

April 16, 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)
)
PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275/325
)
(Diablo Canyon Nuclear Power Plant)
Units 1 and 2))

NRC STAFF'S RESPONSE TO THE PETITION FOR WAIVER
OF COMMISSION REGULATIONS FILED BY SAN LUIS OBISPO MOTHERS FOR PEACE

Pursuant to 10 C.F.R. § 2.335(b), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its response to the "Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2)" ("Waiver Petition") filed by San Luis Obispo Mothers for Peace ("SLOMFP") on March 22, 2010.¹ For the reasons set forth below, the Staff submits that SLOMFP has failed to establish a prima facie case to support its Waiver Petition. Accordingly, the Atomic Safety and Licensing Board ("Board") should deny the Waiver Petition.

BACKGROUND

This proceeding arises from the application of Pacific Gas & Electric Co. ("PG&E" or "Applicant") to renew its operating licenses for Diablo Canyon Nuclear Power Plant Units 1 and 2, ("DCNPP"), in San Luis Obispo County, California. On January 21, 2010, the NRC published

¹ The Staff notes that 10 C.F.R. § 2.335(b) permits a petition for waiver of NRC regulations to be filed by a "party." While SLOMFP has petitioned to intervene, it has not, as yet, been admitted as a party. However, inasmuch as SLOMFP's petition to intervene rests upon a grant of the instant Waiver Petition, the Staff submits that a ruling on SLOMFP's Waiver Petition should be issued in conjunction with a ruling on its petition to intervene.

a Notice of Opportunity for Hearing, requiring that petitions for leave to intervene and requests for hearing be filed by March 22, 2010.

On March 22, 2010, SLOMFP filed a Request for Hearing and Petition to Intervene (“Petition”), accompanied by the instant Waiver Petition. In its Waiver Petition, SLOMFP asserts that the NRC’s rule adopting the findings in NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants (May 1996) (ADAMS Accession No. ML040690705) (“GEIS”) would not serve the purposes for which the Commission promulgated it with respect “to the consideration of the environmental impacts of an earthquake-caused [spent fuel] pool fire or the environmental impacts of an attack on the spent fuel pool.” Waiver Petition at 1. In support of the Waiver Petition, SLOMFP filed the Affidavit of its counsel, Diane Curran. Declaration by Diane Curran in Support of Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2), (Mar. 22, 2010) (“Curran Affidavit”).² As set forth below, SLOMFP’s Waiver Petition and supporting materials fail to establish a prima facie showing that Commission regulations should be waived in this proceeding.

DISCUSSION

A. Legal Standards Governing Petitions for Waiver Under 10 C.F.R. § 2.335.

Pursuant to 10 C.F.R. § 2.335(a), “[e]xcept as provided in [§ 2.335 (b), (c), and (d)], no rule or regulation of the Commission, or any provision thereof, concerning the licensing of production and utilization facilities . . . is subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding subject to this part.” Subsections (b), (c) and (d) of § 2.335 further provide as follows:

(b) A party to an adjudicatory proceeding subject to this part may petition that the application of a specified Commission rule or

² The Staff notes that SLOMFP has failed to demonstrate what expertise, if any, Ms. Curran has with respect to spent fuel pool, seismic, or terrorist issues.

regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. *The sole ground for petition of waiver or exception is that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted.* The petition must be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision of it) would not serve the purposes for which the rule or regulation was adopted. *The affidavit must state with particularity the special circumstances alleged to justify the waiver or exception requested.* Any other party may file a response by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response permitted under paragraph (b) of this section, the presiding officer determines that the petitioning party *has not made a prima facie showing* that the application of the specific Commission rule or regulation (or provision thereof) to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in [§ 2.335(b)], the presiding officer determines that the prima facie showing required by [§ 2.335(b)] has been made, the presiding officer shall, before ruling on the petition, certify the matter directly to the Commission . . . for a determination in the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. . . .

10 C.F.R. § 2.335 (emphasis added).

In applying these provisions, the Commission has emphasized that a waiver of one or more of the license renewal rules may be granted only upon a showing that four requirements have been satisfied:

(i) the rule's strict application "would not serve the purposes for which [it] was adopted;" (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by

necessary implication, in the rulemaking proceeding leading to the rule sought to be waived;" (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities;" and (iv) a waiver of the regulation is necessary to reach a "significant safety problem." The use of "and" in this list of requirements is both intentional and significant. For a waiver request to be granted, *all four* factors must be met.

