UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO APPLICANT'S APPEAL OF ATOMIC SAFETY AND LICENSING BOARD DECISION (LBP-10-15)

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INTRODUCTION

On August 16, 2010, Pacific Gas and Electric Company ("PG&E" or "Applicant"), pursuant to 10 C.F.R. §§ 2.311(a) and (c), filed an appeal from the Atomic Safety and Licensing Board's ("Board") August 4, 2010 decision[1] granting a request for hearing and permitting the San Luis Obispo Mothers for Peace ("SLOMFP") to intervene in the proceeding for the renewal of the Diablo Canyon Nuclear Power Plant ("DCNPP"), Units 1 and 2, operating licenses.[2] The Nuclear Regulatory Commission ("NRC") staff ("Staff") hereby files its answer to the Applicant's Appeal.

As set forth below, the Staff agrees in part, and disagrees in part, with the positions reflected in PG&E's Appeal.

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[1] *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 NRC __ (Aug. 4, 2010)(slip op.) ("Order").

[2] Applicant's Notice of Appeal of LBP-10-15; Applicant's Brief in Support of Appeal from LBP-10-15 ((Aug. 16, 2010) Agency Document Access & Management System ("ADAMS") Accession No. ML102280603) ("Appeal").

PROCEDURAL HISTORY

SLOMFP filed five contentions related to the application to renew the operating licenses for DCNPP Units 1 and 2.[3] The Board admitted four contentions (Technical Contention 1 ("TC-1"), Environmental Contention 1 ("EC-1"), Environmental Contention 2 ("EC-2") and Environmental Contention 4 ("EC-4")), referred EC-2 to the Commission for a ruling on waiver of a rule of general applicability under 10 C.F.R. § 2.335,[4] denied admission of EC-3, and referred several "novel" legal and policy questions to the Commission with regard to EC-4, pursuant to 10 C.F.R. § 2.323(f)(1).[5] On August 16, 2010, PG&E appealed the admission of all four contentions under 10 C.F.R. § 2.311(d)(1).[6]

DISCUSSION

I. Contention TC-1 is Outside the Scope of License Renewal and Lacks an Adequate Basis

In its Appeal, PG&E asserts that TC-1, which challenges PG&E's ability to manage aging in light of recent inspection reports regarding the DCNPP licensing basis, raises current

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[3] Request for Hearing and Petition to Intervene by San Luis Obispo Mothers for Peace (Mar. 22, 2010) (ADAMS Accession No. ML100810441) ("Petition to Intervene").

[4] Contention EC-2 challenges NRC's Part 51 regulations. Under 10 C.F.R. § 2.335(a), no rule or regulation of the Commission is subject to attack in any adjudicatory proceeding absent a waiver or exception. SLOMFP submitted a waiver petition, and the Board determined that SLOMFP made a *prima facie* case for waiver under 10 C.F.R. § 2.335(c). Therefore, the Board certified the issue to the Commission under 10 C.F.R. § 2.335(d) for a determination of whether a waiver is warranted.

[5] Order at 96.

[6] Appeal at 1. PG&E incorrectly cited 10 C.F.R. § 2.311(c) instead of 10 C.F.R. § 2.311(d)(1). On August 19, 2010, the Staff filed an appeal of the Board's decision as to the admission of TC-1 and EC-1, pursuant to 10 C.F.R. § 2.341(f)(2). NRC Staff's Petition for Interlocutory Review of Atomic Safety and Licensing Board Decision (LBP-10-15) Admitting an Out of Scope Safety Contention and Improperly Recasting an Environmental Contention (August 19, 2010) (ADAMS Accession No. ML102310565) ("Petition").

operating issues that are outside the scope of license renewal.[7] As discussed in the Staff's petition for interlocutory review[8] and answer opposing admission of TC-1 before the Board,[9] the Staff also believes that TC-1 is outside the scope of + license renewal. The Commission has clearly indicated that the scope of license renewal is limited to evaluating the adequacy of an applicant's plans to manage aging. The license renewal review does not examine past instances of non-compliance with operating requirements to predict whether an applicant will effectively implement those plans. Rather, the applicant's implementation of the aging management plans is left to the NRC's usual oversight process.[10] Therefore, the Staff supports the portion of PG&E's Appeal that contends TC-1 is out of scope.[11]

PG&E also contends that TC-1, as admitted by the Board, lacks a sufficient basis.[12] The Staff agrees that TC-1 lacks a sufficient basis, but for reasons other than those stated by PG&E. PG&E contends that, assuming the Board was correct about the scope of license renewal, it

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[7] Appeal at 2-11.

