than factors two and four.[24] Even if the late-filed contention criteria are satisfied, proposed contentions still must meet the admissibility standards contained in 10 C.F.R. § 2.714(b)(2), an inquiry we undertake below.

SLOMFP argues that all of its proposed contentions meet our late-filed contention criteria. We agree. First, SLOMFP's proposed contentions plainly satisfy the most heavily weighted factor, good cause. SLOMFP filed its new contentions within thirty days after issuance of the NRC Staff's draft supplemental environmental assessment — the NRC's first attempt to analyze the NEPA-terrorism issue and, therefore, SLOMFP's first opportunity to raise contentions on the adequacy of this assessment — and SLOMFP timely filed its second set of pleadings as directed in our Supplementary Pleadings Order. Second, this proceeding is SLOMFP's only means to achieve its interest related to its claim that the NRC failed to comply with NEPA on the NEPA-terrorism issue in connection with the Diablo Canyon ISFSI. Third, SLOMFP is assisted by experienced counsel, with expert assistance, so its participation may reasonably be expected to contribute to the development of a sound record. Finally, while SLOMFP's participation will delay the proceeding, the real source of the delay is our (now-overturned) decision against addressing the NEPA-terrorism issue when this proceeding first

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[22] *See Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241, 244 (1986), citing *Cincinnati Gas and Electric Co.* (William H. Zimmer Nuclear Power Station, Unit 1), LBP-83-58, 18 NRC 640, 663 (1983), *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982). *See also Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC 476, 483 (2001), *review declined*, CLI-02-3, 55 NRC 155, 156 n.9 (2002).

[23] *Braidwood Nuclear Power Station*, CLI-86-8, 23 NRC at 244.

[24] *Id*. at 245.

began over five years ago, so this factor should not count against SLOMFP's request to file late-filed contentions.

PG&E argues that two of SLOMFP's contentions, Contentions 3 and 5, do not meet the late-filed contention criteria. The NRC Staff agrees with PG&E on the second of these, Contention 5.

In Contention 3, described further below, SLOMFP asserts that the supplemental environmental assessment "fails to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment" in violation of NEPA and Council on Environmental Quality (CEQ) regulations.[25] PG&E maintains that the balancing of the late-filed contention criteria weighs against admitting this contention because, lacking expertise in threat assessment, SLOMFP is unlikely to assist in the development of a meaningful record. Also, PG&E says, litigating this contention would broaden the scope of the proceeding beyond NEPA issues into other issues, like NRC security requirements and ISFSI dry cask design, which the petitioners can address through other means such as by participating in rulemakings. PG&E concludes by suggesting that SLOMFP's information can be appropriately considered a "comment," and thus part of the Staff's normal NEPA process.[26] SLOMFP disputes PG&E's statement that it lacks expertise in threat assessment, referring to its witness's qualifications as an expert on nuclear risk assessment.[27]

SLOMFP reiterates that it has good cause, unchallenged by PG&E, for submitting this contention based on the newly available supplemental environmental assessment. We agree that SLOMFP's showing of good cause is sufficient and justifies its late-filed contention on

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[25] SLOMFP Petition at 12.

[26] PG&E Response at 17-18, 23.

[27] SLOMFP Reply at 22, citing *Declaration of Dr. Gordon R. Thompson in Support of San Luis Obispo Mothers for Peace's (SLOMFP's) Contentions Regarding the Diablo Canyon Environmental Assessment Supplement*, ¶¶ 4-11 (attached to SLOMFP Petition).

"credible scenarios" because the contention is directed at the NRC Staff's very recent NEPA-terrorism analysis. PG&E's arguments do not outweigh SLOMFP's good cause showing.

In Contention 5, also described further below, SLOMFP maintains that the environmental assessment "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."[28] PG&E and the NRC Staff argue that this contention is untimely and does not satisfy the late-filed contention admissibility criteria. They point out that SLOMFP raised issues related to the spent fuel pool early on in the proceeding and that this proposed contention was rejected as inadmissible.[29] Moreover, PG&E and the NRC Staff assert that SLOMFP's interests regarding the spent fuel pool can be protected through other means, namely the NRC's ongoing regulatory oversight of the Diablo Canyon power plant.

Again, though, we cannot fairly reject as too late a SLOMFP contention directed at the adequacy of a brand new NRC Staff NEPA-terrorism analysis in the particular circumstances of this case. PG&E's (and NRC Staff's) arguments on other "late-filed" factors (such as alternate means to protect SLOMFP's interests) do not overcome SLOMFP's strong showing of good cause.

B. Contention Admissibility Standards

Under our pre-2004 rules:

> Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
> (i) A brief explanation of the bases of the contention.
> (ii) 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, together with references to those specific

[28] SLOMFP Petition at 15.

[29] *See* PG&E Response at 21, citing *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 450-51 (2002).

sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) 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.[30]

A contention shall not be admitted if these requirements are not satisfied[31] or if the contention, even if proven, would not entitle the petitioner to relief.[32] This strict contention pleading rule is designed to focus the hearing process on genuine disputes susceptible of resolution, puts the other parties on notice of the specific grievances at issue, and restricts participation to "those able to proffer at least some minimal factual and legal foundation in support of their contentions."[33]

C. Proposed Contentions

SLOMFP proposed five contentions in its original pleading, and made no changes to these contentions in its response to the Commission's Supplementary Pleadings Order, arguing that the NRC Staff made no significant changes in the final supplementary environmental assessment compared to the draft version, and that the final version provided no satisfactory explanation for the alleged deficiencies in the draft supplemental environmental assessment. SLOMFP's view that the Staff's analysis lacks detail, or disclosure of detail, pervades SLOMFP's contentions. The Staff's response is that it has provided the level of detail that it can, given national security concerns, and PG&E echoes this response. As the Ninth Circuit

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[30] 10 C.F.R. § 2.714(b)(2).

[31] 10 C.F.R. § 2.714(d)(2)(i).

[32] 10 C.F.R. § 2.714(d)(2)(ii).

[33] *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999).

acknowledged,[34] the Supreme Court's decision in *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 145 (1981), makes it clear that protecting national security information overrides ordinary NEPA disclosure requirements, and this consideration factors heavily in our decision today.

Our inability to disclose information based on the confidentiality of that information does not mean, however, that the NRC Staff (and the Commission, on review) has not performed the evaluation the Ninth Circuit directed, consistent with *Weinberger* — it simply means that certain information cannot be made public for security reasons. Below we find some portions of SLOMFP's contentions admissible and some not. We use *Weinberger* as our guidepost in evaluating what can and cannot be litigated in further adjudicatory proceedings.