Dominion Nuclear Connecticut, Inc. (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551; 559-60 (2005) (emphasis in original; footnotes omitted). Thus, unless these requirements are satisfied, any matters deemed to be resolved as Category 1 issues in the GEIS cannot be challenged in individual license renewal proceedings.³ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10, 12 (2001).

As set forth below, SLOMFP has failed to establish a prima facie case that its Waiver Petition meets these requirements. Accordingly, its Waiver Petition should be denied.

B. SLOMFP Has Failed to Establish A Prima Facie Case Showing That A Waiver of the Commission's Rules Adopting the GEIS Is Warranted.

In seeking a waiver of NRC rules adopting the GEIS, SLOMFP seeks a waiver of Appendix B to 10 C.F.R. Part 51.⁴ That provision divides environmental issues into two

³ Although the Commission stated that it would only waive application of a rule if a party demonstrated that the waiver was necessary to reach a "significant safety problem," the Staff assumes that the Commission would also waive a regulation if necessary to reach a significant environmental issue as well. In *Millstone*, the Commission relied on *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597, 599 (1988) for the fourth factor in its waiver test. In *Seabrook*, the Commission established this prong of the waiver test to protect the Commission's already crowded regulatory agenda from non-substantive problems. *Id.* The Commission concluded that spending "time and resources on matters that are of no substantive regulatory significance" would be inconsistent with its "statutorily mandated responsibilities." *Id.* As a result, the rationale behind the "significance" factor was limiting Commission consideration to matters of significance. Thus, even though the *Millstone* test could be read to only permit waiver of rules to reach safety issues, the Staff believes it should be liberally construed to also permit waiver of regulations to reach environmental issues, provided, of course, that those issues are significant.

⁴ Additionally, SLOMFP seeks a waiver of 10 C.F.R. § 51.53(c)(2), which provides that an environmental report need not contain any discussion regarding spent fuel storage, in light of the Commission's waste confidence rule at 10 C.F.R. §§ 51.23(a) and (b). But SLOMFP does not argue that application of the waste confidence rule to this proceeding would not serve the purposes for which the (continued. . .)

categories: Category 1 and Category 2. The Commission has explained that Category 1 issues are those issues on which the Commission found it could reach generic determinations regarding the environmental impacts of license renewal. *Turkey Point*, CLI-01-17, 54 NRC at 11. In contrast, Category 2 issues are the remaining issues which the Commission determined it must resolve on a site-specific basis. *Id.* Table B-1 of Appendix B to 10 C.F.R. Part 51 (“Table B-1”) sets forth the Commission’s generic determinations of the environmental impacts of Category 1 issues and identifies the matters that are to be considered on a site-specific basis as Category 2 issues. An environmental report for license renewal need not address Category 1 issues but must address Category 2 issues. *Id.*

In particular, as pertinent here, Table B-1 defines the issue of on-site storage of spent fuel as a Category 1 issue. Table B-1 concludes that the environmental impact of on-site spent fuel will be small, which means that its effects “are not detectable or are so minor that they will neither destabilize nor noticeably alter any important attribute or resource.” It explains, “The expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository or monitored retrievable storage is not available.”

The GEIS provides the analysis supporting the Commission’s determinations in 10 C.F.R. Part 51, Table B-1. The Commission reviewed its experience with on-site storage of spent fuel and regulatory requirements for on-site storage of spent fuel. GEIS at 6-85. The Commission concluded “that there is ample basis to conclude that continued storage of existing spent fuel and storage of spent fuel generated during the license renewal period can be

(. . .continued)

Commission promulgated that rule. Rather, SLOMFP directs its argument toward the GEIS. Presumably, SLOMFP meant to challenge 10 C.F.R. §§ 51.53(c)(3) and 51.95(c), which state that an ER need not address issues resolved generically in the GEIS.

accomplished safely and without significant environmental impacts.” *Id.* In discussing spent fuel pool accidents, the Commission stated,

The fuel-handling structures also have accident-mitigating systems. Spent fuel is handled and stored under water, which would tend to greatly reduce the amount of radioactive material released to the building environment in the event of fuel failure. A safety-grade exhaust air ventilation subsystem contains both charcoal and high-efficiency particulate filters. The ventilation systems are also designed to keep the area around the spent-fuel pool below the prevailing barometric pressure during fuel-handling operations to minimize the outleakage through building openings. Upon detection of high radiation, exhaust air is routed through the filter units, and radioactive iodine and particulate fission products which escaped from the spent fuel pool would be removed from the flow stream before exhausting to the atmosphere.