[8] Petition at 8-18.

[9] NRC Staff's Answer to the San Luis Obispo Mothers for Peace Request for Hearing and Petition to Intervene, at 15-22 (Apr. 16, 2010) (ADAMS Accession No. ML101060667) ("Answer").

[10] Petition at 8-18; Answer at 15-22.

[11] However, the Staff does not agree with PG&E's assertion that the Board accurately interpreted 10 C.F.R. § 54.29(a) to require a predictive finding. Appeal at 5-6. PG&E's interpretation of § 54.29(a) appears internally inconsistent: PG&E states that the regulation requires the NRC to predict whether "aging management activities have been or will be taken," but also asserts that the "relevant inquiry under Part 54 is not whether those programs will be implemented." While the Staff agrees that § 54.29(a) only requires the NRC to judge the adequacy of an applicant's aging management program ("AMP"), as discussed in the Staff's Petition, the most logical way to read § 54.29 is to interpret the word "will" to indicate a statement of intent – not a statement about what will actually occur in the future. Petition at 17-18 & n. 65. This creates a more natural reading of the regulation, in keeping with Commission precedent, which requires the Staff to judge the adequacy of the AMPs as intended for implementation, not to predict whether an applicant will actually implement an AMP. *Id*. at 18. Whether the applicant actually implements the AMP is left to the Staff's usual oversight process, which involves no such guess-work. *Id*.

[12] Appeal at 11-14.

nonetheless failed to link the issues raised by TC-1 to that scope.[13] The Board held that in narrow circumstances "an applicant's ability to implement an AMP and/or manage aging in accordance with the [current licensing basis ("CLB")] during the [period of extended operation ("PEO")] can be informed by the applicant's past performance."[14] The Board concluded that TC-1 presented such narrow circumstances because it raised issues related to PG&E's ability to recognize, understand, and manage DCNPP's design/licensing basis.[15]

The Staff asserted that TC-1 lacks an adequate basis because it does not provide sufficient facts to challenge a finding of reasonable assurance that PG&E will comply with the CLB during the PEO.[16] TC-1 asserts that in light of the identified inspection findings, PG&E has not demonstrated that its plan is sufficient to provide reasonable assurance that it will comply with the CLB during the PEO.[17] But, the inspection findings themselves, while significant, are simply not of the quantity or magnitude that could undermine a Staff finding of reasonable assurance.[18] The Board's response to this argument was that it went to the merits of the case.[19] But the Board's response misinterpreted the Staff's argument. The Staff's argument was akin to a common law demurrer: even assuming all the facts alleged by SLOMFP were correct,

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[13] *Id.* at 11.

[14] Order at 89-90.

[15] *Id*. at 91-92.

[16] Answer at 22.

[17] *Id*. See also Petition to Intervene at 5-6.

[18] Answer at 22-26.

[19] Order at 84.

SLOMFP could still not prevail on TC-1.[20] The issues TC-1 raises, without more, are not material to an NRC finding of reasonable assurance for purposes of license renewal for DCNPP. Consequently, these conclusions do not prevent the NRC from making the necessary finding required by 10 C.F.R. § 54.29 for license renewal.

II. Contention EC-1 Demonstrates a Genuine Dispute on Information Omitted in the Application

As admitted and recast by the Board, EC-1 states that the Environmental Report ("ER") does not contain sufficient information to demonstrate that PG&E's severe accident mitigation alternatives ("SAMA") analysis meets the requirements of 40 C.F.R. § 1502.22, the National Environmental Policy Act ("NEPA"), or the Commission's regulations implementing NEPA, specifically 10 C.F.R. § 51.53(c)(3)(ii)(L).[21] Specifically, EC-1 alleges that the SAMA analysis does not adequately account for the newly-discovered Shoreline Fault near DCNPP. PG&E states that the contention does not establish a genuine dispute with the SAMA analysis; that 40 C.F.R. § 1502.22 does not apply to this license renewal proceeding; and even if 40 C.F.R. § 1502.22 were applicable, consideration of the Shoreline Fault is not "essential" to a choice among alternatives.[22]

As explained in the Staff's Answer to SLOMFP's Petition for a hearing, EC-1 is a contention of omission because the SAMA evaluation contained in the ER omits a discussion of the "Shoreline Fault."[23] As a result, the SAMA analysis did not satisfy NRC implementing

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[20] *See Augusta Mut. Ins. Co.* v. *Mason*, 274 Va. 199, 204, 645 S.E.2d 290, 293 (2007) (stating that a demurrer challenges whether a pleading states a cause of action upon which a court may grant relief, assuming all pleaded facts are true).

