

June 28, 2007  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

In the matter of  
Pacific Gas and Electric Company  
Diablo Canyon Nuclear Power Plant  
Unit Nos. 1 and 2  
Independent Spent Fuel Storage Installation

Docket # 72-26-ISFSI

**SAN LUIS OBISPO MOTHERS FOR PEACE'S  
CONTENTIONS AND REQUEST FOR A HEARING  
REGARDING DIABLO CANYON  
ENVIRONMENTAL ASSESSMENT SUPPLEMENT**

**I. INTRODUCTION AND SUMMARY**

Pursuant to the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") Order in *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007) ("CLI-07-011"), San Luis Obispo Mothers for Peace ("SLOMFP") hereby submits its contentions regarding the Supplement to the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (May 29, 2007) ("EA Supplement"). SLOMFP requests the Commission to hold a formal adjudicatory hearing on its contentions, as required by 10 C.F.R. §§ 2.105(a)(7), 2.700 and 2.714(b).<sup>1</sup>

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<sup>1</sup> Although 10 C.F.R. §2.714 was superseded in 2004 by 10 C.F.R. § 2.2.309 and §§ 2.105(a)((7) and 2.700 were changed to allow the NRC to conduct informal hearings on ISFSI license applications (69 Fed. Reg. 2,182 (January 14, 2004)), SLOMFP believes the former versions of these regulations apply because this proceeding began before the 2004 changes to the NRC's procedural regulations were promulgated.

SLOMFP's contentions are supported by the declaration and expert report of Dr. Gordon Thompson, *Assessing Risks of Potential Malicious Actions at Commercial Nuclear Facilities: The Case of a Proposed Independent Spent Fuel Storage Installation at the Diablo Canyon Site* (June 27, 2007) ("Thompson Report"). Copies of Dr. Thompson's declaration, report, and curriculum vitae are attached.

The EA Supplement purports to address the environmental impacts of intentional attacks on the Diablo Canyon spent fuel storage facility, in response to the U.S. Court of Appeals for the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9<sup>th</sup> Cir. 2006), cert. denied, 127 S.Ct. 1124 (2007) ("*Mothers for Peace*"). While the EA Supplement concedes that some types of attacks on the Diablo Canyon independent spent fuel storage installation ("ISFSI") are plausible, it asserts that the environmental impacts of attacks would be insignificant. Therefore the NRC Staff has decided not to prepare a full-fledged environmental impact statement ("EIS") that would provide a more detailed analysis of the environmental impacts of attacks on the facility and would also evaluate the comparative costs and benefits of a range of alternatives to avoid or mitigate those impacts.

Unfortunately, the NRC Staff has done a very poor job of evaluating the environmental impacts of intentional attacks on the Diablo Canyon facility. The EA distorts and minimizes the environmental impacts of attacks on the facility by using hidden and unjustified assumptions. As a result, the EA Supplement fails to consider a range of credible attacks that could cause significant damage to the human environment. The EA supplement also fails to identify the key documents on which it relies, thus making it impossible for any party or reviewing court to verify the appropriateness of its

reliance on those documents. In addition, the EA Supplement fails to address the U.S. government’s major plan for protection of critical infrastructure and key resources, the National Infrastructure Protection Plan (“NIPP”) (2006). Finally, the EA fails to comply with NEPA because it does not consider the significant cumulative impacts of the proposed ISFSI in relation to the impacts of the existing high-density pool storage system for spent fuel at the Diablo Canyon nuclear plant.

As a result of these profound deficiencies, the EA Supplement completely fails to demonstrate that the NRC made a “fully informed and well-considered” determination of no significant impacts. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9<sup>th</sup> Cir. 1998), cert. denied sub nom. *Malheur Lumber Co. v. Blue Mountain Biodiversity Project*, 527 U.S. 1003 (1999). NEPA requires the NRC to go back to the drawing board and provide an analysis that is understandable and scientifically supported.

As discussed below in Section III, SLOMFP’s contentions satisfy the NRC’s late-filing criteria in 10 C.F.R. § 2.714(b).

