

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

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NRC STAFF'S ANSWER TO MOTION TO ADMIT CONTENTIONS REGARDING  
FAILURE OF ENVIRONMENTAL REPORT TO ADDRESS POST FUKUSHIMA  
INVESTIGATIONS AND MODIFICATIONS

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(h)(1), the Staff of the U.S. Nuclear Regulatory Commission ("Staff") hereby files its answer to the April 27, 2012, Motion to Admit Contentions Regarding Failure of Environmental Report to Address Post-Fukushima Investigations and Modifications ("Motion"), filed by the San Luis Obispo Mothers for Peace ("SLOMFP" or "Intervenor") regarding Pacific Gas and Electric's ("PG&E" or "Applicant") license renewal application for Diablo Canyon Nuclear Power Plant, Units 1 and 2 ("DCNPP"). Intervenor's new Contention 1 alleges that the Environmental Report lacks information regarding proposed modifications to DCNPP because it does not include information about PG&E's plans to modify DCNPP in response to post-Fukushima Order EA-12-049 (March 12, 2012),<sup>1</sup> and new Contention 2 alleges that the Environmental Report lacks information by failing to describe the

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<sup>1</sup> Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately) (NRC Order EA-12-049), 77 Fed. Reg. 16,091 (Mar. 19, 2012) (also available at ADAMS Accession No. ML12054A735) ("EA-12-049"). The Order was issued to all power reactor licensees and holders of construction permits as part of the NRC's response to the Fukushima Dai-ichi accident.

status of PG&E 's compliance with NRC post-Fukushima orders and requests for additional information relevant to the environmental impacts of DCNPP during the license renewal term.

Intervenor's motion should be denied because it raises issues that are (1) outside the scope of this license renewal proceeding; (2) immaterial to this proceeding, and; (3) untimely. In addition, the contentions lack sufficient basis and are, therefore, inadmissible.

#### BACKGROUND

On November 23, 2009, PG&E filed an application to renew its operating licenses for DCNPP.<sup>2</sup> On March 22, 2010, SLOMFP submitted a Request for Hearing and Petition to Intervene that contained five contentions.<sup>3</sup> Because two of the contentions in the Petition to Intervene challenged NRC regulations, SLOMFP filed a petition to waive their application to this proceeding.<sup>4</sup> The Applicant filed an answer opposing all five contentions and the waiver request.<sup>5</sup> The Staff filed a response opposing the waiver request<sup>6</sup> as well as an answer opposing four of the five contentions.<sup>7</sup>

On August 4, 2010, the Board ruled on the Petition to Intervene admitting four contentions, referring one of those contentions to the Commission for a ruling on waiver of a rule of general applicability under 10 C.F.R. § 2.335, denying one contention, and referring

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<sup>2</sup> Letter from James R. Becker, Senior Vice President, dated November 23, 2009, transmitting application for license renewal for Diablo Canyon Nuclear Power Plant, Units 1 and 2 (ADAMS Accession No. ML093350335). Pursuant to 10 C.F.R. § 51.53(c), Appendix E to the application was the Applicant's environmental report. Appendix E, Applicant's Environmental Report – Operating License Renewal Stage (Nov. 23, 2009) (ADAMS Accession No. ML093340123) ("Environmental Report" or "ER").

<sup>3</sup> Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (March 22, 2010) (ADAMS Accession No. ML1008104410) ("Petition to Intervene").

<sup>4</sup> Petition to Intervene at 19, 21.

<sup>5</sup> Applicant's Answer to Petition to Intervene and Response to Requests for Waivers, at 2-3 (Apr. 16, 2010) (ADAMS Accession No. ML101060671).

<sup>6</sup> NRC Staff's Response to the Petition for Wavier of Commission Regulations Filed By San Luis Obispo Mothers for Peace, at 1 (Apr. 16, 2010) (ADAMS Accession No. ML101060657).

<sup>7</sup> NRC Staff's Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 1 (Apr. 16, 2010) (ADAMS Accession No. ML101060667).

several legal and policy questions to the Commission with regard to one of the admitted contentions under 10 C.F.R. 2.323 (f)(1).<sup>8</sup> On August 16, 2010, PG&E appealed the admission of all four contentions under 10 C.F.R. § 2.311(d)(1).<sup>9</sup> On October 12, 2011, the Commission affirmed in part and reversed in part the Board's decision leaving only one contention - EC-1.<sup>10</sup>

On August 11, 2011, SLOMPF filed a Motion to Admit New Contention Regarding Safety and Environmental Implications of the Nuclear Regulatory Task Force Report on the Fukushima Dai-ichi Accident. On November 18, 2011 this Board, in LBP-11-32, denied the Motion to Admit the New Contention and referred that portion of the ruling regarding absence of any obligation of the applicant to supplement or update its ER to the Commission.<sup>11</sup>

On March 12, 2012, in a separate action unrelated to license renewal, the NRC issued three immediately effective orders to impose license modifications on all power reactor licenses, including Order EA-12-049 ("Order"), which is the subject of SLOMPF Contentions 1 and 2.<sup>12</sup>

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<sup>8</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 345-46 (2010).

<sup>9</sup> Applicant's Notice of Appeal of LBP-10-15 (August 16, 2010) (ADAMS Accession No. ML102280603). The Staff also filed a limited appeal on two contentions. NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision (LBP-10-15) Admitting an Out of Scope Safety Contention and Improperly Recasting an Environmental Contention (August 19, 2010) (ADAMS Accession No. ML102310565).

<sup>10</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC \_\_\_\_ (Oct. 12, 2011) (slip op.) The Commission found that the Board erred in admission of Contention TC-1, declined the waiver request for EC-2 and its admission, found the Board erred in admission of Contention EC-4, affirmed the remaining Contention EC-1 and reformulated it as follows: "PG&E's Severe Accident Mitigation Alternatives [(SAMA)] analysis fails to consider information regarding the Shoreline fault that is necessary for an understanding of seismic risks to the Diablo Canyon nuclear power plant. As a result, PG&E's SAMA analysis does not satisfy the requirements of the National Environmental Policy Act [(NEPA)] for consideration of alternatives or NRC implementing regulation 10 C.F.R. § 51.53(c)(3)(ii)(L)."

<sup>11</sup> *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-11-32, 74 NRC \_\_\_\_ (Nov. 18, 2011)(slip op.).

<sup>12</sup> See EA-12-049; Order Modifying Licenses with Regard to Reliable Hardened Containment Vents (Effective Immediately) (NRC Order EA-12-050), 77 Fed. Reg. 16,098 – 16,105 (Mar. 19, 2012);

EA-12-049 requires power reactor licensees and construction permit holders to “develop, implement and maintain guidance and strategies to restore or maintain core cooling, containment and [spent fuel pool (“SFP”)] cooling capabilities in the event of a beyond-design-basis external event.”<sup>13</sup> Also on March 12, 2012, the NRC issued a letter pursuant to 10 C.F.R. § 50.54(f) related to the Fukushima Dai-ichi accident (“50.54(f) Letter”) to all reactor licensees and construction permit holders.<sup>14</sup> The 50.54(f) Letter requires recipients to “provide further information to support the evaluation of the NRC staff recommendations for the Near-Term Task Force (NTTF) review of the accident at the Fukushima Dai-ichi nuclear facility.”<sup>15</sup>

EA-12-049 was the result of a months-long systematic and methodical review of the NRC’s regulations and processes by a senior-level agency task force (the “Near-Term Task Force” or “NTTF”) to determine if additional improvements to the agency’s programs were warranted in light of the March 11, 2011, earthquake and tsunami at the Fukushima Dai-ichi nuclear power plant in Japan.

