LBP-24-06

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Jeremy A. Mercer, Chair
Nicholas G. Trikouros
Dr. Gary S. Arnold

In the Matter of: PACIFIC GAS AND ELECTRIC COMPANY (Diablo Canyon Nuclear Power Plant, Units 1 and 2)	Docket Nos. 50-275-LR-2 50-323-LR-2 ASLBP No. 24-983-02-LR-BD01 July 3, 2024

MEMORANDUM AND ORDER
(Denying Request for Hearing and Terminating Proceeding)

With this Order, we chronicle yet another chapter in the ongoing narrative of the Diablo Canyon Nuclear Power Plant. In this chapter, Pacific Gas & Electric Company ("PG&E") seeks to extend its current operating licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2, for an initial twenty-year period, extending those licenses until November 2, 2044, and August 26, 2045, respectively. Three non-profit groups seek to intervene, based upon representational standing, and oppose PG&E's application: San Luis Obispo Mothers for Peace ("Mothers for Peace"), Friends of the Earth ("Friends"), and Environmental Working Group ("Group") (collectively, "Petitioners"). Petitioners posit three joint contentions, raising safety and environmental issues related to seismic risk, challenging the aging management program for embrittlement of the Unit 1 reactor pressure vessel, and claiming PG&E failed to comply with the Coastal Zone Management Act. While we don't know how the narrative ends, we do know this chapter will end with this Order. Although we conclude that each Petitioner has standing, we also determine that none of the three contentions are admissible. Accordingly, we deny the Petition and terminate this proceeding.

I. BACKGROUND

A. Procedural Background and Filings.

On November 7, 2023, PG&E applied to renew the operating licenses for Diablo Canyon Nuclear Power Plant, Units 1 and 2, for another twenty years, extending those licenses until November 2, 2044, and August 26, 2045, respectively ("LRA").[1] After receiving the LRA, the Nuclear Regulatory Commission ("NRC") Staff ("Staff") announced in the Federal Register an opportunity to request a hearing to contest the LRA, no later than March 4, 2024.[2] The California Energy Commission ("CEC") submitted a timely request to participate as a non-party in this proceeding, pursuant to 10 C.F.R. § 2.315(c).[3]

Petitioners initially emailed their hearing request ("Petition") to the agency's Hearing Docket email address and to counsel for PG&E and the Staff on March 4, 2024.[4] They did not file the Petition via the E-Filing system until March 5, 2024.[5] This Licensing Board ("Board") admonished Petitioners regarding the timeliness of future filings but deemed the Petition timely, concluding there was no prejudice as counsel for PG&E and the Staff received the Petition on March 4, 2024.[6]

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[1] See Diablo Canyon, Units 1 and 2, License Renewal Application (Nov. 7, 2023) at 1-1 (Agencywide Documents Access and Management System ["ADAMS"] Accession No. ML23311A154).

[2] See 88 Fed. Reg. 87,817 (Dec. 19, 2023).

[3] See Request of the [CEC] to Participate as Non-Party Pursuant to 10 C.F.R. § 2.315(c) (Mar. 4, 2024).

[4] See Email from Diane Curran, Counsel for Petitioners, to Hearing Docket (Mar. 5, 2024) (in March 4, 2024 e-mail that is part of e-mail string, indicating that Petitioners had submitted and served their hearing petition by e-mail on March 4, 2024, because of issues getting access to the agency's E-Filing system); see also Request by [Petitioners] for Hearing on [PG&E's] License Renewal Application for the Diablo Canyon Nuclear Plant (Mar. 4, 2024) at 23.

[5] See Electronic Hearing Docket (ADAMS Accession Nos. ML24065A433, ML24065A434, ML24065A435, and ML24065A436).

[6] See Licensing Board Memorandum and Order (Initial Prehearing Order) (Mar. 13, 2024) at 1–4 (unpublished).

On March 7, 2024, the Secretary of the Commission ("Secretary") referred both the Petition and the CEC's request to participate as a non-party to the Chief Administrative Judge of the Atomic Safety and Licensing Board Panel for further action.[7] That same day, the Chief Administrative Judge designated this Board to rule on standing and contention admissibility matters and, if necessary, to preside at any hearing.[8]

PG&E and the Staff timely filed their Answers on March 29, 2024.[9] The CEC did not file an Answer. Petitioners timely filed a consolidated Reply to both Answers on April 5, 2024.[10]

On May 22, 2024, the Board heard oral argument related to Petitioners' standing and the admissibility of Petitioners' proposed contentions. Petitioners, PG&E, and the Staff all appeared and argued through counsel. The nearly four-hour oral argument was conducted in-person in the Panel's Hearing Room in Rockville, Maryland, was webcast and accessible via a listen-only telephone line, and was transcribed.[11] This Memorandum and Order issues within 45 days of the oral argument.[12]

B. Other Recent Filings by Petitioners Related to Diablo Canyon.

As we stated at the beginning, we are chronicling but one additional chapter in the ongoing narrative of Diablo Canyon. Others are writing their own chapters, simultaneously with this one. Before we continue with this chapter, we pause momentarily to set out a summary of

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7 See Memorandum from Carrie M. Safford, Secretary, to E. Roy Hawkens, Chief Administrative Judge (Mar. 7, 2024) (referring Petitioners hearing request); Memorandum from Carrie M. Safford, Secretary, to E. Roy Hawkens, Chief Administrative Judge (Mar. 7, 2024) (referring CEC request to participate as a non-party).

8 See [PG&E]; Establishment of Atomic Safety and Licensing Board, 89 Fed. Reg. 18,443 (Mar. 13, 2024).

9 See [PG&E's] Answer Opposing the Hearing Request Filed by [Petitioners] (Mar. 29, 2024) ("PG&E Answer"); NRC Staff Answer Opposing [Petitioners'] Hearing Request (Mar. 29, 2024) ("Staff Answer").

10 See Reply by [Petitioners] to Oppositions to Request for Hearing on [PG&E's LRA] for the Diablo Canyon Nuclear Plant (Apr. 5, 2024) ("Reply").

11 See Tr. at 1–150.

12 See 10 C.F.R. § 2.309(j).

some of the other chapters being written as there is some overlap with this one on myriad issues.

On September 14, 2023, Mothers for Peace and Friends petitioned the Commission to (1) "convene a hearing on a license amendment effectively issued by the NRC Staff to [PG&E] by letter of July 20, 2003 extending the schedule for conducting surveillance of the Diablo Canyon Unit 1 pressure vessel until 2025"; (2) "exercise their discretionary supervisory jurisdiction to order the immediate closure of Diablo Canyon pending the completion of a series of remedial actions," including "comprehensive testing and inspection of the Unit 1 reactor vessel"; and (3) hold a public hearing "before Unit 1 is allowed to resume operation."[13] Mothers for Peace and Friends attached to that petition a 2023 Declaration from their expert in this proceeding.[14] On behalf of the Commission, on October 2, 2023, the Secretary denied Petitioners' request for a hearing and, pursuant to 10 C.F.R. § 2.206, referred Petitioners' request for immediate closure of Diablo Canyon Unit 1 to the NRC Executive Director for Operations ("EDO").[15]

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[13] Request to the NRC Commissioners by [Mothers for Peace] and [Friends] for a Hearing on NRC Staff Decision Effectively Amending Diablo Canyon Unit 1 Operating License to Extend the Schedule for Surveillance of the Unit 1 Pressure Vessel and Request for Emergency Order Requiring Immediate Shutdown of Unit 1 Pending Completion of Tests and Inspections of Pressure Vessel, Public Disclosure of Results, Public Hearing, and Determination by the Commission that Unit 1 Can Safely Resume Operation (Sept. 14, 2023) at 1–3 (ADAMS Accession No. ML23257A302).

[14] See id. at attach. 1 (Decl. of Digby Macdonald, Ph.D. in Support of Hearing Request and Request for Emergency Order by [Mothers for Peace] and [Friends] (Sept. 14, 2023)) ("2023 Macdonald Decl."). This same declaration is attached as the latter part of exhibit 3 to Petitioners' hearing request in this proceeding. See Petition ex. 3 (Decl. of Digby Macdonald).

[15] See Secretary Order (Denying Hearing Request and Referring Request for Immediate Action to the Executive Director for Operations for Consideration Under 10 C.F.R. § 2.206) (Oct. 2, 2023) (unpublished) (ADAMS Accession No. ML23275A225). By way of an email dated March 8, 2024, the Petition Review Board ("PRB") conveyed its initial assessment that the petition did not meet the Management Directive 8.11 acceptance criteria for consideration under Section 2.206 but gave Mothers for Peace and Friends until March 15, 2024, to request a public meeting on the petition. See E-Mail from Natreon Jordan, NRC, to Diane Curran, Counsel for Mothers for Peace, and Hallie Templeton, Counsel for Friends (Mar. 18, 2024) (ADAMS Accession No. ML24058A103). The PRB held a transcribed virtual public meeting with counsel

Then on March 4, 2024, concurrent with emailing the Petition now pending before this Board, Petitioners filed another request with the Commission asking for the immediate shutdown of Diablo Canyon Nuclear Power Plant, Unit 1, this time "due to the unacceptable risk of a seismically induced severe accident."[16] Petitioners attached to that petition a declaration from their seismic expert in this proceeding.[17] Pursuant to 10 C.F.R. § 2.206 and on behalf of the Commission, the NRC Secretary again referred Petitioners' request for immediate shutdown to the EDO.[18]

On another front, on March 20, 2024, Mothers for Peace and Friends filed with the United States Court of Appeals for the Ninth Circuit an appeal of the NRC Secretary's October 2, 2023 Order denying their pressure vessel-related shutdown request.[19] Petitioners requested that NRC decisions in 2008, 2010, 2012, and 2023 that "cumulatively extended, by a period of more than fourteen years and perhaps indefinitely, the schedule for withdrawing 'Capsule B' from the Unit 1 pressure vessel and testing it for embrittlement" (1) be declared to be unlawfully

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for Mothers for Peace and Friends on April 29, 2024, and obtained additional information. See Letter from Jamie Pelton, Office of Nuclear Reactor Regulation ("NRR"), NRC, to Diane Curran, Counsel for Mothers for Peace, at 2 (ADAMS Accession No. ML24155A218). After consideration of that additional information, the PRB concluded that the petition still did not meet the Management Directive 8.11 acceptance criteria. See id.

16 Petition by [Petitioners] for Shutdown of Diablo Canyon Nuclear Power Plant Due to Unacceptable Risk of Seismic Core Damage Accident (Mar. 4, 2024) at 1 (ADAMS Accession No. ML24067A066).

17 See id. at ex. 2 (Decl. of Peter Bird, Ph.D. (Mar. 4, 2024)).

18 See Secretary Order (Mar. 12, 2024) (unpublished) (ADAMS Accession No. ML24072A529). In a May 15, 2024 email, the PRB conveyed its initial assessment that the petition did not meet the Management Directive 8.11 acceptance criteria but afforded Petitioners until May 29, 2024, to request a public meeting on the petition. See E-mail from Peter Buckberg, NRC, to Diane Curran, Counsel for Mothers for Peace, Hallie Templeton, Counsel for Friends, and Caroline Leary, Counsel for Group (May 15, 2024) (ADAMS Accession No. ML24136A162). Petitioners apparently requested such a public meeting on this PRB determination as well, as one was scheduled for June 25, 2024. See Notice of Meeting between petitioners and the NRC PRB Regarding a [10 CFR § 2.206] Petition Submitted on March 4, 2024 (L-2024-CRS-0000) (May 29, 2024) (ADAMS Accession No. ML24150A137).

19 See Petitioners' Opening Brief, [Mothers for Peace & Friends] v. U.S. NRC, No. 23-3884 (9th Cir. Mar. 20, 2024).

issued amendments or revocations of a license condition imposed on PG&E in 2006; and (2) be reversed and vacated.[20] Petitioners also requested that the Commission be ordered to grant a hearing on whether it should have issued any of the four extension decisions and to "expedite the hearing and any other response to the Court's decision that may be required."[21]

Finally, the Ninth Circuit recently issued its decision on a separate appeal filed by Petitioners.[22] In that decision, the Ninth Circuit determined, among other things, that the NRC's decision to grant PG&E's request for an exemption to the deadline for applying for a license renewal for the continued operation of the Diablo Canyon Nuclear Power Plant and continue those operations while the application is pending was not arbitrary, capricious, or contrary to law.[23]

C. Contentions and Responses Thereto.

Given this chapter is limited to whether Petitioners have standing and have submitted at least one admissible contention, we now turn back to that part of the story. As noted above, Petitioners proffer three proposed contentions in this proceeding that concern both environmental and safety issues. We outline here, briefly, the contentions and responses thereto.

1. Contention 1 – Seismic core damage accidents.

Contention 1 challenges the "unacceptable safety risk and significant adverse environmental impact of seismic core damage accidents" at Diablo Canyon.[24] Thus, Petitioners argue, renewal of PG&E's operating license would violate the Atomic Energy Act's mandate to

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20 Id. at 7, 43.

21 Id. at 43–44.

22 See San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission, 100 F.4th 1039 (9th Cir. 2024).

23 Id. at 1045.

24 Petition at 7.

"'provide adequate protection to the health and safety of the public.'"[25] Petitioners also allege that operation of Units 1 and 2 in the license renewal term poses "significant" or "LARGE" adverse environmental impacts, rather than "SMALL" impacts as asserted by PG&E in its Environmental Report ("ER"), and "[a]s required by the National Environmental Policy Act ("NEPA"), … the [ER] should weigh the costs and benefits of the alternative that would avoid these impacts: closing [Diablo Canyon Power Plant] on the reactors' current 2024/2025 retirement dates," i.e., the no-action alternative.[26]

In its Answer, PG&E argues that Contention 1 is inadmissible in its entirety.[27] PG&E argues the contention's safety-related aspect is inadmissible because Petitioners fail to identify or challenge any specific portion of PG&E's Safety Application[28] and fail to provide the supporting reasons for each dispute, as required to raise a genuine dispute with the LRA on a material issue of law or fact. PG&E further argues the safety-related aspect of Contention 1 is inadmissible because Petitioners impermissibly challenge current licensing basis ("CLB") matters[29] and NRC regulatory policy, both of which are outside the scope of this proceeding.[30]

As for the environmental aspect of Contention 1, PG&E argues it is inadmissible because Petitioners (1) impermissibly challenge the generic analysis of severe accident impacts codified in NRC regulations without a waiver request, thereby exceeding the scope of this proceeding; and (2) disregard the relevant no-action alternative analysis in the ER, thus failing to raise a genuine dispute with the ER.[31]

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25 Id.