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

SLOMFP argues that the NRC Staff's supplemental environmental assessment violates NEPA, NRC regulations, and CEQ regulations because the supplemental environmental assessment "fail[s] to define its terms, explain its methodology, or identify its scientific sources."[35] After an introductory description of the bases for its position, SLOMFP divides Contention 1 into subsections — 1(a) and 1(b). SLOMFP's focus in 1(a) is on the Staff's alleged failure to properly define the terms or describe the methodology it used in preparing its supplemental environmental assessment. In 1(b) SLOMFP focuses on the Staff's failure, in its opinion, to properly identify the documentary support underpinning its analysis.

a. Terms and Methodology.

SLOMFP complains in Contention 1(a) that the draft environmental assessment does not adequately explain terms or methodology.[36] Apart from falling back on its information

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[34] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1034-35.

[35] SLOMFP Petition at 3.

[36] Contention 1, subsection (a), SLOMFP Petition at 5-9.

security concerns, the NRC Staff's general position is that the contention lacks both specificity regarding alleged inadequacies in the supplemental environmental assessment and support for a different viewpoint, and should be rejected based upon the requirements of 10 C.F.R. § 2.714(b)(2)(iii) for failure "to identify a genuine dispute on a material issue of law or fact within the scope of the proceeding."[37] PG&E argues that the contention fails to establish any specific factual dispute with respect to either the likelihood or the consequences of a terrorist attack and should be rejected based on 10 C.F.R. § 2.714(d)(2)(ii).[38]

SLOMFP goes into considerable detail regarding the bases for this contention, designating eight separate, but somewhat overlapping, points:

i. SLOMFP maintains that the supplemental environmental assessment "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."[39]

ii. SLOMFP argues that the supplemental environmental assessment provides "no explanation of what the NRC means by the word 'plausible'."[40]

iii. SLOMFP's argues that the supplemental environmental assessment provides no "description of the criteria used by the NRC to distinguish between scenarios that are 'plausible' and those that are 'remote and speculative'."[41]

iv. SLOMFP argues that the supplemental environmental assessment "fails to demonstrate that the NRC considered the wider scope of scenarios required by NEPA" compared to the narrower scope of scenarios required under the Atomic Energy Act (AEA) "reasonable protection" standard or the Design Basis Threat (DBT) "rule's standard of requiring defense 'against which a private security force can reasonably be expected to defend.'"[42]

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[37] Staff Response at 9.

[38] PG&E Response at 8.

[39] Contention 1, paragraph (a)(i), SLOMFP Petition at 5.

[40] Contention 1, paragraph (a)(ii), SLOMFP Petition at 5.

[41] Contention 1, paragraph (a)(iii), SLOMFP Petition at 6.

[42] Contention 1, paragraph (a)(iv), SLOMFP Petition at 6-7, citing 72 Fed. Reg. 12,705, 12,713 (March 19, 2007).

v. SLOMFP argues that the supplemental environmental assessment provides a poor description of the process used in what SLOMFP refers to as the NRC's 2002 threat scenario analysis, raising many questions that it does not answer.[43]

vi. SLOMFP argues that the supplemental environmental assessment fails to explain how the AEA-based generic security assessments that led to the Staff's conclusion that no additional security measures were required for ISFSIs have "any relevance to a NEPA determination of whether environmental impacts are significant."[44]

vii. SLOMFP argues that the supplemental environmental assessment fails to explain how the NRC's determination that the assumptions in the "generic security assessments were 'representative' or 'conservative' in relation to the Diablo Canyon facility . . . factored into a NEPA analysis."[45]

viii. SLOMFP argues that the supplemental environmental assessment "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."[46]

SLOMFP's arguments fail to justify admitting Contention 1(a). In our view, for example, the context of the Staff's use of the term "plausible" is consistent with the word's ordinary usage and with NEPA; because the Staff's usage is clear, no separate additional definition is required. The qualitative description of the criteria for distinguishing between the terms "plausible" and "remote and speculative" provided by the Staff is also clear enough — and consistent with information security constraints and the *Weinberger* decision. Additionally, the NRC Staff has provided a sufficient description of its scenario identification process and the significance of associated consequences — again within the constraints of information security requirements and consistent with the *Weinberger* decision. And, contrary to SLOMFP's argument, the

[43] Contention 1, paragraph (a)(v), SLOMFP Petition at 7-8, citing the Draft EA Supplement at 6. With respect to the "unanswered" questions, the Staff indicates that "[m]ost of this information was omitted because it is designated as Safeguards Information or SUNSI [Sensitive Unclassified Non-safeguards Information] or Classified Information . . . [and] 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." (Staff Response at 15.)

[44] Contention 1, paragraph (a)(vi), SLOMFP Petition at 8.

[45] Contention 1, paragraph (a)(vii), *id*.

[46] Contention 1, paragraph (a)(viii), *id*. at 8-9 (emphasis added).

supplemental environmental assessment expressly discusses the Staff's analysis of dosage — again, to the extent permitted given the requirement to protect sensitive information.

SLOMFP's points regarding the distinction between AEA analysis and NEPA analysis bear further discussion. SLOMFP argues that the standards for AEA-derived security requirements and NEPA environmental evaluations differ. *See, e.g., Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 741 (3d Cir. 1989). According to SLOMFP, the AEA-derived design basis threat rule focuses on the licensee's ability to defend against threats that the NRC believes it is reasonable or feasible for a licensee to defend against,[47] while NEPA looks at whether the threat is foreseeable, independent of the licensee's ability to defend against it. SLOMFP points to a CEQ rule, 40 C.F.R. § 1502.22(b)(3),[48] calling on agencies to include "a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment" where "'reasonably foreseeable' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."[49] To counter SLOMFP's argument, the Staff maintains that it provided the specifics it could (without disclosing Safeguards Information, SUNSI, or Classified Information) to show how it applied existing analyses to its NEPA analysis.

In addition, the Staff makes a number of other points regarding SLOMFP's claims that the supplemental environmental assessment does not describe any analysis for the purpose of

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[47] SLOMFP Reply at 14, citing *Final Rule, Design Basis Threat*, 72 Fed. Reg. 12,705, 12,713 (March 19, 2007).

[48] SLOMFP Petition at 7.

