

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)
)
PACIFIC GAS AND ELECTRIC) Docket No. 50-275-LR
COMPANY) Docket No. 50-323-LR
)
(Diablo Canyon Power Plant, Units 1 and 2))

APPLICANT'S REPLY BRIEF IN
OPPOSITION TO A WAIVER FOR CONTENTION EC-2

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I. INTRODUCTION

Pursuant to the Commission’s Order, dated August 31, 2010, Pacific Gas and Electric Company (“PG&E”) hereby submits its reply brief opposing a waiver of 10 C.F.R. § 51.53(c)(2) and 10 C.F.R. Part 51, Appendix B, with respect to Contention EC-2 in this proceeding. As both PG&E and the NRC Staff argued in initial briefs opposing the waiver,¹ San Luis Obispo Mothers for Peace (“SLOMFP”) has not demonstrated that a waiver of Commission regulations is warranted.² Contrary to SLOMFP’s assertions, there is no new and significant information that “bears on the conclusion of the NRC’s currently applicable [Generic Environmental Impact Statement (“GEIS”)] that the environmental impacts of high-density pool storage or spent fuel are insignificant.” SLOMFP Brief at 2. Furthermore, even if there were

¹ See “Applicant’s Brief in Opposition to a Waiver for Contention EC-2,” dated September 24, 2010 (“PG&E Brief”); “NRC Staff’s Brief in Opposition to Waiver of 10 C.F.R. §§ 51.53(c)(2) and 10 C.F.R. Part 51, Subpart A, Appendix B as to Contention EC-2,” dated September 24, 2010 (“NRC Staff Brief”).

² See “San Luis Obispo Mothers for Peace’s Brief Regarding the NRC’s Duty to Waive 10 C.F.R. § 51.53(c)(2) and 10 C.F.R. Part 51 Subpart A, Appendix B, in Order to Allow Consideration of Environmental Impacts of Earthquakes on Spent Fuel Pool Storage at the Diablo Canyon Nuclear Power Plant,” dated September 24, 2010 (“SLOMFP Brief”).

new and significant information, the NRC has provided non-adjudicatory mechanisms for considering such information. Finally, fully consistent with the National Environmental Policy Act (“NEPA”), the NRC may properly rely on its technical expertise and its substantial prior analyses concluding that the environmental impacts of spent fuel storage are small and that additional mitigation measures are not warranted. Accordingly, the waiver request should be denied and Contention EC-2 should be dismissed from this proceeding.

II. DISCUSSION

As PG&E noted in its initial brief, waivers should only be granted in “unusual and compelling circumstances.” *N. States Power Co.* (Monticello Nuclear Generating Plant, Unit 1), CLI-72-31, 5 AEC 25, 26 (1972). But, as SLOMFP’s brief makes apparent, there are no unusual and compelling circumstances here that would warrant the unusual step of issuing a waiver. Rather than demonstrating how its request satisfies the Commission’s four waiver criteria, SLOMFP focuses its argument on demonstrating that there is “new and significant information.” As discussed previously and again below, SLOMFP has not identified any “new” (much less “significant”) information. SLOMFP relies entirely on the draft revision to the GEIS — where in reality the NRC simply re-confirmed its prior conclusions in the GEIS regarding spent fuel storage for all plants. SLOMFP’s disagreement with that conclusion does not support a waiver.

A. SLOMFP has not identified any new and significant information.

SLOMFP argues that the draft revised GEIS shows that the NRC’s view of the environmental impacts of spent fuel storage has changed since issuance of the GEIS. Specifically, SLOMFP argues that the NRC “has completely changed” the technical basis for the GEIS conclusion that the risk of a spent fuel pool accident is low. SLOMFP Brief at 2. SLOMFP also argues that the draft revised GEIS “repeats the conclusion of NUREG-1738 that the NRC Staff’s generalized finding that spent fuel pool accident risks are low cannot be applied

to reactors located in the western United States.” *Id.* SLOMFP highlights several other statements in the draft revised GEIS that allegedly support its conclusion that a re-evaluation of the risks of spent fuel pool storage at Diablo Canyon is necessary to comply with NEPA. *Id.* at 16. As discussed below, SLOMFP has mischaracterized NUREG-1738 and the draft revised GEIS. None of the citations highlighted by SLOMFP actually involves new or significant information that would change the conclusions in the GEIS.

