

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 02/26/07

COMMISSIONERS

SERVED 02/26/07

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

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

CLI-07-11

MEMORANDUM AND ORDER

This is a proceeding to license an independent spent fuel storage installation (ISFSI) at the site of the Diablo Canyon nuclear power reactor in California. In *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1028 (9th Cir. 2006), the United States Court of Appeals for the Ninth Circuit held that the NRC's "categorical refusal to consider the environmental effects of a terrorist attack" in this licensing proceeding was unreasonable under the National Environmental Policy Act (NEPA).¹ The Ninth Circuit remanded the "NEPA-terrorism" question to the Commission for "further proceedings consistent with this opinion."²

¹ The Court reasoned, *inter alia*, that the NRC's analysis had resulted in the failure to address the "Petitioners' factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack because (1) the presence of the Storage Installation would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack." 449 F.3d at 1030.

² 449 F.3d at 1035.

Pacific Gas & Electric Co. (PG&E) petitioned the Supreme Court for a writ of certiorari. The Supreme Court recently denied PG&E's petition.³

Today we set a schedule⁴ for further proceedings in this adjudication in response to the Ninth Circuit's remand.⁵ The Ninth Circuit explicitly left to our discretion the precise manner in which we undertake a NEPA-terrorism review on remand, with respect to both our consideration of the merits and the procedures we choose to apply :

Our identification of the inadequacies in the agency's NEPA analysis should not be construed as constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis. There remain open to the agency a wide variety of actions it may take on remand, consistent with its statutory and regulatory requirements.⁶

With this guidance in mind, we set the following procedural schedule:

1) The NRC Staff shall prepare a revised environmental assessment in accordance with the NRC's regulations – addressing the likelihood of a terrorist attack at the Diablo Canyon ISFSI site and the potential consequences of such an attack – to be filed with the Commission and served upon the parties to the Ninth Circuit proceeding *within 90 days* after the date of this

³ *Pacific Gas & Electric Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (S. Ct., Jan. 16, 2007).

⁴ In setting this schedule, we note that PG&E now indicates that it does not intend to use the facility for actual storage of spent fuel until the summer of 2008, rather than November 2007 as previously stated. See Pacific Gas and Electric Company Motion for Prompt Commission Action at 3 (Jan. 24, 2007). See also Response by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard to PG&E Motion for Prompt Commission Action (Feb. 5, 2007). PG&E, in turn, responded to this San Luis Obispo Mothers for Peace response in a filing marked as Pacific Gas and Electric Company's Response to Intervenors' "Request for Clarification" (Feb. 13, 2007).

⁵ The schedule we set here applies only to this particular proceeding. The majority of the Commission, with Commissioner Jaczko dissenting, remains convinced that NEPA does not require a terrorism review in connection with NRC licensing decisions. See *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-___, 65 NRC ___ (Feb. __, 2007).

⁶ 449 F.3d at 1035.

decision;⁷

2) Amended or late-filed contentions must be filed *within thirty days* of publication of the NRC Staff's draft NEPA documentation. New late-filed contentions must meet the standards for late-filed contentions in 10 C.F.R. Part 2.⁸ Absent further direction, in the interest of expeditious resolution the Commission itself will determine the admissibility of contentions and whether oral argument or other further action is required;

3) Any member of the public who wishes to comment on the draft environmental assessment (outside of the adjudicatory process, pursuant to our normal environmental process) must do so *within thirty days* after it is made available in accordance with the NRC's regulations (or *within 45 days* of the publication of a draft environmental impact statement);⁹

4) To the extent practicable, we expect the NRC Staff to base its revised environmental analysis on information already available in agency records, and consider in particular the Commission's DBT for power plant sites¹⁰ and other information on the ISFSI design, mitigative,

⁷ If the NRC Staff requires additional time, or if the NRC Staff determines that an environmental impact statement is necessary, it may request a schedule modification.

⁸ See also, the discussion of contentions of omission in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002). In making their filings, all parties are reminded to appropriately protect all sensitive security information.

⁹ See 10 C.F.R. 51.33(c) and 51.73.

¹⁰ NRC regulations do not require specifically-licensed ISFSIs to defend against the "design-basis threat" of radiological sabotage. In practice, however, when an ISFSI is located at a reactor site (as here), protection of the ISFSI is typically included within the reactor's security plan. Reactor security plans require protection against the design basis threat. See 10 C.F.R. 50.34(c), (d), 73.55(a). PG&E amended its reactor security plan to cover protection of the ISFSI. See *License Amendment Request 01-09, Revision to the DCPP Physical Security Program to Incorporate the Diablo Canyon ISFSI and Associated Request for Exemption to Four 10 CFR 73.55 Requirements*, available as ADAMS Accession No. ML020020039; *Diablo Canyon Independent Spent Fuel Storage Installation Application – Physical Security Program Changes (TAC NO. L23399)*, available as ADAMS Accession No. ML040350009. See also *Pacific Gas and Electric, Diablo Canyon Nuclear Power Plant, Independent Spent Fuel Storage Installation; Order Modifying License (Effective Immediately)*, 70 Fed. Reg. 25,121 (May 12,

and security arrangements bearing on likely consequences, consistent with the requirements of NEPA, the Ninth Circuit's decision, and the regulations for the protection of sensitive and safeguards information. As the Ninth Circuit contemplated, the NRC Staff may rely, where appropriate, on qualitative rather than quantitative considerations;¹¹

5) We expect the NRC Staff to rely on as much public information as practicable and to make public as much of its revised environmental analysis as feasible. We recognize, however, that it may prove necessary to withhold some facts underlying the Staff's findings and conclusions as "safeguards" information, see AEA § 147, 42 U.S.C. § 2167; 10 C.F.R. § 71.23, or even as classified national security information;¹²

6) We expect the NRC Staff to review the comments on its draft analysis and finalize its review within 60 days of the close of the public comment period;

2005), EA-05-088, available as ADAMS Accession No. ML050940493; *In the Matter of Pacific Gas and Electric Diablo Canyon Nuclear Power Plant Independent Spent Fuel Storage Installation Order Modifying License (Effective Immediately)*, 70 Fed. Reg. 25,119 (May 12, 2005), EA-05-089, available as ADAMS Accession No. ML050940492.

¹¹ 449 F.3d at 1031-1032. See also 10 C.F.R. 51.45(c), 51.71(d).

¹² See *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981).

7.) We believe it is reasonable for the NRC to reach a final decision on the licensing action (for example, reaffirming, revoking or conditioning the ISFSI license) no later than twelve months from the date of this order, and expect further scheduling orders to be guided by this goal, recognizing the fundamental objectives of assuring fair and meaningful review and decision-making.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Independent Spent Fuel Storage)	
Installation))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-11) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of February 2007