[49] 40 C.F.R. § 1502.22(b). Of course, the applicability of the CEQ's regulations to our activities is not without limitation. While the Commission's "policy [is] to take account of the regulations of the [CEQ] voluntarily. . . " (10 C.F.R. § 51.10(a)), this policy is tempered by the Commission's overriding "responsibility as an independent regulatory agency for protecting the radiological health and safety of the public" as the Commission conducts its licensing and associated regulatory functions (10 C.F.R. § 51.10(b)).

complying with NEPA and poorly describes any such analyses. The Staff notes that the supplemental environmental assessment expressly describes the review of prior ISFSI security assessments and the additional analyses of potential consequences, including consideration of site-specific conditions at the Diablo Canyon ISFSI, for purposes of conducting the supplemental review of consequences of terrorism under NEPA.[50] Moreover, the supplemental assessment's acknowledged review of prior AEA-based security assessments for pertinent information on the effects of terrorist attacks as one part of the assessment does not show that a NEPA assessment was not performed or that it is inadequate. Indeed, the Commission clearly expected the NRC Staff to use existing information, as appropriate, when it stated:

> To the extent practicable, we expect the NRC 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 regulations for the protection of sensitive and safeguards information.[51]

There is no genuine dispute that NEPA and AEA legal requirements are not the same; the 2003 environmental assessment and the final supplemental environmental assessment were prepared to meet the NRC's obligations under NEPA, and NEPA requirements must be satisfied. SLOMFP's desire for greater detail or a technical discussion of differences between AEA and NEPA requirements does not show either that the supplemental assessment is insufficient for NEPA purposes or establishes a concrete, specific, and genuine issue of material fact or law to warrant admission of the contention.

b. Scientific Source Document Identification.

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[50] Staff Response at 13.

[51] 65 NRC at 150. SLOMFP refers to standards considered in the promulgation of the NRC's Design Basis Threat Rule, but this reference does not show a concrete and specific failing in the analysis contained in the supplemental environmental assessment, which included consideration of threat scenarios considered to be plausible. For example, the Staff notes that it looked at "a large aircraft impact similar in magnitude to the attacks of September 11, 2001." NRC Staff Response at 13. SLOMFP offers nothing concrete to show that this is not true.

In its original petition, SLOMFP argued that the only sources listed in the draft environmental assessment consist "of three documents that are irrelevant and invalid in light of the U.S. Court of Appeals decision in *San Luis Obispo Mothers for Peace v. NRC*: the 2003 license amendment application, the original 2003 [environmental assessment], and the license itself."[52] SLOMFP pointed to places in the environmental assessment where the Staff's phrasing made it clear that the Staff also consulted sources other than these three documents.[53] Under NEPA, SLOMFP argued, the public is entitled to identification of these sources and any other technical data the Staff relied on in reaching its conclusions.

SLOMFP argued that the NRC Staff's failure to provide a complete list of the references underlying the conclusions the Staff presents in its supplemental environmental assessment means that the Staff's decision to stop short of preparing a full environmental impact statement is unjustified, and, by extension, that the finding of no significant impact is unsupported. SLOMFP cites judicial precedent,[54] as well as an NRC regulation, 10 C.F.R. § 51.30(a)(2),[55] and a CEQ regulation, 40 C.F.R. § 1502.24,[56] to support its argument that the NRC Staff must provide source documents underlying its environmental assessment.

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[52] SLOMFP Petition at 9.

[53] *See id*. at 9-10, where SLOMFP quotes extensively from the environmental assessment to highlight apparent documentary references not included in the environmental assessment's list of references.

[54] SLOMFP Petition at 4, citing *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998), and *Earth Island Institute v. United States Forest Service*, 351 F.3d 1291, 1300-31 (9th Cir. 2003).

[55] "An environmental assessment shall identify the proposed action and include: . . . [a] list of agencies and persons consulted, and identification of sources used." 10 C.F.R. § 51.30(a)(2).

[56] "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix." 40 C.F.R. § 1502.24.

The NRC Staff's position on the alleged failure to reference the sources of scientific data used in the supplemental environmental assessment is that sensitive security information must be protected from public disclosure.[57] Indeed, the need to withhold information because of its sensitive security nature is an overarching theme in the Staff's briefs. SLOMFP's reply is that "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 [Freedom of Information Act (FOIA)] exemption under which the NRC claims the right to withhold the content of the document."[58]

Now that the Staff has issued a final environmental assessment, with additional references and sources listed, SLOMFP acknowledges the improvement but argues that the list is still "insufficient to comply with NEPA" because it is "concededly incomplete," because the Staff provides no justification for withholding identification of documents based on their sensitivity, and because no justification is evident.[59] According the SLOMFP, the final environmental assessment "should provide a complete list of its sources and references, including records of the consultations with law enforcement agencies which are identified as important sources of information in the appendix" to the finalized supplement.[60] Moreover, to the extent that any documents relied on in rejecting any contentions are non-public, SLOMFP requests access to these documents, under appropriate protective measures, to evaluate the Commission's basis for rejecting the contentions.[61] SLOMFP also seeks access to safeguards

[57] NRC Staff Response at 6-8.

[58] SLOMFP Reply at 16.

[59] SLOMFP Petition II at 2.

[60] *Id*. at 2-3.

[61] *Id*. at 3.

and classified documents to the extent necessary to evaluate the final supplemental environmental assessment's conclusions.[62]

PG&E disagrees with SLOMFP's position that the list of references remains insufficient, arguing that SLOMFP's complaint about the lack of references is "clearly moot" based upon the listing of sources provided in the final supplemental environmental assessment.[63] Like PG&E, the NRC Staff argues that it cured the omission of reference documents in the draft supplemental environmental assessment by adding to the list of references in the final version.[64] The Staff states that it did not include certain types of documents that it "submits . . . need not be referenced," namely, "[p]ublicly available reference documents that provide background and technical information on matters such as health physics and dose modeling . . . because they provide widely known information regarding the manner in which radioactive doses are calculated and health impacts [are] evaluated."[65]

The link between NEPA and FOIA is spelled out in § 102(2)(C) of NEPA: copies of environmental impact statements "shall be made available to the President, the Council on Environmental Quality and to the public as provided in [FOIA] section 552 of Title 5."[66] We understand this to include information underlying environmental impact statements (or environmental assessments). As the Supreme Court said in *Weinberger*, "§ 102(2)(C) contemplates that in a given situation a federal agency might have to include environmental considerations in its decision[-]making process, yet withhold public disclosure of any NEPA

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[62] *Id*.

[63] PG&E Response II at 3.

[64] Staff includes a further six documents in Attachment 1 to Staff Response II, entitled *Addendum to References Listed in the NRC Staff's Supplement to the Environmental Assessment and Final Finding of No Significant Impact for the Diablo Canyon Independent Fuel Storage Installation*.

[65] Staff Response II at 3-4.

