

April 23, 2010

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the matter of
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant
Units 1 and 2

Docket Nos. 50-275-LR
50-323-LR

**SAN LUIS OBISPO MOTHERS FOR PEACE'S MOTION FOR
LEAVE TO REPLY TO OPPOSITIONS WAIVER PETITION**

Pursuant to 10 C.F.R. § 2.323(b), San Luis Obispo Mothers for Peace ("SLOMFP") hereby seeks leave to reply to the oppositions filed by Pacific Gas and Electric Co. ("PG&E") and the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff to SLOMFP's Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) (March 22, 2010) ("Waiver Petition"). NRC regulation 10 C.F.R. § 2.335 neither provides for nor denies the right to reply to oppositions to waiver petitions. In this case, SLOMFP submitted its waiver petition simultaneously with two contentions related to the environmental impacts of pool storage of spent fuel during the license renewal term at the Diablo Canyon nuclear power plant (Contentions EC-2 and EC-3).

The Atomic Safety and Licensing Board should grant SLOMFP leave to reply with respect to its waiver petition because the issues raised by the contentions and the waiver petition are inextricably tied. Both the contentions and the waiver petition, as well as the responses by the NRC Staff and PG&E, analyze the interplay between PG&E's Environmental Report, the 1996 License Renewal Generic Environmental Impact Statement ("GEIS"), and the 2009 Draft Revised License Renewal GEIS. The arguments in the hearing request and the waiver petition cannot easily be separated, because they all relate to the question of whether the NRC has

adequately addressed the environmental impacts of spent fuel storage in its two Generic EISs or whether they should be addressed individually in PG&E's Environmental Report. Therefore, in order to ensure meaningful consideration of the admissibility of SLOMFP's Contentions EC-2 and EC-3, the ASLB should allow SLOMFP to reply to the oppositions to the waiver petition.

As discussed in the attached Certificate of Counsel Pursuant to 10 C.F.R. § 2.323(b), counsel for SLOMFP has consulted counsel for PG&E and the Staff regarding this motion, but was unable to obtain their consent.

Respectfully submitted,

Electronically signed by

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April 23, 2010

CERTIFICATE OF COUNSEL PURSUANT TO 10 C.F.R. § 2.323(b)

I certify that on April 22, 2010, I contacted counsel for PG&E and the NRC Staff in an attempt to obtain their consent to this motion. They stated that they would prefer to review the motion before taking a position.

Electronically signed by

Diane Curran_____

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**SAN LUIS OBISPO MOTHERS FOR PEACE’S REPLY TO
OPPOSITIONS TO REQUEST FOR HEARING,
PETITION TO INTERVENE AND WAIVER PETITION
REGARDING DIABLO CANYON LICENSE RENEWAL APPLICATION**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(2), San Luis Obispo Mothers for Peace (“SLOMFP”) hereby replies to the oppositions filed by Pacific Gas and Electric Co. (“PG&E”) and the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) Staff to SLOMFP’s Request for Hearing and Petition to Intervene (March 22, 2010) (“Hearing Request”) and SLOMFP’s Petition for Waiver of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) (March 22, 2010) (“Waiver Petition”). Applicant’s Answer to Petition to Intervene and Response to Requests for Waivers (April 16, 2010) (“PG&E Response”); NRC Staff’s Answer to the San Luis Obispo Mothers for Peace Requests for Hearing and Petition to Intervene (April 16, 2010); NRC Staff’s Response to the Petition for Waiver of Commission Regulations Filed by San Luis Obispo Mothers for Peace (April 16, 2010) (“NRC Staff Response”).

Neither PG&E nor the NRC Staff objects to SLOMFP’s standing, but PG&E objects to the admission of all of SLOMFP’s contentions and the Staff objects to all of the contentions except for a portion of Contention EC-1. However, neither party presents meritorious arguments in opposition to SLOMFP’s contentions and waiver petition. Therefore the Atomic Safety and

Licensing Board (“ASLB”) should admit SLOMFP as a party, admit Contentions TC-1, EC-1 and EC-4 for a hearing, and refer Contentions EC-2 and EC-3 to the Commission pursuant to 10 C.F.R. § 2.335.

