

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the matter of
Pacific Gas and Electric Company
Diablo Canyon Nuclear Power Plant
Units 1 and 2

Docket Nos. 50-275-LR, 50-373-LR
July 29, 2024

**BRIEF BY SAN LUIS OBISPO MOTHERS FOR PEACE, FRIENDS OF THE EARTH
AND ENVIRONMENTAL WORKING GROUP ON APPEAL OF LBP-24-06**

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I. INTRODUCTION

Pursuant to 10 C.F.R. §§ 2.311 and 2.341(c)(3), Petitioners San Luis Obispo Mothers for Peace (“SLOMFP”), Friends of the Earth (“FoE”), and Environmental Working Group (“EWG”) hereby brief the Commissioners of the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) regarding their appeal of LBP-24-06, the Atomic Safety and Licensing Board’s (“ASLB’s” or “Board’s”) Memorandum and Order (Denying Request for Hearing and Terminating Proceeding) (July 3, 2024) (hereinafter “LBP-24-06”).¹ LBP-24-06 erroneously and arbitrarily denies the public a hearing on crucial safety and environmental issues raised by Pacific Gas and Electric Company’s (“PG&E’s”) proposal to operate the Diablo Canyon nuclear power plant (“DCPP”) another twenty years past its operating license expiration dates of 2024 (Unit 1) and 2025 (Unit 2). These issues include the unacceptable risk of a seismic core damage accident, PG&E’s failure to ensure the integrity of the Unit 1 reactor pressure vessel, and significant questions raised by the California Coastal Commission (“CCC”) about whether PG&E complies with the federal Coastal Zone Management Act (“CZMA”).

¹ Petitioners submitted their contentions in Request by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group for Hearing on Pacific Gas & Electric Company’s License Renewal Application for the Diablo Canyon Nuclear Plant (March 4, 2024) (“Hearing Request”).

As discussed below, Petitioners' concerns are longstanding and serious. They also affect the risks and environmental impacts of current operation as well as future operation. Therefore, Petitioners have taken every opportunity, at all levels of the agency, to ensure those concerns are addressed for both the current license term and the prospective license renewal term.² But the NRC has rebuffed the Petitioners at every turn, thereby insulating PG&E's unsafe operation of DCPP from public scrutiny. LBP-24-06 constitutes the latest rebuff, barring Petitioners from providing any input to the agency's momentous and potentially disastrous decision to approve operation of DCPP for another twenty years.

Petitioners respectfully submit that the Board erred in ruling that none of Petitioners' three contentions is admissible.³ In addition, the Board unlawfully repudiated a binding commitment by the Commission to conduct a comprehensive review of the seismic risk to DCPP, and to include the public in that review through the hearing process. Therefore, the petition should have been granted. Petitioners respectfully submit that the Commission should reverse LBP-24-06 and grant them a hearing.

² Petitioners note that the distinction between the current operating license term and the license renewal term has been blurred by the NRC's grant to PG&E of an exemption from the NRC's Timely Renewal rule, 10 C.F.R. § 2.109(b). The exemption will allow PG&E to continue operating DCPP without interruption until the NRC has ruled on PG&E's license renewal application – an unknown period of time. Petitioners appealed the exemption to the U.S. Court of Appeals but their petition for review was denied in *San Luis Obispo Mothers for Peace, et al. v. NRC*, [CITE]. Petitioners' request for rehearing or rehearing en banc is pending before the Court.

³ The ASLB correctly found that all three of the Petitioners have standing. LBP-24-06, slip op. at 21-15. Thus, the issue of standing is not briefed here.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Issues Raised in Petitioners' Hearing Request

In their Hearing Request, Petitioners sought an adjudicatory hearing on three significant safety and environmental risks and adverse environmental impacts that have plagued DCPD for decades and the severity of which has become progressively more clear or has worsened over time:

- the significant risk of a devastating seismic accident posed by DCPD's location on and near a web of earthquake faults, including thrust faults in the Irish Hills that have an unacceptably high potential to cause a core damage accident (*i.e.*, approximately one in a thousand per year of operation);
- the heightened vulnerability of the Unit 1 reactor pressure vessel to fracture during a loss-of-coolant accident, due to its defective composition, indications of embrittlement during 2003 surveillance and testing, and PG&E's failure to conduct any surveillance or testing since then; and
- the significant adverse effects of continued operation of DCPD's once-through cooling system on the marine environment, as witnessed by the California Coastal Commission's ("CCC's") refusal to accept PG&E's application for certification under the CZMA.

