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LBP-93-1

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Charles Bechhoefer, Chairman
Dr. Jerry R. Kline
Frederick J. Shon

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2) Facility Operating Licenses No. DPR-80 and DPR-82	Docket Nos. 50-275-OLA-2 50-323-OLA-2 ASLBP No. 92-669-03-OLA-2 (Construction Period Recovery) January 21, 1993

PREHEARING CONFERENCE ORDER
(Ruling Upon Intervention Petition and Authorizing Hearing)

This proceeding involves the proposed amendment of the operating licenses for the Diablo Canyon Nuclear Power Plant, Units 1 and 2, to extend the life of those licenses by more than 13 years (for Unit 1) and almost 15 years (for Unit 2). As explained in our Memorandum and Order (Filing Schedules and Prehearing Conference), LBP-92-27, 36 NRC ___ (September 24, 1992)(hereinafter, "LBP-92-27"), the amendments are intended to "recover" or "recapture" into the

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operating licenses the period of construction for the reactors, to conform the licenses with Commission practice, in effect since 1982, of licensing nuclear reactors for a 40 year period of operation.

In LBP-92-27, we also considered a petition for leave to intervene and request for a hearing filed by San Luis Obispo Mothers for Peace ("MFP" or "Petitioner"). We pointed out that petitioners for intervention had a right to amend their petitions, and we established schedules for the filing of any such amendment and responses by Pacific Gas & Electric Co. ("PG&E" or "Applicant") and the NRC Staff.

In accord with those schedules, MFP on October 26, 1992, filed a supplement to its petition. The Applicant and NRC Staff filed timely responses on November 18, 1992 and November 30, 1992, respectively.[1] On December 10, 1992, we held a prehearing conference in San Luis Obispo, California, to consider these filings.[2]

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[1]On November 23, 1992, the Applicant filed a correction to its response. At the prehearing conference on December 10, 1992 (see n.2, infra), MFP and the Staff made several corrections to their filings.

[2]The conference was announced through our Notice of Prehearing Conference, dated November 2, 1992, published at 57 Fed. Reg. 53362 (November 9, 1992). In accordance with the invitation in that Notice, the Applicant and MFP elected to file proposed agenda for the conference. (References to the transcript of this prehearing conference are hereafter cited as Tr. ___.) As also announced by that Notice, the Board heard oral limited appearance statements from members of the public on Thursday evening, December 10, 1992 (Tr. 218-351), and Friday morning, December 11, 1992 (Tr. 352-406).

As outlined in LBP-92-27, a petitioner for intervention must, as a requirement to achieve party status, establish that it has standing and that it has proffered at least one viable contention. The Applicant opposes MFP's revised petition, for both lack of standing and the failure to assert a valid contention. The Staff also opposes MFP's petition, based on lack of a valid contention.

For the reasons set forth below, we are hereby granting MFP's petition for leave to intervene and request for a hearing. In view of that action, we are also issuing a Notice of Hearing.

I. Standing

As set forth in LBP-92-27, to establish standing, the petitioner must demonstrate that it has suffered or will suffer "injury in fact," that the injury falls within the zones of interest sought to be protected by the statutes being enforced--here, the Atomic Energy Act or the National Environmental Policy Act (NEPA)--and that the injury is redressable by a favorable decision in the proceeding. Public Service Co. of New Hampshire (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266-67 (1991). In addition, a group such as MFP, to the extent it asserts standing as a representative of the interests of its members (as is the case here), must demonstrate that it is authorized to do so.

To assert its standing, MFP has proffered the

affidavits of five members, asserting that they reside and/or carry on businesses ten (1 member), fifteen (2 members) and twenty (2 members) miles from the facility. Each expresses a concern that operation of the plants within the recapture period will be unsafe. In its petition, MFP indicates that this position is founded on reasons set forth in its proposed contentions.[3] All of them also authorize MFP to represent their interests in the proceeding.

In LBP-92-27, we pointed to the Commission's recent decision that dealt with standing in proceedings involving amendments to operating licenses. Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989). There, the Commission noted that, in construction permit or operating license proceedings for nuclear reactors, residence of a person within 50 miles of a facility would be sufficient to confer standing. The Commission went on to hold that this 50-mile presumption did not apply in all operating license amendment proceedings but only in those involving a "significant" amendment involving "obvious potential for offsite consequences." Id., 30 NRC at 329-30.[4] For other amendments, a petitioner would have

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[3]MFP October 26, 1992 Supplemental Petition (hereinafter, MFP Supplement), at 2-3.

[4]In that proceeding, the Commission denied for lack of standing the intervention request of a resident living 40 miles from the facility. The proceeding concerned a proposed exemption from regulatory requirements dealing with the use of "protection (continued...)

to demonstrate a particular "injury in fact" flowing from the amendment in order to participate in the proceeding.

The Applicant challenges the petitioner's demonstration of standing.[5] It claims that the amendment in question is not "significant" but indeed is virtually ministerial--i.e., "an administrative change to the license" with no changes in authorized structures, procedures or operations.[6] Therefore, according to the Applicant, the 50-mile presumption does not apply and a petitioner would have to demonstrate actual "injury in fact" in order to be admitted as a party. The Applicant thus contends that MFP's demonstration of the residence of five MFP members from 10 to 20 miles from the plant is not sufficient.[7]

For its part, the NRC Staff observes that "the geographical 50 miles seem[s] reasonable given that this

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[4](...continued)
factors" in respirators used by workers in radioactive environments. The Commission commented that "the exemption * * * deals with the protection of workers in the plant, not protection of the general public. * * * The Petitioner [for intervention] is not a worker at the plant." Id., at 329.

[5]Pacific Gas and Electric Company's Answer to Request for Hearing and Petition to Intervene, dated September 4, 1992, at 11-14; Pacific Gas and Electric Company's Response to Petitioner's Supplement to Petition to Intervene, dated November 18, 1992 (hereinafter, PG&E Response), at 51-56.

[6]Tr. 15.

[7]No party currently challenges MFP's demonstration that the organization is authorized to represent the interests of the five individual members who submitted affidavits.

does have to do with operation."[8] The Staff does not challenge MFP's demonstration of standing, except with respect to Contention VI, which seeks to litigate certain of the Applicant's practices on the basis, inter alia, of alleged harm to workers.[9] The Staff claims that MFP has not demonstrated authority to represent workers and thus lacks standing to present a portion of that contention. (The Staff opposes Contention VI in its entirety on other grounds as well.)

In response to the Applicant's claims on standing, MFP replies that the members it is representing will be subject to a risk of an accident with offsite consequences for an additional 13 to 15 years (from Units 1 and 2, respectively). It thus deems the amendment in question to be "significant" and to possess an "obvious potential for offsite consequences."[10] It differentiates this amendment from the "minor change to * * * existing operation" considered in cases cited by the Applicant.

In reply to the Staff's claim that MFP cannot assert the portion of Contention VI raising matters affecting workers because none of its members are workers, MFP

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[8]Tr. 34.

[9]NRC Staff Response to San Luis Obispo Mothers for Peace Supplement to Petition to Intervene, dated November 30, 1992 (hereinafter, NRC Staff Response), at 3-6.

[10]MFP Supplement, at 2-3.

concedes that it has no members who are also Diablo Canyon employees.[11] It also asserts that Contention VI additionally deals with harm to members of the general public; we will address this claim in our discussion of the contention, infra.

It is clear to us that a demonstration of "injury in fact" must be actual but need not be substantial. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 939, 447-48 (1979), aff'd, ALAB-549, 9 NRC 644 (1979). MFP claims that the risk of accidents from the facility is a real risk and that, under the amendment, it will continue for more years than if the amendment were not granted. Although the opportunity for considering the risk of accidents was earlier available during the operating license proceeding, as claimed by the Applicant, this does not mean that such risk may not be a basis for standing in this proceeding. The risk, even though it then may have been evaluated by NRC as being acceptably small, nevertheless continues--it is in part a function of time--and constitutes the necessary showing of "injury in fact" for this proceeding.