On April 27, 2012, SLOMPF filed the current motion to admit two new contentions.

DCNPP ‘s Unit 1 and Unit 2 licenses expire in 2024 and 2025, respectively and each would begin its period of extended operation at that time.

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Order Modifying Licenses Regarding Reliable Spent Fuel Pool Instrumentation (Effective Immediately) (NRC Order EA-12-051), 77 Fed. Reg. at 16,082 – 16,090 (Mar. 19, 2012).

<sup>13</sup> Order at 77 Fed. Reg. 16,092.

<sup>14</sup> See Request for Information Pursuant to Title 10 of the Code of Federal Regulations, 50.54(f) Regarding Recommendations 2.1, 2.3, and 9.3, of the Near-Term Task Force Review of Insights from the Fukushima Dai-ichi Accident (Mar. 12, 2012) (ADAMS Accession No. ML12053A340).

<sup>15</sup> *Id.*

## DISCUSSION

### I. Legal Requirements for Contentions

#### A. General Requirements for Admissibility

The legal requirements governing the admissibility of contentions are well-established and set forth in 10 C.F.R. § 2.309(f) of the Commission's regulations. Because the Staff's answer to the Petition to Intervene and this Board have previously discussed the contention admissibility standards, the Staff incorporates those discussions and will not repeat them here.<sup>16</sup>

#### B. Timeliness of New or Amended Contentions

Intervenors who file late contentions must satisfy not only the Commission's requirements to demonstrate standing (10 C.F.R. § 2.309(d)) and submit at least one admissible contention (10 C.F.R. § 2.309(f)(1)), but also the Commission's stringent requirements for late-filed contentions (10 C.F.R. § 2.309(f)(2)) or untimely filings (10 C.F.R. § 2.309(c)). Under 10 C.F.R. § 2.309(f)(2), a new contention filed after the initial filing period may be admitted as a timely new contention only with leave of the Board upon a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.<sup>17</sup>

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. This Board has specified that a new contention will be presumed timely if it is filed within 30 days of the trigger event, i.e.,

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<sup>16</sup> See Staff Answer to Petition to Intervene, April 16, 2010 at 6-10; *Diablo Canyon*, LBP-10-15, 72 NRC at 277-78.

<sup>17</sup> 10 C.F.R. § 2.309(f)(2).

the moment when the new information (upon which the contention is founded) becomes “available” to the petitioners.<sup>18</sup>

A contention that does not qualify as a timely new contention under 10 C.F.R. § 2.309(f)(2)(iii) may be admissible under the provision governing nontimely contentions, 10 C.F.R. § 2.309(c). Nontimely filings may only be entertained following a determination by the Board that a balancing of the eight factors in 10 C.F.R. § 2.309(c) weigh in favor of admission.<sup>19</sup> Of all the eight factors, the first, good cause for failure to file on time is given the most weight.<sup>20</sup>

### C. Scope of License Renewal Proceedings

The Commission’s regulations in 10 C.F.R. Part 54<sup>21</sup> limit the scope of a license renewal proceeding to the specific matters that must be considered for the license renewal application to

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<sup>18</sup> See Initial Scheduling Order (Sept. 15, 2010) at 12-13 (unpublished) (“ISO”).

<sup>19</sup> The eight factors listed at § 2.309(c)(1) are as follows:

- (i) Good cause, if any, for the failure to file on time;
- (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
- (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding;
- (iv) The possible effect of any order that may be entered in the proceeding on the requestor's/petitioner's interest;
- (v) The availability of other means whereby the requestor's/petitioner's interest will be protected;
- (vi) The extent to which the requestor's/petitioner's interests will be represented by existing parties;
- (vii) The extent to which the requestor's/petitioner's participation will broaden the issues or delay the proceeding; and
- (viii) The extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record.

<sup>20</sup> *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-09-7, 69 NRC 235, 261 (2009).

<sup>21</sup> See *generally*, Nuclear Power Plant License Renewal, 56 Fed. Reg. 64,943 (Dec. 13, 1991); Nuclear Power Plant License Renewal; Revisions, 60 Fed. Reg. 22,461 (May 8, 1995).

be granted. The Commission's standards for issuing a renewed license are set forth in 10 C.F.R. § 54.29. These standards, along with other regulations in 10 C.F.R. Part 54, and the environmental regulations related to license renewal set forth in 10 C.F.R. Part 51 and Appendix B thereto, establish the scope of issues that may be considered in a license renewal proceeding. The failure of a proposed contention to demonstrate that an issue is within the scope of the proceeding is grounds for its dismissal. 10 C.F.R. § 2.309(f)(1)(iii); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 567 (2005).

The Commission has provided guidance for license renewal adjudications regarding which safety and environmental issues properly fall within or beyond its license renewal requirements. See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 & 4), CLI-01-17, 54 NRC 3, 6-7 (2001). Specifically, the NRC conducts a technical review pursuant to 10 C.F.R. Part 54, to assure that pertinent public health and safety requirements have been satisfied. *Id.* at 6. In addition, the NRC performs an environmental review pursuant to 10 C.F.R. Part 51 to assess the potential impacts of twenty additional years of operation. *Id.* at 6-7.

Contentions raising environmental issues in a license renewal proceeding are similarly limited to those issues which are affected by license renewal and have not been addressed by rulemaking or on a generic basis. *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

1. The Scope of the NRC's Environmental Review for License Renewal Proceedings

Because SLOMFP's new contentions raise environmental claims, the NRC Staff will only discuss the scope of its environmental review in license renewal proceedings. In the National Environmental Policy Act of 1969 ("NEPA"), Congress announced a national policy "to create and maintain conditions under which man and nature can exist in productive harmony."<sup>22</sup> Thus,

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<sup>22</sup> 42 U.S.C. § 4331.

pursuant to Section 102 of NEPA, before undertaking a major Federal action, Federal agencies must prepare a detailed statement that discusses the environmental impacts of the proposed action.<sup>23</sup> This statement furthers the policies of NEPA in two ways.<sup>24</sup> First, “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.”<sup>25</sup> Second, “[I]t also guarantees that the relevant information will be made available to the larger audience,” and thus “provides a springboard for public comment.”<sup>26</sup> Importantly, NEPA only requires that agencies take a “hard look at environmental consequences;” NEPA does not “mandate particular results.”<sup>27</sup>

Part 51 of the NRC’s regulations contains the agency’s implementation of NEPA.<sup>28</sup> Under Part 51, the NRC must prepare an environmental impact statement (“EIS”) for license renewals.<sup>29</sup> On many environmental issues related to license renewal, the Commission “found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants.”<sup>30</sup> Consequently, the NRC prepared a generic environmental impact statement (“GEIS”) that assessed those impacts generically.<sup>31</sup> Table B-1 of Appendix B of Subpart A to 10 C.F.R. Part 51 (“Table B-1”) codifies the results of the GEIS.

Table B-1 defines environmental issues that the NRC can resolve generically as “Category 1” issues and defines issues that that the NRC could not resolve generically as

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<sup>23</sup> *Id.* at § 4332.

