



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 29, 2006

Cathy A. Catterson, Clerk
United States Court of Appeals
For the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

Subject: *San Luis Obispo Mothers for Peace, et al. v. NRC*, No. 03-74628.

Dear Ms. Catterson:

Enclosed please find the original and four copies of Federal Respondents "Motion For Extension of Time In Which To File A Petition for Rehearing or Rehearing En Banc" for filing in the above-captioned case. Please file stamp the extra copy of this letter to indicate the date of filing and return it to me in the enclosed pre-paid envelope at your convenience. Please feel free to call me at (301) 415-1606 with any questions about this case.

Respectfully,

Charles E. Mullins
Senior Attorney
Office of the General Counsel

cc (with enclosures): Service List

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

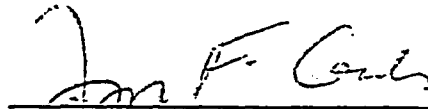
SAN LUIS OBISPO MOTHERS FOR PEACE, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 03-74628
)	
U.S. NUCLEAR REGULATORY COMMISSION)	
and the UNITED STATES OF AMERICA,)	
)	
Respondents,)	
)	
PACIFIC GAS AND ELECTRIC COMPANY,)	
)	
Intervenor.)	
)	

**MOTION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR
REHEARING OR REHEARING *EN BANC***

Pursuant to Federal Rule of Appellate Procedure 27, 35 and 40, and pursuant to Ninth Cir. Rule 35-3, Note 1, the U.S. Nuclear Regulatory Commission and the United States of America respectfully move for an extension of forty-five (45) days, 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. The reasons for seeking this extension are set forth in the attached declaration of Charles E. Mullins.

Opposing counsel (Diane Curran, Esq.) has informed us that she cannot consent to the Motion at this time. Counsel for Pacific Gas & Electric (David Repka, Esq.) has informed us that he does consent to the Motion.

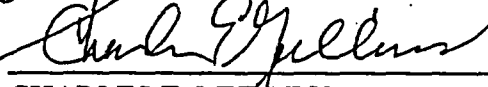
Respectfully submitted,



JOHN F. CORDES, Jr.

Solicitor

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CHARLES E. MULLINS

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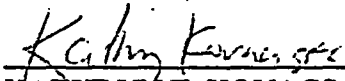
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

1. I am a senior attorney in the Office of the General Counsel, U.S. Nuclear Regulatory Commission (NRC). I have had chief responsibility for the above-captioned lawsuit since it was filed in 2003. I drafted the government's appellate brief and I presented oral argument before a panel of this Court on October 17, 2005.

2. On June 2, 2006, a panel of this Court issued its decision in this case. Pursuant to Fed. R. App. P. 35(c) and 40(a)(1), a petition for rehearing or rehearing *en banc* is currently due on July 17, 2006. We are seek 45 additional days to seek rehearing. If our motion is granted, the new deadline would be August 31, 2006.

3. The panel decision raises a significant issue that may well warrant further review. The panel held that the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4437, requires the NRC to consider the environmental impacts of a potential terrorist attack when

determining whether to issue a license for an independent spent fuel storage facility at the Diablo Canyon Nuclear Power Plant, near San Luis Obispo, California. The panel's NEPA-terrorism ruling may extend to other (non-NRC) government facilities and programs. We need additional time to assess how the panel's decision would affect the NRC licensing process in particular and the government in general. The NRC and the Justice Department are consulting several other federal agencies on the panel decision's practical effects.

4. The panel decision is a plausible candidate for further review on rehearing or rehearing *en banc* not only because of its potentially broad impact, but also because the decision is unprecedented. It appears inconsistent with decisions from several other courts of appeals rejecting claims that NEPA requires a study of the impacts of terrorism, sabotage, or deranged criminal intervention.¹ The panel decision also seems at odds with prior decisions of this Court² and the Supreme Court.³

5. The Solicitor General of the United States must approve the filing of all petitions for rehearing *en banc* in which the United States of America participates. See 28 C.F.R. § 0.20(b). As I've noted, the determination whether the United States should pursue rehearing *en banc* in this case requires extensive consultation among several government departments and agencies

¹ See *Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1988); *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1035 (1984); *City of New York v. U.S. Dept. of Transportation*, 715 F.2d 732, 750 (2d Cir. 1982), *appeal dismissed and cert. denied*, 465 U.S. 1055 (1984). See also *Mid-States Coalition for Progress v. STB*, 345 F.3d 520, 542 (8th Cir. 2003).

² See *Ground Zero Center for Non-Violent Action v. U.S. Dept. of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004); *No Gwen Alliance v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988).

³ See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

and a careful analysis of the basis of the panel's decision and related case law. That process has been slowed in this case because the Main Building at the Department of Justice in Washington is currently closed due to flooding, and will remain closed for a full work week or more. This greatly complicates intra-government communications on litigation matters.

6. In addition, throughout this litigation I have been the government's primary attorney, and I am the only government attorney fully familiar with the procedural and factual record and the legal issues. However, since March 6, 2006, I have been on a special assignment or "detail" to the Appellate Staff, Civil Division, of the Department of Justice. That detail will continue for two more months.

7. At the Department of Justice I am currently assigned to prepare briefs for the United States in the following cases: (1) *Mamikonyan v. Alberto Gonzales*, No. 05-76689 (9th Cir.); and (2) *Acosta Farms v. Department of Agriculture*, No. 06-12832 (11th Cir.). These briefs are due on July 10 (we are seeking an extension of time) and August 28, respectively. I am also assigned to prepare an appeal recommendation for the Solicitor General in *Horizon Lines v. United States of America*, No. 06-5165 (D.C. Cir.), where a protective notice of appeal has already been filed and docketed, and the appeal recommendation is due on July 10.

8. Intervenor, Pacific Gas and Electric Company (PG&E), has consented to our request for an extension of time. Petitioners have not. But Petitioners would not be unduly prejudiced by the granting of our Motion. To store spent fuel at the proposed new storage facility at issue in this lawsuit, PG&E will have to remove that fuel from Diablo Canyon's spent fuel pools and place it in approved dry casks. However, both the NRC staff and counsel for PG&E have informed me that PG&E will not be ready to load fuel into the dry casks until at least November,

2007. In short, under any scenario, the new facility will contain no radioactive material for at least seventeen more months.. In addition, the NRC staff has informed me that the NRC has issued a license amendment (unchallenged by Petitioners) 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.

9. The NRC and the United States are acting diligently in reviewing the panel decision. We seek 45 days of additional rehearing time because the current July 17 rehearing deadline does not allow enough time to complete our ongoing multi-agency consultative process. In addition, if the Solicitor General authorizes the United States to seek rehearing *en banc*, I need adequate time to draft and file a petition.

10. We have sought no prior extensions of rehearing time. I will make every effort to file the government's rehearing petition, if it is authorized, within the time we are requesting in this motion.

For the foregoing reasons, counsel respectfully requests an extension of forty-five (45) days, to and including August 31, 2006, within which to file a petition for rehearing or rehearing *en banc*.

I declare under penalty of perjury that the foregoing is true and correct.



CHARLES E. MILLINS

Done at Rockville, Maryland
this 29th day of June, 2006

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2006, I caused the foregoing "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:

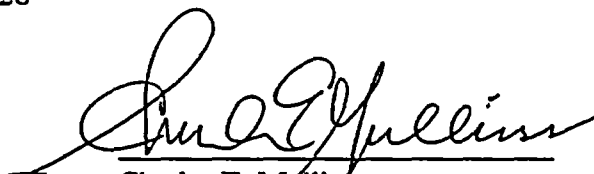
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