26 Id. at 7, 12.

27 See PG&E Answer at 21.

28 PGE defines the Safety Application to be everything in its LRA except the ER. See id. at 6, n.23. We use that same term herein.

29 See below note 164 for definition of CLB.

30 See id. at 21–30.

31 See id. at 30–36.

In its Answer, the Staff argues that Contention 1 is inadmissible because it raises issues that are not unique to license renewal and are addressed by rulemaking or on a generic basis, thus exceeding the scope of license renewal.[32] The Staff also argues that Petitioners' seismic-risk arguments and the environmental-impact arguments, to the extent they involve site-specific issues, do not show a genuine dispute with the LRA on a material issue of law or fact "because Petitioners neither reference or dispute specific portions of the license renewal application, nor provide the supporting reasons for these disputes."[33]

In their Reply, Petitioners affirm their previous arguments that the safety and environmental claims within Contention 1 are admissible. Petitioners concede the Safety Application normally is not required to address issues of seismic risk as this is not an issue unique to license renewal.[34] But they then cite a portion of testimony by NRC Chair Hanson before the Senate Committee on Environment and Public Works about reexamining seismic risks during the license renewal process for Diablo Canyon as being a "formal commitment" that means the safety contention is within the scope of this proceeding.[35] In other words, Petitioners allege the Chair's testimony established that seismic risk is "material" to the NRC's license renewal decisions, rendering in-scope their safety claim.[36] As to their environmental claims, Petitioners argue they raise a genuine dispute within the scope of the proceeding because Chair Hanson's testimony "logically encompasses the environmental risks posed by extended operation of [Diablo Canyon Power Plant]."[37]

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32 See Staff Answer at 22.

33 Id. at 22, 32.

34 See Reply at 6.

35 Id. at 6–7.

36 Id. at 7.

37 Id. at 11. Petitioners also maintain that neither Section 2.6 nor Section 7 of the ER "discusses the environmental or socioeconomic benefits of avoiding the potentially catastrophic effects of a seismically induced core damage accident." Id. at 12. Because these assertions were not included in the Petition, we do not consider them. See also below pp. 52–53.

2. Contention 2 – Unit 1 reactor pressure vessel embrittlement.

Contention 2, a safety contention, states that "PG&E's license renewal application does not include an adequate plan to monitor and manage the effects of aging due to embrittlement of the Unit 1 reactor pressure vessel ('RPV') or an adequate time-limited aging analysis ('TLAA'), as required by 10 C.F.R. § 54.21."[38]

PG&E argues Contention 2 is inadmissible because Petitioners do not identify in their Petition any specific aging management plan or TLAA being challenged or the basis for challenging any of them, thereby failing to present a genuine dispute of material fact or law with the application.[39] Instead, PG&E argues, Petitioners impermissibly incorporate by reference attachments from an expert, an approach that the Commission repeatedly has rejected.[40] Additionally, PG&E states that even if such an approach were permissible, the claims within the expert opinion attachments proffer "out-of-scope challenges to [Diablo Canyon Power Plant]'s CLB, NRC regulations, and the agency's ongoing oversight activities," and "fall short of demonstrating an adequately supported genuine dispute with the LRA."[41]

In its Answer, the Staff argues Contention 2 is outside the scope of the proceeding and does not demonstrate that a genuine dispute exists with the application on a material issue of law or fact.[42] More specifically, the Staff states that Contention 2 does not "provide any explanation or references to demonstrate that its arguments actually relate to specific portions of the application and specific issues within the scope of this license renewal proceeding," and "Petitioners cannot cure this deficiency through general references to" their expert opinion

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38 Petition at 16.

39 See PG&E Answer at 39–41.

40 See id. at 41–42.

41 Id. at 37, 44.

42 See Staff Answer at 37.

attachments.[43] Lastly, the Staff argues that even if the expert opinion attachments were reviewed to satisfy the contention admissibility requirements, they address CLB issues, challenge NRC regulations without a waiver, and "do not provide the supporting reasons for any disputes with the referenced portions of the license renewal application."[44]

Petitioners argue in their Reply that PG&E and the Staff "fail to engage the specific assertions of Petitioners' expert," which demonstrate Petitioners' Contention 2 has raised a genuine dispute with the application on a material issue of law or fact.[45] They allege PG&E "disregards the fact that in Section IV of his Declaration, [Petitioners' expert] provides specific and detailed quotations from PG&E's [LRA] that demonstrate reliance by the LRA on previous results of PG&E's reactor pressure vessel ('RPV') surveillance program for its time-limited aging analysis," and that this reliance is "fundamentally inadequate."[46] Furthermore, Petitioners argue that their expert opinion attachments establish "that the LRA depends on the results of the current RPV surveillance program and related analyses for its assertions that the Unit 1 RPV can be adequately managed during the license renewal term" and, thus, the contention is within the scope of this proceeding.[47]

3. Contention 3 – Failure to comply with Coastal Zone Management Act.

Contention 3 states that "PG&E fails to demonstrate compliance with the Coastal Zone Management Act" ("CZMA") because the California Coastal Commission ("CCC") "has formally rejected PG&E's [Coastal Zone Consistency Certification] as incomplete and insufficient on multiple grounds," and PG&E "may be required to obtain a [coastal development permit]."[48]

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43 Id. at 45–46.

44 Id. at 46.

45 Reply at 13, 15.

46 Id. at 13–14.

47 Id. at 15 (emphasis omitted).

48 Petition at 18–20.

Thus, Petitioners argue the Staff "may not approve PG&E's license renewal application" for Diablo Canyon, Units 1 and 2.[49] Petitioners also argue that PG&E's ER "fails to satisfy the requirements of the NRC's own regulations mandating the content of environmental reports," namely 10 C.F.R. § 51.45(b), (c), and (d).[50]

PG&E argues in its Answer that Contention 3 is inadmissible because (1) Petitioners have not established a genuine dispute with the LRA on a material issue of law or fact; (2) their "claims rely on various factual and legal misrepresentations"; and (3) Petitioners do not identify any deficiencies in the ER.[51] PG&E claims Petitioners mischaracterize the letter from the CCC as a rejection of the Coastal Zone Consistency Certification.[52] Rather, according to PG&E, the CCC has requested that PG&E provide additional information and that any substantive review of the Consistency Certification "will not commence until [the CCC] receive[s] the missing necessary data and information."[53] PG&E states that the Petitioners have not pointed to any "unmet legal requirement to obtain the CZMA concurrence [from the CCC] at this point."[54] Petitioners also allegedly do not engage with the NRC regulatory requirements upon which they rely, namely 10 C.F.R. § 51.45(b), (c), and (d), or "detail [how] the ER fails to satisfy those standards."[55] Finally, PG&E argues that the "'potential requirement to obtain one or more coastal development permits'" from the CCC does not demonstrate "an adequately supported genuine dispute with the application on a material issue of fact or law."[56]

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49 Id. at 20.

50 Id. at 18.

51 PG&E Answer at 48.

52 See id. at 50.

53 Id. at 51 (citations omitted).

54 Id. at 52.

55 Id. at 53.

56 Id. at 54.

In its Answer, the Staff argues that Contention 3 is inadmissible because Petitioners do not show that a genuine dispute exists with the application on a material issue of law or fact.[57] More specifically, the Staff states that Petitioners "do not establish that the [LRA] fails to contain information required by the NRC's regulation at 10 C.F.R. § 51.45(d)."[58] Additionally, the Staff argues that as Petitioners "demand a state agency's final concurrence in the application," which is a demand for "more in the application than the description of the status of compliance that is required by 10 C.F.R. § 51.45(d)," their contention is an impermissible challenge to NRC regulations without requesting a 10 C.F.R. § 2.335 waiver.[59] The Staff also points to a previous licensing board decision declining to admit a similar contention and holding that 10 C.F.R. § 51.45 and the CZMA only require a license renewal applicant to include in the LRA the consistency certification, rather than both the certification and the state agency's consistency decision or concurrence.[60]

Petitioners assert in their Reply that Contention 3 is not premature, as suggested by PG&E, because NRC regulations require that Petitioners raise contentions at the earliest possible opportunity.[61] They argue that it is "evident now that PG&E lacks an essential prerequisite for license renewal (*i.e.,* the State's concurrence with its CZMA certification)."[62] Petitioners also argue that the Victoria decision is inapplicable here because in that proceeding, the contention challenged the applicant's failure to file a consistency certification with the NRC, which then was found to be moot and dismissed by the Board once the certification was filed.[63]

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57 See Staff Answer at 46.

58 Id.

59 Id.

60 See id. at 48–49 (citing Exelon Nuclear Texas Holdings, LLC (Victoria County Station Site), LBP-11-16, 73 NRC 645 (2011)).

61 See Reply at 16–17.

62 Id. at 17 (emphasis omitted).

63 See id. at 17–18.

Here, however, PG&E has submitted a consistency certification to the NRC but, Petitioners argue, "the CCC has found it inadequate to support approval."[64] Finally, Petitioners withdraw the portion of their argument in support of this contention claiming the LRA violates NRC regulations.[65]

II. STANDING

All three Petitioners assert they have representational standing.[66] Group also alternatively argues it should be granted discretionary intervention under Section 2.309(e).[67] The tests for representational standing are found in Commission caselaw.[68] The test for discretionary intervention is found in the Commission's regulations.[69]

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64 Id. at 18.

65 See id. at 19.

66 See Petition at 1–5; Tr. at 11. Although Petitioners appear to use "organizational" standing, see Petition at 1, 5, and "representational" standing, see Petition at 2–3, interchangeably, those concepts are different. See e.g., FirstEnergy Nuclear Operating Co. (Beaver Valley Power Station, Units 1 and 2), CLI-20-5, 91 NRC 214, 220 (2020); Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 411 (2007); Crow Butte Resources, Inc. (Marsland Expansion Area), LBP-13-6, 77 NRC 253, 269 (2013); Cogema Mining, Inc. (Irigaray and Christensen Ranch Facilities), LBP-09-13, 70 NRC 168, 178–79 (2009); see also New York C. L. Union v. New York City Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012).

At oral argument, counsel for Petitioners conceded that Group "did not intend to assert that [it] had standing all on its own without its supporters." Tr. at 25. In other words, Group seeks representational standing, not organizational standing.

PG&E argues that "[n]owhere in the Petition does [Group] assert representational standing." PG&E Answer at 13. While the Board agrees that Group does not use the express term "representational standing" in the Petition, PG&E's argument elevates form over substance. For example, page one of the Petition states that "Petitioners have organizational standing to represent the interests of their members and supporters in this proceeding." Petition at 1. Additionally, the Declaration of Mr. Cook, Group's President and co-founder, concludes by stating that Group "seeks to participate in this license renewal proceeding in a good faith effort to represent our supporters' interest in protecting public health and safety and the environment from radiological accidents and contamination." Id. ex. 1(F) ¶ 7 (Decl. of Ken Cook (Feb. 2, 2024)) ("Cook Decl.").

67 See Petition at 5–6.

68 See below pp. 14–17.

69 See 10 C.F.R. § 2.309(e).

The Board has an independent obligation to ensure a petitioner has standing, even if no participant objects on standing grounds.[70] The Staff concedes that all three Petitioners have established representational standing.[71] PG&E concedes that both Mothers for Peace and Friends have established representational standing but contests Group's claim of standing and its alternative request for discretionary intervention.[72] PG&E's objections will be addressed in the relevant analysis of standing and intervention below. We conclude that all three Petitioners have demonstrated representational standing.

A. Representational Standing Test – Two Formulations.

Based upon our review, it appears there are two substantively different formulations of the representational standing test in recent Commission decisions. We set out both tests below, along with the rationale for applying the test we use.

1. Representational standing test formulation one – three elements only.

The first representational standing test formulation is epitomized by the most recent Commission decisions, from 2019 to 2022, setting forth only a three-element test. In a 2022 decision, the Commission held that "[t]o [establish representational standing], the organization must show one of its members has standing, must identify that member by name and address, and must show, preferably by affidavit, the organization is authorized to request a hearing on behalf of that member."[73]

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70 See id. § 2.309(d)(2) ("In ruling on a request for hearing or petition for leave to intervene, [the Board] must determine, among other things, whether the petitioner has an interest affected by the proceeding . . . .") (emphasis added)); Entergy Operations, Inc. (River Bend Station, Unit 1), LBP-18-1, 87 NRC 1, 6 (2018).

71 See Staff Answer at 5, 8–9; Tr. at 11.

72 See PG&E Answer at 1, 9–15; Tr. at 12.

73 Exelon Generation Co., LLC (Braidwood Station, Units 1 and 2), CLI-22-1, 95 NRC 1, 8 (2022) (citing GPU Nuclear, Inc. (Oyster Creek Nuclear Generating Station), CLI-00-6, 51 NRC 193, 202 (2000)).

