LBP-11-32

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Nicholas G. Trikouros
Dr. Paul B. Abramson

In the Matter of	Docket Nos. 50-275-LR and 50-323-LR
PACIFIC GAS & ELECTRIC COMPANY	ASLBP No. 10-900-01-LR-BD01
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	November 18, 2011

MEMORANDUM, ORDER, AND REFERRAL
(Denying Motion to Admit New Contention and Referring Ruling to Commission)

Before the Board is a motion filed by the San Luis Obispo Mothers for Peace (SLOMFP) seeking to admit a new environmental contention based on the "findings and recommendations raised by the Nuclear Regulatory Commission's Fukushima Task Force Report" issued on July 12, 2011.[1] We refer to this new contention as the "Fukushima Contention" or "EC-5."[2] The

[1] Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Aug. 11, 2011) at 1 (corrected certificate of service added on Aug. 24, 2011) (Motion); Motion attachment, Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Aug. 11, 2011) at 4 (Statement of Contention). SLOMFP's Motion was supported by a declaration from Dr. Arjun Makhijani. Motion attachment, Declaration of Dr. Arjun Makhijani Regarding Safety and Environmental Significance of NRC Task Force Report Regarding Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Aug. 8, 2011). With the new contention, SLOMFP filed in the adjudicatory docket a copy of a rulemaking petition it filed with the Commission. Motion attachment, Rulemaking Petition to Rescind Prohibition Against Consideration of Environmental Impacts of Severe Reactor and Spent Fuel Pool Accidents and Request to Suspend Licensing Decision (Aug. 11, 2011).

Pacific Gas and Electric Company (PG&E) and the NRC Staff oppose the admission of EC-5.[3] For the reasons stated below, we rule that the contention is not admissible. Pursuant to 10 C.F.R. § 2.323(f) we also refer part of our ruling to the Commission, i.e., our conclusion that an applicant has no legal duty, either under the National Environmental Policy Act (NEPA) or any NRC regulation, to supplement an originally compliant environmental report (ER) to incorporate new and significant information that arises after the ER was duly submitted.

I. BACKGROUND

A. Fukushima Dai-ichi Accident and NRC Initial Response

On March 11, 2011, a 9.0 magnitude earthquake and a tsunami produced widespread devastation across a large area of northeastern Japan. This event caused the Fukushima Dai-ichi nuclear facility to suffer substantial damage to a number of its nuclear reactors, spent fuel pools, and other associated systems (hereinafter "Fukushima Accident"). As a result of the Fukushima Accident, radiation was released into the surrounding environment.[4]

On March 23, 2011, the NRC established a special Task Force to study the Fukushima Accident.[5] The Commission directed the Task Force to conduct an independent evaluation of information from the Fukushima Accident and to identify near term and immediate operational or regulatory deficiencies that might affect domestic reactor operation, including protection against

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[2] "EC" means environmental contention. EC-5 is the fifth environmental contention proffered by SLOMFP.

[3] Applicant's Response to Proposed Contention (Sept 6, 2011) (PG&E Answer); NRC Staff's Answer to Motion to Admit New Contention Regarding the Safety and Environmental Implications of the Nuclear Regulatory Commission Task Force Report on the Fukushima Dai-ichi Accident (Sept. 6, 2011) (Staff Answer).

[4] Recommendations for Enhancing Reactor Safety in the 21st Century, The Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (July 12, 2011) at 7-14 (Task Force Report).

[5] Tasking Memorandum – COMGBJ–11–0002 – NRC Actions Following the Events in Japan (Mar. 23, 2011) (Tasking Memorandum); see also Charter for the Nuclear Regulatory Commission Task Force to Conduct a Near-Term Evaluation of the Need for Agency Actions Following the Events in Japan (Apr. 1, 2011).

earthquakes, tsunamis, and other natural events, station blackout, severe accident mitigation, emergency preparedness, and combustible gas control. Tasking Memorandum at 1.

On July 12, 2011, the Task Force issued its report which included twelve recommendations for improving the safety of both new and operating nuclear reactors. Task Force Report at 69-70. Although the Task Force concluded that the continued operation and licensing of nuclear power plants in the U.S. does not pose an "imminent risk" to public health and safety, it nevertheless also "conclude[d] that a more balanced application of the Commission's defense-in-depth philosophy using risk insights would provide an enhanced regulatory framework that is logical, systematic, coherent and better understood" and that "[s]uch a framework would . . . significantly enhanc[e] safety."[6] Id. at vii-viii. Further, it stated that the "Task Force has concluded that a collection of such 'extended design-basis' requirements . . . should be established." Id. at viii.

Meanwhile, on April 14, 2011, three months before the Task Force Report was issued, SLOMFP and over forty other environmental organizations and individuals, filed petitions with the Commission, asking it to temporarily suspend the issuance of new or renewed licenses to nuclear power plants in the United States until information from the Fukushima Accident became clearer, and until the lessons of Fukushima could be learned and understood.[7] In the interim, SLOMFP (and the other petitioners) asked the Commission to suspend all adjudicatory and licensing proceedings, Emergency Petition at 28-29, and to revise its generic environmental

[6] Indeed, this was the central thrust of the Task Force's very first recommendation: "The Task Force recommends establishing a logical, systematic, and coherent regulatory framework for adequate protection that appropriately balances defense-in-depth and risk considerations." Id. at ix.

