

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

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

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

**SAN LUIS OBISPO MOTHERS FOR PEACE
MOTION TO ADMIT CONTENTIONS REGARDING FAILURE OF
ENVIRONMENTAL REPORT TO ADDRESS
POST-FUKUSHIMA INVESTIGATIONS AND MODIFICATIONS**

I. INTRODUCTION

Pursuant to 10 CFR §§ 2.309(c)(1), 2.309(f)(1) and 2.309 (2), San Luis Obispo Mothers for Peace (“SLOMFP”) moves for the admission of two contentions challenging the adequacy of Pacific Gas and Electric Co.’s (“PG&E’s”) Environmental Report for the proposed renewal of the operating license for the Diablo Canyon Nuclear Power Plant (“DCNPP”). The contentions assert that PG&E’s Environmental Report does not satisfy U.S. Nuclear Regulatory Commission (“NRC”) regulations for implementation of the National Environmental Policy Act (“NEPA”) because it does not address PG&E’s plans for complying with recent NRC directives for seismic and flooding risk investigations and new safety measures in response to the Fukushima Daiichi accident of 2011.

As demonstrated in Section II below, the contentions meet the NRC’s admissibility standards in 10 C.F.R. § 2.309(f)(1). In addition, as demonstrated below in Section III.A, the contentions are timely pursuant to 10 C.F.R. § 2.309(f)(2). Even if the ASLB should determine that they are not timely, SLOMFP demonstrates in Section III.B that it has good cause for filing the contentions now, and the contentions also satisfy the other criteria of the late-filed contention standard in 10 C.F.R. § 2.309(c).

Notwithstanding the fact that the contentions are timely (*i.e.*, not filed too late), SLOMFP recognizes that the ASLB may consider the contentions to be premature (*i.e.*, filed too early) because they relate to PG&E's commitments and/or obligations to submit substantive information in the future. If the Board should so rule, SLOMFP requests that it hold the proceeding open until the claims made by the contentions become ripe.

II. CONTENTIONS

Contention 1: Environmental Report Lacks Information Regarding Proposed Modifications to Diablo Canyon Facility

1. Statement of the Contention: The Environmental Report for renewal of the DCNPP operating license fails to satisfy 10 C.F.R. § 51.53(c)(2) because it does not include information about PG&E's plans to modify the Diablo Canyon facility in response to post-Fukushima enforcement order EA-12-049 (March 12, 2012), Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately) ("Order EA-12-049") (ML12056A045). As also required by 10 C.F.R. § 51.53(c)(2), the Environmental Report must include a discussion of a reasonable array of alternative measures for modifying the facility in accordance with Order EA-12-049.

2. Brief Summary of Basis for the Contention: This contention seeks compliance with 10 C.F.R. § 51.53(c)(2)'s requirement that an environmental report must contain "a description of the proposed action, including the applicant's plans to modify the facility or its administrative control procedures as described in accordance with § 54.21 of this chapter."¹

¹ Section 54.21(b) provides that:

Each year following submittal of the license renewal application and at least 3 months before scheduled completion of the NRC review, an amendment to the renewal application must be submitted that identifies any change to the CLB of the facility that

Modifications “directly affecting the environment or affecting plant effluents that affect the environment” must be described “in detail.” The contention also seeks compliance with 10 C.F.R. § 51.53(c)(2)’s requirement for the discussion of a reasonable range of alternatives.

On March 12, 2012, the NRC issued Order EA-12-049, requiring PG&E and other reactor licensees to: “develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment, and SFP [spent fuel pool] cooling capabilities in the event of a beyond-design-basis external event.” As the Order explains, although the NRC believes that continued operation and licensing of reactors do not pose an “imminent threat to public health and safety,” it has acquired “new insights from the events at Fukushima Dai-ichi” leading it to conclude that “additional requirements must be imposed on Licensees or CP holders to increase the capability of nuclear power plants to mitigate beyond-design-basis external events.” *Id.* at 3-4. The NRC deems these requirements essential for protection of public health and safety. *Id.*

The NRC anticipates that the “strategies and guidance developed by licensees such as PG&E in response to Order EA-12-049 “will provide the necessary capabilities to supplement those of the permanently installed plant structures, systems, and components that could become unavailable following beyond-design-basis external events.” *Id.* at 6. The order instructs that “strategies should be developed to add multiple ways to maintain or restore core cooling, containment and SFP cooling capabilities in order to improve the defense-in-depth of licensed nuclear power reactors.” *Id.*