These same three elements were used by the Commission in another 2022 decision as well as a 2021 decision.[74] In a 2020 dissenting opinion, where the majority did not reach the issue of standing, then-Commissioner Baran set out only a three–element test for representational standing.[75] In 2019, the Commission also employed a three-element standing test, explaining that "[a]n organization invoking 'representational' standing on behalf of members must show that 'at least one of its members may be affected by the Commission's approval of the [license] transfer,' which requires identifying the member(s) the organization purports to represent and providing written authorization of such representation."[76]

2. Representational standing test formulation two – one or two extra elements.

The second representational standing test formulation is embodied in Commission decisions from 2020 and earlier. Essentially, this second formulation includes the three

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[74] See Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant and Big Rock Point Site), CLI-22-8, 96 NRC 1, 17 (2022); Entergy Nuclear Operations, Inc. (Indian Point Nuclear Generating Station, Units 1, 2, and 3 and ISFSI), CLI-21-1, 93 NRC 1, 10 (2021) (citing Oyster Creek, CLI-00-6, 51 NRC at 202).

For reasons that will become clear in the next subsection, it is important to note the Commission stated, in the paragraph immediately preceding its three-element standing test in the Palisades case, that when "evaluating whether a petitioner has established standing, [it] has long looked for guidance to judicial concepts of standing, which require a party to claim a concrete and particularized injury (actual or threatened) that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision in the proceeding." Palisades, CLI-22-8, 96 NRC at 16.

[75] See Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station), CLI-20-12, 92 NRC 351, 403 (2020) (Baran, Comm'r, dissenting).

[76] Exelon Generation Co., LLC (Oyster Creek Nuclear Generating Station), CLI-19-6, 89 NRC 465, 481 n.87 (2019); see also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC 257, 276 (2010) (three-element test applied) (citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), CLI-00-20, 52 NRC 151, 163 (2000)). On appeal of the 2010 Diablo Canyon licensing board decision, the Commission expressly noted that Mothers for Peace's "demonstration of standing is not at issue on appeal." Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-11-11, 74 NRC 427, 431 n.16 (2011). But the Commission took no issue with the licensing board's use of a three-element standing test, which we view as significant given the independent requirement of a licensing board (and the Commission) to ensure standing exists. See 10 C.F.R. § 2.309(d)(2).

elements from the first formulation in addition to one or two other elements. An example of a test incorporating one other element is found in the Bellefonte case from 2020.

> To demonstrate representational standing, the organization must show that at least one of its members may be affected by the NRC's approval of a licensing action (for example, by the member's domicile, work, or activities on or near the site) and qualifies for standing in his or her own right. The organization must also identify the member by name and demonstrate that the member has authorized the organization to represent him or her and to request a hearing on his or her behalf. In addition, the organization must show that the interests it seeks to protect are germane to its own purpose.[77]

An example of a test adding two other elements is found in a decision in the Vogtle proceeding, also from 2020.

> In addition, an organization seeking to represent its members must show that at least one member has standing and has authorized the organization to represent her and to request a hearing on her behalf. Further, the interests that the representative organization seeks to protect must be germane to its own purpose, and neither the asserted claim nor requested relief must require an individual member to participate in the organization's legal action.[78]

The cases employing the second formulation of representational standing appear to cite, directly or indirectly, the Public Fuel Storage case from 1999 for their extra element(s).[79] There, the Commission relied upon "judicial concepts of standing" to set out a four-element test for

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[77] Nuclear Development, LLC (Bellefonte Nuclear Power Plant, Units 1 and 2), CLI-20-16, 92 NRC 511, 515 (2020) (footnotes omitted) (emphasis added).

[78] Southern Nuclear Operating Co., Inc. (Vogtle Electric Generating Plant, Unit 3), CLI-20-6, 91 NRC 225, 238 (2020) (emphasis added); see also Beaver Valley, CLI-20-5, 91 NRC at 220 (adding same two other elements); El Paso Electric Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-20-7, 92 NRC 225, 231 (2020) (adding same two other elements).

[79] See Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 323 (1999).

representational standing.[80] But, as the Commission repeatedly instructs, judicial standing concepts do not bind it or its licensing boards.[81]

3. Representational standing test to be applied here.

Recent Commission decisions employ differing representational standing tests. The extra elements for the second formulation of the representational standing test are from non-binding judicial concepts of standing. And it cannot be disputed that the different formulations of the test could lead to a different standing decision (i.e., for one formulation of the test, the purpose of the organization at issue is irrelevant while that same purpose is relevant in the other formulation). But as Mothers for Peace, Friends, and Group meet the test for representational standing, regardless of formulation, we need not attempt to resolve this apparent conflict and will employ the second formulation (with the two extra elements) for the sake of completeness.

B. Environmental Working Group Can Proceed Under the Commission's Representational Standing Test.

Before we apply the five-element representational standing test to Petitioners, we must determine whether Group can proceed thereunder. We determine it can. Group concedes it is

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[80] Id. (citing Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977)). The Commission also noted that none of those representational standing elements were contested in that proceeding, although there was a dispute over whether the organization's members had standing. See id.

[81] See, e.g., Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009) ("In determining whether a person is an 'interested person' for the purposes of a Section 189a(1)(A) standing determination, we are not strictly bound by judicial standing doctrines."); see also Entergy Nuclear Vermont Yankee, L.L.C. and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), LBP-04-28, 60 NRC 548, 552 n.8 (2004) ("The Commission and the Atomic Safety and Licensing Boards are not Article III courts and are not bound to follow judicial concepts of standing."). The licensing board in the above-cited Vermont Yankee case employed the three-element representational standing test. See id.; see also above note 74.

not a membership organization.[82] Yet Group also asserts it has "supporters," including individuals who live near the Diablo Canyon plant at issue here.[83]

In 1982, a licensing board was faced with a situation similar to Group's—a non-membership organization was seeking representational standing to represent the interests of its supporters.[84] That board noted the supporters in question each had standing, which was enough to give the organization "standing, provided those sponsors may be regarded in this instance as equivalent to members."[85] The board answered that caveat in the affirmative.[86]

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82 See Petition at 5.

83 Id. at 3, 5. Because of those supporters, Group argues that it meets the standard for representational standing set out recently by the United States Supreme Court in Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023). (Group mistakenly cites this 2023 case as having been authored and issued in 2003. See Petition at 5.) But given the prior licensing board decisions cited below, we need not resort to that Supreme Court decision to determine that Group can proceed under the representational standing test.

Yet were we to conduct the requested analysis under Students for Fair Admission, we would struggle to find that Group rises to the level of the organization in the Hunt case discussed therein, where the "growers and dealers 'alone elect[ed] the members of the Commission,' 'alone . . . serve[d] on the Commission,' and 'alone finance[d] its activities.'" Students for Fair Admission, 600 U.S. at 200 (brackets and ellipses in original). We do not see any discussion of the "indicia of membership" recognized in the Students for Fair Admission decision in the Declaration of Group's President, Mr. Cook, or elsewhere in the Petition. See Cook Decl.; Tr. at 14–15. And Petitioners' Reply undermines the "alone financed its activities" indicia from the Hunt decision, Students for Fair Housing, 600 U.S. at 200, by stating that only 61 percent of Group's funding comes from individual supporters. See Reply at 3. Moreover, when asked at oral argument about the Supreme Court's "indicia of membership" elements, counsel for Petitioners failed to direct the Board's attention to where those could be found in the submissions, opting instead to argue different items that Petitioners believed factored into the issue of membership. See Tr. at 13–16. Without Group addressing the Supreme Court's identified "indicia of membership" elements, we conclude Group does not meet the Students for Fair Admission-endorsed Hunt test.

84 See Consolidated Edison Co. of New York (Indian Point, Unit No. 2), LBP-82-25, 15 NRC 715 (1982). While not cited by Group in the Petition, we requested that all counsel be prepared to discuss this case, and the financial support status of Group's "supporters," at the oral argument. See Licensing Board Memorandum and Order (Scheduling Initial Prehearing Conference) (Apr. 2, 2024) at 3 (unpublished).

85 Indian Point, LBP-82-25, 15 NRC at 735.

86 In reaching that answer, the licensing board cited an Atomic Safety and Licensing Appeal Board decision that described an organizational entity as one with "'donor' members." Id. (citing Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2),

"Where, as here, a non-membership organization has a well-defined purpose which is germane to the proceedings, sponsors can be considered equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization."[87] That same analysis was employed by a presiding officer in 1989 to conclude

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ALAB-536, 9 NRC 402, 404 n.2 (1979)). But a review of the relevant filing by the Union of Concerned Scientists ("UCS") (the referenced organizational entity) in the underlying cited case reveals the Appeal Board was inaccurate in its use of the term "members." UCS expressly noted in its filing that it did not have members; instead, it only had sponsors. See Amendment for UCS' Petition for Leave to Intervene, and Response to NRC Staff, Consolidated Edison, and PASNY Challenges to UCS Standing to Intervene, Consolidated Edison Co. of New York (Indian Point, Unit No. 2), Docket Nos. 50-247 SP and 50-286 SP (Dec. 14, 1981) at 7–10.

[87] Indian Point, LBP-82-25, 15 NRC at 736. On appeal, the Commission declined to determine the propriety of this conclusion because it determined the organization met the discretionary intervention standard. See Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-82-15, 16 NRC 27, 31 (1982). The same circumstances do not exist here, though, as Group does not meet the standard for discretionary intervention.

Specifically, as Group asserts no additional arguments or contentions beyond what Mothers for Peace or Friends proffer, the factors in paragraphs 1(i) and (ii) and 2(i) through (iii) of Section 2.309(e) governing discretionary standing all weigh against granting discretionary intervention. See 10 C.F.R. § 2.309(e); Tr. at 31 ("They're not going to be adding anything in particular; they're going to be helping the other two parties do the best possible job of presenting the issues that we all agree are important."); see also Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 617 (1976) ("Permission to intervene should prove more readily available where petitioners show significant ability to contribute on substantial issues of law or fact which will not otherwise be properly raised or presented . . . .") (emphasis added); Tennessee Valley Authority, LBP-21-3, 93 NRC at 178 (Abreu, J. dissenting) ("Allowing discretionary intervention is rare . . . ."); Changes to Adjudicatory Process, 69 Fed. Reg. 2182, 2201 (Jan. 14, 2004) (indicating that while "[t]he Commission requested public comment on whether the standard for discretionary intervention should be extended by providing an additional alternative for discretionary intervention in situations when another party has already established standing and the discretionary intervenor may 'reasonably be expected to assist in developing a sound record,'" the Commission declined to so extend the standard.).

Petitioners' arguments in favor of discretionary intervention boil down to (1) Group's desire to be an official part of the case (as opposed to assisting Petitioners unofficially) and (2) a division-of-labor issue (the number and technical nature of the issues require Petitioners to have three lawyers of record on the case, especially as they are opposing lawyers for a large company and a federal agency). See Tr. at 29–31, 33–38. Those arguments do not address the elements of discretionary intervention. Moreover, while Petitioners urged the granting of discretionary intervention by claiming they are in a "David and Goliath situation," they seem to overlook that David prevailed in that situation. See Tr. at 30; I. Sam. 17:48–50. Petitioners also had no compelling response to the question of why Group could not advance its interests by assisting the other Petitioners unofficially, especially considering the limited role envisioned for Group. See Tr. at 31, 37–38.

that "[w]here an organization has no members, its sponsors can be considered equivalent to members where they financially support the organization's objectives and have indicated a desire to be represented by the organization."[88]

Although not binding, we are persuaded by these prior decisions that financial supporters of non-member organizations can be treated as "members" for the purpose of representational standing.[89] At oral argument, Petitioners' counsel confirmed that Ms. Parks, one of the three supporters of Group who submitted Declarations with the Petition, does support Group financially.[90] The Board asked Group to file an Amended Declaration for Ms. Parks

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88 Northern States Power Co. (Pathfinder Atomic Plant, Byproduct Material License No. 22-08799-02), LBP-89-30, 30 NRC 311, 313 (1989).

89 Cf. Georgia Institute of Technology (Georgia Tech Research Reactor), CLI-95-12, 42 NRC 111, 115 (1995) ("To evaluate a petitioner's standing, we construe the petition in favor of petitioner.").

90 See Tr. at 15; see also Reply at 3 (noting Ms. Parks' financial support of Group).

noting her financial support, which Group did.[91] Accordingly, we will apply the general representational standing test to Group, equating "supporter" with "member."[92]

C. Mothers for Peace, Friends of the Earth, and Environmental Working Group Each Have Representational Standing.

In order to establish representational standing, Mothers for Peace, Friends, and Group each must (1) establish at least one member has standing;[93] (2) identify that member by name

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91 See Tr. at 19; Notice of Filing of Supplemental Declaration of Linda Parks (May 28, 2024) attach. (Supplemental Declaration of Linda Parks (May 28, 2024)) ("Parks Supp. Decl."); see also Georgia Tech, CLI-95-12, 42 NRC at 114-17 (upholding representational standing after board allowed amended declarations to be filed to include express allegation of membership in organization).

PG&E objected that Group's failure to include in the initial declarations of its supporters the fact that they provided financial support to Group could not be remedied by way of a reply or a supplemental declaration. See Tr. at 16–17. But given the Commission's directive that when evaluating standing we are to construe the petition in favor of petitioner and given that the issue of financial support did not arise until we requested, after the Petition was filed, that the participants be prepared to discuss this issue, we consider the supplemental declaration to be submitted appropriately. See Georgia Tech, CLI-95-12, 42 NRC at 115; South Carolina Electric & Gas Co. (Virgil C. Summer Nuclear Power Station, Units 2 and 3), CLI-10-1, 71 NRC 1, 7 (2010) (Petitioners may be permitted to "demonstrate[ ] representational standing on the basis of their original and supplemental declarations."); see also Ams. For Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013) ("[I]if the parties reasonably, but mistakenly, believed that the initial filings before the court had sufficiently demonstrated standing, the court may . . . request supplemental affidavits and briefing to determine whether the parties have met the requirements for standing."). Moreover, the case cited by PG&E at the hearing to support its opposition dealt with the blatant failure of a participant to address standing elements required in the Commission's regulations. See Palo Verde, CLI-20-7, 92 NRC at 232 n.31. Here, as noted, the issue not addressed was not part of the Commission's regulations, but rather was a matter raised by the Board in an Order after the filing of the Petition involving a facet of standing that apparently has not been the subject of agency consideration for more than three decades.

