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-LR, 50-323-LR
	)	
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	ASLBP No. 10-900-01-LR-BD01
	)	

NRC STAFF'S ANSWER TO THE SAN LUIS OBISPO MOTHERS FOR PEACE REQUEST FOR HEARING AND PETITION TO INTERVENE

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April 16, 2010

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the Request for Hearing and Petition to Intervene ("Petition") filed by the San Luis Obispo Mothers for Peace ("SLOMFP" or "Petitioner").[1]

As more fully set forth below, the Staff does not contest SLOMFP's standing to intervene in this proceeding. The Staff does, however, oppose the admission of SLOMFP's proposed Contentions TC-1, EC-2, EC-3, EC-4. The Staff has no objection to admission of a limited part of proposed Contention EC-1, which constitutes a contention of omission alleging that the "Shoreline Fault" was not addressed in the Environmental Report's ("ER") Severe Accident Mitigation Alternatives ("SAMA"). However, the Staff opposes the admission of the remainder of Contention EC-1 that alleges that the SAMA analysis must rest on the final study of the "Shoreline Fault" and the results of a broader regional study. Accordingly, SLOMFP's Petition relating to EC-1 should be granted in part and denied in part as to the portion requiring a

[1] Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) (Agency Document Access & Management System ("ADAMS") Accession No. ML100810441).

complete study and denied as to Contentions TC-1, EC-2, EC-3 and EC-4.

BACKGROUND

This proceeding concerns the November 23, 2009, application of Pacific Gas and Electric Company ("PG&E" or "Applicant") to renew its operating licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2 ("DCNPP").[2] The DCNPP site is located in San Luis Obispo County, California, adjacent to the Pacific Ocean and roughly equidistant from San Francisco and Los Angeles. Both DCNPP Units employ a four-loop pressurized water reactor (PWR) nuclear steam supply system (NSSS). The NSSS for each Unit is contained within a steel-lined reinforced concrete structure. PG&E is authorized to operate each unit of the DCNPP at the licensed reactor core power level of 3,411 MWt (100 percent rated power). PG&E is requesting renewal of the Class 104(b) operating licenses for DCNPP, Units 1 and 2 (License Nos. DPR-80 and DPR-82) for a period of 20 years beyond the expiration of the current licenses, midnight on November 2, 2024 and August 26, 2025, respectively.

Notice of receipt of the License Renewal Application ("LRA") was published in the *Federal Register* on December 11, 2009.[3] The NRC accepted the LRA for review, and on January 21, 2010, published a Federal Register Notice providing a Notice of Opportunity for Hearing.[4] The period for filing a petition for intervention or request for hearing closed on March

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[2] Letter from James R. Becker , Senior Vice President, dated November 23, 2009, transmitting application for license renewal for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (ADAMS Accession No. ML093350335).

[3] Pacific Gas & Electric Company; Notice of Receipt and Availability of Application for Renewal of Diablo Canyon Nuclear Power Plant, Units 1 and 2, Facility Operating Licenses Nos. DPR-80 and DPR-82 for an Additional 20-Year Period, 74 Fed. Reg. 65,811 (Dec. 11, 2009).

[4] Notice of Acceptance for Docketing of the Application, Notice of Opportunity for Hearing for Facility Operating License Nos. DPR-80 and DPR-82 for an Additional 20-Year Period, 75 Fed. Reg. 3,493, 3,493 (Jan. 21, 2010).

22, 2010,[5] the date that the SLOMFP submitted its Petition. Petition at 1.

An Atomic Safety and Licensing Board ("Board") was convened by Order dated April 8, 2010. Establishment of Atomic Safety and Licensing Board (Apr. 8, 2010) (ADAMS Accession No. ML100980501).

DISCUSSION

I. Standing to Intervene

A. Applicable Legal Requirements

In accordance with the Commission's Rules of Practice,[6] "[a]ny person[7] whose interest may be affected by a proceeding and who desires to participate as a party must file a written request for hearing or petition for leave to intervene and a specification of the contentions which the person seeks to have litigated in the hearing." 10 C.F.R. § 2.309(a). The regulations provide that the Board "will grant the request/petition if it determines that the requestor/petitioner has standing under the provisions of [10 C.F.R. § 2.309(d)] and has proposed at least one admissible contention that meets the requirements of [10 C.F.R. § 2.309(f)]." *Id.* A request for hearing or petition for leave to intervene must state:

> (i) The name, address, and telephone number of the requestor or petitioner;
> (ii) The nature of the requestor's/petitioner's right under [the Atomic Energy Act of 1954, as amended] to be made a party to the proceeding;
>
> (iii) The nature and extent of the requestor's/petitioner's property,

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[5] *Id*.

[6] *See* "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," 10 C.F.R. Part 2.

[7] "Person" is defined as "(1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, government agency other than the Commission . . . any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing." 10 C.F.R. § 2.4.

financial or other interest in the proceeding; and

> (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

10 C.F.R. § 2.309(d)(1). As the Commission has observed, "[a]t the heart of the standing inquiry is whether the petitioner has 'alleged such a personal stake in the outcome of the controversy' as to demonstrate that a concrete adverseness exists which will sharpen the presentation of the issues." *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994), (citation and quotation omitted). The Commission explained that in order to determine whether a petitioner has demonstrated a personal stake in the outcome,

> the Commission applies contemporaneous judicial concepts of standing. Accordingly, a petitioner must (1) allege an "injury in fact" that is (2) "fairly traceable to the challenged action" and (3) is "likely" to be "redressed by a favorable decision."

Id. at 72, citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

In addition, the Commission has recognized standing based on a petitioner's proximity to the facility at issue. *See Tenn. Valley Auth.* (Sequoyah Nuclear Plant, Units 1 & 2; Watts Bar Nuclear Plant, Unit 1), LBP-02-14, 56 NRC 15, 23 (2002). This recognition "presumes a petitioner has standing to intervene without the need specifically to plead injury, causation, and redressability if the petitioner lives within, or otherwise has frequent contacts with, the zone of possible harm from the nuclear reactor or other source of radioactivity." *Id.,* citing *Florida Power & Light Co.,* (Turkey Point Nuclear Generating Plant, Units 3 & 4), LBP-01-6, 53 NRC 138,146 (2001), *aff'd on other grounds,* CLI-01-17, 54 NRC 3 (2001). In construction permit and operating license proceedings, the presumption generally applies to petitioners residing within fifty miles of a reactor. *See Sequoyah Fuels Corp. & Gen. Atomics* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 75 n.22 (1994).

An organization may establish its standing to intervene based on organizational standing

(showing that its own organizational interest could be adversely affected by the proceeding), or representational standing (based on the standing of its members). *Florida Power and Light Company* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 187 (1991).

B. The San Luis Obispo Mothers for Peace's Standing to Intervene

In its petition, SLOMFP submitted affidavits from three individuals Elizabeth Apfelberg, Elaine E. Holder, and Lucy Jane Swanson. All are members of SLOMFP, and all live less than 50 miles from the plant.[8] Additionally, SLOMFP submitted the Affidavit of Jill ZamEk, a member of the Board of SLOMFP who lives within 25 miles of the plant. Furthermore, each individual's affidavit authorizes SLOMFP, on her behalf, to request a hearing and intervene in this license renewal proceeding. The Staff concedes that each of the SLOMFP members who submitted affidavits has standing as intervenors and consequently SLOMPF has met the requirements for representational standing.

[8] Specifically, they live 20, 11, and 15 miles, respectively, from the plant.

II. Admissibility of the Petitioner's Proposed Contentions

A. Legal Requirements for Contentions

1. General Requirements for Admissibility

The legal requirements governing the admissibility of contentions are well-established and set forth in 10 C.F.R. § 2.309(f) of the Commission's Rules of Practice.[9] Specifically, in order to be admitted, a contention must satisfy the following requirements:

> (f) Contentions. (1) A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request of petition must:
>
> (i) Provide a specific statement of the issue of law or fact to be raised or controverted;
>
> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and

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[9] These requirements substantially reiterate the requirements stated in former § 2.714, published in revised form in 1989. *See* Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,217 (Jan. 14, 2004); Statement of Considerations, "Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process," 54 Fed. Reg. 33,168 (Aug. 11, 1989), as corrected, 54 Fed. Reg. 39,728 (Sept. 28, 1989). Further, while § 2.714 was revised in 1989, those revisions did not constitute "a substantial departure" from then existing practice in licensing cases. 54 Fed. Reg. at 33,170-71; *see also Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-94-11, 39 NRC 205-07 (1994). Thus, while the 1989 amendments superseded, in part, the prior standards governing the admissibility of contentions, those standards otherwise remained in effect to the extent they did not conflict with the 1989 amendments. *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2 and 3), LBP-91-19, 33 NRC 397, 400 (1991).

> documents on which the requestor/petitioner intends to rely to supports its position on the issue; and
>
> (vi) Provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application (including the applicant's environmental report and safety report) that the petition disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.
>
> (2) Contentions must be based on documents or other information available at the time the petition is to be filed, such as the application, supporting safety analysis report, environmental report or other supporting document filed by an applicant or licensee, or otherwise available to a petitioner. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report…

10 .F.R. § 2.309(f)(1)-(2).[10]

The requirements governing the admissibility of contentions are "strict by design". *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 249, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002). Thus, they have been strictly applied in NRC adjudicatory proceedings, including license renewal proceedings. For example, in a recent license renewal decision, the Commission stated:

> To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for

[10] Similarly, long-standing Commission precedent establishes that contentions may only be admitted in an NRC licensing proceeding if they fall within the scope of issues set forth in the Federal Register notice of hearing and comply with the requirements of former § 2.714(b) (subsequently restated in 2.309(f)), and applicable Commission case law. *See, e.g.,Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Power Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 289-90 (2002).

> admissibility set out in 10 C.F.R. § 2.309(f)(1)(i)-(vi) are "strict by design," and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention." Mere 'notice pleading' does not suffice." Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.

AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 118-19 (2006) (footnotes omitted). In short, the contention admissibility rules require "a detailed, fact-based showing that a genuine and material dispute of law or fact exists." *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 289 (2002).