GEIS at 5-9. As the Staff later explained in its proposed revision to the GEIS, because this discussion demonstrated that the impact of accidents at spent fuel pools would be less than impacts from reactor accidents, the Commission concluded that accidents at spent fuel pools should be classified as a Category 1 issue. NUREG-1437, Rev. 1, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Draft Report for Comment, at E-33 (July 2009) (ADAMS Accession No. ML091520164) (“Draft Revised GEIS”). Ultimately, the Commission concluded that the “need for consideration of mitigation alternatives within the context of renewal of a power reactor license has been considered” and the “regulatory requirements already in place provide adequate mitigation incentives for on-site storage of spent fuel.” GEIS at 6-86.

SLOMFP requests waiver of 10 C.F.R. Part 51 Appendix B for two of its contentions, Environmental Contentions EC-2 and EC-3. As discussed below, SLOMFP has not made a prima facie showing for waiving the requirements of 10 C.F.R. Part 51 Appendix B to permit the Board to consider either EC-2 or EC-3.

1. SLOMFP Has Not Made a Prima Facie Showing that Meets the First or Fourth Prong of the *Millstone* Test to Justify Waiving the Application of 10 C.F.R. § Part 51 Appendix B to EC-2

EC-2 claims that: “PG&E’s Environmental Report is inadequate to satisfy NEPA because it does not address the airborne environmental impacts of a reasonably foreseeable spectrum of spent fuel pool accidents, including accidents caused by earthquakes.” Petition at 16.

SLOMFP correctly notes that “NRC regulations excuse PG&E from considering the environmental impacts of spent fuel storage in this proceeding.” *Id.* at 19. *See also Turkey Point*, CLI- 01-17, 54 NRC at 21-22 (concluding that accident mitigation alternatives for spent fuel pools are outside the scope of license renewal). Thus, SLOMFP seeks a waiver from the determination in Table B-1 that spent fuel pool accidents are a Category 1 issue.

To support waiving application of the GEIS to EC-2, SLOMFP argues that the Draft Revised GEIS demonstrates that the NRC relies on an “entirely new set of risk analyses and mitigative measures than it did in” the current GEIS to generically find that the environmental impacts of a spent fuel storage accident are small. Curran Affidavit at 2. SLOMFP notes that the Draft Revised GEIS relies on the analysis in NUREG-1738, “Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants” (October 2000) (“NUREG-1738”), to determine that “spent fuel pool storage risks are small.” *Id.* The Draft Revised GEIS states that NUREG-1738 considered seismic events for its conclusion but specifically exempted western reactors, including DCNPP, from this portion of its analyses. Draft Revised GEIS at E-33 n. (a). Thus, SLOMFP concludes that the new analyses in the Draft Revised GEIS “cannot be applied to” DCNPP. Curran Affidavit at 2. Moreover, SLOMFP notes that the Draft Revised GEIS finds the results of NUREG-1738 conservative in light of recent mitigation enhancements and improved accident analyses. *Id.* at 3. But, SLOMFP asserts that because the conclusions in NUREG-1738 do not apply to Diablo Canyon, the Draft Revised GEIS’s conclusion that the results of NUREG-1738 are conservative in light of recent improvements has “no meaningful application to” DCNPP. *Id.*

SLOMFP’s argument rests on the assumption that the “NRC now relies on an entirely new set of risk analyses and mitigative measures than it did in the 1996 License Renewal

GEIS.” *Id.* at 2. But, the Draft Revised GEIS actually concludes that “the environmental impacts stated in the 1996 GEIS bound the impact from [spent fuel pool] accidents.” Draft Revised GEIS at E-37. Moreover, the Draft Revised GEIS remains only that: a draft. It may change as a result of public comment or further review. As a result, the current GEIS is the operative document for these proceedings. Consequently, the NRC continues to rely on the discussion in the 1996 GEIS to reach the conclusion that environmental impacts from reactor accidents will bound those from spent fuel pools. The additional analyses simply confirm that the conclusions in the 1996 GEIS are more conservative than expected. *Id.*