PG&E also objected to application of this test because it claimed the interests to be protected by Group were not germane to its purpose. See Tr. at 18, 20–23. We will address that argument, which we reject, in discussing germaneness below at page 25.

92 This conclusion resolves PG&E's tautological opposition to Group's representational standing that, as a non-member organization, it cannot identify a "member" who has standing. See PG&E Answer at 13.

93 While the Commission's general test for individual standing is found in Section 2.309(d), the Commission also employs a standing presumption (the "proximity presumption") in proceedings involving nuclear power reactors "whereby a petitioner is presumed to have standing to intervene without the need to specifically plead injury, causation, and redressability if the petitioner lives within 50 miles of the proposed facility." Diablo Canyon, LBP-10-15, 72 NRC at 276 (citations at footnote 14 therein). See also Calvert Cliffs, CLI-09-20, 70 NRC at 915 &

and address; (3) establish that member has authorized the relevant organization to request a hearing on her behalf and to represent her;[94] (4) establish the interests the organization seeks to protect are germane to its own purpose; and (5) establish that neither the asserted claim nor requested relief will require the individual member to participate in the proceeding.[95]

After reviewing the Declarations, we conclude that each of the elements are met for representational standing. Neither PG&E nor the Staff opposed any of the five elements in their Answers.[96] Moreover, given the showing in the Declarations, the only element we need address in detail herein is the fourth—whether the interests the organizations seek to protect are germane to their own purposes.

Mothers for Peace describes itself as a "non-profit membership organization concerned with the dangers posed by Diablo Canyon and other nuclear reactors, nuclear weapons, and radioactive waste."[97] Mothers for Peace also claims to work to promote "peace, environmental

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n.15 (noting application of presumption in license renewal proceedings); San Luis Obispo Mothers for Peace, 100 F.4th at 1054–55 (noting and applying proximity presumption). Petitioners rely upon the proximity presumption here, which we determine is met.

94 While Mothers for Peace and Friends both rely on Ms. Swanson, in addition to others, for their representational standing, Ms. Swanson did not authorize Mothers for Peace or Friends to represent her in this proceeding. See Petition, ex. 1(D) (Decl. of Lucy Jane Swanson (Feb. 24, 2024)). Because authorization to represent an individual is a requirement for representational standing, see Vogtle, CLI-20-6, 91 NRC at 238 (indicating authorization to represent individual is a requirement for representational standing), neither Mothers for Peace nor Friends may rely upon Ms. Swanson for their representational standing.

95 See above pp. 15–17.

96 But see above note 91 (regarding a challenge to germaneness for Group at oral argument by PG&E).

97 Petition at 2. Although Mothers for Peace "has participated in NRC licensing cases involving the Diablo Canyon reactors since 1973," Petition at 2, we have not found in Westlaw a reported decision that analyzed whether Mothers for Peace's purpose is germane to the interests to be protected in those prior proceedings. This lack of reported analysis seems to favor application of the three-element test for representational standing. See above pp. 14–15; see also Diablo Canyon, LBP-10-15, 72 NRC at 275-76 (applying the three-element representational standing test and finding Mothers for Peace had standing to contest the 2009 license renewal application). (footnote continued)

and social justice, and renewable energy."[98] Mothers for Peace is taking the position in this proceeding that operation of the Diablo Canyon plant during a license renewal period will endanger the health and safety of those living near the plant (including its members), as well as endanger the surrounding environment.[99] Those interests appear to be germane to the purpose of Mothers for Peace. Thus, we find Mothers for Peace has demonstrated that the interests it seeks to protect here are germane to its purpose.

Friends describes itself as a "tax exempt, nonprofit environmental advocacy organization dedicated to improving the environment and creating a more healthy and just world."[100] Founded "in part to protest safety and environmental issues at the newly emerging Diablo Canyon" in 1969, Friends now has approximately 42,600 members in California alone.[101] Like Mothers for Peace, Friends is taking the position in this proceeding that operation of the Diablo Canyon plant during a license renewal period will endanger the health and safety of those living near the plant (including its members), as well as endanger the surrounding environment.[102] Those interests appear to be germane to the purpose of Friends. Thus, we find Friends has demonstrated that the interests it seeks to protect here are germane to its purpose.[103]

We are aware of a recent licensing board spent fuel storage decision, not in Westlaw, that analyzed the interests to be protected by, and the purposes of, Mothers for Peace and found those interests to be germane to the purpose. See Pacific Gas and Electric Co. (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-23-1, 98 NRC 1, 10 (2023).

98 Id.

99 See, e.g., id. ex. 1(A) (Decl. of Sherry Lewis (Feb. 24, 2024)).

100 Id. at 2.

101 Id.

102 See, e.g., id. ex. 1(A) (Decl. of Sherry Lewis (Feb. 24, 2024)).

103 We also note that the Commission agreed Friends met this standard when Friends intervened in a proceeding requiring implementation of certain interim measures by the licensee of Indian Point, Unit 2. See Indian Point, CLI-82-15, 16 NRC at 32; see also Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-15-6, 81 NRC 314, 317 n.22 (2015) (finding Friends had standing to challenge the 2009 license renewal application of Diablo Canyon).

Group describes itself as a

> non-profit, non-partisan organization that works to empower people to live healthier lives in a healthier environment. . . . In furtherance of its mission, [Group] engages in research and policy advocacy on a broad range of issues related to state and federal energy policy, climate change, renewable energy, toxic chemicals, food and agriculture, water and air pollution, and public health.[104]

As part of that work, Group claims it has "developed public education information and has submitted formal testimony about radiological risks posed by reactors and facilities for nuclear waste transportation, storage and disposal."[105] Additionally, Group claims that "as ionizing radiation is known to cause cancer in humans, [Group] provides educational and policy advocacy on radiation in drinking water."[106] Group then claims it "and its supporters are highly concerned about continued operation of the aging Diablo Canyon nuclear plant because of its high cost to taxpayers and extreme safety and environmental hazards."[107] Group is taking the position in this proceeding that operation of the Diablo Canyon plant during a license renewal period will endanger the health and safety of those living near the plant (including its financial supporter, Ms. Parks), as well as endanger the surrounding environment.[108] Those interests appear to be germane to the purpose of Group.[109] Thus, we find Group has demonstrated that the interests it seeks to protect here are germane to its purpose.

As noted above, during oral argument, PG&E asserted that Group fails to fulfill this element as it relates to the application of the test equating financial supporters with members in

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104 Cook Decl. ¶ 2.

105 Id. ¶ 4.

106 Id. ¶ 5.

107 Id. ¶ 6.

108 See Petition, ex. 1(I) (Decl. of Linda Parks (Mar. 1, 2024)) ("Parks Decl."); Parks Supp. Decl. ¶ 2.

109 Georgia Tech, CLI-95-12, 42 NRC at 115 ("To evaluate a petitioner's standing, we construe the petition in favor of petitioner.").

the 1982 Indian Point matter.[110] We find PG&E's argument to be inapposite. Essentially, PG&E's counsel argued that a licensing board in a case cited in the Indian Point decision determined that the umbrella nature of an organization precluded a finding that the interests to be protected were germane to its interests. But a closer reading of the case reveals otherwise. The board in Indian Point rejected reliance on the cited case after determining the "umbrella" group, which provided the support to its sub-unit that was seeking to intervene in the proceeding, "was so broadly based that its contributors could not be assumed to have any knowledge of, or specific interest in, the issues sought to be litigated by the sub-unit."[111] We do not face that situation here. The financial supporter, Ms. Parks, specifically identified in her declaration issues of interest to her and (1) noted Group regularly provides her with information about those issues, including data about "health risks posed by toxic and radiological contamination of consumer products and the environment"; (2) indicated she was "pleased with [Group's] work"; and (3) requested that Group represent her in advancing her identified interests.[112]

Accordingly, the Board concludes that Mothers for Peace, Friends, and Group have established representational standing.

III. ANALYSIS OF CONTENTIONS

Simply demonstrating standing is not sufficient for intervention; Petitioners also must demonstrate they have asserted at least one admissible contention.[113] The Board is aware of the limitation that, "for the purposes of contention admissibility, we do not consider the merits of

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110 See Tr. at 18, 20–23. Counsel for the Staff disagreed with PG&E on this issue, noting the broad scope of Group's work does not impact the germaneness of its purposes to the issues raised here. See Tr. at 23.

111 Indian Point, LBP-82-25, 15 NRC at 734.

112 See Parks Decl.; Parks Supp. Decl.

113 See 10 C.F.R. § 2.309(a).

[Petitioners'] arguments."[114] Relatedly, we recognize that a petitioner is not required to prove its contentions at the contention admissibility stage.[115] With those proper limits in mind, we next set forth the Commission's contention admissibility standard and then analyze each of the three contentions jointly proffered by Petitioners and conclude that Petitioners have not proffered an admissible contention.

A. Contention Admissibility Standard.

The Commission's regulations set forth a six-part test for contention admissibility.[116] To submit an admissible contention, a petition must:

> (i) Provide a specific statement of the issue of law or fact to be raised or controverted . . . ;
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> (ii) Provide a brief explanation of the basis for the contention;
>
> (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide a concise statement of the alleged facts or expert opinions that support the . . . petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the ... petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . [P]rovide sufficient information to show that a genuine dispute exists with the applicant . . . on a material issue of law or fact. This information must include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant

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[114] Diablo Canyon, CLI-11-11, 74 NRC at 443; see also, e.g., U.S. Department of Energy (High Level Waste Repository), CLI-09-14, 69 NRC 580, 591 (2009) (noting merits are to be considered at a phase other than admissibility phase).

[115] See Southern Nuclear Operating Co. (Vogtle Electric Generating Plant, Units 3 and 4), CLI-11-8, 74 NRC 214, 221 (2011); see also, e.g., Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation), CLI-04-22, 60 NRC 125, 139 (2004) ("[W]e do not expect a petitioner to prove its contention at the pleading stage . . . .").

[116] See 10 C.F.R. § 2.309(f)(1)(i)–(vi).

> matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.[117]

The failure to meet any one of the six elements for contention admissibility requires a finding that the contention is not admissible.[118] "While the Board may appropriately view Petitioners' support for its contention in a light that is favorable to the Petitioner, it cannot do so by ignoring the [contention admissibility] requirements . . . ."[119]

B. Specific Contention Admissibility Analysis.

1. Contention 1 – Continued operation of Diablo Canyon under a renewed license poses an unacceptable safety risk and a significant adverse environmental impact of seismic core damage accidents.

Petitioners frame Contention 1 as both a safety and an environmental contention.[120] We address each below but find neither aspect to be admissible.

a. Contention 1, as a safety contention, is not admissible.

The safety aspect of Contention 1 asserts that the "continued operation" of Diablo Canyon poses an unacceptable risk of core damage accidents due to earthquakes. To support this contention, Petitioners rely on their expert's analysis of the underlying geology near Diablo Canyon for a purported violation of the Atomic Energy Act's standard of providing "adequate protection to the health and safety of the public."[121] Contention 1, as a safety contention, is not admissible because it is outside the scope of this proceeding and because Petitioners have not identified, with specificity, the aspects of the LRA they contest.

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117 Entergy Nuclear Operations, Inc. (Indian Point, Unit 2), CLI-16-5, 83 NRC 131, 135–36 (2016).

118 See id. at 136.

119 Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991).

120 See Petition at 7; Reply at 5–12; see also Tr. at 43.

121 Petition at 7; Tr. at 43–45.

i. Contention 1, as a safety contention, is outside the scope of this proceeding – 10 C.F.R. § 2.309(f)(1)(iii).

The scope of a safety review on a license renewal is limited, essentially, to evaluation of the aging management program ("AMP") or TLAA for passive structures and components as set out in 10 C.F.R. § 54.4.[122] As the Commission has explained further:

> The objective of the license renewal regulations is "to supplement the regulatory process, if warranted, to provide sufficient assurances that adequate safety will be assured during the extended period of operation." In developing the renewal regulations, the Commission concluded that the "only issue" where the regulatory process may not adequately maintain a plant's current licensing basis involves the potential "detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operations."
>
> The aging management review for license renewal does not focus on all aging-related issues, however. The review focuses on structures and components that perform "passive" intended functions—with no moving parts or changes in configurations or properties—such as maintaining pressure boundary or structural integrity. Detrimental effects of aging on passive functions of structures and components are less apparent than aging effects on active functions of structures and components. Existing regulatory programs, including required maintenance programs, can be expected to "directly detect the effects of aging" on active functions.[123]

Petitioners concede PG&E's LRA "is not required to address issues of seismic risk by 10 C.F.R. Part 54."[124] Petitioners also concede that their entire argument that Contention 1 (safety and environmental) is within the scope of this proceeding is based upon the testimony of Commission Chair Hanson before a Senate Committee.[125] That testimony is as follows:

> Sen. Padilla. And in the same spirit but more specifically, not just maintaining safety standards more broadly, but continuing to be operationally safe with specific concern about seismic risk,

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122 See Entergy Nuclear Generation Co. (Pilgrim Nuclear Power Station), CLI-10-14, 71 NRC 449, 454 (2010); NextEra Energy Seabrook, LLC (Seabrook Station, Unit 1), CLI-12-5, 75 NRC 301, 303–04 (2012).