The basis requirements serve (1) to assure that the contention raises a matter appropriate for adjudication in a particular proceeding; (2) to establish a sufficient foundation for the contention to warrant further inquiry into the assertion; and (3) to put other parties sufficiently on notice of the issues so that they will know generally what they will have to defend against or oppose. *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974); *Palo Verde*, LBP-91-19, 33 NRC at 400. The *Peach Bottom* decision requires that a contention be rejected if:

> (1) it constitutes an attack on applicable statutory requirements;
>
> (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;
>
> (3) it is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;
>
> (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or
>
> (5) it seeks to raise an issue which is not concrete or litigable.

Peach Bottom, ALAB-216, 8 AEC at 20-21.

The Commission has explained that it "toughened its contention rule in a conscious effort to … obviate serious hearing delays caused in the past by poorly defined or supported contentions." *Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 334 (1999). The Commission observed that prior to the revision of the rule "[l]icensing Boards had admitted and litigated numerous contentions that appeared to be based on little more than speculation. Indeed, in practice, intervenors could meet the rule's requirements merely by copying contentions from another proceeding involving another reactor." *Id.* (internal quotation omitted). The petitioner in *Oconee* submitted a contention based on the fact that the Staff had requested additional information from the applicant. The petitioner submitted no documents, expert opinion or fact-based argument in support of the contention, and the *Oconee* Board ruled the contention inadmissible. In upholding the Board, the Commission wrote:

> It is surely legitimate for the Commission to screen out contentions of doubtful worth and to avoid starting down the path toward a hearing at the behest of Petitioner who themselves have no particular expertise – or expert assistance – and no particularized grievance, but are hoping something will turn up later as a result of NRC staff work.

Id. at 342.

An expert's affidavit is not required to support every contention. The regulation governing admissibility requires an intervenor to present "a concise statement of the alleged facts or expert opinion" supporting the contention and "references to the specific sources and documents on which [the intervenor] intends to rely". 10 C.F.R. § 2.309. For some contentions, materiality, specificity, and concreteness can be demonstrated by factual analysis or documentary evidence and no expert affidavit is required.

However, some contentions must be supported by an expert's affidavit. Where a contention is based on a conclusory allegation, speculation or opinion, and the allegation, speculation, or opinion is not supported by an expert's affidavit, boards have ruled those

contentions inadmissible. *E.g., Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139-140 (2004). Similarly, where a contention seeks to connect a set of facts with a specific result and that result is not self-evident, expert analysis is needed to bridge the gap. *E.g., Nuclear Management Company, LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 352 (2006), *aff'd* CLI-06-17, 63 NRC 727 (2006). As the Board in *Georgia Tech* recognized, "it is the petitioner who is obligated to provide the analyses and expert opinion showing why its bases support its contention." *Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995). And that obligation must be satisfied when the petition is filed.

> [T]he mere possibility . . . that Petitioner might in the future find an expert who could provide the assistance necessary to define clearly the issues in question and effectively litigate them, does not warrant admitting the contention at this stage of the proceeding, when we must rule on such questions of admissibility based on what has been provided to this point.

Nuclear Management Company, LLC (Palisades Nuclear Plant), CLI-06-17, 63 NRC 314, 352 fn 152 (2006).

2. Scope of License Renewal Proceedings

The Commission's regulations in 10 C.F.R. Part 54[11] limit the scope of a license renewal proceeding to the specific matters that must be considered for the license renewal application to be granted. Pursuant to 10 C.F.R. § 54.29, the Commission considers the following standards in determining whether to grant a license renewal application:

> 10 C.F.R. § 54.29 Standards for issuance of a renewed license:
>
> A renewed license may be issued by the Commission up to the full term authorized by § 54.31 if the Commission finds that:

---

[11] *See generally*, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991); Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995).

> (a) Actions have been identified and have been or will be taken with respect to the matters identified in Paragraphs (a)(1) and (a)(2) of this section, such that there is reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB, and that any changes made to the plant's CLB in order to comply with this paragraph are in accord with the Act and the Commission's regulations. These matters are:
>
> (1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review under § 54.21(a)(1); and
>
> (2) time-limited aging analyses that have been identified to require review under § 54.21(c).
>
> (b) Any applicable requirements of Subpart A of 10 C.F.R. Part 51 have been satisfied.
>
> (c) Any matters raised under § 2.335 have been addressed.

These standards, along with other regulations in 10 C.F.R. Part 54, and the environmental regulations related to license renewal set forth in 10 C.F.R. Part 51 and Appendix B thereto, establish the scope of issues that may be considered in a license renewal proceeding. The failure of a proposed contention to demonstrate that an issue is within the scope of the proceeding is grounds for its dismissal. 10 C.F.R. § 2.309(f)(1)(iii); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

The Commission has provided guidance for license renewal adjudications regarding which safety and environmental issues fall within or beyond its license renewal requirements. *See Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6 (2001). Specifically, the NRC conducts a technical review pursuant to 10 C.F.R. Part 54, to assure that pertinent public health and safety requirements have been satisfied. *Id.* at 6. In addition, the NRC performs an environmental review pursuant to 10 C.F.R. Part 51 to assess the potential impacts of twenty additional years of operation. *Id.* at 6-7. Regardless of

whether a license renewal application has been filed for a facility, the Commission has a continuing responsibility to oversee the safety and security of ongoing plant operations, and it routinely oversees a broad range of operating issues under its statutory responsibility to assure the protection of public health and safety for operations under existing operating licenses. Therefore, for license renewal, the Commission has found it unnecessary to include a review of issues already monitored and reviewed in the ongoing regulatory oversight processes. *Id.* at 8-10.

The Commission has clearly indicated that its license renewal safety review focuses on "plant systems, structures, and components for which current [regulatory] activities and requirements *may* not be sufficient to manage the effects of aging in the period of extended operation." *Id.* at 10 (*quoting* 60 Fed. Reg. at 22,469). Further, the Commission stated that: "Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC Staff review; for our hearing process (like our Staff's review) necessarily examines only the [safety] questions our safety rules make pertinent." *Id.* at 10.

Contentions raising environmental issues in a license renewal proceeding are similarly limited to those issues which are affected by license renewal and have not been addressed by rulemaking or on a generic basis. *Turkey Point*, CLI-01-17, 54 NRC at 11-12. In 10 C.F.R. Part 51, the Commission divided the environmental requirements for license renewal into generic and plant-specific components. *Id.* at 11. The Generic Environmental Impact Statement ("GEIS") contains "Category 1" issues for which the NRC has reached generic conclusions.[12] *Id.* Applicants for license renewal do not need to submit analyses of Category 1

[12] NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, (May, 1996) (ADAMS Accession No. ML040690705) ("GEIS").

issues in their Environmental Reports, but instead may reference and adopt the generic findings. *Id.* Applicants, however, must provide a plant-specific review of the non-generic "Category 2" issues. *Id.* Category 1 issues "are not subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings." *Id.* at 12;[13] *see* 10 C.F.R. § 51.53(c)(3)(i)-(ii).

The Commission recently reiterated this principle, and specified that the GEIS Category 1 conclusions generally may not be challenged in a license renewal proceeding:

> In 1996, the Commission amended the environmental review requirements in 10 C.F.R. Part 51 to address the scope of environmental review for license renewal applications. The regulations divide the license renewal environmental review into generic and plant-specific issues. The generic impacts of operating a plant for an additional 20 years that are common to all plants, or to a specific subgroup of plants, were addressed in a 1996 GEIS. Those generic impacts analyzed in the GEIS are designated "Category 1" issues. A license renewal applicant is generally excused from discussing Category 1 issues in its environmental report. Generic analysis is "clearly an appropriate method" of meeting the agency's statutory obligations under NEPA.
>
> The license renewal GEIS determined that the environmental effects of storing spent fuel for an additional 20 years at the site of nuclear reactors would be "not significant." Accordingly, this finding was expressly incorporated into Part 51 of our regulations. Because the generic environmental analysis was incorporated into a regulation, the conclusions of that analysis may not be challenged in litigation unless the rule is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding.

Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.*

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[13] In *Turkey Point*, the Commission recognized that "even generic findings sometimes need revisiting in particular contexts. . . . In the hearing process, for example, Petitioner with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule." *Turkey Point*, CLI-01-17, 54 NRC at 12.

(Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 17 (footnotes omitted), *reconsid*. *denied*, CLI-07-13, 65 NRC 211, 214 (2007).

B. Admissibility of San Luis Obispo Mothers for Peace Contentions

The Petition contains five proposed contentions. The following summarizes those contentions and provides the Staff's response to each contention.

PROPOSED CONTENTION TC-1

1. TC-1 Is Outside the Scope of this Proceeding and Lacks an Adequate Basis

TC-1 reads:

> The applicant, Pacific Gas & Electric Company (PG&E), has failed to satisfy 10 C.F.R. § 54.29's requirement to demonstrate a reasonable assurance that it can and will 'manag[e] the effects of aging' on equipment that is subject to the license renewal rule, i.e., safety equipment without moving parts. In particular, PG&E has failed to show how it will address and rectify an ongoing pattern of management failures with respect to the operation and maintenance of safety equipment.

Petition at 2. TC-1 then lists several findings from recent inspection reports, which SLOMFP asserts demonstrate "chronic and significant errors" on the part of PG&E. Petition at 3. SLOMFP contends that the reports "raise a genuine and material dispute regarding PG&E's ability to manage the effects of aging into the renewal period." *Id*. at 5. For the reasons discussed below, TC-1 is outside the scope of this proceeding and lacks an adequate factual basis.

a. TC-1 Is Outside the Scope of License Renewal

SOMFP correctly notes that 10 C.F.R. § 54.29 provides the standard for license renewal. That section states that to renew a license, the Commission must find,

> (a) Actions have been identified and have been or will be taken with respect to the matters identified in paragraphs (a)(1) and (a)(2) of this section, such that there is a reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB . . . These matters are:
>
> (1) managing the effects of aging during the period of extended operation on the functionality of structures and components that have been identified to require review . . ..