[21] Order at 25-26.

[22] Appeal at 14-20.

[23] Answer at 28-29.

regulation 10 C.F.R. § 51.53(c)(3)(ii)(L). Therefore the omission is material. Contrary to PG&E's assertion, the Staff does not mistakenly assume or presume that there is an omission. Although PG&E asserts that its ER addressed "the seismic risks associated with the Shoreline Fault,"[24] PG&E's SAMA analysis did not indicate how or whether PG&E's ER considered the effects of the Shoreline Fault in deriving the SAMA analysis.[25] Moreover, PG&E's bounding arguments go to the merits in scoping the SAMA, not on what was considered for purposes of NEPA's hard-look consideration.

A. In Part, Contention EC-1 Lacks a Sufficient Basis

However, the Staff agrees with PG&E that the remainder of EC-1, suggesting that a complete NEPA analysis must await the results of future studies, is inadmissible for lack of a sufficient basis.[26] Specifically, PG&E points out that the Board's reasoning appears to hinge on the fact that current studies of the Shoreline Fault are preliminary and further studies will reveal something significant to the analysis.[27] The Staff, in its answer to SLOMFP's Petition for a hearing, opposed awaiting further study of the fault before acting in this proceeding because SLOMFP did not demonstrate that the results of future studies will likely impact PG&E's SAMA analysis.[28]

PG&E cites Commission precedent for the assertion that, "The question is not whether…

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[24] Appeal at 16.

[25] License Renewal Application, Diablo Canyon Power Plant Unit 1 and Unit 2, Facility Operating License Nos. DPR-80 and DPR-82, Appendix E, Attachment F (2009) (ADAMS Accession No. ML093340123 ("Environmental Report").

[26] Answer at 28, 30-33.

[27] Appeal at 19 citing Order at 25.

[28] Answer at 28.

the SAMA analysis can be refined further," but rather whether the Petitioner has demonstrated that potentially cost-beneficial SAMAs have been overlooked.[29] This statement may be correct with respect to SAMAs in general, but where, as here, the Applicant has failed to include relevant information in a SAMA analysis, the Staff is of the view that such omissions must be subject to challenge for 10 C.F.R. § 51.53(c)(3)(ii)(L) to have any meaning.[30] PG&E notes that a sensitivity study indicates that the seismic risk could significantly increase, yet it would not alter the results of the SAMA analysis.[31] This may be so, but without any demonstration that the Shoreline Fault itself was considered in the SAMA analysis, the application is incomplete. Moreover, the Commission has also stated that agencies have the discretion to draw the line and move forward with decision making.[32] In this case, the Staff is of the view that more information is needed before the line may be drawn.[33]

B. 40 C.F.R. § 1502.22 Does Not Apply in this License Renewal Proceeding

As stated in the Staff's Petition, the Staff agrees with PG&E that 40 C.F.R. § 1502.22, the regulation promulgated by the Council on Environmental Quality ("CEQ"), does not apply to

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[29] Appeal at 16 (*citing Entergy Nuclear Generating Company and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-10-11, 71 NRC __ (Mar. 26, 2010)(slip op. at 37).

[30] *See Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382 (2002) (stating that intervenor's original admitted contention challenged the failure to discuss the Sandia study).

[31] Appeal at 19.

[32] *Pilgrim*, CLI-10-11, 71 NRC ___ (slip op. at 37) (*quoting Town of Winthrop v. FAA*, 535 F.3d 1, 11-13 (1st Cir. 2008)).

[33] *Cf. Entergy Nuclear Operations,* (Indian Point Nuclear Generating Station, Units 2 and 3), LBP-08-13, 68 NRC 43, 105-110 (2008) (finding that a SAMA analysis need not address new seismic contentions when the NRC Staff opposed the contention because it failed to demonstrate that new information about seismic activity would change the SAMA analysis and the Petitioners did not explain why "the most recent information" was sufficiently different from the earlier data to make a material change in the conclusions of the seismic SAMA analysis).

this license renewal proceeding.[34] The NRC is not bound by substantive CEQ regulations.[35] However, the Staff disagrees with PG&E's assertion that even if the CEQ regulations were applicable, the omitted information is not essential.[36] A complete SAMA analysis, required by Part 51, is not possible until the Staff receives this information. Therefore, consideration of the Shoreline Fault is essential to determine its effect on the current SAMA analysis.[37]

III. Contention EC-2 Lacks an Adequate Basis

In its Appeal, PG&E asserts that under 10 C.F.R. § 2.335, the Board's recommendation of a waiver of a rule of general applicability is automatically certified to the Commission and is not a subject of PG&E's appeal.[38] The Staff agrees that the Board's recommendation is automatically certified to the Commission, but notes that the Board's Order creates uncertainty in how SLOMFP can meet the fourth *Millstone* factor. In the *Millstone* proceeding, the Commission established a four-factor test for waiving a rule of general applicability under 10 C.F.R. § 2.335, which states that absent a waiver or exception, a rule or regulation of the Commission is not subject to challenge in an adjudication.[39] The fourth *Millstone* factor requires a demonstration that waiver of a regulation is necessary to reach a significant *safety* problem.[40] Because EC-2 raises environmental issues, and *Millstone's* fourth factor currently only

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[34] Petition at 21-25.

