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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant Units 1 and 2)	Docket Nos. 50-275 OLA 50-323 OLA (Reracking of Spent Fuel Pools)

INTERVENOR MOTHERS FOR PEACE'S
RESPONSE TO INTERROGATORIES FROM
NUCLEAR REGULATORY COMMISSION STAFF

This document is in response to the interrogatories submitted by the Nuclear Regulatory Commission to the San Luis Obispo Mothers For Peace in preparation for the up-coming safety hearings on re-racking of spent fuel. The response time has been unreasonably short, especially in light of the fact that Mothers For Peace does not have the resources to pursue Contentions 2 and 3 and withdraws Contentions 2 and 3. We submit the following regarding Contention 1.

It has long been the position of the Mothers For Peace that the issue of public safety overrides any other consideration in this case. The burden of proof remains with Pacific Gas and Electric Company to demonstrate the safety of high density reracking. And, contrary to the implications of these interrogatories, it is not the responsibility of Intervenors to propose solutions to the waste storage problems of Diablo Canyon nuclear power plant. Rather, our present and past actions serve the essential

function of raising unanswered questions, and insisting that neither Pacific Gas and Electric Company nor the Nuclear Regulatory Commission may reverse the lawful precedence of safety over operator convenience.

Some of the safety problems of re-racking are a result of errors in siting this plant: "Diablo Canyon is located in an active seismic zone and the original Diablo Canyon licenses did not analyze the effect of an earthquake on this new rack design." (Ninth Circuit Court of Appeals, September 11, 1986, San Luis Obispo Mothers for Peace and the Sierra Club vs. United States Nuclear Regulatory Commission, and the United States of America; and Pacific Gas and Electric Co.)

It is not appropriate to ask a citizens' group to propose solutions to an industry-wide dilemna. Indeed, in 1973 when the public first became aware of the Hosgri Fault, Intervenors did make a proposal that would have avoided problems arising from the earthquake hazard. They filed a petition requesting the N.R.C. to halt construction while the ramifications of the Hosgri Fault on plant design could be assessed. It was denied. By 1978, even the N.R.C.'s Advisory Committee on Reactor Safeguards agreed that "It is evident ... that the design basis and criteria utilized in the seismic re-evaluation of the Diablo Canyon Station for the postulated Hosgri event are in certain cases less conservative than those that would be used for an original design."

The results of siting errors by Pacific Gas and Electric Company, pointed out in the infancy of construction by Intervenors but ignored, cannot now be handed back to Intervenors for solutions of convenience

to the operator. If there is no safe way to store the waste on-site, no safe way to transport the waste off-site, and no implementation of plans for a federal repository, then logic dictates the adoption of alternative c) offered by Mothers For Peace in their contentions: close down the plant.

Further information and documentation of Intervenor's position will be offered at the actual safety hearings. In addition, and at the very least, Mothers For Peace support the recent request of the N.R.C. by Congressman Panetta that an in-depth, scientific analysis be conducted by a body that is independent of the N.R.C. and P.G. and E. regarding the waste storage problems at Diablo Canyon nuclear power plant. (attached) Such a study should be completed preliminary to any safety hearings and form the major bases for that hearing.

Similarly, in the interests of avoiding further errors, no final decision regarding re-racking should be made until the Long Term Seismic Study has been completed.

Mothers For Peace remain committed to insuring that the safety issues of re-racking be considered fully before any amendment to the license of Diablo Canyon nuclear power plant is accepted. We insist upon similar standards from Pacific Gas and Electric Company, as well as the Nuclear Regulatory Commission.

We are unable to answer your questions on Contention 1 at this time because we do not yet have witnesses whom we plan to sponsor at a safety hearing. We will provide the information as it becomes available.

Respectfully submitted,

Betsy Umhofer

Betsy Umhofer for
Mothers For Peace

Honorable Nunzio J. Palladino
Chairman
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C. 20555

Dear Mr. Chairman:

I am writing to express my serious concern about the implications of the proposed reracking of spent fuel pools at the Diablo Canyon nuclear power plant, and to request that a full and independent review of this matter be conducted as expeditiously as possible.

As you know, Pacific Gas and Electric Company has proposed to address the problem of on-site storage of nuclear waste at Diablo Canyon by increasing the capacity of the temporary spent fuel storage pools at the facility. The utility has requested amendments to the operating license of the plant which involve the replacement of the current spent fuel racks, which are bolted to the floor of the pools, with free-standing racks capable of holding five times the capacity of the original racks. The commission approved the amendments without a thorough technical review of the proposal and without holding prior hearings on the issue.