An applicant may demonstrate that it will adequately address age-related degradation for a given passive system, structure, or component within the scope of license renewal by providing an aging management plan ("AMP") for that item in its application. 10 C.F.R. § 54.29(a)(1). A sufficient AMP must " 'demonstrate that the effects of aging will be adequately managed so that the intended function(s) will be maintained consistent with the CLB for the period of extended operation.' " *Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), LBP-08-25, 68 NRC 763, 786 (2008) (*quoting* 10 C.F.R. § 54.21(a)(3)).

But, SLOMFP does not contend that the AMPs, if implemented, are inadequate to manage the effects of aging at DCNPP during the period of extended operation. Rather, in light of the cited inspection reports, SLOMFP challenges the Applicant's "ability to manage the effects of aging into the renewal period." Petition at 5. Thus, TC-1 rests on an interpretation of 10 C.F.R. § 54.29(a) that would require an applicant to not only provide an AMP for an in-scope system, structure, or component, but also to prove that the applicant will comply with the terms of the AMP. Petition at 2, 5. As discussed below, this interpretation contravenes Commission

precedent, undermines the carefully-structured scope of license renewal proceedings, and is contrary to the Commission's regulations.

i. TC-1 Rests on an Interpretation of 10 C.F.R. § 54.29 that Is Contrary to Commission Precedent

The Commission has never found that an applicant for license renewal must prove that it will implement the terms of its AMP's during the period of extended operation. Rather, in describing Part 54 generally, the Commission has stated, "Part 54 requires renewal applicants to demonstrate *how* their programs will be effective in managing the effects of aging during the proposed period of extended operation." *Palisades*, CLI-06-17, 63 NRC at 733-34 (*quoting Turkey Point*, CLI-01-17, 54 NRC at 8) (internal quotations omitted) (emphasis added). Thus, the Commission has recognized that the regulations governing license renewal only require an applicant to demonstrate that, if implemented, an AMP will adequately manage aging effects on passive systems, structures, and components. This conclusion comports with the Commission's general policy of not assuming that licensees will violate NRC regulations. *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000).

Moreover, a previous description of the Generic Aging Lessons Learned Report ("GALL Report") by the Commission confirms this understanding.

> An applicant for license renewal "may reference the GALL Report . . . to demonstrate that the programs at the applicant's facility correspond to those reviewed and approved" therein, and the applicant must ensure and certify that its programs correspond to those reviewed in the GALL Report. In other words, *the license renewal applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period*. If the applicant uses a different method for managing the effects of aging for particular SSCs at its plant, then the applicant should demonstrate to the Staff reviewers that its program includes the ten elements cited in the GALL Report and will likewise be effective. In addition, many plants will have plant-specific aging management programs for which there is no corresponding program in the GALL Report. For each aging

> management program, the application gives a brief description of the licensee's operating experience in implementing that program.

Amergen Energy Company, LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 468 (2008) (*quoting* NUREG-1801, Generic Aging Lessons Learned Report," Rev. 1, Vol. 1, at 3 (Sep. 2005) (GALL Report)) (emphasis added). Clearly, this description of license renewal does not contemplate a review to determine whether the applicant will comply with the specific terms of the AMPs during the period of extended operation. Rather, the Commission explicitly stated that the use of an AMP in the GALL Report constitutes the reasonable assurance necessary for license renewal. *Id*. Consequently, SLOMFP's suggestion that 10 C.F.R. § 54.29(a) requires an applicant to provide reasonable assurance that it will comply with the terms of its AMPs during the period of extended operation contradicts the Commission's previous explanations of AMPs. As discussed below, NRC oversight during the period of extended operation ensures that the licensee will implement the terms of the AMPs. Moreover, by its very nature, to demonstrate compliance with the AMP, the Licensee must be operating in the extended period, after a renewed license has been issued.

ii. Admission of TC-1 Would Undermine the Limited Scope of License Renewal Proceedings

TC-1 threatens to undermine the Commission's carefully structured scope for license renewal proceedings. The Commission based its regulations governing license renewal on two fundamental principles. First, the Commission stated that "with the exception of age-related degradation unique to license renewal[,] the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provide and maintain an acceptable level of safety for operation." 56 Fed. Reg. at 64,946. "Continuing this regulatory process in the future will ensure that this principle remains valid during any renewal term if the regulatory process is modified to include age-related degradation unique to license renewal." *Id*. Second, the Commission determined that "each plant's current licensing basis must be maintained during

the renewal term, in part through a program of age-related degradation management for systems, structures, and components that are important to license renewal." *Id*.

Thus, the Commission concluded, "the decision to issue a renewed operating license need not involve a licensing review of the adequacy of or compliance with a plant's licensing basis." *Id*. at 64,960. Instead, the Commission found that "the NRC's decision should normally be limited to whether actions have been identified and have been or will be taken to address age-related degradation unique to license renewal." *Id*. The Commission similarly limited hearings on license renewals to reflect the narrow scope of NRC review on such applications. *Id*. at 64,961. As the Commission later explained, "In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis [("CLB")] to re-analysis during the license renewal review." *Turkey Point*, CLI-01-17, 54 NRC at 9.

The Commission's rules on license renewal are based on the assumption that the NRC's ongoing regulatory activities are sufficient to ensure licensee compliance with the plant's current licensing basis during the initial period of operation and the extended period of operation. *See* 56 Fed. Reg. at 64,946. Elements of an AMP are incorporated into a plant's licensing basis during the period of extended operation. *See* 10 C.F.R. § 54.33(b) (stating that each renewed license will contain conditions and limitations to ensure that systems, structures, and components subject to review under Part 54 "will continue to perform their intended functions for the period of extended operation"). Thus, the extent to which a plant complies with the elements of its AMPs during the period of extended operation is subject to the NRC's continuing oversight activities, including, if necessary, increased oversight and enforcement actions. *See* 56 Fed. Reg. at 64,946 (noting that the Staff will continue to ensure a plant's compliance with its licensing basis during the period of extended operation). Consequently, a speculative review in this proceeding of whether the Applicant will comply with the terms of its AMP in light of its prior

compliance history would be precisely the type of duplicative inquiry the Commission sought to avoid. [14]

Indeed, when it promulgated the license renewal rules, the Commission discussed the possibility that some applicants for license renewal might not be fully compliant with all NRC requirements. The Commission found:

> Issues . . . which already are the focus of ongoing regulatory processes . . . do not come within the NRC's safety review at the license renewal stage:
>
> > The Commission cannot conclude that its regulation of operating reactors is "perfect" and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements. However, based upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety.

Turkey Point, CLI-01-17, 54 NRC at 10 (*quoting* 56 Fed. Reg. at 64, 945). Therefore, the Commission foresaw that plant's might not operate in "perfect compliance with all NRC requirements" when it promulgated the license renewal rule. *Id.* But, the Commission did not conclude that such non-compliances warranted a review to determine whether or not it could

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[14] The Commission has previously expressed disfavor with speculative bases for contentions. *See e.g.*, *Crow Butte*, CLI-09-12, 69 NRC 535, 562 (2009). The hearing on TC-1 would require the Board and parties to rely on today's operating experience at DCNPP to prognosticate whether PG&E will comply with its AMPs over the twenty year period of extended operation, which would begin in nearly fifteen years if the LRA is approved. In contrast, the NRC's normal oversight process involves no speculation. Should PG&E fail to comply with the terms of an AMP during the period of extended operation, the NRC will be in a position to identify the actual noncompliance and take appropriate measures.

find reasonable assurance that the applicant would implement the terms of its AMPs during the period of extended operations. Rather, the Commission determined that its ongoing oversight process is sufficiently rigorous to address such operating issues and ensure compliance with the CLB during the period of extended operation. Thus, the Commission found that reviewing such issues during license renewal "would not add significantly to safety." TC-1 merely points to several issues that are already subject to the NRC's ongoing oversight. Indeed, SLOMFP relies on NRC inspection reports to identify the "pattern of management failures" that form the bases for TC-1. Petition at 2-5. These inspection findings are plainly the type of issue that the Commission believed would be addressed by the ongoing oversight regulatory process. Hence, TC-1 is outside the scope of this proceeding.

The Commission crafted its license renewal rule around a carefully structured dichotomy between issues related to the aging of passive systems, structures, and components and current compliance issues subject to the NRC's ongoing regulatory oversight. TC-1 proposes to eviscerate that distinction. If the Board accepts the basic premise of TC-1, that current operating issues are relevant to the license renewal review because these issues reflect on the Applicant's ability to implement the terms of its AMPs, then any operating issue regarding DCNPP could support TC-1. As a result, this licensing proceeding would effectively become a wide-ranging inquiry into PG&E's conformance with its licensing basis. The terms of this inquiry would remain ever-malleable because new operating issues at DCNPP could widen and augment the scope of the issues before the Board. Moreover, once the Board completes its hearing on this contention, any new operating issues could form the bases to reopen these proceedings for subsequent contentions. Given the frequency with which the NRC inspects DCNPP, admission of TC-1 could result in an endless stream of contentions and, as a practical matter, result in the litigation of current performance issues. As a result, TC-1 is outside the scope of license renewal.

iii. Because TC-1 Effectively Challenges the NRC's Finding of Reasonable Assurance that the Applicant Is In Compliance with Its Licensing Basis, TC-1 Is Outside the Scope of this Proceeding

Pursuant to 10 C.F.R. § 54.30(a), if the license renewal review of a plant demonstrates that the plant will not comply with its CLB during the current licensing term, the licensee must take actions to address the noncompliance. The licensee's compliance with this requirement is "not within the scope of the license renewal review." 10 C.F.R. § 54.30(b).

TC-1 argues that current inspection reports demonstrate "an ongoing pattern of management failures." Petition at 2. TC-1 asserts that these reports identify "chronic and significant errors [PG&E] is currently committing in the management of safety equipment at DCNPP." *Id*. at 3. SLOMFP concludes, "The public has no reason for confidence that a renewed Diablo Canyon licensee would reasonably ensure protection of public health and safety. PG&E has shown that it cannot adequately identify, evaluate, and resolve maintenance problems involving safety equipment and systems." *Id*. at 5.