A direct showing of injury in fact caused by the proposed amendment, as the Applicant claims is necessary to

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[11]Tr. 160-61.

establish standing, could probably not be shown,[12] for the amendment authorizes no substantive changes except for the added risk stemming from additional time of exposure. That being so, we do not read the Commission's notice as in effect emasculating the hearing procedures by offering a hearing that could not in fact likely be obtained.

As stated by the Appeal Board with respect to a comparable claim in a construction permit extension proceeding:

> If the applicant's premise is right, it would appear to follow that there would not be many, if any, persons resident in the general area of a nuclear facility under construction who could obtain intervention in a permit extension proceeding such as the one at bar. The applicant provides no examples of possible "additional or incremental injury beyond that authorized by the construction permit" which might flow from the extension of the completion date specified in the permit. And very few come readily to mind.[9] Thus, what the applicant's position comes down to is that the notice of opportunity for hearing amounted to a tender of public participational rights on terms which almost no individual could meet.
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> We should, of course, be most cautious in treating Commission notices (whether issued by the Commission itself or its delegate) as being, in practical effect, illusory.
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> [9] Offhand, we can think of only one: the enlargement of the time interval during which the surrounding community must endure the transitory environmental and

[12] The "concerns" expressed by the five MFP members, although not satisfying the Applicant's criteria, might possibly be adequate in this regard, although we are not relying on those expressed concerns to demonstrate "injury in fact". Nor does the Applicant accept as a showing of real injury in fact the incremental risk asserted by MFP as the foundation of its standing claim (Tr. 30-33).

socio-economic effects of the construction work itself.
* * *

Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, 564 (1980).

This Appeal Board conclusion would appear to be fully applicable to the situation here. Moreover, we also believe that the additional operation of a nuclear reactor, for 13 to 15 years, in itself would constitute significant additional exposure to risk for nearby residents, thereby establishing potential "injury in fact."

For these reasons, we are accepting MFP's demonstration of "injury in fact." As for the aspects of standing beyond "injury in fact," MFP through its contentions has alleged harms involving the public health and safety and the environment. Thus its injuries arguably fall within the zones of interest sought to be protected by the Atomic Energy Act and NEPA. Further, MFP has demonstrated how it could attain relief for the problems it asserts--either by license denial or by conditions relating to the problem in question.

In conclusion, at the prehearing conference we stated that we had determined that MFP has standing to participate in this proceeding.[13] That conclusion was not intended to include the representation of plant workers, as comprehended by Contention VI. We reiterate that conclusion now. Except

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[13]Tr. 41-42.

with respect to its attempt to raise the concerns of workers in Contention VI, MFP has demonstrated its standing to participate as a party in this proceeding.

II. Contentions

1. General. In order to be admitted as a party, a petitioner for intervention must not only establish its standing but must also proffer at least one valid contention. 10 C.F.R.§ 2.714(b)(1). In its October 26, 1992 supplement to its intervention petition, MFP submitted 11 contentions (numbered I-XI). The Applicant and Staff, in their responses, each opposed the admissibility of all of the contentions. At the prehearing conference, we considered each contention, but we ruled on only one of them (number X) which we denied as being beyond our jurisdiction to consider. We now turn to all of the contentions, which we discuss seriatim.

At the outset, we would note that contentions in this proceeding are governed by the recently amended version of 10 C.F.R. § 2.714, the requirements of which we summarized in LBP-92-97. These amendments were intended by the Commission to "raise the threshold" for the admissibility of contentions. 54 Fed. Reg. 33,168 (August 11, 1989).

Although petitioners long have been required to identify a "basis" for contentions, they now must identify facts or expert opinion supporting the contention, together

with demonstrating that they have a "genuine dispute with the applicant on an issue of fact or law." Id. In addition, under both the former and the revised rule, contentions asserted must be within the scope of the proposed licensing action.

The revised contention requirement was challenged by an intervenor group on the basis, inter alia, that it deprived intervenors of the hearing provided by § 189a of the Atomic Energy Act. The court rejected this claim and held the revised rules to be valid on their face. Union of Concerned Scientists v. NRC, 920 F.2d 50 (D.C.Cir., 1990). In doing so, however, the court observed that

> The NRC rules of course could be applied so as to prevent all parties from raising a material issue. But '[e]ven assuming arguendo that we were to find that these instances . . . [would] constitute specific misapplications of the rule . . . they [would] suggest, at most, only that the rule might in the future be misapplied. Such arguments are of course inappropriate here, where the rule is being challenged on its face.' [citation omitted].

Id., at 56. In reviewing MFP's proposed contentions, we will keep in mind both the upholding of the purpose of the rule and the need to interpret it as not foreclosing reasonable inquiries into the licensing action before us.

As for the scope of the present licensing action, the Applicant would treat the amendment as an "administrative change," whereas the petitioner appears to consider it the equivalent of "initial licensing." In our view, it is neither. The Commission has not spoken with regard to such

scope. There is no legal precedent that would define such scope, although the decision of the Licensing Board in the Vermont Yankee recapture proceeding provides some guidance. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85 (1990).

The Applicant asserts that, logically, the scope could not be broader than that for license renewal (where the Commission strictly limited the issues that could be considered). Indeed, the single safety issue that can be considered in license renewal--age-related degradation of structures, systems and components (SSCs)--would not, under the Applicant's view, be litigable in this proceeding inasmuch as the SSCs have, according to the Applicant, been previously analyzed for a full forty years of operation (the license term that is currently being sought). The Commission, however, passed a new rule in order to effectuate such limitation of issues for license renewal. It explicitly defined the issues that could be litigated in those proceedings. 10 C.F.R. Part 54, in particular § 54.29. It has enacted no similar limitation with respect to recapture proceedings. Therefore, absent a regulatory pronouncement of this type, the scope of permissible issues would be similar to that permitted with respect to any license amendment involving a degree of risk to the public.

MFP also asserts that the application under review is premature, that the amendment is not needed until 2008 at

the earliest, and that the proceeding should thus be deferred until approximately 2000. The Applicant expressed certain business reasons why it filed its requested amendments at this time and also pointed out that there is no regulatory provision that would bar the current application at this time. The Staff agrees. We conclude that, unlike license renewal, where a specific application period is specified (10 C.F.R. § 54.17), there appears to be no regulatory bar for the early application before us.

We thus will consider the application at this time. On the other hand, although certain of the contentions involve matters that could conceivably be moot by the time of the recapture period, we will take facts as they exist today and apply the results of our review as of the date of our final decision in this proceeding or (assuming we do not bar the amendments) of the license amendment, whichever comes later. In other words, the Applicant cannot have it both ways: with the early application comes the need to consider and rule based on facts that currently exist.

We turn now to the contentions before us.

2. Contention I:

> The San Luis Obispo Mothers for Peace contends that Pacific Gas and Electric Company's proposal to extend the life of the Diablo Canyon Nuclear Power Plant for more than 13 years (Unit 1) and almost 15 years (Unit 2) should be denied because PG&E lacks a sufficiently effective and

comprehensive surveillance and maintenance program.[14]

a. MFP position. In asserting this contention, MFP focuses on section 4.2.3 ("Surveillance and Maintenance Programs") of the Applicant's License Amendment Request 92-04, in which PG&E submitted its request for the operating license amendments at issue in this proceeding. That section states that these "programs assure that any significant degradation of plant equipment will be promptly identified and corrected throughout the proposed 40-year operating license terms."[15] Throughout the application, according to MFP, PG&E relies on these programs in justifying the acceptability of many of the systems, structures and components. MFP asserts that these programs "[have] been noted as having significant weaknesses."[16] MFP attributes the weaknesses to the "performance based pricing" rate-setting mechanism to which PG&E is subjected by the California Public Utility Commission.

