

March 21, 2014

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

|  |   |                      |
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| In the Matter of:                          | ) |                      |
|  | ) |                      |
| PACIFIC GAS AND ELECTRIC                   | ) | Docket No. 50-275-LR |
| COMPANY                                    | ) | Docket No. 50-323-LR |
|  | ) |                      |
| (Diablo Canyon Power Plant, Units 1 and 2) | ) |                      |

APPLICANT’S RESPONSE TO PETITION TO SUSPEND LICENSING DECISION

INTRODUCTION

On February 27, 2014, several organizations (“Petitioners”), including the San Luis Obispo Mothers for Peace (“SLOMFP”) in this proceeding, collectively filed with the Commission a petition to suspend final decisions in initial license and license renewal proceedings.<sup>1</sup> The Petition is based upon a separate petition, characterized as a “Rulemaking Petition,” that was filed with the Office of the Secretary on February 18, 2014 (and attached to the Petition) seeking essentially the same relief on the same grounds. Pacific Gas and Electric Company (“PG&E”) herein opposes the Petition as it applies to the Diablo Canyon Power Plant (“Diablo Canyon”). The Petition, and the relief that it seeks, are unnecessary, are not in accord with NRC process, and are not warranted either under the Commission’s standards for suspensions or on the merits.

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<sup>1</sup> “Petition to Suspend Reactor Licensing Decisions and Reactor Re-Licensing Decisions Pending Completion of Rulemaking Proceeding Regarding Environmental Impacts of High-Density Pool Storage of Spent Fuel and Mitigation Measures,” February 27, 2014 (“Petition”).

## BACKGROUND

The matters addressed in the Petition derive from an NRC evaluation of spent fuel storage issues initiated by the agency following the accident at the Fukushima Daichi station in Japan. In particular, the Petition is based upon allegedly “new and significant” environmental information in NRC Staff evaluations summarized in COMSECY-13-0030, “Staff Evaluation and Recommendation for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel,” dated November 12, 2013.<sup>2</sup> In the COMSECY the NRC Staff summarized its assessments of whether licensees should be required to expedite transfer of spent fuel from spent fuel storage pools to dry cask storage systems.

The COMSECY was based upon an extensive spent fuel pool accident Consequence Study completed in October 2013,<sup>3</sup> and a substantial Regulatory Analysis issued with the Commission paper.<sup>4</sup> Following an opportunity for public input, the NRC Staff concluded that, “in light of the robust designs of [spent fuel pools], especially in more seismically active areas in the western United states, . . . public health and safety are adequately protected.”<sup>5</sup> Further, the NRC Staff concluded that “the expedited transfer of spent fuel to dry storage would provide only a minor or limited safety benefit, and that its implementation costs

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<sup>2</sup> The issue of possible expedited transfer of spent fuel was adopted and prioritized as a Tier 3 Fukushima lessons-learned activity. Expedited transfer of spent fuel was not included as a recommendation of the NRC’s post-Fukushima Near-Term Task Force.

<sup>3</sup> “Consequence Study of a Beyond-Design-Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boiling Water Reactor,” Office of Nuclear Regulatory Research, October 2013 (“Consequence Study”).

<sup>4</sup> “Regulatory Analysis for Japan Lessons-Learned Tier 3 Issue on Expedited Transfer of Spent Fuel,” Office of Nuclear Regulatory Research, November 2013 (“Regulatory Analysis”).

<sup>5</sup> COMSECY-13-0030, at 7-8.

would not be warranted.”<sup>6</sup> The NRC Staff recommended that no further generic assessments be pursued.<sup>7</sup> COMSECY-13-0030 presently remains before the Commission for consideration and policy direction.

Notwithstanding the NRC Staff’s analysis, conclusions, and recommendation, the Petitioners argue that the generic evaluation of the issue of possible expedited transfer of spent fuel to dry storage has “yielded new and significant information about the environmental impacts of high-density pool storage of spent fuel and the cost-beneficial nature of some increases for mitigation of spent fuel pool fires.”<sup>8</sup> Related to the license renewal process for Diablo Canyon, the Petitioners ask the Commission to:

- Suspend the effectiveness of Table B-1 of 10 C.F.R. Part 51, Subpart A, Appendix B, which codifies the NRC’s generic findings on the environmental impacts of spent fuel storage;
- Re-publish for comment the License Renewal Generic Environmental Impact Statement (NUREG-1437, Rev. 1 (June 2013));
- Modify NRC regulations, including Table B-1, based on the further evaluation of the environmental issues; and
- Suspend a final license renewal decision until requested actions are completed.<sup>9</sup>

Petitioners argue that this relief is necessary in order for the NRC to meet its obligations under the National Environmental Policy Act (“NEPA”) for licensing actions. PG&E opposes the Petition for the reasons discussed below.

