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 REPLY TO RESPONDENTS' AND INTERVENOR'S RESPONSES TO 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 of the Record.[1] Petitioner requests the Court to order the Certified Index of the Record be amended to include two additional documents: (1) a request to the NRC, made by Intervenor Pacific Gas & Electric Company (PG&E), to change section 2.5 of the Updated Final Safety Analysis Report ("Safety Report") for Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), and (2) any such similar request by PG&E for changes to section 3.7 of the Safety Report. Sections 2.5 and 3.7 of the Safety Report relate to "Geology and Seismology" and "Seismic Design," respectively. Petitioner's Motion to Supplement the Certified Index of the Record (Mar. 25, 2015) ("Motion").

Respondents and PG&E oppose the Motion, arguing that (1) the NRC did not have PG&E's request to change section 2.5 of the Safety Report ("Change Request") before it when the agency approved Revision 21 of the Safety Report, and (2) the Motion is unnecessary because Respondents had agreed not to object to

[1] On April 13, 2015, this Court ordered "that the case be held in abeyance pending further order of the court." Order (Apr. 13, 2015). The Court directed Respondents "to file reports on the status" of a separate petition currently pending before the Nuclear Regulatory Commission "60 days after the date of this order, and at 60-day intervals thereafter." The Court further ordered "that consideration of the motion to supplement the record be deferred pending further order of the court." Consistent with Federal Rule of Appellate Procedure 27(a)(4), Petitioner submits this Reply to Respondents' and Pacific Gas & Electric Company's Responses to Petitioner's Motion to Supplement the Certified Index of the Record.

Petitioner's citing the Change Request in its pleadings and including portions in the Joint Appendix. Respondents' Response to Petitioner's Motion to Supplement the Record (Apr. 7, 2015) ("NRC Response"). PG&E opposes the Motion on grounds that the Change Request was generated internally by PG&E and that the agency never approved Revision 21. Intervenor's Response to Petitioner's Motion to Supplement the Certified Index of the Record (Apr. 9, 2015) ("PG&E Response").

These arguments are inconsistent with documentation indicating that the agency, particularly personnel tasked with regulatory oversight of Diablo Canyon's seismic safety and the factual issues involved, considered and relied upon the document in the period immediately *before* the NRC issued a memorandum determining that Revision 21 had satisfied certain regulatory requirements. Respondents' argument that the Motion was unnecessary ignores that the scope of the Court's review focuses on documents in the administrative record. PG&E's argument that the document was intended to be an internal PG&E document misses the point. Instead, the inquiry here is whether the agency considered the document during the relevant time. For these reasons, Petitioner respectfully requests that the Court grant the Motion.

ARGUMENT

A. The Change Request And Any Similar Such Request For Changes To Section 3.7 Of The Safety Report Are Within The Scope Of The Administrative Record

The Change Request—one of the documents at issue here—was indisputably in possession of the agency and, indeed, before a relevant decision maker at the time the agency took the action challenged here. Courts have consistently recognized that where an agency "deliberately or negligently excluded documents that may have been adverse to its decision," supplementation is appropriate. *City of Dania Beach v. Fed. Aviation Admin.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Here, the Change Request was indisputably before the agency, and has been impermissibly excluded from the record.

Respondents cite two district court opinions that, in their reading, purport to require that to meet the standard necessary to supplement the record as designated by the agency, a party must show that the document was before the actual employee decision makers. It is not enough, Respondents contend, to show that the document was before the entire agency. NRC Response at 12-14; *City of Duluth v. Jewell*, 968 F. Supp. 2d 281, 289 (D.D.C. 2013); *Pacific Shores Subdivision v. U.S. Army Corps of Engineers*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006).

But to the extent those district court opinions, which of course do not bind this Court, require a showing that the document be considered by the actual employee decision maker, those decisions conflict with other appellate court cases cited by Respondents on this point, and the Court should decline to follow those cases.

