

OVERVIEW OF SAN LUIS OBISPO MOTHERS FOR PEACE LEGAL ACTIONS AS OF DEC. 1, 2005

Contacts: Morgan Rafferty, Project Manager,
Steam Generator Replacement Project
805- 440-4140
Mrafferty805@charter.net

Jane Swanson, Spokesperson
805-595-2605
janeslo@slonet.org

What follows is a summary of the significance of and the relationships between several regulatory and judicial events in progress. This document is designed as a reference for the news media and for members of the Mothers. We have three complex processes in motion with regulatory agencies, and one case in federal court. Some of the NRC actions are in partial response to our federal court case, and some of them overlap.

Background:

It is important to understand that regulatory agencies do not use the processes that the general public is acquainted with in courts of law. They have no responsibility to be "fair" or make nuclear power "safe", only to fulfill their mandates.

The Nuclear Regulatory Commission (NRC) was created by Congress. The following statement is from www.nrc.gov/ :

"The NRC's mission is to regulate the Nation's civilian use of byproduct, source, and special nuclear materials to ensure adequate protection of public health and safety, to promote the common defense and security, and to protect the environment."

Please notice that word "adequate". MFP observation over the 34 years we have been intervenors is that "adequate" gets translated to "to the extent regulation does not seriously inconvenience utilities or interfere with their profits."

The California Public Utilities Commission was created by the state legislature. Below are selected sections of its mission statement, taken from www.cpuc.ca.gov . The underlining is mine.

"We are responsible for ensuring that customers have safe, reliable utility service at reasonable rates, protecting against fraud, and promoting the health of California's economy."

In pursuing these goals, we:

- * Monitor the safety of utility and transportation operations, and oversee markets to inhibit anti-competitive activity;
- * Oversee the merger and restructure of utility corporations, and enforce the California Environmental Quality Act for utility construction; "

[Note: All text in italics, below, is that of Diane Curran, our attorney for the federal court case.]

A. NRC announced Nov. 7, 2005, a proposed rule revising the Design Basis Threat

The proposed rule does not address the principal issue raised in our 9th Circuit U.S. Court of Appeals challenge to the NRC's decision on the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI"): whether the NRC was required to prepare an Environmental Impact Statement ("EIS") on the impacts of acts of malice or insanity against the ISFSI before issuing a license. But it does address a secondary issue raised in the appeal, i.e., whether the NRC should have upgraded the security of the entire Diablo Canyon site before licensing the ISFSI (Independent Spent Fuel Storage Installation, or dry cask storage of radioactive wastes that exceed the capacity of the two spent fuel pools) and whether it should have done that in a way that allowed the SLOMFP a meaningful opportunity to comment on the adequacy of the upgrades.

The proposed rule also responds to a separate lawsuit that we filed in 2003 with Public Citizen in the D.C. Circuit of the U.S. Court of Appeals, seeking to force the NRC to make post-9/11 security upgrades through a public rulemaking rather than through secret enforcement orders. (Please note that this was an entirely separate lawsuit from the one referenced in the previous paragraph.) We sued the NRC over the enforcement orders because of our concern over the secrecy in which they were issued and the lack of any procedure for public comment on the adequacy of the orders. The only parties that had any input to the content of the secret orders were the nuclear licensees and their lobbyists at the Nuclear Energy Institute. The lawsuit was suspended in 2004, after the NRC promised to go ahead with a rulemaking. The November 7, 2005, Federal Register notice is the rulemaking promised to the U.S. Court of Appeals in 2004. We are pleased that the proposed rule contains enough information about the DBT for the public to know its general outline and evaluate its adequacy. We are in the process of evaluating the proposed rule and will be filing comments in January.