Order EA-12-049 directs licensees to establish mitigation strategies as follows:

This Order requires a three-phase approach for mitigating beyond-design-basis external events. The initial phase requires the use of installed equipment and resources to maintain or restore core cooling, containment and spent fuel pool (SFP) cooling capabilities. The transition phase requires providing sufficient, portable, onsite equipment

materially affects the contents of the license renewal application, including the FSAR supplement.”

and consumables to maintain or restore these functions until they can be accomplished with resources brought from off site. The final phase requires obtaining sufficient offsite resources to sustain those functions indefinitely.

- (1) Licensees or construction permit (CP) holders shall develop, implement, and maintain guidance and strategies to maintain or restore core cooling, containment and SFP cooling capabilities following a beyond-design-basis external event.
- (2) These strategies must be capable of mitigating a simultaneous loss of all alternating current (ac) power and loss of normal access to the ultimate heat sink and have adequate capacity to address challenges to core cooling, containment, and SFP cooling capabilities at all units on a site subject to this Order.
- (3) Licensees or CP holders must provide reasonable protection for the associated equipment from external events. Such protection must demonstrate that there is adequate capacity to address challenges to core cooling, containment, and SFP cooling capabilities at all units on a site subject to this Order.
- (4) Licensees or CP holders must be capable of implementing the strategies in all modes.
- (5) Full compliance shall include procedures, guidance, training, and acquisition, staging, or installing of equipment needed for the strategies.

Id., Attachment 2.

In addition, Order EA-12-049 sets forth a schedule for compliance. Within twenty days of the issuance of the Order, licensees must tell the NRC whether they intend to challenge the order and they must also inform the NRC whether they think any of the order's requirements would compromise public health or safety. *Id.* at 8. By February 28, 2013, licensees must submit to the NRC "an overall integrated plant including a description of how compliance with the requirements described in Attachment 2 will be achieved." *Id.* at 9. The order requires fulfillment of the requirements within two refueling cycles after submittal of the overall integrated plan or by December 31, 2016, whichever is earlier. *Id.* at 7-8. The order also states that the NRC will issue Interim Staff Guidance in August 2012. *Id.* at 4.

In a letter dated March 28, 2012, PG&E agreed to comply with the requirements of Order EA-12-049 on the schedule set forth in the order, although it stated that it might be necessary to

request “schedule relief as warranted by subsequent NRC requirements or implementing guidance or the results of engineering analyses not yet performed.” Letter from John T. Conway, PG&E to NRC (ML12089A082).

As explicitly stated in Order EA-12-049, the NRC considers the modifications set forth in the order to be necessary for adequate protection of public health and safety against beyond-design-basis accidents. Therefore these modifications are relevant to the environmental impacts of the site and must be discussed in the Environmental Report pursuant to 10 C.F.R. § 51.53(c)(2).

Moreover, as set forth in Attachment 2 to Order EA-12-049, the NRC has chosen not to prescribe specific strategies and measures for fulfilling the requirements and has instead allowed licensees to make their own proposals. Therefore, as also required by § 51.53(c)(2), the relative effectiveness and costs of a range of alternatives for meeting the requirements of Order EA-12-049 should be discussed.

3. Demonstration that the Contention is Within the Scope of the Proceeding: The contention is within the scope of the proceeding because it seeks the inclusion of required environmental information in the Environmental Report and because it bears on the environmental impacts of the DCNPP during the license renewal term, including consideration of alternatives to avoid or mitigate the adverse environmental impacts of beyond-design-basis accidents.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to Re-License Diablo Canyon: The contention is material to the findings that NRC must make in order to re-license Diablo Canyon because it seeks the provision and analysis of information regarding the environmental impacts of proposed modifications to the Diablo Canyon plant that

will affect its safety and environmental impacts during the license renewal term as well as the effectiveness and relative costs of alternatives for mitigation of beyond-design-basis accidents, as required by NRC license renewal regulation 10 C.F.R. § 51.53(c)(2). This information will ensure that the NRC has considered an appropriate array of alternatives for protecting public health and safety against the adverse environmental impacts of a beyond-design-basis accident at Diablo Canyon, as required by NEPA. *Exelon Generation Co., L.L.C. (Limerick Generating Station, Units 1 and 2), LBP-12-08, ___ NRC ___, slip op. at 9 and n. 42 (April 4, 2012) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 737 (1989))*.

