

May 29, 2012

**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'S REPLY
TO OPPOSITIONS BY PG&E AND NRC STAFF TO
MOTION TO ADMIT CONTENTIONS REGARDING FAILURE OF
ENVIRONMENTAL REPORT TO ADDRESS
POST-FUKUSHIMA INVESTIGATIONS AND MODIFICATIONS**

I. INTRODUCTION

Pursuant to 10 CFR §§ 2.309(h), San Luis Obispo Mothers for Peace (“SLOMFP”) hereby replies to the oppositions submitted by Pacific Gas and Electric Co. (“PG&E”) and the U.S. Nuclear Regulatory Commission (“NRC”) Staff to SLOMFP’s motion to admit two new contentions challenging the inadequacy of PG&E’s Environmental Report for the Diablo Canyon Nuclear Power Plant (“DCNPP”). Applicant’s Response to Proposed Contentions (May 22, 2012) (“PG&E Response”); NRC Staff’s Answer to Motion to Admit Contentions Regarding Failure of Environmental Report to Address Post Fukushima Investigations and Modifications (May 22, 2012) (“NRC Staff Answer”). The contentions assert that PG&E’s Environmental Report does not satisfy 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.

PG&E does not oppose the timeliness of the contentions, but objects to their admissibility. The NRC objects to both the timeliness and the admissibility of the contentions,

and also argues that SLOMFP has not satisfied the NRC's criteria for late-filed contentions. As demonstrated below, their arguments are without merit.

II. THE CONTENTIONS ARE ADMISSIBLE.

A. Contention 1

Contention 1 states as follows:

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.

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 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.

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

PG&E argues that Contention 1 exceeds the scope of this license renewal proceeding because it is not limited to aging issues. PG&E Response at 6-7, 10. In making this argument, PG&E ignores Commission precedent, which the Atomic Safety and Licensing Board (“ASLB”) has applied in this proceeding, clearly rejecting PG&E’s position. *See* LBP-10-15, slip op. at 20 (citing *Fla. Power & Light Co. (Turkey Point Generating Plant Units 3 and 4)*, CLI-01-17, 54 NRC 3, 13 (2001) (“*Turkey Point*”) (holding that the limitations of NRC safety regulations for license renewal do not apply to issues raised under NEPA). Thus, for example, there is no merit to PG&E’s argument that the issues raised by Contention 1 are outside the scope of this license renewal review because PG&E’s response to EA-12-049 is part of the Current Licensing Basis (“CLB”). PG&E Response at 6 and n.32 (citing *Turkey Point*, 54 NRC at 8-9; *Nuclear Generation Co. and Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, CLI-10-14, 71 NRC ___, slip op. at 4, 18, and n.76 (June 17, 2010)). The language from the *Turkey Point* and *Pilgrim* decisions quoted by PG&E in note 23 consists of descriptions of what constitutes the CLB as the term is applied under NRC’s Part 54 safety regulations for license renewal. It does not address the question of what is covered by NEPA or by 10 C.F.R. § 51.53(c)(2). SLOMFP respectfully submits that the contention raises issues within the scope of NEPA because it seeks information about aspects of the “proposed action,” *i.e.*, the measures that will affect the environmental impacts of DCNPP during its term of renewed operation and that have not previously been analyzed in any EIS for DCNPP.

PG&E asserts that Contention 1 has no regulatory basis because it constitutes a demand for supplementation of the Environmental Report to consider new and significant information, for which the ASLB has concluded there is no applicable NRC regulation. PG&E Answer at 8 (citing LBP-11-32). Contention 1 is not a demand for consideration of new and significant

information, however. Instead, it seeks compliance with a specific regulation, 10 C.F.R. § 51.53(c)(2), that requires a license renewal applicant to describe the proposed action, including plans to modify the facility. If the licensee changes its proposed action while a license renewal application is pending, then the license renewal applicant must amend its license application to more accurately reflect the nature of its proposed action. Otherwise, the environmental impact statement (“EIS”) that the Staff ultimately prepares, based on the Environmental Report, may be inaccurate in its evaluation of impacts and alternatives to the proposed action.

