

December 5, 2011

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION**

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 PETITION FOR  
PARTIAL INTERLOCUTORY REVIEW OF LBP-11-32**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. § 2.341(f), San Luis Obispo Mothers for Peace (“SLOMFP”) hereby petitions for partial interlocutory review of LBP-11-32, Memorandum and Order ((Denying Motion to Admit New Contention and Referring Ruling to Commission), \_\_ NRC \_\_ (Nov. 18, 2011). In LBP-11-32, the Atomic Safety and Licensing Board (“ASLB”) denied admission of a contention asserting that the Pacific Gas & Electric Co.’s (“PG&E’s”) Environmental Report (“ER”) for the proposed renewal of the operating license for the Diablo Canyon Nuclear Power Plant is inadequate to satisfy the National Environmental Policy Act (“NEPA”) because it does not address the environmental implications of new and significant information contained in the July 2011 report of the U.S. Nuclear Regulatory Commission’s (“NRC’s” or “Commission’s”) Fukushima Task Force, entitled *Recommendations for Enhancing Reactor Safety in the 21<sup>st</sup> Century: the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident* (July 12, 2011) (“Task Force Report”).

The ASLB has already certified to the Commission one of the two legal grounds on which the ASLB based its decision: that NRC regulations requiring the consideration of new and significant information apply only to environmental impact statements (“EISs”) prepared by

the NRC and not to ERs prepared by license renewal applicants. *Id.*, slip op. at 13-16. This petition seeks review, in addition, of the ASLB's other ground for denying admission of the contention: that it is premature. *Id.*, slip op. at 18-19. Interlocutory review is warranted under 10 C.F.R. § 2.341(f)(2)(ii) because the decision will have a pervasive and unusual effect on the proceeding. In addition, the ruling meets the NRC's standard for referral or directed certification of ASLB decisions in 10 C.F.R. § 2.341(f)(1) and the Commission's *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998). Review is also appropriate because LBP-11-32 presents the type of "novel" legal question that the Commission has encouraged Licensing Boards to certify on an interlocutory basis if they arise during litigation of contentions related to the Fukushima Daiichi accident. *Union Electric Co. d/b/a/ Ameren Missouri* (Callaway Plant, Unit 2), CLI-11-05, 74 NRC \_\_\_, slip op. at 35 (Sept. 29, 2011) ("CLI-11-05").

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

On March 11, 2011, a catastrophic radiological accident, triggered by a massive earthquake and tsunami, commenced at the Fukushima Daiichi nuclear power plant complex in northeastern Japan. The accident damaged the reactors, power grid and power supply connections, cooling and backup cooling systems, and the spent fuel pools at the six-unit facility. CLI-11-05, slip op. at 3-4. The accident resulted in radiological releases to the surrounding environment and evacuation of the area. LBP-11-32, slip op. at 2; Task Force Report at 14.

On March 23, 2011, the NRC Commissioners commissioned a Task Force, composed of highly qualified agency experts, to consider the regulatory implications of the Fukushima accident for U.S. reactors. Between April 14 and 18, 2011, SLOMFP and forty-seven other environmental and civic groups and individuals petitioned the NRC to establish a decision-

making framework for consideration of the regulatory implications of the Fukushima Daiichi accident and the Task Force's anticipated report in pending licensing decisions. Emergency Petition to Suspend all Pending Reactor Licensing Decisions and Related Rulemaking Decisions Pending Investigation of the Lessons learned from Fukushima Daiichi Nuclear Power Station Accident ("Emergency Petition"). The petitioners asked the Commission to (a) suspend all licensing decisions pending completion of the Task Force's investigation, (b) suspend all licensing proceedings with respect to the issues under investigation by the Task Force pending completion of the Task Force investigation of those issues, (c) conduct an analysis of whether the Fukushima accident poses new and significant information that must be considered in environmental impact statements ("EISs") for pending NRC licensing decisions, (d) conduct a safety analysis of the regulatory implications of the accident and publish the results for public comment, (e) establish procedures and a timetable for raising new issues relevant to the Fukushima accident in pending licensing proceedings, (f) suspend all licensing decisions and rulemakings pending the outcome of any independent investigation that may be ordered by the president or instigated by the Commission, and (g) request the President to establish an independent investigation of the Fukushima accident and its implications for the safety and environmental impacts of U.S. reactors and spent fuel pools. *Id.* at 1-3.