As bases for the alleged weaknesses in the programs, MFP cites a number of NRC inspection reports, notices of violation directed at the Applicant, observations of various

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[14]MFP Supplement, at 5.

[15]The "Surveillance and Maintenance Programs" covered by this section are defined to include the Inservice Inspection (ISI) Program, Inservice Testing (IST) Program, Environmental Qualification (EQ) Program, and Maintenance Program.

[16]MFP Supplement, at 6.

NRC personnel (at enforcement conferences and through other means) and Applicant Licensee Event Reports (LERs). MFP leads off with alleged instances where the NRC has "repeatedly cited PG&E for its slow response to correct maintenance problems." Specifically:

1. Inspection Report 92-17 (May 12, 1992), concerning failure to correct a condition involving reverse rotation of containment fan cooler units (CFCU) 1-5.

2. A Notice of Violation, dated June 19, 1992, involving the same CFCUs.

3. An enforcement conference report (Inspection Report 92-19) also relating to the CFCU matter and identifying three apparent violations (one of which was later withdrawn). In that same report, an NRC official allegedly criticized PG&E for the excessive time taken to address certain operational problems in a systematic manner.

4. Failure promptly or effectively to identify problems relating to the positive displacement charging pumps (PDPs), as discovered in an inspection conducted from June 2, 1992 through July 13, 1992 (based on Notice of Violation dated August [1]3, 1992, Inspection Report 92-20.)

MFP next asserts that "[m]aintenance and surveillance practices at Diablo Canyon * * * have been further criticized by the NRC for lack of attention to detail, poor or incomplete work, inadequate instructions to personnel, and ineffective surveillance."[17] The following examples are provided:

1. The first example provided is not an "NRC criticism" but rather a Licensee Event Report (LER) submitted to NRC by the Applicant. The

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[17]MFP Supplement, at 9.

report stated that tools, plastic tool bags, clothing and other items had been left unattended in the containment. A PG&E investigation determined that the cause was the failure of four individuals who entered the containment to comply with surveillance recordkeeping requirements. LER 2-91-012-00, dated March 5, 1992.

2. The discovery by NRC during a January 1, 1992-February 3, 1992 inspection (92-01) of a maintenance violation, including the failure of licensee personnel to detect for over 7 days the failure of a reactor cavity level instrument; this was a repeat of a 1990 failure of the instrument that had not been detected for over 2 months. A Notice of Violation dated February 28, 1992 was cited.

3. The report by NRC (Inspection Report 91-39, dated January 24, 1992) of weaknesses in the motor-operated valve (MOV) testing program.

4. The report by NRC (Inspection Report 92-14, dated June 5, 1992) of PG&E's failure to provide written instructions for the assembly of the expansion bellows to the turbocharger of the diesel generator EDG-2-3.

5. The next example is not a report by NRC but instead was derived from an LER. It concerned corrosion on DFO supply piping that left the liner below minimum wall thickness requirements. It also concerned maintenance of coal tar protective coating. LER 1-92-006-00, dated August 6, 1992.

6. The discovery by NRC (Inspection Report 92-21, dated August 18, 1992) of gum, candy wrappers, sunflower seeds, and/or smoked cigarettes in 12 different locations in which eating, drinking and smoking are banned.

At the prehearing conference, MFP referred to several other asserted violations. It sought to distribute a supplemental statement, but the Board declined to permit it to do so, inasmuch as the Applicant or NRC Staff would not have had an opportunity to respond adequately. According to

MFP, all of the examples reinforced MFP's position that the sheer number and repetitiveness of the violations or discrepancies reflected on its face a deficiency in the maintenance or surveillance programs. Because of the lack of an opportunity for proper response, however, we are not considering these additional violations in determining the admissibility of this contention.

In view of all of the foregoing examples of alleged deficiencies in maintenance and surveillance practices, as set forth in its Supplemental Petition, MFP claims that the Applicant has had a consistent and chronic pattern of poor maintenance and surveillance practices, that its program is neither adequate nor effective and that the license amendment should be denied. Alternatively, MFP indicated that it would accept license conditions if denial were not warranted (Tr. 59).

b. Applicant and Staff positions. The Applicant and Staff each oppose this contention on a variety of grounds. The Applicant first expresses the view that the maintenance and surveillance programs are outside the scope of the proceeding, inasmuch as the amendment offers no changes to these programs, which were subject to review at the operating license (OL) stage of review. It would relegate the petitioners' challenge to these programs to an enforcement forum, as provided by 10 C.F.R. § 2.206, for operational problems of the type underlying this contention.

Next, alternatively assuming (but not conceding) that implementation of these programs may be within the scope of the proceeding, it expresses the view that the cited inspection reports, licensee event reports and notices of violation represent isolated, out-of-context events that do not have any implications about the adequacy of the Applicant's maintenance or surveillance programs. The Applicant also cites favorable NRC Staff findings concerning plant operations, as well as what it deems to be favorable Staff findings in the Systematic Assessment of Licensee Performance (SALP) program. It asserts that financial considerations bearing upon the California rate system are not subject to review in an NRC licensing proceeding. Finally, it points out that the majority of adverse findings concerning the maintenance and surveillance programs have been "closed out" to the Staff's satisfaction. The Applicant concludes that there is no real dispute between it and MFP inasmuch as the cited bases are inadequate to serve as such.[18]

For its part, the Staff initially takes the position that, to the extent that MFP raises matters that concern current operation of the facility rather than operation in the recapture period, those concerns are properly raised in a petition pursuant to 10 C.F.R. § 2.206 and "may not" be

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[18]PG&E Response, at 3-4, 14-25; Tr. 84.

admitted into this proceeding.[19] The Staff goes on to describe why the various violations or findings cited by MFP cannot, in the Staff's view, form a valid basis for a contention.

With respect to the CFCU assertions of MFP, the Staff points out that the Notice of Violation on this matter was withdrawn and that a contention may not be based on information repudiated by its source. (As an aside, the Staff notes that the Licensee was cited for other matters involving improper maintenance of the dampers (in the CFCUs.)) The Staff also points out that the CFCU situation was identified in an LER, not a Staff inspection report (a circumstance that MFP acknowledged at the prehearing conference).[20] The Staff concludes that the CFCU maintenance problems will be mooted long before the recapture period.[21]

c. Board analysis. (i). We disagree with both the Applicant and Staff that operational problems such as those cited by MFP need be relegated for challenges to the § 2.206 forum. That provision does no more than to permit the petitioner to request the NRC Staff--a party to this proceeding--to institute enforcement action against the

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[19]Staff Response, at 10.

[20]Tr. 98-99.

[21]Staff Response, at 14, n.8.

Applicant for a particular violation or activity. With respect to the matters brought to our attention by MFP, the Staff has until this time not chosen to take any such action.

Although the § 2.206 forum may be technically available to MFP, it is not the exclusive means for challenging these practices. When it provided an opportunity for a hearing, the Commission opened the door of this proceeding for licensing challenges of this type. Moreover, the hearing rights available to MFP through § 2.206 are scarcely equivalent to, and not an adequate substitute for, those available in this proceeding. See Washington Public Power Supply System (WPPS Nuclear Project No. 3), ALAB-747, 18 NRC 1167, 1175-77 (1983). Among other matters, the decision of the Staff to take or not take enforcement action pursuant to § 2.206 is purely discretionary--it is not subject to review by the Commission (except on its own motion) or by courts, even for abuse of discretion. 10 C.F.R. § 2.206(c)(1) and (2); Heckler v. Cheney, 470 U.S. 821 (1985).[22] Further,

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[22]The Commission has agreed that § 2.206 actions under 10 C.F.R. Part 52 are reviewable--unlike actions taken under § 2.206 in other contexts. Such reviewability in that context was one of the primary ingredients in the judicial approval of Part 52. Nuclear Information Resource Service v. NRC, 969 F.2d 1169 (1992). The Court there noted that "the use to which a § 2.206 petition is put--not its form--governs its reviewability." Id., at 1178. The Commission or Staff (or Applicant) has not suggested that the § 2.206 petition to which they would relegate MFP would be reviewable at the behest of MFP, either by the Commission itself or judicially.

hearings as a result of § 2.206 petitions are almost never granted.