## **II. CONTENTIONS**

### **Contention 1: Failure to define terms, explain methodology or identify scientific sources**

The EA violates NEPA and NRC and Council on Environmental Quality (“CEQ”) implementing regulations because it fails to document the basis for the NRC Staff’s determination that the environmental impacts of intentional attacks on the Diablo Canyon ISFSI are insignificant, by failing to define its terms, explain its methodology, or identify its scientific sources. Therefore, the EA fails to justify the Staff’s decision not to prepare an EIS for the facility.

**Basis:** As the U.S. Court of Appeals for the Ninth Circuit ruled in *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1988), NEPA requires that an agency must provide the public with “a basis for evaluating the impacts” of a proposed action, including “hard data” relied on by the agency’s experts. The purpose of this requirement is two-fold: (a) to protect “a plaintiff’s ability to challenge an agency action,” and (b) to allow a court to review an agency’s NEPA decision without “second guessing” the agency’s “scientific conclusions.” *Id.* See also *Earth Island Inst. V. United States Forest Ser.*, 351 F.3d 1291, 1300-31 (9<sup>th</sup> Cir. 2003), citing *Marsh v. Ore. Natural Res. Council, Inc.*, 490 U.S. 360, 377(1989) (a reviewing court must be able to independently review the record in order to satisfy itself that the agency has made a reasoned decision based on its evaluation of the evidence). Consistent with these judicial interpretations of NEPA, NRC regulation 10 C.F.R. § 51.30(a)(2) requires that an EA must provide a “list of agencies and persons consulted, and identification of sources used.” CEQ regulation 40 C.F.R. § 1502.24 also requires that:

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

While Section 1502.24 nominally applies to EISs, the U.S. Court of Appeals has also applied it to evaluate the adequacy of EAs. See *Idaho Sporting Congress*, 137 F.3d at 1150.

The Diablo Canyon EA Supplement does not comply with NEPA, 10 C.F.R. § 51.30(a)(2) or 40 C.F.R. § 1502.24 because it fails to describe the methodologies used by the NRC Staff or to provide the underlying data on which it relied. In fact, the EA does

not even identify the documents that the NRC Staff reviewed in preparing its environmental analysis.

**a. Failure to define terms or explain methodology**

The EA fails to define its terms or explain its methodology in the following respects:

i. The EA fails to provide a clear description of the NRC's process for identifying plausible or credible attack scenarios and assessing their consequences to determine whether they are significant. The EA does not describe the types of attack scenario that the NRC considered in preparing the EA, the types of attack scenario that were disregarded, or why the NRC considered or disregarded any particular scenario. Some information about the considered and disregarded scenarios can be inferred from other information, leading to the conclusions stated below in Contention 3. Inference by the reader should not be required, however. The EA should define its terms directly and precisely.

ii. The reader is given no explanation of what the NRC means by the word "plausible." This is a grave omission, because the NRC's initial determination of whether attack scenarios are "plausible" established the scope of impacts considered in the EA. EA at 6. The term requires explanation, because it is clear from the EA that "plausible" means something to the NRC that is different from or in addition to its ordinary meaning of "credible." For instance, a number of factors relevant to a determination of plausibility were not evaluated until *after* the NRC made the plausibility determination, *i.e.*, "iconic value," "complexity of planning required," "resources needed," and "execution risk." *Id.* Moreover, as stated below in Contention 3, above, the

NRC disregarded attack scenarios that are plausible by any reasonable definition, including scenarios that would yield radiological impacts much larger than those considered in the EA.

iii. Just as the Pa'ina Irradiator EA rules out attack scenarios that are "remote or speculative" (page B-5), it is reasonable to infer that the Diablo Canyon EA does the same.<sup>2</sup> But neither the Diablo Canyon EA nor the Pa'ina Irradiator EA provides any description of the criteria used by the NRC to distinguish between scenarios that are "plausible" and those that are "remote and speculative." Given that the NRC has asserted the probability of an intentional attack on a nuclear facility "cannot be reliably quantified" (EA Supplement at 6), it is important for the EA to provide qualitative criteria for determining whether attacks are remote and speculative.

iv. The EA does not describe any analysis performed by the NRC Staff for the specific purpose of complying with NEPA. Instead, it describes an analysis that apparently took place in 2002, long before the Ninth Circuit's decision, and that apparently was based on compliance with NRC's AEA-based security requirements. EA Supplement at 6. The scope of threat scenarios covered by the AEA-based standard of reasonable protection or the Design Basis Threat rule's standard of requiring defense "against which a private security force can reasonably be expected to defend" (72 Fed.