[66] 42 U.S.C. § 4332(2)(C).

documents, in whole or in part, *under the authority of an FOIA exemption*."[67] "NEPA provides . . . that any information kept from the public under the exemptions in . . . FOIA . . . need not be disclosed."[68] FOIA exemption 1, for example, permits withholding classified information and FOIA exemption 3 supports withholding safeguards material.[69] So called "SUNSI" material,[70] official use only (non-public), or general information like the title, date, or a general summary or description of the contents of an otherwise classified or exempt document,[71] may or may not qualify under a FOIA exemption, depending upon the specifics of the information. "Ordinarily," when access to documents is disputed in FOIA litigation, "the government must submit detailed public affidavits identifying the documents withheld, the FOIA exemptions claimed, and a particularized explanation of why each document falls within the claimed exemption."[72] This process commonly requires what is referred to as a "*Vaughn*" index.[73] Where a *Vaughn* index is required, it must be sufficiently detailed to support *de novo* assessment of the validity of the claimed exemption should the matter go to court.[74]

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[67] *Weinberger*, 454 U.S. at 143 (emphasis added). *See also Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy*, 891 F.2d 414, 420 (2nd Cir. 1989).

[68] *Hudson River Sloop Clearwater,* 891 F.2d at 420, citing *Weinberger* at 202-03.

[69] *See* 5 U.S.C. §§ 552(b)(1), (b)(3); 42 U.S.C. § 2167.

[70] "SUNSI" is an NRC term referring to sensitive unclassified non-safeguards information.

[71] If the existence of a document is classified, such that disclosure of the title and a description of the contents would also be classified, then, as in *Weinberger* where the environmental impact statement was classified because the very presence or absence of nuclear weapons was classified, FOIA Exemption 1 would apply and even limited information, such as the title of the document, could be withheld. *See Weinberger*, 454 U.S. at 144-46.

[72] *Lion Raisins Inc. v. United States Dept. of Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004), citing *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991).

[73] *See Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

[74] *Lion Raisins Inc.*, 354 F.3d at 1082.

In our initial scheduling order, we recognized that "it may prove necessary to withhold some facts underlying the Staff's findings and conclusions."[75] The expanded list of references that the Staff provided in the finalized environmental assessment supplement has been augmented by the additional references identified in the addendum to the Staff's pleading. But, as SLOMFP notes, there are indications that the Staff's list of references is still incomplete. While the unlisted documents may be general background references — as the Staff suggests[76] — the Staff has identified no applicable FOIA exemption(s) to justify excluding any documents from the reference list. Nor is it clear whether any withheld documents, even if they include safeguards information or classified national security information, might be redacted, with portions released.

We direct the Staff to prepare a complete list of the documents on which it relied in preparing its environmental assessment, together with a *Vaughn* index (or its equivalent) for any document for which the Staff claims a FOIA exemption, to be filed within 14 days of the date of this decision. Releasable documents (or releasable portions of documents), if any, should be turned over to the other parties at that time. The other parties may respond to the NRC Staff's *Vaughn* index (or detailed affidavit) within seven calendar days. We will permit SLOMFP to dispute the NRC Staff's exemption claims based on the index and public record. Under the *Weinberger* decision, we need not and will not provide SLOMFP access to exempt documents.[77]

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[75] CLI-07-11, 65 NRC at 150.

[76] The Staff asserts that "[p]ublicly available reference documents that provide background and technical information on matters such as health physics and dose modeling were not included because they provide widely known information regarding the manner in which radioactive doses are calculated and health impacts evaluated. The Staff submits that these types of documents need not be referenced." Staff Response II at 3-4. The Staff's assertion has merit, provided that the reference documents the Staff is talking about are not agency records within FOIA and are instead, for example, textbooks or personal records.

[77] 454 U.S. at 143.

We thus admit Contention 1(b) to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for its withholding decisions.

Contention 2: Reliance on hidden and unjustified assumptions.

SLOMFP infers from the supplemental environmental assessment[78] that the NRC Staff appears to have made the "absurd" choice to exclude a range of threat scenarios and consequences from its analysis based on the assumption that the environmental effects of a given hypothetical scenario are insignificant unless the potential consequences include early fatalities.[79] This, SLOMFP argues, is a "hidden and unjustified" assumption that "violates NEPA by 'impairing the agency's consideration of the adverse environmental effects of a proposed project.'"[80]

Moreover, according to SLOMFP, this "hidden and unjustified" assumption ignores consequences like increased cancers and illnesses that are routinely considered in the NRC's environmental impact statements. It also ignores land contamination, which would be, in SLOMFP's expert's view, the "dominant effect" of an accident or attack at an ISFSI, making a large land area uninhabitable and causing significant economic and social harm.[81]

According to SLOMFP, another "hidden" and perhaps "unjustified" assumption that the supplemental environmental assessment makes is that the environmental effects of an attack could be mitigated by certain unspecified emergency planning measures. SLOMFP complains that these emergency planning measures are not identified in the supplemental environmental

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[78] SLOMFP Petition at 10-12, referring to the Draft EA Supplement at 6-7.

[79] SLOMFP Petition at 11.

[80] *Id*., citing *South Louisiana Environmental Council v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980) and referencing also similar cases from the 10th and 4th Circuits.

[81] SLOMFP Petition at 11-12, citing Thompson Report at 17, 35.

assessment and also are not discussed in the license application, making it impossible to evaluate their effectiveness.

PG&E argues that this proposed contention fails to identify any assumptions in the NRC Staff's analysis that are either misleading or unjustified and that the two factual issues that SLOMFP does identify — Staff's alleged exclusion of consequences other than early fatalities and Staff's alleged assumption that potential consequences are mitigated via unspecified emergency planning upgrades — are not well supported and do not raise admissible issues. The Staff, for its part, denies that the assumptions underlying its analysis are "hidden" or "unjustified," asserting that the assumptions are explained throughout the supplemental environmental assessment, and that the Staff addressed "'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."[82]

We find Contention 2 admissible to the extent we discuss below. The Staff correctly points out that the assessment mentions early fatalities only in the context of the consideration of the need for additional security measures and that the assessment goes on to provide dose estimates and other findings in support of its determination. However, SLOMFP stresses that while the environmental assessment emphasizes low potential radiation doses to humans from a hypothetical terrorist attack, it appears to be silent on the possibility of land contamination — a possibility SLOMFP's expert considers significant and serious. We cannot say, under the standards applicable at this stage, that SLOMFP's concern that the environmental assessment ignores environmental effects on the surrounding land is unworthy of further inquiry. Nor do we reject at the threshold SLOMFP's request to litigate its claim that the NRC Staff has not considered non-fatal health effects (*e.g.,* latent cancers) from a hypothetical terrorist attack. The environmental assessment appears to be silent on that point as well. The Staff may be

[82] Staff Response at 19, citing Draft EA Supplement at 6.

able to easily explain how such issues were addressed by reference to source documents, including the 2003 environmental assessment, or how such issues are bounded and were implicitly addressed by the very low dose estimates and other considerations, but we believe further inquiry is appropriate.