[7] See, e.g., Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 14, 2011) at 28 (Emergency Petition); see also Amendment and Errata to Emergency Petition to Suspend All Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of Lessons Learned from Fukushima Daiichi Nuclear Power Station Accident (Apr. 18, 2011).

impact statement (GEIS) related to the licensing of nuclear reactors in light of the allegedly "new and significant information" from the Fukushima Accident. Id. at 29. In light of the evolving information, SLOMFP and the other petitioners also asked the Commission to "establish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings." Id. at 30.

On September 9, 2011, the Commission denied all of the foregoing requests in SLOMFP's Emergency Petition. The Commission stated that there is "no imminent risk to public health and safety if. . . [the] regulatory process . . . continue[s]."[8] The Commission concluded "[m]oving forward with [Commission] decisions and proceedings will have no effect on the NRC's ability to implement necessary rule or policy changes that might come out of [Commission] review of the Fukushima Daiichi events." Id. In addition, the Commission stated that any changes adopted as a result of the Fukushima Accident or the Task Force Report can and will be implemented through the "normal regulatory process." Id. (slip op. at 5, n.6).

The Commission rejected the petitioners' "request that NRC conduct a separate generic NEPA analysis regarding whether the Fukushima events constitute 'new and significant information' under NEPA that must be analysed as a part of the environmental review for new reactor and license renewal decisions." Id. (slip op. at 30). The Commission ruled

> [t]he request is premature. Although the Task Force completed its review and provided its recommendations to us, the agency continues to evaluate the accident and its implications for U.S. facilities and the full picture of what happened at Fukushima is still far from clear. In short, we do not know today the full implications of the Japan events for U.S. facilities. Therefore, any generic NEPA duty – if one were appropriate at all – does not accrue now.

Id. (slip op. at 30).

The Commission added, however, that individual "[r]eactor adjudications should go forward, including those that may involve proposed contentions based on issues implicated by

[8] Union Electric Company d/b/a Ameren Missouri (Callaway Plant, Unit 2), CLI-11-05, 74 NRC __, __ (slip op. at 29) (Sept. 9, 2011).

the Fukushima events." Id. (slip op. at 35). But the Commission declined to provide guidance to the petitioners as to when contentions based on the Fukushima Accident or Task Force Report might "accrue." The Commission stated that it agreed with the respondents that NRC regulations and case law already provide "clear and uniform standards" to determine the timeliness of motions to add new contentions. Id. (slip op. at 33).

B. Procedural Background to EC-5

The motion to admit EC-5 was filed on August 11, 2011, before the Commission had issued CLI-11-05 rejecting the April 2011 Emergency Petition. Motion at 1. Likewise, the answers of PG&E and the Staff, opposing the admission of EC-5, were filed before CLI-11-05 was issued. PG&E Answer at 1; Staff Answer at 1. SLOMFP's reply, filed on September 13, 2011, did address the implications of CLI-11-05.[9] And, at the Board's request, PG&E and Staff each filed a surreply on September 27, 2011 addressing CLI-11-05.[10] The Board held oral argument on EC-5 on October 13, 2011, in Rockville, MD.

During the oral argument, the Board requested that the parties submit, within 5 days of the argument, short written answers to the following question: What regulation, if any, requires a license renewal applicant to supplement or update its environmental report? Tr. at 610. On October 18, 2011, the parties filed one-page answers to that question.[11]

[9] [SLOMFP's] Reply to Oppositions to Admission of New Contention (Sept. 13, 2011) at 1 (SLOMFP Reply); SLOMFP Reply attachment, Reply Memorandum Regarding Timeliness and Admissibility of New Contentions Seeking Consideration of Environmental Implications of Fukushima Task Force Report in Individual Reactor Licensing Proceedings (Sept. 13, 2011) at 3-4 (Reply Memorandum).

[10] Applicant's Sur-Reply Regarding Admission of Proposed New Contention (Sept. 27, 2011) (PG&E Surreply); NRC Staff's Surreply to the Reply of [SLOMFP] (Sept. 27, 2011) (Staff Surreply).

[11] [SLOMFP's] Response to Board Question (Oct. 18, 2011) at 1 (SLOMFP Supplemental Brief); [PG&E's] Response to Licensing Board Question at Oral Argument (Oct. 18, 2011) at 1 (PG&E Supplemental Brief); NRC Staff's Response to Question at Oral Argument (Oct 18, 2011) at 1 (Staff Supplemental Brief).

Thereafter, on October 18, 2011, the Commission issued SRM/SECY-11-0124, directing the Staff to implement some of the Task Force recommendations and to strive to do so within 5 years—by 2016.[12] Within 10 days, SLOMFP filed a motion to supplement EC-5 based on the issuance of SRM/SECY-11-0124.[13] PG&E and Staff filed answers thereto.[14]

II. LEGAL STANDARDS

Three regulations address the admissibility of new contentions once an adjudicatory proceeding has been initiated. These are 10 C.F.R. § 2.309(f)(2), which deals with the admission of new and timely contentions; 10 C.F.R. § 2.309(c), which deals with the admission of new but nontimely contentions; and 10 C.F.R. § 2.309(f)(1), which establishes the basic criteria that all contentions must satisfy.

The first regulation states that a timely new or amended contention may be admitted if it meets the following requirements:

> (i) The information upon which the amended or new contention is based was not previously available;
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> (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
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> (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

10 C.F.R. § 2.309(f)(2)(i)-(iii) (emphasis added).[15]

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[12] Staff Requirements – SECY-11-0124 – Recommended Actions to be Taken Without Delay from the Near-Term Task Force Report (Oct. 18, 2011) at 1 (unanimous approval) (SRM/SECY-11-0124).

[13] [SLOMFP's] Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirements to Address Safety and Environmental Implications of the Fukushima Task Force Report (Oct. 28, 2011) (Motion to Supplement Basis).