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<sup>2</sup> On June 1, 2007, almost contemporaneously with the issuance of the Diablo Canyon EA Supplement, the NRC issued a supplemental appendix to the draft EA for the Pa'ina Irradiator in Hawaii which purported to address the environmental impacts of attacks on the irradiator. Draft Environmental Assessment for Pa'ina Irradiator, Appendix B: Consideration of Terrorist Attacks on the Proposed Pa'ina Irradiator ("Pa'ina Irradiator EA"). See <http://www.nrc.gov/materials/paina.pdf>. The Pa'ina Irradiator EA is useful in analyzing the EA for the Diablo Canyon facility because it provides additional insight into the NRC's criteria for determining what attack scenarios it would consider in the EA. The Pa'ina Irradiator EA is also deficient for many of the same reasons as the Diablo Canyon EA.

Reg. 12,705 12,713 (March 19, 2007)) is narrower than the scope of scenarios covered by the NEPA standard of reasonable foreseeability in 40 C.F.R. 1502.22(b)(3). The EA Supplement fails to demonstrate that the NRC considered the wider scope of scenarios required by NEPA.

v. To the extent that the EA Supplement describes the analytical steps taken by the NRC in its 2002 analysis, the process is poorly described. According to the EA Supplement, the analysis had four steps: (1) “Initially, the NRC screened threat scenarios to determine plausibility;” (2) “NRC assessed the attractiveness of the facility to attack by taking into account factors such as iconic value, complexity of planning required, resources needed, execution risk, and public protection measures;” (3) “NRC made conservative assessments of consequences, to assess the potential for early fatalities from radiological impacts;” and (4) “NRC then looked at the combined effect of the attractiveness and the consequences analyses, to determine whether additional security measures for ISFSIs were required.” EA Supplement at 6.

This description raises many questions that go unanswered in the EA Supplement. For instance:

- Why isn’t the attractiveness of the facility to attack a plausibility consideration? If attractiveness of the facility is not a plausibility consideration, then how does the NRC define plausibility?
- How is “iconic value” determined?
- By what standard did the NRC evaluate “complexity of planning required,” “resources needed,” and “execution risk?”

- What are “public protection measures?” Do they constitute security plans, emergency planning, or something else? How are “public protection measures” relevant to the “attractiveness of the facility?” How is the criterion of “public protection measures” different than “execution risk?”
- Did the NRC avoid discussing significant impacts by assuming that public protection measures would prevent the attacks? Such an assumption would defeat a key purpose of an environmental assessment, which is to evaluate scenarios that are low in probability but credible, *i.e.*, scenarios for which “protective measures” can be circumvented or do not exist.

vi. In describing “generic assessments” that “formed the basis for the NRC’s conclusion that there was no need for further security measures at ISFSIs beyond those currently required by the regulation” (EA Supplement at 7), the NRC Staff fails to explain how this general analysis of licensee compliance with Atomic Energy Act-based security regulations and orders has any relevance to a NEPA determination of whether environmental impacts are significant.

vii. The NRC asserts that it “reviewed the analyses done for the ISFSI security assessments, and compared the assumptions used in these generic assessments to the relevant features of the Diablo Canyon ISFSI” (*Id.*), determining that the assumptions in these generic security assessments were “representative” or “conservative” in relation to the Diablo Canyon facility. The NRC fails to explain how that determination was factored into a NEPA analysis.

viii. The EA Supplement fails to provide any analysis of the radiological impacts of threat scenarios, including any documented estimate of the



radiation dose arising from release of radioactive material. The only statement made by the EA Supplement is that the dose “would likely be below 5 rem.” *Id.* at 7.