B. Passage of S.B. 846 by the California Legislature

Petitioners' longstanding concerns would have been conclusively resolved by PG&E's planned closure of the DCPD reactors on their operating license expiration dates in 2024 (Unit 1) and 2025 (Unit 2). Under that plan, as approved by the California Public Utilities Commission ("CPUC") in 2018, DCPD would have been decommissioned and replaced with renewable energy sources. But in 2022, out of unsubstantiated concern that closure of DCPD would make

the State vulnerable to summer energy shortages, the California Senate Bill (“S.B.”) 846, reversing the CPUC’s decision approving PG&E’s closure plan. The Legislature directed PG&E to seek NRC approval of license renewal for operation until 2030.⁴

Underlying the Legislature’s directive was an implicit assumption that before permitting continued operation of DCP, the NRC would undertake a robust reexamination of seismic and other safety risks to DCP. In fact, the Legislature held open the possibility that as a result, the NRC might even order upgrades that could prove too expensive to justify continued operation of the reactors. These assumptions were reflected in a “covenant” that:

[I]f the United States Nuclear Regulatory Commission or any state agency requires, during the process of relicensing the Diablo Canyon powerplant, seismic safety or other safety modifications to the powerplant that would exceed the loan amount specified in paragraph (1) of subdivision (a), any application or approval to extend the operation period the commission shall promptly evaluate whether the extension of the Diablo Canyon powerplant remains a cost-effective means to meet California’s mid-term reliability needs, before any subsequent authorization and appropriation by the Legislature of an amount in excess of the loan amount.”⁵

Thus, the Legislature’s directive to PG&E to apply for NRC permission to operate for five more years past 2025 was based on the Legislature’s assumptions that PG&E would not seek more than five years’ renewal and that the NRC’s license renewal review would thoroughly assess all issues relevant to the safety of continued operation, including seismic risk.

C. Commitment by NRC Chairman Hanson to California Senator Padilla for Seismic Review and Public Participation During License Renewal Proceeding

The following spring, in a hearing of the U.S. Senate Environment and Public Works Committee, California Senator Alex Padilla questioned NRC Chairman Christopher T. Hanson regarding the scope of the seismic safety review that the NRC planned to undertake for DCP:

⁴ Cal. Pub. Utils. Code § 712.7(c)(2)

⁵ Cal. Pub. Resources Code § 25548.3(c)(9) (emphasis added).

And in the same spirit but more specifically, not just maintaining safety standards more broadly, but continuing to be operationally safe *with specific concern about seismic risk*, which have talked about for years here, and maintaining of that. Any comments here would be helpful. Also a friendly reminder to anticipate that when you do have these public hearings.⁶

Mr. Hanson responded:

Of course. We are going to be looking at updated safety information as part of that license renewal process. We did require all plants to take a look at the enhanced, relook at their risks after Fukushima. Diablo, of course, did look at their seismic risk and *we will take another look at that as part of the license renewal process.*⁷

Accordingly, under questioning by Senator Padilla, Chairman Hanson and his fellow Commissioners committed – formally and without rebuttal or qualification – to undertake a new review of seismic risks to DCPD during the license renewal process. This commitment was extremely significant, given that (a) NRC regulations for implementation of the Atomic Energy Act (10 C.F.R. Part 54) excused PG&E from addressing seismic risks in the safety portion of its license renewal application and (b) NRC regulations for the implementation of the National Environmental Policy Act (“NEPA”) (10 C.F.R. Part 51) excused PG&E from addressing seismic risks in its Environmental Report.⁸

D. Petitioners’ Hearing Request and Shutdown Petition in Response to NRC Extension of Deadline for Pressure Vessel Inspection

In the summer of 2023, Petitioners learned of a letter from the NRC Staff to PG&E that extended, for the fourth time in seventeen years, the NRC’s deadline for conducting surveillance

⁶ Hearing on the Nuclear Regulatory Commission’s Proposed Fiscal Year 2024 Budget (April 19, 2023), Remarks of Sen. Alex Padilla (emphasis added). A recording of the hearing is posted on the Committee’s website at:

<https://www.epw.senate.gov/public/index.cfm/hearings?ID=DD1B6EC6-588A-4A56-9961-F9961BE12270>. Sen. Padilla’s question can be found at approximately 1:45:26.

⁷ *Id.* (emphasis added). Chairman Hanson’s response can be found at approximately 1:45:55.