[14] Applicant's Reply to Motion for Leave to Supplement Basis (Nov. 7, 2011) (PG&E Answer to Supplemental Basis); NRC Staff's Answer to Motion for Leave to Supplement Basis of Contention Regarding NEPA Requirement to Address Safety and Environmental Implications of the Fukushima Task Force Report (Nov. 7, 2011) (Staff Answer to Supplemental Basis).

[15] NRC regulations also include a special rule for new contentions under NEPA. The regulations state that, at the outset of the proceeding, NEPA contentions are to be based on the

The regulation does not specify the number of days within which a new or amended contention must be filed in order to be "timely." Timeliness is subject to a reasonableness standard, depending on the facts and circumstances of each situation. Many boards, including this one, have specified that a new contention will be presumed timely if it is filed within 30 days of the trigger event, i.e., the moment when the new information (upon which the contention is founded) becomes "available" to the petitioners. Initial Scheduling Order (Sept. 15, 2010) at 12-13 (unpublished) (ISO). However, the moment when the 30 day clock begins to run, i.e., when the new information becomes "available," is frequently the subject of much dispute and litigation and the standard is far from "clear and uniform."

If a proposed new contention is not timely under 10 C.F.R. § 2.309(f)(2)(iii), then the proponent of the contention must address the eight criteria of 10 C.F.R. § 2.309(c)(1) for "nontimely filings." The first of the eight criteria, "good cause" for failure to file on time, is the most important factor in the 10 C.F.R. § 2.309(c) analysis.[16] If good cause is not shown, the Board may still permit the late filing, but the petitioner or intervenor must make a strong showing on the other factors.[17]

In addition to the foregoing, all contentions must satisfy the six criteria specified in 10 C.F.R. § 2.309(f)(1)(i)-(vi). We reviewed the six-factor test earlier in this proceeding. LBP-10-15, 72 NRC at __ (slip op. at 6-8).

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applicant's ER. 10 C.F.R. § 2.309(f)(2). Subsequently, new or amended NEPA contentions may be filed "if there are data or conclusions in the NRC draft or final environmental impact statement (EIS), environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document." Id. Inasmuch as the DEIS has not been issued, there can (as yet) be no difference between the ER and the DEIS, and thus this regulatory provision is not implicated here.

[16] See Crow Butte Resources, Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 549 n.61 (2009); Amergen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-09-07, 69 NRC 235, 261 (2009).

[17] See Pacific Gas and Electric Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1, 5-8 (2008).

III. POSITIONS OF THE PARTIES

Proposed Contention EC-5 states:

> The ER for Diablo Canyon license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.

Statement of Contention at 4-5.

According to the SLOMFP, the "findings and recommendations" of the Task Force Report raise "new and significant environmental implications" that must be addressed in PG&E's ER.[18] In support, SLOMFP cites NEPA case law and NRC regulations for the proposition that a supplement to the DEIS or FEIS is required if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." See 10 C.F.R. §§ 51.72(a)(2); 51.92(a)(2); Statement of Contention at 9-11.

SLOMFP's logic seems to be as follows. First, SLOMFP points out that the Task Force has recommended that the Commission take actions to impose additional, more stringent requirements on nuclear reactors, for instance, by establishing mandatory safety regulations for certain severe accidents without regard to cost. Statement of Contention at 2, 13; Tr. at 530, 532. Second, if these recommendations are implemented, SLOMFP asserts that they would significantly increase the cost of safely operating nuclear reactors. Statement of Contention at 13. Third, SLOMFP says that these increased costs would change the NEPA cost-benefit analysis, and severe accident mitigation alternatives (SAMA) analysis for nuclear reactors, including for the Diablo Canyon Nuclear Power Plant (DCNPP).[19] Fourth, SLOMFP contends that the Task Force recommendations, in-and-of themselves, constitute "new and significant

[18] Indeed, SLOMFP takes the view that those recommendations, in-and-of themselves, constitute the requisite new information. Motion at 1; Statement of Contention at 4-5, 10-11; Tr. at 545-46, 552-55.

[19] Statement of Contention at 3, 13-14 (citing 42 U.S.C. § 4332(C)(iii), which requires a "detailed statement . . . on . . . alternatives to the proposed action"); Tr. at 541, 543, 546.

information" whose environmental implications must be considered under NEPA before the NRC may grant renewed operating licenses for DCNPP.[20] Finally, in a point only made explicit in its supplemental brief, SLOMFP asserts that this NEPA duty extends to PG&E, which must supplement its ER to account for the Task Force recommendations.[21]

In response, PG&E argues that EC-5 is inadmissible, assuring us that "[a]ny new requirements or enhancements for operating nuclear power plants resulting from lessons learned through the Fukushima accident should (and will) be imposed in the context of the NRC's ongoing review, independent from this license renewal review." PG&E Answer at 1. According to PG&E, EC-5 raises generic issues and, because the Commission may ultimately deal with these generic issues through notice and comment rulemaking, NRC precedent precludes admitting EC-5.[22]

PG&E also contends EC-5 is inadmissible because it does no more than challenge the basic regulatory structure of the NRC's design basis and generic environmental impacts already assessed through rulemaking.[23] Viewed as a contention challenging the ER's SAMA analysis, PG&E argues further that EC-5 does not establish a genuine dispute with the ER, as required by 10 C.F.R. § 2.309(f)(1)(vi). PG&E Answer at 11-15. PG&E states that not only does EC-5 not address any specific aspect of the ER's SAMA analysis, but EC-5 fails to even discuss any

[20] Statement of Contention at 9-11 (citing Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 371 n.14 (1989)).