For these reasons, we do not believe that the Commission has closed off the various challenges advanced by MFP to the adequacy of the Applicant's surveillance and maintenance programs. The Applicant has relied extensively on those programs to support the adequacy of its proposed amendment. MFP has referenced that reliance. Moreover, consideration of the implementation of those programs is one of the limited means available to challenge the adequacy of those programs. The only aspect of the programs that could have been examined at the OL stage of review was the validity of the paper programs. But, even assuming the continuing adequacy of the paper programs, the imp[lementation of those programs is the only real gauge of their effectiveness. As the Appeal Board observed with respect to analytically similar Quality Assurance (QA) programs,

> No QA program is self-executing. Thus, irrespective of how comprehensive it may appear on paper, the program will be essentially without value unless it is timely, continuously and properly implemented.

Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-106, 6 AEC 182, 184 (1973). We thus reject the positions of the Applicant and Staff that the implementation of the maintenance and surveillance programs cannot be questioned in this proceeding.

Further, the prior opportunity at the OL stage of review to question the paper programs was in itself likely to have been circumscribed. For, on paper, the only statement of those programs normally appears in various technical specifications--there is no detailed program set forth in the Applicant's FSAR, except through incorporation by reference. Moreover, the programs as a whole need not comply with any NRC regulations and are merely subject to approval by the NRC Staff.[23] Indeed, at the operating-license stage, a timely challenge by an intervenor would not have been possible inasmuch as proposed technical specifications were not issued at the time when timely petitions would have had to have been submitted. (Late-filed challenges, although permissible, are explicitly not favored, and must meet a balancing of the factors set forth in 10 C.F.R. § 2.714.)

(ii). As for the claims that the cited incidents are not sufficient to indicate a problem with the surveillance or maintenance programs, we disagree. Although the cited incidents each may rise to a level no higher than a level IV violation, such violations "are of more than minor concern, i.e., if left uncorrected they could lead to a more serious concern." 10 C.F.R. Part 2, Appendix C, IV. Moreover, when

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[23]The Commission has issued a Policy Statement concerning maintenance programs, but that Statement explicitly declines to impose any particular standards. 54 Fed. Reg. 50611 (December 8, 1989).

sufficient repetitive or similar incidents are demonstrated, aggregation and/or escalation of sanctions may well be in order. See Tulsa Gamma Ray, Inc. (Materials License No. 35-17178-01), LBP-91-40, 34 NRC 297, 305 (1991).

Sufficient incidents have here been cited so that we could not, as a matter of law, hold that there are no problems with the maintenance or surveillance programs. Although none of the cited incidents individually rises to the level of a serious violation, collectively they might well have some safety significance, as MFP claims.

Moreover, although some of the cited incidents may in fact have little or no bearing on surveillance or maintenance practices, that is an evidentiary matter. (The single CFCU matter that the Applicant and Staff focus on as having no bearing on maintenance or surveillance was not primarily relied upon by MFP--only the CFCU violations bearing on maintenance.[24]) The favorable comments cited by the Applicant may counterbalance the negative comments relied on by MFP. But that is also an evidentiary question. Nor does the circumstance (relied on by the Applicant) that all of the alleged violations or adverse comments have been "closed out" by the NRC Staff indicate that implementation problems do not exist. Indeed, if the violations had not

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[24]See MFP Supplement, at 11.

been closed out, far more serious enforcement remedies might well be in order.

Nor is there any indication that the close-outs will render the implementation question moot by the time of the recapture period. In any event, were we to find that implementation conditions (as contrasted with license amendment denial) were warranted because of problems with the maintenance or surveillance programs, we would make those conditions effective as of the date of issuance of our Order in this proceeding or of the license amendment, whichever came later.[25]

(iii). For these reasons, we find that Contention I is a valid contention, and we hereby accept it into this proceeding. The contention is similar in type to that accepted by the Licensing Board in Vermont Yankee, LBP-90-6, supra. The Applicant's point that the defects in the implementation of the maintenance or surveillance programs here are less severe than in Vermont Yankee is another purely evidentiary question. And the contrast that the Applicant and Staff make concerning the more stringent contention rule in effect here is not meritorious. The revised contention rule requires a statement of facts--which MFP has provided. The facts and the issue raised thereby

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[25]We note that, on the basis of a proposed "no significant hazards" analysis, the Applicant seeks to make the proposed amendments effective prior to the conclusion of this proceeding.

must also be material--a requirement that MFP in our opinion has satisfied. Finally, the revised rule requires a showing of a genuine dispute with the Applicant which, in our view, MFP has demonstrated.

In sum, were the new contention rule to be interpreted to rule out this contention, a material issue would in effect be ruled out of this proceeding. This is the type of "specific misapplication of the rule" which the Court in UCS indicated would be improper under the rule as applied.

We note that, in proving its claim, MFP will not be limited to the specific incidents relied on to admit its contention. As set forth in the Statement of Considerations for the revised contention rule,

> [The contention] requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinion, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention. 54 Fed. Reg. at 33,170 (emphasis supplied).

Incidents such as those that MFP attempted to read into the record at the prehearing conference may be acceptable, as long as they are material to the implementation of the surveillance and maintenance programs. To the extent that MFP is asked to do so, however, it must identify prior to hearing all of the incidents on which it intends to rely in advancing and going forward with its contention.

3. Contention II:

> The San Luis Obispo Mothers for Peace contends that the proposed license extension at Diablo Canyon Nuclear Power Plant should not be granted because PG&E's employees have not proven themselves skilled, reliable or motivated enough to adequately protect the public safety.[26]

a. MFP position. In support of this contention, MFP claims that the Diablo Canyon plant has been "plagued" with incidents related to personnel errors. It cites differing incidents or NRC comments set forth in 4 LERs, 1 PG&E letter to NRC, and three NRC inspection reports (one of which concerned a report by PG&E and led to a Notice of Violation). It concludes, generally, that the incidents in question demonstrate a "consistent and repetitive pattern of poor and unsafe personnel performance" and that the license "extension" would further jeopardize safety, because "personnel at the plant have not exhibited the expertise or motivation to resolve detected safety problems or to prevent dangerous situations."[27] Finally, it adds that, as the plant ages, experienced personnel will retire and there is no assurance that qualified personnel can be obtained and, further, that a "maintenance program must rely on experienced and qualified workers."[28]

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[26]MFP Supplement, at 13-14.

[27]MFP Supplement, at 16.

[28]Id., at 16-17.

b. Applicant and Staff positions. The Applicant opposes this contention on essentially two bases. First, it claims that the contention represents a challenge to PG&E's technical qualifications and that such issue was considered during initial plant licensing. Second, it asserts that the contention fails for lack of a basis indicating a genuine dispute between it and MFP. Specifically, it denies the accuracy of the claim of a consistent and repetitive pattern of poor and unsafe personnel performance. It derogates the significance of the cited incidents, claiming that they do not support the systematic programmatic conclusion suggested by MFP. It also criticizes MFP for ignoring favorable SALP reports in the functional area of operations.[29] Finally, it concludes that, even if proved, the assertions would not entitle MFP to relief.

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[29]PG&E Response, at 26-27. The Applicant further criticizes MFP for ignoring its "ironclad obligation to examine the publicly available documentary material * * * with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention," citing Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), 16 NRC 460, 468 (1982), and Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 412 (1984). That obligation by its terms only applies to publicly available information in support of a contention. Although the Applicant claims that it is "logical" as well as "consistent with fundamental concepts of fairness and judicial economy" to apply the obligation to information both supportive of and contrary to a proposed contention, we disagree. Such an interpretation would unduly exacerbate the considerable threshhold that petitioners must already meet under the revised contention rules. Cf. Duke Power Co. (William B. Mcguire Nuclear Station, Units 1 and 2), ALAB-143, 6 AEC 623, 625 (1973) (at evidentiary stage, all parties have an obligation to reveal all information in their possession concerning a matter at issue).