In short, the NRC Staff’s description of the analytical process it used to reach a finding of no significant impact is unintelligible. The EA Supplement’s dismal failure to provide an understandable explanation of its methodology violates NEPA’s requirement to take a “hard look” at environmental impacts and disclose the nature of that hard look. *Blue Mountains Biodiversity Project*, 161 F.3d at 1211.

**b. Failure to reference sources of scientific data**

The EA supplement’s only list of “references” consists of three documents that are irrelevant and invalid in light of the U.S. Court of Appeals decision in *San Luis Obispo Mothers for Peace v. NRC*: the 2003 license amendment application, the original 2003 EA, and the license itself. Yet, the drafters of the EA Supplement clearly consulted other sources of data and information. For instance, the EA Supplement describes several internal review processes that the NRC Staff apparently relied on in preparing its environmental analysis:

- “Following issuance of the 2002 security orders for ISFSIs, NRC used a security assessment framework as a screening and assessment tool, to determine whether additional security measures, beyond those required by regulation and the security orders, were warranted for NRC’s regulated facilities, including ISFSIs.” EA Supplement at 6.
- “Initially, NRC screened threat scenarios to determine plausibility.” *Id.*
- “For those scenarios deemed plausible, NRC assessed the attractiveness of the facility to attack . . .” *Id.*
- “. . . NRC made conservative assessments of consequences, to assess the potential for early fatalities from radiological impacts.” *Id.*
- “NRC . . . looked at the combined effect of the attractiveness and the consequences analyses, to determine whether additional security measures for ISFSIs were necessary.” *Id.*
- “In conducting the security assessments for ISFSIs, NRC chose several spent fuel storage cask designs that were representative of most currently NRC-certified designs.” *Id.* at 6-7.

- The Staff reached a “conclusion that there was no need for further security measures at ISFSIs beyond those currently required by regulation and imposed by orders issued after September 11, 2001.” *Id.* at 7.
- The Staff “reviewed the analyses done for the ISFSI security assessments, and compared the assumptions used in these generic assessments to the relevant features of the Diablo Canyon ISFSI.” *Id.* at 7.
- The Staff made a determination “that the assumptions used in these generic security assessments, regarding the storage cask design, the source term (amount of radioactive material released) and the atmospheric dispersion, were representative, and in some cases conservative, relative to the actual conditions at the Diablo Canyon ISFSI.” *Id.*

Thus it appears from the EA Supplement that the NRC Staff may have engaged in as many as nine separate reviews that informed the Staff’s environmental review in this case – yet the EA Supplement fails to list any of these reviews as references.

Under NEPA, the NRC is required to disclose the technical basis for its determination that the environmental impacts of licensing the Diablo Canyon ISFSI are insignificant. The public is also entitled to review that technical basis. *Idaho Sporting Cong.*, 137 F.3d at 1150. Therefore SLOMFP seeks identification and access to any security studies or other data relied on by the NRC in reaching its conclusion that the environmental impacts of the proposed spent fuel storage facility are insignificant. SLOMFP understands that these studies and data may constitute safeguards or classified information, and intends to request access to them under appropriate protective measures.<sup>3</sup>

**Contention 2: Reliance on hidden and unjustified assumptions.**

The EA Supplement fails to satisfy NEPA because the NRC’s decision not to prepare an EIS is based on hidden and unjustified assumptions.

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<sup>3</sup> SLOMFP’s attorney, Diane Curran, and one of its experts, Dr. Edwin S. Lyman, have active Level L security clearances.