[21] SLOMFP Supplemental Brief at 1 (contending that 10 C.F.R. § 51.53(c)(3)(iv) requires PG&E to supplement its ER); see Statement of Contention at 11 (citing 10 C.F.R. § 51.53(c)(3)(iv)).

[22] PG&E Answer at 7 (citing Duke Energy Corp. (Oconee Nuclear Station, Units 1, 2, and 3), CLI-99-11, 49 NRC 328, 345 (1999)).

[23] Id. at 9-10 (citing Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974) and 10 C.F.R. § 51.53(c)(3)(i), respectively); Tr. at 532-33.

discernable implications of the Fukushima Accident with respect to accident probabilities or environmental consequences at the DCNPP site.[24] Id. at 13; Tr. at 532-33.

The Staff also argues that EC-5 is not admissible. Staff Answer at 1. The four principal arguments advanced by Staff are that the issues raised by EC-5 (1) are outside the scope of this license renewal proceeding, (2) fail to challenge any specific provisions or statements in the ER, (3) are not material to this proceeding, and (4) lack an adequate basis. Staff Answer at 1; Tr. 534-35. The Staff also argues that EC-5 is untimely under 10 C.F.R. § 2.309(f)(2) because the Fukushima Accident was previously discussed by SLOMFP's own expert Dr. Makhijani as early as April 19, 2011, more than 30 days before the filing of EC-5. Staff Answer at 32-36; Tr. at 594.

In reply, SLOMFP asserts that the Commission decision in CLI-11-05 bolsters the admissibility of EC-5. Reply Memorandum at 3-4. According to SLOMFP, the Commission held that even though the Task Force Report did not justify initiating a generic NEPA review, the Commission acknowledged that new and significant information "may come to light," that "must be considered in individual reactor licensing proceedings."[25] In this individual licensing proceeding, SLOMFP argues that the Task Force Report recommendations themselves constitute such new and significant information. Id. at 4; Tr. at 537, 606. PG&E and Staff disagree, both arguing that in CLI-11-05 the Commission conclusively determined that "[b]ased on the Task Force Report and the current state of information, there is no new and significant environmental information giving rise to a NEPA duty." PG&E Surreply at 3 (emphasis in original); see also Staff Surreply at 4. According to PG&E and Staff, the Commission's statement applies equally to this licensing proceeding. Tr. at 570-72.

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[24] PG&E does not oppose the timeliness of EC-5 under 10 C.F.R. § 2.309(f)(2) or 10 C.F.R. § 2.309(c)(1). PG&E Answer at 5.

[25] Reply Memorandum at 3-4 (citing Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30)) (internal quotations omitted).

During the oral argument, the Board asked the Parties whether there is any legal requirement for the applicant to supplement or update the ER to incorporate "new and significant information."[26] None of the parties could provide a satisfactory answer to this question. See Tr. at 542 (SLOMFP), 567 (SLOMFP), 591 (PG&E), 597-600 (Staff), 606 (SLOMFP). At the close of the oral argument, the Board instructed the parties to address that question, as follows: "What regulation, if any, requires the environmental report to be supplemented or updated annually?" Tr. at 610. In response, SLOMFP identified 10 C.F.R. § 51.53(c)(3)(iv) as the regulation that requires license renewal applicants to supplement their environmental reports. SLOMFP Supplemental Brief at 1. PG&E and the NRC Staff did not assert that Part 51 requires the ER to be supplemented, and instead stated only that 10 C.F.R. § 54.21(b) requires an applicant to update its license renewal application annually to reflect changes in its current licensing basis (CLB), but such updating does not "explicitly extend to the [ER]." PG&E Supplemental Brief at 1; see also Staff Supplemental Brief at 1.

After oral argument SLOMFP moved to supplement the basis for EC-5. Motion to Supplement Basis at 1. According to SLOMFP, a key event occurred on October 18, 2011, when the Commission issued SRM/SECY-11-0124, directing the Staff to implement some of the Task Force recommendations. SLOMFP maintains that the Commission's action "provides further support . . . for SLOMFP's contention that the information set forth in the Task Force Report must be considered before the Diablo Canyon nuclear power plant operating license can be renewed." Id. at 1. In response, PG&E did not oppose SLOMFP's motion to supplement, but continued to oppose admission of the contention, echoing arguments made in its pleadings and at oral argument. PG&E Answer to Supplemental Basis at 1-2. Staff opposed SLOMFP's motion as both procedurally defective and failing to demonstrate that EC-5 is admissible. Staff Answer to Supplemental Basis at 4-5.

[26] Tr. at 542 (Judge Abramson: "[C]an you point us to legal authority where the applicant is required to do that, to modify its ER? Isn't NEPA a duty of the agency, not of the applicant?").

IV. ANALYSIS AND RULING

Our analysis starts with the plain words of the contention and the black letter of the law. Applying these criteria, we conclude that EC-5 fails on its face because an applicant has no legal duty to supplement or update the ER to incorporate new and significant information that arises from events that occur after the ER was duly filed.

The contention focuses, as is required by our regulations, on the ER.[27]

> The ER for Diablo Canyon license renewal fails to satisfy the requirements of NEPA because it does not address the new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report. As required by NEPA and the NRC regulations, these implications must be addressed in the ER.