As you know, the Ninth Circuit Court of Appeals has recently issued a stay order prohibiting storage of spent fuel in the new racks until a safety hearing has been held to consider the issue. The court found that the proposed reracking would create the possibility of a new type of accident not previously studied by the NRC, because the new racks would be free-standing and could collide during an earthquake. Clearly, this matter must be resolved before the utility should be allowed to proceed to address the problem of waste storage at the facility. My concern is that the issues raised in this case must be the subject of a full and unbiased review before the time of the safety hearing, in order for the Commission to make fair and balanced judgements on the reracking issue.

I understand that despite clear Congressional intent that doubtful or borderline cases should not be resolved with a finding of no significant hazards consideration, the Commission made such a finding in approving the license amendments. Surely, the unique circumstances involved at Diablo Canyon warrant the most thorough review of the reracking proposal possible. As you are well aware, the plant itself was designed to withstand a "worst-case" earthquake measuring 7.5 on the Richter Scale. That the proposal to increase the storage capacity of the waste storage ponds several times over would be given nothing more than a perfunctory review seems to me indefensible.

In fact, the Court has ruled that the Commission violated its own regulations in finding no significant hazards consideration with respect to the Diablo Canyon amendments. I am deeply concerned that the Commission's decision may be yet another example of an effort to conceal relevant safety information from the public. On every occasion that I have become involved in the controversy over Diablo Canyon, whether it

was because of evidence of design flaws or the failure to consider earthquakes in emergency planning, I have urged the Commission to make every effort to ensure that the trust of the people is maintained. Unfortunately, it seems that the decision to grant this significant license amendment under the cloak of a no significant hazards consideration represents business as usual for the Commision.

Now that the court has ordered the public hearing the Commission should have held as a matter of course, an independent technical review is mandated. I strongly urge you therefore, to take the necessary steps to ensure that such a review is conducted. I believe that this action will help restore public confidence in the Commission's commitment to public safety.

Thank you for your time and consideration. I look forward to hearing from you in the near future.

Sincerely,

LEON E. PANETTA

LEP/pt

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE and THE SIERRA CLUB, Petitioners, vs. UNITED STATES NUCLEAR REGULATORY COMMISSION, and the UNITED STATES OF AMERICA, Respondents, and PACIFIC GAS AND ELECTRIC COMPANY, Respondent-Intervenor.	No. 86-7297 OPINION

Argued and Submitted
August 13, 1986 -- San Francisco, California

Petition to Review a Decision of the United States Nuclear Regulatory Commission

Before: MERRILL, NELSON and WIGGINS, Circuit Judges.

NELSON, Circuit Judge:

San Luis Obispo Mothers for Peace and the Sierra Club (petitioners) challenge an order of the Nuclear Regulatory Commission (NRC) granting operating license amendments for Units 1 and 2 of the Diablo Canyon Nuclear Power Plant (Diablo Canyon). The license amendments permit Pacific Gas & Electric Company (PG&E) to expand the capacity of the on-site radioactive spent

fuel storage pools at Diablo Canyon. The NRC found that the license amendments involved "no significant hazards consideration" and made them immediately effective without prior public hearings. Because the NRC violated its own regulations in finding no significant hazards consideration with respect to the Diablo Canyon amendments, we reverse this finding and remand to the NRC for the public hearings contemplated by the Atomic Energy Act.

BACKGROUND

Nuclear reactors are operated with fuel contained in rods that are placed in the core of the reactor. As the reactor is operated, radioactive byproducts gradually accumulate in the fuel rods. Eventually, the rods must be removed from the reactor and replaced. The exhausted fuel rods, known as "spent" fuel rods, are placed in pools of water near the reactor. After a period of storage near the reactor, the rods are removed for some other form of permanent waste disposal. See generally Lower Alloways Creek Township v. United States Nuclear Regulatory Commission, 481 F.Supp. 443, 445 (D.N.J. 1979).

Under PG&E's original licenses for Diablo Canyon, spent nuclear fuel rods were to be stored on stationary racks secured to the bottom of two pools filled with water, one pool for each of the two units at the plant. Each pool contained racks with 270 spent fuel assembly spaces. PG&E's amended license allows the storage of the spent fuel rods in free-standing racks not anchored to the base of the pools that contain 1324 spent fuel assembly

spaces in each pool. The change in the configuration of the racks in the pools is referred to as "reracking."

In October 1985, PG&E requested license amendments to permit reracking of the pools. The need for increased storage capacity seems to have been caused by the realization that federal storage facilities for spent nuclear fuel rods would not be available until at least 1998. Under the old configuration of the pools, Diablo Canyon's storage capacity would be exhausted by 1990.

In January 1986, the NRC published a notice of these proposed amendments to the Diablo Canyon licenses. This notice included a proposed no significant hazards consideration determination. Petitioners timely intervened and requested a hearing. On May 30, 1986, prior to any hearings and based on a staff finding of no significant hazards consideration, the NRC approved the proposed license amendments and made them immediately effective. PG&E began reracking the pool for Unit 1 the next day.