Insofar as Contention 2 reiterates Contention 1(b)'s concern about the lack of supporting information and deficient explanations, we deny the contention as duplicative. We intend to address those grievances in the context of Contention 1(b). We also deny the portion of Contention 2 alleging a lack of clarity about the role of emergency planning in mitigating harm. The environmental assessment says merely that "[i]n some situations, emergency planning and response actions could provide an additional measure of protection."[83] As we see it, there is no reason to convene an NRC hearing to debate that self-evident, and unexceptionable, proposition.

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

SLOMFP argues that the NRC's supplemental environmental assessment fails to satisfy the CEQ's NEPA regulations (at 40 C.F.R. § 1502.22(b)(3)), which require the NRC "to consider low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable," because it apparently only considers scenarios where the dry storage casks sustain minimal damage.[84] SLOMFP infers that the Staff only considered "minimal damage" scenarios from the Staff's assumption that minimal releases of radioactive material will occur. But SLOMFP argues that scenarios with much larger releases of radiation are also "plausible" and should have been considered.

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[83] Final EA Supplement at 7.

[84] SLOMFP Petition at 12-13.

As an example of scenarios the NRC allegedly failed to consider, SLOMFP references scenarios discussed in its expert witness's report,[85] where the penetrating device is accompanied by an incendiary component that ignites the zirconium cladding of the spent fuel inside the storage cask, causing a much larger release of radioactive material than posited in the scenarios where the casks sustain minimal damage. According to SLOMFP's expert, such a release could contaminate up to 7,500 square kilometers of land, rendering it uninhabitable and causing cancers and other health problems as well as significant economic and social damage.[86]

SLOMFP argues that the Staff should prepare a full environmental impact statement to remedy its (allegedly) NEPA-violating failure to analyze the impacts of a wide range of scenarios.[87] SLOMFP maintains that this environmental impact statement should be available in both a public version that summarizes the scenarios and their effects and in a restricted, detailed version that is available to those with interest and clearance to receive the information.[88]

PG&E disputes the applicability of 40 C.F.R. § 1502.22(b)(3)[89] based upon the NRC's conclusion that there were no foreseeable adverse effects from reasonably foreseeable scenarios.[90] By its terms, § 1502.22 applies only "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects. . . ." According to PG&E, we should accept Staff's apparent assessment that the example SLOMFP's witness gives as a scenario that should have been considered (described above, where a small number of attackers render a large area

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[85] *Id*. at 13, citing Thompson Report at 33-37.

[86] SLOMFP Petition at 13-14, citing Thompson Report at 17, 37.

[87] SLOMFP Petition at 14, citing Thompson Report at 34-36.

[88] SLOMFP Petition at 14.

[89] PG&E Response at 13.

[90] *Id*.

uninhabitable) was not reasonably foreseeable. Assessing this scenario requires a presumption, according to PG&E, that the attack will be successful. PG&E argues that neither NEPA, nor the Ninth Circuit's remand, requires litigation of a matter that cannot be addressed conclusively.

The NRC Staff denies that it failed to consider credible threat scenarios with significant environmental impacts. The Staff states that it cannot publicly disclose the details of its analysis of particular threat scenarios. According to the Staff, SLOMFP's contention is without foundation and should not be admitted. SLOMFP, in reply, reiterates that the supplemental environmental report should identify the assessments it relied on, the FOIA exemptions that it claims, and its reasons for invoking a FOIA exemption. The sensitive nature of security assessments may provide a reason for holding a closed hearing, SLOMFP maintains, but not for dismissing the contention outright.

We agree with PG&E and the NRC Staff.[91] The NRC Staff's supplemental environmental assessment explains that the Staff considered "[p]lausible threat scenarios . . . includ[ing] 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."[92] This approach, grounded in the NRC Staff's access to classified threat assessment information,[93] is reasonable on its face. We do not understand the Ninth Circuit's remand decision — which expressly recognized NRC security concerns and suggested the possibility of a "limited proceeding"[94] — to require a

[91] Insofar as Contention 3 reiterates a SLOMFP's complaint about a lack of support documents, we intend to address that point under the rubric of Contention 1(b).

[92] Final EA Supplement at 7.

[93] *Id.* at 4-7.

[94] 449 F.3d at 1034-35.

contested adjudicatory inquiry into the credibility of various hypothetical terrorist attacks against the Diablo Canyon ISFSI.

Adjudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity. And hearings on such claims could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance. Such information — disclosure of which is prohibited by law — would lie at the center of any adjudicatory inquiry into the probability and success of various terrorist scenarios.

The Supreme Court's controlling *Weinberger* decision makes clear that NEPA does not contemplate such adjudications: "'public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.'"[95] The NRC has a statutory obligation to protect national security information.[96] We have never disclosed such information in NEPA-based proceedings, notwithstanding the theoretical possibility, raised by SLOMFP, of security clearances and closed-door hearings. *Weinberger* and other "state secrets" cases indicate that no such disclosure is warranted.[97] In practical terms, this leaves the matter of threat assessment under NEPA in the hands of the NRC,

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[95] *Weinberger*, 454 U.S. at 146-47, *quoting Totten v. United States*, 92 U.S. 105, 107 (1876). *See also Tenet v. Doe*, 544 U.S. 1, 8 (2005); *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953).

[96] *See, e.g.,* AEA § 141, 42 U.S.C. § 2161 (2000) (Commission is required to control information in "a manner to assure the common defense and security"), AEA § 147, 42 U.S.C. § 2167 (2000) (requiring the Commission to take actions "to prohibit the unauthorized disclosure" of information including security measures).

