UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD, Petitioners, v. UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	No. 03-74628

PETITIONERS' RESPONSE TO U.S. NUCLEAR REGULATORY COMMISSION'S MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING

I. INTRODUCTION

Petitioners, San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard, hereby respond to a motion by the U.S. Nuclear Regulatory Commission ("NRC") and the United States for a 45-day extension of the time for filing a petition for rehearing or rehearing *en banc* of the Court's June 2, 2006, decision in this case, *San Luis Obispo Mothers for Peace v. NRC* ("Decision"). Motion for Extension of Time Within Which to File a petition for Rehearing or Rehearing *En Banc* (June 29, 2006). Petitioners oppose the requested 45-day extension because it is not justified and because any significant delay in the issuance of the mandate

would prejudice the Petitioners' interest in obtaining meaningful relief from the remand ordered by the Court. Petitioners would not object, however, to an extension of a week to account for recent flooding of the Justice Department's offices.

II. FACTUAL BACKGROUND

The procedural history of this case is described in the Decision at pages 6,069-075. To summarize, in December of 2001, Pacific Gas & Electric Company ("PG&E") applied for a license to build and operate an Independent Spent Fuel Storage Installation ("ISFSI") on the site of the Diablo Canyon nuclear power plant. The proposed ISFSI would store "spent" reactor fuel that had been used in the Diablo Canyon reactor.

Petitioners requested a hearing on the application, contending that the NRC should prepare an environmental impact statement ("EIS") that addresses the impacts of acts of malice or insanity against the proposed facility. The NRC's Atomic Safety and Licensing Board denied the hearing request in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002); and the Commission affirmed that decision in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1 (2003).

Separately, the Petitioners also filed a petition before the NRC Commissioners demanding that before licensing the ISFSI, the Commission should improve the security of the entire Diablo Canyon site under the Atomic Energy Act. The Commission denied the petition in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 413 (2002).

In October of 2003, after the conclusion of the administrative proceeding, the NRC's technical staff prepared an Environmental Assessment ("EA") concluding that that proposed ISFSI would have no significant adverse environmental impacts. The EA did not address the environmental impacts of intentional attacks on the proposed ISFSI, based on the Commission's prior determination that such a review was not appropriate under NEPA.

On December 11, 2003, Petitioners submitted a Petition for Review to this Court. Asserting that the NRC had violated the Atomic Energy Act, the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act, Petitioners asked the Court to reverse LBP-02-23, CLI-03-01, and CLI-02-23. *Id.* at 3.

On March 15, 2004, Petitioners filed their initial brief. Like the Petition for Review, the brief requested the Court to reverse CLI-02-23 and CLI-03-01. Brief for Petitioners at 56. The brief also requested the Court to remand the case to the

Commission. In addition, Petitioners' reply brief requested reversal of CLI-02-23 and CLI-03-01 and remand of the case to the Commission. *See also* Reply Brief for Petitioners at 38 (June 28, 2004).

In the spring of 2004, the NRC's technical staff completed its safety evaluation for the proposed ISFSI. On March 22, 2004, having completed both its environmental and safety reviews, the NRC issued a license to PG&E for operation of the ISFSI. *See* Answering Brief of Respondent-Intervenor Pacific Gas and Electric Company at 10 (May 26, 2004).

On June 2, 2006, the Court issued a decision denying the petition with respect to Petitioners' Atomic Energy Act and Administrative Procedure Act claims but granting the petition for review with respect to Petitioners' NEPA claim, thereby reversing CLI-03-01.[1] The Court found that as a matter of law, the Commission's refusal to prepare an EIS on the environmental impacts of an attack on the Diablo Canyon ISFSI did not meet NEPA's reasonableness standard. *Id.,*

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[1] The exact wording of the Court's ruling is as follows:

> We deny the petition as to the claims under the AEA and the APA. However, because we conclude that the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review, we hold that the EA prepared in reliance on that determination is inadequate and fails to comply with NEPA's mandate. We grant the petition as to that issue and remand for further proceedings consistent with this opinion.

Id., slip op. at 6,096.

slip op. at 6,096. Therefore, the EA on which the NRC had relied for the issuance of PG&E's permit was inadequate. *Id.*, slip op. at 6,096. The Court remanded the case to the NRC for further proceedings. *Id.*

In a press interview conducted shortly after issuance of the Court's decision, PG&E stated that "absent an injunction," it did not consider the Court's ruling to bar it from loading fuel into the ISFSI once construction is completed. *Ninth Circuit Voids NEPA Analysis*, NuclearFuel, June 19, 2006 at 10 (Attachment 1). PG&E also told reporters from NuclearFuel and the Los Angeles Times that the decision would have no effect on its schedule for construction of the proposed ISFSI, which began last fall. *Id. See also* Henry Weinstein, *Review of Terrorist Threat to Reactor Ordered*, Los Angeles Times, June 3, 2006 (Attachment 2).