Petitioners then sought stays from both the NRC and this court. On July 2, this court enjoined the reracking of Unit 2 and permitted PG&E to proceed with the reracking on Unit 1 at its own risk. The court further ordered that PG&E not use the pool for the storage of radioactive nuclear waste pending further order of the court.

On July 22, the NRC modified its May 30 order in response to petitioners' stay request. The NRC order now permits reracking of the spent fuel pools prior to the hearing petitioners have requested, but prohibits PG&E from storing more spent fuel in the pools than authorized by the original licenses until the

conclusion of the hearing. On August 5, 1986, petitioners amended their petition for review to include the NRC's latest order.

ANALYSIS

Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(1982), sets forth the hearing framework for the amendment of licenses for nuclear power plants. The Act provides that "[i]n any proceeding . . . for the granting, suspending, revoking, or amending of any license . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." Id. (emphasis added). The hearing shall be held after thirty days' notice and publication in the Federal Register. The NRC "may dispense with such thirty days' notice and publication . . . upon a determination by the Commission that the amendment involves no significant hazards consideration." Id.

Prior to 1980, if the NRC staff found that a license amendment presented no significant hazards consideration, the staff issued the amendment without notice or an opportunity for a prior hearing. 42 U.S.C. § 2239(a)(1)(1962)(amended 1982). In Sholly v. Nuclear Regulatory Commission, 651 F.2d 780 (D.C. Cir. 1980), vacated to consider mootness, 459 U.S. 1194 (1983), the District of Columbia Circuit held that the NRC could not make an amendment immediately effective in this manner if there was an outstanding request for a hearing. This decision prompted an amendment to Section 189a, enacted in 1982, known as the "Sholly" amendment. This amendment provides, in pertinent part, that:

> The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

42 U.S.C. § 2239(a)(2)(A)(1982). The amendment also provides that the NRC shall promulgate detailed regulations for making a no significant hazards consideration determination. 42 U.S.C. § 2239(a)(2)(C)(1982).

Under the NRC's regulations, the NRC may make a license amendment immediately effective only if the amendment does not:

> (1) Involve a significant increase in the probability or consequences of an accident previously evaluated; or
>
> (2) Create the possibility of a new or different kind of accident from any accident previously evaluated; or
>
> (3) Involve a significant reduction in a margin of safety.

10 C.F.R. § 50.92. Although the NRC did consider these amendments in accordance with the form of the regulations set forth above, its analysis of the second standard is contradictory and in direct contravention of Congressional intent in enacting the Sholly amendment.

The Conference Committee Report accompanying the Sholly amendment, which is entitled to great weight in analyzing Congressional intent, see American Jewish Congress v. Kreps, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978), expressly states that the implementing regulations "should ensure that the NRC staff does not resolve doubtful or borderline cases with a finding of no significant hazards consideration." House Conference Report No. 97-884, at p.37, reprinted in 1982 U.S. Code Cong. & Ad. News 3607. The Conference Committee Report further states that the standards "should not require the NRC staff to prejudge the merits of the issues raised by a proposed license amendment." Id. The regulations thus appropriately require a hearing before the proposed license amendment becomes effective whenever the amendment creates the possibility of a new or different kind of accident. Petitioners have identified such an accident and they should have been granted a prior hearing.

The change from racks bolted to the floor of the the pools to free-standing racks creates the possibility that, in the event of an earthquake, the racks will collide with the walls of the pools or with each other, enhancing the risk of a nuclear reaction occurring in the pools. Diablo Canyon is located in an active seismic zone and the original Diablo Canyon licenses did not analyze the effect of an earthquake on this new rack design. The license amendments thus would seem to create the possibility of a new or different kind of accident.

The NRC does not deny that the specific kinds of accidents petitioners identify -- racks colliding with each other and with

the walls of the pools -- were not analyzed in connection with the original licenses. The NRC also admits that petitioners' claims are sufficiently serious to justify a later hearing. At the same time, however, the NRC seeks to support its finding of no significant hazards consideration by a technical analysis of why petitioners' claims lack merit. See NRC Memorandum and Order dated July 22, 1986, at 12-15. The NRC attacks certain of the assumptions underlying petitioners' contentions and concludes that the new racks "have been designed to meet the seismic force requirements previously applied to the originally intended bolted racks." Id. at 13. The NRC's arguments amount to an assertion that, because the possibility of a nuclear reaction occurring in the pools in the event of an earthquake was analyzed in connection with the original operating licenses, and because the NRC staff is satisfied that the new racks will not increase the possibility of a nuclear reaction occurring in the pools in the event of an earthquake, no new or different kind of accident is implicated by the amendments.