[97] The "state secrets" privilege is absolute. *See United States v. Reynolds*, 345 U.S. at 11.

without judicial oversight or agency hearings. But that is exactly the result *Weinberger* calls for.[98]

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

SLOMFP argues that the supplemental environmental assessment does not comply with NEPA and NRC regulations because it does not address consistency with the NIPP,[99] to which the NRC is a signatory. In SLOMFP's view, the environmental assessment should have identified the NIPP or its officials as "resources or individuals" consulted under 10 C.F.R. § 51.30(a)(2).[100] According to SLOMFP, the environmental assessment should have addressed "homeland security strategy, the principles of protective deterrence, [and] the opportunities that the NIPP has identified for incorporating protective features into the design of infrastructure elements."[101] In the opinion of SLOMFP's expert, protective measures of the types identified in NIPP could significantly reduce the likelihood of a successful attack, "deterring" attacks by changing potential attacker's cost-benefit calculations rather than deterring based upon the ability to counterattack.[102]

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[98] Our decision not to adjudicate SLOMPF's "hypothetical terrorist scenarios" claim does not equate to ignoring SLOMFP's concerns. As *Weinberger* makes clear, an inability to adjudicate or publicize NEPA information does not justify an agency's failure to perform a NEPA analysis. *See Weinberger*, 454 U.S. at 146. Here, the NRC Staff presumably considered SLOMFP's concerns as part of the comment process on the draft environmental impact statement, and as a check upon the reasonableness of the NRC Staff's approach, we ourselves ultimately will review the range of terrorist events considered by the Staff.

[99] *National Infrastructure Protection Plan of 2006*, available at http://www.dhs.gov/xprevprot/programs/editorial_0827.shtm.

[100] SLOMFP Petition at 14. The regulation provides:

> (a) An environmental assessment shall identify the proposed action and include:
> . . .
> (2) A list of agencies and persons consulted, and identification of sources used.
>
> 10 C.F.R. § 51.30(a).

[101] SLOMFP Petition at 14.

[102] SLOMFP Petition at 15, citing Thompson Report at 11-12.

PG&E argues that this contention is not admissible. NIPP imposes no regulatory or legal requirements on the NRC, PG&E argues, so the proposed contention does not state a claim for which SLOMFP is entitled to relief. PG&E maintains that even if NIPP were applicable, the supplemental environmental assessment appears to have addressed the basic physical protection principles of NIPP, through security measures and cask design requirements and mitigation, so SLOMFP has failed to demonstrate a genuine, litigable issue.

The Staff's position is that this contention is outside the scope of the proceeding, that NEPA does not require a demonstration of compliance with NIPP, and that SLOMFP's contention is unsupported and inadmissible.

In reply, SLOMFP argues that it is well-established that NEPA obligates federal agencies to evaluate all of the environmental effects of their actions, not only those regulated under their own statutes, citing a Ninth Circuit case to support this proposition.[103] SLOMFP points to the NRC's own regulations, specifically 10 C.F.R. § 51.71(d), which requires an environmental impact statement to 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."[104] Relying on the NRC's commitment as a signatory to the NIPP, SLOMFP argues that the supplemental environmental assessment should address the NIPP. Moreover, SLOMFP's expert witness questions whether the storage casks, designed to withstand natural forces, can protect against weapons available to terrorist groups.[105]

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[103] SLOMFP Reply at 23, citing *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005).

[104] 10 C.F.R. § 51.71(d).

[105] SLOMFP Reply at 24, citing Thompson Report at 34.

We do not admit this contention. While we certainly agree that in implementing its security program the NRC should take account of the NIPP, to which it is a signatory,[106] we do not agree that the NRC must demonstrate compliance with the NIPP in its NEPA evaluation. The NIPP is concerned with security issues, not environmental quality standards and requirements — and it is environmental quality standards and requirements that 10 C.F.R. § 51.71(d) obliges the environmental analysis to address, not security issues. As a result, SLOMFP's "NIPP" contention is therefore outside the scope of this NEPA-based remand proceeding.

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

SLOMFP argues that the environmental assessment does not comply with NEPA because it does not consider the cumulative impact of storing spent fuel at the site in two locations, the ISFSI and the existing spent fuel pool, rather than in one location. SLOMFP's theory appears to be that adding the ISFSI increases the terrorism threat to the spent fuel pool, causing a cumulative impact that exceeds the impact that would be attributable to the ISFSI in isolation. In other words, according to SLOMFP, adding the ISFSI makes the entire Diablo Canyon site a more attractive target for terrorists, and the NRC should have analyzed this cumulative effect. SLOMFP argues that the environmental assessment should consider alternatives for mitigating this cumulative effect, for example, by allocating spent fuel storage between the ISFSI and the spent fuel pool in a fashion that reduces the density of storage in the spent fuel pool.[107]

PG&E dismisses this contention as "a clear attempt to bootstrap the previously licensed wet storage at Diablo Canyon into this licensing proceeding related to dry storage at the

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[106] *See Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Homeland Security Regarding Consultation Concerning Potential Vulnerabilities of the Location of Proposed New Utilization Facilities*, 72 Fed. Reg. 9,959 (March 6, 2007).

[107] SLOMFP Petition at 16.

ISFSI."[108] As such, PG&E argues, the contention is outside the scope of the remanded proceeding.

With respect to the cumulative impact aspect of SLOMFP's proposed contention, PG&E argues that "[c]umulative impact reviews can focus on aggregate impacts of multiple actions, where the environmental impacts are apparent — either qualitatively or quantitatively — and are reasonably certain."[109] According to PG&E, SLOMFP's described cumulative "impact" is really cumulative "risk," a concept that does not apply because risk has a probability component and "[p]robabilities do not aggregate."[110] As a result, SLOMFP's arguments do not, in PG&E's view, raise a cumulative impact issue under NEPA. PG&E adds that to the extent SLOMFP seeks an analysis of the "cumulative consequences of a simultaneous assault on the ISFSI and the wet storage pools at Diablo Canyon, they have provided no basis for an assertion that such a scenario is plausible."[111] Again, there is no issue within the scope of this proceeding, from PG&E's perspective.

From the Staff's perspective, it already considered the cumulative impacts of the facility in the original environmental assessment for the facility, although without considering terrorism.[112] Nonetheless, because of the Staff's determination that a terrorist attack on the ISFSI will cause no significant impact, the Staff observes that the original assessment of cumulative impacts did not change.

We agree with PG&E and the NRC Staff that SLOMFP's Contention 5 is outside the scope of this proceeding, which is limited to the analysis of the NEPA-terrorism consequences of licensing the ISFSI, and in any event is inadequately supported. SLOMFP has provided no

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[108] PG&E Response at 20.

[109] PG&E Response at 22.

[110] *Id*.

[111] *Id*. at 23.

[112] Staff Response at 23.

factual or even logical support for its view that licensing the ISFSI truly might have a "cumulative impact" — that is, a sum "greater than its parts."[113] The expert testimony SLOMFP discusses in connection with this contention relates to the independent consequences of an attack on the spent fuel pool only.[114] If anything, placing the spent fuel in two separate locations (one a hardened dry cask ISFSI) on the Diablo Canyon site, rather than in one place seemingly would reduce the terrorism risk, not enhance it. In any event, examining the terrorism risk facing the spent fuel pool as an independent facility is not part of this proceeding to license a dry storage ISFSI. We see no basis for expanding this proceeding to include testimony and arguments on the spent fuel pool.