There is one glaring aspect of the proposed rule with which we are extremely dissatisfied: its failure to address one of the issues of greatest concern to the SLOMFP: protection from the threat of airborne attack. This issue was raised in two petitions for rulemaking: one by the Union of Concerned Scientists and SLOMFP in 2003, and one by Committee to Bridge the Gap in 2004. In the proposed rule, the NRC states that it is deferring resolution of the airborne attack issue until it issues the final rule on the DBT. 70 Fed. Reg. at 67,385. By failing to include in the proposed rule any proposal for protecting nuclear facilities from aerial attack, the NRC sends an implicit message that it plans to do nothing to require protection of nuclear facilities from the airborne security

threat.

Given the vulnerability of the unprotected coastal site of the Diablo Canyon nuclear plant and associated Independent Spent Fuel Storage Installation, and given the passage of over four years since the September 11, 2001, airborne attacks on the World Trade Center and the Pentagon, the NRC's failure to address the threat of airborne attack is completely unacceptable.

B. NRC on November 17, 2005 rules on a 2003 petition for rulemaking filed by Union of Concerned Scientists and San Luis Obispo Mothers for Peace

Like the NRC's proposed DBT rulemaking, the NRC's response to UCS' and SLOMFP's petition for rulemaking has positive and negative aspects. On the positive side, the NRC agreed with us that the NRC's regulations should be changed to require the evaluation of the interactive effect of safety and security regulation. In particular, the NRC agreed with UCS and SLOMFP that 10 C.F.R. § 50.59, which allows licensees to make unapproved changes, tests or experiments if they would not adversely affect the safety of operation, must be changed to also require an evaluation of the effect of the change, test or experiment on security. The Federal Register notice states that the NRC plans to include this issue as part of an "ongoing rulemaking" for 10 C.F.R. § 73.55, which contains the NRC's requirements for protection of nuclear power plants against sabotage.

On the negative side, the NRC refuses to take action on the portion of UCS' and SLOMFP's petition that requested the NRC to amend its regulations to require that licensees evaluate each nuclear power plant against specified aerial hazards and make necessary changes to provide reasonable assurance that the ability of the facility to reach and maintain safe shutdown will not be compromised by an accident or intentional aerial assault. As in the DBT proposed rule, the NRC said that it would address this issue when it issues the DBT final rule. 70 Fed. Reg. at 69,690. As discussed above, the NRC's refusal to discuss the airborne attack issue or propose a regulation to address it indicates that the NRC has no plans for dealing with the issue, other than to reject UCS' and SLOMFP's rulemaking petition.

Please also see the third paragraph of section A above to review the connection between this petition and the DBT proposed rule change.

C . 9th Circuit Court of Appeals hears oral argument Oct. 17, 2005 MFP vs. NRC

San Luis Obispo Mothers for Peace and the Sierra Club, joined by former San Luis Obispo County Supervisor Peg Pinard, told a 3-judge panel of the 9th Circuit U.S. Court of Appeals why the U.S. Nuclear Regulatory Commission (NRC) violated federal environmental law when it licensed a new facility for storage of spent reactor fuel at the Diablo Canyon nuclear power plant. The Attorneys General of California, Washington, Utah, Massachusetts, and the San Luis Obispo County Council filed briefs in support of the lawsuit.

The groups' attorney, Diane Curran, asked the judges to reverse the NRC's 2003 decision refusing to hold a hearing on the question of whether a terrorist attack on the new facility is "reasonably foreseeable" and therefore requires preparation of an Environmental Impact Statement (EIS). As Curran told the Court, "the terrorist attacks of September 11, 2001, have removed any shred of credibility from the NRC's stance that terrorist attacks on nuclear facilities are 'speculative' events that cannot be predicted."

Curran pointed out that 140 spent fuel storage casks are to be located on an exposed hillside overlooking the Pacific Ocean where they are vulnerable to airborne attack. "The effects of a terrorist attack on the steel casks could be devastating," she warned. "Our expert study found that if only two casks were breached, an area more than half the size of the State of Connecticut could be rendered uninhabitable."