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> *Id.*

<sup>8</sup> Petition at 5 (footnote omitted).

<sup>9</sup> *Id.* at 8-9.

## DISCUSSION

### A. The Petition is Unnecessary and Premature

As the Petitioners recognize, the NRC is already examining on a generic basis the issue raised in the Petition, independent of any one licensing decision. The issues of spent fuel storage, postulated fires, and the costs and benefits of expedited transfer of spent fuel are not unique to license renewal or to Diablo Canyon. The Commission will make a decision in response to COMSECY-13-0030, and any action required for Diablo Canyon will apply as a current operational or Current Licensing Basis issue. The Commission could also take any actions necessary at that time to meet its obligations under NEPA for licensing decisions. The relief requested in the Petition — prospective suspension of a license renewal decision — is therefore unnecessary.

For Diablo Canyon, there is ample time in the current license renewal review schedule to allow completion of the NRC's evaluation of COMSECY-13-00030. The Commission has already suspended all licensing decisions, including the Diablo Canyon license renewal decision, pending completion of its Generic Environmental Impact Statement on storage of spent fuel beyond the operating license term and completion of the related "Waste Confidence" rulemaking later this year.<sup>10</sup> Further, the Petition itself relies only on the NRC Staff analyses addressed in COMSECY-13-0030. The NRC Staff has not yet issued the draft or final environmental review documents for Diablo Canyon and therefore will have an opportunity to

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<sup>10</sup> *Calvert Cliffs Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3) et al.*, CLI-12-16, 76 NRC \_\_ (August 7, 2012).

incorporate, to the extent necessary, any purportedly “new and significant information” in those documents. There is simply no need to prospectively suspend a final license renewal decision.<sup>11</sup>

The Petitioners’ related Rulemaking Petition can also be considered in due course in accordance with the appropriate NRC process for rulemaking petitions, which includes opportunities for public comment. To the extent the Petitioners disagree with the outcome of the NRC’s assessment of the Rulemaking Petition, they may avail themselves of applicable judicial processes to challenge a final agency action. The Petition is therefore premature to the extent that it is arguing that the Commission will not meet NEPA responsibilities in ruling on the Rulemaking Petition.

B. Suspension of a Final Licensing Decision Is Not Warranted

The Commission has previously addressed petitions to suspend licensing reviews, hearings, and final licensing decisions — and established a standard to evaluate those petitions. In addressing a similar multi-docket petition filed shortly after the Fukushima accident, the Commission traced precedent related to licensing after the Three Mile Island event and after September 11, 2001.<sup>12</sup> In both of those situations, as with the Fukushima accident, the NRC engaged in extensive generic reviews of lessons learned and the need for regulatory enhancements. The Commission declined to suspend the reviews, hearings, and licensing decisions pending the outcome of the Fukushima reviews.<sup>13</sup> Indeed, the Commission recognized at that time that it had specifically denied a petition from SLOMFP after September 11, 2001, to

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<sup>11</sup> As is discussed below, if Petitioners seek to litigate the NEPA issue in an individual proceeding, they have not followed the appropriate administrative process to raise that issue.

<sup>12</sup> *Union Electric Company d/b/a Ameren Missouri (Callaway Plant, Unit 2) et al.*, CLI-11-05, 74 NRC 141 (September 9, 2011).

<sup>13</sup> CLI-11-05, 74 NRC at 159-166.

suspend the licensing proceeding for the Diablo Canyon Independent Spent Fuel Storage Installation.<sup>14</sup>

In its decision on the post-Fukushima suspension petitions, the Commission reiterated its prior assessment that suspension of licensing proceedings (including suspensions of final decisions) is a “drastic” action that is not warranted absent immediate threats to public health and safety, or other compelling reason.<sup>15</sup> The Commission drew upon its post-September 11 decision in *Private Fuel Storage* for the legal framework.<sup>16</sup> It affirmed a three part test:

- Whether moving forward will jeopardize the public health and safety;
- Whether continuing the review process will prove an obstacle to fair and efficient decision-making; and
- Whether going forward will prevent appropriate implementation of any pertinent rule or policy changes that might emerge from the ongoing, generic evaluation.<sup>17</sup>

In the present case the Petitioners are raising a NEPA compliance issue. Therefore, under the first criterion, no public health and safety issue is involved. And none could be involved, given that a period of extended operation under a renewed license would not begin for many years. With respect to the second criterion, Petitioners are not seeking suspensions of either ongoing reviews or licensing proceedings (only final licensing decisions). And, under the third criterion there can be no doubt that the outcome of the NRC’s ongoing evaluations of spent fuel storage and expedited transfer to dry storage can be addressed as a

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<sup>14</sup> See *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002)

<sup>15</sup> CLI-11-05, 74 NRC at 158.