D. Summary

We admit Contentions 1(b) and 2 consistent with and to the extent and as limited in our discussion above. We do not admit Contentions 1(a), 3, 4, and 5.

III. PROCEDURAL SCHEDULE

As a result of the remand filing schedule in this proceeding and the need for further proceedings, our previously-stated "goal" of resolving this adjudication by February 26, 2008,[115] must be modified slightly. At the time we set this goal, PG&E indicated that it would not be using the facility for storage until the summer of 2008,[116] a date that we understand may not be

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[113] *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 57-58 (2001). As noted above, SLOMFP requests that we hear arguments for *use* of the ISFSI to reduce the density in the spent fuel pool, which has been authorized separately. SLOMFP Petition at 16. Indeed, SLOMFP itself has acknowledged reduced environmental consequences of terrorism against dry storage as compared to wet storage, declaring that "[t]he potential consequences of an attack on a pool are considerably more severe than the consequences of an attack on a dry storage facility." *Supplemental Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace, [et al.]* (July 18, 2002) (Supplemental Petition) at 38.

[114] "[A] conventional accident or attack on a Diablo Canyon spent fuel pool that causes the water level in the pool to fall below the top of the fuel-storage racks would cause a large atmospheric release of the cesium-137 in the pool . . . , causing widespread land contamination and adverse health and economic effects." SLOMFP Petition at 16, citing Thompson Report at 17.

[115] CLI-07-11, 65 NRC at 151.

[116] CLI-07-11, 65 NRC at 149, n.4.

firm, rendering any short delay in our ultimate decision not prejudicial to any party. We remain committed to a prompt resolution of this proceeding.

Pursuant to our ruling that Subpart K[117] applies in this proceeding, and pursuant to 10 C.F.R. § 2.1109(b), we set a tentative schedule for the Commission's further consideration of Contention 1(b), for discovery, and for an ultimate Subpart K "oral argument"-type hearing on Contention 2 (as limited in this decision):

1. The NRC Staff shall file with the Commission a complete list of the documents it relied on in the preparation of its environmental assessment (Reference Document List), together with a *Vaughn* index (or its equivalent) for any documents for which the Staff claims a FOIA exemption, with the Commission (and with the presiding officer designated pursuant to paragraph 5, below), and make available to the other parties any documents (or portions thereof) not covered by a FOIA exemption, within 14 days of the date of this decision;
2. The other parties shall respond to the Staff's Reference Document List and *Vaughn* index filing within 7 days of the Staff's filing;
3. Discovery will begin on the date of this decision and will conclude no later than 45 days after the date of this decision;[118]
4. Discovery, including interrogatories, requests for admissions, and requests for production of documents, will be governed by the general provisions contained in 10

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[117] For a description of our Subpart K process, *see Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001).

[118] It is premature, however, to consider discovery on the adequacy of the justification for withholding source documents under FOIA. A relatively detailed index or affidavit should provide a sufficient basis for a decision as to the bases for withholding enumerated source documents. *See Miscavige v. I.R.S.*, 2 F.3d 366, 368 (11th Cir. 1993) (affidavits sufficient to establish that records were exempt); *SafeCard Services v. S.E.C.*, 926 F.2d 1197, 1200-1202 (D.C. Cir. 1991) (affirming decision to deny discovery as to adequacy of search on ground that agency's affidavits were sufficiently detailed); *Pollard v. F.B.I.*, 705 F.2d 1151, 1154-55 (9th Cir. 1983) (affirming decision to deny deposition concerning the content of withheld documents where content was precisely what defendant maintained was exempt from disclosure).

C.F.R. § 2.740 *et seq.*, except that oral depositions will be permitted only upon a showing of compelling need and with appropriate security precautions;

5. The Chief Administrative Judge of our Atomic Safety and Licensing Board Panel shall designate an administrative judge to sit as presiding officer[119] to keep discovery on schedule, if necessary by setting schedules, and by resolving promptly any discovery disputes, including privilege, materiality, and burdensomeness controversies.

6. Any late-filed contentions must be filed within 14 days after disclosure of new information warranting such contentions, with responses to such contentions due 7 days thereafter;

7. The parties' detailed written summaries of facts, data, and arguments and written supporting information, conforming to the requirements of 10 C.F.R. § 2.1113, shall be submitted to the Commission no later than 75 days after the date of this decision; and

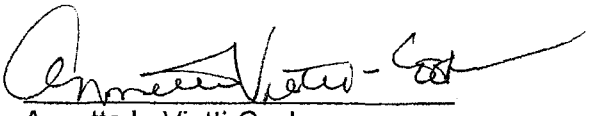
8. The Subpart K oral argument will be heard by the Commission, absent a further determination, on a date to be determined, but no sooner than 90 days after the date of this decision. *See* 10 C.F.R. § 2.1113.

[119] *See generally* 10 C.F.R. §§ 2.717 and 2.718.

9. After the oral argument, the Commission will issue a prompt decision directing further proceedings, upholding the supplemental environmental assessment, modifying it based on the adjudicatory record, or requiring an environmental impact statement.

IT IS SO ORDERED.

For the Commission



Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 15th day of January, 2008

Commissioner Gregory B. Jaczko Respectfully Dissenting in Part:

I concur on the majority of this Order but respectfully dissent from the majority's decision to deny the admission of Contention 3. At this stage in the proceeding, the Commission is simply deciding contention admissibility, a role usually left to the Licensing Boards. The standards for determining contention admissibility are straight forward. The Commission is not being asked to determine the outcome of the proceeding, but rather to allow the adjudicatory process to proceed.

Contention 3 alleges a "failure to consider credible threat scenarios with significant environmental impacts." I do not find the Staff's arguments against admitting this contention to be compelling. The argument can be reduced to claiming that the intervenor can not possibly develop an admissible contention without gaining access to sensitive information, and since the agency has no intention of providing that information, the intervenor will never have the foundation for an admissible contention. This is a circular and weak argument in my view.

There does not appear to be anything in the Environmental Assessment or in the Staff's briefs to indicate that the Staff did consider the scenarios outlined by the petitioner, which is the basis for the contention. The Staff had the opportunity to address this contention directly since it was filed as a comment to the draft EA. The Staff could have done so on the record and in an unclassified manner. If Staff had then incorporated that response into the final EA, this contention would have been moot. Because Staff did not address it, I do not believe we have fulfilled our NEPA obligations. I believe the contention, therefore, meets our contention admissibility standards and should be admitted to the proceeding.

