

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 14-1213

FRIENDS OF THE EARTH,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

and

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor.

**PETITIONER'S MOTION TO SUPPLEMENT THE
CERTIFIED INDEX OF THE RECORD**

Richard Ayres
Jessica Olson
John Bernetich
AYRES LAW GROUP LLP
1707 L St. NW, Suite 850
Washington, DC 20036
(202) 452-9200
ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

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INTRODUCTION

Petitioner Friends of the Earth hereby requests that the Court order Respondent Nuclear Regulatory Commission (NRC) to supplement the Certified Index to the Record filed in this case. This Petition for Review challenges the NRC's approval of a revision to the Updated Final Safety Analysis Report ("Safety Report") for Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), without the procedures required by the Atomic Energy Act. Petition for Review (Oct. 28, 2014). Revision 21 changed provisions of the Safety Report that are required to provide reasonable assurance of the safety of Diablo Canyon in the event of an earthquake near the plant.

Petitioner seeks to supplement the record with (1) the request to the NRC, made by Intervenor Pacific Gas & Electric Company (PG&E), to change section 2.5 of the Safety Report, relating to seismology and geology ("Change Request"), and (2) any such similar request by PG&E for changes to section 3.7 of the Safety Report, relating to seismic design. To Petitioner's knowledge the change request for section 3.7 has not yet been made public.

Because these documents, clearly showing the changes requested by PG&E and later approved by the NRC, were considered and relied upon by the NRC in the course of approving Revision 21—the action challenged here—the Court

should grant the motion to supplement the record.¹ *See* Change Request (attached as Exhibit 1).

BACKGROUND

Beginning on approximately November 21, 2014, undersigned counsel and counsel for Respondents conferred regarding the contents of the Certified Index of the Record (Record). Among other documents, Petitioner requested Respondents via email to include in the Record “a ‘change report’ submitted by PG&E to accompany its submission of FSAR Revision 21” in order to identify the relevant changes PG&E wished to make to Revision 20, Email from John Bernetich to Charles Mullins (Nov. 24, 2014), and a “redlined version of Revision 21,” Email from Jessica Olson to Charles Mullins (Dec. 3, 2014). In response, counsel for Respondents informed undersigned via email that “there is no ‘Change Document’ filed with Revision 21. There is (apparently) such a document, but it is a licensee document and not filed with the NRC.” Email from Charles Mullins to Jessica Olson (Dec. 8, 2014).

In response to another request from undersigned counsel to include such a document in the record, counsel for Respondents repeated that “the NRC does not have any such document in its possession.” Email from Charles Mullins to Richard

¹ Counsel for Petitioner conferred with counsel for Respondents and counsel for Intervenor PG&E regarding this motion. Respondents have indicated that they object to Petitioner’s request to place the Change Request in the Record. PG&E does not consent to the motion.

Ayres (Dec. 8, 2014). Counsel explained that “[w]hile the license [sic] may have such a document at its facility, it did not submit that document to the NRC and thus, it is not a part of the agency record in this case.” *Id.*

After further consultations and over Petitioner’s objections regarding the failure to include the Change Request, Respondents filed a Certified Index of the Record on December 12, 2014. Certified Index of the Record (Dec. 12, 2014). As filed, the Record includes Revision 20 of the Safety Report and other documents dating from September 2012 to October 2014. Thus, as designated by the agency, the Record in this case includes documents that chronicle NRC’s decision to approve Revision 21 to the Safety Report.