[35] Answer at 26 n.22.

[36] Appeal at 18-20.

[37] Answer at 29.

[38] Appeal at 20.

[39] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-05-24, 62 NRC 551, 559-60 (2005) (outlining four factors). *See also* 10 C.F.R. § 2.335(a).

[40] *Millstone*, CLI-05-24, 62 NRC 551, 559-60 (2005) (emphasis added).

addresses safety issues, Staff and SLOMFP proposed separate approaches for modifying the fourth *Millstone* factor to include environmental issues.[41] The Board's Order expanded the Commission's *Millstone* test to include environmental issues in the fourth factor.[42] The Board, however, did not indicate whether it was adopting SLOMFP's interpretation for modifying the *Millstone* test, or the Staff's interpretation. Instead, the Board merely indicated it agreed with SLOMFP and the Staff that a showing must be made to justify a waiver.[43] Since SLOMFP and Staff did not agree as to how or why the *Millstone* test should be modified to address EC-2, the Board's Order creates uncertainty in how to address this issue.[44]

PG&E also contends that the Board contravened Commission regulations by considering the admissibility of Contention EC-2 in conjunction with the waiver request.[45] Under 10 C.F.R. § 2.335(d), once the Board determines a *prima facie* case for waiver has been made, the Board must certify the matter directly to the Commission, before ruling on the petition. Thus, the Staff

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[41] SLOMFP proposed modifying *Millstone's* fourth factor to make it consistent with 10 C.F.R. § 50.92 and *Marsh v. Oregon Natural Resources Council*, 489 U.S. 360 (1989), and to include new and significant information (also modifying *Millstone's* second factor). San Luis Obispo Mothers for Peace's Brief Regarding Waiver Standard, at 2-3, 5 (May 13, 2010) (ADAMS Accession No. ML1013306290) ("SLOMFP's Waiver Brief"). The Staff's more limited argument was that the Commission was concerned with waiving its rules only for substantive, significant issues, and that *Millstone* should be liberally construed to also permit waiver of regulations to reach environmental issues that are significant. NRC Staff's Response to the Petition for Waiver of Commission Regulations Filed by San Luis Obispo Mothers for Peace, at 4 n.3 (April 16, 2010) (ADAMS Accession No. ML1010606570) ("Staff Waiver Response").

[42] Order at 44 n. 56. *See also* SLOMFP's Waiver Brief at 3. *See* Staff Waiver Response at 4 n.3. Under *Millstone*, the Commission stated that it would only waive application of a rule if a party demonstrated that the waiver was necessary to reach a "significant safety problem." *See supra* note 40.

[43] Order at 44 n.56.

[44] Notably, the Board's Order expanded Commission precedent, using interpretive arguments made by SLOMFP and the Staff. The Board, however, did not consider this to present novel legal or policy issues that would benefit from Commission review. 10 C.F.R. § 2.323(f)(1).

[45] Appeal at 21 n. 16. PG&E cited 10 C.F.R. § 2.335(c) for this proposition. The correct citation is 10 C.F.R. § 2.335(d).

agrees that a ruling on EC-2 should be held in abeyance pending the Commission's ruling on waiver.[46]

Additionally, PG&E asserts that during its improper admissibility analysis, the Board failed to recognize that SLOMFP did not present information challenging the analysis and conclusions in the ER related to spent fuel pool accidents.[47] PG&E notes that the ER incorporated the conclusions of the 1996 Generic Environmental Impact Statement[48] ("GEIS") by reference.[49] Typically, an intervenor may only challenge those findings by seeking a waiver.[50] PG&E notes that the spent fuel impacts analysis in the GEIS would not be eliminated if a waiver were granted.[51] Instead, a waiver would only permit SLOMFP to offer a contention challenging conclusions in the ER regarding spent fuel pool accidents.[52] Because SLOMFP

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[46] Appeal at 21 n.16. Under 10 C.F.R. § 2.335(d), after finding a *prima facie* case for waiver, "the presiding officer shall, *before ruling on the petition*, certify the matter directly to the Commission." (emphasis added). Moreover, the Commission "may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made. The Commission may direct further proceedings as it considers appropriate to aid its determination."