II. ARGUMENT

A. Contention TC-1 is Admissible.

Contention TC-1 asserts as follows:

TC 1 – Failure to demonstrate adequacy of program for management of aging equipment

Contention: 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 “manage[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.

PG&E argues that the contention is inadmissible because it does not raise a dispute with the license renewal application. PG&E Response at 9. This assertion is incorrect. SLOMFP specifically asserts that the license renewal application relies for the management of aging equipment on precisely the same organization that has had tremendous difficulty managing safety equipment during the current license term. Hearing Request at 3. The Hearing Request also cites the specific pages numbers of the license renewal application upon which the contention relies. *Id.*

PG&E also argues that the contention does not link the trend of management failures cited in the contention “to aging-related mechanisms, programs, or analyses.” PG&E Response at 10. Again, PG&E is incorrect. The contention clearly links the trend of management failures to PG&E’s program for management of aging equipment because it shows that PG&E intends to use the same problem-plagued organization to manage aging equipment as it uses now in its current operation.

Similarly, PG&E argues that Contention TC-1 “raises discrete performance and compliance matters that are applicable to current operations rather than to operations during the renewal term,” and therefore the contention is outside the scope of the license renewal proceeding. PG&E Response at 10. But the plain language of the regulation demonstrates that the adequacy of PG&E’s program for management of aging equipment is within the scope of the license renewal rule. PG&E’s aging management program necessarily includes the organization that will carry it out. Because that organization already has a bad track record, it is relevant to raise that track record with respect to PG&E’s prospective effectiveness in managing aging equipment.

PG&E cites NRC case law and the Part 54 rulemaking history for the proposition that “license renewal reviews should not duplicate the Commission’s ongoing compliance oversight” and contends that “the proposed contention is clearly focused on current operational issues and not on the effects of aging.” PG&E Response at 11 (citing *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-04-36, 60 NRC 631, 638 (2004); 56 Fed. Reg. 64,943 64,952 (Dec. 13, 1991)). In making this argument, PG&E misses the point of the contention, *i.e.*, that PG&E’s ongoing problems in managing its current program presage problems with its aging management program, given that the very same people in the very same organization that now manages Diablo Canyon’s safety equipment will be responsible in the future for PG&E’s program for managing aging equipment during the license renewal term.

PG&E apparently would have SLOMFP show a difference between the aging management program during the license renewal term and the current program for managing safety equipment at Diablo Canyon. But SLOMFP does not need to do that in order to raise a genuine dispute with PG&E regarding the adequacy of its aging management program.

SLOMFP has shown that PG&E plans to have the aging management program managed by exactly the same organization that is now incapable of adequately managing the current operation. Thus, SLOMFP has raised a reasonable inference that PG&E will not adequately manage aging problems that are unique to the license renewal period.

Further, PG&E argues that SLOMFP has failed to provide any expert or factual information to support its “broad allegation that PG&E will be unable to reverse the adverse trend or manage the effects of aging during the renewal term.” PG&E Response at 13. This assertion is incorrect. Contention TC-1 presents a pattern of chronic and repetitive management problems which consistently recur despite PG&E’s promises to correct them.¹

The NRC Staff makes the circular argument that if PG&E relies on a currently existing program to manage the effects of aging, then even if that program is poorly administered, its future effectiveness may not be challenged. NRC Staff Response at 18-19. The Staff’s interpretation would render meaningless the language of 10 C.F.R. § 54.29 which requires a showing regarding the adequacy of an applicant’s measures to manage aging equipment. Such an interpretation would not only violate basic principles of regulatory interpretation, but it would be inconsistent with the NRC’s commitment, as described in the preamble to the 1991 license renewal rule, to ensure that licensees have adequate programs to manage aging equipment:

The planning for the management of age-related degradation unique to license renewal reflects the knowledge that materials, stressors, the operating environment, and their interactions contribute to age-related degradation in SSC’s. When these interactions cause degradation of reliability and impact safety, then the effects of age-related degradation unique to license renewal must be mitigated to ensure that the aged SSCs will adequately perform their design safety functions. The acceptable elements of an aging management program are described below.