<sup>24</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (internal quotations omitted).

<sup>28</sup> 10 C.F.R. § 51.2.

<sup>29</sup> 10 C.F.R. § 51.20(b)(2).

<sup>30</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11.

<sup>31</sup> NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” Final Report, (May 1996) (ADAMS Accession No. ML040690705).

“Category 2” issues. The NRC must address these Category 2 issues in the site-specific supplemental environmental impact statement (“SEIS”) it prepares prior to granting a renewed operating license.<sup>32</sup> For all Category 1 issues, Table B-1 also assigns an impact level of small, moderate, or large.

To qualify as a Category 1 issue, an environmental issue must meet three criteria. First, the environmental impacts associated with that issue must apply to all plants or groups of plants. Second, those impacts must have a single significance level across all plants. Finally, additional plant-specific mitigation measures must not be likely to be sufficiently beneficial to warrant implementation.<sup>33</sup> The NRC’s regulations specifically provide that the NRC may incorporate the generic conclusions for Category 1 issues into its SEIS and applicants for license renewal need not discuss Category 1 issues in their applications.<sup>34</sup> Thus, challenges to Category 1 issues, like challenges to all of the Commission’s regulations, are outside the scope of NRC adjudications. Consequently, a party seeking to litigate a Category 1 issue or challenging a determination in Table B-1 in a license renewal proceeding must seek a waiver of the Commission’s regulations, pursuant to 10 C.F.R. § 2.335.<sup>35</sup>

## 2. The NRC’s Consideration of the Environmental Impacts of Severe Accidents in License Renewal Proceedings

As pertinent here, in the GEIS, the NRC reached a generic determination that the environmental impacts of severe accidents would be “not significant,” or “small.” See GEIS at

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<sup>32</sup> 10 C.F.R. § 51.95(c).

<sup>33</sup> The Attorney General of Commonwealth of Massachusetts, The Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,206 (Aug. 8, 2008). The NRC must further evaluate Category 1 issues, however, if it identifies new and significant information. 10 C.F.R. §§ 51.53(c)(3)(iv), 51.72(a)(2) and 51.92(a).

<sup>34</sup> 10 C.F.R. §§ 51.53(c)(3), 51.95(c). While NEPA ultimately places an obligation on the NRC to prepare an EIS to support a major Federal action, 42 U.S.C. § 4332, the NRC requires applicants to submit an ER to aid the NRC in conducting its environmental analysis. 10 C.F.R. § 51.41. Potential intervenors must file contentions based on the ER, and may amend those contentions if the NRC’s draft SEIS (“DSEIS”) contains different information. 10 C.F.R. § 2.309(f)(2).

<sup>35</sup> *Turkey Point*, CLI-01-17, 54 NRC at 12, 22-23.

5.3.3.1. The NRC's regulations implementing NEPA expressly incorporated this generic finding. "The probability weighted consequences of atmospheric releases, fallout onto open bodies of water, releases to ground water, and societal and economic impacts from severe accidents are small for all plants." See Table B-1.<sup>36</sup> Therefore, the Applicant's license renewal ER for DCNPP and the Staff's SEIS do not have to reassess the issue.<sup>37</sup>

While the ER and SEIS do not have to reassess the issue, the Commission recognizes its duty to evaluate whether there is any new and significant information regarding its severe accident determinations and supplements its NEPA documentation accordingly. See 10 C.F.R. § 51.95(c)(3); *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), CLI-10-29, 72 NRC 556, 563 (2010)) (*citing Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989)). In *Watts Bar*, the Commission noted that even when a regulation in Part 51 excuses the agency from considering the issue in a given proceeding, NEPA requires the NRC Staff to take a hard look at new and significant information related to the issue. *Id.*<sup>38</sup> Thus, while the Commission's regulations characterize the environmental impacts of severe accidents as "small" for all plants, the Commission has continued to extensively study the issue of severe accidents and mitigation

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<sup>36</sup> The Commission also made the generic determination, codified in Table B-1 and 10 C.F.R. § 51.53(c)(3)(ii)(L), that if the NRC had conducted a site-specific consideration of severe accident mitigation alternatives ("SAMA") for a plant in a previous EIS or environmental assessment ("EA"), another SAMA analysis need not be done for license renewal. GEIS at 5.4.1.5; Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28, 467, 28,480-28,481 (June 5, 1996).

<sup>37</sup> Both the applicant and Staff have to determine if new and significant information significantly alters previous SAMA determinations. See 10 C.F.R. §§ 51.53(c)(3)(iv); 51.71;51.95(c)(1).

<sup>38</sup> See also *Massachusetts v. U.S.*, 522 F.3d 115, 127 (1st Cir. 2008)(noting that "NRC procedures anticipate a situation...in which a generic finding adopted by agency rule may have become obsolete. In such a situation, the regulations provide channels through which the agency's expert staff may receive new and significant information, namely from a license renewal applicant's environmental report or from public comments on a draft SEIS, and the NRC staff may seek modification of a generic...finding").

measures in the years since the 1996 rulemaking to determine, among other things, whether any new and significant information affects this determination.<sup>39</sup>

Importantly, the Commission recently determined that the Fukushima events do not currently constitute new and significant information under NEPA. *Union Electric Company, d/b/a Ameren Corp. (Callaway Plant, Unit 2) et al.*, CLI-11-05, 74 NRC \_\_ (Sept. 9, 2011)(slip op. at 30-31). Specifically, while the Near-Term Task Force made extensive findings and recommendations under the AEA, it did not find that Fukushima would have a direct impact on the NRC's environmental reviews of current licensing activities under NEPA or recommend that the NRC alter those reviews to account for Fukushima. The Near-Term Task Force did not provide any indication that the events at Fukushima changed the NRC's understanding of the environmental consequences of a severe accident for NEPA purposes. *Id.*<sup>40</sup>

### 3. The NRC's Consideration of Severe Accident Mitigation Alternatives in License Renewal Proceedings

Certain license renewal applicants, including PG&E, are required to consider SAMAs in the environmental report prepared in connection with their license renewal application.<sup>41</sup> See *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power

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<sup>39</sup> For example, following the events of September 11, 2001, the Commission issued orders and ultimately a new regulation (10 C.F.R. § 50.54(hh)) which required commercial power reactor licensees to, among other things, adopt mitigation strategies using readily available resources to maintain or restore core cooling, containment, and spent fuel pool cooling capabilities to cope with the loss of large areas of the facility due to large fires and explosions from any cause, including beyond-design-basis aircraft impacts. See *Power Reactor Security Requirements*, 74 Fed. Reg. 13,926 (Mar. 27, 2009). See also SRM-SECY-11-0089, Staff Requirements — SECY-11-0089 — Options for Proceeding with Future Level 3 Probabilistic Risk Assessment with Future Level 3 Probabilistic Risk Assessment (PRA) Activities (Sept. 21, 2011) (ADAMS Accession No. ML112640419) (authorizing Staff to conduct an updated level 3 probabilistic risk assessment for the purpose of evaluating its generic understanding of severe accident risk and mitigation following the Fukushima Dai-ichi accident of March 11, 2011).

<sup>40</sup> The Commission made clear, however, that 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.” *Callaway*, CLI-11-05, 74 NRC \_\_ (slip op. at 30-31).