[47] Appeal at 21 (noting that Board made "a threshold error during its assessment of admissibility").

[48] NUREG-1437, Vol. 1, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (May 1996)(ADAMS Accession No. ML040690705).

[49] Appeal at 21. The GEIS findings have been expressly incorporated into Part 51 of NRC's regulations. Therefore, the environmental analysis in the GEIS may not be challenged in litigation unless the rule is waived by the Commission for a particular proceeding or the rule itself is suspended or altered in a rulemaking proceeding. *Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Entergy Nuclear Generation Co. & Entergy Nuclear Operations, Inc. (Pilgrim Nuclear Power Station)*, CLI-07-03, 65 NRC 13, 17-18 (2007).

[50] *Vermont Yankee*, CLI-07-03, 65 NRC at 17-18.

[51] Appeal at 21. A waiver would only waive Table B in App. B of Subpt. A. of Part 51 (i.e., Commission approval of a rule waiver could allow litigation of a contention on a "Category 1" issue). *Vermont Yankee*, CLI-07-03, 65 NRC at 20. The analysis underlying the regulation, however, would remain and would have to be challenged.

failed to dispute the analysis, conclusions, or findings in the GEIS as to the probability or impacts of spent fuel pool accidents, PG&E argues that EC-2 is inadmissible under 10 C.F.R. § 2.309(f)(1)(ii) and (vi).[53]

The Staff agrees that SLOMFP did not provide information that undermined the analysis and conclusions in the GEIS.[54] While SLOMFP did argue that Diablo Canyon was excluded from consideration in the 2009 Draft GEIS,[55] SLOMFP did not show how this challenged the conclusions in the GEIS, which considered *all* reactors[56] and on which PG&E relied in the ER.[57] The Commission has clearly stated that evidence must be more than mere assertions for a contention to be admissible.[58] SLOMFP only asserted that the GEIS's analysis of the environmental impacts of on-site spent fuel storage was inadequate, and did not produce any evidence or testimony to demonstrate that the discussion in the GEIS is insufficient.[59] Rather, SLOMFP argued that the 2009 Draft GEIS did not adequately assess the risks of seismic

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(. . .continued)

[52] Appeal at 21.

[53] *Id*. at 21-22.

[54] Answer at 35-39 (noting that SLOMFP's discussion in support of EC-2 fails to claim any deficiency in GEIS itself).

[55] Order at 28-29.

[56] GEIS at iii. ("The analyses in the GEIS encompass all operating light-water reactors").

[57] Order at 42-43 (Board agrees with Staff that the 1996 GEIS is a controlling document analyzing generic environmental impacts for license renewal). *See* Staff Waiver Response at 10; Answer at 36.

[58] *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-17, 56 NRC 1, 8 (2002). Answer at 31, 33. *See also Private Fuel Storage, L.L.C.*(Independent Spent Fuel Storage Installation), CLI-04-22. 60 NRC 125, 139 (2004)(noting that while Commission does not expect petitioner to prove its contention at pleading stage, Commission does require petitioner to show genuine dispute warranting hearing).

[59] Answer at 38. Petition to Intervene at 16-20.

accidents at spent fuel pools ("SFP"). But, SLOMFP failed to link any deficiencies in the 2009 Draft GEIS to the 1996 GEIS cited in PG&E's application. Therefore, under the Commission's regulations and precedent, SLOMFP did not meet its burden as a petitioner[60] to provide a sufficient basis to support EC-2, namely by making some demonstration that the SFP accident analysis in the 1996 GEIS is invalid, non-conservative, or otherwise faulty.[61] Thus, EC-2 is inadmissible under 10 C.F.R. § 2.309(f)(1) because SLOMFP did not demonstrate a deficiency in the current, applicable GEIS.[62]

Notably, the Board's Order recognizes that SLOMFP has the burden of providing evidence that the GEIS is invalid.[63] But, the Board's Order then improperly places the burden on PG&E and the Staff to provide evidence that the GEIS remains valid.[64] Elsewhere in the Order, the Board stated:

> "[i]n the absence of evidence that the 1996 GEIS relies on sufficient information to reach a conclusion applicable to DCNPP regarding the impacts of a seismically-induced SFP accident, we find that SLOMFP has made at least a prima facie showing that special circumstances exist at DCNPP that render the generic SFP conclusions inapplicable to DCNPP, but only with regard to seismically-induced SFP accidents.[65]

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[60] *Progress Energy Carolinas, Inc.* (Shearon Harris Nuclear Power Plant, Units 2 and 3), CLI-09-08, 69 NRC 317, 325 (2009) ("[T]he initial burden of showing whether the contention meets our admissibility standards still lies with the petitioner.") *See* 10 C.F.R. §§ 2.335(a)-(b) (outlining party's duty to submit petition sufficient to show special circumstances exist to waive specified Commission rule or regulation). *See also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631 (2004); *McGuire/Catawba*, CLI-02-17, 56 NRC at 8.