**Basis:** As the U.S. Court of Appeals for the Fifth Circuit held in *South Louisiana Env'tl. Council v. Sand*, 629 F.2d 1005, 1011-12 (5<sup>th</sup> Cir. 1980), an agency's reliance on misleading assumptions violates NEPA by "impairing the agency's consideration of the adverse environmental effects of a proposed project." *See also Johnston v. Davis*, 698 F.2d 1088, 1094 (10<sup>th</sup> Cir. 1983) (holding that misleading or unqualified statements that do not represent a realistic assessment of environmental impacts violate NEPA); *Hughes Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4<sup>th</sup> Cir. 1999) (rejecting an EIS that contained misleading projections of a proposed project's economic benefits).

Here, the EA Supplement violates NEPA by relying on hidden and unjustified assumptions. For instance, the EA Supplement appears to assume that the environmental impacts of an attack on a spent fuel storage cask would be insignificant if they do not result in early fatalities. This assumption is not completely clear, but can be inferred from the document's discussion of consequences. In considering the consequences of potential releases of radioactive material, the NRC has employed only one indicator, namely "the potential for early fatalities." EA at 6. The Staff thus appears to have used early fatalities as a criterion to screen out consideration of any threat scenarios that cause impacts other than early fatalities.

To exclude consequences other than early fatalities is absurd. The adverse health effects of a successful attack on the Diablo Canyon ISFSI would include increased cancers and illnesses (Thompson Report at 17, 35), which indisputably constitute significant adverse environmental impacts that are routinely considered in NRC's EISs.<sup>4</sup>

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<sup>4</sup> *See, e.g.*, NUREG-1767, Vol. 1, Environmental Impact Statement on the Construction and Operation of a Proposed Mixed Oxide Fuel Fabrication Facility at the Savannah

Moreover, as discussed in Dr. Thompson’s report, land contamination -- the dominant impact of spent-fuel-storage conventional accidents or attacks – is a very serious impact that can render uninhabitable a large land area, causing significant economic and social impacts. *Id.*

The EA Supplement also appears to assume that the environmental impacts of an attack on a spent fuel storage cask would be reduced to the point of insignificance by unspecified emergency planning upgrades. *Id.* at 7. According to the EA Supplement, these measures “could” mitigate the impacts of an attack on the Diablo Canyon ISFSI. *Id.* The EA Supplement’s discussion is insufficient to satisfy NEPA because but it does not refer to any specific emergency planning measures that could be assessed for their effectiveness, nor does Pacific Gas and Electric Company’s license application for the spent fuel storage facility include any new or upgraded emergency planning measures for the Diablo Canyon ISFSI.

**Contention 3: Failure to consider credible threat scenarios with significant environmental impacts.**

In violation of NEPA and CEQ regulation 40 C.F.R. § 1502.22(b)(3), the EA fails to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment.

**Basis:** CEQ regulation 40 C.F.R. § 1502.22(b)(3) requires the NRC to consider low-probability environmental impacts with catastrophic consequences, if those impacts are reasonably foreseeable. The EA Supplement creates the appearance of compliance with § 1502.22(b)(3) by claiming to consider all “plausible” attack scenarios. *Id.* at 6.

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River Site, South Carolina, Table 4.14 (2005), which provides an estimate of “latent” cancer fatalities as a result of facility accidents.

But the EA Supplement fails to consider credible scenarios that could cause significant environmental damage. As discussed in the Thompson Report at page 33, it may be inferred from the very small dose consequences estimated in the EA Supplement that the EA Supplement examined scenarios that caused only minimal damage to a storage module.<sup>5</sup>

As discussed in Dr. Thompson's report at pages 33-37, the EA Supplement fails to consider credible scenarios in which penetration of a spent-fuel canister is accompanied by the use of an incendiary device to ignite the zirconium cladding of the spent fuel. Scenarios of this type could be implemented by a relatively small group of attackers using weapons and devices that are readily available to sub-national groups, causing a release of radioactive material much larger than the EA has considered. For instance, penetration of the overpack of a storage module and the multi-purpose canister ("MPC") could be readily accomplished using a shaped charge, a device that is commonly used in the mining and petroleum industries and therefore well-known and available. *Id.* An attack on storage modules could be accomplished through a variety of means, including direct contact, firing of guided missiles from a distance, or the use of small aircraft as improvised cruise missiles. *Id.* at 35-36.