SLOMFP, however, errs when it asserts that NEPA requires that these implications be addressed in the ER. SLOMFP asserts that NEPA requires NRC to supplement its EIS to incorporate any new and significant information that arises after the EIS is issued, but before the NRC takes final agency action. Although this statement is accurate, this licensing proceeding has not yet reached the EIS stage and EC-5 challenges only the ER. Environmental Reports are creatures of 10 C.F.R. Part 51. In contrast, NEPA applies to "agencies of the Federal Government," see 42 U.S.C. § 4322(2), not to private parties such as applicants for NRC licenses.[28]

The Commission recently affirmed that Part 51, not NEPA, is the source of the legal requirements applicable to the applicant's environmental report.[29] On this basis, we dispense

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[27] That this is appropriate is evident in the black letter of Section 2.309(f)(2) requiring that "on issues arising under NEPA, the petitioner shall file contentions based upon the applicant's environmental report." But one principal shortcoming of this contention is its assertion of a duty to update the ER.

[28] See, e.g., Save the Bay, Inc. v. U.S. Corps of Engineers, 610 F.2d 322, 326 (5th Cir. 1980); Sierra Club v. EPA, 995 F.2d 1478, 1485 (9th Cir. 1993); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243-44 (D.C. Cir. 1980); see also Daniel R. Mandelker, NEPA Law and Litigation §§ 1.1, 8.18 (2d ed. 2008).

[29] Progress Energy Florida, Inc. (Levy County Nuclear Power Plant, Units 1 and 2), CLI-10-02, 71 NRC 27, 34 (2010), affirming LBP-09-10, 70 NRC 51, 87 (2009) ("The Board, therefore, was

with the portion of EC-5 that asserts that "NEPA [requires] that these implications be addressed in the ER." NEPA does not apply to PG&E or the ER.

Thus we turn to the NRC regulations for a source of some legal duty that the ER must address the alleged "new and significant environmental implications of the findings and recommendations raised by the NRC's Fukushima Task Force Report." Before proceeding, we note that PG&E filed the ER on November 23, 2009, see 75 Fed. Reg. 3,493, 3,493 (Jan 21, 2010), whereas, the Fukushima Accident began on March 11, 2011, and the Task Force Report was issued on July 12, 2011.

SLOMFP asserts that 10 C.F.R. § 51.53(c)(3)(iv) imposes such a duty. SLOMFP Supplemental Brief at 1. Section 51.53 deals with three types of "postconstruction" ERs. Subsection (b) deals with "operating license stage" ERs; subsection (c) deals with "operating license renewal stage" ERs; and subsection (d) deals with "postoperating license stage" ERs. See 10 C.F.R. § 51.53(b), (c) and (d) respectively. For an "operating license renewal stage", as here, the regulation specifies that the ER "must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). But this provision does not impose a continuing duty upon the applicant to supplement or update its originally compliant ER if new and significant information arises after the ER is submitted.

Where the NRC intends to mandate that an originally compliant environmental document be supplemented, it does so explicitly. For example, Section 51.72 is titled "Supplement to draft environmental impact statement" and states that "[t]he NRC staff will prepare a supplement to a draft [EIS] . . . if . . . (2) there are significant new circumstances or information relevant to

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correct when it observed that it is not NEPA, but our regulations in 10 C.F.R. Part 51, that require that an applicant submit an ER."); see also Washington Public Power Supply System (WPPSS Nuclear Project No. 3), LBP-96-21, 44 NRC 134, 136 (1996); Duke Power Company (Catawba Nuclear Station, Units 1 and 2), LBP-83-8A, 17 NRC 282, 285 (1983) ("The Commission cannot delegate its NEPA responsibilities to a private party.").

environmental concerns and bearing on the proposed action or its impacts." 10 C.F.R. § 51.72(a)(2). The provisions of Section 51.92, titled "Supplement to the final environmental impact statement" are virtually identical. 10 C.F.R. § 51.92(a)(2). In contrast, neither 10 C.F.R. § 51.53(c)(3)(iv), nor any other NRC regulation, states that the ER must be "supplemented" or "updated."

Certainly 10 C.F.R. § 51.53(c)(3)(iv) requires that license renewal ERs contain "new and significant information." But in context, this simply means that, when a license is being renewed, the renewal applicant cannot rest on the ER (and EIS) associated with the original license, and instead must submit an ER that includes new environmental information of which the licensee is aware and that has arisen subsequent to the issuance of the original license.

This reading is confirmed by a review of the NRC's other provisions relating to ERs. For example, Part 51 nowhere requires that ERs include new information when the application is for a new license or permit. See 10 C.F.R. §§ 51.50(b) (early site permit stage (ESP)); 51.50(c) (combined license (COL) stage without prior ESP); 51.53(b) (operating license stage); 51.54 (manufacturing license stage); 51.55 (standard design certification stage).

In contrast, Part 51 only specifies that an ER must include new information when a prior license has been issued for the facility, and the ER in question is associated with a subsequent license for the same facility. See 10 C.F.R. §§ 51.50(c)(1)(iii) (COL referencing a prior ESP); 51.53(c)(3)(iv) (license renewal); 51.53(d) (postoperating license).

If, as SLOMFP contends, Section 51.53(c)(3)(iv) is intended to require an applicant to supplement its originally compliant ER whenever "new and significant information" subsequently arises, then why is this "duty to supplement" limited to only some ERs? Logically, if there is a continuing duty to supplement an ER then it would be universal. It would apply equally to ERs associated with original license applications, and not be limited to subsequent applications relating to a facility that has already received a license.

We conclude that, in context, the phrase "new" as used in 10 C.F.R. § 51.53(c)(3)(iv) merely requires that the ER include environmental information that is "new" as compared to the original ER for the same facility and new as of the time of submission of the required ER. It does not impose a continuing duty to supplement an ER which was compliant when submitted.