First, the NRC has not “completely changed” the technical basis for its conclusions that the environmental impacts of spent fuel pool storage are low. As PG&E explained in its initial brief, the GEIS conclusions were based on the robust design of spent fuel pools, operational experience, and mitigation measures already in place, as well as on a series of studies examining spent fuel pool storage risks.³ PG&E Brief at 3-10. The draft revised GEIS relies on the same considerations and analyses in reaching the same conclusion. The draft revised GEIS notes that spent fuel pools are designed with reinforced concrete, allowing them to remain operable through the largest earthquake that has occurred or is expected to occur in the area near the plant.⁴ Draft GEIS at 3-50. The draft GEIS also references the same studies of

³ See, e.g., NUREG-1353, “Regulatory Analysis for the Resolution of Generic Issue 82, Beyond Design Basis Accidents in Spent Fuel Pools” (April 1989); NUREG/CR-4982, “Severe Accidents in Spent Fuel Pools in Support of Generic Safety Issue 82” (July 1987); NUREG/CR-5176, “Seismic Failure and Cask Drop Analysis of the Spent Fuel Pools at Two Representative Nuclear Power Plants” (Jan. 1989); NUREG/CR-5281, “Value/Impact Analysis of Accident Preventive and Mitigative Options for Spent Fuel Pools” (March 1989); and WASH-1400 (NUREG-75/014), “Reactor Safety Study: An Assessment of Accident Risks in U.S. Commercial Nuclear Power Plants” (1975); see also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Station, Units 3 & 4), CLI-01-17, 54 NRC 3, 22 n.11 (2001) (citing studies relied upon in the GEIS).

⁴ The draft GEIS acknowledges that the Diablo Canyon spent fuel pool was constructed to a more rigorous seismic design basis. The draft GEIS specifically notes that, while Diablo Canyon is located in an area with higher seismic hazards, the plant has been designed to withstand expected seismic effects. Draft GEIS at 3-50.

spent fuel pools as the GEIS. *See id.* at E-32 to E-36 (citing NUREG-1353 and NUREG/CR-4982). And, the draft GEIS credits mitigation measures already in place. *Id.* at E-36. Thus, SLOMFP's argument that the technical bases for the agency's conclusion has "completely changed" is completely incorrect.

Second, SLOMFP incorrectly states (SLOMFP Brief at 2) that the draft revised GEIS "repeats the conclusion of NUREG-1738 that the NRC Staff's generalized finding that spent fuel pool accident risks are low cannot be applied to reactors located in the western United States." The draft revised GEIS does discuss NUREG-1738 (*see* Draft GEIS at E-33), but this discussion does not repudiate the overall conclusion that the environmental impacts of spent fuel pool storage are small for all plants, including plants in the western United States. In fact, the NRC Staff, which was responsible for preparing the draft GEIS, has confirmed in this proceeding that the draft GEIS conclusions apply to all plants, not just those plants located in the eastern and central United States. NRC Staff Brief at 5; *id.* at 18. SLOMFP also makes much of the NRC's description in the draft GEIS of NUREG-1738 as a "key" document. *See* SLOMFP Brief at 8; Draft GEIS at E-33. But, in context, the NRC simply highlighted NUREG-1738 as one analysis of spent fuel pools that was completed after the GEIS. Nowhere does the NRC say that it is rejecting the basis for the GEIS conclusion and relying instead on NUREG-1738. In the same paragraph cited by SLOMFP, the NRC highlights other activities that post-date the GEIS and that support a generic finding for all plants. These activities include the NRC's denial of a petition for rulemaking where the petition was specifically based on NUREG-1738. Draft GEIS at E-33. And, as the NRC explains elsewhere in the draft GEIS, the Sandia studies, which take into account mitigation measures and more realistic assessments of heat transfer, demonstrate that the risk of a spent fuel pool fire is less than reported in NUREG-1738. *Id.* at E-36. As a

result, the overall conclusion is the same in the draft GEIS as it is in the current GEIS — the environmental impacts of spent fuel pool storage are small for all plants.