Therefore, with respect to its arguments that the Commission should waive Table B-1 for Contention EC-2, SLOMFP cannot meet the first or fourth prong of the *Millstone* test. *Millstone*, CLI-05-24, 62 NRC at 559-60. The Commission generically found that the environmental impacts from on site storage of spent fuel would be small because the impacts from spent fuel pool accidents would be less than those from reactor accidents. SLOMFP has not produced any evidence to suggest that this analysis is no longer valid. SLOMFP points to a newer analysis that does not apply to DCNPP, but the results of that analysis generally indicate that the assumptions in the GEIS are in fact more conservative than originally thought. They certainly do not suggest that any assumptions in the original GEIS are erroneous or unsafe. Thus, SLOMFP has not pointed to any reason why application of Table B-1 to EC-2 would not serve the purposes for which the Commission promulgated Table B-1.

Moreover, SLOMFP has not shown that application of the rule would prohibit the NRC from considering a significant issue. In contrast, all of the documents upon which SLOMFP relies suggest that the NRC’s conclusions are more conservative than the NRC believed when it originally promulgated the GEIS. As noted above, an intervenor must show that all four of the *Millstone* factors are met before the Commission will waive a rule. *Millstone*, CLI-05-24, 62 NRC at 559-60. As the regulation makes clear, this showing must “state with particularity the special circumstances alleged to justify the waiver.” 10 C.F.R. § 2.335(b). Here, SLOMFP has

failed to show, with particularity or otherwise, that its claim meets the first and the fourth factors. Thus, SLOMFP has failed to make a prima facie showing for waiver under 10 C.F.R. § 2.335, and the Board should decline to further consider SLOMFP's request for waiver with respect to EC-2.

Indeed, the Commission found similar circumstances insufficient to justify a waiver in *Turkey Point*. CLI-01-17, 54 NRC 3, 22-23. In that case, an intervenor maintained that the "possibility of catastrophic hurricanes" justified a "plant-specific contention on spent fuel accidents." *Id.* at 22. The intervenor supported his claim by noting that "hurricanes were excluded from the GEIS as accident initiators and that a category 5 hurricane hitting Turkey Point would produce catastrophic damage to spent fuel facilities." *Florida Power & Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 165 (2001). The Commission noted that previous NRC analysis found the risks from hurricanes at spent fuel pools very low or negligible. *Turkey Point*, CLI-01-17, 54 NRC at 22-23. Thus, the Commission found that the intervenor's concerns did not "raise any information that might render the GEIS's Category 1 finding inapplicable." *Id.* at 23. Consequently, the Commission determined that even if the intervenor had requested a waiver, it had not produced sufficient evidence to justify a waiver. *Id.* Like the intervenor in *Turkey Point*, SLOMFP has not produced any evidence that suggests the NRC's findings in the GEIS are suspect. To the contrary, subsequent analyses and studies suggest that the NRC findings in the GEIS are conservative. As a result, SLOMFP has not made the requisite prima facie showing to justify waiver.

Next, SLOMFP argues that neither the GEIS nor the ER adequately account for the damage a spent fuel pool fire would cause to surrounding California farm land. In support of this argument, SLOMFP points to U.S. census data demonstrating the value of California farm land. Curran Affidavit at 2-3. However, Section 3.3 of Attachment F to the Applicant's ER states that the Applicant used data on the value of farm and non-farm land from the 2002 National Census of Agriculture in calculating the benefits of SAMAs for DCNPP, although the

SAMAs do not address spent fuel pool accidents, in conformance with the Commission's regulations. But, SLOMFP has not provided any information that suggests that the environmental effects of a spent fuel fire on farm land would be any different from the environmental impacts from reactor accidents or would affect the generic findings in the GEIS.