But, SLOMFP's arguments that the NRC cannot find reasonable assurance that the plant will comply with its CLB during the period of extended operation would apply with equal force to the current term of operation. If PG&E is incapable of adequately identifying, evaluating, and resolving maintenance problems involving safety equipment and systems, then this incapacity would impact the licensee's ability to safely operate the plant now, during the current term of operation. Therefore, SLOMFP's arguments effectively challenge the NRC's ability to find reasonable assurance that PG&E could safely operate the plant during the present term of operation. Clearly, PG&E would have an obligation to rectify those matters immediately pursuant to 10 C.F.R. § 54.30(a). Under 10 C.F.R. § 54.30(b), this issue would then be outside the scope of license renewal.

Moreover, NRC regulations already provide a sufficient avenue for SLOMFP to raise its concerns regarding PG&E's current operation of DCNPP. SLOMFP can always file a petition under 10 C.F.R. § 2.206 to redress on going compliance issues at DCNPP. Thus, twisting the scope of license renewal proceedings beyond their clearly delineated limits to accommodate TC-1 would serve no purpose.

b. TC-1 Lacks an Adequate Basis

Even assuming this inquiry was within the scope of the proceeding, TC-1 would not meet the admissibility requirements of 10 C.F.R. § 2.309(f)(1)(vi). The contention lacks sufficient information to demonstrate a genuine dispute on a material issue of law or fact. As noted above, to renew a license, the Commission must find "reasonable assurance that the activities authorized by the renewed license will continue to be conducted in accordance with the CLB." 10 C.F.R. § 54.29. TC-1 alleges that the application does not meet this standard because PG&E has not demonstrated that it will comply with the terms of its AMPs during the period of extended operation.[15] The contention relies on several NRC inspection findings describing incidents of non-compliance on the part of the Applicant. But, given the quantity and magnitude of these inspection findings, they are not the type of violations that can cause the NRC to be unable to find reasonable assurance.

Violations that lead to the Staff's inability to find reasonable assurance that the plant will operate in conformity with its licensing basis will result in the Staff placing the plant in the Unacceptable Performance Column (Column 5) of its Action Matrix. NRC Inspection Manual, Manual Chapter 0305, Operating Reactor Assessment Program, at 26 (Dec. 24, 2009) (ADAMS Accession No. ML093421300) ("NRC Inspection Manual, Manual Chapter 0305"). If the Staff

[15] Should the NRC renew the operating license, the terms of the AMPs will be implemented in the licensing basis for DCNPP. 10 C.F.R. § 54.33(b).

places a plant in the Unacceptable Performance Column, the NRC will issue a shutdown order for that plant. *Id*. Examples of unacceptable performance include: "[m]ultiple significant violations of the facility's license, technical specifications, regulations, or orders;" "multiple safety-significant examples where the facility was determined to be outside of its design basis;" or "[a] pattern of failure of licensee management controls to effectively address previous significant concerns." *Id*. Previously, the NRC has issued a shutdown order to the Three Mile Island license holder for lack of reasonable assurance after the incident at that plant. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-79-8, 10 NRC 141, 142-43 (1979). Additionally, the NRC Staff issued a shutdown order to D.C. Cook in light of electrical fire concerns arising from research following the Brown's Ferry incident. *Petition for Emergency and Remedial Action*, CLI-78-6, 7 NRC 400, 410, 417, 420-21 (1978).

In contrast, when it promulgated the license renewal rule, the Commission stated that it could not find that all plants have and will operate in perfect compliance with all NRC requirements. 56 Fed. Reg. at 64,945. Nonetheless, the Commission concluded that the existing oversight process sufficed to protect public health and safety and that a similar review during license renewal "would not add significantly to safety." *Id*. Therefore, the Commission appears to have recognized that routine compliance issues would not prohibit the Commission from finding reasonable assurance that an applicant would safely operate its plant during the period of extended operation. Only instances of non-compliance that are of sufficient magnitude and pervasiveness could support an NRC finding of no reasonable assurance that an Applicant will comply with the terms of its CLB during the period of extended operation. Such instances have not been identified here.

SLOMFP primarily relies on the portions of three NRC inspection reports that

documented an adverse trend in problem evaluation at DCNPP from 2007 to 2009.[16] These inspection reports found that PG&E "used less than adequate thoroughness when evaluating problems resulting in the failure to identify the extent of conditions [and adverse effects] on the operability of Technical Specification required equipment." IRR 08-05, Enclosure 1 at 24. Many of the evaluations identified by the inspection reports related to PG&E's determinations that proposed changes to DCNPP met the criteria of 10 C.F.R. § 50.59 and therefore did not require PG&E to request amendment of the DCNPP licenses before implementing the changes. IRR 08-05 at 24-25; IRR 09-03 at 22; IRR 09-05 at 24-25. Other specific examples included a "less than adequate" evaluation of particulate radiation monitor operability, a failure to adequately evaluate 230 kV operability, and an inadequate operability evaluation of the reactor coolant leakage detection system. IRR 08-05, Enclosure 1 at 25. As SLOMFP's pleading points out, the NRC Staff characterized many of these findings as "minor violation[s]." Petition at 4. Indeed, none of these inspection reports documented a finding of greater significance than a "green finding,"[17] the lowest level of violation contemplated by the Staff's enforcement manual.[18] While the Staff does not minimize the importance of these findings, they do not rise to the level of the violations that have previously resulted in the NRC's inability to find reasonable

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[16] Petition at 3-5 *citing* (Diablo Canyon Power Plant - NRC Integrated Inspection Report 05000275/2008005, 05000323/2008005 and 07200026/2008001, Enclosure 1 at 24-25 (Feb. 6, 2009) (ADAMS Accession No. ML090370406) ("IIR 08-05"); Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009003 and 05000323/2009003, Enclosure 1 at 21-24 (Aug. 5, 2009) (ADAMS Accession No. ML092170781) ("IIR 09-03"); Diablo Canyon Power Plant – NRC Integrated Inspection Report 05000275/2009005 and 05000323/2009005, Enclosure 1 at 35-37 (Feb. 3, 2010) (ADAMS Accession No. ML100341199) ("IIR 09-05")). SLOMFP also points out that IIR 09-03 notes an adverse trend in design margin and capability of ac power systems, but SLOMFP does not discuss what significance this finding has to PG&E's capacity to "adequately identify, evaluate, and resolve maintenance problems." Petition at 5 (*citing* IIR 09-03, Enclosure 1 at 24).

[17] IIR 08-05, at 1; IIR 09-03 at 1; IIR 09-05 at 1.

[18] Reactor Oversight Process, NUREG-1649, Rev. 3, at 5 (Dec. 2006) (ADAMS Accession No. ML070890365).

assurance.[19] As a result, these findings do not provide sufficient support for TC-1.[20]

Therefore, TC-1 is not supported by "sufficient information" to demonstrate a genuine issue of material fact. 10 C.F.R. § 2.309(f)(1)(vi). As discussed above, TC-1 asserts that in light of the adverse trend in problem evaluation, the Applicant cannot demonstrate with reasonable assurance that it can manage the effects of aging during the period of extended operation. But, the information underlying this contention is not the type of information that can prevent a finding of reasonable assurance. While the NRC has identified violations at DCNPP in recent months, these violations are plainly of a different order of magnitude than those that have previously resulted in the NRC being unable to find reasonable assurance that a licensee

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[19] In addition, these issues do not relate to the degradation of a passive systems, structure or component as a result of aging.

[20] In the past, the Commission has considered contentions similar to TC-1 outside the context of Part 54 license renewal. *E.g. Georgia Institute of Technology (*Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 118 (1995); *Georgia Power Company, et al.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 31 (1993). Such contentions have focused on management integrity. *Georgia Tech*, CLI-95-12, 42 NRC at 120. But these cases involved allegations far more serious than those at issue here and proceedings that were not conducted under Part 54. *Id*. at 118-22.

The Staff recognizes that an ASLB recently admitted a similar contention in the Prairie Island Nuclear Generating Plant license renewal proceedings. *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Order (Narrowing and Admitting PIIC's Safety Culture Contention) (January 28, 2010) (unpublished) ("ADAMS") Accession No. ML100280537) ("PINGP Order"). Naturally, this decision is not binding on this Board. *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-25, 48 NRC 325, 343 n.3 (1998) ("[U]nreviewed Board rulings do not constitute precedent or binding law at this agency."). The Staff continues to disagree with the ASLB's findings in that proceeding and that decision is currently under appeal to the Commission. But, even if this Board were to follow that decision, the Staff notes that the contention in *Prairie Island* relied on more supporting facts than TC-1. The contention in *Prairie Island* relied on a performance issue similar to the problem identification finding noted by IIR 08-05, IIR 09-03, and IIR 09-05. Prairie Island Indian Community's Submission of a New Contention on the NRC Safety Evaluation Report, at 4-10 (Nov. 23, 2009) (ADAMS Accession No. ML093270615). But, the *Prairie Island* contention also involved inspection reports that resulted in two white findings and an ongoing problem with a leak in the reactor refueling cavity. *Id*. In describing the contention, the *Prairie Island* Board stated that the contention did "not arise from any single event or any single piece of information. Rather it arises from the history of [the applicant's] deficient performance and dereliction of its obligations to promptly and effectively correct deficient conditions." PINGP Order at 5-6 (quotations omitted). TC-1 does not point to any similar additional findings to support its claim that PG&E lacks the ability to implement the AMPs during the period of extended operation.

will comply with the terms of its licensing basis. Rather, these inspection reports document the type of compliance issues that the Commission contemplated would not prohibit the finding of reasonable assurance necessary to renew a plant's operating license.[21] 56 Fed. Reg. at 64,945. Consequently, in addition to being outside the scope of this proceeding, TC-1 lacks a sufficient basis.

c. Conclusion as to TC-1

For the reasons discussed above, TC-1 is an inadmissible contention. TC-1 is outside the scope of this proceeding pursuant to 10 C.F.R. § 54.30(b) and lacks adequate basis Therefore, admission of TC-1 should be denied.

