UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 11/09/06
SERVED 11/09/06

In the Matter of	)	
PACIFIC GAS & ELECTRIC CO.	)	Docket No. 72-26-ISFSI
(Diablo Canyon Power Plant Independent Spent Fuel Storage Installation)	)	

CLI-06-27

MEMORANDUM AND ORDER

We recently denied a "Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard (collectively, "SLOMFP") for Declaratory and Injunctive Relief with Respect to Diablo Canyon ISFSI."[1] SLOMFP now asks us to reconsider our denial of its request to declare Pacific Gas & Electric Co.'s ("PG&E's") ISFSI's license for Diablo Canyon invalid and to enjoin PG&E from loading spent fuel into the facility.[2] PG&E and the NRC Staff both oppose SLOMFP's motion.[3]

[1]CLI-06-23, 64 NRC __ (Sept. 6, 2006). An "ISFSI" is an independent spent fuel storage installation.

[2]Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Partial Reconsideration of CLI-06-23 (September 18, 2006) ("SLOMFP Motion").

[3]Answer of Pacific Gas and Electric Company to Motion for Partial Reconsideration of CLI-06-23 (September 28, 2006) ("PG&E Answer"); NRC Staff Response to Motion for Reconsideration of CLI-06-23 (September 26, 2006) ("Staff Response").

SLOMFP's motions derive from the United States Court of Appeals for the Ninth Circuit's holding, in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" was unreasonable under the National Environmental Policy Act ("NEPA"). The Ninth Circuit remanded the NEPA-terrorism question to the Commission for "further proceedings consistent with this opinion."[4]

We undertake reconsideration only when a party shows a "compelling circumstance," "such as the existence of a clear and material error in a decision, which could not have reasonably been anticipated" and that "renders the decision invalid."[5] We apply this standard strictly, and do not grant motions for reconsideration lightly.[6] SLOMFP's motion for reconsideration does not meet our strict standard.

In its motion, SLOMFP seizes upon a change in one of the factors we pointed to when we denied SLOMFP's earlier motion. This single factor – that the Ninth Circuit has now issued its mandate[7] in *SLOMFP v. NRC*, whereas at the time of our earlier decision the mandate had

---

[4] 449 F.3d at 1035.

[5] *See* 10 C.F.R. §§ 2.323(e), 2.345(b). SLOMFP cites 10 C.F.R. §§ 2.323 and 2.345 as the bases for its motion. Technically, our former rule (10 C.F.R. § 2.771(b)) applies here (since the original proceeding was noticed prior to February 13, 2004), but the new rules simply codify our practice (*see* n.6 below).

[6] *See Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622 (2004) ("We do not lightly revisit our own already-issued and well-considered decisions. We do so only if the party seeking reconsideration brings decisive new information to our attention or demonstrates a fundamental Commission misunderstanding of a key point."); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 2), CLI-03-18, 58 NRC 433, 434 (2003) ("'[p]etitions for reconsideration should not be used merely to "re-argue matters that the Commission already [has] considered" but rejected.' Reconsideration petitions must establish an error in a Commission decision, based upon an elaboration or refinement of an argument already made, an overlooked controlling decision or principle of law, or a factual clarification." [alterations in original]).

[7] The mandate consists simply of a copy of the judgment issued with the decision back on June 2, 2006, with a September 12, 2006, date stamp and a court clerk's signature added.

not yet issued – does not justify reconsideration. Functionally, all that the mandate does is to effectuate the court of appeal's judgment by formally returning the proceeding to the NRC. The mandate creates no "compelling circumstance" warranting reconsideration of our decision to deny SLOMFP's motion for declaratory and injunctive relief and unearths no "clear and material error" in our reasoning. The eventual – legally required – issuance of the mandate is hardly an "unanticipated event." It is not a sufficient factual change to justify reconsideration.

We also do not find SLOMFP's legal arguments persuasive. SLOMFP questions our application of the "balancing the equities" concept in denying its original motion. SLOMFP argues that "[t]he only context in which a balancing of the equities might be relevant would be if the NRC or PG&E had requested a stay of the mandate."[8] But SLOMFP *itself* requested that *we* provide injunctive relief, as the title of its motion says. We considered the equities to decide *that* question – as any determination on the necessity for an injunction requires.[9] Thus, to

---

[8]SLOMFP Motion at 6.