In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), perhaps the leading Supreme Court case regarding the scope of judicial review of agency decisions, the Court noted that, in accordance with the APA, "[judicial] review is to be based on the full administrative record that was *before the Secretary* at the time he made his decision." *Id.* at 420 (emphasis added). The Court declined to limit the scope of the record under review to documents that were *before the specific agency employees* who, exercising authority delegated by the agency chief—there, the Secretary of Transportation—undertook primary decision making duties.

This Court's opinion in *Saratoga Development Corp. v. United States*, 21 F.3d 445 (D.C. Cir. 1994), also relied on by Respondents, in fact supports Petitioner's argument that the case law requires only that the document be before the agency. NRC Response at 12. There, acting upon a request to supplement the record, this Court considered whether the document was "prepared for []or provided to the [Pennsylvania Avenue Development Corporation] *or its staff*." 21

F.3d at 457 (footnote omitted) (emphasis added). The Court was concerned with whether the document was before *the agency*, rather than before the specific employee within the agency who took the action under review.

Here, *Citizens to Preserve Overton Park* and *Saratoga Development Corp.* require the Court to supplement the record with a relevant document that was before *the agency* at the relevant time. There is no question that the Change Request was before the agency during the relevant period: Dr. Michael Peck, NRC's former Chief Resident Inspector for Diablo Canyon, cited the Change Request in a document filed with the agency on the same day it approved Revision 21, the action challenged by this Petition for Review. *See* Differing Professional Opinion – Appeal at 11 (Exhibit 1). As the Change Request formed a substantial basis for Dr. Peck's assertion in that document that approval of Revision 21 was unlawful, that document was in Dr. Peck's possession and thus before the agency well before he filed his appeal of the DPO decision. Yet Respondents refuse to acknowledge that the Change Request constitutes part of "the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a)(3).

Since the agency itself has designated as part of the record numerous documents that were not actually reviewed by Mr. Orenak and Mr. Bamford, the two individuals who according to the NRC reviewed Revision 21, NRC Response at 12-15, Respondents' attempt to limit the record to documents they reviewed

must be seen as disingenuous. At most, two of the 13 documents designated by Respondents can be characterized as having been before Mr. Orenak and Mr. Bamford during their review of Revision 21—a cover letter accompanying the submission of Revision 21[2] and Revision 21 itself;[3] a third document was generated as a result of that review—a memorandum signed by Mr. Bamford memorializing the agency's review of Revision 21 and its determination that it met applicable regulatory requirements.[4] Certified Index of the Record (Dec. 12, 2014).

The remaining nine documents in the administrative record as designated by Respondents include various documents that were not considered by either employee in their review of Revision 21, *e.g.*: a September 2012 study of the Shoreline Fault, located near Diablo Canyon; an October 2012 letter from Joseph Sebrosky, Senior Project Manager at NRC, to PG&E concerning the findings of that study; and pleadings filed in an agency proceeding involving different legal and factual issues but also focused on seismic safety at Diablo Canyon. *See* Certified Index of the Record.

The record also includes the case file for a Dissenting Professional Opinion (DPO) filed by Dr. Peck, the NRC employee who, in response to a request under

[2] Letter from Barry S. Allen to NRC Document Control Desk (Sep. 16, 2013) (ML14022A120).

[3] Updated Final Safety Analysis Report, Revision 21, Diablo Canyon Power Plant (Sep. 16, 2013).

[4] Memorandum from Peter J. Bamford, Project Manager, Plant Licensing IV-1, to Michael T. Markley, Chief, Plant Licensing IV-1 (June 23, 2014) (ML13280A391).

the Freedom of Information Act, produced the Change Request at issue.[5] Oesterle Decl. ¶ 22 (NRC Response, Exhibit 4). In the DPO, Dr. Peck asserted that the agency had failed to adhere to its own regulations in accepting Revision 21 without requiring a public hearing. As referenced above, despite Declarations from two NRC employees indicating that each "had no role in the NRC review of that document or of any related appeal," Respondents have designated the DPO case file as within the record in this proceeding. Orenak Decl. ¶ 15 (NRC Response, Exhibit 2); Bamford Decl. ¶ 13 (NRC Response, Exhibit 3). In designating the DPO as within the record but refusing to include the Change Request, which formed a significant basis of Dr. Peck's dispute, Respondents attempt to apply different rules to Petitioner than to themselves, thus unfairly skewing the record to support Respondents' merits arguments, contrary to the facts of this case and this Circuit's caselaw.