¹ Thus, SLOMFP has effectively rebutted the presumption that licensees will comply with NRC aging management regulations during the license renewal term. *See GPU Nuclear, Inc.* (Oyster Creek Nuclear Generating Station), CLI-00-06, 51 NRC 193, 207 (2000) (cited in NRC Staff Response at 16).

To gain the necessary understanding of aging mechanisms, the renewal applicants will need to review the SSC design, fabrication, installation, testing (including performance and nondestructive testing), inservice inspection, operation, and maintenance to the extent necessary in performing the [Integrated Performance Assessment.]

Elements for timely mitigation of age-related degradation effects include inspections surveillance, condition monitoring, trending, recordkeeping, replacement, refurbishment, and appropriate adjustments in the operating environment of the equipment in which the degradation occurs.

Adequate recordkeeping is needed on items such as transients, component failures, root causes, and repair and replacement of components. Records being generated now will be useful in providing the technical bases for continued safe operation of nuclear power plants.

Maintenance, refurbishment, replacement of parts and components, residual life assessment, and changes in operational environment are other elements useful for mitigating age-related degradation effects. Timely mitigation of age-related degradation through servicing, repair, refurbishment, or replacement of components is the prime function of an effective program.

56 Fed. Reg. 64,943, 64,957 (December 13, 1991). Contention TC-1 successfully challenges PG&E's ability and commitment to carry out such an aging management program, by virtue of its current inability to adequately manage the operation it already has.²

B. Contention EC-1 is Admissible.

Contention EC-1 asserts:

Contention EC-1: Failure of SAMA Analysis to Include Complete Information About Potential Environmental Impacts of Earthquakes and Related SAMAs

1. Statement of Contention: PG&E's Severe Accident Mitigation Alternatives

² The NRC Staff concedes that the inspection reports relied on by SLOMFP for Contention TC-1 document "an adverse trend in problem evaluation at DCNPP from 2007 to 2009." NRC Response at 26. But the NRC disputes the significance of the trend, arguing that the violations "are plainly of and on a different order of magnitude than those that have previously resulted in the NRC being unable to find reasonable assurance that a licensee will comply with the terms of its licensing basis." NRC Response at 26. The Staff's arguments goes to the merits of the contention, not its admissibility, and therefore should be disregarded.

(“SAMA”) analysis fails to satisfy 40 C.F.R. § 1502.22 because it is not based on complete information that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant and because PG&E has failed to acknowledge the absence of the information or demonstrated that the information is too costly to obtain. As a result of PG&E’s failure to use complete information, the SAMA analysis does not satisfy the requirements of the National Environmental Policy Act (“NEPA”) for consideration of alternatives (*see Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992)) or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L).

Although the NRC would admit this contention to the extent it asserts that the SAMA Analysis omits a discussion of the Shoreline Fault, it opposes the remainder of the contention. NRC Staff Response at 28-29. In agreeing to the admission of a portion of the contention, the Staff demonstrates that in its view, more than a simple mention of the Shoreline Fault is required to satisfy NEPA. The Staff believes the following information should have been included in 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 [core damage frequency] 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.

NRC Staff Response at 29. The only major disagreement that the Staff seems to have with SLOMFP is that the Staff would not hold out for a probabilistic analysis of the Shoreline Fault. According to the Staff, “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.”