The Staff acknowledges that the incidents cited resulted from personnel errors. But it asserts that, considered together, they do not reflect any recurring or pervasive problem with the competence of PG&E's employees. According to the Staff, they represent isolated incidents of the type that inevitably occur in the operation of a reactor, and do not reflect any underlying breakdown in the training, motivation or reliability of the employees.[30]

c. Board analysis. At the outset, we reject the Applicant's position that, because the technical qualifications of the Applicant were open to examination during initial licensing, they perforce cannot be examined here. For that examination could not have reflected any experience in operating with those technical qualifications. To claim that the program will stay the same throughout the recapture period and thus cannot be reexamined is to state that, irrespective of the quality of personnel performance, there can be no collective examination of the company's operation--a result that would defy rational analysis and ignore the need for adequate protection of the public health and safety. And, as set forth in conjunction with Contention I (pp. 19-20, supra), the potential examination of various personnel practices under 10 C.F.R. § 2.206 is

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[30]Staff Response, at 19.

not a practical substitute for a hearing here, at least for anyone other than the NRC Staff.

The other major claim of both the Applicant and Staff has more merit. As they each point out, the incidents cited appear to have no common thread. Specifically, the four that were uncovered by the Applicant involve (1) a mobile crane coming too close to 500 kV power lines; (2) calibration of a steam flow channel being performed using an incorrect data sheet/scaling calculation; (3) a non-licensed operator who filled the acid and caustic day tanks simultaneously, causing an acid/caustic spill and a chemical mist to enter the turbine building; and (4) the isolation of the sprinkler fire water to the component cooling water and centrifugal charging pump areas in accordance with an equipment tagout request without the Shift Foreman noting that a continuous fire watch was needed.[31]

The remaining three are founded on Staff inspection reports. Specifically, (5) the statement in an inspection report that, during a three-month period in 1991, there "appeared to be a high number of noteworthy personnel error events;" (6) the performance of inspections of the CFCU matter (discussed in conjunction with Contention I) without appropriate procedures; and (7) a reported weakness in

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[31]Staff Response at 20, n. 10.

control of lifting and rigging devices for heavy loads, particularly in light of a year ago rigging problem involving a loss of offsite power.

We agree that these incidents or statements represent unrelated and widely disparate personnel incidents that collectively do not appear to amount to a failure of either the personnel program or related training programs. Unlike the numerous incidents cited in Contention I that relate, for the most part, to the specific maintenance and surveillance programs, the incidents cited here have no apparent common focus.

For that reason, we are rejecting Contention II. We note, however, that the incident of the missed fire watch (founded upon LER 1-92-008-00, dated July 22, 1992) is sufficiently related to the maintenance and surveillance programs, dealt with by Contention I, as well as the Thermo-Lag Contention V (which we are also accepting in part) for it to be included in the litigation of either (or both) of those contentions. Further, the CFCU incident bears upon a subject that we have accepted for litigation in Contention I, and those allegations here may also be examined in conjunction with Contention I.

4. Contention III:

> The San Luis Obispo Mothers for Peace contends that PG&E's application for an extended license should be denied because PG&E has not taken adequate measures to detect the presence of fraudulently certified components at Diablo Canyon Nuclear Power Plant. Nor has PG&E demonstrated that it is capable of preventing the acquisition and use of counterfeit parts in the future. Failure of such components could cause or contribute to an accident at Diablo Canyon. Thus, NRC lacks reasonable assurance that the plant can safely operate beyond its original license period.[32]

a. MFP position. In support of this contention, MFP cites several regulatory requirements concerning a licensee's obligation to establish suitable control programs for purchased parts and components. It references a General Accounting Office report and several NRC information notices or other statements to the effect that there is a general problem concerning bogus parts. With respect to Diablo Canyon, however, MFP cites two NRC inspection reports critical to particular specified procurement activities.

b. Applicant and Staff positions. Both the Applicant and Staff oppose this contention for not setting forth any viable basis for challenging the Applicant's procurement program. The Applicant notes that the criticisms advanced by MFP both related to non-safety procurements that were not subject to the Applicant's quality-assurance rules for safety-related procurements. Moreover, in both cases, the

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[32]MFP Supplement, at 17.

Applicant provided information to the NRC that eventually led to the arrest and conviction of the fraudulent vendors. Further, the Applicant cites an NRC Procurement Assessment Report that gave a favorable overall assessment of PG&E's program. The Staff observes that the only one of the cited Information Notices having any bearing upon Diablo Canyon is one which concerns the felony conviction of a vendor after PG&E identified it as a seller of counterfeit valves.

c. Board analysis. It is clear that the cited incidents do not raise a sufficient question about PG&E's program to constitute an adequate challenge. In particular, the two inspection reports concern equipment the purchase of which is not even subject to the procurement program for safety equipment. For these reasons, we are rejecting this contention.

5. Contention IV:

> The San Luis Obispo Mothers for Peace contends that PG&E's application for license extension must be denied because age-related degradation of systems, structures and components unacceptably increases the risk of accidents during the extended period of operation.[33]

a. MFP position. In support of this Contention, MFP claims that it is "common knowledge" that a wide variety of structures, systems and components (it lists some 27 of them) are subject to age-related degradation. It cites a GAO report concerning uncertainties in this area and stating

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[33]MFP Supplement, at 24.

that, accordingly, each plant applying for an operating license "extension" must be evaluated in light of its own operating history. It also references a speech by an NRC Commissioner. These materials are general statements that do not relate specifically to Diablo Canyon.

Specifically with regard to Diablo Canyon, MFP references two LERs, one of which concerned leakage from the chemical and volume control system and the other corrosion of piping associated with diesel fuel oil and two fire suppression system carbon dioxide lines.[34] MFP further cites an article stating that Diablo Canyon has been identified by NRC as a reactor with anticipated vessel embrittlement, and a newspaper account of PG&E's discovery of several age-related problems. MFP concludes that, as components age, the probability of an accident increases, including accidents involving multiple failures of equipment or more severe than the safety systems were designed to mitigate.

b. Applicant and Staff positions. The Applicant and Staff view age-related degradation as a subject suitable for examination in a license "renewal" proceeding but not in a recapture proceeding such as this one. They reason that the components have already been examined for forty years of

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[34]This latter LER--1-92-006-00, dated August 6, 1992--was also cited in conjunction with Contention I and is to be reviewed by us in that context.

operation, and, if they age prematurely, maintenance and surveillance programs are designed to detect and mitigate any such effects. They note that the GAO Reports related to license renewal and the Commissioner's speech related to common-mode failure of steam generator tubes. They also question the accuracy of or weight that should be afforded the cited newspaper accounts. They further reference the holding of the Vermont Yankee Licensing Board rejecting a similar contention, largely because of the availability of maintenance programs. They conclude that this contention lacks a proper basis.

c. Board analysis. We agree that the contention lacks an adequate basis. We also note that, to the extent that degradation is subject to maintenance efficacy, the subject will be examined in conjunction with the contention on that subject that we are accepting (Contention I). Accordingly, we are rejecting this contention.