On July 12, 2011, the Fukushima Task Force issued its report. The Task Force concluded that the regulatory system on which the NRC relies to make the safety findings required by the Atomic Energy Act for licensing of nuclear reactors must be strengthened by raising the level of safety that is minimally required for the protection of public health and safety. Task Force Report at 18-23. A central element of the Report was the recommendation that the NRC

incorporate severe accidents into the design basis for nuclear power plants that is subject to mandatory safety regulations. *Id.* at 22-23.

On August 11, 2011, SLOMFP submitted a new contention in this proceeding, charging that the ER for renewal of the Diablo Canyon operating license is inadequate to satisfy NEPA because it does not address the new and significant environmental implications of the findings and recommendations of the Task Force Report. 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 (“SLOMFP’s Motion”). SLOMFP’s contention was very similar to contentions that were submitted at the same time in numerous other reactor re-licensing and new reactor licensing cases. *See* CLI-11-05, slip op. at 35 n.121. The contention was supported by the expert declaration of Dr. Arjun Makhijani (August 8, 2011). The contention was also supported by a rulemaking petition to rescind regulations prohibiting consideration of the environmental impacts of severe reactor and spent fuel pool accidents. The ASLB held an oral argument on October 13, 2011.

On September 9, 2011, the Commission issued CLI-11-05, denying the Emergency Petition that had been submitted in April. The Commission characterized the Petition as a “request that the NRC conduct a separate generic NEPA analysis regarding whether the Fukushima events constitute ‘new and significant information’ under NEPA that must be analyzed as part of the environmental review for new reactor and license renewal decisions.” *Id.*, slip op. at 30. The Commission concluded that the request was “premature” because:

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.

*Id.* Accordingly, the Commission concluded that “any generic NEPA duty – if one were appropriate at all – does not accrue now.” *Id.*

The Commission asserted, however, “if new and significant information comes to light that requires consideration as part of the ongoing preparation of application-specific NEPA documents, the agency will assess the significance of that information, as appropriate.” *Id.*, slip op. at 30-31. The Commission also found that the hearing process could be used to raise “issues implicated by the Fukushima events” in individual licensing proceedings. *Id.*, slip op. at 35.

On November 18, 2011, the ASLB issued LBP-11-32, denying the admission of SLOMFP’s contention. The ASLB’s principal ground for rejecting the contention was that the NRC’s regulations impose no legal duty on a license renewal applicant to supplement its ER. *Id.*, slip op. at 12-18. Pursuant to 10 C.F.R. § 2.323(f) and CLI-11-05, the ASLB also referred that ruling to the Commission.

In addition, the ASLB concluded that the contention was premature because the ultimate outcome of the Task Force Report is uncertain:

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 [severe accident mitigation alternatives] 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 312). Any future regulatory modifications which might arise out of the Fukushima Accident are simply not reasonably predictable. It remains to be seen what additional requirements, if any, the NRC will actually impose as a result of the Fukushima Accident and the Task Force Report.

*Id.*, slip op. at 18-19 (footnote omitted). *See also id.* at 19 (concluding that the “impacts of the Task Force recommendations remain uncertain and unpredictable”).

Other ASLB panels have also rejected contentions similar to SLOMFP's, principally on the ground of prematurity. *See, e.g., PPL Bell Bend, L.L.C.* (Bell Bend Nuclear Power Plant), et al., LBP-11-27, Memorandum and Order (Denying Motions to Reopen Closed Proceedings and Intervention Petition/Hearing Request as Premature) (Oct. 18, 2011) ("LBP-11-27")<sup>1</sup>; *Nextera Energy Seabrook, L.L.C.* (Seabrook Station, Unit 1), LBP-11-28, Memorandum and Order (Denying Motions to Admit New Contention) (Oct. 19, 2011) ("LBP-11-28"); *Florida Power & Light Co.* (Turkey Point Units 6 and 7), LBP-11-33, Memorandum and order (Denying Request to Suspend Licensing Proceeding, Granting Motion to Supplement, and Denying Admission of Proposed New Fukushima Contention) (Nov. 21, 2011). On November 28, 2011, the ASLB also denied a differently worded contention regarding the environmental implications of the Fukushima accident that was submitted in the Pilgrim license renewal proceeding by the Commonwealth of Massachusetts. *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), LBP-11-35, Memorandum and Order (Denying Commonwealth of Massachusetts' Request for Stay, Motion for Waiver, and Request for Hearing on a New Contention Relating to Fukushima Accident ("LBP-11-35").