PROPOSED CONTENTION EC-1

2. Contention EC–1

EC-1 reads:

> Failure of SAMA Analysis to Include Complete Information about Potential Environmental Impacts of Earthquakes and Related SAMAs

Petition at 8. In support of the contention, SLOMPF argues that PG&E's SAMA analysis fails to satisfy 40 C.F.R. § 1502.22 because it is not based on complete information.[22] SLOMPF contends that the SAMA analysis omits the use of the "Shoreline Fault" which is necessary for an understanding of the seismic risks to the Diablo Canyon Nuclear Power Plant. Furthermore,

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[21] "[B]ased upon its review of the regulatory programs in this rulemaking, the Commission does conclude that (a) its program of oversight is sufficiently broad and rigorous to establish that the added discipline of a formal license renewal review against the full range of current safety requirements would not add significantly to safety, and (b) such a review is not needed to ensure that continued operation during the period of extended operation is not inimical to the public health and safety." 56 Fed. Reg. at 64,945.

[22] The Staff notes that the NRC is not required to follow guidance promulgated by the Council on Environmental Quality but gives it substantial deference. *Dominion Nuclear North Anna*, *LLC* (ESP for North Anna Early Site Permit Site), CLI-07-27, 66 NRC 215, 222 n.21 (2007).

since the Applicant has not acknowledged the absence of the information in its SAMA analysis or demonstrated that the information is too costly to obtain, the SAMA analysis does not satisfy the requirements of the National Environmental Policy Act ("NEPA") or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L). Petition at 8-9. SLOMFP contends that PG&E must await the final results of the "Shoreline Fault" study and the results of a broader regional tectonic study before it can submit a complete SAMA analyses for DCNPP. Petition at 14-15.

DCNPP has a unique and complex seismic design and licensing basis. Specifically, the DCNPP Unit 1 full-power license DPR-80 has a license condition (2.C.(7)) that required a reevaluation of the seismic design basis of the plant.[23] To meet this requirement, PG&E developed the Long-Term Seismic Program (LTSP). Based on United States Geological Service ("USGS") recommendations and on requirements in 10 C.F.R. Part 100, Appendix A, NRC required a significant increase in the seismic design basis to what is now known as the Hosgri ground motion. This safe shutdown earthquake ("SSE") ground motion is based on the assumption of a magnitude 7.5 earthquake on the Hosgri Fault, which is located 5 km (3 mi) from the DCNPP Consequently, PG&E reanalyzed and upgraded the plant design to accommodate the higher estimates of shaking levels caused by the Hosgri Fault.

As part of the LTSP, PG&E performed a full seismic reevaluation of the DCNPP between 1985 and 1988.[24] During that reevaluation, the licensee determined that the Hosgri Fault was

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[23] In the years after the FSAR submission, PG&E investigated the Hosgri Fault Zone located near DCNPP in response to NRC requests for additional information. At the same time, the USGS performed an independent investigation of the fault zone for the NRC. Based on USGS recommendations and on requirements in 10 C.F.R. Part 100, Appendix A, the NRC required a significant increase in the seismic design basis to what is now known as the Hosgri ground motion.

[24] The results of the program are detailed in the Final Report of the Diablo Canyon Long Term Seismic Program (PG&E, 1988) and summarized in the Seismic Safety Evaluation Report, NUREG-0675 Supplement No. 34 (1991).

the controlling fault. NRC staff agreed that the Hosgri Fault remained the controlling fault, but came to believe that a higher review ground shaking level was appropriate for the scenario earthquake. As a result, the licensee increased the review spectrum, and undertook a reevaluation of the plant with this new "LTSP spectrum."[25] The LTSP response spectrum is the current review spectrum for the plant and is used as a point of comparison in the study detailed in the *Preliminary Deterministic Analysis of Seismic Hazard at Diablo Canyon Nuclear Power Plant from Newly Identified "Shoreline Fault"* at 10-11 (April 8, 2009) ("RIL-09-001") (ADAMS Accession No. ML090330523).[26]

The Staff has no objection to admission of a limited part of proposed Contention EC-1 which constitutes a contention of omission in that the SAMA evaluation contained in the ER (Attachment F to Appendix E of the ER) omits a discussion of the "Shoreline Fault." However, the Staff opposes the admission of the remainder of Contention EC-1 specifically requiring a further study of the fault and a broader regional study to be included in the analysis in the Environmental Report. Petition at 14. Specifically, the Petitioner have failed to provide a sufficient basis for this part of their contention. *See* 10 C.F.R. § 2.309(f)(1)(v).

a. EC-1 In Part Constitutes an Admissible Contention of Omission

Petitioner is correct that the SAMA analysis omits information regarding the newly discovered Shoreline Fault. Applicant's failure to discuss information in its License Renewal Application constitutes an omission. Thus, that part of the contention is a contention of

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[25] The LTSP spectrum is essentially a Hosgri spectrum that is enhanced over some frequencies. Ground motions, like other forms of energy that propagate as complex waves (such as light and sound), are composed of energy at many frequencies being combined together in complex patterns that can be defined by a plot of amplitude versus frequency (a spectrum). In engineering, the definition of seismic ground shaking levels is called the response spectrum.

[26] Any changes that might be required as a result of the LTSP program would be under its current licensing basis and would not be materiel to this proceeding.

omission. *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-83 (2002).

The Commission stated: “There is, in short, a difference between contentions that merely allege an ’omission’ of information and those that challenge substantively and specifically how particular information has been discussed in a license application. Where a contention alleges the omission of particular information or an issue from an application, and the information is later supplied by the applicant or considered by the Staff in a draft EIS, the contention is moot.” *McGuire/Catawba*, CLI-02-28, 56 NRC at 382-383.

In order for the Staff to complete its SAMA review, it will need additional information from the Applicant related to the Shoreline Fault. The Staff will need to know how the Applicant’s SAMA analysis is affected by consideration of the Shoreline Fault. The Staff believes that, as to the discussion of the Shoreline Fault, the following has been omitted from the Environmental Report:

(1) The potential impact of the Shoreline Fault on the seismic core damage frequency (CDF) and off-site consequences.

(2) If the revised CDF estimate and consequences are higher, how the use of the higher CDF affects the SAMA analysis.

(3) The Applicant’s search for any equipment or structure failures not previously identified that relate specifically to mitigating the potential risk associated with the Shoreline Fault.

To the extent EC-1 identifies the Applicant’s failure to include Shoreline Fault SAMA analysis, EC-1 is an admissible contention of omission. The Staff proposes the following language for EC-1:

> The SAMA evaluation contained in the Environmental Report, at Attachment F to Appendix D omits a discussion of the impact, if any, the "Shoreline Fault" might have on the SAMA evaluation.

b. To the Extent EC-1 Contends that the ER Must Await the "Shoreline Fault" Study, EC-1 Is Inadmissible for Lack of Basis

The Petitioner is incorrect that it is necessary to wait for the results of the long-term seismic studies, because precise quantification using state-of-the-art PRA methods is not needed to complete a SAMA analysis, nor does the Petitioner explain why this would be necessary. Petition at 14,15. The Applicant may be able to complete its analyses based on the information that is available today but not discussed in its ER. If the Applicant does not have a revised seismic PRA, a sensitivity analysis using a best estimate or conservative multiplier on the CDF would be sufficient for the purpose of completing the SAMA analysis. SAMA analyses rest on a "process that determines the worth of potential actions that could be taken, in advance, to mitigate the effects of a severe accident." *Northern States Power Company*, (Prairie Island Nuclear Generating Plant, Units 1and 2), LBP-08-26 , 68 NRC 905, 923 n. 115 (2008). Thus, a conservative estimate of the impacts from the Shoreline Fault would suffice if it can be shown that this approximate analysis would serve to identify any potentially cost beneficial SAMAs that might be identified using a more precise estimate of the impacts from the Shoreline Fault on DCNPP. As the Commission has stated, "while there 'will always be more data that could be gathered,' agencies 'must have some discretion to draw the line and move forward with decisionmaking.'" *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (March 26, 2010)(slip op. at 37) (*quoting Hells Canyon Alliance v. United States Forest Serv.,* 227 F.3d 1170, 1185 (9th Cir.2000)).

i. Admissible Contentions Must Contain an Adequate Factual Basis

For each contention a petitioner seeks to admit, the petitioner must "provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's

position on the issue." 10 C.F.R. § 2.309(f)(1)(v). The Commission has concluded, "[m]ere 'notice pleading' is insufficient under these standards." *Fansteel, Inc.*(Muskogee, Oklahoma Site), CLI-03-13, 58 NRC 195, 203 (2003). "[B]are assertions and speculation [are] not enough to trigger an adversary hearing . . .." *GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 208 (2000). Thus, "[a] petitioner's issue will be ruled inadmissible if the petitioner 'has offered no tangible information, no experts, [or] no substantive affidavits." *Fansteel, Inc.*, CLI-03-13, 58 NRC at 203 (*quoting Oyster Creek*, CLI-00-5, 51 NRC at 207). Rather, "a petitioner may meet its pleading burden by providing 'plausible and adequately supported' claims." *Id*. While the Commission does not "expect a petitioner to prove its contention at the pleading stage," the Commission does require a petitioner to "show a genuine dispute warranting a hearing." *Private Fuel Storage*, CLI-04-22, 60 NRC at 139. Thus, a petitioner must demonstrate how the facts upon which it relies support its contention. *Id*. (rejecting a contention that an ER failed to adequately evaluate the health impacts of a defective spent-fuel storage canister at a storage site when the petitioner failed to demonstrate "how a canister could become so contaminated that it would be harmful to workers at the storage site").

ii. EC-1 Does Not Provide Supporting Reasons, Facts or Expert Opinion for Concluding that the NRC Must Wait for A Further Seismic Study