6. Contention V:

> It is the contention of the San Luis Obispo Mothers for Peace that the Thermo-Lag material fails as a fire barrier and, in fact, poses a hazard in the event of a fire or an earthquake. Until this situation is adequately resolved, the license for Diablo Canyon Nuclear Plant certainly should not be extended.[35]

a. MFP position. As a basis for this contention, MFP first asserts that Thermo-Lag is used at Diablo Canyon (citing a PG&E Letter to NRC, dated July 29, 1992, to this

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[35]MFP Supplement, at 28.

effect). MFP next refers to a series of NRC Bulletins warning power reactor operators that, based on certain tests, Thermo-Lag failed to protect cables and conduits. It references a series of compensatory measures that NRC has prescribed for Thermo-Lag materials, including "roving human observers." It then cites five incidents (based on two NRC inspection reports and three LERs) involving such matters as missed fire watches or the disabling by plant personnel for personal convenience of fire protection measures (specifically, fire barriers).[36] MFP observes that NRC proposes to treat the issue generically but to require "compensatory measures" in the interim. It asks that the license amendment be denied until PG&E has taken all measures necessary to end its use of Thermo-Lag for fire protection. (It adds that the risk of Thermo-Lag is even greater in an area subject to earthquakes, as is Diablo Canyon.)

b. Applicant and Staff positions. The Applicant describes this contention as addressing a current issue, generic in the industry, that is "not safety significant."[37] According to the Applicant, it is an

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[36]MFP also cites a purported technical study of the question, derived from a newspaper article. It turns out that the information in the newspaper article was incorrect and that no such report exists, and MFP conceded its error in this respect at the prehearing conference (Tr. 146-47). We are giving no consideration to this purported study.

[37]PG&E Response, at 37.

issue that will be resolved generically, without regard to the expiration dates of the Diablo Canyon licenses, and accordingly is not within the scope of this proceeding. The Applicant also references a letter to it from NRC accepting the interim fire protection measures adopted by PG&E. Finally, it asserts that MFP has failed to develop a nexus between the fire protection measures and the proposed license amendments. As with certain other contentions, the Applicant asserts that the petitioner's only remedy for a perceived problem of this type is through a 10 C.F.R. § 2.206 petition (under which the Staff has already declined to take action with respect to the Thermo-Lag question).

The NRC Staff disagrees with PG&E's conclusion that the Thermo-Lag issue lacks safety significance, but the Staff agrees that the issue is not safety significant at Diablo Canyon.[38] It acknowledges that it has accepted the Applicant's interim compensatory measures as providing adequate fire protection. The Staff claims that MFP has not shown any basis for concluding that the Applicant has not taken sufficient action to prevent any problems arising from its use of Thermo-Lag. Further, the Staff asserts that MFP has provided no basis on which it could be concluded that any problem with Thermo-Lag at Diablo Canyon would not be

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[38]NRC Staff Response, at 30, n. 16.

rendered moot for the recapture period, inasmuch as any needed action would be taken prior to that time.[39]

c. Board analysis. This contention can be construed as raising a question of the adequacy of fire protection both on an interim and a permanent basis. Covering both aspects of the contention, MFP has provided bases for asserting that problems with use of Thermo-Lag exist (the NRC Bulletins) and that Thermo-Lag is used at Diablo Canyon (the PG&E letter). However, the basis provided for contending that fire protection on a permanent basis is inadequate--i.e., the purported study that in fact does not exist--is insufficient. (The connection to earthquakes, also apparently derived from the purported study, is also inadequate.) Thus, there is an insufficient basis for the claim concerning the generic resolution of the Thermo-Lag issue, as applied at Diablo Canyon. This aspect of the contention is accordingly rejected.

On the other hand, the portion of the contention applying to the interim corrective action stands on a different footing. Facts are provided to support this aspect of the contention--i.e., missed fire watches and disablement of fire barriers, together with the use of Thermo-Lag at Diablo Canyon and the existence of problems with Thermo-Lag. Moreover, there is no basis for requiring

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[39] Id., at 32.

MFP to demonstrate that the interim measures will become moot by the recapture period, as asserted by the Staff. Those measures are scheduled to extend indefinitely, until superseded by a generic resolution of the issue. Terming the measures "interim" does not limit the time of their applicability.[40] In any event, as noted earlier, any corrective action found by us to be necessary would be made effective as of the date of our final decision or the license amendment, whichever comes later. Finally, required resort to 10 C.F.R. § 2.206 is not appropriate--particularly where, as here, the Staff has already unilaterally denied a similar petition.

For these reasons, MFP has met all applicable requirements for setting forth a contention concerning the interim fire-protection measures. We could provide various forms of relief, ranging from license denial to conditions designed to improve fire protection pending generic resolution of the Thermo-Lag issue. Accordingly, this contention is accepted, limited to the litigation of interim fire-protection measures.[41]

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[40]When the Commission wishes to impose a termination date for interim measures, it does so explicitly. See, e.g. 10 C.F.R. §§ 50.44(c)(3)(combustible gas control systems), 50.62(d)(ATWS requirements) and 50.63(c)(loss of all alternating current).

[41]We express no opinion with respect to the Applicant's extensive arguments (PG&E Response at 37-38, especially n. 42) concerning the litigability of generic issues, inasmuch as the issue we are accepting for litigation is not such an issue.

7. Contention VI:

> The San Luis Obispo Mothers for Peace contends that PG&E's inability to properly store and handle hazardous materials is another indication of the company's inadequate control programs and personnel. (Refer to Contentions I and II.) PG&E's violations of NRC regulations affects the health of its employees, the local environment, the integrity of safety-related equipment, and thus the safety of the general public. On this basis, PG&E's proposed license extension must be denied.[42]

a. MFP position. In support of this contention, MFP cites a number of NRC inspection reports and Notices of Violation, and a Licensee Nonconformance Report, dealing with such matters as the mislabeling of low-level waste and chemical storage containers, the failure to post properly areas in which waste is stored, the failure to perform a whole-body frisk immediately following a person's exit from a contaminated area, and the failure to include certain chemicals on a specified list. These violations or failures are said to endanger workers and have "implications for the integrity of safety-related equipment as well, thus jeopardizing the health and safety of the general public."[43]

b. Applicant and Staff positions. The Applicant opposes this contention because it involves operational issues that, in its view, are beyond the scope of this

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[42]MFP Supplement, at 31.

[43]Id., at 34-35.

proceeding. Further, it claims that the allegation that labeling and posting practices at Diablo Canyon have "implications for the integrity of safety-related equipment" lacks any basis.

The Staff claims that the asserted violations and deficiencies were discovered in a Staff inspection devoted to the Applicant's occupational radiation protection program and are relevant only to workers at the facility. It claims that MFP lacks standing to represent workers. Like the Applicant, it claims that MFP has provided no basis for its claim that the practices may affect the general public.

c. Board analysis. In our discussion of standing (supra, pp. 6, 9-10), we already ruled that MFP lacks standing to assert claims on behalf of workers. Although we believe that occupational practices affecting the public could form the basis for a contention in this proceeding (contrary to the assertion of the Applicant), we agree with both the Applicant and Staff that MFP has provided no basis for its claim of consequences to the general public. Accordingly, we are rejecting this contention.

8. Contention VII:

> The San Luis Obispo Mothers for Peace contends that the proposal to extend the operating life of the Diablo Canyon Nuclear Power Plant for an additional 15 years must be denied because of the unsolved problem of radioactive waste storage and disposal.[44]

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[44]MFP Supplement, at 35.

a. MFP position. This contention takes issue with the portion of PG&E's license amendment application dealing with the disposal of spent fuel, stating that PG&E has a contract with the Department of Energy for the disposal of spent fuel. MFP claims that there is no assured storage location, either permanent or interim, for such waste. It states that the problem should not be treated generically inasmuch as earthquakes make the Diablo Canyon spent fuel pool likely to be deformed (citing actual deformation of the spent fuel liner at PG&E's Humboldt Bay Power Plant as the result of an earthquake).

b. Applicant and Staff positions. As both the Applicant and Staff point out, this contention is barred as a matter of law from operating license and operating license amendment proceedings. As set forth in 10 C.F.R. § 51.23(a):

> The Commission has made a generic determination that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations.