<sup>16</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel storage Installation), CLI-01-26, 54 NRC 376, 380 (2001).

<sup>17</sup> CLI-11-05, 74 NRC at 158-159.

current operational matter, at whatever time the NRC deems appropriate, regardless of the status of license renewal. Those evaluations can also be incorporated into the Diablo Canyon environmental review documents if necessary. Therefore, based on clear precedent, the request for a suspension should be denied.

C. The Petition Does Not Conform to NRC Process for NEPA Contentions

The Petition specifically alleges that an individual licensing decision would violate NEPA absent further consideration of the issues identified therein. As it relates to license renewal, the Petition seeks suspension of the environmental regulations in Table B-1 of 10 C.F.R. Part 51, Subpart A, Appendix B, which codify the NRC's generic findings on the environmental impacts of spent fuel storage. Those regulations are based on the NRC's Generic Environmental Impact Statement ("GEIS") for License Renewal. The Petition does not comply with NRC rules of procedure for asserting a NEPA violation as it relates to an individual licensing decision.

First, the Petitioners would need to plead an admissible contention in accordance with 10 C.F.R. § 2.309, including a demonstration that the issues are (a) being timely raised based on new information previously unavailable, and (b) are within the scope of a license renewal proceeding. Rather than follow that process, Petitioners have charted a new course that has no basis in the NRC's rules of procedure. The Rulemaking Petition previously filed is, of course, a legitimate method to address a generic issue. And NRC practice establishes that generic issues should be addressed in rulemaking processes rather than individual adjudications.<sup>18</sup> But in an individual proceeding, there is no process to seek a suspension of a final licensing decision directly from the Commission — whether based upon an alleged NEPA

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<sup>18</sup> *Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-03, 65 NRC 13, 20 (2007).

violation or any other violation — without filing a proposed contention and following the established process.<sup>19</sup> The Commission therefore could deny the Petition simply as not in accordance with NRC process.<sup>20</sup> But, because the Petition has been filed on many dockets, and with the Commission, the Commission should rule on the issue and assure a consistent resolution across all cases.

Second, because the Petition seeks to suspend regulations that specifically apply to this (and all other) license renewal proceedings, the Petitioners would need to request a waiver in accordance with 10 C.F.R. § 2.335(b). The potential environmental impacts of spent fuel storage for an additional twenty years, including the risks of spent fuel fires, has been considered in the License Renewal GEIS (and the revised License Renewal GEIS). The NRC concluded that the risks would be small for all plants.<sup>21</sup> The issue is therefore a Category 1 issue that would not require a site-specific analysis absent a waiver. SLOMFP previously proposed a contention (EC-2 in this proceeding) addressing the environmental impacts of a spent fuel pool accident due to an earthquake, and sought a waiver. The Commission denied SLOMFP's waiver request and ruled the contention to be inadmissible.<sup>22</sup> SLOMFP asserts that the present Petition is based on

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<sup>19</sup> Commission involvement, whether under NRC rules of practice or as an exercise of inherent supervisory authority, is limited to extraordinary circumstances. *See, e.g.*, 10 C.F.R. 2.341(f)(2); *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), CLI-09-6, 69 NRC 128, 133 (2009) (and cases cited therein).

<sup>20</sup> In *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-12-13, 75 NRC \_\_ (slip op. June 7, 2012), the Commission addressed SLOMFP's responsibility "to raise new or amended contentions as new information becomes available if they wish to litigate those issues." Based on its failure to do so, we must assume that SLOMFP has no desire to litigate the NEPA issues that it raises.

<sup>21</sup> *See* NUREG-1437, Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Final Report, Vol. 1 (May 1996), at 6-85 to 6-86.

<sup>22</sup> *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-11-11, 74 NRC \_\_, \_\_ (Oct. 12, 2011) (slip op. at 23, *et seq.*).



“new and significant” information related to the same issues (addressed below). But SLOMFP offers no basis for not following the established process to raise that information in connection with a license renewal matter.