<sup>41</sup> See 10 C.F.R. § 51.53(c)(3)(ii)(L) (noting that ER must provide a consideration of alternatives to mitigate severe accidents if the staff has not previously considered such alternatives for the plant in a NEPA document).

Station), CLI-10-11, 71 NRC 287, 290 (2010) *reconsideration denied*, CLI-10-15, 71 NRC 479 (2010). “Mitigation alternatives or ‘SAMAs’ refer to safety enhancements such as a new hardware item or procedure intended to reduce the risk of severe accidents.” *Id.* at 290-91. The SAMA review ensures “that any plant changes – in hardware, procedures, or training – that have a potential for significantly improving severe accident safety performance are identified and assessed.” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-17, 56 NRC 1, 5 (2002); *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), CLI-12-08, 75 NRC \_\_\_ (Mar. 27, 2012) (slip op. at 17).

In explaining another SAMA contention, the Commission noted that it has “long stressed that NRC adjudicatory hearings are not EIS editing sessions.” *Entergy Nuclear Generation Co. & Entergy Nuclear Operations* (Pilgrim Nuclear Power Station), CLI-09-11, 69 NRC 529, 533 (2009) (quotations omitted). “Under NEPA, mitigation (and the SAMA issue is one of mitigation) need only be discussed in ‘sufficient detail to ensure that environmental consequences [of the proposed project] have been fairly evaluated.’” *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 431 (2003) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (alteration in original)). Thus, the Commission has stated that the “ultimate concern” for a SAMA analysis “is whether any additional SAMA should have been identified as potentially cost beneficial, not whether further analysis may refine the details in the SAMA NEPA analysis.” *Pilgrim*, CLI-09-11, 69 NRC at 533.

Thus, when it comes to admissibility of SAMA contentions, “the proper question is not whether there are plausible alternative choices for use in the analysis, but whether the analysis that was done is reasonable under NEPA.”<sup>42</sup> “Unless a petitioner sets forth a supported contention pointing to an apparent *error or deficiency* that may have significantly skewed the

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<sup>42</sup> *Davis-Besse*, CLI-12-08, 75 NRC at \_\_\_ (slip op. at 17-18), (citing *NextEra Energy Seabrook, LLC* (Seabrook Station, Unit 1), CLI-12-5, 75 NRC \_\_\_ (Mar. 8, 2012) (slip op. at 28-29).

environmental conclusions, there is no genuine material dispute for hearing.” *Id.* (internal citations omitted).

II. Timeliness of Contentions 1 and 2

A. Contentions 1 and 2 are Not Timely Filed

As discussed above, pursuant to the Board’s ISO a new contention is deemed timely under 10 C.F.R. § 2.309(f)(2)(iii) if it is filed within thirty days of the date when the information on which it is based first becomes available to the moving party through service, publication, or any other means.<sup>43</sup> The Commission has repeatedly stressed that intervenors have an “iron-clad obligation to examine the publicly available documentary material ... with sufficient care to enable [them] to uncover any information that could serve as the foundation for a specific contention.” *Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2)*, CLI-10-27, 72 NRC 481, 496 (2010) (quoting *Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station)*, CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted)). In this case, the Intervenor asserts that the late-filed contentions are timely because the information on which the contention is based was only recently available as it relates to obligations that the NRC imposed on PG&E, and it is materially different than information previously available because it relates to obligations that did not exist prior to the issuance of EA-12-049 and the Information Request on March 12, 2012. See Motion at 10. SLOMPF implies that the triggering event would be 30 days after the issuance of the Order to allow time for PG&E to file an amended ER, plus another 30 days for SLOMPF to file its motion. However, neither of the new contentions are timely as the triggering event should be the issuance of EA-12-049 and the Information Request rather than the date proposed by SLOMPF. March 12, 2012 was the date when the Applicant first had knowledge of these requirements.

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<sup>43</sup> ISO at 12.

The Order was published on March 19, 2012.<sup>44</sup> Therefore, the latest date the motion should have been filed was April 18, 2012.

Moreover, this Board has stated in a prior ruling that the Applicant has no duty to supplement its environmental report after its initial filing. The Board has stated: "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." See *Diablo Canyon*, LBP-11-32, 74 NRC at \_\_\_ (slip op. at 11). Furthermore, in the same order this Board also stated that "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." *Id.* at 17. However, SLOMPF has presented no facts that PG&E has voluntarily supplemented its ER.

The Petitioner acknowledges, in the alternative, that the Contentions are premature and should await submission of substantive information<sup>45</sup> by PG&E. Motion at 11. As stated above, there is no duty to update the ER.

#### B. Late-Filed Criteria

The Petitioner alleges that in the event that the new contentions do not meet criteria for timeliness than they satisfy a balancing of the late filed criteria of 10 CFR 2.309(c)(i)-(viii). SLOMPF merely states that it meets the "good cause" factor because they are timely in relation to EA-12-049 and the Information Request. The Petitioner has not explained or shown "good cause" why it could not have independently reviewed Order EA-12-049, and independently

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<sup>44</sup> 77 Fed. Reg. at 16,091.

<sup>45</sup> SLOMPF is presumably referring to submittal of the overall integrated plan as required in Condition C.1.a, or by December 31, 2016, whichever comes first. See Order at 8.

determined what specifically is missing from the ER. Instead, SLOMPF admits they waited additional time after the 30 days allowing for the Applicant to file an update. Motion at 11. SLOMPF proffers no expert opinions or other documentation to say what specifically is lacking in the ER relating to EA-12-049 or why waiting for PG&E to amend its ER rose to the level of good cause to allow SLOMPF extra time to file new contentions. They merely state that the facts supporting this contention are found in Order EA-12-049, the ER and the Information Request. Motion at 10. Petitioner did not specify how information they were aware of was materially different from information that was made publicly available within the 30 days of the issuance of the Order. SLOMPF remained silent until it's time to file had passed, waiting for the Applicant to file information that might be materially different. As the Commission has made clear, intervenors cannot "delay filing a contention until a document becomes available that collects, summarizes and places into context the facts supporting that contention." *Prairie Island*, CLI-10-27, 72 NRC at 496.

SLOMPF has incorrectly assumed that they have demonstrated "good cause" merely based on their argument that the new contentions are timely filed. However, as discussed above, the contentions are not timely in relation to issuance of the Order. Additionally, of all the eight factors, the first, "good cause" for failure to file on time, is given the most weight. SLOMPF has failed to justify the most important factor. Even if Petitioners could have justified the remaining factors, which are not particularly strong,<sup>46</sup> they have not overcome the "good cause" burden. Intervenors have not met the heavy burden of the "good cause" and the remaining factors are not particularly strong. Therefore, the Motion should be denied.

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<sup>46</sup> For example, regarding 2.309(c)(vi), SLOMPF argues that it has no other means other than this proceeding to protect its interests. However, SLOMPF may file a §2.206 request. For the 2.309(c)(vii) factor, SLOMPF admits that its participation will broaden the issues, but does not justify why the issues they raise are within the scope of the proceeding.

III. Contention Admissibility

SLOMPF's Motion contains two proposed environmental contentions. The following summarizes those contentions and provides the Staff's response to each contention.