On June 29, 2006, the NRC and the United States of America filed a motion for a 45-day extension of the time for seeking rehearing or rehearing *en banc*[2]. If the motion were granted the deadline would be extended from July 17 to August 31, 2006. Under F. R. App. P. 41(b), the issuance of the mandate would also be delayed until seven days after August 31, or September 7, 2006.

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[2] The motion is accompanied by a declaration of the NRC's principal attorney in this case, Charles E. Mullins. Declaration of Charles E. Mullins in Support of Motion for Extension of Time Within Which to File a Petition for Rehearing or Rehearing En Banc ("Mullins Declaration").

III. ARGUMENT

A. The NRC Has Not Justified a 45-Day Extension.

None of the NRC's arguments justifies the NRC's proposed doubling of the very generous 45-day period that already is provided to the federal government for seeking rehearing or rehearing *en banc* by F. R. App. P. 40. The rule already gives the federal government more than three times longer to seek rehearing than private parties, who have 14 days. As stated in the Advisory Committee Notes to F. R. App. P. 40, the time period for the federal government to seek rehearing or rehearing *en banc* was extended from 14 days to 45 days in 1994, in order to provide the Solicitor General with enough time to "conduct a thorough review of the merits of a case before requesting a rehearing." Thus, the rule already provides ample time for the Solicitor General's review and inter-agency consultations described in paragraph 5 of the Mullins Declaration.

Moreover, the fact that the principal NRC attorney on the case has been detailed to the Justice Department and is working on other assignments (Mullins Declaration, pars. 6-7) does not justify the granting of an extension. The NRC was well aware that this case was pending when it agreed to detail Mr. Mullins to the Justice Department, and could have arranged for him to brief other NRC attorneys on the issues he thinks should be raised in a petition for rehearing or rehearing *en banc.*

Finally, the fact that the Justice Department's main building will be closed for a week or more due to recent flooding does not warrant the doubling of the period for seeking rehearing. Presumably, the Justice Department has a contingency plan if its office is closed for an extended period. While Petitioners would not object to a week's extension to account for the unanticipated flooding, the requested 45-day extension would be excessive.[3]

B. Granting of the Requested Extension Would Prejudice Petitioners' Interests in a Meaningful Remand.

Petitioners are concerned that any significant delay in the issuance of a mandate in this proceeding would prejudice their ability to obtain meaningful relief

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[3] Petitioners do not believe the NRC's argument that the Court's decision constitutes a "plausible candidate for further review" because it is inconsistent with other judicial decisions (Mullins Declaration, par. 4) is relevant to the question of whether the NRC has justified the granting of an extension. Nevertheless, it is worth noting that with one exception, the parties already briefed the Court regarding the applicability of the cases cited by Mr. Mullins in notes 1, 2, and 3. Some of these cases are directly cited in the Court's decision, and presumably the others were considered in the decision.

The only new case cited by Mr. Mullins, *Mid-States Coalition for Progress v. STB,* 345 F.3d 520, 542 (8th Cir. 2003), is not inconsistent with the Court's decision in this case, but rather is inapposite. In *Mid-States,* the Court affirmed the Surface Transportation Board's ("STB's") refusal to consider new post-9/11 information about the vulnerability of a proposed rail line to terrorist attacks in a supplemental EIS. The Court found that the STB's factual rationale for refusing to supplement its EIS in those circumstances, *i.e.,* that the agency already had reviewed the safety of the rail line and that the concerns raised by the petitioners were generic rather than site-specific, was not "arbitrary or capricious." 345 F.3d at 544. Here, in contrast, the Court reversed the NRC's categorical refusal, as a matter of law, to consider the impacts of terrorist attacks under any circumstances.

in the remanded proceeding. PG&E received its license in the spring of 2004, and has been building the ISFSI since the fall of 2005. Thus, for more than six months prior to the issuance of the Court's decision, PG&E invested resources in construction of a facility whose design does not reflect consideration of measures for protection of the environment from intentional attacks. Since the issuance of the Court's decision, PG&E has stated publicly that the Court's decision will not affect its plans to continue building the ISFSI to its original design, and that PG&E intends to load fuel into the ISFSI once construction is complete.

If PG&E loads fuel into the ISFSI as it is now designed, the irradiation of the facility may render a change in the facility design prohibitively expensive or impossible. Physical changes to the Diablo Canyon site during construction may also be difficult or impossible to reverse later. Thus, PG&E's continued construction work on the ISFSI and the loading of fuel into the ISFSI may result in the "irreversible and irretrievable commitment of resources" and preclusion of fair consideration of alternatives. 42 U.S.C. § 4332(C). *See also Robertson v. Methow Valley,* 490 U.S. 346, 349 (1989) (NEPA requires consideration of environmental impacts *before* federal action is taken, in order to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast"). While the NRC states that PG&E "will not be ready" to load fuel into the ISFSI until November of 2007, that date is

only 14 months from the end of August. It is not clear whether the NRC could complete the remanded NEPA proceeding in that time, let alone whether the Court could complete a proceeding for rehearing or rehearing *en banc*.[4] Moreover, the loading of fuel is not the only action that could prejudice the NRC's remanded NEPA review. The NRC may be reluctant to force PG&E to make extensive and expensive changes to the Diablo Canyon facility after PG&E has finished building it.