On February 19, 2015, in response to a request to the NRC under the Freedom of Information Act (FOIA), Friends of the Earth received from the NRC one part of the document that Petitioner requested in the above-referenced email correspondence titled “[Safety Report] Change Request.” Attached to it was section 2.5 of Revision 21, relating to seismology and geology, “redlined” with proposed changes to that section of the Safety Report with explanations of the changes in marginal comments. Exhibit 1. The Safety Report Change Request consisted of:

- A four-page form including, among other things, a “description of [the] change” requested, a “justification/basis for the change,” and

information on the requested change's "affect [sic] on other documents." Exhibit 1 at 2-5. The Safety Report Change Request indicated that PG&E was requesting to revise section 2.5 of the Safety Report (related to seismology and geology);

- Section 2.5 of the Safety Report with proposed changes in "redline," Exhibit 1 at 6-99; and
- A two-page form titled "Applicability Determination," in which PG&E indicated that the requested changes do not require a "screen" to determine whether further procedures, such as a license amendment, are necessary pursuant to 10 C.F.R. § 50.59 before the change can be made, Exhibit 1 at 100-01.

While it is clear from Revision 21 that NRC also approved changes to section 3.7, related to seismic design, Petitioner received no such redlined change request record in response to its FOIA request.

In response to the requested changes to the Safety Report, NRC issued a memorandum stating that "[b]ased on [its] review [of the requested changes to the Safety Report], the [NRC] staff concludes that the [Safety Report] Update, Revision 21 was submitted consistent with the requirements in 10 CFR 50.71(e)." Memorandum to Michael T. Markley, Chief, Plant Licensing IV-1, NRC from Peter J. Bamford, Project Manager, Plant Licensing IV-1, NRC (June 23, 2014) at

4 (attached as Exhibit 2). This determination indicates beyond doubt that the Safety Report Change Request, which was submitted in order to discharge PG&E's duties under § 50.71(e), is relevant, within the scope of the administrative record, and was considered by the agency during its decision making process regarding whether to approve Revision 21. Any such document showing the redlined changes to section 3.7 of the Safety Report would also meet these criteria.

Petitioner now seeks to compel the NRC to supplement the record with the Safety Report Change Request and any such similar document explaining the changes requested for section 3.7 of the Safety Report.

ARGUMENT

The Safety Report Change Request and any such similar document pertaining to section 3.7 of the Safety Report are squarely within the administrative record that was before the agency at the time it made its decision to approve Revision 21. These documents initiated the NRC's review of the legal sufficiency of Revision 21 and highlight and explain the effect of the changes requested to be made to the Safety Report. Thus, the Court should grant this motion to supplement the record with these documents.

A. In A Proceeding Seeking Review Of An Agency Action, The Record Includes Documents Reviewed And Approved By The Agency

The Administrative Procedure Act directs the Court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The record in a petition

for review of agency action consists of the order involved, any findings or reports on which that order is based, and “the pleadings, evidence, and other parts of the proceedings before the agency.” Fed. R. App. P. 16(a). This requires the Court to review “the full administrative record that was before the [agency] at the time [it] made [its] decision.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971). “Courts in this Circuit have interpreted the whole record to include all documents and materials that the agency directly or indirectly considered and nothing more nor less.” *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 287 (D.D.C. 2013) (internal quotation marks and alterations omitted).

“To ensure that the administrative record contains neither more nor less information than was before the agency, courts in this circuit have directed agencies to collect those materials that were compiled by the agency that were before the agency at the time the decision was made.” *Maritel, Inc. v. Collins*, 422 F. Supp. 2d 188 (D.D.C. 2006) (internal quotation marks omitted). Accordingly, an agency “may not skew the record by excluding unfavorable information but must produce the full record that was before the agency at the time the decision was made.” *Blue Ocean Inst. v. Gutierrez*, 503 F. Supp. 2d 366, 369 (D.D.C. 2007). “Further, the agency may not exclude information from the record simply because it did not ‘rely’ on the excluded information in its final decision.” *City of Duluth*, 968 F. Supp. 2d at 288 (quoting *Maritel*, 422 F. Supp. 2d at 196). Therefore, “a

complete administrative record should include all materials that *might have* influenced the agency's decision." *Id.* (quoting *Amfac Resorts, LLC v. U.S. Dept. of the Interior*, 143 F. Supp. 2d 7, 12 (D.D.C. 2001) (emphasis added)).