Third, SLOMFP argues that NUREG-1738 is “new” information that must be considered to satisfy NEPA. SLOMFP Brief at 17. But, consistent with NEPA, the draft GEIS considered more recent and available information regarding spent fuel storage risks, including NUREG-1738. *See, e.g.*, Draft GEIS at E-36. SLOMFP is actually ignoring “new” information that demonstrates that NUREG-1738 is not a significant factor and does not undercut the agency’s generic conclusion. The NRC explained that, since the issuance of NUREG-1738, significant additional analyses have been performed that support the view that the risk of a spent fuel pool zirconium fire is very low. Draft GEIS at E-35. For example, the Sandia studies indicate that there is a significant amount of time between the spent fuel becoming uncovered and the possible onset of a zirconium fire, thereby providing a substantial opportunity for both operator and system event mitigation. *Id.* at E-36. The NRC also explained that additional mitigation strategies implemented subsequent to September 11, 2001, enhance the operator’s ability to cool spent fuel and the potential to recover spent fuel pool water level and cooling prior to a potential zirconium fire. *Id.* The Sandia studies also confirmed the effectiveness of these additional mitigation strategies to maintain spent fuel cooling in the event the pool is drained and its initial water inventory is reduced or lost entirely. *Id.* Based on the more rigorous accident progression analyses subsequent to NUREG-1738, the recent mitigation enhancements, and NRC site evaluations of every spent fuel pool in the United States, the draft GEIS concludes that the risk of a spent fuel pool zirconium fire is less than reported in NUREG-1738 and previous studies. *Id.* Thus, contrary to the central premise of SLOMFP’s waiver request, NUREG-1738

does not undermine the conclusions of the GEIS. In fact, those conclusions were confirmed to be conservative for all plants by the Sandia studies.

Fourth, SLOMFP argues that NUREG-1738 addresses a “new” scenario — a partial loss of cooling water in the spent fuel pool — that increases the likelihood of a zirconium fire. SLOMFP states that in NUREG-1738 the NRC Staff “conclude[ed] that regardless of the age of the fuel in a pool, the fuel will burn shortly after the tops of the fuel assemblies are uncovered.” SLOMFP Brief at 8. But, in fact, NUREG-1738 states only that it is not feasible, without numerous constraints, to define a generic decay heat level (and therefore decay time) beyond which a zirconium fire is not physically possible. NUREG-1738 at 2-1. There is also nothing new about the potential for a zirconium fire following a partial spent fuel pool drain down event. As SLOMFP itself pointed out, the NRC considered that possibility as early as 1979. SLOMFP Brief at 4 (citing NUREG/CR-0649, “Spent Fuel Heatup Following Loss of Water During Storage” (March 1979)).

Fifth, SLOMFP references a statement in PG&E’s Environmental Report that seismic events are the dominant external hazard at Diablo Canyon and argues that other causal factors may also play a role in spent fuel pool accidents. SLOMFP Brief at 16-17. But, this information is also not “new” and, in any event, does not support SLOMFP’s request for a waiver. The spent fuel pool at Diablo Canyon, like all spent fuel pools, was designed to meet NRC requirements that take into account site-specific hazards, including the potential for seismic events, as well as a number of different causal factors. *See* Draft GEIS at 3-50 (noting that, while Diablo Canyon is located in an area with higher seismic hazards, the plant has been designed to withstand expected seismic effects). In accordance with a fundamental principle of NRC’s license renewal rule, this licensing basis will remain in effect and will continue to provide

reasonable assurance of safety, throughout the period of extended operation. Again, SLOMFP has not highlighted any information that is actually new or that suggests a unique vulnerability at Diablo Canyon.⁵

Finally, SLOMFP argues that the NRC has not “identified any mitigative measures specific to DCNPP or explained how they took into account the increased risk of an earthquake at that site.” SLOMFP Brief at 17. SLOMFP misses the point. Increased seismic risk at Diablo Canyon is addressed by NRC regulations and the current licensing basis of the plant. The NRC has also previously concluded that existing regulatory requirements provide adequate mitigation incentives for on-site storage of spent fuel. GEIS at 6-86. Indeed, for all issues designated as Category 1, the Commission concluded that additional site-specific mitigation alternatives are unlikely to be beneficial and need not be considered for license renewal. *See* “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule,” 61 Fed. Reg. 28467, 28484 (June 5, 1996); GEIS at 1-5, 1-9. In the draft GEIS, the NRC bolsters this conclusion by referencing the additional mitigation strategies that every licensee was required to implement subsequent to September 11, 2001. Draft GEIS at E-36; *see also, New York v. NRC*, No. 08-3903, slip op. (2d Cir. Dec. 21, 2009) at 10-11 (explaining that a discussion of site-specific mitigation is not necessary because the NRC mandated that mitigation tactics be implemented at all nuclear power plants). The draft GEIS describes the potential for any cost-effective mitigation measures related to the spent fuel pool as “substantially less than

⁵ SLOMFP also argues that the fact that the revised GEIS is a draft is not crucial. SLOMFP Brief at 16 n.5 (citing LBP-10-15 at 24 n.23). Instead, SLOMFP asserts that the relevant point is that the draft GEIS contains new and significant information, not that the document is labeled “draft.” But, the draft GEIS summarizes and discusses other studies; it does not break new ground. As noted above, the draft GEIS considered NUREG-1738 and subsequent studies, including the Sandia studies. Based on all of this new information, the NRC Staff reconfirmed the GEIS conclusion that the environmental impacts of spent fuel pool storage are small.