Finally, the present circumstances can be distinguished from the Waste Confidence matter. As noted above, the Commission has suspended all final licensing decisions until the Waste Confidence rulemaking is complete. However, on that issue the Court of Appeals specifically adjudicated a challenge to a final agency action (a revised Waste Confidence Decision and Temporary Storage Rule) and found deficiencies in the environmental analysis prepared by the agency to meet NEPA. The Court of Appeals remanded the agency’s action for further consideration. Clearly, on that matter the agency is compelled to do more to meet NEPA (as delineated by the Court of Appeals) for all licensing decisions that rely upon the Waste Confidence Decision. In the present case, there is neither a reviewable final decision of the agency nor a judicial remand compelling an agency suspension. It remains incumbent upon the Petitioners to follow applicable administrative processes to assert their position under NEPA, rather than merely asserting a need for a licensing suspension without following the process to establish the validity of their position.

D. The Petition Does Not Raise New and Significant Environmental Information

Petitioners’ focus is on whether the NRC — in the future when it completes its environmental review for Diablo Canyon prior to a license renewal decision — will comply with NEPA by addressing purportedly “new and significant information” in the recent studies. In this regard, it is important to recognize that NEPA does not demand specific actions, only that the agency document a “hard look” at the relevant environmental impacts and consider a reasonable range of alternatives. Even if new information is available, the remedy is simply to timely

incorporate that information in either the License Renewal GEIS or the Diablo Canyon supplement. But, on the merits, the Petitioners are incorrect that there is “new and significant” information demanding a NEPA supplement.

A supplement to an environmental impact statement is necessary only where new information “raises new concerns of sufficient gravity such that another, formal in-depth look at environmental consequences of the proposed action is necessary.”<sup>23</sup> Only changes that cause effects that are significantly different from those already studied, or reveal “a seriously different picture of the environmental impact of the proposed project” necessitate a supplemental environmental review.<sup>24</sup> Nothing presented by Petitioners meets this standard.

The Petitioners base their position (as they recognize in the Petition, at 9) almost exclusively on the NRC Staff’s evaluations in the Consequence Study and Regulatory Analysis. In particular, the Petitioners argue that the NRC Staff’s Consequence Study “revealed for the first time that as many as 9,400 square miles could be rendered uninhabitable by a relatively small spent fuel pool fire, displacing over 4 million people for decades.”<sup>25</sup> Petitioners focus on the costs of land contamination from a spent fuel fire (as opposed to health effects) and believe that reducing the density of spent fuel storage in spent fuel pools would be a cost-beneficial NEPA mitigation alternative.<sup>26</sup> But, the Petition fails to show that this is new and significant

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<sup>23</sup> *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-06-3, 63 NRC 19, 28 (2006).

<sup>24</sup> *Hydro Resources, Inc.* (P.O. Box 15910, Rio Rancho, NM 87174), CLI-01-4, 53 NRC 31, 52 (2001).

<sup>25</sup> Petition at 4.

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

information that undermines the NRC’s prior conclusion that the environmental impacts of spent fuel pool storage are small.

The NRC has taken a “hard look” at the issue of spent fuel pool fires many times over the course of the last decade. In evaluating the impacts of severe accidents related to spent fuel storage, the NRC has consistently applied a risk approach that considers the probability and consequences of events such as spent fuel fires. In *Carolina Environmental Study Group v. United States*, the Court of Appeals validated that it is “entirely proper and necessary” for the agency to consider both probability and consequences when assessing the environmental impacts of accidents under NEPA.<sup>27</sup> The low probability of an event can lead to a finding of no significant impact, notwithstanding hypothetical consequences.<sup>28</sup>

In the 2013 License Renewal GEIS, the NRC Staff addressed its prior studies of spent fuel risks<sup>29</sup> and referenced “significant additional analyses” conducted by Sandia National Laboratories. The Sandia studies addressed the risks of spent fuel zirconium fires from terrorist events<sup>30</sup> and accounted for the additional physical security and mitigation measures imposed after the September 11, 2001, attacks and after the 2011 Fukushima event. The NRC concluded

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<sup>27</sup> 510 F.2d 796, 799 (D.C. Cir. 1975).

<sup>28</sup> This principle was again validated in the D.C. Circuit in the most recent case involving the Waste Confidence rule, *New York v. NRC*, 681 F.3d 471, 481-482 (D.C. Cir. 2012). The Court of Appeals was simply not convinced that the agency *had* analyzed consequences of spent fuel pool fires.

<sup>29</sup> *See, e.g.*, NUREG-1738, “Technical Study of Spent Nuclear Fuel Pool Accident Risk at Decommissioning Nuclear Plants” (2001).