PG&E asserts that 10 C.F.R. § 51.53(c)(2) applies only to plant modifications made specifically in connection with the Part 54 license renewal rule (i.e., integrated plant assessments and time-limited aging analyses). PG&E Reponse at 9. But the language of § 51.53(c)(2) does not support PG&E’s narrow interpretation. The regulation requires “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.” *Id.* (emphasis added). Thus, the regulation is inclusive, not exclusive. As the Commission ruled in *Turkey Point*, NEPA is not limited by the NRC’s regulations for implementation of the Atomic Energy Act.

PG&E also asserts that SLOMFP has failed to show that PG&E’s proposed modifications “will result in a new or different environmental impact during the license renewal period.” PG&E Response at 11. Clearly, however, the NRC believes the required measures will reduce the risks of an accident at DCNPP. Because the NRC has not prescribed particular measures and instead is allowing PG&E to propose its own choice of measures, it is reasonable to require PG&E to explain how the measures will reduce accident risks and justify the cost-effectiveness of its choice among a range of alternatives.

Finally, PG&E asserts that to the extent SLOMFP seeks consideration of spent fuel storage impacts, those impacts have been addressed in the Generic Environmental Impact Statement for License Renewal and therefore need not be discussed. PG&E Response at 12. But Contention 1 seeks a comparison of mitigation measures ordered by the Commission with respect to spent fuel pools, not an impact analysis *per se*. Therefore SLOMFP respectfully submits that the prohibition against consideration of spent fuel storage impacts in individual license renewal proceedings does not apply to Contention 1.

Similar to PG&E's argument regarding spent fuel storage impacts, the NRC Staff argues that Contention 1 impermissibly challenges the Commission's generic determination that the environmental impacts of severe accidents are small. NRC Staff Answer at 17. The contention seeks consideration of mitigation measures, however, which have not been generically evaluated. In fact, Appendix B to 10 C.F.R. Part 50 requires the site-specific consideration of mitigation measures.

The NRC Staff also argues that EA-12-049 is related to DCNPP's current operation, not the license renewal term. According to the NRC, this is demonstrated by the fact that the actions required by EA-12-049 must be completed before December 2016, *i.e.*, before the current license terms expire in 2024 and 2025. NRC Staff Answer at 17-18. But the requirements have arisen while PG&E's license renewal application is pending and they also will affect the environmental impacts of operating DCNPP during the license renewal term. Thus, they meet the NRC Staff's own test for issues that fall within the scope of NEPA: "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.” NRC Staff Answer at 19.²

The NRC Staff also argues that if changes to the design are not expressly identified by the licensee as relating to license renewal need not be discussed in the Environmental Report. NRC Staff Answer at 19-20. SLOMFP respectfully submits that the relevant question is whether the design or operation of a reactor changes significantly, in ways that could affect the environment, between the time the initial EIS for the facility is prepared and the time of the license renewal application. PG&E’s proposed measures in response to EA-12-049 obviously have never previously been considered in an EIS and obviously could affect the level of risk posed by DCNPP to the human environment during the license renewal term. Thus they are relevant to PG&E’s license renewal application.

The NRC Staff’s other objections to the contention amount to an argument that it is insufficiently supported and insufficiently specific because PG&E has not yet proposed the measures in question. NRC Staff Answer at 21-24. Essentially the Staff is arguing that the contention is premature. But this argument is inconsistent with the Staff’s argument at pages 13-15 that the contention is not timely. In any event, SLOMFP believes that the contention is ripe for admission now, because the NEPA obligation to address the measures identified in EA-12-049 has arisen with the issuance of EA-12-049. PG&E may moot the contention by describing

² Moreover, the requirements of EA-12-049 are not merely “potential” but are mandatory and certain. Thus, this case is different from *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), where the Commission found that a license amendment that was merely a potential future event need not be considered in a license renewal review. *See* NRC Staff Response at 19 n.60. The *McGuire-Catawba* decision is also inapplicable here because the NRC is required by 10 C.F.R. § 51.21 to conduct a NEPA review for all license amendment applications, and thus compliance with NEPA during the license renewal term would be independently assured.

and analyzing alternatives for its proposed measures in the Environmental Report at the time it responds to EA-12-049.