Petitioners believe that it would be unlawful for PG&E to load spent fuel into the ISFSI, because PG&E now lacks a valid permit to do so. Petitioners also believe that by continuing construction of the ISFSI according to its original design, which does not reflect consideration of alternatives for avoiding or mitigating the impacts of attacks on the ISFSI, PG&E is flouting NRC regulations which strongly warn against carrying on construction of an ISFSI before completion of the required environmental review. 10 C.F.R. § 72.40(b).[5] Therefore Petitioners have requested the NRC to declare that the license issued to PG&E in March of 2004 is invalid, to enjoin PG&E from loading spent fuel into the ISFSI, and to put PG&E on notice that if it continues to build the ISFSI prior to

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[4] For example, the time between the filing of initial briefs and the issuance of a decision in this case was more than two years.

[5] *See also Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239 (2003) (NRC regulations "provide a disincentive to early construction by raising the possibility of ultimate denial of the license application should an applicant move forward precipitously, despite open environmental issues").

the completion of the remanded environmental review it risks denial of a license to use the ISFSI. Motion by San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard for Declaratory and Injunctive Relief With Respect to Diablo Canyon ISFSI (July 5, 2006) (Attachment 3). It is not clear, however, whether the NRC will grant the relief requested by Petitioners in the absence of a mandate. In the meantime, PG&E may take further actions that prejudice the fairness and objectivity of the NRC's NEPA review on remand. Accordingly, any significant delay in the issuance of the mandate would prejudice Petitioners' interest in a meaningful remand of this case.

IV. CONCLUSION

For the foregoing reasons, the Court should not grant an extension of the time for seeking rehearing or rehearing *en banc* that is longer than a week.

Respectfully submitted,

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July 5, 2006

ATTACHMENT 1

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NuclearFuel

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Tenex's Mikerin says US-Russia HEU deal won't run beyond 2013

Moscow does not intend to sign a new high-enriched uranium deal with the US when the current agreement expires in 2013, a top Techsnabexport (Tenex) official said this month.

Speaking June 5 at the World Nuclear Fuel Market annual meeting in Seattle, Vadim Mikerin — the head of the uranium directorate in the joint stock company's department of intergovernmental programs and Pan-American operations — cited statements that he said Sergey Kiriyenko, the director of Russia's Federal Atomic Energy Agency, made during a visit last month to meet with US government, congressional and industry officials.

But at a May 23 press conference in Washington, Kiriyenko's comments on the prospects of the HEU deal appeared to be much less categorical than Mikerin's. Speaking through an interpreter, Kiriyenko emphasized that Russian commerce with the US should be on a "market basis" at a "fair" price, without an intermediary.

Under the HEU agreement, 500 metric tons of Russian HEU is being blended down to low-enriched uranium. As the US executive agent, USEC sells the SWU component to US utilities. Tenex is the Russian executive agent.

In an interview shortly after Kiriyenko's appearance, a Russian official said his personal view was that there would be no follow-on HEU deal. One factor, he said, is that, because of increased income from oil and gas, Moscow does not need the revenues from the deal as badly as it did when the US and Russia negotiated the agree-

(Continued on page 20)

Converters poised for nuclear renaissance

Plans are in place for major increases in uranium conversion capacity to meet the projected upsurge in demand created by new plant construction, conversion company representatives said this month.

But the plans have some flexibility, so that if the "nuclear renaissance" is smaller or takes longer to arrive than the higher estimates say, the new capacity could be brought on line more slowly, two of the representatives said.

Pierre Durante, head of marketing and sales for Areva NC's Chemistry Business Unit, which manages the Comurhex facilities, said that if the World Nuclear Association's high scenario for nuclear development is realized, with 518 gigawatts of installed capacity in 2020, 47,000 metric tons U/year of new conversion capacity must be built between now and then.

Jim Graham, the president/CEO of

(Continued on page 18)

IUC says it will resume U production

International Uranium Corp. announced last week that it has decided to produce uranium once again from mined ore and expects to produce about 3.4 million pounds U3O8 in 2008 and at least 1.5 million lb in subsequent years. The company's White Mesa uranium mill in Utah has a capacity of producing 8 million lb U3O8 a year. The company said it intends to consider purchasing additional ore from non-IUC mines, as well as entering into toll milling agreements. Ron Hochstein, IUC president, said that the White Mesa mill is the only available mill currently operating for mines within a 350-mile radius. IUC last produced uranium from its mines in 1999.