Here, Petitioner seeks only to supplement the record with documents that explain the effects of the very document that NRC was asked to review. The Safety Report Change Request provides, in plain English, clarity and context for the seismic-related portions of Revision 21. Without the Safety Report Change Request, and any such similar document detailing proposed changes to section 3.7, the NRC would be left without any description of the effect of the changes requested to the Safety Report's seismic provisions. These documents, therefore, played an important role in the agency's decision making process.

B. The Safety Report Change Requests Are Part Of The Record Reviewed By The Agency

While the record designated by the agency is entitled to a presumption of regularity, that presumption is overcome where the movant provides "concrete evidence" that the documents it seeks to add to the record "were before the actual decisionmakers." *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008); *Overton Park*, 401 U.S. at 415.

The agency clearly had the Change Request, and any similar such document explaining the changes proposed for section 3.7 of the Safety Report, before it at the time of the agency's decision making process. *See Sara Lee Corp.*, 252 F.R.D.

at 34. The Change Request addresses important regulatory requirements that are a prerequisite to NRC accepting a request to change the Safety Report. *See* 10 C.F.R. § 50.71(e). Any request to change Diablo Canyon’s Safety Report must include certain information, including: “the effects of all changes made in the facility or procedures as described in the [Safety Report]” and “all safety analyses and evaluations performed by the applicant or licensee . . . in support of conclusions that changes did not require a license amendment in accordance with [10 C.F.R.] § 50.59(c)(2)”; and “all analyses of new safety issues performed by or on behalf of the applicant or licensee at Commission request.” 10 C.F.R. § 50.71(e).

The Change Request purports to demonstrate to the NRC, the actual decision maker, compliance with these requirements. The relevant “effects of all changes” and “all safety analyses and evaluations” required under 10 C.F.R. § 50.71(e) are presented by PG&E in a seven-page matrix in the Change Request titled “[Safety Report] Section 8.1- Introduction Applicability Determination Matrix.” Exh. 1 at 105-11. This matrix includes two columns that address the requirements of § 50.71(e). The first column, titled “Brief Change Description,” includes one-sentence descriptions of the specific Safety Report provision requested to be changed. The second column, titled “50.59 Applicability Discussion,” contains longer descriptions of the changes requested to the Safety Report with explanations of the requested changes’ effects and reasons the change request was necessary.

These columns address the requirement in § 50.71(e) that each Safety Report change request include “the effects of all changes made” and “all safety analyses and evaluations . . . in support of conclusions that changes did not require a license amendment in accordance with [10 C.F.R.] § 50.59(c)(2).” 10 C.F.R. § 50.71(e).

This showing, along with the fact that the Safety Report Change Request is the very document explaining the changes to the Safety Report requested by PG&E, is sufficient to rebut the presumption of regularity of the record submitted by the NRC in this instance. *See Walter O. Boswell Mem’l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (“If a court is to review an agency’s action fairly, it should have before it neither more nor less information than did the agency when it made its decision.”).

CONCLUSION

For the foregoing reasons, Petitioner requests that this Court order the NRC to supplement the administrative record in this case as set forth herein.

Respectfully submitted,

/s/ Richard Ayres

Richard Ayres

Jessica Olson

John Bernetich

AYRES LAW GROUP LLP

1707 L St. NW, Suite 850

Washington, DC 20036

(202) 452-9200

ayresr@ayreslawgroup.com
olsonj@ayreslawgroup.com
bernetichj@ayreslawgroup.com

Dated: March 25, 2015

Counsel for Petitioner

CERTIFICATE OF SERVICE

I certify that on March 25, 2015, I served “Petitioner’s Motion to Supplement the Certified Index of the Record” in the above-captioned case upon all counsel registered with the Court’s CM/ECF system.

Respectfully submitted,

/s/ Jessica L. Olson

Jessica L. Olson

AYRES LAW GROUP LLP

1707 L St. NW, Suite 850

Washington, DC 20036

(202) 452-9200

olsonj@ayreslawgroup.com