

May 13, 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
BRIEF REGARDING WAIVER STANDARD**

Pursuant to the Atomic Safety and Licensing Board's ("ASLB's) Order of May 4, 2010, San Luis Obispo Mothers for Peace ("SLOMFP") briefs the question of whether, and how, the four-factor test articulated in *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) applies to this case.

A. Whether the *Millstone* Test Applies

NRC regulation 10 C.F.R. § 2.335(b) provides that the "sole ground for a petition of waiver or exception" to NRC regulations is that "special circumstances with respect to the subject matter of the particular proceeding are such that the application or the rule or regulation (or a provision of it) would not serve the purposes for which the rule or regulation was adopted." In *Dominion*, which involved a request for a waiver of the NRC's emergency planning regulations, the Commission broke down the requirements of § 2.335(b) into the following four-fold showing:

That (i) the rule's strict application "would not serve the purposes for which [it] as adopted"; (ii) the movant has alleged "special circumstances" that were "not considered, either explicitly or by necessary implication, in the rulemaking proceeding leading to the rule sought to be waived"; (iii) those circumstances are "unique" to the facility rather than "common to a large class of facilities"; and (iv) a waiver of the regulation is necessary to reach a "significant safety problem."¹

¹ 62 NRC at 560 (quoting 10 C.F.R. § 2.335(b) and citing *Public Service Company of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-89-20, 30 NRC 231, 235 (1989); *Public*

Because *Millstone* interpreted 10 C.F.R. § 2.335(b) with respect to a safety regulation promulgated under the Atomic Energy Act, it is not completely applicable to SLOMFP's waiver petition, which concerns an environmental regulation promulgated under the National Environmental Policy Act ("NEPA"). SLOMFP's waiver petition challenges the continued validity of 10 C.F.R. Part 51 Subpart A Appendix B and 10 C.F.R. § 51.53(c)(2) as applied to the Diablo Canyon nuclear power plant, in light of significant new information presented by the NRC in the course of revising the generic environmental impact statement ("GEIS") underlying the rule. SLOMFP respectfully submits that in order to satisfy NEPA's requirement that an environmental impact statement ("EIS") must be supplemented in light of new information and changed circumstances that bear on the outcome of the EIS' environmental analysis, the ASLB must apply both § 2.335(b) and the *Millstone* test in a manner that is consistent with the requirements of 10 C.F.R. § 51.92(a)(2) and *Marsh v. Oregon Natural Resources Council*, 489 U.S. 360, 371-72 (1989).

SLOMFP believes that it is possible to interpret 10 C.F.R. § 2.335(b) in a way that is consistent with § 51.92(a)(2) and *Marsh*. In the context of a NEPA analysis, the question raised by § 2.335(b) of whether application of a regulation would "serve the purposes for which the rule or regulation was adopted" can be addressed by examining the continued viability of the environmental analysis on which the regulation is based. SLOMFP also believes it is reasonable to inquire whether a waiver petition presents "special circumstances" for the purpose of determining whether the rule should be changed on a site-specific basis rather than generically.

Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 597 (1988), *reconsid'n denied*, CLI-89-3, 29 NRC 234 & CLI-89-7, 29 NRC 395 (1989); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 239, *reconsid'n granted in part on other grounds*, LBP-98-10, 47 NRC 288, *aff'd*, CLI-98-13, 48 NRC 26 (1988)).

The “special circumstances” test is also consistent with the “new information or changed circumstances” standard of 10 C.F.R. § 51.92(a)(2). To interpret the “special circumstances” language to allow any additional test, however, such as a procedural test requiring that new information in a draft EIS must be adopted in a final EIS in order to qualify as legitimate special circumstances, would not be consistent with NEPA, § 51.92(a)(2), or *Marsh*. Section 2.335(b) should be deemed satisfied by the presentation of new information or changed circumstances that have a bearing on the outcome of the environmental analysis for the licensing action at issue and that are unique to the proceeding.

Like § 2.335(b), the *Millstone* test can be applied in a way that is generally consistent with 10 C.F.R. § 51.92(a)(2) and *Marsh*, except that factors (ii) and (iv) should be changed slightly to apply to environmental issues. Factor (ii) should include consideration of whether the special circumstances were considered in an earlier environmental impact statement (“EIS”) for the proposed action, not just the rulemaking that was supported by the EIS. In addition, factor (iv) should require the petitioner to show that a waiver is necessary to reach a significant environmental issue rather than a safety issue (*i.e.*, consideration of the new information or changed circumstances could change the outcome of the earlier EIS on which the rulemaking was based.)