### III. ARGUMENT

#### A. The ASLB Erred in Concluding That SLOMFP's Contention Was Premature.

The Commission should take review of LBP-11-32 because the ASLB applied an erroneous legal standard to the question of whether SLOMFP had presented "new and significant information" under the standard in 10 C.F.R. § 51.92 and *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

---

<sup>1</sup> A petition for review of LBP-11-27 is pending before the Commission.

The ASLB erred in three respects. First, the ASLB erroneously assumed that the Task Force recommendations would only be significant and therefore need only be addressed if they were adopted: “Any future regulatory modifications which might arise out of the Fukushima Accident are simply not reasonably predictable. *It remains to be seen what additional requirements, if any, the NRC will actually impose as a result of the Fukushima Accident and the Task Force Report.*” *Id.*, slip op. at 18-19 (emphasis added) (footnote omitted). *See also id.*, slip op. at 19 (“... what changes, if any, result from the process [of NRC review of the Task Force recommendations], cannot be predicted.”)

Contrary to the ASLB’s opinion, it is the very *existence* of the Task Force’s criticisms of the existing safety regime which triggers the NRC’s NEPA obligations. As discussed in SLOMFP’s Motion at 12, courts have found that an EIS that fails to disclose and respond to expert opinions concerning the hazards of a proposed action, particularly those opinions of the agency’s own experts, are “fatally deficient” and run contrary to NEPA’s “hard look” requirement. *Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157 (9th Cir. 2003) (finding an EIS’s failure to disclose and discuss responsible opposing scientific viewpoints violated NEPA and the implementing regulations).<sup>2</sup>

Similarly, while the ASLB cited the “uncertainty” surrounding the question of whether and to what extent the NRC would adopt the Task Force recommendations as grounds to dismiss

---

<sup>2</sup> *See also Seattle Audubon Society v. Moseley*, 798 F.Supp. 1473, 1479 (W.D. Wa. 1192), *aff’d* sub. nom. *Seattle Audubon Society v. Espy*, 998 F.2d 699 (9th Cir. 1993) (“[a]n EIS that fails to disclose and respond to ‘the opinions held by well respected scientists concerning the hazards of the proposed action . . . is fatally deficient’”); *Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 487 (9th Cir. 2010) (finding that an agency failed to take a “hard look” under NEPA when it ignored concerns raised by *its own experts*); *Blue Mountain Diversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998) (noting that an agency’s failure to discuss and consider an independent scientific report’s recommendations “lends weight to [plaintiff’s] claims that the [agency] did not take the requisite ‘hard look’ at the environmental consequences” of the project).

the contention (slip op. at 18-19), the existence of uncertainty is one of the factors that *compels* a new environmental analysis. *National Parks and Conservation Assoc. v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001) (citing *Blue Mountains Biodiversity Project*, 161 F.3d at 1213).

In this case, a hand-picked Task Force composed of the NRC's most experienced and skilled experts has criticized the most fundamental element of the NRC's regulatory program for protecting public health and safety, *i.e.*, the scope of the NRC's mandatory or "design basis" regulations. *See* SLOMFP Motion at 6-7 (citing Task Force Report at 16, 18, 20, 73-75). These standards "represent *the definition* of what is required to protect the public health and safety." *Vermont Yankee Nuclear Power Corp. Vermont Yankee Nuclear Power Station*, ALAB-138, 6 AEC 520, 528 (1973) (emphasis added). As discussed in Dr. Makhijani's declaration, the Task Force Report contains the implicit conclusion that compliance with the NRC's current safety is not sufficient to protect public health and safety. *Id.*, par. 11. "Therefore in its environmental analyses, the NRC would have to revise its analysis to reflect the new understanding that the risks and radiological impacts of accidents are greater than previously thought." *Id.* It is difficult to imagine a more profound criticism of the conclusion on which the Diablo Canyon ER is based, *i.e.*, that the environmental impacts of design basis accidents and severe accidents are "small." SLOMFP Motion at 12 (citing 10 C.F.R. Part 51, Appendix B). The uncertainty surrounding the question of whether the NRC will adopt the Task Force recommendations only adds to the importance of an environmental analysis of the concerns raised by the Task Force Report.