The contention is also relevant to license renewal because the new measures are scheduled to be proposed within the next year and implemented within four years, and therefore may affect the degree to which the environment is protected against the environmental impacts of beyond-design-basis accidents during the license renewal term.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials: The facts supporting this contention are found in the Environmental Report and Order EA-12-049 and are described above.

Contention 2: Environmental Report Lacks Information on Status of Compliance With Federal Requirements and Approvals

1. Statement of the Contention: In violation of 10 C.F.R. § 51.45(d), the Environmental Report fails to describe the status of PG&E's compliance with NRC post-Fukushima orders and requests for additional information relevant to the environmental impacts of the Diablo Canyon nuclear power plant during the license renewal term. These requests for

information and orders for actions originate with both the NRC and the U.S. Congress. *See* Order EA-12-049 at 4-7; Requirements of Request for Information Pursuant to Title 10 of the Code of Federal Regulations, 50.54(f) Regarding Recommendations 21.1, 2.3, and 9.3 of the Near-Term Task Force Review of Insights From the Fukushima Dai-ichi Accident at 2 (March 12, 2012) (“3/12/12 Information Request”) (ML12053A340).

The Environmental Report for renewal of the Diablo Canyon operating license is inadequate to comply with NEPA and NRC implementing regulations because it lacks the following information regarding PG&E’s compliance with NRC requirements and approvals:

(a) Requirement of Order EA-12-049 to: “develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment, and SFP [spent fuel pool] cooling capabilities in the event of a beyond-design-basis external event.” *Id.* at 6.

(b) The following requirements of the 3/12/12 Information Request:

(i) “Requested Information” regarding Seismic Hazard Evaluation and Seismic Risk Evaluation. *Id.*, Enclosure 1 at 6-8. Details of these requirements are provided in Attachment 1 to Enclosure 1.

(ii) “Required Response” related to item (i) above. *Id.*, Enclosure 1 at 9. Details of these requirements are provided in Attachment 1 to Enclosure 1.

(iii) “Requested Information” regarding Hazard Evaluation Report and Integrated Assessment Report. 3/12/12 Information Request, Enclosure 2 at 7-8.

(iv) “Required Response” related to item (iii) above. 3/12/12 Information Request, Enclosure 2 at 9-10. Details of these requirements are provided in Attachment 1 Enclosure 2.

(v) “Requested Actions,” “Requested Information,” and “Requested Response” regarding communication systems and equipment used during an emergency event, assuming that (a) the potential onsite and offsite damage is a result of a large scale natural event resulting in the loss of all alternating current (ac) power and (b) the large scale natural event causes extensive damage to normal and emergency communications systems both onsite and in the area surrounding the site. 3/12/12 Information Request, Enclosure 5 at 2-3.

Moreover, to the extent that PG&E proposes modifications to the Diablo Canyon facility in response to the 3/12/12 Request for Information, NEPA also requires the consideration of the effectiveness and relative costs of a range of alternatives for satisfying the NRC’s concerns. *See* 10 C.F.R. § 51.53(c)(2) and *Exelon*, cited above at pages 5-6.

2. Brief Summary of Basis for the Contention: NRC regulation 10 C.F.R. § 51.45(d) requires an Environmental Report to “[l]ist all Federal permits licensees, approvals and other entitlements which must be obtained in connection with the proposed action” and “describe the status of compliance with these requirements.” Section 51.45(d) also requires that the Environmental report must include “a discussion of the status of compliance with applicable environmental quality standards and requirements.” Further, the discussion of alternatives must state whether the alternatives will comply with these standards. *Id.*

The NRC has stated that all of the information and actions requested above are mandatory because they are necessary to provide adequate protection to public health, and therefore they relate to the environmental impacts of Diablo Canyon on the human environment during the license renewal term. *See* Order EA-12-049 at 4-7, 3/12/12 Information Request at 2-3. Therefore they constitute federal requirements that must be identified in the Environmental

Report. In addition, the Environmental Report must discuss the status of PG&E's compliance with these requirements.