Such an attack could lead to penetration of several canisters and zirconium combustion within the canisters, causing the release of a substantial fraction of the volatile radionuclides, notably cesium-137, that are present in the affected canisters. Consequences of such a release could include the contamination and rendering

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<sup>5</sup> It is impossible to discern the NRC Staff's reasoning for considering only attack scenarios that would cause minimal damage to a spent fuel storage cask. Whatever the Staff's reasoning may have been, its failure to consider credible attacks with significant adverse impacts violates NEPA.

uninhabitable of about 7,500 square kilometers of land, together with cancers and other adverse health effects and significant economic and social damage. *Id.* at 17, 37.

The NRC Staff violated NEPA by failing to prepare a full-scale EIS that analyzed the impacts of a wide range of potential attack scenarios, including the attack scenarios described above and in Dr. Thompson's Report at pages 34-36.<sup>6</sup> The EIS should include a publicly available version that summarizes the nature of the scenarios considered and their impacts, and it should also include a detailed description whose circulation is restricted to agencies, groups and individuals that have a demonstrated interest in the information and are cleared to receive such information.

**Contention 4: Failure to address National Infrastructure Protection Plan (NIPP)**

The EA fails to comply with NEPA and NRC implementing regulations because it fails to address homeland-security strategy, the principles of protective deterrence, or the opportunities that the NIPP has identified for incorporating protective features into the design of infrastructure elements.

**Basis:** The U.S. Department of Homeland Security has issued the National Infrastructure Protection Plan ("NIPP"), whose purpose is to provide "the unifying structure for the integration of critical infrastructure and key resources (CI/KR) protection into a single national program." *Id.* at vii. The NIPP identifies three purposes of measures to protect critical infrastructure and key resources: (i) deter the threat; (ii) mitigate vulnerabilities; and (iii) minimize consequences associated with an attack or

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<sup>6</sup> It is not SLOMFP's responsibility to identify all credible scenarios that should be evaluated in an EIS. That is the NRC's responsibility.

other incident. *Id.* at 7. The NIPP identifies a range of protective measures to achieve these purposes:

Protection can include a wide range of activities such as improving business protocols, hardening facilities, building resiliency and redundancy, incorporating hazard resistance into initial facility design, initiating active or passive countermeasures, installing security systems, leveraging ‘self-healing’ technologies, promoting workforce surety programs, or implementing cyber security measures, among various others.

*Id.* at 7. Protective measures of these types could significantly reduce the conditional probability that an attack would be successful. Thompson Report at 11-12. Such measures could, therefore, "deter" attacks by altering attackers' cost-benefit calculations. As Dr. Thompson observes in his report, that form of deterrence is different from deterrence attributable to an attacked party's capability to counter-attack. *Id.*

As a signatory to the Department of Homeland Security’s National Infrastructure Protection Plan, the NRC is responsible for demonstrating that its environmental analysis of the impacts of attacks on the Diablo Canyon ISFSI is consistent with the NIPP. Yet, the EA does not identify the NIPP or its officials as resources or individuals consulted under 10 C.F.R. § 51.30(a)(2).

**Contention 5: Failure to consider vulnerability of ISFSI in relation to the entire Diablo Canyon spent fuel storage complex.**

The EA fails to comply with NEPA because it does not consider the significant cumulative impacts of the proposed ISFSI in relation to the impacts of the existing high-density pool storage system for spent fuel at the Diablo Canyon nuclear plant. The NRC Staff should prepare an EIS that discusses the cumulative impacts of spent fuel storage at the Diablo Canyon site, including the vulnerability of both the ISFSI and the spent fuel

storage pools to attack. The EIS should also consider alternatives for mitigating those impacts, such as using the ISFSI to reduce the density of fuel storage in the pool.

**Basis:** According to the 2003 EA, the proposed ISFSI is needed to provide additional spent fuel storage capacity for the Diablo Canyon plant, in order to allow the plant to continue to operate after the spent fuel pool becomes filled to capacity. The ISFSI will provide storage capacity “as needed” during the operating life of the plant and will be able to hold the entire inventory of spent fuel after the plant closes. *Id.* at 2.