SLOMPF has requested that PG&E wait for the tectonic modeling and three-dimensional modeling (which will be completed in 2013) and then complete a probabilistic evaluation of the risk of the Shoreline Fault and conduct a SAMA analysis. Petition at 15. However, the Petitioner does not refer to any specific documents or other sources of which the Petitioner is aware and upon which it intends to rely in establishing the validity of waiting for a new probabilistic analysis

of the newly discovered fault or how this information might impact the SAMA analysis.[27] *Millstone*, CLI-01-24, 54 NRC at 358 (*citing Duke Energy Corp.* (Oconee Nuclear Station, Units 1, 2, & 3), CLI-99-11, 49 NRC 328, 333 (1999)). The Petitioner must submit more than "bald or conclusory allegation[s]" of a dispute with the Applicant. *Id.*

The Petitioner alleges that when the Applicant conducted its SAMA analysis, it should have used information regarding the newly discovered fault off the coast from the Diablo Canyon Nuclear Power Unit which is known as the "Shoreline Fault."[28] Specifically, the Petitioner relies upon the NRC Research Information Letter 09-001RIL-09-001, the "collaborative research program" conducted by PG&E and the United States Geologic Survey (USGS) under the Collaborative Research and Development Agreement ("CRADA"), and the January 20, 2010, NRC issued report summarizing a January 5, 2010 meeting with PG&E regarding the Shoreline Fault (Summary of January 5, 2010, Meeting With Pacific Gas and Electric Company ("Meeting Summary")) (ADAMS Accession No. ML100130753). Petition at 9-12. Petitioner provides no other other evidence or expert opinions or documents to support its assertion that the SAMAs are deficient without further studies.

Petitioner cites from the RIL-09-001, the Meeting Summary discussing the fault, and the Staff's determination that the updated information has not changed the conclusion that the "Hosgri Fault" is bounding and that PG&E had performed additional analysis showing that damage due to secondary faulting is "very unlikely to impact the DCNPP seismic core damage frequency." Petition at 10-12. The Petitioner further cites the Environmental Report at F-65, F-3-F-23 and other pages in the Report to show the absence of discussion of the Shoreline Fault.

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[27] The SAMA analysis in the Environmental report uses data from the Hosgri fault that is based upon the 1994 Review of the Diablo Canyon Probabilistic Risk Assessment, NUREG/CR-5726. Petitioners do not explain how the new fault would change the SAMA analysis.

[28] The Petition at 9 discusses what is known as the "Shoreline Fault".

These documents may suffice to demonstrate that the application omitted discussion of the Shoreline Fault in the SAMA; but Petitioner does not say how the information contained in these documents demonstrates that the Staff must await completion of future studies or how these studies would impact the SAMA analysis. Petitioner does not proffer any facts or expert opinion in support of its rationale that waiting for a further study of this new fault is necessary or to demonstrate how a such a report would change the SAMA analysis. Rather, SLOMFP relies primarily on speculation and bare assertion to support the proposition that the NRC cannot complete an adequate SAMA analysis for DCNPP until these studies are final. The Commission has stated that it "is unwilling to throw open its hearing doors to petitioners who have done little in the way of research or analysis, provide no expert opinion, and rest merely on unsupported conclusions." *McGuire/Catawba*, CLI-02-17, 56 NRC at 8. While there "will always be more data that could be gathered,… [agencies] must have some discretion to draw the line and move forward with decisionmaking." *Pilgrim*, CLI-10-11, 71 NRC __ (slip op. at 37) (internal quotations omitted).

Finally, Petitioner also alleges that not waiting for the study would impact the California Public Utilities Commission's ability to undertake its AB 1632 obligations to ensure plant reliability, and in turn to ensure grid reliability, in the event of prolonged or permanent plant outage. Petition at 15. While the studies may have an affect on the State of California's oversight, California State rules and or regulations have no bearing on this proceeding and therefore do not establish the validity of waiting for the seismic study.

c. Conclusion as to EC-1

As discussed above, proposed Contention EC-1 is admissible to the extent that it is a contention of omission, alleging that the ER is incomplete because it omits discussion of the Shoreline Fault in its SAMA analysis. However, the contention is inadmissible to the extent that it alleges that the ER must await the Shoreline Fault study. The Staff proposes the following

language for EC-1:

> The SAMA evaluation contained in the Environmental Report, at Attachment F to Appendix D omits a discussion of the impact, if any, the "Shoreline Fault" might have on the SAMA evaluation

PROPOSED CONTENTION EC-2

3. EC-2 Is Outside the Scope of this Proceeding, Lacks an Adequate Factual Basis, and Does Not Contain Sufficient Information to Demonstrate a Genuine Dispute on a Material Fact with the Application

EC-2 reads:

> 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. This contention is inadmissible because it seeks to litigate an issue that is outside the scope of this license renewal proceeding. In addition, EC-2 lacks an adequate factual basis and fails to raise a genuine dispute with the application. Consequently, the Board should dismiss it.

a. EC-2 Relates to a Category 1 Issue and Is Therefore Outside of the Scope of a License Renewal Proceeding

As discussed above, the Commission has limited contentions raising environmental issues in license renewal proceedings to those issues that are affected by license renewal and have not been addressed by rulemaking or on a generic basis. *Turkey Point*, CLI-01-17, 54 NRC at 11, 16. In 10 C.F.R. Part 51, the Commission divided the environmental requirements for license renewal into generic and plant-specific issues. *Id.* at 11. The GEIS addresses "Category 1" issues for which the NRC has reached generic conclusions for commercial nuclear power plants. Therefore, applicants for license renewal do not need to submit analyses of Category 1 issues in their Environmental Reports, but instead may reference and adopt these generic findings. *Id.* Applicants, however, must provide a plant-specific review of the non-

generic "Category 2" issues. *Id.* Likewise, the Staff may adopt applicable Category 1 findings from the GEIS in preparing a site-specific Environmental Impact Statement ("EIS"). *Id*. Category 1 issues generally "are not subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings." *Id.* at 16; *see also* 10 C.F.R. § 51.53(c)(3)(i)-(ii). The Commission reaffirmed these fundamental principles in *Vermont Yankee*, CLI-07-3, 65 NRC at 17.

The GEIS generically considered the impacts of onsite storage of spent fuel during the term of extended operation.[29] GEIS at 6-85 – 6-86. In light of NRC regulatory requirements and experience with spent fuel pools, the GEIS concluded that "continued storage of existing spent fuel and storage of spent fuel generated during the license renewal period can be accomplished safely and without significant environmental impacts." *Id*. Consequently, Part 51 identifies the environmental effects of on-site spent fuel storage as a Category 1 issue. 10 C.F.R. Part 51, App. B.

SLOMFP concedes that "NRC regulations excuse PG&E from considering the environmental impacts of spent fuel storage in this proceeding." Petition at 19. Thus, SLOMFP has submitted a 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"). As discussed in the Staff's response to the Waiver Petition, the Waiver Petition fails to make a prima facie case that in light of special circumstances unique to DCNPP, application of the rules implementing the GEIS to EC-2 would not serve the purposes for which the Commission promulgated those regulations. Thus, EC-2 is outside the scope of this proceeding.

b. EC-2 Fails to Provide Sufficient Information to Demonstrate a Genuine Dispute with the Application

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[29] *Id.*

Pursuant to 10 C.F.R. § 2.309(f)(1)(vi), for each contention an intervenor seeks to admit, the intervenor "must provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." This information must identify specific portions of the application "that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). Even assuming EC-2 were within the scope of this proceeding, SLOMFP has failed to show that it meets the requirements of 10 C.F.R. § 2.309(f)(1)(vi). SLOMFP notes that with respect to the impacts of spent fuel storage, the Environmental Report ("ER") relies on the analysis in the GEIS. Petition at 16 (*citing* ER at 4-1). Thus, SLOMFP concludes that "the license renewal GEIS is the appropriate focus of this contention." *Id*.

But, SLOMFP's discussion in support of EC-2 fails to claim any deficiency in the GEIS itself. Rather, SLOMFP concentrates its arguments entirely on 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"). For now, the Draft Revised GEIS is only a draft. The contents of the Draft Revised GEIS, including its analysis of the environmental impacts of spent fuel pool accidents, may change as a result of public comment or further study on the part of the Staff. Rather, the existing GEIS is the operative document in this proceeding, currently incorporated by the Commission's regulations, and referenced by the ER.[30] As a result, this proceeding focuses on the analysis in the GEIS, not the proposed analysis contained in the Draft Revised GEIS. SLOMFP has failed

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[30] *See Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), Order (Granting Motion for Leave to File New Contentions and Denying Their Admission) (Unpublished), at 11 (Feb. 25, 2010) (ADAMS Accession No. ML100560382) (declining to rely on the Draft Revised GEIS to delineate the scope of a license renewal proceeding).

to show how the analysis in the GEIS is insufficient. Instead, SLOMFP challenges the analysis in the Draft Revised GEIS, but that evaluation is not incorporated into the regulations or relied on by the ER. Because the focus of EC-2 is an analysis not relied on by the ER, EC-2 fails to provide sufficient facts to demonstrate a genuine dispute with a portion of the application. Thus, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), EC-2 is inadmissible.

c. EC-2 Lacks a Sufficient Factual Basis

Even if EC-2 were within this proceeding's scope and focused its arguments on a portion of the application or the GEIS, it would still lack an adequate basis to demonstrate that the ER inadequately considers seismically-caused spent fuel pool accidents. EC-2's discussion of the Draft Revised GEIS does not demonstrate any deficiency in the current GEIS. In fact, it demonstrates that the conclusions in the GEIS are more robust than originally thought. Thus, pursuant to 10 C.F.R. § 2.309(f)(1)(v), EC-2 is inadmissible.

As discussed above, for each contention a petitioner seeks to admit, the petitioner must "provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue."[31] 10 C.F.R. § 2.309(f)(1)(v).