for reactor accidents.” See *Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station)*, CLI-10-11, ___ NRC ___ (slip op. March 26, 2010) at 33 n. 125 (citing Draft GEIS at E-42). On this basis, the draft GEIS concludes that no change is warranted to the existing GEIS conclusion that mitigation alternatives for spent fuel pool accidents need not be considered on a site-specific basis. Draft GEIS at E-42. Because the NRC concluded that sufficient mitigation measures are in place for all spent fuel pools, there is no need for the NRC to specifically identify the mitigation measures in place at Diablo Canyon.⁶

B. Even if there were new and significant information, the NRC may consider such information outside the hearing process.

SLOMFP argues that under NEPA the NRC has “a nondiscretionary duty to consider new and significant DCNPP-specific information that bears on the GEIS conclusions.” SLOMFP Brief at 2; see also *id.* at 16. According to SLOMFP, a federal agency “has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions.” *Id.* at 13 (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th Cir. 1980)). However, even if true as a general proposition, the NRC has met that obligation here. As noted above, the draft GEIS considered more recent and available information regarding spent fuel storage risks, including NUREG-1738 and the issue of partial loss of cooling water. See, e.g., Draft GEIS at E-36. But, this does not mean that the NRC must waive its regulations or otherwise permit SLOMFP to litigate spent fuel pool risks in this proceeding.

In LBP-06-20, the Board in the *Vermont Yankee* license renewal proceeding addressed a contention asserting that the applicant’s Environmental Report (“ER”) “does not

⁶ Requiring the NRC to identify every site-specific spent fuel pool mitigation measure in every supplement to the GEIS would also run counter to the intent of the GEIS, which was to increase efficiency by eliminating duplicative and unnecessary reviews of issues that could be addressed generically. Thus, the first waiver criteria — the rule’s strict application “would not serve the purposes for which [it] was adopted” — is not met.

satisfy 10 C.F.R. § 51.53(c)(3)(iv) and NEPA . . . because it fails to address new and significant information regarding the reasonably foreseeable potential for a severe accident involving nuclear fuel stored in high-density storage racks in the Vermont Yankee fuel pool.” *Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station), LBP-06-20, 64 NRC 131, 152 (2006). Based in part on NUREG-1738, the contention argued that there was new and significant information relating to the risks of a spent fuel pool fire that must be addressed in the applicant’s ER.⁷ *Id.* at 153. Relying on the Commission decision in *Turkey Point*, the Board concluded that a contention cannot challenge an ER’s failure to include new and significant information concerning a Category 1 issue. As the Board explained, the Commission provides other, non-adjudicatory processes for raising concerns regarding the continued generic applicability of a Category 1 issue. *Id.* at 156-157. Accordingly, the Board held that a contention seeking to litigate an ER’s failure to include new and significant information is not admissible absent a waiver. On review, the Commission cited the Board’s reasoning with approval and explained that “[a]djudicating category one issues site-by-site based merely on a claim of ‘new and significant information,’ would defeat the purpose of resolving generic issues in a GEIS.” *Entergy Nuclear Vermont Yankee LLC et al* (Vermont Yankee Nuclear Power Station and Pilgrim Nuclear Power Station), CLI-07-3, 65 NRC 13, 21 (2007) (emphasis added). While SLOMFP has requested a waiver here, the same analysis would apply. The waiver request amounts to an attempt to litigate a Category 1 issue based only on a claim that there is

⁷ The alleged new information was that: (a) if the water level in a fuel storage pool drops to the point where the tops of the fuel assemblies are uncovered, the fuel will burn, (b) the fuel will burn regardless of its age, (c) the fire will propagate to other assemblies in the pool, and (d) the fire may be catastrophic. LBP-06-20, 64 NRC at 153. This allegedly new information is strikingly similar to the allegedly new information in SLOMFP’s brief. *See* SLOMFP Brief at 5 (citing NUREG-1738 for the proposition that partially uncovered fuel will burn regardless of its age and that high consequences would result).

“new and significant information” related to the GEIS. This is not the sort of “special circumstances” that would justify a waiver from the NRC’s regulations to allow litigation of a generic issue.