⁸ See *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 8 (2001); 10 C.F.R. Part 51, Subpart A, Appendix B.

of the DCCP Unit 1 pressure vessel for signs of embrittlement.⁹ Petitioners SLOMFP and FoE reviewed the record of the previous extensions and discovered that the proposed extension altered a deadline the NRC had set in 2006 in a license amendment proceeding to extend Unit 1's operating license by three years to recover the period of low-power testing. At the same time, SLOMFP and FoE retained a highly qualified and experienced technical expert, Dr. Digby Macdonald, Professor Emeritus at the University of California, to evaluate the body of publicly-available documents regarding the condition of the Unit 1 pressure vessel. Dr. Macdonald advised SLOMFP and FoE that not only was the proposed extension unjustified, but that Unit 1 should be closed immediately due to PG&E's longstanding failure to monitor the condition of the pressure vessel and the significant possibility that the pressure vessel was embrittled and could not survive a loss of coolant accident.

Therefore, with a supporting declaration by Dr. Macdonald, SLOMFP and FoE requested a hearing on the proposed extension on the grounds that it constituted an operating license amendment and should not be granted because it would jeopardize public health and safety. They also petitioned the Commissioners to shut down Unit 1 immediately, pending the completion of surveillance on the Unit 1 pressure vessel.¹⁰ However, the Commission refused to consider the

⁹ Letter from Jennifer L Dixon-Herrity, NRC to Paula Gerfen, PG&E re: Diablo Canyon Nuclear Power Plant, Unit 1 – Revision to the Reactor Vessel Material Surveillance Capsule Withdrawal Schedule (EPID L-2023-LLL-0012) (ADAMS Accession No. ML120330497).

¹⁰ Request to the NRC Commissioners by San Luis Obispo Mothers for Peace and Friends of the Earth for a Hearing on NRC Staff Decision Effectively Amending Diablo Canyon Unit 1 Operating License to Extend the Schedule for Surveillance of the Unit 1 Pressure Vessel and Request for Emergency Order Requiring Immediate Shutdown of Unit 1 Pending Completion of Tests and Inspections of Pressure Vessel, Public Disclosure of Results, Public Hearing, and Determination by the Commission that Unit 1 Can Safely Resume Operation (Sept. 14, 2023) at 1–3 (ADAMS Accession No. ML23257A302).

petition and instead referred it back to the NRC Staff.¹¹ A Petition Review Board (“PRB”) convened by the Staff has issued a final decision denying the petition.¹²

A. PG&E’s License Renewal Application

In November 2023, PG&E applied to the NRC for renewal of the DCPD operating licenses for twenty years (although S.B. 846 contemplates renewal of only five years, *see* 4 above). Once again, Petitioners retained Dr. Macdonald, this time to evaluate the question of whether PG&E had justified continued reliance on the Unit 1 pressure vessel during the proposed license renewal term. Dr. Macdonald advised Petitioners that continued operation of DCPD was not justified due to (a) the defective composition of the Unit 1 pressure vessel when it was purchased; (b) indications of embrittlement in 2003 surveillance tests; and (c) PG&E’s failure, since the 2003 tests, to monitor the condition of the pressure vessel.

Petitioners also retained another highly experienced and qualified technical expert, Dr. Peter Bird, Professor Emeritus of Geology and Geophysics at the University of California at Los Angeles, to evaluate the seismic risk of continuing to operate DCPD past its operating license expiration dates. Dr. Bird, who has previously participated in seismic risk evaluations for DCPD, advised the Petitioners that PG&E and the NRC had systematically underestimated the significant risk of a core damage accident due to rupture of thrust faults in the Irish Hills that underlie and surround DCPD. According to Dr. Bird, the risk of seismic core damage due to

¹¹ Secretary Order (Denying Hearing Request and Referring Request for Immediate Action to the Executive Director for Operations for Consideration Under 10 C.F.R. § 2.206) (Oct. 2, 2023) (unpublished) (ADAMS Accession No. ML23275A225). Petitioners appealed the Commission’s refusal to grant them a hearing on the extension to the U.S. Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers for Peace and Friends of the Earth v. NRC*, No. 23-3882. The case is briefed and oral argument has been scheduled for November.

¹² Letter from Jamie Pelton to Diane Curran (June 18, 2024) (ADAMS Accession No. ADAMS Accession No. ML24155A218).

these thrust faults *alone* is at least one in a thousand per year – a level so high that it meets the NRC’s criteria for immediate shutdown of a nuclear reactor.¹³

A. Petitioners’ Hearing Request and Seismic Enforcement Petition

On March 4, 2024, supported by declarations from both Dr. Bird and Dr. Macdonald, Petitioners submitted contentions challenging the safety of continued operation of DCPD in a license renewal term.¹⁴ Petitioners also submitted a contention challenging PG&E’s failure to comply with the CZMA.¹⁵

In addition, based on Dr. Bird’s assessment of the high risk posed by current operation of DCPD, Petitioners also submitted a request to the Commissioners to immediately shut down DCPD pending further evaluation of seismic risks.¹⁶

Once again, the Commission refused to consider Petitioners’ request and referred it back to the NRC Staff.¹⁷ The Staff’s PRB has issued a preliminary decision denying the petition.¹⁸ As

¹³ Declaration of Peter Bird, Ph.D (March 4, 2024) (ADAMS Accession No. ML24067A06) (“Bird Declaration”).

