

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 03-74628
)	
U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
Respondents,)	
)	
PACIFIC GAS AND ELECTRIC COMPANY,)	
)	
Intervenor.)	
)	

**REPLY TO PETITIONERS' RESPONSE TO GOVERNMENT'S MOTION
FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR
REHEARING OR REHEARING *EN BANC***

On June 30, 2006, the United States Nuclear Regulatory Commission (NRC) and the United States moved for a 45-day extension of time, to and including August 31, 2006, within which to file a petition for rehearing or rehearing *en banc*. The panel decision was issued on June 2, 2006, making the current rehearing deadline July 17. Petitioners have filed a response opposing our extension request. Below we reply, briefly, to petitioners' chief points.

1. By law, the Solicitor General must authorize the filing of any petition for rehearing *en banc* by the United States. See 28 C.F.R. § 0.20. As outlined in the sworn declaration attached to our motion for an extension of time, deciding whether to invoke the *en banc* process in this case calls for a careful study, by multiple government agencies, of potentially significant legal and practical issues raised by the panel decision. Petitioners quibble over the availability of the NRC lawyer who has handled this case from the start (Pet. Response at 6) and over the

significance of flooding at the Justice Department's headquarters building (*id.* at 7),¹ but they don't deny the potential importance of the panel decision or dispute the need for a full review by the NRC, the government-at-large, and ultimately the Solicitor General.

2. Petitioners' major reason for opposing our extension request is their claim that extending the rehearing deadline would delay the court-ordered remand proceeding and "would prejudice their ability to obtain meaningful relief" (*id.* at 7). They express concern that loading radioactive spent fuel into the disputed spent fuel storage facility may render changes in the facility design "prohibitively expensive or impossible" (*id.* at 8). Their further concern is that delaying the remand may allow Pacific Gas & Electric Company (PG&E) to complete construction of the disputed facility, making the NRC "reluctant to force PG&E to make extensive and expensive changes" (*id.* at 9).

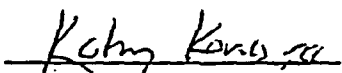
But there is no emergency precluding this Court from granting the 45 additional days the government needs to review the panel decision and its ramifications fully. Petitioners do not explain how in the context of this case an additional 45 days of rehearing time harms them. As petitioners acknowledge (*id.* at 8-9), PG&E has no plans to store spent nuclear fuel in its new storage facility until at least November, 2007. As for PG&E's construction activities, contrary to petitioners' assumption, there is no reason to suppose that the NRC will not act according to law on remand, even if that would require PG&E to alter its facility. Indeed, this Court should

¹ Justice Department headquarters remains shut because of flood damage, and it is expected to remain so for a few weeks. Petitioners make light of this problem (Response at 7), but it is quite real, as key Justice Department personnel are not readily available to consult and work on this case. It is also true, as the sworn declaration accompanying our motion makes clear, that the government lawyer with chief responsibility for this case, Charles E. Mullins, is on special assignment, and not in position to devote immediate and full attention to a rehearing petition.

presume "regularity" in NRC decision-making – that is, it should presume that the NRC will act properly and lawfully. *See generally United States v. Navarro-Vargas*, 408 F.3d 1184, 1207 (9th Cir. 2005) (*en banc*), *cert. denied*, 126 S.Ct. 736 (2005); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004).

Denying the government an extension of time to seek rehearing is not necessary to protect petitioners' legal interests. The NRC itself, and ultimately this Court, have ample power to issue any orders necessary to protect against irreparable harm and to preserve meaningful remedies should petitioners prevail. Indeed, as petitioners' Response indicates (at 9-10), they already have filed with the Commission a motion seeking "declaratory and injunctive relief."

Petitioners, in short, will suffer no tangible injury if this Court allows the government 45 more days to consider the rehearing question. It is important to the government, and also to this Court, that the Solicitor General have adequate time to make a well-considered judgment on whether the panel decision warrants further review. It's in no one's interest to force a precipitous, and perhaps incompletely informed, government decision on whether to litigate this case further.


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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2006, I caused the foregoing "Reply to Petitioners' Response to Motion for Extension of Time Within Which to File a Petition for Rehearing or Rehearing *En Banc*" to be filed with the Court and served upon the following counsel by Federal Express overnight service:

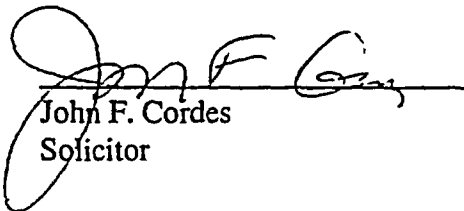
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