123 Pilgrim, CLI-10-14, 71 NRC at 454.

124 Reply at 6.

125 See Reply at 7; see also Tr. at 42, 47–48.

> which we have talked about for years here, and maintaining of that. Any comments here would be helpful. Also a friendly reminder to anticipate that when you do have these public hearings.
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> Mr. Hanson. Of course. We are going to be looking at updated safety information as part of that license renewal process. We did require all plants to take a look at the enhanced, relook at their risks after Fukushima. Diablo, of course, did look at their seismic risk and we will take another look at that as part of the license renewal process.
>
> We also have a process, it is the process on natural hazards information, basically, it is kind of an ongoing information gathering on external hazards to plants where we look at that in conjunction with the licensee about maybe any changing conditions at the plant with regard to external hazards to make sure we are incorporating that into our safety bases.[126]

We have grave doubts whether a statement during a congressional hearing, even by the Commission's Chair, can otherwise expand the scope of a licensing proceeding beyond that defined by the Commission's adjudicatory precedent or the hearing opportunity notice.[127] Even

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[126] The Nuclear Regulatory Commission's Proposed Fiscal Year 2024 Budget: Hearing Before the S. Comm. on Env't and Pub. Works, 117th Cong. 73–74 (2023) (statement of Christopher Hanson, Chair, U.S. Nuclear Reg. Comm'n), https://www.epw.senate.gov/public/?a=Files.Serve&File_id=FAA1FDEE-B869-4888-BF76-5BA6D8B317BB ("Hanson Hearing Statement").

[127] Petitioners did not cite authority for the proposition that such testimony is binding. See Tr. at 57–58, 63. Similarly, neither PG&E nor the Staff cited authority for the proposition that such testimony would not be binding. See Tr. at 57–58, 63. And the caselaw is unclear as to the impact of testimony before congressional committees. Compare Lincoln v. Virgil, 508 U.S. 182, 194 (1993) ("It is true that the Service repeatedly apprised Congress of the Program's continued operation, but, as we have explained, these representations do not translate through the medium of legislative history into legally binding obligations."), and Ruiz v. Morton, 462 F.2d 818, 822 (9th Cir. 1972) ("Various Commissioners of the Bureau have proclaimed, in justifying their budget requests, that agency services extended to Indians on or near reservations, and have used the total Indian population of the United States in citing the number of people their agency serves. Needless to say, the Bureau cannot be permitted to expand and contract its jurisdiction to justify its own purposes at the expense of the group it aids." (footnotes omitted)), with Texas v. United States, 86 F. Supp. 3d 591, 654 n.64 (S.D. Tex. 2015) ("Nevertheless, it is clear from the testimony of IRS Commissioner John A. Koskinen presented to the Senate Finance Committee that the DAPA recipients would be eligible for earned income tax credits once they received a Social Security number."), and United States v. Morgan, 118 F. Supp. 621, (S.D.N.Y. 1953) ("These views are not binding upon me, or upon any other court or judge; but they are persuasive and helpful, especially as they are those of public officials of ripe

if this Board were to conclude the testimony of Chair Hanson is binding on the scope of license renewal reviews and, thus, this proceeding, there is nothing in that testimony indicating the promised "another look" was anything other than another look at the impact of seismic risk on the AMP or TLAA aspects of license renewal. In fact, the second sentence of Chair Hanson's response implies, in the safety context, that the seismic risks he referenced were related to those that already had been considered as part of the agency's safety review—which are limited to aging management programs and time-limited aging analyses. "We are going to be looking at updated safety information as part of that license renewal process."[128] At oral argument, counsel for Petitioners was unable to articulate why that interpretation of Chair Hanson's testimony was unreasonable.[129] Significantly, Chair Hanson, on behalf of the Commission, did not expressly state that the NRC was broadening the seismic risks to be included in a license renewal safety review. Combining this with the fact that his testimony can be read in harmony with the codified scope of license renewal safety review, this Board is unwilling to expand that scope by implication.[130]

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experience in dealing with this very subject matter from day to day. Moreover, the very commissioners who expressed these views had been in close cooperation with the members of the Congress who formulated the terms of some of the statutory provisions under consideration."). Cf. Spirit of Aloha Temple v. County of Maui, 49 F.4th 1180, 1187 (9th Cir. 2022) (looking to litigation testimony of Director of County Planning Department and noting that Federal Rule of Civil Procedure 30(b)(6) testimony binds government agency).

At oral argument, counsel for PG&E did cite Perez v. Mortgage Bankers Ass'n, 575 U.S. 92 (2015), for the related proposition that modification or revocation of a rule requires an agency to follow the same method for promulgation of the rule. See Tr. at 58, 63. Given our resolution of this issue, we need not wade into an analysis of that argument as it might be applicable to an adjudicatory proceeding.

[128] See Hanson Hearing Statement at 73–74.

[129] See Tr. at 65–67.

[130] That unwillingness does not mean, though, that Petitioners' safety concerns will not be addressed. Petitioners submitted a nearly identical seismic concern to the Commission by way of a Petition for Shutdown of Diablo Canyon Nuclear Power Plant Due to Unacceptable Risk of Seismic Core Damage Accident, which was referred for consideration under 10 C.F.R. § 2.206. See above p. 5.

In their Reply, Petitioners cite a case they claim demonstrates the safety contention fits within the scope of this proceeding.[131] Their reliance on that case is misplaced. The Board agrees the cited case stands for the general proposition that the NRC cannot remove from the scope of an adjudicatory proceeding those items that would be factored into the Commission's decision as to whether to grant a license or license renewal.[132] In that case, though, the Commission expressly stated the evacuation drill at issue was something to be considered in deciding whether to issue an operating license.[133] But here, we have no such express statement, which we previously indicated was not provided by Chair Hanson's above-quoted congressional hearing statement.[134]

Thus, when viewed in light of the agency's binding regulations and the Commission's associated adjudicatory pronouncements as to the scope of license renewal proceedings,[135] Chair Hanson's testimony provides nothing other than an indication that the Commission will consider the seismic risk on the required AMP or TLAA aspects of PG&E's LRA. Accordingly, Petitioners have not provided a basis for application of the conclusion in Union of Concerned Scientists and have not demonstrated the safety aspect of this contention is within the scope of this proceeding.

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131 See Reply at 7 (citing Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1438 (D.C. Cir. 1984)). Petitioners' pinpoint cite appears to be erroneous as it is to the two-paragraph case introduction and the first two paragraphs of the case background. But the Board nonetheless reviewed the entirety of the majority decision in that case to determine what impact, if any, the case had on the issues pending before the Board. Counsel are urged to ensure that citations are to the relevant portion of authority.

132 See Union of Concerned Scientists, 735 F.2d at 1443.

133 See id. at 1441.

134 See page 30, above.

135 See, e.g., 10 C.F.R. § 54.4; Pilgrim, CLI-10-14, 71 NRC at 454.

ii. Petitioners have not met the specificity requirement for Contention 1, as a safety contention – 10 C.F.R. § 2.309(f)(1)(vi).

Moreover, and importantly as it relates to the admissibility of Contention 1 as a safety contention, Petitioners have not cited any specific portion of the Diablo Canyon LRA that will be impacted by the purportedly different seismic risk posited by Petitioners.[136] That failing, in turn, runs afoul of the Commission's contention admissibility rules requiring a petitioner to "include references to specific portions of the application . . . that the petitioner disputes and the supporting reasons for each dispute."[137] And if Petitioners did not include such specification, the Board is not required to hunt for it.

> But a court is not required to plumb the record for "novel arguments a [litigant] could have made but did not," United States v. Laureys, 653 F.3d 27, 32 (D.C. Cir. 2011); cf. United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs"), and we see no reason agency officials engaged in adjudication should be any more obligated than judges to do counsels' work for them.[138]

Petitioners claim in their Reply Brief to have been "specific with respect to the assertions by PG&E and the NRC that they challenge and the documents where those assertions are located, including titles, accession numbers, dates, and page numbers."[139] After reviewing those cited pages, though, the Board is unconvinced Petitioners have met the requirements for contention admissibility. The documents Petitioners cite all pre-date the LRA. And nowhere in

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136 See, e.g., PG&E Answer at pp. 24–25.

137 10 C.F.R. § 2.309(f)(1)(vi); see also Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) ("This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view.").

138 Nat. Res. Def. Council v. NRC, 879 F.3d 1202, 1209 (D.C. Cir. 2018); see also Freeman Inv. Mgmt. Co., LLC v. Frank Russell Co., 729 F. App'x. 590, 591 (9th Cir. 2018); Seabrook, CLI-12-5, 75 NRC at 332.

139 Reply at 9 (citing Hearing Request at 7–13 (Statement of Contention and Basis Statement) and Bird Decl. § IV).

those myriad pages does the Board see a specific disputed LRA section dealing with aging management or TLAA.[140] Thus, in the context of this license renewal proceeding, Petitioners have failed to meet the required specificity for an admissible contention.

For the foregoing reasons, as a safety contention, Contention 1 fails to meet the third and sixth required elements for contention admissibility. Accordingly, as a safety contention, Contention 1 is not admissible.

b. Contention 1, as an environmental contention, is not admissible.

Petitioners' environmental aspect of Contention 1 challenges the LRA's determination of impacts resulting from an earthquake-initiated accident as "SMALL," which Petitioners assert should be "LARGE," requiring a re-analysis of the no-action alternative.[141] This aspect of Contention 1 is inadmissible for two reasons as well: it is outside the scope of a license renewal proceeding and it challenges a Commission rule without Petitioners having filed a Section 2.334 waiver petition.[142]

i. Contention 1, as an environmental contention, is outside the scope of this proceeding – 10 C.F.R. § 2.309(f)(1)(iii).

One element Petitioners must satisfy for contention admissibility is to demonstrate that the environmental aspect of Contention 1 is within the scope of the proceeding. See 10 C.F.R. § 2.309(f)(1)(iii). Petitioners fail to satisfy this element.

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140 See Tr. at 71–75.

141 See Petition at 7; Tr. at 44–46, 53, 75–76.

142 Petitioners also mentioned Severe Accident Mitigation Alternatives ("SAMA") in their Petition, see Petition at 7 n.12, and claimed that their "contention [was] material to the analysis required by NEPA regarding the significance of environmental impacts and reasonable alternatives for avoiding or mitigating those impacts," id. at 15 (emphasis added). At oral argument, though, they disclaimed raising a SAMA contention. See Tr. at 46–47, 77–80. Thus, we need not engage in an analysis of the admissibility of a phantom contention asserting that PG&E's SAMA analysis in its ER severely underestimated the frequency of severe (e.g., severe enough to cause core damage) earthquakes impacting the Diablo Canyon plant.

Petitioners stated at oral argument that the environmental aspect of Contention 1 was based upon a claim that PG&E underestimated the seismic hazard for Diablo Canyon.[143] But the Commission's 2013 Generic Environmental Impact Statement ("2013 GEIS") specifically notes such a claim is not within the scope of license renewal environmental review:

> Changes in potential seismic hazards are not within the scope of the license renewal environmental review, except, where appropriate, during the analysis of severe accident mitigation alternatives, because any such changes would not be the result of continued operation of the nuclear power plant.[144]

The 2013 GEIS resulted from Commission rulemaking and its conclusions are codified in 10 C.F.R. Part 51; therefore, it is binding on the Board, absent a waiver.[145] And, importantly, Petitioners conceded they asserted no SAMA contention here.[146] Thus, by rule, the Commission has excluded the subject matter of the environmental aspect of Contention 1 from the scope of license renewal proceedings.

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143 See Tr. at 75.

144 Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Final Report, NUREG-1437, Revision 1 (June 2013) at 3-52 (ADAMS Accession No. ML13106A241). That same limiting language also is in the 2024 GEIS, with one minor change (the addition of "NRC's" before "license renewal"). See Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Main Report, Final Report, NUREG-1437, Rev. 2 ("2024 GEIS") at 3-38 (Feb. 2024) (ADAMS Accession No. ML23201A224).

145 See, e.g., Tr. at 75–77; Entergy Nuclear Operations, Inc. (Indian Point, Units 2 and 3), CLI-15-6, 81 NRC 340, 350–51 & n.40 (2015) (discussing codification of prior GEIS conclusions but noting the 2013 revision occurred after the hearing at issue in that proceeding); 10 C.F.R. Pt. 51, Subpt. A., App. B, Tbl. B-1 n.1 (noting the data supporting the table is found in the 2013 GEIS) ("Table B-1"); 10 C.F.R. § 51.95(c)(4) ("In order to make recommendations and reach a final decision on the proposed action, the NRC staff, adjudicatory officers, and Commission shall integrate the conclusions in the [GEIS] for issues designated as Category 1 with information developed for those Category 2 issues applicable to the plant under § 51.53(c)(3)(ii) and any new and significant information.") (emphasis added)); 2013 GEIS at § 1-2 ("The GEIS for license renewal of nuclear power plants assesses the environmental impacts that could be associated with license renewal and an additional 20 years of power plant operation. This assessment is summarized in this GEIS. This GEIS also provides the technical basis for license renewal amendments to the Commission's regulations, 10 CFR Part 51, 'Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions.'"); see also 10 C.F.R. § 2.335.

146 See above note 142.

Petitioners attempt to avoid this out-of-scope conclusion by relying solely on the same scope argument they did for the safety aspect of Contention 1—they assert that Chair Hanson's testimony before the Senate committee operates to enlarge the scope of issues to be considered.[147] But, as noted above, the Board is not persuaded that anything in Chair Hanson's testimony expressly, or even by implication, operates to expand the codified scope of review on license renewal. Importantly, Chair Hanson stated the Commission would "take another look at [seismic risk] as part of the license renewal process."[148] And while the environmental aspect of an initial license renewal review can include seismic-risk information (i.e., as part of the SAMA analysis), Petitioners chose not to assert such a contention here. Thus, the Board rejects Petitioners' reliance on Chair Hanson's testimony to show the environmental aspect of Contention 1 is within the scope of this proceeding.

As was the case with its safety-associated sibling, the environmental aspect of Contention 1 is not admissible because Petitioners have not demonstrated it is within the scope of this license renewal proceeding.

ii. Contention 1, as an environmental contention, impermissibly challenges a Commission rule without a filed waiver petition.