¹⁴ Hearing Request at 7-16 (Contention 1: Continued Operation of DCPD Under a Renewed License Poses an Unacceptable Safety Risk and Significant Adverse Environmental Impact of Seismic Core Damage); 16-18 (Contention 2: PG&E Fails to Provide an Adequate Plan to Monitor and Manage the Effects of Aging on Unit 1 Reactor Pressure Vessel).

¹⁵ Hearing Request at 18-21 (Contention 3: PG&E Fails to Demonstrate Compliance With the Coastal Zone Management Act).

¹⁶ Petition by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group for Shutdown of Diablo Canyon Nuclear Power Plant Due to Unacceptable Risk of Seismic Core Damage Accident (March 4, 2024) (ADAMS Accession No. ML24067A066)

¹⁷ Secretary Order (Mar. 12, 2024) (unpublished) (ADAMS Accession No. ML24072A529).

¹⁸ Email from Perry Buckberg, NRC, to Diane Curran, et al. (May 15, 2024) (ADAMS Accession No. ML24136A162).

contemplated by PRB procedures, Dr. Bird appeared before the PRB on July 17, 2024, and provided a briefing.¹⁹ The PRB has not yet issued a final decision.

Both PG&E and the NRC Staff opposed Petitioners' Hearing Request.²⁰ On May 22, 2024, the ASLB held an oral argument on Petitioners' standing and the admissibility of contentions. The ASLB issued LBP-24-06 on July 3, 2024, finding that Petitioners had standing but denying admission of all three of their contentions.

III. ARGUMENT

A. Contention 1 is Admissible.

The risk of a serious earthquake at DCPD has been a controversial subject since construction of DCPD when the Hosgri fault was discovered to lie three miles from the DCPD site, throwing into doubt the adequacy of the reactors' seismic design. At that time, two Commissioners dissented from the Commission's decision to approve the licensing of DCPD.²¹ In 2008, during the first license renewal proceeding (and prior to the termination of that proceeding at PG&E's request), the Shoreline fault was discovered only 600 meters from DCPD. That discovery halted the progress of the license review while PG&E updated its seismic analysis.²² Thus, both knowledge *and* concern about seismic risk to DCPD have expanded in

¹⁹ See Supplemental Declaration of Peter Bird, Ph.D (June 7, 2024) (ADAMS Accession No. 24162A079)

²⁰ Pacific Gas and Electric Company's Answer Opposing the Hearing Request Filed by San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group (March 29, 2024) ("PG&E Answer"); NRC Staff Answer Opposing the San Luis Obispo Mothers for Peace, Friends of the Earth and Environmental Working Group Hearing Request (March 29, 2024) ("NRC Staff Answer").

²¹ *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-82-12A, 16 N.R.C. 7, 8-14 (1982). The Commission effectively approved the licensing of DCPD by refusing to take review of an Appeal Board decision approving the granting of the licenses.

²² *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), LBP-10-15, 72 N.R.C. 257, 280 (2010).

tandem over the decades. Thus, as Senator Padilla noted in his discussion with Chairman Hanson, seismic risk has concerned him.”²³

To date, PG&E’s seismic studies have primarily focused on the Hosgri fault, the Shoreline fault, and other strike-slip faults to the southwest of the reactors. Two thrust faults (the Los Osos fault and the San Luis Bay fault) were also modeled, but their hazard was systematically underestimated through PG&E’s assignment of arbitrarily steep dips, unrealistically slow slip-rates, and limited extents of their seismogenic areas. For these modeled faults, PG&E most recently (in 2024) estimated seismic core damage frequency (“SCDF”) at approximately 3×10^{-5} per year and cited that value in its 2023 Environmental Report.²⁴ As demonstrated by Dr. Bird, however, thrust faults in the Irish Hills beneath and to the northeast of DCPD constitute a source of seismic risk that is significantly greater, because they produce strong shaking that leads to a much higher chance of seismic core damage.²⁵ Taking into account the recent experience of a severe earthquake on analogous thrust faults under the Noto Peninsula of Japan, Dr. Bird estimates that SCDF from the thrust faults in the Irish Hills could be as high as 1.4×10^{-3} /year, a factor of 47 times higher than estimated by PG&E.²⁶ Under NRC guidance, this rate of core damage frequency is high enough to warrant immediate shutdown of a reactor.²⁷

²³ See discussion above at page 5.