B. Contention 2

Contention 2 asserts:

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 Generation Co., L.L.C.* (Limerick Generating Station, Units 1 and 2), LPB-12-08, __ NRC __, 869 F.2d 719, 737 (1989)], cited above at pages 5-6.

This contention seeks compliance with 10 C.F.R. § 51.45(d), which 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.*

In opposing the admission of Contention 2, PG&E argues that the contention is inadmissible because it does not relate to managing the effects of aging. PG&E Response at 14-15. As discussed above at page 3, however, NEPA is not limited by the AEA or NRC regulations for implementing the AEA.

PG&E next argues that while 10 C.F.R. § 51.54(d) requires the Environmental Report to list approvals required of other agencies, it does not require the listing of approvals by the NRC. PG&E Response at 15. *See also* NRC Staff Response at 26. But the regulation refers to “all” permits and approvals and does not exclude the NRC.

PG&E also argues that the approvals required by EA-12-049 do not fall under § 51.45(d) because EA-12-049 was not issued “in connection with the proposed action.” PG&E Response at 15. *See also* NRC Staff Response at 27, 2930. Instead, EA-12-049 was issued as part of the NRC's ongoing oversight of DCCP operations and the CLB. *Id.* To the contrary, the approvals required under EA-12-049 and the Information Request are connected to the proposed action

because (a) they arose while the license renewal application application is pending and (b) they will govern the operation of DCNPP during the license renewal term and could affect the environmental impacts of DCNPP during the license renewal term.

In addition, PG&E argues that SLOMFP does not point to any “substantive portion” of the Environmental Report that is deficient. PG&E Response at 16. *See also* NRC Staff Response at 28-29. It would be impossible, however, for SLOMFP to describe a deficiency in a substantive portion of the Environmental Report where no discussion of the subject matter exists at all, however.

Finally, PG&E argues that SLOMFP has failed to explain why the Environmental Report should have to address the information required by EA-12-049 and the Information Request, given that the actions requested would reduce the environmental impacts of DCNPP. PG&E Response at 16. The clear purpose of this section, however, is to ensure that all relevant permits necessary to protect the environment are obtained before a federal action with significant impacts on the environment may be approved.

III. THE CONTENTIONS ARE TIMELY.

PG&E does not object to the contentions on grounds of timeliness. The NRC Staff, however, objects that the contentions are not timely because they should have been submitted by April 18, 2012, *i.e.*, within 30 days after the publication of EA-12-049 and the Information Request. NRC Staff Response at 14. The Staff does not give a reason for its position, other than to argue that PG&E was not required to amend its Environmental Report at all and therefore SLOMFP was not justified in waiting to see whether PG&E would amend it. *Id.* (citing LBP-11-32, slip op. at 11). As discussed above at page 3, while PG&E may be excused from amending its Environmental Report to discuss new and significant information that could affect the

outcome of the Environmental Report, new and significant information from outside of PG&E is fundamentally distinct from changes that PG&E makes to its own proposed action. When PG&E proposes new measures that change its operation, it must amend its application or else the environmental analysis ultimately performed by the NRC in the EIS for license renewal may be inaccurate.

IV. CONCLUSION

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

Respectfully submitted,

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May 29, 2012

CERTIFICATE OF SERVICE

I certify that on May 29, 2012, I posted on the NRC’s Electronic Information Exchange the foregoing San Luis Obispo Mothers for Peace’s Reply to PG&E and NRC Staff Oppositions to Motion to Admit Contentions Regarding Failure of Environmental Report to address Post-Fukushima Investigations and Plant Modifications . It is my understanding that as a result, the following persons were served:

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