In addition, the Staff's understanding appears to be that it is required, and has the right, to withhold all sensitive information with no further public explanation on the Staff's part. The agency has established and convened closed proceedings in the past, however, and could do so again if that became necessary to ensure we are meeting our responsibilities under NEPA, while at the same time safeguarding sensitive information from public disclosure.

Thus, I disagree with the decision of the majority to deny the admission of contention #3.

Commissioner Peter B. Lyons Respectfully Dissenting in Part:

I agree with the majority of the Commission with respect to the disposition of all but one of the contentions proposed by San Luis Obispo Mothers for Peace (SLOMPF). I write separately to voice my dissent to the admission of SLOMPF Contention 2, "Reliance on hidden and unjustified assumptions." Contention 2 does not meet the regulatory requirements for contention admissibility and should have been rejected. *See* 10 C.F.R. § 2.714(d)(2) (petitioner must show genuine dispute of material fact or law).

Contention 2 asserts that the EA Supplement violates NEPA in that it "appears to assume" that impacts of an attack would be insignificant if they do not result in early fatalities and that the Staff "appears to have used early fatalities as a criterion" to screen out scenarios that cause other impacts. *See* SLOMPF Contentions at 11. SLOMPF states that "this assumption is not completely clear but can be inferred" from the EA Supplement.

Contention 2 should have been rejected for failing to demonstrate a material dispute of law or fact. In response to comments, the Staff states that "the EA Supplement did not consider early fatalities as a measure of environmental impact." *See* Final EA Supplement at A-6. The majority itself recognizes that the EA Supplement mentions early fatalities only in the context of additional security measures. Therefore, the very premise of the contention is incorrect.

Further, as the majority states, the EA Supplement provides dose estimates and other findings in support of its determination. The EA Supplement stresses low potential doses from attack. In this regard, it states: "the dose to the nearest affected resident, from even the most plausible threat scenarios . . . would be likely well below 5 rem." Final EA Supplement at 7. In addition, it states: "In many scenarios, the hypothetical dose to an individual in the affected population could be substantially less than 5 rem, or none at all." *Id.* Moreover, the EA Supplement provides a discussion of the Staff's evaluation:

> For the EA Supplement, the Staff performed a dose assessment that used a source term derived from the security assessment work, which was based on a hypothetical release resulting from a terrorist attack. The Staff also assumed national average meteorological conditions in making an initial estimate of the dose at the location of the nearest resident. Then, the Staff applied Diablo Canyon site-specific dispersion parameters, to generate a dose estimate to the nearest resident that was more representative of the actual conditions at the site. That revised dose estimate was used by the Staff in assessing environmental impact.

Final EA Supplement at A-6.

Regarding dispersion of radioactive material, the EA Supplement states that if there is a breach, "most of the radioactive material released would be in solid form, locally deposited in the immediate area of the ISFSI." Final EA Supplement at A-6. For the small fraction that would be in the form of fine particulate or gases, and thus able to be transported offsite, the atmospheric dispersion factors for the site would result in "greater dilution" than that used in the generic analysis. Final EA Supplement at 6, A-6. This reduces the projected dose consequences by a factor of 10 to 100. Final EA Supplement at 7. Thus, the projected dose consequences at Diablo Canyon, with consideration of the site-specific meteorology, is described as from 500 mrem to .50 mrem.[120] The assessment continued, however: "Use of a site-specific source term [amount of radioactive material released] for the Diablo Canyon spent

[120] To put this into perspective, the findings of no significant radiological impacts from routine operation observed that there is a "100 mrem estimated annual dose received from naturally occurring terrestrial and cosmic radiation in the vicinity" of the plant. Final EA Supplement at 3. The average annual dose in the United States, with considerable variation, has been estimated to be around 300 mrem. *See Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 457 F. 3d 941, 946 (9th Cir. 2006). The NRC's occupational dose limits for adults includes as one dose limit "[t]he total effective dose equivalent to 5 rems." 10 C.F.R. § 20.1201(a)(1).

fuel would reduce this projected dose even further." *Id.* Thus, as I mentioned above, the EA Supplement states:

"Based on these considerations, the dose to the nearest affected resident, from even the most severe plausible threat scenarios . . . would likely be well below 5 rem." *Id.* It could be "substantially less then 5 rem, or none at all." *Id.*[121]

An environmental assessment is expected to provide a brief discussion. 10 C.F.R. § 51.30(a)(1). Its purpose is to determine whether an action has a "significant impact," thus informing the decision whether the preparation of an EIS and detailed assessment of impacts is required. *See Environmental Protection Information Center v. United States Forest Service*, 451 F.3d 1005, 1009 (9th Cir. 2006). In determining whether there is no significant impact, the Government does not need to show "that there is *no* risk of injury, but only that the risk is not significant." *Anderson v. Evans*, 314 F.3d 1006, 1018 (9th Cir. 2002).

The EA Supplement expressly finds "no" significant environmental impact, which implicitly embraces any significant environmental effect. For instance, the EA Supplement concludes that "a terrorist attack that would result in a significant release of radiation affecting the public is not reasonably expected to occur," and finds that "design features and mitigative security measures will provide high assurance that substantial environmental impacts will be avoided and thereby reduced to a non-significant risk level." Final EA Supplement at 8. Land

[121] The EA Supplement also explains, in summarizing the consideration of potential impacts in the Environmental Assessment (October 24, 2003), that "[f]or hypothetical accidents, the calculated dose to an individual at the nearest site boundary was found to be well below the 5 rem limit for accidents set forth in 10 C.F.R. § 72.106(b) and in the U.S. Environmental Protection Agency's protective action guidelines." Final Supplement at 2. The NRC's regulations establish an accident dose limit of 5 rem to any individual located on or beyond the nearest boundary of the controlled area of an ISFSI. 10 C.F.R. § 72.106(a)(1). The accident dose limit of 5 rem was derived from the protective actions recommended by EPA for projected doses to populations for planning purposes. *See* Final Rule 10 CFR Part 72, "Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuels Storage Installation," 1980 45 Fed. Reg. 74, 693, 74, 697. Thus, the EA Supplement's dose projections complement the findings of the EA regarding off-site consequences, with its similar dose projection of "well below the 5 rem limit for accidents."

contamination and latent fatalities are not discussed, but SLOMFP's reliance on a reference to a potential for early fatalities in one part of the terrorism review is not sufficient to show a genuine and material issue regarding that omission, particularly in the context of the description of the dose assessment and other factors in support of the EA Supplement's findings and conclusions.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND 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 the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-08-01) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Dated at Rockville, Maryland
this 15th day of January 2008