²⁴ Bird Declaration at 3-4.

²⁵ *Id.* at 4, 5-10.

²⁶ *Id.* at 4. In other words, as asserted by Dr. Bird, the severe accident that PG&E asserts will occur only once in 33,000 years may actually occur every ~715 years. That means that a license extension for 20 years would incur an additional ~2.8% probability of a severe accident.

²⁷ Hearing Request at 13 and note 27 (citing Office Instruction LIC-101, License Amendment Review Procedures (Rev. 6, July 31, 2020) (NRC Accession No. ML19248C539)).

Petitioners presented these specific concerns in their Hearing Request, supporting them with the detailed and well-documented declaration of Dr. Bird. They also relied on Chairman Hanson’s commitment to Sen. Padilla that the NRC would “*d*” at seismic risk “as part of the license renewal process.”²⁸ But the ASLB rejected Petitioners’ claims.

1. Petitioners’ claims fall within the scope of this license renewal proceeding.

First, the ASLB held that consideration of Petitioners’ contention is out of scope because it is barred by NRC regulations: Part 54 regulations limiting the scope of a safety review for license renewal to the adequacy of the licensee’s aging management program for passive structures and Part 51 regulations barring NEPA consideration of issues covered by the 2013 License Renewal GEIS.²⁹ In light of these barriers, the ASLB ruled that the Petitioners were required to submit a waiver petition in order to obtain consideration of Contention 1.³⁰ The ASLB also rejected Petitioners’ argument that Chairman Hanson’s commitment to Senator Padilla overrode the NRC’s Part 54 and Part 51 regulations and rendered Petitioners’ claims material to the NRC’s license renewal decision under *Union of Concerned Scientists v. NRC*, 735 F.2d 1435, 1438 (D.C. Cir. 1984) (finding that a rule that “denie[d] a right to a hearing on a material factor relied upon by the Commission in making its licensing decisions . . . was issued in excess of the Commission’s authority under section 189(a), and must be vacated”). While the ASLB conceded that the caselaw was “unclear” on the subject, it expressed “grave doubt” as to whether the Commission could be bound by Chairman Hanson’s statements.³¹

²⁸ See discussion above at page 5.

²⁹ LBP-24-06, slip op. at 28, 33-35.

³⁰ *Id.*, slip op. at 35-37.

³¹ *Id.*, slip op. at 29 and note 127. Petitioners note that LBP-24-06 appears to assume that Petitioners’ reliance on Chairman Hanson’s commitment is limited to the portion of Contention 1

Petitioners respectfully submit that in the circumstances of this proceeding, caselaw cited in LBP-24-06 (at page 29 n. 127) supports a finding that Chairman Hanson’s commitment to conduct a thorough review of seismic risks to DCPD during the license renewal process is binding on the Commission. In *Texas v. United States*, 86 F.Supp.3d 591, 654 n.64 (S.D. Tex. 2015), for instance, the District Court relied on representations by an IRS commissioner regarding the eligibility of a certain class of taxpayers for earned income tax credits. And in *United States v. Morgan*, 118 F.Supp. 621, 699 (S.D.N.Y. 1953), the District Court found that writings by commissioners of the Securities and Exchange Commission who addressed the meaning of statutory provision on which they had been in “close cooperation with the members of the Congress who formulated the terms of some of the statutory provisions” provided information that while not “binding” was “persuasive and helpful, especially as they are those of public officials of ripe experience in dealing with this very subject matter from day to day.”

Here, as in *Texas* and *Morgan*, Chairman Hanson and his fellow Commissioners are closely familiar with the general regulatory framework of the NRC’s regulatory process, including the conceptual framework that ordinarily excludes seismic risk issues from the license renewal review process. And they are just as closely familiar with their obligation and plenary power, as the NRC officials with ultimate responsibility for carrying out the requirements of the Atomic Energy Act, to ensure that under no circumstances will operation of Diablo Canyon or any other nuclear power plant pose an unacceptable risk to public health and safety.³² Further,

that is based on Atomic Energy Act-based safety requirements, not NEPA. *Id.*, slip op. at 28. That assumption is incorrect. Section A of Contention 1 (Statement of Contention) invokes both the Atomic Energy Act and NEPA. Hearing Request at 7. Section C (Demonstration that the Contention is Within the Scope of the Proceeding) also invokes both the Atomic Energy Act and NEPA in claiming reliance on Chairman Hanson’s commitment to Senator Padilla. *Id.* at 14.