In 2006, IUC said it expects to produce 500,000 lb U3O8 from processing alternate feed supplied by Cameco and others. The Utah Department of Environmental Quality June 12 awarded IUC a license to process alternate

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ready for startup between 2014 and 2019, and an advanced fuel cycle facility between 2016 and 2019. Under DOE's plan, "commercial-scale demonstration of the closed fuel cycle" could be possible "within 20-25 years."

The EPRI paper noted several economic hurdles to reprocessing in the current market. It described reprocessing plants as "expensive and not attractive to commercial financing in the context of the US economy." It is believed that reprocessing costs will be higher than the costs for storing spent fuel "for the foreseeable future," the paper said.

"Projections of major savings in Yucca Mountain repository costs as a result of reprocessing are highly speculative at best," the paper said.

But EPRI acknowledged that using waste fund revenue generated by new nuclear power plants could offset the costs of closed fuel cycle facilities.

The US government would have to shoulder a larger share of the costs if reprocessing were pushed on a timetable before it is economically sustainable based on fuel costs, the paper said. *—Jenny Weil, Washington*

Spent fuel cask developments

Ninth circuit voids NEPA analysis

A federal appeals court's June 2 ruling that NRC should have considered the environmental impacts from a potential terrorist attack when it licensed an independent spent fuel storage installation, or Isfsi, at the Diablo Canyon plant will not halt construction of that facility.

Pacific Gas & Electric Co. spokeswoman Sharon Gavin told Platts that construction of the Isfsi, which began last fall, is not affected by the ruling and that PG&E is considering whether to appeal. Absent an injunction, the decision does not preclude PG&E from loading spent fuel into storage casks once the facility is built.

After finding that NRC should have considered terrorist threats as part of its environmental analysis under the National Environmental Policy Act (NEPA), a three-judge panel of the Ninth Circuit US Court of Appeals remanded the issue to NRC for further action. NRC and PG&E have 45 days to petition for a rehearing before the same three judges or for a hearing before the full court, or 90 days to seek Supreme Court review. NRC granted a site-specific license for the Isfsi in March 2004. The breadth of federal facilities requiring NEPA review and the existence of conflicting court decisions appear to weigh heavily in favor of an appeal.

In a prepared statement issued June 2, PG&E pointed out that NRC did "consider the terrorist threat issue as part of its safety and design review" of the facility, but the court found NRC "erred when it concluded it was not required to look at this issue again as part of its environmental review." PG&E had hoped to begin loading spent fuel into dry storage casks during fourth quarter 2007. As a contingency, the utility has licensed a temporary storage rack in its pool that will enable the reactor to continue operating until 2010 without losing full-core offload capability.

Both NRC's Atomic Safety Licensing Board and NRC commissioners had rejected contentions by San Luis Obispo Mothers for Peace, Santa Lucia chapter of the Sierra Club, and former San Luis Obispo County Supervisor Peg Pinard related to environmental effects of terrorism. The intervenors asked the Ninth Circuit in December 2003 to review those decisions, arguing the NRC inappropriately excluded the potential for terrorist attacks from its analysis under NEPA.

The court agreed, rejecting each of the four arguments NRC made to justify its decision (Inside NRC, 12 June, 1). The court ruled it was "unreasonable" for NRC to dismiss the possibility of terrorist attacks as too remote to require analysis under NEPA. The opinion pointed to other actions NRC and the federal government have taken to guard against terrorist attacks, and said sensitive security issues need not be aired in public to comply with the NEPA mandate.

Nuhoms HD yields six comment letters

Six individuals or companies provided comments on a proposed rule to add the Transnuclear Nuhoms HD to NRC's list of spent fuel storage systems approved for use under a general license, prompting NRC to pull the direct final rulemaking. But Dominion Virginia Power's Surry plant, which is first in line to load the Nuhoms HD, had previously pushed back its loading campaign from August 2006 to spring 2007.

Dominion's Tom Brookmire said that decision was made earlier this year for several reasons, including the need for NRC to approve a license amendment request currently before the agency to address 10 CFR Part 50.68 criticality control requirements.

At press time, four sets of comments were available on NRC's Adams data base. Issues raised range from concern about Boral degradation, to New Hampshire resident Peter Kuhn's concern that loaded canisters would be difficult to remove from storage modules and that horizontal storage of Westinghouse fuel may not be safe. California resident James Smith also voiced concerns that gravity alone holds a loaded canister in place and that soil-structure interaction would amplify accelerations at the site beyond the design basis 0.3g horizontal and 0.2g vertical seismic events, potentially leading to "a canister rolling off the rails."

An NRC official said last week there is no schedule yet for resolving the 28 comments provided in the six letters. Under the direct final rule process, NRC simultaneously issues a proposed rule when it publishes a direct final rule. Absent significant adverse comments, the direct final rule adding the Nuhoms HD would have gone into effect July 17. Because the bar for "significant adverse" is fairly low, NRC must now address each comment and finalize the proposed rule.