Second, the ASLB erroneously assumed that the only significant effect of the Task Force Report was that the cost of the facility would rise if the Task Force recommendations were adopted. To be sure, the increased cost of operating Diablo Canyon under adopted Task Force



recommendations could have a very significant impact on the cost-benefit analysis for the plant. But the ASLB overlooked the environmental impact of a decision *not* to adopt the Task Force recommendations: operation of the facility at a significantly greater risk than was previously considered in the ER or in the Generic Environmental Impact Statement for License Renewal (1996). NEPA requires that whether or not the Commission ultimately adopts the Task Force’s conclusions and recommendations, it must reckon with the environmental implications of those conclusions and recommendations in order to ensure “that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Western Watersheds Project*, 632 F.3d at 487 (quoting *Marsh*, 490 U.S. at 371).

Finally, the ASLB interpreted CLI-11-05 too broadly. CLI-05 does not hold that *any* contentions regarding the Fukushima accident are premature, only contentions that seek “generic” relief. *See, e.g.*, slip op. at 35 (characterizing the Emergency Petition as a request for a “generic NEPA analysis”); *id.* (“any generic NEPA duty – if one were appropriate at all – does not accrue now”); *id.*, slip op. at 31 (“[f]or these reasons, we decline petitioners’ request to commence a *generic* NEPA review today) (emphasis added). In fact, CLI-11-05 strongly suggests that individual proceedings are the appropriate venues to raise Fukushima-related environmental concerns. *Id.*, slip op. at 35. That is exactly what SLOMFP did by filing its contention. While the principal concern of the Task Force for which SLOMFP seeks an environmental analysis – that the scope of the NRC’s mandatory safety regulations must be expanded to ensure adequate protection of public health and safety – is expressed by the Task Force as a generic concern, it is within the Commission’s discretion to provide that this concern should be addressed separately in each individual licensing proceeding. *See Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100-01 (1983) (holding that the NRC has discretion to

choose between site-specific and generic proceedings for environmental decision-making). Having made that choice, the NRC has the responsibility under NEPA to address the Diablo Canyon-specific environmental implications of the Task Force's conclusions and recommendations. SLOMFP's contention satisfies the NRC's pleading requirements for admitting that issue for litigation in an adjudicatory hearing.

**B. The ASLB's Error Will Have a Pervasive and Unusual Effect on This Proceeding.**

As discussed above, NRC regulations provide for interlocutory review where a decision will have a "pervasive" or "unusual" effect on a proceeding. 10 C.F.R. § 2.341(f)(2). *See also Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC at 23; CLI-11-05, slip op. at 35.

The Commission should take review of LBP-11-32 because its interpretation of CLI-11-05 affects this proceeding – and others in which similar contentions have been raised -- in a pervasive and unusual manner by creating great uncertainty regarding the appropriate timing of a contention challenging the failure of an environmental decision-making document to address the implications of the Fukushima accident. As the ASLB observed in the Seabrook re-licensing case, intervenors who seek to raise Fukushima-related environmental issues in NRC licensing proceedings are "in a bind:"

That Intervenor's proffered contention is not admissible does not mean that the issues raised by the near-Term Task Force Report are unimportant. They have not yet ripened, however, to the point where they can be appropriately be litigated in this adjudicatory proceeding concerning the Seabrook LRA. Perhaps they never will. As Intervenor acknowledge, "given the sweeping scope of the Task Force conclusions and recommendations, it may be more appropriate for the NRC to consider them in generic rather than site-specific environmental proceedings."