Curran also said that although an array of design measures could be used to minimize the impacts of a terrorist attack on the new spent fuel storage facility, the NRC had refused to consider them.

"We asked the NRC to analyze the environmental benefits of fortifying the casks, or putting them in bunkers, or scattering the cask storage pads over the site so that they would not present one big target," Curran said. "These are all feasible alternatives for minimizing the impacts of a terrorist attack on the Diablo Canyon facility. The NRC had no lawful basis to ignore them."

Jill ZamEk, Project Director for the Mothers for Peace, noted the group's frustration that while the NRC routinely discusses its measures for protection against the threat of terrorist attacks with nuclear industry lobbyists, it has completely shut out citizen groups like the Mothers for Peace.

"The NRC only listens to the nuclear industry, which has a vested interest in minimizing the cost of environmental protection," said ZamEk. "The NRC must protect the environment and consider our views on how that can be best accomplished. We have come to the Court of Appeals to vindicate our legal right to participate in government decisions that could drastically affect our lives and the health of our environment."

The Petitioners' Brief in its entirety can be found at <http://www.mothersforpeace.org/data/2004-03-159thCircuitBrief.pdf>

Please re-read the first paragraph under section A above, to review how this court case has been partially responded to in NRC rulemaking.

C. CPUC rules in favor of SGRP Nov. 18, 2005

Note that all of the above cases are in federal domains. The CPUC is a state regulatory body. While it is the federal government that has sole authority over radiological matters, the state has its own responsibilities to public safety and to the environment under the California Environmental Quality Act. Please see the end of the **Background** section above to review CPUC mandate.

The California Public Utilities Commission (CPUC) on November 18, 2005 voted to approve ratepayer funding of the replacement of eight prematurely failing steam generators at Diablo Canyon Nuclear Power Plant (DCNPP). The cost to ratepayers will be \$706 million with a cap of \$815 million, plus many millions in profits to PG&E shareholders.

Replacement of the steam generators will enable PG&E to continue operating DCNPP at least through 2025 and possibly longer if PG&E seeks and receives a license extension to 2045. If the steam generators are not replaced, the plant will have to end operations in 2013/2014 because of the defects in the present generators.

The San Luis Obispo Mothers for Peace, along with Sierra Club, Public Citizen, and Environment California has actively participated in this case in an effort to ensure that the full range of environmental and cost concerns associated with the extended operating period be considered thoroughly. In this decision the CPUC has failed to comply with the California Environmental Quality Act (CEQA), which requires that the environmental and safety implications of Diablo's extended operations be addressed. California law also obligates the Commission to ensure that its decision provides adequate protection to the public and the environment and is generally in the public interest.

This decision made by the CPUC is in defiance of state and environmental law. The Commission's environmental analysis completely ignored all the potential safety and environmental impacts associated with the extended operative period made possible by the steam generator replacements. The impacts include increased risks associated with creating, transporting, and storing larger quantities of radioactive materials, increased seismic and terrorism risks and impacts on public health and safety and marine life.

Failure to study these impacts means the Commission did not have an adequate basis for knowing whether PG&E's application met the requirements of law, or whether it served the overall public interest.

According to Morgan Rafferty, Project Manager for the Mothers for Peace, "The CPUC is required by law to evaluate all the costs and risks associated with extending Diablo Canyon's operation to the end of its licenses in 2025. Since PG&E may well seek and receive license extensions through 2045, state law also requires that potential impacts during this period be addressed. Both in its economic analysis and in its environmental analysis the CPUC has put on a set of blinders that causes the overall impacts, costs and risks to be greatly under-estimated. This has deprived PG&E ratepayers of the right to see that their monies are well spent. It has also deprived all Californians of their constitutional right that all environmental and safety considerations of 30 years of additional operation of a nuclear power plant be addressed. Mothers for Peace will continue its efforts to see that the public and the environment are properly protected"

--

Jane Swanson
janeslo@slonet.org