See also 10 C.F.R. § 51.53(a)(Applicant's Supplement to its Environmental Report need not discuss any aspect of the storage of spent fuel within the scope of the generic determination in § 51.23); Vermont Yankee, LBP-90-6, 31 NRC at 94-95.

c. Board analysis. We agree that this contention is generally barred as a matter of law. Further, to the extent that it attempts to challenge the lack of safety of the current spent fuel pool, it is not supported by an adequate basis. The alleged defects at Humboldt Bay are not relevant to, or suggestive of, defects with regard to the Diablo Canyon spent fuel pool. Indeed, MFP has not even alleged, much less demonstrated, that the design at Humboldt Bay is any way comparable to that at Diablo Canyon.

In view of the foregoing, we decline to admit any aspect of this contention.

9. Contention VIII:

> The emergency preparedness program for Diablo Canyon Nuclear Power Plant is inadequate to protect public health and safety. The San Luis Obispo Mothers for Peace contends that until this program is revised and improved, PG&E's request for a license extension cannot be considered.[45]

a. MFP position. Petitioner cites NRC Inspection Reports 91-15 and 92-15 and a FEMA report dated April 1, 1992 as bases for its contention. The reports cite particular deficiencies in performance of the Licensee or local government noted during exercises of the Diablo Canyon Emergency Plan conducted in 1991 and 1992.

Most of the deficiencies cited by petitioners involve failures of personnel to follow procedures. These include, for instance, delays in the transmission of protective

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[45]MFP Supplement, at 38.

action recommendations (PARs) from the Licensee to the County, failure to verify reactor shutdown, failure to refer to all Annunciator Response Procedures and several instances of failure to follow procedures in the performance of emergency related tasks or communications.

These failures lead petitioners to conclude that PG&E's and County's employees are inadequately trained for emergency response and unprepared to act efficiently in an emergency. Accordingly, MFP urges the Board to deny the license amendment pending correction of the asserted deficiencies in personnel training.

b. Applicant and Staff positions. The Applicant opposes admission of this contention on two grounds. First, it claims there is no nexus between the proffered contention and the proposed license amendment because the amendment does not change the emergency plan in any way. Second, it claims that the inspection reports cited by petitioners do not provide support for the contention because all findings cited in the reports have been addressed by PG&E and closed out by NRC. The Applicant argues that the contention is beyond the scope of the proceeding and should be rejected.[46]

The NRC Staff opposes admission of this contention for the same reasons cited by the Applicant. Additionally,

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[46]PG&E Response, at 43-45.

however, the Staff argues that to be litigable in any proceeding, contentions concerning emergency planning exercises must allege that the exercise revealed a fundamental flaw in the emergency plan. A fundamental flaw is defined as a failure of an essential element of the plan that can only be corrected through a significant revision of the plan itself. Under this standard, minor or isolated problems on the day of the exercise do not constitute fundamental flaws in the emergency plan. According to the Staff, MFP has not advanced any rationale for concluding that the flaws cited in its contention are indicative of a pervasive breakdown of any essential element in the emergency preparedness program sufficient to constitute a fundamental flaw in the program. Accordingly, for reasons cited by the Applicant, and for the asserted failure to allege a fundamental flaw in the emergency plan, the Staff concludes that the contention is inadmissible.[47]

c. Board analysis. The Commission has limited the scope of litigation on emergency preparedness exercises to a consideration of whether the results of an exercise indicate that emergency preparedness plans are fundamentally flawed. It has determined that minor or ad hoc problems occurring on the day of the exercise are not relevant to licensing and may be excluded from consideration in a hearing. The

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[47]Staff Response, at 36-38.

Commission has explained that a fundamental flaw in the plan is a deficiency that would "preclude a finding of reasonable assurance that protective measures can and will be taken." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 581 (1986).

A fundamental flaw in an emergency preparedness plan has two essential components. First, the deficiency must reflect a failure of an essential element of the plan; and second, the deficiency must be sufficiently serious that it can be remedied only through a significant revision of the plan. With respect to the first factor, an essential element should be determined by reference to the 16 emergency planning standards set forth in 10 CFR § 50.47(b) and the requirements of 10 CFR Part 50, Appendix E. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 NRC 499, 505 (1988).

Deficiencies that alone do not constitute a fundamental flaw can be considered collectively provided that "they are pervasive and show a pattern of related or repeated failures associated with a particular essential element of the plan." However, "where the deficiency is the result of a particular person's failure to follow the requirements of the emergency plan itself, such deficiency is not a fundamental flaw unless that person performs a critical role under the plan and there is no backup structure or provision that would

mitigate the effects of the individual's failure." Id., at 505-06 (fn. omitted).

The second factor requires consideration of how the deficiency can be corrected. "If the involved portion of the plan itself must be reassessed and reconceived to a significant extent in order to prevent such a failure in the future, then there is a fundamental flaw." However, "where the problem can be readily corrected, the flaw cannot reasonably be characterized as fundamental." Id., at 506. "Any contention alleging that an exercise revealed a fundamental flaw in the emergency plan must address both of these factors...." Id.

In this case, the petitioner has submitted the results from three recent emergency preparedness exercises as bases for their belief that the Diablo Canyon Plan is fundamentally flawed. The contention together with the accompanying bases urge the Board to consider the individual exercise deficiencies collectively in support of petitioner's assertion that both the Applicant and local government personnel lack the requisite preparedness or training to effectively protect the public health and safety in an emergency. Training and preparedness of personnel are one of the 16 essential elements of emergency preparedness set forth in 10 C.F.R § 50.47(b)(15). To that extent, the petition partially meets the criteria for an admissible contention.

However, there is no basis provided that suggests that the cited deficiencies constitute a pervasive breakdown in a training program and the Petitioner does not address the question of actions required to remedy the deficiencies. Nothing in Petitioner's filing suggests that the Applicant's program for radiological emergency response training must be reassessed or reconceived in order to prevent such failures in the future.

The deficiencies cited by MFP appear to be attributable to individual failures to follow procedures occurring on the day of the exercise. No reason is given why such deficiencies could not be corrected by instructions to the individuals instead of restructuring the emergency plan.

Both the Applicant and Staff assert that the deficiencies have in fact been addressed by the Applicant and closed out by the Staff. While such action is not sufficient per se to cause rejection of a contention, it places a burden on petitioners under the pleading requirements of 10 C.F.R. § 2.714(b)(2) to state with specificity why the Staff remedy is inadequate and why an essential element of the plan must be reconceived. This has not been done.

The Board concludes that the Petitioner has not satisfied the Commission's particular requirements for admission of a contention based on alleged fundamental flaws in emergency preparedness exercises or its general pleading

requirements set forth in 10 C.F.R § 2.714 (b)(2). Accordingly, Contention VIII is not admitted.

10. Contention IX:

> The Emergency Preparedness program for Diablo Canyon Nuclear Power Plant is inadequate to protect the public health and safety during an earthquake. The importance of an effective program was demonstrated recently by the lack of an adequate response to the effects of Hurricane Andrew in Florida.[48]

a. MFP position. As basis for this contention, the Petitioner cites seismic dangers of the Hosgri Fault and the Commission's asserted prior refusal to consider impacts of an earthquake that either caused, or occurred coincidentally with, an accident at Diablo Canyon. The Petitioner claims that the impact of Hurricane Andrew on the Turkey Point Emergency Planning Zone demonstrates that it is unsafe for NRC to ignore effects of local natural phenomena on emergency planning for Diablo Canyon. Restricted emergency access assertedly due to storm caused road blockage at Turkey Point is cited as basis for Petitioner's assertion by analogy that earthquake damage to roads and bridges near Diablo Canyon would inhibit emergency response during a simultaneous nuclear accident. Petitioner buttresses the point with assertions that storm warnings were available at Turkey Point prior to Hurricane Andrew while earthquakes would strike suddenly and without warning at Diablo Canyon. Thus, says Petitioner, there is no assurance that PG&E or

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[48]MFP Supplement, at 40.

the local government could respond rapidly to a sudden earthquake. Finally, MFP cites a newspaper article that asserts that new seismic information exists that brings into question PG&E's assessment of ground motion during an earthquake.