SLOMFP also makes several additional arguments in support of its Waiver Petition with respect to EC-2, but these arguments are based on a misreading of the GEIS or ER. SLOMFP argues that the Draft Revised GEIS "admits that to some extent, mitigation measures at all nuclear reactor spent fuel pools (including [DCNPP]) are site specific." Curran Affidavit at 2. Consequently, SLOMFP contends that the NRC must legally apply this new information in evaluating the environmental impacts of renewing the DCNPP license. But, SLOMFP provides no citation pointing to the source for this statement. Rather, the discussion of mitigative measures at spent fuel pools in the Draft Revised GEIS appears to focus on common features of all spent fuel pools. Draft Revised GEIS at E-36. Moreover, SLOMFP makes no effort to demonstrate how the existence of site-specific mitigation measures at spent fuel pools would undermine the GEIS. Consequently, this argument does not demonstrate that application of the rule in this case would not serve the purpose for which it was adopted, as required by 10 C.F.R. § 2.335(b) or a significant issue warranting further Commission review.

Additionally, SLOMFP argues that the Draft Revised GEIS is deficient because it contains the following statement: "Based on . . . NRC site evaluations of every [spent fuel pool] in the United States, the risk of [a spent fuel pool] zirconium fire initiation is expected to be less than reported in NUREG-1738 (NRC 2001b) and previous studies." Curran Affidavit at 3 (*quoting* Draft Revised GEIS at E-36). This site-specific analysis is incompatible with a generic determination, SLOMFP asserts. But, SLOMFP forgets that the adequacy of the Draft Revised GEIS is not at issue. Rather, the current GEIS is the operative document for this proceeding. SLOMFP has not pointed to a deficiency in the analyses underlying that document. Moreover, the Draft Revised GEIS also relies on "rigorous accident progression analyses" and "recent

mitigation enhancements.” Draft Revised GEIS at E-36. Thus, even if a site-specific analysis were incompatible with generic determinations, the Draft Revised GEIS would still be adequate because its conclusions are also supported by generic determinations.

2. SLOMFP Has Failed to Make a Prima Facie Showing that Any of the *Millstone* Factors Justify Waiving Application of 10 C.F.R. Part 51 Appendix B to EC-3

EC-3 states, “The Environmental Report fails to satisfy NEPA because it does not evaluate the environmental impact of an attack on the Diablo Canyon spent fuel pool during the operating license renewal term.” Petition at 20. SLOMFP concedes that this contention challenges a Commission rule of general applicability, and consequently seeks this waiver.⁵ *Id.* at 21. To support this waiver, SLOMFP argues “The site-specific nature of site evaluations and mitigation measures for attacks on spent fuel warrants the granting of a waiver.” Curran Declaration at 3.

But, this statement does not demonstrate that application of Table B-1 to EC-3 would not serve the purposes for which the Commission adopted it. As discussed above, the Commission categorized spent fuel pool accidents as Category 1 issues, because it found the impacts from those accidents would be much less severe than impacts from reactor accidents. GEIS at 5-9, 6-85 – 6-86; Draft Revised GEIS at E-33. SLOMFP has failed to provide any explanation beyond mere assertion to demonstrate how the site specific nature of spent fuel pools would alter that conclusion. *Millstone*, CLI-05-24, 62 NRC at 559-60. As a result, SLOMFP has not

⁵ The United States Court of Appeals for the Ninth Circuit found that “the NRC’s determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review.” *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1035 (2006). The Commission has stated that it must comply with the Ninth Circuit’s decision within that Circuit, but will not do so elsewhere. *Amergen Energy Company (Oyster Creek Nuclear Generating Station)*, CLI-07-8, 65 NRC 124, 128-129 & n.14. Nonetheless, the Ninth Circuit’s holding is limited by the facts before it, in which the NRC categorically argued that it did not need to prepare an assessment of terrorist threats as part of its NEPA analysis. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1022-23. Here, the environmental analysis at issue rests on the discussion of the environmental impacts of spent fuel pools in the GEIS, not a categorical determination that terrorist attacks are outside the scope of NEPA review. Consequently, the Ninth Circuit precedent does not apply to this case.

shown how application of 10 C.F.R. Part 51 Appendix B to EC-3 would not serve the purposes for which the Commission promulgated that rule. Thus, SLOMFP has failed to meet the first prong of the Commission's test for waiving a rule of general applicability.

Next, to waive a general rule, SLOMFP must demonstrate "special circumstances that were not considered, either explicitly or by necessary implication" when the Commission first promulgated the rule. *Id.* Again, SLOMFP has failed to make this showing. By definition, each spent fuel pool will have a unique location, design, and security program. Thus, the Commission was certainly aware of the site-specific nature of spent fuel pools when it promulgated the GEIS. As a result, SLOMFP can not meet the second prong of the test with respect to EC-3.