[61] 10 C.F.R. §§ 2.335(a),(b); 10 C.F.R. §§ 2.309(f)(1)(v),(vi). *See also Millstone*, CLI-04-36, 60 NRC at 631; *McGuire/Catawba*, CLI-02-17, 56 NRC at 8.

[62] Answer at 35-39. The Staff disagrees with PG&E only as to which parts of 10 C.F.R. § 2.309(f)(1) SLOMFP failed to meet. Specifically, the Staff argued that SLOMFP fails to meet 10 C.F.R. §§ 2.309(f)(1)(v) and (vi). Answer at 35-39. In contrast, PG&E argues that SLOMFP fails to meet 10 C.F.R. §§ 2.309(f)(1)(ii) and (vi). Appeal at 22.

[63] Order at 50 n. 65, 66.

[64] *Id*. at 43.

[65] *Id*.

This language suggests that the Board confused who held the burden of proof with respect to EC-2. As in the waiver analysis, in the contention admissibility analysis the burden rested on SLOMFP to show that the GEIS, relied on by the ER, was deficient. But, the Board's ruling regarding waiver and contention admissibility suggests that the burden rested with PG&E and the Staff to demonstrate that the 1996 GEIS was still valid. With this ruling, the Board fundamentally altered the burden of proof for waivers and contention admissibility under the Commission's regulations, and improperly admitted a contention that did not meet the requirements of 10 C.F.R. § 2.309. Thus, the Board's ruling is clearly erroneous.

PG&E asserts that the Board's Order improperly found that "bounding analyses" cannot satisfy NEPA.[66] PG&E points out that the GEIS concluded that the environmental impacts of SFP accidents are "bounded" by reactor accidents at full power, and that the likelihood of a fuel cladding fire is remote, even under a severe seismically generated accident causing a catastrophic failure of the pool.[67] Further, PG&E notes that these GEIS findings are supported by Commission precedent and numerous studies regarding the risks of spent fuel pool accidents.[68] PG&E notes that a bounding analysis "comports with an approach that the Board implied would be acceptable (i.e., that a proper analysis could demonstrate that an event is 'remote and speculative')."[69]

The Staff agrees that the GEIS contains a SFP accident analysis adequate to satisfy

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[66] Appeal at 24 ("The Board erred in finding that a 'bounding' analysis is unacceptable under NEPA").

[67] *Id*. at 26 (*citing* GEIS at 6-72, 6-75).

[68] *Id.* at 23-26. *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 22 n. 11 (2001).

[69] Appeal at 26. Order at 49.

NEPA, and notes that the NRC studies cited by PG&E confirm that this analysis is robust. The Staff does not, however, read the Board's Order as finding that a bounding analysis is unacceptable under NEPA. Instead, the Staff reads the Board's Order as finding the bounding analysis in the GEIS unacceptable in this particular instance, given new information in the 2009 Draft GEIS and related to the Shoreline Fault.[70] Therefore, the Staff opposes the portion of PG&E's appeal construing the Board's ruling to hold that a "bounding analysis" is unacceptable under NEPA. Regardless, the Staff agrees with PG&E that the Board erred in admitting EC-2, because SLOMFP did not show how the GEIS's bounding analysis related to spent fuel pool impacts was undermined by the 2009 Draft GEIS or information related to the Shoreline Fault.

Finally, the Staff does not agree with PG&E's argument that EC-2 is completely a SAMA contention.[71] Instead, the Staff agrees with the Board that EC-2 raises both SAMA and non-SAMA issues.[72] Most of the language in EC-2 focuses on the ER in general. The contention asserts that "[t]he analysis should consider a full spectrum of potential causes including seismic contributors" and the consequences of those contributors "including not only health effects but economic and societal effects."[73] But, in other places, EC-2 appears to also assert a SAMA contention, "*In addition*, the [ER] should address alternatives for avoiding or mitigating those impacts."[74] Therefore, to the extent EC-2 is a SAMA contention, the Staff agrees that EC-2 is

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[70] Order at 41-44.