Finally, to the extent that PG&E should propose modifications to the DCNPP in response to the 3/12/12 Request for Information, NEPA also requires the consideration of the effectiveness and relative costs of a range of alternatives for satisfying the NRC's concerns. *See Exelon*, cited above at pages 5-6.

3. Demonstration that the Contention is Within the Scope of the Proceeding: The contention is within the scope of the proceeding because it seeks the inclusion of required environmental information in the Environmental Report and because it bears on the environmental impacts of the DCNPP during the license renewal term, including consideration of alternatives to avoid or mitigate the adverse environmental impacts of beyond-design-basis accidents. *See Exelon*, cited above at pages 5-6.

4. Demonstration that the Contention is Material to the Findings NRC Must Make to Re-License Diablo Canyon: The contention is material to the findings that NRC must make in order to re-license Diablo Canyon because it seeks the provision of information relevant to federal requirements and approvals that relate to protection of the environment and public health and safety against the adverse environmental impacts of a beyond-design-basis accident at Diablo Canyon during the license renewal term. All of the requested information must be provided and actions must be taken within the next three or four years, i.e., well before the expiration of DCNPP's current operating license in 2024 and 2025. Order EA-12-049 at 7-8; 3/12/12 Request for Information, Enclosure 1 at 9; Enclosure 2 at 9. Therefore any actions that PG&E takes in response to the requirements may affect the degree to which the environment is

protected against the environmental impacts of beyond-design-basis accidents during the license renewal term.

5. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along With Appropriate Citations to Supporting Scientific or Factual Materials: The facts supporting this contention are found in the Environmental Report, Order EA-12-049 and the 3/12/12 Information Request and are described above.

III. SLOMFP SATISFIES THE NRC’S STANDARDS FOR FILING CONTENTIONS AFTER THE INITIAL DEADLINE ESTABLISHED IN THE HEARING NOTICE.

SLOMFP respectfully submits that its contentions are timely under the Commission’s standard in 10 C.F.R. § 2.309(f)(2)(i)-(iii). Therefore, as discussed below in Section III.A, it should be admitted. In the event that the ASLB should determine that the contentions are not timely, SLOMFP nevertheless satisfies the standard for a “nontimely filing” under 10 C.F.R. § 2.309(c)(1)(i)-(iii). *See* Section III.B below.

A. The Contention is Timely.

SLOMFP’s contention meets the NRC’s three-part standard for a timely contention.

1. Relevant information not previously available.

The information on which the contention is based was not previously available because it relates to obligations that the NRC imposed on PG&E only recently.

2. Information is materially different.

The information on which the contention is based is materially different than information previously available, *see* 10 C.F.R. § 2.309(f)(2)(ii), because it relates to legal obligations that did not exist before the NRC issued EA-12-049 and the 3/12/12 Information Request.

3. The contentions are timely.

In its Initial Scheduling Order of September 15, 2010, the ASLB established a rule for this proceeding that contentions will be deemed timely if they are submitted within 30 days of the occurrence of the triggering event. *Id.* at 12. The rule is consistent with other ASLB decisions. *See Shaw Areva MOX Services, Inc.* (Mixed Oxide Fuel Fabrication Facility), LBP-08-10, 57 NRC 460, 493 (2008). Although SLOMFP recognizes the possibility that the ASLB will conclude that SLOMFP's contentions are premature and should await the submission of substantive information by PG&E in response to EA-12-049 and the 3/12/12 Information Request, under 10 C.F.R. § 2.309(f)(2)(iii) they are not untimely in relation to the triggering events.

Contentions 1 and 2 are timely because they are filed within 30 days of April 11, 2012. By that date, which is 30 days after the issuance of Order EA-12-049 and the 3/12/12 Information Request, it would be reasonable to expect PG&E to have amended its Environmental Report to discuss the requirements of those NRC directives. To SLOMFP's knowledge, however, the only documents that PG&E has issued regarding Order EA-12-049 or the 3/12/12 Information Request consist of PG&E's March 28, 2012 letter agreeing to comply with EA-12-049 and a letter to NRC confirming under oath that PG&E received the 3/12/12 Information Request. Letter from Edward D. Halpin, PG&E, to NRC (April 11, 2012) (ML12102A184). The letters make no mention of NEPA or the Environmental Report.