To support EC-2, SLOMFP argues that "very little discussion" supports the GEIS findings regarding spent fuel pools. Petition at 16. SLOMFP states that the Draft Revised GEIS updates the GEIS "by addressing additional analyses performed since 1996." *Id*. 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 (January 2001) (ADAMS Accession No. ML010430066) ("NUREG-1738"), to determine that "the health-related environmental impacts of a spent fuel pool accident would be comparable to or lower than the

[31] *See supra* section II.B.2.b.i.

impacts of a reactor accident and are bounded by the 1996 GEIS." *Id*. at 16-17. 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 analysis for spent fuel pool accidents at DCNPP is incomplete. Petition at 19. 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 17. 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 ER does not "contain a complete analysis of the potential for a pool fire at Diablo Canyon." *Id*. at 18-19. But, the ER relies on the GEIS, which fully considers the potential environmental impacts of spent fuel pool accidents during the period of extended operation. GEIS at 6-70 – 6-86. Although SLOMFP complains that the conclusions in the GEIS rest on "very little discussion," Petition at 16, the GEIS's analysis of the environmental impacts of on-site spent fuel storage covers almost sixteen pages. GEIS at 6-70 – 6-86. SLOMFP has not produced any evidence or testimony to demonstrate how this discussion in insufficient. Rather, SLOMFP has only asserted that it is inadequate.

SLOMFP provides a more-detailed critique of the Draft Revised GEIS. Specifically, SLOMFP argues that the Draft Revised GEIS relies on an analysis that did not fully consider seismic issues at DCNPP. Petition at 16-17. But SLOMFP does not show how this feature of the Draft Revised GEIS renders the GEIS, upon which the ER relies, inadequate. In fact, 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. Thus, if

anything, the Draft Revised GEIS suggests that the analysis in the current GEIS is more conservative than expected. *Id*.

In addition, 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. Petition at 18 and n.7. 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 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.

Therefore, SLOMFP has failed to provide an adequate factual basis for EC-2. Although SLOMFP asserts that the ER and GEIS contain an inadequate evaluation of the environmental impacts from spent fuel pool accidents, none of the evidence upon which SLOMFP relies undermines the conclusions in the GEIS. If anything, the documents SLOMFP cites suggest that the conclusions in the GEIS are safer than originally thought. Consequently, the Board should dismiss EC-2.

d. Conclusion as to Proposed Contention EC-2

As discussed above, EC-2 is inadmissible because it is outside the scope of this proceeding, fails to demonstrate that there is a genuine dispute with the license renewal application and lacks a sufficient basis.

PROPOSED CONTENTION EC-3

4. EC-3 Is Outside the Scope of this Proceeding, Lacks an Adequate Factual Basis, and Does Not Contain Sufficient Information to Demonstrate a Genuine Dispute on a Material Fact with the Application

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. This contention is inadmissible because it seeks to litigate an issue that is outside the scope of this license renewal proceeding. In addition, EC-3 lacks an adequate factual basis and fails to raise a genuine dispute with the application. Consequently, the Board should dismiss it.

a. EC-3 Relates to a Category 1 Issue and Is Therefore Outside of the Scope of a License Renewal Proceeding

As discussed above, the Commission has limited contentions raising environmental issues in license renewal proceedings to those issues that are affected by license renewal and have not been addressed by rulemaking or on a generic basis. *Turkey Point*, CLI-01-17, 54 NRC at 11, 16. The GEIS generically considered the impacts of onsite storage of spent fuel during the term of extended operation. GEIS § 6.4.6.7. In light of NRC regulatory requirements and experience with spent fuel pools, the GEIS concluded that "continued storage of existing spent fuel and storage of spent fuel generated during the license renewal period can be accomplished safely and without significant environmental impacts." *Id*. Consequently, Part 51 identifies on-site spent fuel as a Category 1 issue. 10 C.F.R. Part 51, App. B.

The GEIS at § 5.3.3.1 specifically discusses the issue raised by the contention in "Review of Existing Impact Assessments," which considered the risk from sabotage and beyond design basis earthquakes at existing nuclear power plants and concluded it is small and that the

risks from these and other external events are adequately addressed by a generic consideration of internally initiated severe accidents.[32] Thus, attacks on spent fuel pools are covered as a Category 1 issue and the environmental impact of an attack has already been given adequate NEPA consideration in the GEIS.[33]

Without any basis, SLOMFP has presumed that the "NRC did indeed rely on site-specific measures for evaluation of the impacts of attacks on the DCNPP spent fuel pool and appropriate mitigation measures," and therefore in a separate motion requested that the Commission waive its regulations to permit a site-specific evaluation of the environmental impacts of an attack on the spent fuel pool. Petition at 21. As discussed in the Staff's response to the Waiver Petition, the Waiver Petition fails to make a prima facie case that in light of special circumstances unique to DCNPP, application of the rules implementing the GEIS to EC-3 would not serve the purposes for which the Commission promulgated those regulations and should be denied. NRC Staff's Response to the Petition for Waiver of Commission Regulations Filed by San Luis Obispo Mothers for Peace, at 11-13 (April 16, 2010).

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[32] "The Commission has long used deterministic criteria to establish a set of regulatory requirements for the physical protection of nuclear power plants from the threat of sabotage. 10 CFR Part 73, "Physical Protection of Plants and Materials", delineates these regulatory requirements. In addition, as a result of the World Trade Center bombing, the Commission amended 10 CFR Part 73 to provide protection against malevolent use of vehicles, including land vehicle bombs. This amendment requires licenses to establish vehicle control measures, including vehicle barrier systems to protect against vehicular sabotage. The regulatory requirements under 10 CFR part 73 provide reasonable assurance that the risk from sabotage is small. The GEIS further states, "Nonetheless, if such events were to occur, the Commission would expect that resultant core damage and radiological releases would be no worse than those expected from internally initiated events. Based on the above, the Commission concludes that the risk from sabotage and beyond design basis earthquakes at existing nuclear power plants is small and additionally, that the risks from other external events are adequately addressed by a generic consideration of internally initiated severe accidents." *See* GEIS at Section 5.3.3.1.

[33] The Commission previously found the consideration of attacks on reactors in the GEIS adequate in *Amergen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 128, 131-32 (2007). For a complete discussion of this case see section II.B.5.a.

SLOMPF is incorrect that the ER improperly omits an evaluation of the impact of an attack on the spent fuel pool, as this is dealt with as a Category 1 issue considered in the GEIS. Therefore, Contention EC-3 is outside the scope of this proceeding.

b. EC-3 Fails to Provide Sufficient Information to Demonstrate a Genuine Dispute with the Application on a Material Issue.

As discussed above, pursuant to 10 C.F.R. § 2.309(f)(1)(vi), for each contention an intervenor seeks to admit, the intervenor "must provide sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact." This information must identify specific portions of the application "that the petitioner disputes and the supporting reasons for each dispute." 10 C.F.R. § 2.309(f)(1)(vi). Even if EC-3 were within the scope of this proceeding, SLOMFP has not shown that EC-3 meets the requirements of 10 C.F.R. § 2.309(f)(1)(vi). SLOMFP merely argues that the proposed generic finding in the Draft Revised GEIS using "NRC site evaluations of every SFP in the United States," appears to actually be a site specific analysis, even though it is, in fact, a generic finding. Petition at 20 (internal quotations omitted). Again, as in EC-2, SLOMFP focuses on the Draft Revised GEIS as its basis for this contention.[34]

But, SLOMFP's discussion in support of EC-3 fails to claim any deficiency in the GEIS itself. Rather, SLOMFP concentrates its arguments entirely on the Draft Revised GEIS. But, as mentioned above, the Draft Revised GEIS is only a draft. Thus, this proceeding should focus on the analysis in the GEIS, the operative document in this proceeding, not the proposed analysis contained in the Draft Revised GEIS. Because the focus of EC-3 is an analysis not relied on by

[34] "In the Environmental Report, PG&E does not discuss the environmental impacts of spent fuel storage but instead relies on the 1996 License Renewal GEIS and related regulations. Environmental Petition at 20 (*citing* Report at 4-1).

the ER, EC-3 fails to provide sufficient facts to demonstrate a genuine dispute with a portion of the application. Thus, pursuant to 10 C.F.R. § 2.309(f)(2), EC-3 is inadmissible.

c. EC-3 Lacks a Sufficient Factual Basis

Even if EC-3 were within this proceeding's scope and focused its arguments on a portion of the application or the GEIS, it would still lack an adequate basis to demonstrate that the ER inadequately considers attacks on spent fuel pool accidents. EC-3's discussion of the Draft Revised GEIS does not demonstrate any deficiency in the current GEIS.

As discussed above, for each contention a petitioner seeks to admit, the petitioner must "provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue." 10 C.F.R. § 2.309(f)(1)(v).[35]

To support EC-3, SLOMFP argues that the ER fails to satisfy NEPA because PG&E does not evaluate the environmental impacts of an attack on the spent fuel pools. Petition at 20. SLOMFP states that, "As discussed above in Contention EC-2, the Draft Revised GEIS contains significant new information about the risks of spent fuel storage which was not previously considered in the 1996 License Renewal GEIS." *Id*.

SLOMFP's argument rests on the assumption that the "NRC site evaluations of every SFP in the United States," used for a generic finding to determine "mitigation enhancements," appears to actually be a site specific analysis and therefore a Category 2 site specific analysis must be prepared. Yet, SLOMPF does not explain how this analysis in the Draft Revised GEIS undermines the generic conclusion in the regulations or the GEIS. Petition at 20 (*citing* Draft Revised GEIS at E-36). SLOMFP has not produced any facts or expert opinion to demonstrate how this discussion is insufficient. Rather, SLOMFP has only asserted that it is insufficient. Nor

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[35] *See supra* section II.B.2.b.i.

has SLOMFP demonstrated why the Board should consider the findings of the Draft Revised GEIS, since the ER relies on the current GEIS, which is incorporated into the regulations.