The Nuhoms HD has been optimized for high-thermal loads, limited space, and radiation shielding performance. The system uses a Nuhoms 32PTH canister and horizontal storage module that are similar to the 24PTH canister and storage module NRC approved as amendment 8 to the

ATTACHMENT 2

http://www.latimes.com/news/local/la-me-diablo3jun03,1,2124749.story
From the Los Angeles Times

Review of Terrorist Threat to Reactor Ordered

An appeals court tells a federal agency to study the effects of an attack on Diablo Canyon plant.

By Henry Weinstein
Times Staff Writer

June 3, 2006

Since Sept. 11, 2001, President Bush and other federal officials have frequently warned that the nation's nuclear power plants are vulnerable to terrorist attack.

But when the Nuclear Regulatory Commission took up a proposal to expand spent nuclear fuel storage facilities at the Diablo Canyon nuclear plant, the agency said the possibility of a terrorist assault was so "speculative" that no environmental review was needed.

On Friday, however, a federal appeals court in San Francisco ordered the agency to conduct such a review of the possible consequences of a terrorist attack on the expansion at the Pacific Gas & Electric Co. facility on the Central Coast near San Luis Obispo.

In a 3-0 decision, the U.S. 9th Circuit Court of Appeals ruled that the commission violated federal environmental laws by failing to undertake the review.

The appeals court held that it was unreasonable for the agency to declare "without support" that "the possibility of a terrorist attack ... is speculative ... " and "inconsistent with the government's efforts and expenditures to combat" terrorist attacks at the nation's nuclear power plants in the aftermath of the Sept. 11, 2001, terrorist attacks.

The Diablo Canyon case is one of five in which the commission said no environmental analysis of a terrorist threat was necessary in licensing a nuclear plant, according to court documents, but the first to generate a decision from a federal appeals court.

The ruling could have "a very important impact" on other licensing decisions around the country, said physicist Edwin Lyman, a senior staff scientist at the Union of Concerned Scientists in Washington, who has served as an expert witness in Nuclear Regulatory Commission proceedings. "Ultimately, this decision will make Americans safer," he said.

Jeff Lewis, a PG&E spokesman, said the firm might appeal. He said the decision "does not affect" current operations at Diablo Canyon and would have no effect on the construction schedule of the fuel storage casks there. He also said the plant "currently meets all NRC mandated security requirements."

David McIntyre, a commission spokesman, said agency attorneys were still reviewing the decision and would have no immediate comment.

The court, in its decision, cited the commission's own statements about attempts to shore up security at the plants after the 2001 terror attacks. In one instance, the agency had said it was "reexamining, and in many cases have already improved, security and safeguards matters" such as the size of guard forces at nuclear plants, clearance requirements and background investigations for key employees, as well as the design of plants.

The commission even set up an "Office of Nuclear Security and Incident Response," the court noted.

Judge Sidney Thomas wrote in the opinion, "We find it difficult to reconcile the commission's conclusion" in the Diablo Canyon case "that as a matter of law, the possibility of a terrorist attack on a nuclear facility is 'remote and speculative,' with its stated efforts to undertake a 'top to bottom' security review against this same threat."

Thomas added: "It appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-Sept. 11 terrorist threat, while concluding, as a matter of law, that all terrorist threats are 'remote and highly speculative.' "

The court spurned the commission's contention that it could not comply with federal environmental laws in this instance because of security risks. "There is no support for the use of security concerns as an excuse" to deviate from the law, Thomas wrote, quoting an earlier 9th Circuit decision that held "there is no 'national defense' exception to the National Environmental Policy Act."

Thomas acknowledged that the public may not be entitled to hear the agency's analysis of possible terrorist threats at a nuclear power plant. But he said that "does not explain the NRC's determination to prevent the public from contributing information to the decision-making process" as the San Luis Obispo Mothers for Peace attempted to do in this case.

Friday's decision "is really meaningful," said Jane Swanson of the anti-nuclear group that filed the case.

"The terrorist attacks of Sept. 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," Washington attorney Diane Curran, who represents the Mothers for Peace, said during her oral argument in October.

Curran emphasized that under the expansion plan, 140 spent fuel storage casks are to be placed on an exposed hillside overlooking the Pacific Ocean. "The effect of a terrorist attack on the steel casks could be devastating," Curran warned in her argument. "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." Mothers for Peace suggested that the commission consider fortifying the casks, or putting them in bunkers, or scattering the cask storage pads over the site so that they would not present one large target.

Friday's ruling was hailed by California Atty. Gen. Bill Lockyer as "a victory for communities that live in the shadow of Diablo Canyon, and for the health of California's residents and the environment."