We recognize that this state of affairs places Intervenor in a bind. To avoid the inevitable challenge on lateness grounds must intervenors regularly resubmit their contention asking in effect: Are we there yet?" The Board hopes not. Although it has

not seen fit to do so at this time, the Commission has suggested that it may in the future provide further guidance as to when Fukushima-related contentions might be ripe for adjudication in individual reactor cases.<sup>35</sup>

---

<sup>35</sup> “Although we do not establish a timetable for future adjudicatory pleadings today, we will monitor our ongoing adjudicatory proceedings and will reassess this determination if it becomes apparent that additional guidance would be appropriate.” *Callaway*, CLI-11-056, 74 NRC at \_\_\_ (slip op. at 36).

LBP-11-28, slip op. at 8 (footnotes omitted). Other ASLBs have also pointed out the uncertainty created by CLI-11-05 regarding when and under what circumstances it will be appropriate to submit Fukushima-related contentions. *See, e.g.*, LBP-11-28, slip op. at 14 (noting the ASLB’s inability to provide guidance as to “when there might be some development associated with the Fukushima event that might give rise to a supportable contention respecting a need for further NEPA review either on a generic basis or in the context of one or more individual reactors”); LBP-11-35, separate opinion of Ann Marshall Young (“ . . . it would be desirable to provide some reasonable mechanism for informing parties when the time is ripe for filing new Fukushima-related contentions.”) Given the concerns expressed by several panels of the ASLB, SLOMFP respectfully submits that it is now apparent that “additional guidance” from the Commission “would be appropriate.” CLI-11-05, slip op. at 36.

#### **IV. CONCLUSION**

For the foregoing reasons, the Commission should take interlocutory review of the portion of LBP-11-32 which holds that SLOMFP’s contention is premature.

Respectfully submitted,

*Electronically signed by*

Diane Curran

Harmon, Curran, Spielberg, & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

202/328-3500

e-mail: [dcurran@harmoncurran.com](mailto:dcurran@harmoncurran.com)

December 5, 2011

## CERTIFICATE OF SERVICE

I certify that on December 5, 2011, I posted on the NRC's Electronic Information Exchange the foregoing San Luis Obispo Mothers for Peace's Petition for Interlocutory Review of LBP-11-32. It is my understanding that as a result, the following persons were served:

Office of the Secretary Rules and Adjudications Branch U.S. Nuclear Regulatory Commission 11555 Rockville Pike Rockville, MD 20852 <a href="mailto:hearingdocket@nrc.gov">hearingdocket@nrc.gov</a>	David A. Repka, Esq. Tyson R. Smith, Esq. Winston & Strawn, LLP 1700 K Street N.W. Washington, D.C. 20006-3817 <a href="mailto:drepka@winston.com">drepka@winston.com</a> , <a href="mailto:trsmith@winston.com">trsmith@winston.com</a>
Susan Uttal, Esq. Lloyd Subin, Esq. Maxwell Smith, Esq. Richard Harper, Esq. Office of General Counsel Mail Stop O-15D21 U.S. Nuclear Regulatory Commission Washington, D.C. 20555 <a href="mailto:Susan.Uttal@nrc.gov">Susan.Uttal@nrc.gov</a> <a href="mailto:Lloyd.Subin@nrc.gov">Lloyd.Subin@nrc.gov</a> <a href="mailto:Maxwell.smith@nrc.gov">Maxwell.smith@nrc.gov</a> <a href="mailto:Richard.Harper@nrc.gov">Richard.Harper@nrc.gov</a>	Alex Karlin, Chair Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 <a href="mailto:Alex.Karlin@nrc.gov">Alex.Karlin@nrc.gov</a>
Nicholas G. Trikouros Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 <a href="mailto:Nicholas.trikouros@nrc.gov">Nicholas.trikouros@nrc.gov</a>	Paul B. Abramson Atomic Safety and Licensing Board Panel U.S. Nuclear Regulatory Commission Washington, D.C. 20555 <a href="mailto:Paul.abramson@nrc.gov">Paul.abramson@nrc.gov</a>
	Office of Appellate Adjudication U.S. Nuclear Regulatory Commission Washington, D.C. 20555-0001

*Electronically signed by*  
Diane Curran