B. This Motion To Supplement Is Not "Unnecessary," Given Respondents' Refusal To Designate The Change Request As Part Of The Record

Respondents maintain that because they agreed not to object to Petitioner's citing the Change Request and including portions in the Joint Appendix, this Motion is "unnecessary." NRC Response at 9. But as the Court is well aware,

[5] Case File for DPO-2013-002 (Sep. 9, 2014) (ML14252A743). The DPO case file includes, among other documents, Dr. Peck's initial DPO, a Panel Report and Decision dismissing Dr. Peck's DPO, Dr. Peck's Appeal Submittal (attached as Exhibit 1), and the Appeal Decision.

"[j]udicial review of agency action under the APA is generally confined to the administrative record." *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010) (citing 5 U.S.C. § 706). Simply including the Change Request in the Joint Appendix as a relevant document considered by the agency during the decision making process, rather than designating that document as part of the record, relegates the document to second-class status.

Where, as here, there is no formal agency docket collecting documents considered during the agency proceeding, and the parties sharply dispute the very nature of the decision under review, the distinction between a document within the administrative record and one not in the record is in especially high relief. No doubt recognizing this point, Respondents designated a number of documents as part of the record that by no measure could be considered to have been before the two agency decision makers who reviewed Revision 21. By including these documents, over Petitioner's objections, Respondents sought to bolster their arguments on the merits of this Petition.

But, as this Court has repeatedly recognized, the record includes "all documents and materials that the agency directly or indirectly considered . . . [and nothing] more nor less." *City of Duluth*, 968 F. Supp. 2d at 287 (alterations in original) (internal quotation marks omitted). The Court should reject Respondents' attempt to include in the record documents favorable to its merits argument while

excluding a document that was indisputably before NRC at the time the agency reviewed and approved Revision 21.

Respondents' notion that Petitioner failed to respond to Respondents' offer to allow Petitioner to cite the Change Request in pleadings and include portions in the Joint Appendix is simply incorrect. Respondents contend that this "omission violates at least the spirit of Circuit Rule 27(b)(2) ('Consultation')." NRC Response at 10. It can be presumed that Respondents intended to cite Circuit Rule 27(h)(2), rather than Circuit Rule 27(b)(2), which does not address consultation. But the terms of Circuit Rule 27(h)(2) do not require consultation in this instance. Instead, subsection (h)(2) requires a party to confer with opposing parties regarding only a motion to extend the time for filing or for leave to exceed page limits.

In any event, Petitioner agrees that reasonable consultation before filing this Motion, such as the consultation undertaken prior to this Motion, is appropriate and conserves the parties' and the Court's resources, even if not required by procedural rules. Nonetheless, Respondents' argument that Petitioner did not adequately consult with Respondents' counsel is inaccurate. NRC Response at 10-11. Respondents attached to their Response a number of emails between counsel for Petitioner and counsel for Respondents, spread over nearly four months, concerning the relief requested in this Motion. NRC Response, Exhibit 5.

Respondents, however, neglected to include an email dated March 22, 2015, from Petitioner's counsel to Respondents' counsel responding to Respondents' offer not to object in the event Petitioner cites the Change Request and includes portions in the Joint Appendix. *See* Exhibit 2. This email indicates clearly that Petitioner intended to reject Respondents' offer and proceed with filing this Motion. Respondents' arguments to the contrary are simply belied by the facts.

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
Counsel for Petitioner

Dated: April 17, 2015

CERTIFICATE OF SERVICE

I certify that on April 17, 2015, I served "Petitioner's Reply to Respondents' and Intervenor's Responses to 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