[71] Appeal at 26-27.

[72] Order at 47 ("It is not clear whether EC-2 is a SAMA contention."). *See also* Order at 48 n. 64.

[73] Petition to Intervene at 18.

[74] *Id*. at 19.

inadmissible because it is contrary to Commission precedent.[75] Further, to the extent EC-2 is a non-SAMA contention, the Staff believes the Board erred in admitting EC-2, as SLOMFP did not meet their burden of providing evidence that the GEIS's SFP accident analysis is inadequate.

Thus, because EC-2 contravenes Commission precedent and regulations and improperly changes the burdens of proof Staff and applicants must meet, the Board's ruling on EC-2 is erroneous.

IV. Admission of Contention EC-4 Contravenes Commission Precedent

In its Appeal, PG&E asserts that EC-4 is inadmissible because it contravenes established Commission precedent on the scope of analysis required to satisfy NEPA.[76] Specifically, in *Oyster Creek*, the Commission determined that the Staff's discretionary consideration of terrorism in the license renewal context was adequate to satisfy NEPA.[77] In this license renewal proceeding, the Board's Order requires additional analyses from PG&E and Staff, including the impact of additional initiating events (terrorist attacks) upon the Core Damage Frequency and the cost-benefit analyses regarding mitigative (preventative as well as palliative) alternatives.[78]

The Staff agrees that EC-4 is inadmissible because it contravenes the Commission's *Oyster Creek* decision, and supports the portion of PG&E's appeal that contends that the Board

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[75] *Turkey Point*, CLI-01-17, 54 NRC at 21.

[76] Appeal at 27-29 (*citing Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124 (2007)).

[77] *Oyster Creek*, CLI-07-8, 65 NRC at 131-32. *See* Answer at 46-49.

[78] Order at 66. Appeal at 28. Notably, the Board recognized that these additional analyses were problematic and posed significant policy and/or legal issues. *See* Order at 69.

erred in admitting EC-4 on this ground.[79] However, the Staff disagrees with PG&E's position that the Third Circuit's decision affirming *Oyster Creek* is "directly applicable" in this case.[80] The Third Circuit's holding regarding the sufficiency of Staff's NEPA-terrorism analysis, while persuasive, is not binding precedent in this proceeding, which could be appealed to the Ninth Circuit.[81] PG&E also contends that terrorism contentions are beyond the scope of a license renewal proceeding because they are directly related to security and thus unrelated to the detrimental effects of aging.[82] But, this is not accurate as to proceedings in the Ninth Circuit. While as a general rule the NRC does not consider terrorist acts within the scope of NRC's NEPA analysis, in the Ninth Circuit, the NRC is required to consider the effects of terrorism following the decision in *SLOMFP v. NRC*.[83] In that proceeding, for the construction and

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[79] Appeal at 27-30. The Board referred EC-4 to the Commission under 10 C.F.R. § 2.323(f)(1), citing novel or legal policy issues. Order at 69. The Staff does not believe there is a novel legal issue, as *Oyster Creek* is directly on point.

[80] Appeal at 29. The Board's Order inaccurately states that the Staff urged the Board to follow the Third Circuit's decision in *New Jersey Department of Environmental Protection v. NRC*, 561 F.3d 132 (3d Cir 2009). Order at 61-63. In fact, the Staff repeatedly urged the Board to follow the Commission's *Oyster Creek* decision. Answer at 46-47; Transcript of Diablo Canyon Nuclear Plant Oral Arguments, at 44-45, 345 (May 26, 2010) (ADAMS Accession No. ML101590109) ("Tr.")).

[81] The Third Circuit also held, contrary to *SLOMFP v. NRC*, 449 F.3d 1016 (9th Cir. 2006), that there is no reasonably close causal relationship between NRC's licensing action and the environmental effects of terrorist attacks. *NJDEP v. NRC*, 561 F.3d at 142.

[82] Appeal at 28-29.

[83] The Commission, consistent with Supreme Court NEPA doctrine, considers terrorist acts outside the scope of the Staff's NEPA review because "there simply is no 'proximate cause' link between an NRC licensing action…, and any altered risk of terrorist attack." *Oyster Creek*, CLI-07-8, 65 NRC at 129-30. However, in *SLOMFP v. NRC*, the Ninth Circuit determined that Supreme Court precedent was inapplicable in an independent spent fuel storage installation ("ISFSI") proceeding, and that the appropriate analysis was that in *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380 (9th Cir.1988). *SLOMFP v. NRC*, 449 F.3d at 1029. The Commission continues to reject this analysis outside of the Ninth Circuit.