³² 42 U.S.C. § 2232(a).

they surely are aware that few people outside the NRC are familiar with the byzantine and loopholed structure of the NRC's license renewal process, which limits the safety review to aging management issues and excludes seismic risks from environmental reviews based on the NRC's Generic Environmental Impact Statement for License Renewal. Case in point is the California Legislature, which assumed in passing S.B. 846 that the NRC's license renewal review would review seismic risk to DCPD before allowing an extended operating license term.³³ Finally, as conveyed by Senator Padilla, seismic risk to DCPD constitutes a longstanding and grave concern to the Senator as well as his constituents.³⁴

Thus, Chairman Hanson's unqualified assurance to Senator Padilla that the NRC will "take another look" at seismic risk "as part of the license renewal process" must be taken to constitute an assurance that means just what it reasonably appears to mean: that the NRC will examine seismic risk with new eyes and in a comprehensive manner, and that it will be conducted as part of the license renewal process, *i.e.*, will be a condition of license renewal. And if the seismic review is conducted as material part of the license renewal proceeding as promised, that necessarily means that it will be subject to public participation through the adjudicatory process.³⁵

³³ See discussion above at 4.

³⁴ See discussion above at 5.

³⁵ *Union of Concerned Scientists v. NRC*, 735 F.2d at 1438. According to the Board, Chairman Hanson's statement could reasonably be interpreted to mean that "the seismic risks [Chairman Hanson] referenced were related to those that already had been considered as part of the agency's safety review – which are limited to aging management programs and time-limited aging analyses." LBP-24-06, slip op. at 30. But this crabbed alternative interpretation does not bear objective scrutiny. Senator Padilla stated his inquiry in the broadest possible terms, and Chairman Hanson responded in kind, without qualification. Further, none of his fellow commissioners demurred or sought to qualify his statement. Thus, they can reasonably be presumed to have agreed with and supported his promise.

2. Petitioners' claims are sufficiently specific to warrant admission of the contention.

The ASLB also ruled that with respect to its safety claims, Contention 1 is inadmissible for its failure to dispute with specificity the exact portions of PG&E's license renewal application the Petitioners disputed.³⁶ But this ruling is tautological. It would not be possible for Petitioners to dispute PG&E's license renewal application, because the NRC's Part 54 regulations do not require PG&E to address seismic risk in the safety portion of its application. Petitioners comprehensively cited all relevant PG&E studies and reports bearing on the question of seismic risk to DCPD including the Environmental Report, which constitutes a part of PG&E's license renewal application.³⁷ If the Commission upholds Chairman Hanson's commitment to Senator Padilla, it will find that Dr. Bird has comprehensively analyzed every one of PG&E's reports that is relevant to the question of whether extended operation of DCPD in a license renewal term can be conducted safely.

B. Contention 2 is Admissible.

Petitioners' Contention 2 asserts that:

PG&E's license renewal application does not include an adequate plan to monitor and manage the effects of aging due to embrittlement of the Unit 1 reactor pressure vessel ("RPV") or an adequate time-limited aging analysis ("TLAA"), as required by 10 C.F.R. § 54.21.³⁸

As Petitioners assert in their Basis Statement, "PG&E's proposed aging management program for the reactor pressure vessel relies heavily upon and perpetuates the preexisting and inadequate surveillance program that PG&E has used during the decades-old initial operating license period." Petitioners rely for this assertion on the expert declaration of Dr. Digby Macdonald,

³⁶ LBP-24-06, slip op. at 32.

³⁷ See Hearing Request at 7-13, Bird Declaration, ¶¶ 10-13, 14(6), 15, 30, 34.

³⁸ Hearing Request at 16.

which sets forth a set of fundamental deficiencies in PG&E’s monitoring program, including its disregard of serious indications of embrittlement.³⁹ As summarized in the contention’s Basis Statement, “[t]aking all of these deficiencies into account, Dr. Macdonald concludes that the NRC must reject PG&E’s license renewal application because it relies on this outdated preexisting program without addressing or resolving multiple serious inadequacies.”⁴⁰

The ASLB rejected Contention 2, ruling that Petitioners and Dr. Macdonald had focused impermissibly on safety problems in the current license term rather than the prospective license renewal term.⁴¹ In making this ruling, however, the ASLB failed to consider the detail and specificity with which Dr. Macdonald demonstrated that in Shakespeare’s words, “What’s past is prologue.” For instance, in Section IV of his Declaration, Dr. Macdonald provided specific and detailed quotations from PG&E’s license renewal application that demonstrate reliance by the LRA on previous results of PG&E’s reactor pressure vessel surveillance program for its TLAAAs.⁴² Dr. Macdonald also cited specific portions of the LRA to demonstrate that PG&E implicitly relies on deadlines in its current operating license for withdrawal of surveillance

³⁹ *Id.* (citing Exhibit 3, Declaration of Digby Macdonald, Ph.D (March 4, 2024) (“Macdonald Declaration”).