NRC Staff Response at 30. The Staff’s position in this case is a radical departure, however, from the position it took in the Pilgrim license renewal case. There, instead of describing PRA as “state-of-the-art” or unnecessary, the Staff referred to the use of PRA in a SAMA analysis as “an essential and widely accepted part of the cost-benefit methodology, as described in Section 5.6 of

NUREG/BR-0184.”³ NRC Staff’s Response to Request for Hearing and Petition to Intervene Filed by Pilgrim Watch (Docket No. 50-293, June 19, 2006).⁴ The Staff’s argument was accepted by the ASLB, which denied a contention that argued that a SAMA analysis had underestimated accident consequences by relying on a PRA, on the ground that probabilistic analysis constitutes the “accepted and standard practice in SAMA analyses.” *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-06-23, 64 NRC 257, 340 (2006).⁵ Thus, not only does the Staff’s argument lack credibility, but its statements in the *Pilgrim* case and the ASLB decision that accepted the Staff’s assertions support the admission of the contention.

PG&E opposes the contention in its entirety. PG&E begins by arguing that Contention EC-1 impermissibly challenges the current licensing basis (“CLB”) for Diablo Canyon and is

³ NUREG/BR-0184, *Regulatory Analysis Technical Analysis Handbook* (1997) reiterates the NRC’s stated policy of using “PRA methods in nuclear regulatory activities.” *Id.* at 5.14 (citing NRC Policy Statement, Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities,” 60 Fed. Reg. 42,622 (August 16, 1995).

⁴ The Staff’s brief is posted on the NRC’s website at (http://ehd.nrc.gov/EHD_Proceeding/home.asp).

⁵ Although this holding was not appealed, the Commission cited it with approval in *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, __ NRC __ (March 26, 2010):

NRC SAMA analysis evaluates a number of potential accident progression sequences (scenarios) and the possible safety enhancements that may reduce the risk of those accident scenarios. The analysis assesses whether and to what extent the probability-weighted consequences of the analyzed severe accident sequences would decrease if a specific SAMA were implemented at a particular facility. SAMA analysis is used for determining whether particular SAMAs would sufficiently reduce risk – *e.g.*, by reducing frequency of core damage or frequency of containment failure – for the SAMA to be cost-effective to implement. *The SAMA analysis therefore is a probabilistic risk assessment analysis.*

Id., slip op. at 3 (emphasis added).

therefore inadmissible. PG&E Response at 13. This assertion is simply incorrect. Nothing in the contention challenges the CLB for Diablo Canyon. The contention challenges PG&E's SAMA analysis with respect to earthquake risks, which PG&E itself recognizes as a legitimate legal basis for a contention by addressing earthquake risks in the SAMA analysis (pages F-7 – F-8).

Citing *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Station, Units 2 and 3), LBP-08-13, 68 NRC 43, 110 (2008), PG&E next argues that Contention EC-1 should be rejected because it fails to explain why the information sought by SLOMFP is sufficiently different from information relied on in PG&E's SAMA analysis to make a difference in the outcome of the SAMA analysis. PG&E Response at 15-17. *Indian Point* does not apply, however, because it concerned information that was already available but which the license renewal applicant chose not to include in its SAMA analysis. There, the ASLB found that the State of New York had not made a sufficient demonstration that the omitted information was sufficiently different from the information relied on in the SAMA analysis to affect the outcome of the analysis.⁶ In a case where the information that is missing from an EIS or ER does not exist, the appropriate test of compliance with NEPA and 40 C.F.R. § 1502.22 is whether the analysis “constitutes a reasonable, good faith presentation of the best information available under the circumstances.” *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1172 (9th Cir. 1999).⁷

⁶ Similarly, PG&E's citation to *Duke Energy Corporation* (McGuire Nuclear Station, Units 1 and 2), CLI-02-11, 56 NRC 1, 11-12 (2002) is inapposite because the missing information already existed.

⁷ PG&E argues that the SAMA analysis is conservative enough to encompass any additional information that might be supplied by the missing probabilistic study. PG&E Response at 17. Given that the study has not been finished, however, this is just a guess on PG&E's part and must be rejected as speculative.