PROPOSED CONTENTION 1

Contention 1 states:

The Environmental Report 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 DCNPP 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). Also, as 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.<sup>47</sup>

In Contention 1, SLOMPF argues that PG&E's ER does not contain "a description of the proposed action, including the applicant's plans to modify the facility or its administrative controls as described in accordance with § 54.21 of this chapter" that directly affect the environment or affect plant effluents that affect the environment, as required by 10 C.F.R. § 51.53(c)(2).<sup>48</sup> SLOMPF asserts that because the Order requires modifications the NRC has determined are necessary for adequate protection of public health and safety against beyond-design-basis accidents, the modifications must be set forth in the ER.<sup>49</sup> SLOMPF further contends that because the Order does not prescribe specific strategies and measures for complying with the Order's requirements, but rather allows the licensee to make its own proposal, "the relative effectiveness and costs of a range of alternatives for meeting the requirements of [the Order] should be discussed."<sup>50</sup> SLOMPF argues that modifications to

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<sup>47</sup> Motion at 2.

<sup>48</sup> Motion at 2-3 (quoting § 51.53(c)(2)).

<sup>49</sup> Motion at 5.

<sup>50</sup> *Id.*

comply with the Order are within the scope of this proceeding and are material because they bear on the consideration of the environmental consequences of a beyond-design-basis accident and alternatives for mitigation of beyond-design-basis accidents.<sup>51</sup>

For the reasons discussed below, Contention 1 is outside the scope of this proceeding, is unsupported, immaterial, and fails to raise a genuine dispute with the Application.

1. Contention 1 Raises Issues Outside the Scope of This Proceeding

For the following reasons, Contention 1 raises issues that are outside the scope of this proceeding and are therefore inadmissible.

a. Contention 1 Impermissibly Challenges the Commission's Generic Determination on the Environmental Impacts of Severe Accidents

Contention 1 implicitly attacks the Commission's generic determination in Table B-1 that the environmental impacts of severe accidents are small.<sup>52</sup> Specifically, SLOMPF asserts that the information that Contention 1 alleges has been omitted from the ER "may affect the degree to which the environment is protected against the environmental impacts of [severe] accidents during the license renewal term."<sup>53</sup>

As discussed, the Commission has limited contentions raising environmental issues in license renewal proceedings to those issues that are affected by license renewal and have not been addressed by rulemaking or on a generic basis.<sup>54</sup> While "severe accident mitigation alternatives" is a Category 2 issue, i.e., requires site-specific review, the Commission has made

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<sup>51</sup> *Id.* at 5-6. Although SLOMPF uses the term "beyond design basis accident" the term used in Part 51 and in NUREG-1437 ("GEIS") is "severe accident." While the terms are equivalent, the Staff will use the term "severe accident." See GEIS at 5-1 to 5-2 (stating: the [NRC] categorizes accidents as "design-basis" (i.e., the plant is designed specifically to accommodate these) or "severe" (i.e., those involving multiple failures of equipment or function and, therefore, whose likelihood is generally lower than design-basis accidents but where consequences might be higher), for which plants are analyzed to determine their response).

<sup>52</sup> 10 C.F.R Part 51 Appendix A, Table B-1.

<sup>53</sup> Motion at 6.

<sup>54</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11, 16.

a generic determination that the environmental impacts for both design-basis and severe accidents are small for all plants. See Table B-1 at 65. These generic findings, codified in NRC regulations, are not subject to challenge absent a waiver of their application in a particular adjudicatory proceeding.<sup>55</sup> SLOMPF has not requested such a waiver. Thus, SLOMPF has not demonstrated that this issue is within the scope of this proceeding, as required by 10 C.F.R. § 2.309(f)(1)(iii).

b. Any Potential Modifications to DCNPP as a Result of the Order are Beyond the Scope of the License Renewal NEPA Review

The environmental impacts of potential modifications to DCNPP as a result of the Order are outside the scope of license renewal NEPA review. First, the Order requires compliance by December 31, 2016. Therefore, any potential modifications to DCNPP resulting from the Order must be completed before the period of extended operation and are unrelated to license renewal. While the NRC's NEPA review for license renewal is not limited to the scope of its safety review, the NRC's NEPA review for license renewal is limited to the environmental impacts of an additional 20 years of operation beyond the current term.<sup>56</sup> In the case of DCNPP, the NEPA review considers the environmental impacts of operation from 2024/2025 to 2044/2045, which is well beyond December 31, 2016.

Second, the Order is unrelated to license renewal, as it was issued to all operating reactors regardless of whether a plant holds or has applied for a renewed operating license.<sup>57</sup> As discussed, contentions raising environmental issues in a license renewal proceeding are limited to those issues which are affected by license renewal.<sup>58</sup> NEPA considerations for

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<sup>55</sup> See 10 C.F.R. § 2.335(a); *Turkey Point*, CLI-01-17, 54 NRC at 11, 16; *FirstEnergy Nuclear Operating Co.* (Davis-Besse Nuclear Power Station, Unit 1), LBP-11-13, 73 NRC \_\_ (Apr. 26, 2011)(slip op. at 35).

<sup>56</sup> *Turkey Point*, CLI-01-17, 54 NRC at 7, 11.

<sup>57</sup> See Order at Attachment 1 (listing recipients).

<sup>58</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

operation during the initial licensing term have already been considered and actions triggering NEPA during the life of the plant must be addressed when the action occurs.<sup>59</sup> Potential future actions are only within the scope of NEPA review if they are pending before the agency *and* are in some way related to the action the agency is actively considering.<sup>60</sup>

Potential modifications to DCNPP to comply with the Order are not yet pending and, even if they were, are not interrelated to license renewal. Modifications are not yet pending because licensees are not required to submit implementation plans until February 2013. Even if potential modifications were pending, actions to comply with the Order are not related to license renewal because PG&E must comply with the requirements of the Order even to operate DCNPP until the end of its current term in 2024 and 2025. That compliance with the Order is unrelated to license renewal and is supported by the Commission's agreement in CLI-11-05 with the proposition that any enhancements or changes to regulatory requirements as a result of Fukushima will be imposed irrespective of whether a plant is applying for or has been granted a renewed operating license.<sup>61</sup> Thus, SLOMPF's claim that the ER should discuss the environmental impacts of modifications to comply with the Order is outside the scope of this proceeding.

In addition, the Applicant is not required by 10 C.F.R. § 51.53(c)(2) to discuss in its ER potential modifications to DCNPP as a result of the Order. Section 51.53(c)(2) requires license renewal applicants to include in the ER "plans to modify the facility or its administrative control

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<sup>59</sup> See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule, 61 Fed. Reg. 28,467, 28,485 (June 5, 1996).

<sup>60</sup> *Duke Energy Corp.* (McGuire Nuclear Station Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-14, 55 NRC 278, 295-97 (2002) (finding that a potential license amendment to allow use of MOX fuel in the McGuire and Catawba reactors was neither pending nor interrelated to license renewal because, if the potential amendment to use MOX fuel were granted, the plants could operate using the MOX fueling during the remainder of the current operating terms regardless of whether the operating licenses were renewed).