SLOMFP also cites general NEPA cases requiring agencies to consider new and significant information, but points to no cases that require the NRC to consider new and significant information in a plant-specific hearing. Indeed, “[w]hile NEPA clearly mandates that an agency fully consider environmental issues, it does not itself provide for a hearing on those issues.” *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995), *citing Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 (D.C. Cir. 1990); *see also Baltimore Gas and Elec. Co. v. NRDC*, 462 U.S. 87, 100 (1983) (“NEPA does not require agencies to adopt any particular internal decisionmaking structure.”). Here, the NRC has established appropriate mechanisms for ensuring that new and significant information is considered as required by NEPA. The NRC has addressed the issues identified by SLOMFP and provides multiple ways for SLOMFP and other stakeholders to participate in the agency’s process. In addition to the public comment process for the GEIS rulemaking, there has been a public comment period associated with the GEIS revision,⁸ and there will be a comment period for each site-specific supplement to the GEIS. Moreover, NRC regulations provide two other procedural mechanisms (10 C.F.R. §§ 2.206 and 2.802) by which SLOMFP may pursue concerns about the generic conclusions in the GEIS or the applicability of the GEIS to a particular site. Through these processes, the NRC fully satisfies its NEPA obligations.⁹

⁸ Indeed, SLOMFP filed comments on the draft revision to the GEIS. *See* SLOMFP Brief at 9-10. The NRC Staff will address those comments in finalizing the revised GEIS.

⁹ The NRC’s approach is consistent with the Council on Environmental Quality Guidance on NEPA, which states that “[p]ublic hearings or meetings, although often held, are not

At bottom, it is simply an overstatement for SLOMFP to assert, as it does here, that site specific litigation of these claims is somehow necessary for the NRC to satisfy NEPA.

C. A site-specific licensing proceeding is not the proper forum for challenging the methodology used or the expert conclusions in the GEIS.

As discussed above, SLOMFP's request for a waiver rests on an incorrect reading of the draft GEIS. SLOMFP argues that the draft GEIS conclusions do not apply to Diablo Canyon, yet the draft GEIS plainly states that its conclusions apply to all plants. The NRC Staff has reiterated this conclusion in its filings in this proceeding. *See, e.g.*, NRC Brief at 5. As also noted above, the draft GEIS concludes — based on the more rigorous accident progression analyses completed subsequent to NUREG-1738, on mitigation enhancements, and on NRC site evaluations of every spent fuel pool in the United States — that the risk of an spent fuel pool zirconium fire is less than reported in NUREG-1738 and previous studies. *Id.* If SLOMFP believes that the NRC's logic in the draft GEIS is unclear or that the GEIS should take into account different studies, then SLOMFP should, as it has done, explain its position in comments to the NRC. But, disagreeing with the methodology¹⁰ that the NRC used in the draft GEIS does not warrant a waiver or necessitate litigation of the issue in this proceeding.

Under well-established NEPA principles, the NRC is entitled to rely on its technical experts in evaluating the risk of a spent fuel pool fire. *See, e.g., Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331-33 (9th Cir. 1992) (finding that an agency is entitled to rely on its

required; instead the manner in which public input will be sought is left to the discretion of the agency.” 48 Fed. Reg. 34263 (July 28, 1983).

¹⁰ The GEIS and the draft GEIS both rely on “bounding analyses,” which describe environmental impacts of spent fuel storage based on conservative assumptions (*i.e.*, describing the upper limits of environmental consequences). GEIS at 2-33. The bounding license renewal scenarios, being very conservative, are intended to address what might occur for those plants whose impacts will be considerably greater than is typical of the nuclear power reactor population as a whole. *Id.*

own scientific opinion of data); *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985) (“NEPA does not require that we decide whether [a NEPA analysis] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology.”). Here, those NRC experts have unambiguously confirmed the earlier conclusion in the GEIS that the environmental impacts of spent fuel pool storage are small for all plants. NEPA does not compel, as implied by SLOMFP, that these conclusions be tested against SLOMFP’s unsupported views in this site-specific license renewal proceeding. This proceeding is simply not the appropriate forum for challenging those conclusions.

III. CONCLUSION

SLOMFP has not demonstrated that a waiver of Commission regulations is warranted. The NRC has repeatedly and conclusively addressed the environmental impacts of spent fuel pool storage for all facilities, including Diablo Canyon. There are no “special circumstances” that were not considered in the GEIS rulemaking (or, for that matter, in the draft GEIS). A waiver of the NRC’s regulations also is not necessary to ensure consideration of any unique conditions at Diablo Canyon or to address “new and significant” information regarding the environmental impacts of spent fuel pool storage. Therefore, the Commission should deny SLOMFP’s request for a waiver of NRC regulations and reject proposed Contention EC-2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S REPLY BRIEF IN OPPOSITION TO A WAIVER FOR CONTENTION EC-2” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 15th day of October 2010, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

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