⁴⁰ Hearing Request at 17.

⁴¹ *U.S. Dept. of Energy (High-Level Waste Repository)*, LBP-09-06, 69 N.R.C. 367, 408 (2006) (“LBP-09-06”). In LBP-09-06, the ASLB accepted contentions wherein the expert opinions supporting the contentions were detailed in the contentions themselves and supported by a brief statement of adoption in the expert declaration. Petitioners could have taken that approach, but chose instead to provide detailed technical support for the main points of the contention in the expert declaration. In both cases, the contention and supporting declaration, taken together, put other parties on notice of the petitioners’ concerns and thereby satisfied the objective of 10 C.F.R. § 2.309(f)(1)(v) and (vi) to ensure that “only those contentions that have been demonstrated to have sufficient substance to warrant further consideration on the merits” will be admitted.

⁴² *See* Macdonald Declaration, Section IV, ¶¶ 12-18.

Capsule B and the conduct of ultrasonic testing, without explicitly setting new deadlines as part of the license renewal application.⁴³ Thus, Dr. Macdonald documented his observation that:

[T]he LRA incorporates and depends heavily on previous tests and analyses of RPV embrittlement at DCPD and other reactors for its conclusion that (a) the Unit 1 RPV is entering the period of license renewal in a reasonably safe condition that complies with NRC regulations and (b) its condition can be adequately managed throughout the license renewal term.⁴⁴

As Dr. Macdonald further attested, PG&E's conclusions in these sections of the LRA are "not justified" because PG&E has failed to demonstrate that the Unit 1 reactor pressure vessel is safe to operate in the current license term, let alone a renewal term.⁴⁵ These deficiencies include PG&E's "inexplicable and gravely concerning" decision to discard surveillance data showing that the Unit RPV would approach the NRC's screening limit for embrittlement at the end of its current operating life (¶¶ 19.a and 19.b), substitution of data from other reactors without applying a larger error band (¶ 19.c), failing to speed up the RPV monitoring schedule to get a better sense of its condition (¶¶ 19.d and 19.f), and unreasonable extending the schedule for ultrasound testing of the beltline region (¶¶ 19.e, 19.f, and 19.g). These explicitly-stated deficiencies support Dr. Macdonald's conclusion that:

[T]he NRC lacks a reasonable basis to approve PG&E's license renewal application. Unless and until the NRC establishes that the Unit 1 pressure vessel can operate with a reasonable degree of safety, it has no basis to permit continued operation in a license renewal term.⁴⁶

⁴³ *Id.*, ¶¶ 14, 16.

⁴⁴ *Id.*, ¶ 19.

⁴⁵ *Id.*, Section V, ¶¶ 19-21 (citing Declaration of Digby Macdonald, Ph.D in Support of Hearing Request and Request for Emergency Order by San Luis Obispo Mothers for Peace and Friends of the Earth (Sept. 14, 2023) (NRC Accession No. ML23257A302)).

⁴⁶ *Id.*, ¶ 21.

With these specific and well-supported statements, Dr. Macdonald’s Declaration established that PG&E’s license renewal application *depends on* the results of the current reactor vessel surveillance program and related analyses for its assertions that the Unit 1 RPV can be adequately managed during the license renewal term. As in *Entergy Nuclear Operations, Inc.* (Indian Point, Units 1 and 2), LBP-08-13, 68 N.R.C. 43, 131 (2008), Petitioners lawfully based their contention on “serious embrittlement issues that are not adequately addressed in [the licensee’s license renewal application].”⁴⁷ Therefore, Petitioners have more than sufficiently “raised a genuine issue to be resolved at an evidentiary hearing.”⁴⁸

C. Contention 3 is Admissible.

Petitioners’ Contention 3 asserts:

The NRC may not approve renewal of PG&E’s operating licenses for DCPD because PG&E has not demonstrated compliance with the Coastal Zone Management Act (“CZMA”), 16 U.S.C. § 1451, et seq. For the same reason, PG&E’s Environmental Report also fails to satisfy the requirements of NRC’s own regulations mandating the content of environmental reports.⁴⁹

In support of their contention, Petitioners attached a letter from the CCC to PG&E withholding approval of PG&E’s Coastal Zone Consistency Certification (“Consistency Certification”) pending resolution of a set of deficiencies identified by the CCC.⁵⁰ In addition to state approval of its Consistency Certification, PG&E may be required to obtain one or more coastal development permits (“CDPs”).⁵¹

⁴⁷ *Id.*, 68 N.R.C. at 131.