licensing of an independent spent fuel storage installation ("ISFSI"),[84] the Staff had not prepared an EA or EIS discussing the effects of terrorism, and the application did not contain a terrorism discussion. The Ninth Circuit held that it was unreasonable under NEPA for the Staff to categorically refuse to consider the environmental effects of a terrorist attack.[85] Moreover, unlike the NRC's separate Part 54 safety analysis in license renewal, the NRC's Part 51 NEPA analysis is not limited to the detrimental effects of aging.[86]

In this license renewal proceeding, the Staff has considered the environmental effects of a terrorist attack generically in the GEIS, and the applicant's ER relies on the analysis in the GEIS in its discussion of terrorism.[87] Consequently, Staff has met the *SLOMFP v. NRC* requirement to consider terrorism.[88] Further, in *Oyster Creek*, the Commission determined that the Staff's consideration of these effects in the GEIS was adequate to satisfy NEPA.[89] Thus, admission of EC-4 is contrary to Commission precedent.

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[84] Notably, the construction of an ISFSI creates a new target for terrorists, whereas here, in license renewal, there is no construction and no new target for terrorists.

[85] *SLOMFP v. NRC*, 449 F.3d at 1028, 1035.

[86] *See Turkey Point,* CLI-01-17, 54 NRC 3, 7, 13 (2001).

[87] *See* ER at § 4.20 & Attachment F. Staff is preparing a SEIS for DCNPP, which will contain a site-specific analysis of the effects of terrorism. The draft SEIS is scheduled for publication in Oct. 2010.

[88] Notably, in *SLOMFP v. NRC*, the Ninth Circuit made clear that its decision that the NRC could not categorically refuse to consider the possibility of terrorist attacks did not constrain the NRC's consideration of the merits on remand, or circumscribe the procedures that the NRC used in conducting its NEPA-terrorism analysis. *SLOMFP v. NRC*, 449 F.3d at 1035. Further, the Ninth Circuit indicated it was not prejudging the NRC's "selected alternatives or the merits of the NRC's inquiry." *Id*.

[89] *Oyster Creek*, CLI-07-8, 65 NRC 124, 131-32 (2007). Thus, the entire field of terrorism has *not* been neglected. Order at 63; Tr. at 326. The NRC has selected a reasonable procedure for analyzing the environmental effects of terrorism in license renewal proceedings, which the Commission approved.

Moreover, the Board's reading of *SLOMFP v. NRC*[90] erroneously expands the requirements placed on the applicant and Staff in the Ninth Circuit.[91] The Board's ruling opens the possibility of site-specific litigation of which terrorist scenarios should be considered.[92] The Commission has clearly stated that this type of adjudicatory inquiry into the essentially limitless range of conceivable, but highly unlikely, terrorist-attack scenarios should be avoided.[93] Rather, the Commission found that the Staff's usual evaluation of the national security information that would necessarily underlie such a contention, without judicial oversight or agency hearings, satisfied NEPA.[94] Therefore, the admission of EC-4 by the Board contravenes Commission precedent and erroneously expands the requirements Staff and applicants must meet in the Ninth Circuit. Thus, the Board's ruling on EC-4 is in error.

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[90] Order at 66-69.

[91] *See supra* notes 81, 83, 85 (*SLOMFP v. NRC* only held that NRC could not categorically refuse to consider effects of terrorism in its Ninth Circuit proceedings).

[92] This is precisely what happened on remand in the *SLOMFP v. NRC* ISFSI proceeding. *See e.g.*, *Pacific Gas & Elec. Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-1, 67 NRC 1 (2008) and *Pacific Gas & Elec. Co*. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, 68 NRC 509 (2008).

[93] *Diablo Canyon ISFSI*, CLI-08-1, 67 NRC at 20 (internal footnotes omitted) ("We do not understand the Ninth Circuit's remand decision – which expressly recognized NRC security concerns and suggested the possibility of a 'limited proceeding' – to require a contested adjudicatory inquiry into the credibility of various hypothetical terrorist attacks against the Diablo Canyon ISFSI. Adjudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity").

[94] *Id*. at 21 (*citing Weinberger v. Catholic Action of Hawaii/Peace Educ. Project*, 454 U.S. 139, 146 (1981).

CONCLUSION

For the reasons set forth above, the Staff respectfully supports and in part disagrees with PG&E's appeal of the Board's opinion in LBP-10-15.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO APPLICANT'S APPEAL OF ATOMIC SAFETY AND LICENSING BOARD DECISION (LBP-10-15)," dated August 26, 2010, have been served upon the following by the Electronic Information Exchange, this 26th day of August, 2010:

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