In addition to being most consistent with the language and context of the regulations, our reading makes the most sense. This is because the ER is merely the first step in the environmental review and will be followed by a draft EIS (DEIS) and then a final EIS (FEIS). Clearly the DEIS must capture and address any "new and significant information" that arises in the interval after the applicant files its originally compliant ER. See 10 C.F.R. § 51.72(a)(2). Likewise, if new and significant information arises after the FEIS, then the NRC must supplement the FEIS. See 10 C.F.R. § 51.92(a)(2). SLOMFP's reading of 10 C.F.R. § 51.53(c)(3)(iv) would require the applicant to continually supplement the ER, even after the DEIS and FEIS are issued, until the moment the NRC takes final action and issues the license renewal. This would be duplicative and unproductive.[30] The regulations cited by PG&E and the Staff do not alter this result.[31]

[30] Our interpretation of 10 C.F.R. § 51.53(c)(3)(iv) does not bar the applicant from voluntarily supplementing its ER. Nor does it bar the Staff from filing a request for additional information asking the applicant to supplement the ER. It merely means that the regulation does not impose an automatic and continuing duty to supplement the ER.

[31] PG&E and the Staff cite several other regulations as possible support for the proposition that the applicant has a legal duty to supplement or update an originally compliant ER to incorporate new and significant information bearing on the environmental impacts of the proposed action. During the oral argument, the Staff cited 10 C.F.R. § 50.9 and § 54.13. Similar regulations are found in many parts of the NRC regulations. See 10 C.F.R. §§ 30.9, 40.9, 63.13, 70.9. First they state that the "[i]nformation provided to the Commission by an applicant . . . must be complete and accurate in all material respects." See 10 C.F.R. §§ 50.9(a), 54.13(a). While this regulation mandates that the application be complete and accurate when it is filed, it does not require that it be supplemented or updated. Second, these regulations specify that "each applicant shall notify the Commission of information identified by the applicant as having, for the regulated activity, a significant implication for public health and safety or common defense and security. See 10 C.F.R. §§ 54.13(b), 50.9(b). Even if this latter provision constitutes a duty to supplement or update the application, it only applies to matters relating to "public health and safety" and "common defense and security." These phrases derive directly and soley from the AEA. See AEA §§ 53b, 69, 103d. They are not found in NEPA and impose no duties

Our conclusion – that neither NEPA nor Part 51 requires an applicant to supplement, update, or otherwise modify an originally compliant ER to incorporate "new and significant information" arising from events occurring after the ER was filed, is fatal to EC-5. The contention alleges that the ER is deficient because it omits any discussion of any event that happened after the ER was filed,[32] i.e., the issuance of findings and recommendations in the Task Force Report. However, when the ER was filed on November 23, 2009, it would have been impossible for it to discuss the import of events that occurred more than a year later. There was no omission at that time. Unless there is a duty (which we have not found, and to which the Parties have not pointed us) to supplement or update the ER, we find no legal theory to support the proposition that the originally compliant ER was rendered non-compliant due to a subsequent accident or report. Thus, Contention EC-5 is inadmissible because it raises an issue that is not within the scope of this proceeding. 10 C.F.R. § 2.309(f)(1)(iii).

SLOMFP is, however, not without potential remedy as to its concerns about the NEPA-derived obligations respecting implications from the Fukushima events. Even though PG&E is not obligated to supplement the ER, the NRC Staff will, as it always does in license renewal proceedings, be issuing a draft supplemental EIS (DSEIS).[33] If the DSEIS fails to capture and

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thereunder. Finally, PG&E and the Staff both cite 10 C.F.R. § 54.21(b), which states, in pertinent part, that "an amendment to the renewal application must be submitted [annually] that identifies any changes to the CLB [current licensing basis] of the facility that materially affects the contents of the license renewal application, including the FSAR supplement." This regulation deals with Part 54 and the CLB, not NEPA or environmental matters. And even though the ER is, certainly, a part of the application, we cannot read this provision (or any of the others) as an obscure method for mandating that an originally compliant ER be supplemented or updated annually to incorporate new and significant environmental information.

[32] EC-5 is a contention of omission. See Reply Memorandum at 8 ("Even a cursory reading of Intervenors' contention makes it abundantly clear that it is a contention of omission.").

[33] A point of clarification is in order. The Staff's site-specific DEIS is referred to as a draft "supplemental" EIS or DSEIS, because, in the license renewal context, the Staff has already issued a generic EIS (GEIS). Thus, the Staff's site-specific DEIS serves as a "supplement" to the GEIS. More pertinent to our analysis here, however, is the fact that if new and significant environmental information arises after the Staff issues the DSEIS, then 10 C.F.R. § 51.72(a)(2) would require the Staff to issue a supplement to the DSEIS.

address any information that SLOMFP believes to be "new and significant", then SLOMFP may file a NEPA contention at that time. If it is filed within 30 days of the DSEIS, the contention will be deemed timely. [34] ISO at 12-13. Alternatively, if PG&E voluntarily supplements its ER, either in response to an RAI or sua sponte, to address the impact of the Fukushima Accident or the Task Force Report, then a new contention, relating to those events, would need to be filed within 30 days of the filing of the supplemental ER in order to be timely.[35]

Finally, we note that the conclusion that 10 C.F.R. § 51.53(c)(3)(iv) does not require that an ER be supplemented to include "new and significant information" associated with events that occur after the ER was filed, does not mean that "new" contentions, challenging the adequacy of