Relatedly, the environmental aspect of Contention 1 also is not admissible because Petitioners are challenging a Commission rule without filing a waiver petition. Here, Petitioners are challenging PG&E's characterization in its ER of the impacts resulting from a severe accident as "SMALL"; Petitioners claim the resulting impacts from a severe earthquake that allegedly would cause core damage are "LARGE."[149] At oral argument, counsel for PG&E

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147 See Tr. at 75–76.

148 Above note 126.

149 See Petition at 7; Tr. at 44, 75–76.

stated the designation of "SMALL" in the ER came directly from Table B-1 in the Commission's Part 51 regulations.[150]

While a SAMA analysis for a plant that has not considered such alternatives is a Category 2 issue (which is not being advanced here), the designation of impacts resulting from severe accidents as "SMALL" is a Category 1 issue and is not subject to challenge without a waiver petition.[151] Petitioners' seismic expert, Dr. Bird, concedes that the contents of a GEIS, including the designation of the impacts of severe accidents, are the product of rulemaking.[152] Also, Mothers for Peace previously recognized the need for a waiver petition when it challenged the then-in-draft-form 2013 GEIS's conclusion that the environmental impacts of spent fuel storage were "SMALL."[153] And during oral argument in this proceeding, counsel for Petitioners stated the characterization of the impacts of a severe accident as "SMALL" was a codification.[154]

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150 See Tr. at 55.

151 See 2013 GEIS at 4-160 ("[S]evere accidents remain a Category 2 issue to the extent that only alternatives to mitigate severe accidents must be considered for all plants that have not previously considered such alternatives."); Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), LBP-21-4, 93 NRC 179, 190 & n.12 (2021) ("Commission caselaw establishes that an adjudicatory challenge based on an applicant's failure to deal appropriately with a Category 1 item constitutes an attack on an agency rule, making a section 2.335(b) waiver the sole vehicle for raising such an issue in an adjudication."); Florida Power & Light Co. (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001) ("In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule."); id. at 15 ("And while it is true that 'Category 1' generic issues normally are beyond the scope of a license renewal hearing, the Commission provides mechanisms for a petitioner to alert the Commission to generic findings that are incorrect or do not pertain to a particular site."); id. at 16 (indicating contention at issue involved "topics discussed in the GEIS and codified in Part 51 as generic 'Category 1' issues. As we indicated earlier, these issues are not subject to site-specific review and thus fall beyond the scope of individual license renewal proceedings.").

152 See Petition, Attach. 2, ¶ 4 (first numbered 4 paragraph) ("My declaration in that rulemaking proceeding is relevant to this [Diablo Canyon Power Plant] license renewal proceeding because the NRC relied heavily on PG&E's seismic analyses for its conclusion that the environmental impacts of an earthquake-induced or related accident at [Diablo Canyon Power Plant] are 'SMALL.'") (emphasis added).

153 See Diablo Canyon, CLI-11-11, 74 NRC at 446.

154 See Tr. at 41–42.

But Petitioners submitted no waiver petition. Instead, they again attempt to rely upon Chair Hanson's testimony to transform the "SMALL" designation into a Category 2 issue.[155] For the reasons set out above, we again decline to read that testimony as essentially eliminating codified limits on the scope of contentions.[156] Thus, we do not admit the environmental aspect of Contention 1 challenging the categorization of impacts from severe accidents as "SMALL."[157]

In sum, and for the foregoing reasons, neither the safety nor the environmental aspects of Contention 1 are admissible.

2. Contention 2 – PG&E fails to provide an adequate plan to monitor and manage the effects of aging on the Unit 1 reactor pressure vessel.

In Contention 2, Petitioners allege PG&E's LRA "does not include an adequate plan to monitor and manage the effects of aging due to embrittlement of the Unit 1 reactor pressure

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155 See Reply at 11; see also Tr. at 75–76.

156 See above pp. 28–31, 35.

157 Nor do we admit the environmental aspect of Contention 1 to the extent it seeks reconsideration of the no-action alternative. As we read that portion of Contention 1, it is based upon Petitioners' claim that the environmental impacts of a severe accident are "LARGE," rather than "SMALL." But, as noted, the designation of the impacts as "SMALL" is a Category 1 issue not subject to challenge without a waiver petition, which Petitioners did not submit.

But this does not mean that Petitioners' concerns cannot be considered by the Commission. See Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 28,467, 28,470 (June 5, 1996) ("All comments on the applicability of the analyses of impacts codified in the rule and the analysis contained in the draft supplemental EIS will be addressed by NRC in the final supplemental EIS in accordance with 40 CFR 1503.4, regardless of whether the comment is directed to impacts in Category 1 or 2. . . . If a commenter provides new, site-specific information which demonstrates that the analysis of an impact codified in the rule is incorrect with respect to the particular plant, the NRC staff will seek Commission approval to waive the application of the rule with respect to that analysis in that specific renewal proceeding. The supplemental EIS would reflect the corrected analysis as appropriate."); 2013 GEIS at 1-18 ("The NRC's draft SEIS will include its analysis of the environmental impacts of the proposed license renewal action and the environmental impacts of the alternatives to the proposed action. The NRC will utilize and integrate (1) the environmental impacts of license renewal as provided in Table B-1 of 10 CFR Part 51 for Category 1 issues, (2) the appropriate plant-specific analyses of Category 2 issues, and (3) any new and significant information identified in the applicant's environmental report or during the scoping and public comment process to arrive at a conclusion regarding the environmental impacts of license renewal."); id. ("The NRC will issue a final SEIS in accordance with 10 CFR 51.91 and 51.93 after considering (1) the public comments, (2) the analysis of Category 2 issues, and (3) any new and significant information involving Category 1 issues.").

vessel ("RPV") or an adequate time-limited aging analysis ("TLAA"), as required by 10 C.F.R. § 54.21."[158] Petitioners further contend an unspecified PG&E proposed aging management program for the RPV in Unit 1 is deficient, meaning the effects of aging on that Unit will not be managed in a manner sufficient to protect public health and safety. As indicated in Exhibit 3 to the Petition:

> 2. As discussed below, PG&E's aging management program for the Unit 1 RPV is based upon and continues the surveillance program that PG&E has used during the initial operating license period. . . .
>
> 3. . . . I am concerned that the significant defects in PG&E's current RPV surveillance program are perpetuated in the LRA without being addressed or corrected. Therefore, the LRA fails to demonstrate that the effects of aging on the Unit 1 RPV will be managed in a way that is adequate to protect public health and safety.[159]

As we discuss below, this contention is not admissible for three reasons.

a. Petitioners' claims in Contention 2 are outside the scope of this proceeding – 10 C.F.R. § 2.309(f)(1)(iii).

As noted above, one of the elements Petitioners must establish for an admissible contention is that the claim is within the scope of the proceeding.[160] "[T]he scope of our license renewal process is limited. The license renewal safety review—and any associated license renewal adjudicatory proceeding—focuses on the detrimental effects of aging posed by long-term reactor operation."[161] "License renewal, by its very nature, contemplates a limited inquiry—i.e., the safety and environmental consequences of an additional 20-year operating period.

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158 Petition at 16.

159 Petition, ex. 3 § I, ¶¶ 2-3 (Decl. of Digby Macdonald, Ph.D. (Mar. 4, 2024)) ("2024 Macdonald Decl."); see also Tr. at 84. Petitioners' expert, Dr. Digby Macdonald, confirmed that his opinion is directed only to Unit 1. See 2024 Macdonald Decl. § I, ¶ 1 n.1; Tr. at 84.

160 See 10 C.F.R. § 2.309(f)(1)(iii).

161 Seabrook, CLI-12-5, 75 NRC at 304.

License renewal focuses on aging issues, not on everyday operating issues."[162] Yet most of the Analysis section of Dr. Macdonald's Declaration is devoted to actions taken by (or not taken by) PG&E and/or the Commission prior to PG&E's submission of the LRA. That is problematic for Petitioners because, as noted above, license renewal proceedings are focused on (1) detrimental effects of aging not routinely addressed by ongoing regulatory oversight and (2) the applicant's plans for managing those effects during the license renewal period.[163] "Ongoing operational issues are not reviewed because such issues are 'effectively addressed . . . by ongoing agency oversight, review, and enforcement.'"[164]

In upholding a licensing board's decision not to admit a comparable contention in Point Beach, the Commission cited, among other things, the contention's challenge to the CLB, which is outside the scope of a license renewal proceeding.

> Contention 2 stated that Point Beach's "continued operation" violates NRC requirements "because the reactor pressure boundary has not been tested," and [petitioner's] expert asserted that "[d]uring the last 50 years of operation" Point Beach "has been violating [General Design Criterion] 14 by not testing coupons." These aspects of Contention 2 challenged the basis for current and past operations, not NextEra's plans for managing

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[162] Duke Energy Corp. (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-01-27, 54 NRC 385, 391 (2001).

[163] See NextEra Energy Point Beach, LLC (Point Beach Nuclear Plant, Units 1 and 2), CLI-22-5, 95 NRC 97, 101–02 (2022).

[164] Id. (quoting Turkey Point, CLI-01-17, 54 NRC at 9); see Turkey Point, CLI-01-17, 54 NRC at 9 ("In establishing its license renewal process, the Commission did not believe it necessary or appropriate to throw open the full gamut of provisions in a plant's current licensing basis to re-analysis during the license renewal review. The current licensing basis represents an 'evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety.' 60 Fed. Reg. at 22473. It is effectively addressed and maintained by ongoing agency oversight, review, and enforcement."); 10 C.F.R. § 54.30(b) ("The licensee's compliance with the obligation under Paragraph (a) of this section to take measures under its current license is not within the scope of the license renewal review.").

"The current licensing basis (CLB) is the set of NRC requirements (including regulations, orders, technical specifications, and license conditions) applicable to a specific plant, and includes the licensee's written, docketed commitments for ensuring compliance with applicable NRC requirements and the plant-specific design basis." Pilgrim, CLI-10-14, 71 NRC at 454 (citing 10 C.F.R. § 54.3).

> aging during the period of extended operations, and were thus inadmissible.[165]

The same rationale applies here. Petitioners conceded at oral argument that, as a general matter, challenges to a plant's CLB are not within the scope of a license renewal proceeding.[166] Yet Dr. Macdonald repeatedly challenges the current and prior operations at Diablo Canyon rather than the plans for managing aging during the license renewal period.[167] Simply having Dr. Macdonald address what he considers to be deficient current operating programs via an attack on an AMP that continues those allegedly deficient current operating programs does not permit a different result. Petitioners still are challenging, improperly, the CLB in this safety contention.

When asked directly at oral argument how Contention 2 was not a challenge to the CLB of Diablo Canyon, Petitioners claimed the lack of sufficient current knowledge regarding the status of the embrittlement of the Unit 1 RPV precluded an effective AMP during the license renewal period.[168] The Board views this as an admission that Petitioners' dispute is not with how the aging of the Unit 1 RPV will be managed during the license renewal period, but rather with the AMP that is part of the CLB.

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165 Point Beach, CLI-22-5, 95 NRC at 108.

166 See Tr. at 84–85.

167 See 2024 Macdonald Decl. ¶ 2; id. ¶ 19(a) (challenging coupon testing from 2002); id. ¶ 19(d) ("[T]he results of the 2003 evaluation of the Charpy tests should have motivated PG&E to speed up its schedules for obtaining more data to get a better sense of the pressure vessel's condition. At the very least, PG&E should have adhered to its approved schedule for the next capsule extraction and Charpy test in approximately 2009."); id. ¶ 19(f) ("PG&E could have and should have obtained more plant-specific data by now."); id. ¶ 20 ("Under these circumstances, it is my expert opinion that the NRC currently lacks an adequate basis to conclude that Diablo Canyon Unit 1 can be operated safely."); 2023 Macdonald Decl. § I, ¶ 2 ("The purpose of my declaration is to explain the reasons why, in my professional opinion, the current operation of Diablo Canyon Unit 1 poses an unreasonable risk to public health and safety . . . .") (emphasis added)).

168 See Tr. at 85–87, 99–102, 107–08.

As Contention 2 challenges a matter related to the current and prior operation of Diablo Canyon Unit 1,[169] it is inadmissible because it is outside the scope of this proceeding.

b. Petitioners have not identified, with specificity, the LRA provisions that they challenge and have not identified a material dispute – 10 C.F.R. § 2.309(f)(1)(iv) & (vi).

The Commission's contention admissibility standards also require a petitioner to "review the relevant documents . . . and provide sufficient discussion of these documents and its concerns to demonstrate the existence of a genuine material dispute with the licensee on a material issue of law or fact."[170] It is the "Petitioners' responsibility, not the Board's, to formulate contentions and to provide 'the necessary information to satisfy the basis requirement' for admission."[171]

Nowhere in their Petition do Petitioners identify an LRA provision they challenge in Contention 2.[172] Instead, Petitioners incorporate by reference and rely upon Dr. Macdonald's

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169 See also above notes 13–15 and accompanying text (regarding a 10 C.F.R. § 2.206 petition filed by Petitioners).

170 Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-15-23, 82 NRC 321, 326 (2015); see also 10 C.F.R. § 2.309(f)(1)(iv), (vi).

171 Palisades, CLI-15-23, 82 NRC at 329.

172 See Petition at 16–18; Tr. at 121–23; see also Seabrook, CLI-12-5, 75 NRC at 312 ("NextEra asserts on appeal that, on this point, Friends/NEC fail to address the relevant AMP in the Application. We agree. . . . Friends/NEC have an 'ironclad obligation' to review the Application thoroughly and to base their challenges on its content. Friends/NEC did not satisfy this obligation here.") (footnotes omitted)). At oral argument, Petitioners stated they were challenging the reactor vessel surveillance AMP. See Tr. at 97; ER at B.2-95. Yet the basis for the challenge was not about how the embrittlement would be monitored or managed during the license renewal period, but rather the purported lack of current knowledge of the status of the reactor pressure vessel due to alleged failings of PG&E to conduct sufficient testing during the current operating period. See above note 168. Petitioners also failed to point to any AMP requirement that was not included in the RPV AMP, relying instead on an opinion by their expert of what should be in the AMP, regardless of whether the Commission's regulations required that content. See Tr. at 87–94, 101–02, 112–13, 125; see also Tr. at 106, 111.