[9]"[T]he bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Company v. Village of Gambell*, 480 U.S. 531, 542 (1987). *See also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982) ("[T]he basis for injunctive relief . . . has always been irreparable injury and the inadequacy of legal remedies."). "[A]n injunction is an equitable remedy . . . not a remedy which issues as of course." *Weinberger*, 456 U.S. at 311.

Moreover, contrary to SLOMFP's apparent view, there is no presumption that irreparable damage occurs whenever there is a failure to adequately evaluate the environmental impact of a proposed project. Where, in weighing the "balance of harms," injury to the environment is "not at all probable," an injunction is not appropriate. *See Amoco*, 480 U.S. at 545. *See generally Entergy Nuclear Vermont Yankee, L.L.C.* and *Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-06-08, 63 NRC 235, 237-38 & nn.4-7 (2006).

Here, where spent fuel will not be stored in the new facility for some time (at least another year), injury to the environment is "not at all probable" now, so there is no present need to pass on the validity of PG&E's license or to consider injunctive relief. And again, as we noted in CLI-06-23, PG&E does not need an NRC license for construction activity. *See generally Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 246-50 (2003).

justify reconsideration of our denial of SLOMFP's request for an injunction, SLOMFP's motion for reconsideration had to support a re-balancing of the equities, which it did not. SLOMFP's other legal argument, this one based on 10 C.F.R. § 51.101(a), falls afoul of our prohibition against raising new arguments in a motion for reconsideration.[10] SLOMFP's original motion never mentions section 51.101(a). Section 51.101(a)(2) states, in part, that until a record of decision is issued "[a]ny action concerning the proposal taken by an applicant which would (i) have an adverse environmental impact, or (ii) limit the choice of reasonable alternatives may be grounds for denial of the license." At the most, this rule merely confirms what we said in our earlier decision: PG&E proceeds with construction of the ISFSI at its own risk.[11]

As our prior decision stressed, the Ninth Circuit directed no particular NRC action on remand and in fact gave the NRC "maximum procedural leeway," stating that it was not "circumscribing the procedures that the NRC must employ," and that "[t]here remain . . . a wide variety of actions [the NRC] may take on remand."[12] We have not yet resolved the procedures that, consistent with the Court's decision, would govern our handling of the remanded proceeding.[13] But there is at present no need to issue any declaration regarding PG&E's ISFSI license and no need to issue any injunction. PG&E has stated publicly that it will not be ready to use the ISFSI to store spent fuel "until at least November, 2007."[14] So, as a practical matter,

---

[10] *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-2, 55 NRC 5, 7 & n.3 (2002), citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 264 (2000).

[11] CLI-06-23, 64 NRC at __, slip op. at 3.

[12] CLI-06-23, 64 NRC at __, slip op. at 2, citing 449 F.3d at 1035.

[13] We also note PG&E has petitioned for a writ of certiorari. *Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (S.Ct.).

[14] *See* Answer of Pacific Gas and Electric Company to Motion for Declaratory and Injunctive Relief, at 15 (July 17, 2006).

the facility will not be used and the irradiation of the casks that SLOMFP says it fears will "foreclose the consideration of alternatives"[15] cannot occur in the near term.

For these reasons, the Commission *denies* SLOMFP's motion for reconsideration. To avoid last-second emergency motions, however, we direct PG&E to provide written notification, to the Commission and to all parties, of its intention to load any spent fuel into the new facility *a minimum of 60 days prior* to any actual loading of such material into the ISFSI.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of November, 2006

[15]SLOMFP Motion at 6 n.4.

Commissioner Gregory B. Jaczko respectfully concurs, in part:

I concur, in part, with this decision. I agree that the arguments presented do not establish a sufficient basis to merit reconsideration. I continue, however, to believe that the agency should conduct a review of the impacts of terrorist attacks on nuclear facilities as part of a NEPA analysis. My concerns regarding the Commission's decision not to do so have been fully explained in my dissent on the Order ruling upon the San Luis Obispo Mothers for Peace Motion for Declaratory and Injunctive Relief (CLI-06-23), and thus, need not be repeated here.