<sup>61</sup> *Callaway*, CLI-11-05, 74 NRC \_\_ (slip op. at 26-27).

procedures as described in accordance with § 54.21 of this chapter.”<sup>62</sup> NRC guidance<sup>63</sup> describes the type of information on plant modifications license renewal applicants should provide to satisfy § 54.21(c)(2). Importantly, that guidance states that the chapter in the ER on the proposed action “should identify those activities *attendant to license renewal* that can affect the environment external to the plant.”<sup>64</sup> That same NRC guidance, in turn, refers to Chapter 2 of the GEIS. Section 2.6 of the GEIS assesses activities a plant may undertake to “achieve license renewal and an extended plant life,” as well as “major activities the applicant may choose to perform to enable safe and economic operation during the incremental term allowed by license renewal.”<sup>65</sup>

Any potential modifications to DCNPP as a result of the Order would not be “attendant to license renewal,” undertaken to “achieve license renewal,” nor “to extend plant life.” Likewise, they are not activities the licensee is choosing to take to ensure safe and economic operation during the proposed renewal term. Instead, any modifications PG&E may make in response to the Order are attendant on achieving compliance with the Order and must be completed regardless of whether DCNPP operates beyond 2024 and 2025. Thus, the information SLOMPF asserts has been omitted is neither required nor within the scope of this proceeding.

Furthermore, to accept SLOMPF’s theory that the ER must discuss modifications to comply with the Order would mean that every change to the plant during the current operating term would have to be individually described in detail in the ER for its potential environmental effect during the renewal term. Requiring such an exhaustive level of detail is surely contrary to

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<sup>62</sup> Section 54.21 describes the information that must be contained in a license renewal application.

<sup>63</sup> Supplement 1 to Regulatory Guide (“RG”) 4.2 Preparation of Supplemental Environmental Reports for Applications to Renew Nuclear Power Plant Operating Licenses (ADAMS Accession No. ML003710495) (Sept. 2000).

<sup>64</sup> RG 4.2 at 4.2-S-9 (emphasis added).

<sup>65</sup> GEIS at 2-32; 2-36.

NEPA's rule of reason.<sup>66</sup> Moreover, the triggering event of NEPA consideration (categorical exclusion, EA or EIS), if any, would have already occurred at the time of decision making on the changes.

2. Even if Contention 1 Were In Scope, It Lacks Sufficient Basis and Support, Is Immaterial, and Fails to Demonstrate a Genuine Dispute with the Application

As discussed below, even if Contention 1 were within the scope of this proceeding, it would nevertheless be inadmissible because it lacks sufficient basis, is immaterial, and otherwise fails to demonstrate a genuine material dispute with the application. 10 C.F.R. § 2.309(f)(1)(ii), (iv), (v), (vi).

a. Contention 1 Lacks Sufficient Basis and Support

SLOMPF states that the support for its contention may be found in the ER, the Order, and its Motion.<sup>67</sup> These documents do not, however, provide sufficient basis or support for Contention 1. As SLOMPF admits, the Order does not require licensees to submit a plan describing how they will comply with the requirements in Attachment 2 of the Order until February 28, 2013.<sup>68</sup> While the Staff plans to issue guidance on compliance with the Order in August,<sup>69</sup> the only available information about how licensees are expected to comply with the Order is in Attachment 2 to the Order.<sup>70</sup> While PG&E's compliance with the Order may be necessary to ensure adequate protection during the current operating term, SLOMPF provides no facts or expert opinion to support its assertion that PG&E's compliance with the requirements

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<sup>66</sup> See *Pilgrim*, CLI-10-11, 71 NRC at 315 (discussing the limits of what NEPA requires).

<sup>67</sup> Motion at 6

<sup>68</sup> Motion at 4; Order at 9.

<sup>69</sup> Order at 4.

<sup>70</sup> Order at Attachment 2 "Requirements for Mitigation Strategies for Beyond Design-Basis External Events at Operating Reactor Sites and Construction Permit Holders" (ADAMS Accession No. ML12054A735)(77 Fed. Reg. at 16098).

in Attachment 2 will result in environmental impacts during the period of extended operation, including the effectiveness and relative costs of alternatives for mitigation of severe accidents.<sup>71</sup> Without some factual explanation and expert opinion, one is left to speculate how potential modifications to DCNPP to *enhance* its ability to mitigate severe accidents, as required by the Order, could change the environmental impacts of license renewal or make the identification of a cost-beneficial SAMA more likely, which is the purpose of the SAMA analysis.<sup>72</sup> Thus, Contention 1 is based upon speculation and bare assertion without expert support and is inadmissible.<sup>73</sup>

Furthermore, where a contention seeks to connect a set of facts with a specific result and that result is not self-evident, expert analysis is needed to bridge the gap.<sup>74</sup> As the Board in *Georgia Tech* recognized, “it is the petitioner who is obligated to provide the analyses and expert opinion showing why its bases support its contention.”<sup>75</sup> And that obligation must be satisfied when the petition is filed.

SLOMPF has not provided sufficient facts or expert analysis to link potential modifications to DCNPP to comply with the Order by the end of 2016 with potential environmental impacts of operations of DCNPP during the proposed license renewal term or consideration of severe accident mitigation alternatives. Moreover, SLOMPF has provided no facts or expert opinion to establish a link between potential modifications to DCNPP to enhance its ability to mitigate severe accidents, as required by the Order, and environmental impacts

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<sup>71</sup> Motion at 6.

<sup>72</sup> See *Pilgrim*, CLI-10-11, 71 NRC at 290-91.

<sup>73</sup> See e.g., *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139-140 (2004).

<sup>74</sup> See e.g., *Nuclear Mgmt. Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 352 (2006), *aff'd* CLI-06-17, 63 NRC 727 (2006).

<sup>75</sup> *Georgia Inst. of Tech.* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995).

during the proposed period of extended operation. Consequently, Contention 1 is inadmissible as it does not meet the basis and support requirements of 10 C.F.R. § 2.309(f)(1)(ii), (v).

b. Contention 1 is Immaterial and Fails to Raise a Genuine Dispute with the Application

In addition to lacking sufficient basis and support, Contention 1 is immaterial and fails to raise a genuine dispute with the application as required by 10 C.F.R. § 2.309(f)(1)(iv), (vi). First, SLOMPF asserts that information about potential modifications to DCNPP to comply with the Order by 2016 is required by 10 C.F.R. § 51.53(c)(2) because modification “will affect [DCNPP’s] safety and environmental impacts during the license renewal term.”<sup>76</sup> This is insufficient to demonstrate a material issue or a genuine dispute with the Application because DCNPP must be in compliance with the Order eight years before the proposed period of extended operation would even begin. Thus any environmental impacts from making any potential modifications will occur during the current term. As discussed above, SLOMPF has provided no explanation or expert support for its assertion that potential modifications during the current term will result in environmental impacts during the proposed period of extended operation or explained how information on potential modifications to DCNPP is material to the NRC’s license renewal decision. It is incumbent upon the petitioner to demonstrate why the omitted information is material. The unsupported assertions by SLOMPF are simply insufficient to demonstrate materiality or raise a genuine dispute with the application. 10 C.F.R. § 2.309(f)(1)(iv), (vi).