[34] We establish this timetable in order to achieve some reasonable clarity in the timing and efficient management of this adjudication. In this regard, we note that the Commission has stated that, based on current information regarding the Fukushima Accident, it would be "premature" to initiate a new generic EIS, but has declined to provide guidance as to when a Fukushima contention, challenging an individual EIS, would be mature. See, e.g., Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30 and 35). Meanwhile, in the Fukushima context, it is virtually impossible for an intervenor to identify when the information becomes mature, i.e., the precise moment at which the key information (upon which the contention would be based and the 30-day clock begins to run) becomes "available" within the meaning of 10 C.F.R. § 2.309(f)(2)(i). Indeed, the NRC Staff, in this very case, takes the position that EC-5 is both too late (untimely) and too early (premature). Tr. at 594. Compare Staff Answer at 5-6, 11, 25 (premature) with 32-36 (untimely). SLOMFP acknowledges that it has filed this contention in order to avoid this perennial "Catch 22" dilemma posed by the application of the regulation. Tr. at 568. Counsel for SLOMFP alludes to the second sentence of 10 C.F.R. § 2.309(f)(2), which states that, on issues arising under NEPA, "the petitioner shall file contentions based on the applicant's environmental report." Tr. at 567. It is not clear how this comports with the fact that there is no duty to supplement the ER. SLOMFP, being (fairly we think) confused about the timing of its environmental contentions relating to the Fukushima Accident, is trying to avoid having its contention thrown out as "untimely." Tr. at 555 ("We are obligated . . . to ask you to admit a contention . . . if you want to tell us that you think it's premature, we would appreciate knowing when it's right [ripe], because we're not getting any guidance from anybody."). Our ruling establishes some fair and objectively determinable milestones (e.g., issuance of the DSEIS) which can be used to determine the timeliness of any new environmental contentions based on the Fukushima Accident and/or the Task Force Report and its recommendations.

[35] We do not address whether, at the time of the issuance of the DSEIS (or voluntary supplement to the ER), there will actually be any "new and significant information" relating to Fukushima. It is possible that any such Fukushima contentions may still be premature. See Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30). Nor do we address whether any such contention will be otherwise admissible under 10 C.F.R. § 2.309(f)(1). That remains to be seen.

the ER, can never be filed under 10 C.F.R. § 2.309(f)(2).[36] The latter regulation authorizes the filing of new contentions, including environmental contentions, if they are based on information that was "not previously available" and is "materially different." As we see it, 10 C.F.R. § 2.309(f)(2) applies to any new information that reveals that the ER, as originally filed, was inadequate. For example, if new information becomes available that an endangered species has been living on the site, or that the facility has been leaking tritium into the groundwater, then 10 C.F.R. § 2.309(f)(2) authorizes the filing of a new contention, alleging that the ER, as originally filed, did not comply with Part 51. But we reject the proposition that, absent a duty to supplement, a compliant ER can be rendered non-compliant by subsequent events or the issuance of a report about a subsequent event, such as the Fukushima Accident.

Finally, even if we had found that Part 51 imposes a duty upon PG&E to supplement the ER if new and significant information subsequently arises, we find EC-5 not admissible because it fails to satisfy the requirements of 10 C.F.R. § 2.309(f)(1)(vi).

The logic of the contention is that implementation of the Task Force recommendations will greatly increase the reactor costs, necessarily resulting in changes to the SAMA analysis and alternatives analysis. But we fail to see, and SLOMFP has not shown, how these recommendations in-and-of themselves (even from such an august body as the Task Force), constitute "new and significant information" that "present[s] a seriously different picture of the environmental impact of the project from what was previously envisioned." Callaway, CLI-11-05, 74 NRC at __ (slip op. at 31). Any future regulatory modifications which might arise out of the Fukushima Accident are simply not reasonably predictable. It remains to be seen what

[36] The third sentence of 10 C.F.R. § 2.309(f)(2) authorizes new environmental contentions if the data or conclusions in the DEIS differ significantly from the data or conclusions in the ER. That would not be the situation here. Instead, SLOMFP would be asserting the converse, i.e., that if the data and conclusions in the DEIS are NOT different from the ER (fail to capture and discuss the Fukushima Accident and recommendations of the Task Force Report) then the DEIS would, allegedly, be deficient. The latter also is a (potentially) admissible environmental contention.

additional requirements, if any, the NRC will actually impose as a result of the Fukushima Accident and the Task Force Report.[37]

The impacts of the Task Force recommendations remain uncertain and unpredictable, despite the fact, as recently pointed out to us by SLOMFP, that on October 18, 2011, the Commissioners voted to accept and adopt some of the Task Force recommendations. Motion to Supplement Basis at 1-2 (citing SRM/SECY-11-0124). The Commissioners' vote seems to task the NRC Staff with commencing various rulemaking and other activities. But what changes, if any, actually result from the NRC process, cannot be predicted. Absent better knowledge of those regulatory changes, it is impossible to predict what additional costs, if any, such changes may impose on DCNPP. Therefore, assessing any changes that might need to be made in the DCNPP SAMA analysis or NEPA alternatives analysis, is similarly impossible. Furthermore, since SLOMFP offers nothing to link the outcome of the Fukushima events to either the DNCPP plant or to its LRA, there is no information provided to show any dispute with the application.

Thus, we conclude that, EC-5 is inadmissible, because SLOMFP has failed to "provide sufficient information to show that a genuine dispute exists . . . on a material issue of law or fact" as required by 10 C.F.R. § 2.309(f)(1)(vi). SLOMFP has not provided even a potentially plausible case that the Task Force "findings and recommendations" will "paint a seriously different picture" of the environmental impacts of the DCNPP.[38]

V. REFERRAL OF RULING TO COMMISSION

NRC regulations authorize a Board to refer a ruling to the Commission if the Board "determines that the decision or ruling involves a novel issue that merits Commission review at

[37] It should be noted that the Fukushima Accident involved boiling water reactors, and at least one of the Task Force recommendations (Recommendation 5) focuses on the need for hardened vents in BWRs. The reactors at the DCNPP are pressurized water reactors, which are a substantially different design.