"President Bush and administration officials make constant public statements about the terrorist threats. Yet the NRC in this case concluded the danger of a terrorist attack on a nuclear facility is so minimal that the environmental effects of an attack did not have to be considered," added Lockyer, whose office filed a friend-of-the court brief on behalf of California, Utah, Washington and Wisconsin.

California's brief cited numerous statements of federal officials after 9/11 about the possibility of attacks on nuclear plants, including an alert released by the Nuclear Regulatory Commission on Jan. 23, 2002, which warned of the potential for an attack by terrorists who planned to crash a hijacked airliner into a nuclear facility. Four months later, a spokesman for the Office of Homeland Security said, "We know that Al Qaeda has been gathering information and looking at nuclear facilities and other critical infrastructure as potential targets."

ATTACHMENT 3

July 5, 2006

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

MOTION BY SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, AND PEG PINARD FOR DECLARATORY AND INJUNCTIVE RELIEF WITH RESPECT TO DIABLO CANYON ISFSI

I. INTRODUCTION

Pursuant to the National Environmental Policy Act ("NEPA"), 10 C.F.R. § 72.40(b), and the Commission's inherent supervisory authority to protect the integrity of its licensing and NEPA decisions, the San Luis Obispo Mothers for Peace, Santa Lucia Chapter of the Sierra Club, and Peg Pinard ("Petitioners") hereby request the Commission to enjoin Pacific Gas & Electric Company ("PG&E") from loading spent fuel into an independent spent fuel storage installation ("ISFSI") on the site of the Diablo Canyon nuclear power plant unless and until the U.S. Nuclear Regulatory Commission ("NRC") has completed an environmental impact statement ("EIS") that addresses the environmental impacts of an intentional attack on the ISFSI, as required by the U.S. Court of Appeals for the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, No. 03-74628 (June 2, 2006) ("*Mothers for Peace*"). Petitioners also request the Commission to issue a declaratory judgment notifying PG&E that the *Mothers for Peace* decision has effectively revoked PG&E's license for the ISFSI due to the lack of an

adequate supporting NEPA review, and that if PG&E continues to build the ISFSI before completion of a remanded NEPA review process it risks denial of a new permit.

Petitioners are aware that the mandate has not yet issued in the *Mothers for Peace* case, but believe it is appropriate and necessary for the Commission to issue an order in advance of the issuance of the mandate in order to preserve the integrity of the remand proceeding ordered by the Court in *Mothers for Peace.*

II. FACTUAL BACKGROUND

A. Description of Petitioners

The Petitioners are environmental and civic membership organizations and one individual who participated in the NRC licensing proceeding for the Diablo Canyon ISFSI. They were found to have standing to challenge the safety of the ISFSI's operation in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 429-30 (2002) ("LBP-02-23").

B. NRC Licensing Proceeding and Environmental Review for ISFSI

In December of 2001, PG&E applied for a license to build and operate an ISFSI on the site of the Diablo Canyon nuclear power plant. Petitioners requested a hearing on the application and submitted a set of contentions, including a contention that the NRC should prepare an EIS that addresses the impacts of acts of malice or insanity against the proposed facility. The NRC's Atomic Safety and Licensing Board denied the hearing request in LBP-02-23 and referred its decision to the Commission. The Commission affirmed LBP-02-23 in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent

Fuel Storage Installation), CLI-03-01, 57 NRC 1 (2003), ruling that as a matter of law, the NRC is not required to consider the environmental impacts of intentional attacks on proposed nuclear facilities.

Separately, the Petitioners also filed a petition before the NRC Commissioners demanding that before licensing the ISFSI, the Commission should improve the security of the entire Diablo Canyon site under the Atomic Energy Act. The Commission denied the petition in *Pacific Gas & Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 413 (2002).

In October of 2003, after the conclusion of the administrative proceeding, the NRC's technical staff prepared an Environmental Assessment ("EA") concluding that that proposed ISFSI would have no significant adverse environmental impacts. The EA did not address the environmental impacts of intentional attacks on the proposed ISFSI, based on the Commission's prior determination that no NEPA review was required.

In the spring of 2004, the NRC's technical staff completed its safety evaluation for the proposed ISFSI. On March 22, 2004, having completed both its environmental and safety reviews, the NRC issued a license to PG&E for operation of the ISFSI. According to a PG&E spokesman, PG&E began construction of the ISFSI in the fall of 2005. *Ninth Circuit Voids NEPA Analysis*, NuclearFuel, June 19, 2006 at 10 (Exhibit 1).

C. Petitioners' Appeal to the Ninth Circuit

On December 11, 2003, Petitioners submitted a Petition for Review to the U.S. Court of Appeals for the Ninth Circuit. Asserting that the NRC had violated the Atomic Energy Act, the National Environmental Policy Act ("NEPA"), and the Administrative

Procedure Act, Petitioners asked the Court to reverse LBP-02-23, CLI-03-01, and CLI-02-23. *Id.* at 3.