Therefore the contentions are timely under 10 C.F.R. § 2.309(f)(2)(iii) and the rule established in the Initial Scheduling Order.

B. The Contentions Meet the Standard for Admission of Nontimely Contentions.

In the event that the ASLB should decide that SLOMFP's contentions are not timely, nevertheless they should be admitted because they satisfy a balancing of the NRC's late-filed contention criteria in 10 C.F.R. § 2.309(c)(i)-(viii).

1. Good cause

SLOMFP satisfies the first and most important factor – “good cause” (10 C.F.R. § 2.309(c)(1)(i)) – because, as discussed above in Section II.A, the contentions are timely in relation to the issuance of Order EA-12-049 and the 3/12/12 Information Request.

2. Right to be made a party to the proceeding

SLOMFP has already established its right to participate as a party in this proceeding by gaining the admission of a contention which is now pending before the ASLB. Therefore it satisfies 10 C.F.R. § 2.309(c)(1)(ii).

3. Nature of the requestor's interest

SLOMFP's interests in the health and safety of its members and the integrity of the environment in which they live are directly implicated by the issues raised in Contentions 1 and 2, which seek consideration in the Environmental Report of the safety and environmental implications of PG&E's response to Order 12-049 and the 3/12/12 Information Request. Therefore it satisfies 10 C.F.R. § 2.309(c)(1)(iii).

4. Possible effect of an order on requestor's interest

SLOMFP's interests in a safe, clean and healthful environment would be served by the completion of the Environmental Report to address the Fukushima-related issues raised by Contentions 1 and 2. *See* 10 C.F.R. § 2.309(c)(1)(iv).

5. Availability of other means to protect SLOMFP's interests

SLOMFP has no means other than this proceeding to protect its interest in a complete and well-reasoned environmental analysis for the proposed renewal of the DCNPP operating license. Only through this hearing does SLOMFP have a right that is judicially enforceable to seek compliance by the NRC with NEPA before the DCNPP is permitted to operate and impose potential severe accident risks on the public for another 20 years. Therefore it satisfies 10 C.F.R. § 2.309(c)(1)(v).

6. Extent SLOMFP's interests are represented by other parties

There are no other parties representing SLOMFP's interest in this proceeding with respect to the issue raised in the their contentions. Therefore SLOMFP satisfies 10 C.F.R. § 2.309(c)(1)(vi).

7. Extent to which participation will broaden the issues.

While SLOMFP's participation may broaden or delay the proceeding (10 C.F.R. § 2.309(c)(1)(vi)), this factor should not be relied on to exclude the contentions, for two reasons. First, the contentions do not arise from issues independently raised by SLOMFP but from post-Fukushima requirements established by the NRC that will affect the safety and environmental impacts of DCNPP during the license renewal term. Second, when new and significant information arises, even at a late stage of a proceeding, it must be addressed in the Environmental Report. *See* 10 C.F.R. § 51.53(c)(3)(iv) (requiring license renewal applicants to discuss in the Environmental Reports new and significant information of which they are "aware.") PG&E's letters to the NRC regarding Order 12-049 and the 3/12/12 Information Request show it is aware of the obligations they impose. SLOMFP has a right under 42 U.S.C. § 2239(a) to seek enforcement of this NEPA implementing regulation through the hearing process.

8. Extent to which SLOMFP will assist in the development of a sound record.

SLOMFP respectfully submits that through its experienced counsel, it has the ability to assist in the development of a sound record on the primarily legal issues raised by the contentions. Therefore it satisfies 10 C.F.R. § 2.309(c)(1)(viii).

Accordingly, SLOMFP has satisfied the test for non-timely contentions under 10 C.F.R. § 2.309(c)(1).

IV. CONCLUSION

For the foregoing reasons, SLOMFP's contentions should be admitted.

Respectfully submitted,

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April 27, 2012

CERTIFICATION PURSUANT TO 10 C.F.R. 2.323(b)

I certify that on April 26, 2012, I consulted counsel for PG&E and the NRC Staff regarding their clients' position on this motion. Counsel for both parties stated that they would not take a position on the motion at this time but would respond to it after it is filed.

Signed (electronically) by:
Diane Curran