<sup>30</sup> The Sandia studies included additional impacts on human health due to additional pathways, as well economic impacts due to the cost of land cleanup and food interdiction.

that the risks are lower than considered previously and that the impacts are bounded by the impacts of reactor accidents included in the 1996 License Renewal GEIS.<sup>31</sup>

In this context, the recent Consequence Study and Regulatory Analysis do not present “new and significant” environmental information or a “seriously different picture” of the environmental consequences of spent fuel storage. The NRC Staff’s overall *risk* findings in the Consequence Study and Regulatory Analysis are comparable to the prior studies.<sup>32</sup> For example, the Consequence Study summarizes the latest review as follows:

In conclusion, past SFP risk studies have shown that high-density spent fuel storage is safe and risk of a release due to an accident is low. This study is consistent with earlier research conclusions that spent fuel pools are robust structures that are likely to withstand severe earthquakes without leaking. This study estimated that the likelihood of a radiological release from the spent fuel pool resulting from the selected severe seismic event analyzed in this study is on the order of one time in 10 million years or lower.<sup>33</sup>

The Consequence Study further discusses potential consequences in terms of health effects and land contamination, including the benefits of mitigation measures. Specific estimates may be new or different from prior estimates. But, the overall finding remains that environmental impacts are small — based on the low probability and therefore very low risk of the events, particularly when required measures to mitigate beyond-design-basis external events are taken

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<sup>31</sup> NUREG-1437, Rev. 1, at Section E.3.7.

<sup>32</sup> The NRC Staff has also taken a risk-based approach to spent fuel fires in Draft NUREG-2157, Waste Confidence Generic Environmental Impact Statement (September 2013). The environmental impact determination for severe accidents is based on both the probability and consequences of an accident. Considering the analyses in NUREG-1738, and the 1996 and 2013 License Renewal GEISs, as well as post-Fukushima studies and mitigation measures, the NRC Staff has proposed that the environmental impacts during a short-term post operation period are small. Draft NUREG-2157, Appendix F, Section F.2.2 – F.2.3.

<sup>33</sup> Consequence Study, at xii.

into account.<sup>34</sup> The Petitioners cite isolated details and ignore the overall conclusion of the Consequence Study. In light of that conclusion, the NRC’s prior NEPA analyses remain bounding.<sup>35</sup>

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<sup>34</sup> The release scenario specifically cited in the Petition (at 5) assumed that preplanned and improvised mitigation actions were either not successful or not implemented before three days, at which time the analysis was terminated. For example, the study did not consider post-Fukushima mitigation required by NRC in Orders EA-12-051 and EA-12-049 and currently being implemented by all operating U.S. nuclear power plants. These measures further reduce spent fuel pool accident risk by increasing the capability of nuclear power plants to mitigate beyond-design-basis external events. The scenario cited in the Petition also did not include required 10 C.F.R. § 50.54(hh)(2) mitigation measures or the possibility that the site emergency response organization would request support from the offsite response organizations to implement improvised mitigation measures, such as pumping water into the spent fuel pool using a fire truck. As the NRC Staff explained in COMSECY-13-0030 (at 5), a more reliable and robust mitigation capability is in place to address degraded spent fuel pool conditions than that assumed in the study. Indeed, according to the Consequence Study, if section 50.54(hh)(2) measures are taken into account, the probability of a release from a spent fuel pool accident after the hypothetical severe earthquake at the reference plant is  $5.5 \times 10^{-9}$  — so low as to be considered remote and speculative. Consequence Study at x (Figure ES-2).

<sup>35</sup> The Petitioners also assert (at 6) that the NRC Staff in its Consequence Study “for the first time” concluded that spent fuel pool fires could be affected by reactor accidents. The Petitioners then acknowledge that the NRC Staff is in the process of evaluating the issue in the context of a Level 3 probabilistic risk assessment (“PRA”) for Vogtle Electric Generating Plant Units 1 and 2. The assertion that there is new and significant information is therefore, at a minimum, premature and not addressed further.

CONCLUSION

For the foregoing reasons, the Commission should deny the request to suspend the Diablo Canyon final license renewal decision.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 21st day of March 2014

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S RESPONSE TO PETITION TO SUSPEND LICENSING DECISION” in the captioned proceeding have been served via the Electronic Information Exchange (“EIE”) this 21st day of March 2014, which to the best of my knowledge resulted in transmittal of the foregoing to those on the EIE Service List for the captioned proceeding.

Respectfully submitted,

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