B. How the *Millstone* Test Applies

SLOMFP’s Waiver Petition satisfies all four of the elements of the *Millstone* test, as modified above for consistency with NEPA. First, strict application of the rule would not serve the purposes for which the rule was adopted of eliminating the need for case-by-case analysis of environmental impacts that can be assessed generically. As discussed in SLOMFP’s waiver petition and supporting declaration, new information presented in the Draft Revised Generic

Environmental Impact Statement for License Renewal (2009) (“Draft Revised License Renewal GEIS”) shows that the NRC no longer relies on the same studies that it relied on in the 1996 License Renewal GEIS for its generic conclusion that spent fuel storage impacts are insignificant. As stated in the Draft Revised License Renewal GEIS, the “key” document on which the now NRC relies -- NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* (October 2000) – specifically refuses to generalize about the environmental impacts of spent fuel pool storage outside the eastern United States. NUREG-1738’s refusal to account for the environmental impacts of earthquakes with respect to spent fuel pool storage risks at nuclear plants outside the eastern United States is repeated in the Draft Revised License Renewal GEIS at page E-33.

In addition, the Draft Revised License Renewal GEIS relies on mitigation measures that are site-specific, thus further undermining the regulations’ purpose of generalizing about the impacts of spent fuel storage. Curran Declaration, pars. 9-11. In order to satisfy the public disclosure requirements of NEPA, these site-specific mitigation measures – which are not specifically identified in the Draft Revised License Renewal GEIS – should be identified in the context of the environmental analysis for renewal of the Diablo Canyon operating license.

The second element of the *Millstone* test is a showing that “special circumstances” exist that were not considered in the original rulemaking. The “special circumstances” consist of the development and publication of the new information described above, which was not discussed in the 1996 License Renewal GEIS. In no previous EIS has the NRC stated that it lacked a technical basis for making conclusions about the environmental impacts of earthquakes on spent fuel pools located outside the eastern United States.

The third element of the *Millstone* test is a showing that the special circumstances are “unique” to the facility rather than “common to a large class of facilities.” This test is satisfied by the statements in both NUREG-1738 and the Draft Revised License Renewal GEIS that the NRC’s generalizations about the safety of onsite pool storage of spent fuel cannot be stretched to apply to western nuclear plant sites like Diablo Canyon. As a result, Diablo Canyon is in the unique position that the NRC has no current technical basis for concluding that the environmental impacts of spent fuel storage during the license renewal term are insignificant.

The fourth factor is that a waiver of the regulations is necessary to reach a significant environmental problem. The environmental impacts of a pool fire would be significant, including widespread land contamination. Curran Declaration, par. 8. While the Draft Revised License Renewal GEIS claims to evaluate these impacts, the analysis is extremely cursory and is also tainted by probability considerations that are concededly inapplicable to Diablo Canyon. *See, e.g.*, Draft Revised License Renewal GEIS at E-37 (asserting that economic impacts: “are related to the likelihood of the [spent fuel pool] accidents and the cost of cleanup and food interdiction. Even with higher fuel inventories, the lower likelihood of accidents in the SFP reduces the economic impacts.”) Thus, the NRC has not performed an analysis of the economic impacts of a spent fuel pool fire that is independent of probability considerations. This is an especially significant omission in light of the enormous potential economic impacts of a pool fire on agriculture in California, as discussed in Contention EC-2. Curran Declaration, par. 8.

Accordingly, SLOMFP satisfies the standard for a waiver as set forth in 10 C.F.R. § 2.335(b), as interpreted in *Millstone*, and as rendered consistent with 10 C.F.R. § 51.92(a)(2) and *Marsh*.

Respectfully submitted,

Electronically signed by

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CERTIFICATE OF SERVICE

I certify that on May 13, 2010, I posted San Luis Obispo Mothers for Peace's Brief Regarding Waiver Standard on the NRC's Electronic Information Exchange. It is my understanding that as a result, the following persons were served:

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