Second, SLOMPF asserts that consideration of potential modifications to comply with the Order “will ensure that the NRC has considered an appropriate array of alternatives for protecting public health and safety against the adverse environmental impacts of [severe]

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<sup>76</sup> Motion at 5-6.

accidents at DCNPP, as required by NEPA.”<sup>77</sup> SLOMPF provides no explanation or expert analysis demonstrating that potential modifications to DCNPP to comply with the Order render the existing SAMA analysis unreasonable or otherwise deficient for NEPA purposes. The Commission has stated that an admissible SAMA contention must demonstrate that some error or deficiency in the analysis renders the analysis unreasonable under NEPA.<sup>78</sup> In that same decision, the Commission stated, “Unless a petitioner sets forth a supported contention pointing to an apparent error or deficiency that may have significantly skewed the environmental conclusions, there is no genuine material dispute for hearing.”<sup>79</sup> Where, as here, the petitioner, has provided no expert support for the purported deficiency let alone demonstrated how the allegedly omitted information could significantly skew the environmental conclusions, there is no genuine, material dispute for hearing and thus, the Board should deny the contention.

10 C.F.R. § 2.309(f)(1)(iv), (vi).

Accordingly, Contention 1 is inadmissible because it falls outside the scope of this proceeding, lacks sufficient basis and support, is immaterial, and fails to raise a genuine dispute with the Application. See 10 C.F.R. § 2.309(f)(1)(ii)-(vi).

## PROPOSED CONTENTION 2

Contention 2 states, in part:

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<sup>80</sup> and requests for additional information relevant to the environmental impacts of the DCNPP 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.

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<sup>77</sup> Motion at 6 (citing *Exelon Generation Co. LLC* (Limerick Generation Station Units 1 and 2), LBP-12-08, 75 NRC \_\_, \_\_ (slip op. at 9 & n.42) (Apr. 4, 2012).

<sup>78</sup> *Davis-Besse*, CLI-12-08, 75 NRC \_\_ (slip op at 18-19).

<sup>79</sup> *Id.* (slip op. at 19).

<sup>80</sup> While the Commission issued several post-Fukushima orders, Contention 2 only challenges Order EA-12-049, which is abbreviated as “Order” throughout this Answer.

Motion at 6-7<sup>81</sup> (citations omitted).

In support of Contention 2, SLOMPF argues that the Order and the 50.54(f) Letter “constitute federal requirements that must be identified in the Environmental Report,” and that the “Environmental Report must discuss the status of PG&E’s compliance with these requirements.”<sup>82</sup> SLOMPF asserts that Contention 2 is within the scope of the proceeding and is material because the information SLOMPF requests bears on the environmental impacts of a severe accident at DCNPP and consideration of alternatives for mitigation of severe accidents.<sup>83</sup> Finally, SLOMPF argues that any actions that PG&E takes in response to the Order and the 50.54(f) Letter may affect the degree to which the environment is protected against the environmental impacts of severe accidents during the license renewal term.<sup>84</sup>

For the reasons discussed below, Contention 2 is inadmissible because it falls outside the scope of this proceeding, lacks sufficient support, is immaterial, and fails to raise a genuine dispute with the Application.

1. Contention 2 is Outside the Scope of This Proceeding

Section 51.45(d) requires that the license renewal ER “list all Federal permits, licenses, approvals and other entitlements which must be obtained in connection with the proposed action and . . . describe the status of compliance with these requirements.” SLOMPF claims that the information and actions requested in the Order and the 50.54(f) Letter “are mandatory because they are necessary to provide adequate protection to public health, and therefore they relate to the environmental impacts of DCNPP on the human environment during the license renewal term.” *Id.* at 8. Thus, SLOMPF argues that the Order and the 50.54(f) Letter

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<sup>81</sup> The statement of Contention 2 continues by quoting from the Order and referencing specific portions of the 50.54(f) Letter, which SLOMPF asserts must be addressed in the ER.

<sup>82</sup> Motion at 8-9.

<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 9-10.

“constitute federal requirements that must be identified in the Environmental Report,” and that the “Environmental Report must discuss the status of PG&E’s compliance with these requirements.” *Id.* at 8-9.<sup>85</sup> Further, SLOMPF argues that 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 severe accidents during the license renewal term. *Id.* at 9-10.

Contrary to SLOMPF’s assertions, the Order and the 50.54(f) Letter are not requirements to be listed in the ER in accordance with 10 C.F.R. § 51.45(d). In practice, § 51.45(d) has only been applied to approvals needed from Federal, State, and local agencies other than the NRC such as permits issued by the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the U.S. Fish and Wildlife Service.<sup>86</sup> Moreover, by its terms, § 50.54 only requires a written statement in response to an information request by the NRC—it is not a federal permit, license, approval, or entitlement. Therefore, Contention 2 falls outside the scope of this license renewal proceeding.

Even if § 51.45(d) applies to NRC orders and requests for information pursuant to 10 C.F.R. § 50.54(f), Contention 2 falls outside the scope of this proceeding because PG&E’s

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<sup>85</sup> SLOMPF further asserts that Contention 2 is within the scope of the proceeding because the information SLOMPF requests bears on the environmental impacts of a severe accident at DCNPP and consideration of alternatives for mitigation of such severe accident. *Id.* at 9. In addition, SLOMPF asserts that the information is relevant to license renewal because the actions and information requested in Order EA-12-049 and the 50.54(f) Letter must be fulfilled within the next three or four years. *Id.* at 9-10.

<sup>86</sup> See “10 CFR Part 51, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses” 61 Fed. Reg. 28,467, 28,475 (June 5, 1996)(“[P]ursuant to 10 CFR 51.45(d), an applicant for license renewal must identify and indicate in its environmental report the status of State and local approvals regarding water use issues.”); *id.* at 28,484 (“Pursuant to 10 CFR 51.45(d), the environmental report must include a discussion of the status of compliance with applicable Federal, State, and local environmental standards.”). See also, e.g., *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 2), LBP-09-26, 70 NRC 939, 956-60 (2009); *South Texas Project Nuclear Operating Company* (South Texas Project, Units 3 and 4) LBP-09-21, 70 NRC 581, 595-94 (2009); *Progress Energy Florida, Inc.* (Levy County Nuclear Power Plant, Units 1 and 2) LBP-09-10, 70 NRC 51, 97-98, 105-106 (2009); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), LBP-08-09, 67 NRC 421, 447 n. 151 (2008); *Nuclear Management Co., LLC* (Palisades Nuclear Plant), LBP-06-10, 63 NRC 314, 362 (2006); *Hydro Resources, Inc.* (292 Coors Road, Suite 101, Albuquerque, NM 87120) CLI-98-16, 48 NRC 119, 122 n.3 (1998).

compliance with the Order and the 50.54(f) Letter is unrelated to license renewal. Contentions raising environmental issues in a license renewal proceeding are limited to those issues which are affected by license renewal.<sup>87</sup> Compliance with the 50.54(f) Letter is unrelated to license renewal because the environmental review for license renewal considers the environmental consequences of 20 additional years of operation beyond the initial 40-year term.<sup>88</sup> The 50.54(f) Letter states that the NRC Staff's goal is to collect sufficient information to make a regulatory decision for most plants within five years (2017) and that information collection for all plants will take no longer than seven years (2019). Therefore, compliance with the 50.54(f) Letter will be completed five to seven years before DCNPP's period of extended operation begins in 2024 and 2025. Moreover, the 50.54(f) Letter was issued to all power reactor licensees regardless of whether a plant is applying for or has been granted a renewed operating license.<sup>89</sup> Thus, the 50.54(f) Letter falls outside the scope of license renewal.