As discussed in Dr. Thompson’s Report at page 17, a conventional accident or attack on a Diablo Canyon spent fuel pool that causes the water level in the pool to fall below the top of the fuel-storage racks would cause a large atmospheric release of the cesium-137 in the pool (50 percent being a likely release fraction), causing widespread land contamination and adverse health and economic effects.

As the Commission has held, NEPA requires an EIS to consider the cumulative impacts of a proposed action, *i.e.*, the incremental impacts of the proposed action when added to the impacts of past, present, and reasonably foreseeable actions. *Hydro Resources, Inc.*, CLI-01-04, 53 NRC 31, 60 (2001). The NRC Staff should prepare an EIS that considers the cumulative impact of the proposed ISFSI in relation to the significant existing environmental risks posed by the Diablo Canyon spent fuel storage pools. The EIS should also examine, as a mitigative measure, the use of the ISFSI to reduce the risk of a pool fire by lowering the density of fuel assemblies in the Diablo Canyon spent fuel storage pools.



### **III. SLOMFP'S CONTENTIONS SATISFY THE NRC'S LATE-FILED CONTENTION CRITERIA.**

The contentions in Section II above satisfy a balancing of the NRC's late-filed contention criteria in 10 C.F.R. § 2.714(a). First, SLOMFP satisfies the first and most important factor -- good cause -- because it is filing its contentions within 30 days of the issuance of the EA Supplement. The EA Supplement constitutes the first attempt by the NRC to address the environmental impacts of intentional attacks on the Diablo Canyon spent fuel storage facility, and therefore this is the first opportunity SLOMFP has had to address the adequacy of the analysis.

Second, SLOMFP has no means other than this proceeding to vindicate its interest in requiring the NRC to fully comply with NEPA in considering the environmental impacts of intentional attacks on the Diablo Canyon ISFSI.<sup>7</sup>

Third, SLOMFP's participation may reasonably be expected to assist in the development of a sound record. SLOMFP is assisted by experienced counsel and Dr. Gordon Thompson, a qualified expert on risk assessment and nuclear security issues who has prepared an expert report regarding the deficiencies of the EA Supplement and who is prepared to testify regarding those deficiencies. If and when the NRC Staff complies with NEPA by identifying the sources on which it relied for the EA Supplement, SLOMFP also anticipates that it will retain Dr. Edwin S. Lyman of the Union of Concerned Scientists, for the purpose of reviewing any documents that may be protected as classified or safeguards information. Dr. Lyman's expert qualifications regarding nuclear facility security issues were established in *Duke Energy Corporation* (Catawba

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<sup>7</sup> While SLOMFP may submit comments on the EA Supplement, the NRC's failure to respond to its comments does not appear to be appealable in federal court unless SLOMFP has also requested a hearing.

Nuclear Station, Units 1 and 2), LBP-04-13, 60 NRC 33, affirmed, CLI-04-21, 60 NRC 21 (2004). Dr. Lyman recently applied for and received renewal of his Level L security clearance, for the purpose of reviewing any relevant classified documents that may be identified in this case.

Finally, SLOMFP anticipates that its participation in this proceeding will broaden and delay the proceeding. Nevertheless, it is not appropriate for the Commission to give any weight to this factor, because SLOMFP has done nothing to cause any delay or 11<sup>th</sup> hour broadening of the proceeding. SLOMFP has sought compliance by the NRC with NEPA's requirement to consider the environmental impacts of attacks on the Diablo Canyon ISFSI since the proceeding began over five years ago. Any delay is attributable to the intransigence of the NRC and PG&E, not to SLOMFP.

#### **IV. CONCLUSION**

For the foregoing reasons, SLOMFP requests the Commission to admit its contentions and hold a formal adjudicatory hearing on the adequacy of the EA Supplement to consider the environmental impacts of intentional attacks on the proposed Diablo Canyon ISFSI.

Respectfully submitted,

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