2024 expert declaration.[173] Even if the Board were to consider such incorporation by reference to be acceptable,[174] it does not save Contention 2 for several reasons.

The first reason wholesale incorporation of Dr. Macdonald's opinion does not save Contention 2 is because Dr. Macdonald's 2024 Declaration identifies with any degree of specificity only five pages of the LRA and/or its Enclosure E.[175] Those five pages are cited in the "Background Regarding PG&E's License Renewal Application" section of his declaration, not in the "Scientific Analysis" section.[176] Regardless, of those five pages, Dr. Macdonald only identifies two issues arising from them, both of which are immaterial.

As to the first purported issue in the few LRA pages cited, Dr. Macdonald cites LRA pages 4.2-2 to 4.2-3, claiming to be "unable to locate any commitment by PG&E to a deadline for removing and testing Capsule B."[177] Setting aside Petitioners' concession that there is no

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173 See Petition at 16–18.

174 We observe that such a practice likely contravenes Commission precedent. See Palisades and Big Rock Point, CLI-22-08, 96 NRC at 100 ("Moreover, our rules and practice make clear that we will not accept the wholesale incorporation by reference of large documents as the basis for a contention."); see also 10 C.F.R. § 2.309(f)(1) ("For each contention, the request or petition must . . . (v) "Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issues.") (emphasis added); Crow Butte Resources, Inc. (In Situ Leach Facility, Crawford, Nebraska), LBP-08-24, 68 NRC 691, 737 (2008) ("In support of Technical Contention D, Consolidated Petitioners merely reference an opinion provided by Dr. Abitz, and assert that it goes into great detail concerning specific inadequacies in the License Renewal Application, including a list of omissions and areas that he considers warrant more detailed evaluation. The contention fails on its face to meet the contention admissibility requirements set forth in 10 C.F.R. § 2.309(f)(1). Rather than articulate any support or adequate factual explanation for the contention or describe some dispute with the application on a material issue, Consolidated Petitioners simply refer to Dr. Abitz's report.").

175 See 2024 Macdonald Decl. ¶¶ 12–18.

176 Mothers for Peace and Friends recently argued in the Ninth Circuit that the location of something within a particular section of a report, rather than another section of the same report, can be meaningful. See [Mothers for Peace & Friends] v. U.S. NRC, Case No. 23-3884, Petitioners' Reply Brief, DktEntry 38.1, ECF Page 13 of 34, at n.2 (June 14, 2024).

177 2024 Macdonald Decl. ¶ 14.

requirement for such a testing schedule or deadline to be included in a reactor vessel surveillance AMP,[178] to reach that conclusion Dr. Macdonald overlooks the citations by PG&E in the LRA (at 4.9-1) to correspondence with the Staff wherein (1) PG&E committed to remove and test Capsule B in the fall of 2023 or spring of 2025; and (2) the Staff approved that schedule and required the test results to be submitted to it no later than 18 months after capsule withdrawal.[179]

As to the second purported issue in the few LRA pages cited, Dr. Macdonald claims that he is unable to find a reference as to how certain ultrasonic testing of beltline welds relates to the scheduled ultrasonic testing inspection.[180] Yet, Dr. Macdonald does not explain why the supposedly lacking relationship is relevant or why such relationship must be included in the LRA.[181]

The second reason wholesale incorporation of Dr. Macdonald's opinions does not save Contention 2 is because there is only one paragraph in the Analysis section of Dr. Macdonald's 2024 Declaration that either is not directed at current operations or does not simply repeat information from Dr. Macdonald's September 2023 Declaration, issued nearly two months

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178 See Tr. at 113.

179 See Letter from Paula Gerfen, Senior Vice President and Chief Nuclear Officer, Diablo Canyon Power Plant, to NRC Document Control Desk (May 15, 2023) (ADAMS Accession No. ML23135A217); Letter from Jennifer L. Dixon-Herrity, Division Chief, NRR, NRC (July 20, 2023) (ADAMS Accession No. ML23199A312). Notably, Dr. Macdonald undermines his claim that there is no deadline by referencing, in Paragraphs 19(e) and 20 of that same Declaration, the commitment by PG&E to withdraw and test Capsule B by those dates.

180 See 2024 Macdonald Decl. ¶ 16.

181 See Palisades, CLI-15-23, 82 NRC at 326–27 ("Our contention admissibility rules require petitioners to proffer contentions that demonstrate a genuine dispute with the application. . . . [Petitioners'] expert [does not] address this claimed relationship between sulfur content and fracture toughness.").

before the LRA was submitted.[182] And that two-sentence paragraph identifies no provisions of the LRA that Petitioners challenge.[183] Instead, Dr. Macdonald simply states:

> For the same reasons, it is also my expert opinion that the NRC lacks a reasonable basis to approve PG&E's license renewal application. Unless and until the NRC establishes that the Unit 1 pressure vessel can operate with a reasonable degree of safety, it has no basis to permit continued operation in a license renewal term.[184]

Importantly, Dr. Macdonald does not explain why or how PG&E's AMP for the RPV for Unit 1 is inadequate for monitoring or managing embrittlement during the license renewal period, especially considering PG&E's representation that the AMP is consistent with the GALL Report.[185]

We note also that Petitioners' Statement of the Contention refers to the purported inadequacy of PG&E's TLAA.[186] But other than that reference, Petitioners mention "time-limited aging analysis" or TLAA only three other times: once to define the term and two other times when they cite to the LRA's use of the term. Even then, all three of those references are in Dr. Macdonald's report, not in the Petition.[187] During oral argument, Petitioners conceded there

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182 See 2024 Macdonald Decl. § V.

183 Id. ¶ 21.

184 Id. (emphasis added). The use of "also" by Dr. Macdonald underscores the fact that his opinions expressed prior to this paragraph were directed at CLB issues. See above pp. 38–40.

185 See below p. 45 (defining GALL Report and explaining import of consistency therewith); see also Rules of Practice for Domestic Licensing Proceedings—Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,170 (Aug. 11, 1989) ("This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, state the applicant's position and the petitioner's opposing view."); Point Beach, CLI-22-5, 95 NRC at 107 (upholding licensing board's decision denying contention wherein petitioner did not "specifically dispute NextEra's aging management plans, which describe NextEra's plan to employ coupon testing and other methods to address reactor pressure vessel embrittlement"). Instead, Petitioners and Dr. Macdonald attack the purportedly deficient current knowledge base resulting from PG&E's allegedly deficient compliance with current operating requirements. See above note 168.

186 See Petition at 16, § 2(A).

187 See Tr. at 87–88; 2024 Macdonald Decl. ¶¶ 11–13; cf. 10 C.F.R. § 2.309(f)(1) (requiring identified six elements to be included in "the request or petition").

was no specific TLAA identified or challenged in the Petition or Dr. Macdonald's report.[188] Instead, Petitioners claimed any issue or concern with TLAAs in general arises from the same general concern they have with the AMP, i.e., a purported lack of CLB information.[189] Thus, to the extent safety Contention 2 is based upon a challenge to a TLAA to be employed by PG&E during the license renewal period, the contention is inadmissible for exceeding the scope of this proceeding, lack of specificity, and failure to engage with the LRA.

Therefore, Petitioners fail to make specific reference to the relevant LRA provision(s) and fail to demonstrate a genuine dispute with PG&E on a material issue of fact or law, rendering Contention 2 inadmissible.[190]

c. Petitioners do not contest that PG&E's AMP for embrittlement issues is consistent with the GALL Report.

"In reviewing license renewal applications, the NRC is guided primarily by two documents—the Generic Aging Lessons Learned (GALL) Report and the License Renewal Standard Review Plan."[191] The Commission routinely has held that if an AMP is consistent with the GALL Report, then the Commission "accepts the applicant's commitment to implement that AMP, finding the commitment itself to be an adequate demonstration of reasonable assurance under section 54.29(a)."[192] "The purpose of the GALL Report is to identify and describe

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188 See Tr. at 114–15.

189 See id. at 114–18; see also above note 168.

190 See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-15-21, 82 NRC 295, 306 (2015) ("The Board also found that because Friends of the Earth did not provide any specific references to the license renewal application, Friends of the Earth had failed to demonstrate the existence of a genuine dispute with PG&E on a material issue of fact or law. We agree that Friends of the Earth's intervention petition does not identify any specific portion of the application that it seeks to challenge and therefore lacks the specificity that our contention admissibility rules require.").

191 Seabrook, CLI-12-5, 75 NRC at 304.

192 Id. (citing Entergy Nuclear Vermont Yankee, LLC (Vermont Yankee Nuclear Power Station), CLI-10-17, 72 NRC 1, 36 (2010); AmerGen Energy Co., LLC (Oyster Creek Nuclear Generating Station), CLI-08-23, 68 NRC 461, 467–68 (2008)).

programs which have proved effective in managing aging effects in reactors. Deviations from the generically approved programs must be individually justified by the license renewal applicant."[193]

> The GALL Report identifies generic aging management programs that the Staff has determined to be acceptable, based on the experiences and analyses of existing programs at operating plants during the initial license period. The report describes each aging management program with respect to the ten program elements defined in the [Standard Review Plan for Review of License Renewal Applications for Nuclear Power Plants]. The report also includes a table summarizing various structures and components, the materials from which they are made, the environment to which they are exposed, the aging effects (e.g., loss of material through pitting, leaching, or corrosion), the aging management program found to manage the particular aging effect in that component, and whether additional evaluation is necessary.
>
> … In other words, the license renewal applicant's use of an aging management program identified in the GALL Report constitutes reasonable assurance that it will manage the targeted aging effect during the renewal period."[194]

Here, PG&E expressly noted its reactor vessel surveillance AMP for Unit 1 was "consistent" with the GALL Report's reactor vessel surveillance AMP.[195] The Board cannot find where Petitioners cite, assert, or argue in their Petition or accompanying expert report (and Petitioners concede they do not) that PG&E's reactor vessel surveillance AMP either is not consistent with the GALL Report or that PG&E failed to include sufficient information for them to be able to make that determination.[196]

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193 Oyster Creek, CLI-08-23, 68 NRC at 479.

194 Id. at 467–68.

195 See LRA, App. B, at B.2-95 (Aging Management Programs); PG&E Answer at 39–42. Petitioners acknowledged at oral argument the only AMP they were challenging was the reactor vessel surveillance AMP. See Tr. at 96–97.

196 See Tr. at 107, 108 ("We did not address the GALL report."), 114 (same); Seabrook, CLI-12-5, 75 NRC at 311 ("This language is nearly identical to the referenced GALL AMP. Friends/NEC dispute none of this."); cf. Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), LBP-08-26, 68 NRC 905, 948 (2008) ("[T]he Application must

Thus, as the LRA relies on the GALL Report for its RPV AMP, and as Petitioners do not challenge that stance, Contention 2 is inadmissible.[197]

3. Contention 3 – PG&E fails to demonstrate compliance with the Coastal Zone Management Act.

In Contention 3, Petitioners contend PG&E's license renewal application cannot be approved because PG&E did not comply with a federal statute and because it did not comply with the Commission's regulations: "PG&E has not demonstrated compliance with the Coastal Zone Management Act ('CZMA') . . . . For the same reason, PG&E's Environmental Report also fails to satisfy the requirements of NRC's own regulations mandating the content of environmental reports."[198] The alleged deficiency is a failure to include in the LRA a CZMA concurrence from the California Coastal Commission: "Before the NRC may grant license renewal, PG&E's Consistency Certification must be sanctioned by the State of California. In addition, the State must grant any necessary coastal development permits ('CDPs'). Neither of

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contain sufficient information to independently confirm consistency with the GALL Report. Currently, the description of the AMP in the Application leaves this in question.").

At oral argument, counsel for the Staff noted that the Staff has not completed its review of the relevant AMP. See Tr. at 104. Our decision should not be taken to preclude or prejudge that review and any subsequent determination, which is required by the Commission. See Seabrook, CLI-12-5, 75 NRC at 304 ("If the NRC concludes that an aging management program (AMP) is consistent with the GALL Report, then it accepts the applicant's commitment to implement that AMP, finding the commitment itself to be an adequate demonstration of reasonable assurance under section 54.29(a).") (emphasis added).

[197] We stress that simply intoning "GALL Report" is not a magic incantation that inoculates an applicant's aging management plan from challenge. But that supported intonation, without challenge by Petitioners as to whether the plan is consistent, is one of the reasons for the inadmissibility of Contention 2. See Seabrook, CLI-12-5, 75 NRC at 315 ("We recently held that a license renewal applicant who commits to implement an AMP that is consistent with the corresponding AMP in the GALL Report has demonstrated reasonable assurance under 10 C.F.R. § 54.29(a) that the aging effects will be adequately managed during the period of extended operation. While referencing an AMP in the GALL Report does not insulate that program from challenge in litigation, as discussed above, Friends/NEC have not submitted an adequately supported challenge here.") (footnote omitted)); Vermont Yankee, CLI-10-17, 72 NRC at 37–38 (noting that while "any AMP is subject to challenge before a board in a license renewal proceeding," the petitioner there failed to provide examples of deficiencies or lack of specificity with a GALL-approved AMP to be used by the licensee).