Third, SLOMFP must show that the circumstances it has identified are unique to the facility at issue, as opposed to a large class of facilities. *Id.* But, the reason provided by SLOMFP, the site specific nature of spent fuel pool mitigation measures and site analyses at DCNPP, would also apply to every facility in the country. After all, each spent fuel pool will have a unique location, design, and security program. Consequently, SLOMFP's arguments fail to meet the third prong of the *Millstone* test because SLOMFP has not shown any feature unique to DCNPP that would justify waiving application of the rule to EC-3.

Finally, to waive the applicability of the GEIS to EC-3, SLOMFP must demonstrate that the waiver is necessary to address a "significant safety problem." But SLOMFP points to no such problem that will go unaddressed unless the Commission waives Table B-1. The Commission explicitly found that the environmental impact of continued on-site storage would be small, and SLOMFP has not made any demonstration, apart from vague assertions that the Commission must undertake a site specific analysis of attacks, that would undermine that conclusion. SLOMFP has not demonstrated how a specific analysis of attacks would change the Commission's conclusions in the GEIS. Moreover, SLOMFP has failed to show with any particularity how a site-specific review of such attacks would change the analysis of those

attacks. As a result, SLOMFP has not demonstrated any significant problem that the GEIS would bar the NRC from considering. Thus, SLOMFP has not met the fourth *Millstone* criterion.

The Commission has recently rejected a petition for rulemaking that sought relief similar to SLOMFP's Waiver Petition. The Attorney General of Commonwealth of Massachusetts, the Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204 (Aug. 8, 2008). The Attorney Generals of California and Massachusetts filed petitions for rulemaking challenging the GEIS's characterization of the impacts of on-site fuel storage as insignificant. *Id.* Specifically, they contended that a terrorist attack on a spent fuel pool could result in a zirconium fire that would release "a substantial amount of radioactive material into the environment." *Id.* The Commission denied the petitions, because it found the risk of a zirconium fire to be "very low" in light of the "physical robustness" of spent fuel pools, security measures, mitigation measures, and the NRC's site evaluations. *Id.* at 46,208. Thus, the Commission has already considered, and rejected, a similar challenge to the GEIS's evaluation of terrorist attacks on spent fuel pools.

Last, SLOMFP argues that with respect to EC-3, the Commission cannot rely on the determinations in the Draft Revised GEIS because it does not sufficiently identify all reference documents upon which it relies. But, the NRC will not rely on the Draft Revised GEIS to make its determination. That document is only a draft, which may change as a result of public comment or internal revision. Rather, the GEIS is the controlling document for this proceeding. SLOMFP has not suggested that the GEIS relies on insufficient information. Consequently, SLOMFP has not made a prima facie showing that application of 10 C.F.R. Part 51 Appendix B to EC-3 would not serve the purposes for which the Commission adopted that rule. As a result, the Board should dismiss the Waiver Petition with respect to EC-3 as well.

CONCLUSION

SLOMFP has failed to make a prima facie showing that the Commission should waive the application of 10 C.F.R. Part 51 Appendix B to EC-2 and EC-3. With respect to EC-2 and

EC-3, SLOMPF has not shown that strict application of the rule adopting the GEIS would not serve the purposes for which the Commission adopted it or that a waiver of the regulation is necessary to reach a significant safety or environmental problem. In addition, regarding EC-3, SLOMFP has also failed to show that any "special circumstances" were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to" the promulgation of 10 C.F.R. Part 51 Appendix B or that those circumstances are "unique" to DCNPP rather than "common to a large class of facilities." Consequently, the Board should deny SLOMFP's Waiver Petition.

Respectfully submitted,

Signed (electronically) by

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Dated at Rockville, Maryland
this 16th day of April 2010

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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PACIFIC GAS AND ELECTRIC COMPANY) Docket Nos. 50-275-LR/ 50-323-LR
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(Diablo Canyon Nuclear Power Plant,) ASLBP No. 10-900-01-LR-BD01
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF'S RESPONSE TO THE PETITION FOR WAIVER OF COMMISSION REGULATIONS FILED BY SAN LUIS OBISPO MOTHERS FOR PEACE, dated April 16, 2010, have been served upon the following by the Electronic Information Exchange, this 16th day of April, 2010:

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