Here, SLOMFP has identified a number of facts which raise a genuine dispute with PG&E regarding whether PG&E has made a “reasonable, good faith presentation of the best information available under the circumstances.” Those facts raise a reasonable inference that PG&E should have awaited the outcome of the probabilistic study of the Shoreline fault before completing its analysis of earthquake-related SAMAs, or at the very least included in the ER a justification of its omission of the information. The facts include:

- the environmental significance of the Shoreline Fault in light of its close proximity to the Diablo Canyon plant and the Hosgri fault;
- the environmental significance of the Shoreline Fault as reflected by the facts that (a) upon discovering the fault, PG&E and the NRC Staff immediately performed a preliminary deterministic analysis to evaluate its effect on the safety of the day-to-day operation of Diablo Canyon and (b) PG&E accelerated and re-focused a joint PG&E-USGS probabilistic study of earthquake risks to provide an earlier result regarding the Shoreline Fault (*see* Hearing Request at 9);
- the SAMA analysis’ description of fire and seismic contributors as “disproportionately dominant when compared to all external events” (Environmental Report at 13);
- the “preliminary” nature of currently available information about the Shoreline Fault in contrast to the more comprehensive study that is underway (*id.*);
- the fact that PG&E submitted its license renewal application fourteen years before the expiration date for Unit 1, far earlier than is necessary in order to ensure that the process is completed before expiration of PG&E’s current licenses;⁸

⁸ In contrast, Entergy submitted its license renewal application for the Indian Point reactors six years before the schedule expiration date for Unit 2.
<http://www.nrc.gov/reactors/operating/licensing/renewal/applications/indian-point.html>;

- the fact that the California Public Utilities Commission -- the state agency with the greatest interest in early resolution of PG&E's license renewal application -- has told PG&E that without the completion of a rigorous and up-to-date seismic study it cannot rely on the electricity generated by Diablo Canyon during the license renewal term. *See* Hearing Request at 15.⁹

These facts demonstrate that SLOMFP has raised a material dispute with PG&E regarding whether it was reasonable to issue a seismic SAMA analysis without awaiting the results of the probabilistic analysis of the Shoreline Fault.¹⁰ None of the cases cited by PG&E suggest otherwise. *Southern Oregon Citizens Against Toxic* PG&E cites *Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1479 (9th Cir. 1983), cert. denied, 469 U.S. 1028 (1984) for the unremarkable proposition that "an analysis under 1502.22 is not required if an agency has carefully studied the potential environmental impacts of a proposed action and has determined with a reasonable degree of certainty, the probability and consequences of such impacts." PG&E Response at 19. PG&E seems to miss the point that SLOMFP disputes the reasonableness of PG&E's conclusions regarding the probability and consequences of earthquake impacts in light of the missing information. PG&E also overlooks the fact that *Citizens Against Toxic Sprays* provides strong support for the admission of Contention EC-1 by discussing an example of a case involving a newly discovered earthquake fault, in which 40 C.F.R. § 1502.22 could only be

NUREG/CR-6577, Supp. 2, *U.S. Nuclear Power Plant Operating Cost and Experience Summaries* at 97, 99 (2003).

⁹ PG&E and the Staff incorrectly presume that Contention EC-1 challenges PG&E's noncompliance with California Assembly Bill 1632. PG&E Response at 21, NRC Staff Response at 33. That is not the case. SLOMFP relies on the CPUC's statement of concern that it will be unable to assess the reliability of Diablo Canyon as a future energy source in California as evidence of circumstances which call upon PG&E to postpone completion of its SAMA analysis until the Shoreline study is complete.

¹⁰ SLOMFP's citation of these facts also belies the Staff's assertion that SLOMFP has failed to provide factual support for its contention. NRC Staff Response at 32.

satisfied by the supplementation of the EIS with a new study:

Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017 (9th Cir. 1980), involved an information gap about the effect of a newly discovered fault system on a proposed dam. 621 F.2d at 1020-21. We noted that the original failure to discuss this danger violated NEPA, but held that the agency cured the defect by commissioning an extensive study that supplied the missing information. *Id.* at 1025-26. By eliminating the uncertainty, the agency essentially complied with 40 C.F.R. § 1502.22(a) which requires an agency to obtain information relevant to adverse impacts that “is essential to a reasoned choice among alternatives” when the cost of obtaining it is not exorbitant.