The very process by which the NRC attempts to rebut petitioners' contentions constitutes a tacit admission that the amendments do create the possibility of a new or different kind of accident. The claims are at least serious enough to warrant a later hearing. The NRC's own regulations require that a hearing be held before the amendments are made effective when there is a possibility of a new or different kind of accident. These regulations are in accordance with the Congressional directive that doubts be resolved in favor of a prior hearing and that the

NRC staff not prejudge the merits of a proposed license amendment. A prior hearing is required in this case.

Because we find the NRC's action to have been impermissible under its own regulations, we need not reach petitioners' additional arguments concerning the Atomic Energy Act, the Nuclear Waste Policy Act, and the National Environmental Protection Act (NEPA). With respect to petitioners' NEPA claims, however, we note that the site specific environmental assessment was based on a seven year old generic environmental assessment and that no worst case analysis, 40 C.F.R. § 1502.22, appears to have been conducted. We strongly suggest that any doubt concerning the need to supplement the NEPA documents be resolved in favor of additional documentation.

CONCLUSION

The NRC failed to comply with its own regulations in denying petitioners a hearing prior to making the Diablo Canyon reracking license amendments effective. Accordingly, the existing stay of those amendments is continued. PG&E shall not deposit any spent fuel rods in the pool for Unit 1 and shall not rerack the pool for Unit 2 until hearings have been held in compliance the the requirements of the Atomic Energy Act.[1/]

REVERSED AND REMANDED.

WIGGINS, Circuit Judge, will file his views separately.

1/ PG&E may, of course, elect to return the racks to the original configuration in accordance with its existing operating licenses and may then use the spent fuel pools prior to completion of the hearings.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the Matter of	Docket Nos. 50-275
	50-323
PACIFIC GAS AND ELECTRIC COMPANY	
	(Reracking of Spent Fuel Pools)
(Diablo Canyon Nuclear Power Plant Units 1 and 2)	

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 1986, copies of Intervenor Mothers For Peace's Responses to Interrogatories from Nuclear Regulatory Commission have been served on the following by deposit in the United States mail.

B. Paul Cotter, Jr., Chairman
Administrative Judge
Atomic Safety and Licensing
Board Panel
US Nuclear Regulatory Commission
4350 East West Highway 4th Floor
Bethesda, MD 20814

Glenn O. Bright
Administrative Judge
Atomic Safety and Licensing
Board Panel
US Nuclear Regulatory Commission
4350 East West Highway 4th Floor
Bethesda MD 20814

Dr. Jerry Harbour
Administrative Judge
Atomic Safety and Licensing
Board Panel
US Nuclear Regulatory Commission
4350 East West Highway 4th Floor
Bethesda MD 20814

Docketing and Service Branch
Office of the Secretary
US Nuclear Regulatory Commission
Washington DC 20555

Lawrence Chandler, Esq.
Henry J. McGurren, Esq.
Office of Executive Legal Director
US Nuclear Regulatory Commission
Maryland National Bank Building
Room 9604
7735 Old Georgetown Road
Bethesda MD 20814

Lewis Shollenberger
Regional Counsel
US Nuclear Regulatory Commission
Region V
1450 Maria Lane, Suite 210
Walnut Creek CA 94596

Atomic Safety and Licensing
Board Panel
US Nuclear Regulatory Commission
Washington DC 20555

Mr. Lee M. Gustafson
Pacific Gas and Electric Company
1726 M Street NW Suite 1100
Washington DC 20036-4502

Janice E. Kerr, Esq.
Public Utilities Commission
5246 State Building
350 McAllister Street
San Francisco, CA 94102

Nancy Culver
192 Luneta Street
San Luis Obispo, CA 93401

Atomic Safety and Licensing
Appeal Board Panel
US Nuclear Regulatory Commission
Washington DC 20555

Diablo Canyon Service List

Dr. Richard Ferguson
Vice-Chairman
Sierra club
Rocky Canyon Star Route
Creston CA 93432

Dian M. Grueneich
Grueneich & Lowry
345 Franklin Street
San Francisco, CA 94102

Jacquelyn Wheeler
2455 Leona Street
San Luis Obispo, CA 93401

Laurie McDermott, Coordinator
C.O.D.E.S.
731 Pacific Street Suite #42
San Luis Obispo CA 93401

Rita Mills
San Luis Obispo County
Telegram-Tribune
1321 Johnson Avenue
San Luis Obispo CA 93406

Richard E. Blankenburg
Co-publisher
South County Publishing Company
P.O. Box 460
Arroyo Grande CA 93420

Bruce Norton
c/o P.A. Crane
Pacific Gas and Electric Company
77 Beale Street, 31st Floor
San Francisco, CA 94106

Betsy Umhofer
for Mothers For Peace

Dated October 3, 1986 in San Luis Obispo, California