On March 15, 2004, Petitioners filed their initial brief. Like the Petition for Review, the brief requested the Court to reverse CLI-02-23 and CLI-03-01. Brief for Petitioners at 56. The brief also requested the Court to remand the case to the Commission. In addition, Petitioners' reply brief requested reversal of CLI-02-23 and CLI-03-01 and remand of the case to the Commission. *See also* Reply Brief for Petitioners at 38 (June 28, 2004).

On June 2, 2006, the Court issued a decision denying the petition for review with respect to Petitioners' Atomic Energy Act and Administrative Procedure Act claims but granting the petition for review with respect to Petitioners' NEPA claim, thereby reversing CLI-03-01. *Id.*, slip op. at 6,096. The Court found that as a matter of law, the Commission's refusal to prepare an EIS on the environmental impacts of an attack on the Diablo Canyon ISFSI did not meet NEPA's reasonableness standard. *Id.* Therefore, the EA on which the NRC had relied for the issuance of PG&E's permit was inadequate. *Id.* The Court remanded the case to the NRC for further proceedings.[1]

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1 *Id.* The exact wording of the Court's ruling is as follows:

> We deny the petition as to the claims under the AEA and the APA. However, because we conclude that the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review, we hold that the EA prepared in reliance on that determination is inadequate and fails to comply with NEPA's mandate. We grant the petition as to that issue and remand for further proceedings consistent with this opinion.

D. PG&E's Post-Decision Announcements

In a press interview conducted shortly after issuance of the Court's decision, PG&E stated that "absent an injunction," it did not consider the Court's ruling to bar it from loading fuel into the ISFSI once construction is completed. *Ninth Circuit Voids NEPA Analysis* at 10. PG&E also told reporters from NuclearFuel and the Los Angeles Times that the decision would have no effect on its schedule for construction of the proposed ISFSI. *Id. See also* Henry Weinstein, *Review of Terrorist Threat to Reactor Ordered*, Los Angeles Times, June 3, 2006 (Exhibit 2). Recently, PG&E and NRC Staff counsel informed the Commission's counsel that PG&E "will not be ready to load fuel" into the ISFSI until November of 2007.[2]

III. ARGUMENT

A balancing of the four factors relevant to issuance of a preliminary injunction – likelihood of success on the merits, likelihood of irreparable harm, harm to other parties, and public interest – warrants the granting of the injunctive and declaratory relief requested in this motion. *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Petitioners already have satisfied the first prong of the test, by succeeding on the merits of their claim that NEPA requires the NRC to prepare an EIS regarding the environmental impacts of intentional attacks.

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2 Declaration of Charles E. Mullins in Support of Motion for Extension of Time Within Which to File a Petition for Rehearing or Rehearing En Banc, filed in support of Motion for Extension of Time Within Which to File a Petition for Rehearing or Rehearing *En Banc*. The motion, which seeks a 45-day extension of the time for seeking rehearing or rehearing *en banc*, was filed in the Ninth Circuit on June 29, 2006, and is still pending.

Moreover, Petitioners are likely to prevail on their bedrock claim that PG&E's ongoing construction activities and its apparent intention to load fuel into the ISFSI before completion of the remanded NEPA review violate NEPA's fundamental principle that environmental impacts must be weighed in an EIS *before* federal action is taken, so that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

The NRC's regulations follow *Robertson* by forbidding the issuance of a license to possess spent fuel in an ISFSI before the NRC's NEPA review is complete. 10 C.F.R. § 72.40(b). Moreover, 10 C.F.R. § 72.40(b) provides that a license to possess spent fuel "may be denied if construction on the proposed facility begins before a finding approving issuance of the proposed license with any appropriate conditions to protect environmental values." As the Commission held with respect to a similar regulation in 10 C.F.R. Part 70, the intent of the regulation is to "provide a disincentive to early construction by raising the possibility of ultimate denial of the license application should an applicant move forward precipitously, despite open environmental issues." *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-3, 57 NRC 239, 247 (2003) ("*NFS*").[3]

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3 PG&E now stands in the shoes of an applicant for an ISFSI license, not a licensee. On no account can PG&E be deemed to hold a valid license for the Diablo Canyon ISFSI. As discussed above at page 4, the Court granted Petitioners' request that it reverse CLI-03-01, which had approved the NRC Staff's finding of no significant impact in the EA and its failure to prepare an EIS regarding the environmental impacts of an attack on the ISFSI. Moreover, the Court found that the EA on which the NRC Staff relied in licensing the ISFSI "is inadequate and fails to comply with NEPA's mandate." *Mothers for Peace,* slip op. 6,096. Thus, PG&E's permit is not supported by any NEPA-

Now that CLI-03-01 has been reversed and the case has been re-opened to consider a whole new category of environmental impacts that was not examined in the EA for the Diablo Canyon ISFSI – and that to our knowledge has not been examined for any other ISFSI -- the Commission should put PG&E on notice that it "proceeds at its own risk with construction activities," 57 NRC at 247, and that even if the NRC does not deny a license to PG&E it may require PG&E to rip out and re-build the ISFSI if the NRC's environmental analysis results in a decision to impose new design features for protection of the ISFSI.