720 F.2d at 1479.¹¹

PG&E cites a number of cases to support its argument that the demands of Contention EC-1 are unreasonable, but none of them supports PG&E’s position. In *Town of Winthrop v. FAA*, 535 F.3d 1, 11 (1st Cir. 2008), for example, the Court upheld the Federal Aviation Administration’s (“FAA’s”) refusal to supplement an EIS for Logan International Airport to gather additional data on fine and ultrafine particulate air pollutants before permitting construction of a new taxiway. The Court held that “[w]hile there ‘will always be more data that could be gathered,’ agencies ‘have some discretion to draw the line and move forward with decisionmaking.’” The situation here is starkly different: PG&E’s SAMA analysis does not include any probabilistic information (or any information at all) about the Shoreline Fault, even though the potential significance of that fault for the safety of Diablo Canyon has been demonstrated by PG&E’s and the NRC Staff’s responses to the fault’s discovery.

PG&E cites *Entergy Nuclear Generation Company and Entergy Nuclear Operations, Inc.*, CLI-10-11, and *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.2d 1170, 1185 (9th Cir. 2000) for the proposition that “[t]here is no NEPA requirement to use the latest scientific

¹¹ In *Warm Springs*, the Court also found that the agency had no need to do a worst-case analysis, which was previously required by 40 C.F.R. § 1502.22 under some circumstances. The Council on Environmental Quality has since removed the worst-case analysis requirement from its regulations.

methodology.” But PRA is not a recent methodology, indeed it is deemed “standard” for SAMA analyses. *See* discussion above at 7.¹²

C. Contention EC-2 is Admissible and Meets the Standard for a Waiver.

Contention EC-2: Failure of SAMA Analysis to Address Environmental Impacts of Spent Fuel Pool Accidents

1. Statement of Contention: 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.

PG&E and the Staff oppose both the admission of Contention EC-2 and the granting of a waiver, which is necessary before this Category 1 issue can be admitted for a hearing. They oppose SLOMFP’s waiver petition on the principal ground that SLOMFP relies on the 2009 Draft Revised Generic Environmental Impact Statement (“GEIS”), which has not been finalized. PG&E Response at 21, NRC Staff Response at 8. But the 1996 GEIS cannot be cast in stone and applied to this licensing proceeding if it is significantly outdated, because NEPA and NRC implementing regulations require the NRC to update an EIS if (a) the proposed action has not been taken yet and (b) new and significant information or changed circumstances would change the outcome of the environmental analysis. 10 C.F.R. §§ 51.53(c)(iv), 51.92(a)(2). The Draft Revised GEIS addresses this requirement by completely changing the 1996 GEIS’ technical basis for generically concluding that spent fuel pool storage poses no significant environmental

¹² PG&E argues that the NRC’s “general policy is to expedite adjudicatory proceedings.” PG&E Response at 20 n.14 (citing *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18 (1998)). But nothing in the Commission’s policy statement suggests that otherwise meritorious contentions may be rejected on the ground that they might make a hearing last longer. PG&E’s argument also begs the question of why PG&E deemed it necessary to file a license renewal application fourteen years before expiration of its current license, providing a grossly excessive amount of time for a hearing.

risks.¹³

Moreover, the chief technical document on which the NRC relies specifically excludes Diablo Canyon from that conclusion because of the significant earthquake risks to California nuclear plants. To ignore this tremendous change in the reasoning behind the GEIS and its implications for Diablo Canyon in this licensing proceeding would constitute an extreme violation of NEPA and NRC's implementing regulations.¹⁴