The Petitioner urges that the Diablo Canyon Emergency Plan be revised to take into account new seismic information and that it include plans for a simultaneous earthquake and nuclear accident.

b. Applicant and Staff positions. The Applicant opposes admission of this contention because principles of collateral estoppel and res judicata preclude consideration of this issue. The Applicant cites prior litigation in which Petitioner was a party where issues related to simultaneous plant accident and earthquake were adjudicated and resolved by a tribunal of competent jurisdiction.[49] The Staff also opposes admission of this contention on the basis that established doctrines of collateral estoppel and res judicata prevent relitigation of issues decided against Petitioner in previous litigation.[50]

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[49]Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-12, 20 NRC 249 (1984); CLI-84-13, 20 NRC 267 (1984); San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1,287 (D.C.Cir. 1984), reh. granted, 760 F.2d 1,320 (D.C.Cir. 1985), aff'd., 789 F.2d 26 (D.C.Cir. 1986). See PG&E Response, at 45-46.

[50]Staff Response, at 39-40.

c. Board analysis. The Board concludes that litigation of issues related to simultaneous earthquake and plant accident at Diablo Canyon is prohibited by the doctrine of collateral estoppel and res judicata. The Board also concludes that MFP has not provided an adequate basis to support revisiting this issue based on new seismic information that may have been developed since the operating license hearings were held.

Petitioner attempted to save its contention at the prehearing conference by denying that it was interested in relitigating the issue of simultaneous earthquake and plant accident. It claimed instead that it was concerned about diminished resistance of the plant to earthquake stresses caused by aging components (Tr. 184-85). This claim, however, is contrary to the wording of the contention as it was filed with the Board and parties, and it came too late and with too little basis (i.e., no scientific data) to permit admission of a revised contention. For all of the foregoing reasons, Contention IX is not admitted to this proceeding.

We have every confidence, however, that the Staff has examined, or will examine, any new information bearing upon the resistance of plant structures, systems and components to earthquakes.

11. Contention X:

> The San Luis Obispo Mothers for Peace believes that PG&E is not justified in their request to extend their operating license for Diablo Canyon Nuclear Power Plant.[51]

Although not apparent from the text of the contention, MFP is here challenging the appropriateness of a "no significant hazards consideration" finding by the Staff in this proceeding. MFP admitted as much at the prehearing conference (Tr. 189). As we advised the parties and petitioner at that prehearing conference, this contention is beyond our authority to consider (Tr. 190). It is solely within the province of the NRC Staff. 10 C.F.R. § 50.58(b)(6). Accordingly, we reiterate our earlier denial of this contention (Tr. 192).

We note that, at the time of the Notice of Opportunity for Hearing in this proceeding, the NRC also sought public comment on a proposed "no significant hazards" finding. 57 Fed. Reg. 32571-72, 32575 (July 22, 1992). The Staff, to our knowledge, has not yet issued a final finding (which does no more than determine the timing of any evidentiary hearing).[52] We asked the Staff to consider this proposed contention as a public comment on the proposed finding, and the Staff agreed it would do so (Tr. 189).

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[51]MFP Supplement, at 43.

[52]At the time of the prehearing conference, the Staff had not yet made such a finding. Tr. 188.

12. Contention XI:

> The San Luis Obispo Mothers for Peace contends that before permitting the extension of PG&E's license for the Diablo Canyon Nuclear Power Plant, PG&E must weigh the costs and benefits of continued operation of the plant--as required by the National Environmental Policy Act (NEPA) 42 USC 4332.[53]

a. Parties' positions. Through this contention, MFP seeks to have an Environmental Impact Statement issued for the proposed amendments. It also seeks to have the question of need for power explored.

As the Applicant and Staff each point out, recapture amendments of the type involved here are not among those actions for which an EIS is required (10 C.F.R. § 51.20) or categorically excluded (10 C.F.R. § 51.22). They are among those for which the Staff must prepare an Environmental Assessment (EA) determining whether an EIS need be issued. 10 C.F.R. § 51.21. As of the time of the prehearing conference, the Staff had not yet prepared its EA but indicated its intent to do so in the near future (Tr. 193). The Board in the Vermont Yankee recapture proceeding noted, however, that EISs had not been prepared in any of the prior recapture actions. 31 NRC at 97-98.

b. Board analysis. Insofar as this contention seeks an EIS, therefore, it is premature. We are denying it on that basis. After the Staff issues its EA, and assuming that the EA will not call for an EIS, MFP may submit a late-filed

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[53]MFP Supplement, at 45.

contention calling for an EIS. Such a contention, to be accepted, would have to be based on substantial and significant information indicating why an EIS is called for.

As for the question of need for power, that question appears not to be open to us to explore. 10 C.F.R. §§ 51.53(a), 51.95(a), 51.106(c). We deny outright that aspect of the contention.

13. Conclusion with respect to contentions. As set forth above, we have found two of the contentions (I and one aspect of V) to meet the Commission's revised requirements for contentions. (Certain bases set forth for other contentions may also be considered under those contentions.) Coupled with our finding of standing, therefore, MFP has satisfied the intervention requirements and will be admitted as a party/Intervenor into the proceeding.

III. Other Matters

1. On December 9, 1992, the California Public Utilities Commission filed a Notice of its intent to participate as an Interested State, pursuant to 10 C.F.R. § 2.715(c). (We did not receive this Notice until December 14, 1992, subsequent to the prehearing conference.) No party opposed this request. We could not grant the request until we had formally authorized a hearing. We do so now.

2. At the prehearing conference, we advised the parties that, were we to accept any contentions, we would arrange a

telephone conference call to arrange for discovery schedules and schedules for a further prehearing conference, if necessary, and the evidentiary hearing. We plan to hold this telephone conference during the period of January 27, 1993-February 3, 1993, and will contact the parties to arrange a convenient time.

IV. ORDER

For the foregoing reasons, and in light of the entire record of this proceeding, it is, this 21st day of January, 1993

ORDERED:

1. The request for a hearing and petition for leave to intervene of the San Luis Obispo Mothers for Peace (MFP) is hereby granted.

2. MFP Contentions I and V, to the extent indicated in this Opinion, are hereby admitted.

3. MFP Contentions II, III, IV, VI, VII, VIII, IX, X and XI are hereby denied. (Certain bases for these contentions may be included in the adjudication of one or the other of the contentions we are admitting, as described in this Order.)

4. The request of the State of California Public Utilities Commission to participate as an Interested State pursuant to 10 C.F.R. § 2.715(c) is hereby granted.

5. A telephone conference call for the purpose of developing discovery schedules and considering schedules for further prehearing conferences and the evidentiary hearing is scheduled for the period of January 27, 1993-February 3, 1993, at a time to be established in the near future.

6. This Order is subject to appeal to the Commission in accordance with the requirements of 10 C.F.R. § 2.714a(particularly § 2.714a(c)). Any such appeal must be filed within ten (10) days after service of this Order.

THE ATOMIC AND LICENSING BOARD

Charles Bechhoefer, Chairman
ADMINISTRATIVE JUDGE

Dr. Jerry R. Kline
ADMINISTRATIVE JUDGE

Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland
January 21, 1993

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of

PACIFIC GAS AND ELECTRIC COMPANY

(Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2)

Docket No.(s) 50-275/323-OLA-2

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PREH. CONF ORDER (LBP-93-1) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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U.S. Nuclear Regulatory Commission
Washington, DC 20555

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Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Jerry R. Kline
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Docket No.(s)50-275/323-OLA-2
LB PREH. CONF ORDER (LBP-93-1)

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California Public Utilities Commission
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San Francisco, CA 94102

Nancy Culver, President
Board of Directors
Mothers for Peace
P. O. Box 164
Pismo Beach, CA 93448

Dated at Rockville, Md. this
22 day of January 1993

Office of the Secretary of the Commission