[38] See Nextera Energy Seabrook, LLC (Seabrook Station, Unit 1), LBP-11-28, 74 NRC __, __ (Oct. 19, 2011) (slip op. at 6-7).

the earliest opportunity." 10 C.F.R. § 2.323(f). In this case, the Commission specifically encouraged the Board to seek guidance from the Commission with regard to new contentions based on the Fukushima Accident. Callaway, CLI-11-05, 74 NRC at __ (slip op. at 35) ("[S]hould a licensing board decision raise novel legal or policy questions, we encourage the boards to certify to us, in accordance with 10 C.F.R. §§ 2.319(l) and 2.323(f), those questions that would benefit from our consideration."). PG&E also urged us to seek Commission guidance. PG&E Answer at 2, 8.

Our ruling herein is founded on the proposition that the applicant is under no legal obligation, pursuant to NEPA or NRC regulations, to supplement an ER even though "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" thereafter arises. See, e.g., 10 C.F.R. §§ 51.72(a)(2), 51.92(a)(2).

This ruling has significant consequences. First and foremost, it tells PG&E that it has no automatic duty to supplement or update its ER (absent an RAI), even if the Fukushima Accident constitutes (or subsequently generates) significant new information that is relevant to environmental concerns and that bears on the proposed action or its impacts. If our ruling is not correct, and PG&E indeed has a duty to supplement or update its ER, then it needs to know it now, so that it can comply. Second, our decision means that the onus is on the NRC Staff to capture and discuss, in its DSEIS, any new and significant information that arises after the ER. The Staff can, of course, enlist the assistance of the applicant in this endeavor, by issuing an RAI. But ultimately, the Staff is the party with the duty to address any such new and significant information.

The third impact of our ruling is that the earliest possible moment at which SLOMFP could be obliged to file an environmental contention based on any "new and significant information" relating to the Fukushima Accident (including the Task Force Report and any actions by the Commissioners pursuant thereto) would be 30 days after either (a) NRC issues

the DSEIS for DCNPP or, (b) PG&E chooses voluntarily to supplement its ER to address Fukushima.[39] The Board concludes that this is the appropriate schedule, and that the date when the DSEIS is issued and/or any voluntary supplement to the ER is filed provides clear and objectively determinable events by which to assess the timeliness of any such Fukushima-related environmental contentions. If, however, our decision is incorrect, then SLOMFP would be misled into not filing any alleged Fukushima environmental contentions in a timely manner, and might lose its right to obtain a hearing under the Atomic Energy Act § 189a, 42 U.S.C. § 2239(a). For all these reasons, we refer our ruling to the Commission.

VI. CONCLUSION

For the reasons set forth above, SLOMFP's motion to admit a new Fukushima-related environmental contention is denied. Further, although we grant SLOMFP's motion to supplement EC-5 based on the Commission's approval of SRM/SECY-11-0124, we conclude that the Commission's action does not change the basis for our denial of the contention. Finally, in accord with 10 C.F.R. § 2.323(f), we certify to the Commission that portion of our ruling regarding the absence of any obligation of the applicant to supplement or update its ER, as set forth above.

[39] As stated in footnote 35, supra, it remains uncertain whether, at the time of the issuance of the DSEIS (or supplement to the ER), there will actually be any "new and significant information" relating to Fukushima and it is possible that any such Fukushima contention may still be premature. See Callaway, CLI-11-05, 74 NRC at __ (slip op. at 30).

This order is subject to appeal to the Commission in accordance with the provisions of 10 C.F.R. § 2.341(f). Any petitions for such review must be filed within fifteen (15) days of service of this Memorandum and Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/
Alex S. Karlin, Chairman
ADMINISTRATIVE JUDGE

/RA/
Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 18, 2011

Concurring Opinion of Judge Abramson

I concur completely with my colleagues in their ruling. However, I see no reason for, and am concerned about the implications of, the referral to the Commission respecting the holding that there is no obligation for an applicant to update an ER, which was compliant at the time of its submittal. The interpretation of plain-on-its-face, black letter law on that topic is simple and accurate, and does not fall into the category of matters which are worthy of certification to the Commission. It raises no novel legal or policy issue. Rather it simply recognizes and effectuates the fact that NEPA compliance is an obligation of the Agency, not the applicant, and that our regulations are plain on their face as to the applicant's obligations. Once an applicant has submitted an ER which complies with the regulatory requirements applicable to it at the time of its submittal, the applicant has fulfilled its regulatory requirements, and the Staff, as it proceeds to fulfill its obligations under NEPA, has, as my colleagues observe, authority, frequently exercised, to ask the applicant for additional information when important post-submittal matters arise.

Moreover, I am concerned that the mere act of certifying this portion of our ruling to the Commission casts a cloud over what is a straightforward and obvious result. For this reason, I disagree with my colleagues' certification to the Commission of this portion of our holding.

_____***/RA/***_____
Dr. Paul B. Abramson
ADMINISTRATIVE JUDGE

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275-LR and 50-323-LR
	)	
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM, ORDER, AND REFERRAL (Denying Motion to Admit New Contention and Referring Ruling to Commission) (LBP-11-32)** have been served upon the following persons by the Electronic Information Exchange.

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[Original signed by Nancy Greathead]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 18th day of November 2011