⁴⁸ *Id.*

⁴⁹ Hearing Request at 18 (footnote omitted).

⁵⁰ Exhibit 4, Letter from Tom Luster, CCC, to Tom Jones, PG&E re: Pacific Gas & Electric Company’s Requested Nuclear Regulatory Commission License Renewal for Diablo Canyon Power Plant, San Luis Obispo County – Incomplete Consistency Certification at 3-8 (Dec. 7, 2023) (“CCC Letter”).

⁵¹ Hearing Request at 19 (citing Cal. Public Resources Code § 30600).

The ASLB “agree[d] with Petitioners that the CZMA requires the NRC ultimately to receive a concurrence in a licensee’s consistency certification.”⁵² But the Board ruled that Contention 3 nevertheless is inadmissible because “the CZMA does not require an applicant to include *with the application* to the federal agency a concurrence by the state agency.”⁵³ Thus, according to the Board, the contention is unripe. Petitioners must wait until some undesignated time in the future, when – if PG&E has not obtained the necessary concurrence – they may seek to file a motion to reopen the record or a motion to file a new contention.⁵⁴

The Board’s ruling is unlawful under *Union of Concerned Scientists*, 735 F.2d at 1438, 1443. As conceded by the ASLB, a concurrence from the CCC is essential to the NRC’s licensing decision, and therefore it is a material issue on which the NRC must offer a hearing. In *Union of Concerned Scientists*, the petitioners challenged an NRC rule that conditioned the issuance of reactor operating licenses on the conduct of offsite emergency planning exercises and yet excluded the outcome of the exercises from the subject matter of hearing requests by characterizing them as “part of the operational inspection process.”⁵⁵ The rationale for the rule was that by treating the exercises as inspections and holding them close to the time of licensing, the exercises would be “more meaningful.”⁵⁶ But the NRC was unwilling to delay licensing by holding hearings on the outcome of the exercises.

⁵² LBP-24-06, slip op. at 48. *See also id.*, slip op. at 50 (finding that “a consistency determination (by the state or the Secretary) is required prior to the issuance of any license renewal here.”).

⁵³ *Id.* (emphasis in original).

⁵⁴ *Id.*, slip op. at 51.

⁵⁵ 735 F.2d at 140.

⁵⁶ *Id.*

The Court reversed the NRC rule, holding that “once a hearing on a licensing proceeding is begun, it must encompass all material factors bearing on the licensing decision raised by the requester.⁵⁷ In so ruling, the Court explicitly rejected the NRC’s invitation to petitioners “to reopen the hearing if the exercise identifies fundamental defects in the emergency preparedness plans,” finding that the offer to apply a discretionary standard for whether to grant a hearing was not consistent with the strict hearing requirements of Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a).⁵⁸

Here, Petitioners have provided evidence, in the form of a letter to PG&E from the CCC, that the CCC is not satisfied with PG&E’s certification. This evidence is sufficient to raise a genuine and material dispute with PG&E as to whether it will be able to obtain the necessary concurrence. The NRC may not reject the contention now as unripe and later impose a heightened pleading standard on Petitioners for litigating their concern. While the Commission may hold the contention in abeyance pending further developments, it may not reject the contention now and place extra burdens on Petitioners at whatever time in the future the NRC deems ripe for raising this material issue.

IV. CONCLUSION

For the foregoing reasons, the Commission should reverse LBP-24-06 and admit Petitioners’ contentions.

⁵⁷ 735 F.2d at 1443 (citing *Porter County Chapter of the Izaak Walton League v. NRC*, 606 F.2d 1363, 1368 (D.C. Cir. 1979) (“such proceedings as are begun shall be formal, public hearings”).

⁵⁸ *Id.*

Respectfully submitted,

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July 29, 2024

CERTIFICATE OF SERVICE

I certify that on July 29, 2024, I posted the foregoing NOTICE OF APPEAL OF LBP-24-06 BY SAN LUIS OBISPO MOTHERS FOR PEACE, FRIENDS OF THE EARTH AND ENVIRONMENTAL WORKING GROUP and BRIEF BY SAN LUIS OBISPO MOTHERS FOR PEACE, FRIENDS OF THE EARTH AND ENVIRONMENTAL WORKING GROUP ON APPEAL OF LBP-24-06 the NRC's Electronic Information Exchange.

/signed electronically by/
Hallie Templeton