Additionally, as discussed in detail above in the Staff's response to Contention 1, modifications to DCNPP to comply with the Order are not yet pending, and even if they were, are not interrelated to license renewal. See *infra* at 19-21. The Order imposes requirements on all operating license holders regardless of whether a licensee holds or has applied for a renewed operating license.<sup>90</sup> Moreover, DCNPP must be in compliance with the Order no later than December 31, 2016, eight/nine years before DCNPP's proposed period of extended operation begins in 2024/2025. Therefore, Contention 2 is inadmissible because both the Order and the 50.54(f) Letter fall outside the scope of license renewal. 10 C.F.R. § 2.309(f)(1)(iii).

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<sup>87</sup> *Turkey Point*, CLI-01-17, 54 NRC at 11-12.

<sup>88</sup> *Id.* at 7, 11.

<sup>89</sup> See 50.54(f) Letter at 1 and Enclosure 6 (listing the letter's addresses).

<sup>90</sup> See Order Attachment 1 (listing recipients)

2. Contention 2 is Inadmissible Because It Lacks Sufficient Basis and Support, Is Immaterial, and Fails to Raise a Genuine Dispute with the Application

As discussed below, even if Contention 2 were within the scope of this proceeding, it would nevertheless be inadmissible because it lacks sufficient basis, is immaterial, and otherwise fails to demonstrate a genuine material dispute with the application. 10 C.F.R. § 2.309(f)(1)(ii), (iv), (v), (vi).

a. Contention 2 Lacks Sufficient Basis and Support

In addition to being out of scope, Contention 2 is inadmissible because SLOMPF does not provide sufficient basis and support as required by 10 C.F.R. § 2.309(f)(1)(ii), (v). SLOMPF states that the facts supporting Contention 2 can be found in the ER, the Order, the 50.54(f) Letter, and the Motion.<sup>91</sup> However, none of these documents provide sufficient support for Contention 2. SLOMPF suggests that the Order and the 50.54(f) Letter relate to the environmental impacts of DCNPP during the license renewal term because “the NRC has stated that [these documents] are mandatory because they are necessary to provide adequate protection to public health . . . .”<sup>92</sup> While compliance with the Order may be necessary to ensure adequate protection during the current operating term, SLOMPF provides no facts or expert opinion that PG&E’s compliance with the Order will result in environmental impacts during the period of extended operation. Similarly, SLOMPF provides no facts or expert opinion that PG&E’s response to the 50.54(f) Letter will result in environmental impacts during the period of extended operation.

Additionally, with respect to the 50.54(f) Letter, SLOMPF asserts that “to the extent that PG&E proposes modifications to the DCNPP facility in response to the [50.54(f) Letter], NEPA also requires consideration of the effectiveness and relative costs of a range of alternatives for

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<sup>91</sup> Motion at 10.

<sup>92</sup> *Id.* at 8.

satisfying the NRC's concerns." Motion at 9. However, SLOMPF's assertion is speculative because the 50.54(f) Letter does not require PG&E to propose potential modifications to the DCNPP facility in its response. Contentions based upon speculation or opinion without expert support are inadmissible.<sup>93</sup> Therefore, Contention 2 is inadmissible because it does not provide sufficient basis and support for SLOMPF's assertions. 10 C.F.R. § 2.309(f)(1)(ii), (v).

b. Contention 2 is Immaterial and Fails to Raise a Genuine Dispute with the Application

Even if Contention 2 were within the scope of this proceeding, it would still be inadmissible because SLOMPF does not raise a genuine material dispute with PG&E's Application in accordance with 10 C.F.R. § 2.309(f)(1)(iv), (vi). SLOMPF suggests that Contention 2 is relevant to license renewal because the actions and information requested in the Order and the 50.54(f) Letter must be fulfilled within the next three or four years.<sup>94</sup> Thus, SLOMPF argues that 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 severe accidents during the license renewal term. *Id.* at 10.

SLOMPF's claims are insufficient to demonstrate a material issue or genuine dispute with the Application because, as discussed above, PG&E must comply with both the Order and the 50.54(f) Letter several years before the proposed period of extended operation would even begin. Therefore, any environmental impacts from any actions that PG&E takes in response to the Order or the 50.54(f) Letter would occur during the current operating term. SLOMPF does not provide any explanation or expert support for the assertion that PG&E's compliance with the Order and the 50.54(f) Letter during the current operating term would result in any environmental impacts during the proposed period of extended operation or how PG&E's compliance with the Order and response to the 50.54(f) letter are material to the NRC's license

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<sup>93</sup> *Private Fuel Storage, LLC*, CLI-04-22, 50 NRC at 139-140.

<sup>94</sup> Motion at 9.

renewal decision. Such unsupported assertions are insufficient to demonstrate materiality or establish a genuine dispute with the application. See 10 C.F.R. § 2.309(f)(1)(iv), (vi).

Additionally, Contention 2 does not raise a material issue because it is unnecessary to include the status of compliance with the Order and the 50.54(f) Letter in the ER. The purpose of an ER is to provide information to the NRC which may be useful to the NRC in completing an EIS and complying with section 102(2) of NEPA. See 10 C.F.R. § 51.41. Because the Order and the 50.54(f) Letter are not relevant to license renewal, including the status of PG&E's compliance with these documents would not aid the NRC in completing its EIS for PG&E's Application.

Accordingly, Contention 2 is inadmissible because it falls outside the scope of this proceeding, lacks sufficient basis and support, is immaterial, and fails to raise a genuine dispute with the Application. See 10 C.F.R. § 2.309(f)(1)(ii)-(vi).

#### CONCLUSION

To be admissible a contention must be within the scope of the proceeding, have a sufficient factual basis, be material to findings the NRC must make, and demonstrate a genuine dispute with the application on a material issue. SLOMFP's contentions do not meet these requirements. Contentions 1 and 2 raise issues that are not within the scope of this proceeding and otherwise lack sufficient basis, are immaterial, and fail to demonstrate a genuine dispute with the Application. PG&E's compliance with the Order and its response to the 50.54(f) Letter are not within the scope of the NRC's NEPA review for license renewal. Compliance with the Order is required by 2016 and is required regardless of whether a plant holds or has applied for a renewed license. Like PG&E's response to the 50.54(f) Letter is unrelated to license renewal.

The Commission's regulations in 10 C.F.R. § 51.53(c)(2) and 51.45(d) do not require inclusion of information regarding PG&E's compliance either with the Order or its response to the 50.54(f). Even if Contentions 1 and 2 were in scope, SLOMFP has not provided a factual

basis for its assertion that PG&E's compliance with the Order and response to the 50.54(f) bear on the environmental impacts of license renewal including alternatives to avoid or mitigate severe accidents. In addition, SLOMFP has not demonstrated on how the information it alleges in Contentions 1 and 2 to have been omitted is material, i.e., demonstrated how the allegedly omitted information could significantly skew the environmental conclusions. Because SLOMFP has not filed a timely contention, met the nontimely requirements for contention admission and has not proffered an admissible contention, the Motion should be denied.

Respectfully submitted,

***Signed (electronically) by***

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NRC STAFF'S ANSWER TO MOTION TO ADMIT CONTENTIONS REGARDING FAILURE OF ENVIRONMENTAL REPORT TO ADDRESS POST FUKUSHIMA INVESTIGATIONS AND MODIFICATIONS, dated May 22, 2012, have been served upon the following by the Electronic Information Exchange, this 22nd day of May, 2012:

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