[198] Petition at 18 (citation omitted); see Tr. at 132–33.

these crucial approvals have occurred."[199] Contention 3 is not admissible because it fails to demonstrate a genuine dispute on a material issue of law or fact.[200]

While the Board agrees with Petitioners that the CZMA requires the NRC ultimately to receive a concurrence in a licensee's consistency certification, that concurrence is not required to be submitted with the LRA. As is relevant here, the CZMA specifically requires only that an "applicant for a required Federal license or permit . . . shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with that program."[201] Here, PG&E included such a certification.[202]

The CZMA does not require an applicant to include with the application to the federal agency a concurrence by the state agency. In fact, the Act's text contemplates just the opposite—the concurrence will come after the application has been submitted. "At the same time [as the application is submitted], the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data."[203] Once the applicant has provided this certification to the state, the CZMA provides that the state agency

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199 Petition at 18 (footnotes omitted); see Tr. at 131–33.

200 See 10 C.F.R. § 2.309(f)(1)(vi).

201 16 U.S.C. § 1456(c)(3)(A); see 15 C.F.R. § 930.57(a) ("[A]ll applicants for required federal licenses or permits subject to State agency review shall provide in the application to the federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the management program.").

202 See LRA § 9.5.11 & attach. F (Coastal Zone Management Act Certification); see also 15 C.F.R. § 930.57(b) ("The applicant's consistency certification shall be in the following form: 'The proposed activity complies with the enforceable policies of (name of State) approved management program and will be conducted in a manner consistent with such program.'"); Cal. Code Regs. tit. 14, § 13660.3(b) ("The consistency certification shall be in the following form: The proposed activities described in detail in this plan comply with California's approved coastal management program and will be conducted in a manner consistent with such program.").

203 16 U.S.C. § 1456(c)(3)(A) (emphasis added); see 15 C.F.R. § 930.57(a) ("At the same time, the applicant shall furnish to the State agency a copy of the certification and necessary data and information.").

will establish its procedures for review of the certification and, "[a]t the earliest practicable time" thereafter will advise the federal agency whether the state agency "concurs with or objects to the applicant's certification."[204] Section 1456(c)(3)(A) of the CZMA then concludes by noting:

> No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary [of the United States Department of Commerce], on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.[205]

Thus, PG&E was not required to submit with the LRA anything more regarding the CZMA than it did—the consistency certification.[206]

As a prior licensing board cogently explained in rejecting a similar contention:

> [Petitioner] also seems to confuse an applicant's CZMA certification with a state's final consistency decision when it implies in Miscellaneous Contention 1 that the ER is in violation of the CZMA because the ER neglects to include a final consistency determination from the Texas Coastal Coordination Council ("TCCC"). . . . As NRC Staff correctly note, [Petitioner] fails to point to any regulation indicating that an applicant's ER must

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[204] 16 U.S.C. § 1456(c)(3)(A); see 15 C.F.R. § 930.60(a) ("The State agency's six-month review period (*see* § 930.62(a)) of an applicant's consistency certification begins on the date the State agency receives the consistency certification required by § 930.57 and all the necessary data and information required by § 930.58(a)."); id. § 930.62(a) ("At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification. . . . Concurrence by the State agency shall be conclusively presumed if the State agency's response is not received within six months following commencement of State agency review."); Cal. Code Regs. tit. 14, § 13660.3(a) ("The Commission shall issue a decision on whether the applicant's consistency certification complies with the [California Coastal Management Plan]; i.e., whether it 'concurs' or 'objects' to the applicant's consistency certification, at the earliest practicable time and in no event more than 6 months from the date of receipt of such consistency certification and required information . . . ."); id. § 13660.8(c) ("The Commission shall notify the applicant . . . and the relevant Federal agencies of its decision by sending a copy of its Final Decision to them.").

[205] 16 U.S.C. § 1456(c)(3)(A).

[206] When asked at oral argument what else PG&E was required to do at this time, counsel for Petitioners could not identify anything, opting instead to focus on the fact that a concurrence will be needed prior to license renewal issuance. See Tr. at 132–34.

> include a final consistency determination by the relevant state, and the regulations clearly state that only a consistency certification must be submitted, not a final consistency determination as well. . . . Thus, to the extent that [Petitioner] bases MISC-1 on Exelon's failure to include a final consistency determination, MISC-1 is inadmissible because it fails to present a genuine dispute of material law or fact.[207]

Petitioners here similarly misapprehend the statutory and regulatory requirements and thus their contention suffers from the same deficiency in stating an admissible contention.

Petitioners also appear to claim that the CCC's response that additional information is required before it can consider the consistency certification[208] indicates a possibility PG&E could obtain an NRC license renewal without the required consistency determination. That reading of the contention also fails. The Staff and PG&E both are aware a consistency determination (by the state or the Secretary) is required prior to issuance of any license renewal here.[209] And

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[207] Victoria, LBP-11-16, 73 NRC at 705 n.367 (citations omitted). Petitioners' attempt to distinguish Victoria, see Reply at 17–18, is unavailing as they fail to distinguish the footnote in that case that the Staff cited. Moreover, that footnote tracks the Board's analysis of the relevant statutory and regulatory text. Thus, any differing factual scenario between Victoria and the current proceeding is irrelevant to application of that footnote's textually supported reasoning.

[208] See Petition, ex. 4, at 1 (Letter from Tom Luster, CCC, to Tom Jones, Senior Director-Regulatory, Environmental and Repurposing, PG&E (Dec. 7, 2023)) at 1.

[209] See Tr. at 141; 16 U.S.C. § 1456(c)(3)(A) (state inaction also can provide required determination); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-16-11, 83 NRC 524, 536 n.72 (2016) (in connection with its 2009 license renewal application, PG&E noted "the NRC could not issue renewed licenses for Diablo Canyon without concluding that license issuance would be consistent with the [CZMA]," which required the "issuance of a state [CZMA] consistency certification."); Standard Review Plans for Environmental Reviews for Nuclear Power Plants, Supplement 1: Operating License Renewal, Draft Report for Comment (NUREG-1555, Supplement 1, Revision 2) (February 2023) § 3.2.1 at 3-3 ("For nuclear power plants located in a coastal zone or coastal watershed, as defined by each State participating in the National Coastal Zone Management Program, applicants must submit to the affected State certification that the proposed license renewal action is consistent with the State Coastal Zone Management Program. Applicants must receive a determination from the State agency that manages the State Coastal Zone Management Program that the proposed license renewal action would be consistent with the State program. A Federal agency cannot issue a license or permit until the State concurs.").

Petitioners have presented the Board with no evidence or argument the Staff will not act in conformity with the CZMA or its own proposed Standard Review Plan.[210]

Instead, Petitioners expressed concern at oral argument and in briefing that they wished to avoid any claim of untimeliness should Petitioners raise this issue later.[211] In their Reply, Petitioners argue this contention should be admitted because a contention of failure by PG&E to comply with the CZMA must be raised at the earliest opportunity possible, plus "because it is evident now that PG&E lacks an essential prerequisite for license renewal . . . there can be no doubt that if Petitioners waited until some future time to submit this contention, it would be vulnerable to rejection for lack of timeliness."[212] This argument fails for three reasons.

First, it is not evident that PG&E currently lacks an essential prerequisite for license renewal; because the CZMA concurrence is not required at the time of LRA submission, the fact that PG&E did not have it then does not mean PG&E lacks anything. Second, and as noted above, Petitioners fail to provide any evidence or argument the Staff will not act in conformity with the CZMA. Finally, Petitioners cite nothing that persuades this Board that the Commission would allow an unripe contention to be admitted now simply to avoid the possibility Petitioners later would have to meet the elements for reopening the record or seeking the admission of a new or amended contention. In fact, Commission precedent counsels just the opposite; unripe or placeholder contentions are not to be admitted.[213]

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210 See Tr. at 141–43; U.S. Department of Energy (High Level Waste Repository), CLI-08-11, 67 NRC 379, 384 (2008) ("A 'presumption of regularity attaches to the actions of Government agencies.' Absent 'clear evidence to the contrary,' we presume that public officers will 'properly discharge[ ] their official duties.'") (footnotes omitted, brackets in original).

211 See Tr. at 137, 142.

212 Reply at 16–17 (emphasis in original); see also Tr. at 137, 142. At oral argument, both Staff and PG&E counsel recognized that Petitioners would be able to challenge issuance of the requested license renewal if the State of California (or Secretary of Commerce) did not provide a CZMA consistency concurrence and that such a challenge could be lodged either in a motion to reopen the record or in a motion to file a new contention. See Tr. at 138–41.

213 See Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), LBP-24-03, 99 NRC ___, ___ (Mar. 7, 2024) (slip op. at 30) (collecting Commission cases).

Thus, Contention 3 is not admissible because Petitioners do not demonstrate a genuine dispute with PG&E on a material issue of law or fact. See 10 C.F.R. § 2.309(f)(1)(vi).[214]

IV. THE CEC'S REQUEST TO PARTICIPATE AS A NON-PARTY IS GRANTED

The California Energy Commission filed a Request to Participate as a Non-Party Pursuant to 10 C.F.R. § 2.315(c).[215] None of the Petitioners, PG&E, or the Staff opposed this request.[216]

The Commission's regulations require the Board to "afford an interested State . . . governmental body . . . that has not been admitted as a party under § 2.309, a reasonable opportunity to participate in a hearing."[217] As the CEC is a California state governmental body and the Diablo Canyon plant is in California, the Board grants the CEC's request to participate. Its participation, though, will be limited to the activities permitted by Section 2.315(c).

V. PG&E'S MOTION TO STRIKE IS DENIED AS MOOT

On May 15, 2024, PG&E filed a motion to strike two discrete portions of Petitioners' Reply as exceeding the scope of a permissible Reply.[218] Petitioners timely filed an opposition to that Motion on May 25, 2024, arguing the two specified portions of the Reply were permitted and should not be stricken.[219] The two relevant portions of the Reply contained arguments regarding (1) the environmental or socioeconomic benefits argument vis-à-vis the no-action

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214 Petitioners' Contention 3 as formulated in the Petition also challenged PG&E's compliance with NRC regulations. See Petition at 18. In their Reply, Petitioners stated they withdrew that aspect of Contention 3. See Reply at 19. The Board confirmed that withdrawal during the oral argument. See Tr. at 132.

215 See Request of the California Energy Commission to Participate as Non-Party Pursuant to 10 C.F.R. § 2.315(c) (Mar. 4, 2024).

216 See generally PG&E Answer; Staff Answer; Reply; Tr. at 143–44.

217 10 C.F.R. § 2.315(c).

218 See [PG&E's] Motion to Strike Portions of the Reply Filed by [Petitioners] (Apr. 15, 2024) at 2.

219 See Response by [Petitioners] to [PG&E's] Motion to Strike Portions of Their Reply (Apr. 25, 2024).

alternative in Contention 1 and (2) Contention 3. Because we determined neither of those Contentions were admissible, we deny PG&E's Motion as moot.

VI. ENSURING ARGUMENTS ARE SUPPORTED FACTUALLY AND LEGALLY

Before concluding, we pause here to address an issue raised by PG&E in its Answer. Specifically, on pages 50–51 of its Answer, in opposing Petitioners' CZMA argument, PG&E claimed a part of Petitioners' argument violated this Board's Initial Prehearing Order wherein we implored all counsel not to "stretch arguments beyond what they and the legal/factual support can bear."[220] While Petitioners filed their Petition prior to the issuance of the referenced Order, what's sauce for the goose also is sauce for the gander.

In its argument against Group's discretionary intervention, PG&E erroneously claims Group "only addresses a few of the [discretionary intervention] factors—each with a single, conclusory sentence."[221] The Board agrees the support supplied by Group can be described as conclusory sentences. But Group addressed all six of the discretionary intervention standards, not just a "few" as PG&E claimed.[222] At oral argument, counsel for PG&E argued Group did not "address" at least three elements of discretionary intervention, claiming (erroneously) one element was not addressed at all and two others were addressed from the perspective of Group's supporters as opposed to the perspective of Group itself.[223] But there is a significant difference between not addressing an element at all (as the Answer claimed) and addressing the element in a manner another participant considers to be deficient (as PG&E attempted to shift to arguing at oral argument).

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220 Licensing Board Memorandum and Order (Initial Prehearing Order) (Mar. 13, 2024) at 6 (citing 10 C.F.R. § 2.323(d)) (unpublished).

221 PG&E Answer at 15.

222 Compare 10 C.F.R. § 2.309(e)(1), (2), with Petition at 6. See also Tr. at 27–29. Counsel for the Staff agreed that Petitioners addressed all six elements for discretionary intervention. See Tr. at 35 ("And so looking at the six factors, it does appear that they articulate at least one thing for each of the six factors.").

223 See Tr. at 31–32.

The Board takes this opportunity to remind all participants to ensure their arguments are supported factually and legally in any future submissions, both oral and written.

VII. CONCLUSION

With that, we have reached the end of our chapter, and our chronicling is complete. As a summary, and for the foregoing reasons, we:

A. Conclude that San Luis Obispo Mothers for Peace, Friends of the Earth, and Environmental Working Group each have established representational standing;

B. Conclude that each of the three joint Contentions are inadmissible and the Petition is denied;

C. Grant the California Energy Commission's Request to Participate as a Non-Party;

D. Deny as moot PG&E's Motion to Strike portions of the Reply; and

E. Terminate this proceeding.

Any appeal to the Commission from this Memorandum and Order must be filed in accordance with the provisions of 10 C.F.R. § 2.311, including the requirement that any such appeal be filed within 25 days of the service of this Order.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Jeremy A. Mercer, Chair
ADMINISTRATIVE JUDGE

/RA/

Nicholas G. Trikouros
ADMINISTRATIVE JUDGE

/RA/

Dr. Gary S. Arnold
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 3, 2024

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Memorandum and Order (Denying Request for Hearing and Terminating Proceeding),** have been served upon the following persons by Electronic Information Exchange.

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Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2, Docket Nos. 50-275-LR-2 and 50-323-LR-2)
Memorandum and Order (Denying Request for Hearing and Terminating Proceeding)

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KRISTEN HALOJ Digitally signed by KRISTEN HALOJ
Date: 2024.07.03 13:34:27 -04'00'

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of July 2024.