Petitioners also satisfy the second prong of the test for injunctive relief by showing that PG&E's continued construction activities and loading of fuel into the ISFSI without a permit will cause irreparable harm to the integrity of the NEPA decision-making process. As discussed above at page 3, PG&E began construction on the ISFSI in the fall of 2005, and recently announced that the Court's decision will not affect the construction schedule that is already well underway. Petitioners are concerned that in building the ISFSI, PG&E may make substantial alterations to the Diablo Canyon site and/or build structures that are difficult or very expensive to change at a later date. Such significant commitments of resources or financial investments could prejudice the NEPA

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compliant Commission decision or EA. Under the circumstances, it cannot be considered to constitute a valid instrument or to provide any authority for PG&E to possess spent fuel at the Diablo Canyon ISFSI. Nor does the license authorize PG&E to continue to build the ISFSI without running afoul of 10 C.F.R. § 72.40(b)'s warning that a license applicant should not build an ISFSI before the NRC makes "a finding approving issuance of the proposed license with any appropriate conditions to protect environmental values."

process for consideration of alternatives that would reduce or avoid the impacts of intentional attacks. *See Sierra Club v. U.S. Department of Transportation,* 664 F. Supp. 1324, 1340 n. 9 (N.D.Ca. 1987). Therefore it is essential to notify PG&E now of the risk it undertakes by continuing its construction activities.

Moreover, while PG&E and the NRC technical staff have said that the spent fuel will not be ready for loading into the ISFSI until November of 2007, that statement is a prediction and not a commitment. In any event, it is possible that November 2007 will arrive before the NRC has completed the NEPA review process remanded by the Court of Appeals. This outcome seems particularly likely if commencement of the remanded proceeding is delayed by an extension of the time for seeking rehearing or rehearing *en banc,* and/or if the NRC submits a rehearing petition and the Court considers and rejects it. Finally, it would be imprudent not to immediately correct such a fundamental misunderstanding as PG&E has about its authority to load radioactive material into the Diablo Canyon ISFSI.

Moreover, PG&E will not be harmed by the granting of the requested relief. According to par. 8 of Mr. Mullins' declaration (*see* note 2, *supra*), the NRC has issued a license amendment allowing PG&E to store more spent fuel in its existing wet pools, if necessary, thus postponing the need to use the new dry cask storage facility." Finally, the public interest favors the granting of a stay in order to protect the integrity of the NEPA decision-making process.

Petitioners are aware that the *Mothers for Peace* decision has not yet become law. Under F. R. App. P. 41(b), the mandate will not issue until July 24, 2006, seven days

after expiration of the period for seeking rehearing or rehearing *en banc* pursuant to F. R. App. P. 40.[4] Nevertheless, Petitioners request the NRC to exercise its inherent supervisory authority to preserve the integrity of the remanded NEPA proceeding ordered by the Court in *Mothers for Peace. Statement of Policy on Conduct of Adjudicatory Proceedings,* CLI-98-12, 48 NRC 18, 19 (1998) (noting Commission's overall objective of managing its proceedings in a way that "supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment.") To delay a ruling until issuance of the mandate may prejudice Petitioners' right to an objective and impartial NEPA review.

IV. CONCLUSION

For the foregoing reasons, Petitioners request the Commission to immediately take the following actions:

1. Declare that the license issued to PG&E on March 22, 2004, is invalid and therefore confers no authority for the possession of spent fuel or the construction of the ISFSI.

2. Declare that PG&E proceeds with construction of the Diablo Canyon ISFSI at the risk that a new permit may be denied, or that it may have to change the design and construction of the ISFSI in response to the NRC's environmental

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4 As discussed above in note 2, the NRC has requested a 45-day extension of the time for filing a rehearing petition, which presumably would extend the time for issuance of the mandate by a corresponding length of time. Petitioners have filed an opposition to the request for an additional 45 days, but do not oppose an extension of a week. Petitioners' Response to U.S. Nuclear Regulatory Commission's Motion for Extension of Time to File Petition for Rehearing (July 5, 2006).

review of the impacts of attacks on the facility;

3. Enjoin PG&E from loading spent fuel into the ISFSI unless and until the NRC has completed an EIS regarding the environmental impacts of attacks on the ISFSI and has issued a valid license to PG&E.

Respectfully submitted,

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July 5, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	

CERTIFICATE OF SERVICE

I certify that on July 5, 2006, copies of the foregoing Petitioners' Response to U.S. Nuclear Regulatory Commission's Motion for Extension of Time to File Petition for Rehearing were served on the following by first-class mail or by hand, as indicated below:

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