Both PG&E and the Staff also argue that SLOMFP has failed to show that the effects of a pool fire would be any different than those of a reactor accident, citing the statement in the Draft Revised EIS that "the environmental impacts of accidents at spent fuel pools (SFPs) (as quantified in NUREG-1738) can be comparable to those from reactor accidents at full power (as estimated in NUREG-1150)." PG&E Response at 26, NRC Staff Response at 37-38. In making this argument, however, PG&E and the Staff ignore paragraph 8 of the declaration supporting SLOMFP's waiver petition, which points out that NUREG-1738 assumes that people will evacuate after an accident, without addressing the societal or economic costs of such an evacuation. They also ignore Contention EC-2's discussion the potential environmental impacts of a pool fire, which include "high consequences in terms of property damage and land contamination." Hearing Request at 18. In any event, even if the consequences of reactor accidents and spent fuel pool accidents are similar, the mitigation measures for these very

¹³ The Staff makes the absurd assertion that the additional analyses supporting the Draft Revised GEIS "simply confirm that the conclusions in the 1996 GEIS are more conservative than expected." Staff Response at 8. To the contrary, with respect to Diablo Canyon, the Draft Revised GEIS effectively withdraws the 1996 GEIS' statement of confidence that spent fuel pool fire impacts would be insignificant.

¹⁴ The Draft Revised License Renewal GEIS not only updates the 1996 License Renewal GEIS, but also the NRC's 1987 decision regarding re-racking of the Diablo Canyon spent fuel pools. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-87-25, 26 NRC 168 (1987) (cited in PG&E Brief at 29).

different types of accidents would be very different from each other. *See* discussion below with respect to Contention EC-4.

Finally, PG&E contends Contention EC-2 is inadmissible because it does not relate to “age-related degradation or any other issues unique to license renewal.” PG&E Response at 25 and 30; *see also* PG&E Response at 36. But PG&E confuses the NRC’s safety regulations with NEPA regulations, which are “analytically separate.” *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 13 (2001). The NRC’s “aging-based safety review does not in any sense ‘restrict NEPA’ or ‘drastically narrow the scope of NEPA . . .’” *Id.* (quoting Appellant’s brief).

**D. Contention EC-3 is Admissible and Meets the Standard for a Waiver.
Contention EC-3: Failure to Address Environmental Impacts of an Attack on the
Diablo Canyon Spent Fuel Pool**

1. Statement of contention: The Environmental Report fails to satisfy NEPA because it does not evaluate the environmental impacts of an attack on the Diablo Canyon spent fuel pool during the operating license renewal term.

This contention challenges the adequacy of either the 1996 License Renewal GEIS or the 2009 Draft Revised License Renewal GEIS to support PG&E’s failure to address the environmental impacts of an attack on the Diablo Canyon spent fuel pool. While the Draft Revised License Renewal GEIS claims to rely on site-specific mitigation measures taken at Diablo Canyon, it does not identify them in any reference document. Therefore, in order to satisfy NEPA, PG&E must identify them in the Environmental Report, and their effectiveness must be evaluated. Because it raises a Category 1 issue, the contention is supported by a waiver petition.

PG&E argues that Contention EC-3 raises “no special circumstances that were not considered in the GEIS.” PG&E Response at 33 (citing 1996 License Renewal GEIS at 5-18). In addition, PG&E contends that SLOMFP has failed to show a genuine dispute with the

conclusion of the 1996 GEIS because “even if there were sabotage, the ‘resultant core damage and radiological release would be no worse than those expected from internally initiated events.’”. *Id.* at 37 (citing License Renewal GEIS at 5-18). But the 1996 License Renewal GEIS considered only sabotage against reactors. It did *not* consider sabotage against spent fuel pools. Both the means of attack and the alternatives for avoiding or mitigating attacks would be different for a reactor than for a spent fuel pool, and thus the environmental analysis of those impacts would be different.