SLOMFP provides a detailed critique of the Draft Revised GEIS. But SLOMFP does not show how the Draft Revised GEIS renders the GEIS, upon which the ER relies, inadequate. In fact, the Draft Revised GEIS actually concludes that "[s]ince the issuance of NUREG-1738[36] (NRC 2001b), and subsequent to the terrorist attacks of September 11, 2001, significant additional analyses have been performed and support the view that the risk of a successful terrorist attack (i.e., one that results in a zirconium fire) is very low." Draft Revised GEIS at E-35. Furthermore, the Draft concludes that "[b]ased on the more rigorous accident progression analyses, the recent mitigation enhancements, and NRC site evaluations of every SFP in the United States, the risk of an SFP zirconium fire initiation is expected to be less than reported in NUREG-1738 (NRC 2001b) and previous studies. Draft Revised GEIS at E-36. SLOMPF has neglected to show how this information would undermine the generic findings in the GEIS or even support SLOMPF's conclusion.

Contrary to Commission precedent, SLOMFP provides no support for its assertion that the ER failed to address attacks of the spent fuel pool. SLOMFP, has offered no expert opinion or facts to support its claim. *Fansteel*, CLI-03-13, 58 NRC at 203. SLOMFP has not made any effort to demonstrate how the Applicant's ER is inadequate for failing to consider information relating to terrorist attacks. *Private Fuel Storage, L.L.C.*, CLI-04-22, 60 NRC at 139. Instead, SLOMFP's claim rests on mere speculation and assertion and thus lacks an adequate factual basis. *Oyster Creek*, CLI-00-6, 51 NRC at 208.

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[36] NUREG 1738 – Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants (Published February 2001).

Therefore, SLOMFP has failed to provide an adequate factual basis for EC-3. Although SLOMFP asserts that the ER and GEIS contain an inadequate evaluation of the environmental impacts from spent fuel pool attacks, none of the assertions upon which SLOMFP relies undermines the conclusions in the GEIS. Therefore, EC-3 is inadmissible under 10 C.F.R. § 2.309(f)(1)(v).

d. Conclusion as to EC-3

As discussed above, proposed Contention EC-3 is outside the scope of this proceeding, lacks an adequate factual basis, and does not contain sufficient information to demonstrate a genuine dispute on a material fact with the application. Consequently, the Board should dismiss EC-3.

PROPOSED CONTENTION EC-4

5. EC-4 Is Inadmissible

EC-4 states:

> The Environmental Report fails to satisfy the National Environmental Policy Act (NEPA) because it does not discuss the cost-effectiveness of measures to mitigate the environmental impacts of an attack on the Diablo Canyon reactor during the license renewal term.

Petition at 22. For the reasons discussed below, SLOMFP has not provided adequate factual support for this claim. Thus, the Board should dismiss EC-4 pursuant to 10 C.F.R. § 2.309(f)(1)(v).

a. EC-4 Lacks an Adequate Factual Basis

SLOMFP contends that the ER fails to satisfy NEPA because it does not contain any SAMA analyses addressing attacks on Diablo Canyon. Petition at 22. SLOMPF points out that the ER references the GEIS's discussion regarding the impact of terrorist attacks on nuclear power plants. *Id*. The GEIS concludes that if such an attack occurred, "the Commission would expect that the resultant core damage and radiological releases would be no worse than those

expected from internally initiated events." GEIS at § 5.3.3.1. SLOMFP asserts that this discussion of terrorist attacks is inadequate because it does not include a discussion of SAMAs. Petition at 23 (*citing* 10 C.F.R. § 51.53(c)(3)(ii)(L)).

But, the ER contains SAMA analyses for internally initiated events. ER at § 4.20 & Attachment F. Moreover, the Commission found that the effects of internally initiated events would bound the results of an attack. GEIS at § 5.3.3.1. In addition, the Commission found that, in light of the security requirements in 10 C.F.R. Part 73, the risk posed by an attack is small. Thus, the Commission concluded that overall "the risk from sabotage . . . is small." *Id.*

In the *Oyster Creek* license renewal proceedings, the Commission found a similar SAMA analysis of terrorist attacks sufficient under NEPA. *Oyster Creek*, CLI-07-8, 65 NRC at 128, 131-32. In that proceeding, the State of New Jersey contended that the "environmental analysis ought to have included a more elaborate examination of 'Severe Accident Mitigation Alternatives' at Oyster Creek, including an inquiry into the consequences of a potential aircraft attack . . . and long-term compensatory measures to defend against terrorism." *Id*. at 128.

In response, the Commission stated "the NRC has in fact examined terrorism under NEPA and found the impacts similar to the impacts of already analyzed severe reactor accidents." *Id*. at 126. The Commission noted that the GEIS contained an analysis of terrorist attacks that "concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events." *Id*. at 131-32. In addition, the Commission noted that environmental analysis relied on the site-specific SAMA discussions required by the GEIS. *Id*. Thus, the Commission found that even if the contention were within the scope of license renewal, "there is no basis for admitting New Jersey's NEPA-terrorism contention in this license renewal proceeding." *Id*. at 131. The United States Court of Appeals for the Third Circuit upheld this reasoning and concluded, "Ultimately, New Jersey has never explained how or why an aircraft attack on Oyster Creek would produce

impacts that are different from severe accidents." *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132, 144 (2009).

To support EC-4, SLOMFP cites to the United States Court of Appeals for the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*. Petition at 23 (*citing* 449 F.3d 1016 (2006)). In that case, 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." 449 F.3d at 1035. The Commission has stated that it must comply with the Ninth Circuit's decision within that Circuit, but will not do so elsewhere. *Oyster Creek*, CLI-07-8, 65 NRC at 128-129 & n.14. Nonetheless, the Ninth Circuit's holding is limited by the facts before it. In the Ninth Circuit case, the NRC categorically argued that the National Environmental Policy Act ("NEPA") did not require the agency to prepare an assessment of terrorist threats as part of its NEPA analysis. 449 F.3d at 1022-23. This proceeding, like the *Oyster Creek* proceeding, is different in that the environmental analysis at issue rests on the discussion of terrorism contained in the GEIS, not a categorical determination that terrorist attacks are outside the scope of the agency's NEPA review. *Oyster Creek*, CLI-07-8, 65 NRC at 131-32. Consequently, the Ninth Circuit precedent is inapplicable because the Ninth Circuit did not have a chance to pass on the adequacy of the analysis in the GEIS.[37] Thus, the Board should follow the Commission's ruling on this issue in the *Oyster Creek* proceeding.

Unsatisfied with the Applicant's reliance on the GEIS and these SAMAs, SLOMFP asserts that attack-specific SAMAs are necessary because "[j]ust as mitigative measures are specific to the types of severe accidents to which a particular reactor design and site are

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[37] The subject of the Ninth Circuit's opinion was a dry cask storage facility. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1021. The Commission has not prepared a generic environmental impact for licensing such installations.

vulnerable, they are also specific to the types of attacks to which the particular reactor design and site are vulnerable." Petition at 23.

But the Commission "is unwilling to throw open its hearing doors to petitioners who have done little in the way or research or analysis, provide no expert opinion, and rest merely on unsupported conclusions" regarding the SAMA discussion. McGuire/Catawba, CLI-02-17, 56 NRC at 12. Under NEPA, mitigation in general and SAMAs in particular need be discussed only in sufficient detail to ensure that environmental consequences of the proposed action have been fairly evaluated. *Duke Energy Corporation*, (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352-53 (1989). As SLOMFP has not demonstrated how consideration of terrorist attacks at Diablo Canyon would change the SAMA analyses or the environmental consequences of severe accidents, EC-4 is not admissible.

Like the State of New Jersey in *Oyster Creek*, SLOMFP has not demonstrated how intentional attacks on Diablo Canyon would produce different impacts from those attributable to internally initiated events. Contrary to Commission precedent discussed above, *supra* at II.B.2.b.i, SLOMFP provides no support for its assertion that the Applicant's SAMAs are inadequate because they do not specifically address types of attacks to which the reactor design and site may be vulnerable. SLMOFP has offered no factual information, expert opinion, or substantive affidavit to support its claim. *Fansteel, Inc.*, CLI-03-13, 58 NRC at 203. SLOMFP has not made any effort to demonstrate how the Applicant's SAMA analyses are inadequate for failing to consider specific information relating to terrorist attacks. *Private Fuel Storage, L.L.C.*, CLI-04-22, 60 NRC at 139. Instead, SLOMFP's claim rests on speculation and assertion and lacks an adequate factual basis. *Oyster Creek*, CLI-00-6, 51 NRC at 208. Therefore, EC-4 is inadmissible under 10 C.F.R. § 2.309(f)(1)(v) and should be dismissed.

b. Conclusion as to EC-4

In proposed contention EC-4, SLOMFP argues that the SAMA analysis for DCNPP in the ER is inadequate under NEPA because it does not consider accidents caused by attack. The ER relies on the analysis in the GEIS, which found that the impacts of a terrorist attack would be less than those that resulted from an internally initiated event, and contains SAMA analyses for such internally initiated events. The Commission has previously held that such analyses are adequate to satisfy NEPA. *Oyster Creek*, CLI-07-8, 65 NRC at 131-32. SLOMFP has failed to provide any factual support for its claim that these analyses are inadequate. Thus, EC-4 fails to satisfy 10 C.F.R. § 2.309(f)(v). Consequently, the Board should dismiss this contention.

CONCLUSION

Accordingly, for the foregoing reasons, SLOMFP's Petition should be denied as to Contentions TC-1, EC-2, EC-3 and EC-4. With respect to Contention EC-1, SLOMFP's Petition should be granted to the extent it alleges that the ER's SAMA analyses must address the "Shoreline Fault." But, the Board should deny EC-1 to the extent it claims that the NRC cannot conduct an adequate SAMA analyses until the Applicant completes the final "Shoreline Fault" study and the regional study.

Respectfully submitted,

Signed (electronically) by

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Date of signature: 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-LR/ 50-323-LR
	)	
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	ASLBP No. 10-900-01-LR-BD01
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO THE SAN LUIS OBISPO MOTHERS FOR PEACE REQUEST FOR HEARING AND PETITION TO INTERVENE" for Maxwell C. Smith, dated April 16, 2010, have been served upon the following by the Electronic Information Exchange, this 16th day of April, 2010:

Administrative Judge
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