The NRC incorrectly argues that Contention EC-3 “has presumed,” without “any basis,” that NRC relied on site-specific measures to evaluate the impacts of attacks on the Diablo Canyon spent fuel pools. NRC Staff Response at 41. SLOMFP relied on statements by the NRC in the Draft Revised GEIS that NRC relied for its conclusion on unsupported statements that spent fuel pool fire impacts are low based on “mitigation enhancements” and “NRC site evaluations of every SFP in the United States.” Hearing Request at 20 (citing Draft Revised License Renewal GEIS at E-36). It is not SLOMFP’s fault that the NRC did not provide any more specific information than this. The information is sufficient to support SLOMFP’s inference.

PG&E cites *New York v. NRC*, No. 08-3903, slip op. at 4 (2nd Cir. Dec. 21, 2009), for the proposition that the NRC may make a generic mitigation finding based on site-specific mitigation measures. PG&E Response at 35. That decision involved the appeal of a rulemaking petition denial, however. It did not address the question of whether, in an individual licensing proceeding where the NRC relies on site-specific mitigation measures for a finding of no significant impact, NEPA requires disclosure and discussion of those site-specific impacts in the Environmental Report for the specific facility. SLOMFP submits that in this case, NEPA

requires such disclosure and discussion.¹⁵

E. Contention EC-4 is Admissible.

Contention EC-4: Failure to Address Environmental Impacts of Attack on Diablo Canyon reactor

1. Statement of Contention: 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.

PG&E and the NRC Staff do not dispute SLOMFP's assertion in Contention EC-4 that no SAMA analysis of the impacts of attacks on a reactor can be found in the Environmental Report, the 1996 License Renewal GEIS, or the 2009 Draft Revised License Renewal GEIS. But they argue that such a SAMA analysis is not necessary because the NRC has found that the effects of internally initiated events would bound the results of an attack. PG&E Response at 40, NRC Staff Response at 46 (citing GEIS at § 5.3.3.1). As pointed out in SLOMFP's Hearing Request, however, mitigative measures are specific to the types of severe accidents to which a particular reactor design and site are vulnerable, and the same is true for attacks. None of the environmental documents relied on by PG&E and the NRC Staff show any consideration of how the characteristics of attacks would be mitigated. The NRC Staff argues that SLOMFP's claim must fail because this conclusion is "unsupported." NRC Staff Response at 48. *See also* PG&E Response at 40. But one need only look at PG&E's SAMA Analysis to see the logic of SLOMFP's argument. Table F.5-3 analyzes twenty-five SAMAs, each of which is specifically tailored to an internal event. For each SAMA, the table gives a detailed description of how it works to mitigate the effects of the event. Thus, the SAMA analysis takes into account the characteristics of the specific internal events. To say the effects of an attack are "bounded" by

¹⁵ Many of PG&E's and the Staff's arguments in opposition to Contention EC-3 repeat the same arguments they made in response to Contention EC-2 and SLOMFP's waiver petition with respect to Contention EC-2, and therefore are not addressed again here.

the effects of an internal event does not tell anything about how the attack occurs or how it is most effectively mitigated.¹⁶

III. CONCLUSION

For the foregoing reasons, SLOMFP should be granted intervenor status and its contentions should be admitted.

Respectfully submitted,

Electronically signed by

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¹⁶ PG&E argues that SLOMFP should have sought a waiver for Contention EC-4, because the issue of SAMAs for the impacts of attacks has been “conclusively addressed in the GEIS for license renewal.” PG&E Response at 38. In fact, however, PG&E is not able to point to a single statement in any relevant environmental document that discusses SAMAs to mitigate the impacts of attacks. While the documents do contain some discussion of the environmental impacts of attacks, they do not mention SAMAs. Therefore there is nothing to waive.

CERTIFICATE OF SERVICE

I certify that on April 23, 2010, I posted San Luis Obispo Mothers for Peace's Reply to Oppositions to Request for Hearing, Petition to Intervene and Waiver Petition Regarding Diablo Canyon License Renewal Application and motion for leave to file same on the NRC's Electronic Information Exchange. It is my understanding that as a result, the following persons were served:

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