UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY & LICENSING APPEAL BOARD

In the Matter of	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-274 O.L. 50-323 O.L.
(Diablo Canyon Nuclear Power Plant, Units 1 and 2)	)	

JOINT INTERVENORS'
APPLICATION FOR A STAY

Pursuant to 10 C.F.R. § 2.788, the SAN LUIS OBISPO MOTHERS FOR PEACE SCENIC SHORELINE PRESERVATION CONFERENCE, INC., ECOLOGY ACTION CLUB, SANDRA SILVER, GORDON SILVER, ELIZABETH APFELBERG, and JOHN FORSTER ("Joint Intervenors") hereby apply for an order staying the effectiveness of (1) the Atomic Safety and Licensing Board's ("Licensing Board") August 31, 1982 Initial Decision authorizing the issuance of a license for full power operation of Diablo Canyon Nuclear Power Plant ("Diablo Canyon"), and (2) the issuance of such license in the event the Commission authorizes full power operation. The Joint Intervenors request the stay in order to prevent irreparable harm and to preserve the status quo until administrative and judicial review of all issues underlying issuance of the license are complete. This application is filed in anticipation of the Commission's scheduled July 30, 1984 vote on issuance of a full power license for Diablo Canyon, Unit 1.

I. SUMMARY OF THE DECISION TO BE STAYED

The Licensing Board's August 31, 1982 Initial Decision authorized issuance of a full power license for Diablo Canyon. No decision by the Appeal Board has yet been issued on appeal of that decision.

II. GROUNDS FOR THE STAY[1/]

A. The Joint Intervenors' Likelihood of Prevailing on the Merits Is Strong

1. Class Nine Accident Analysis. In the past, the Commission did not require consideration under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., of the effect on the environment of core melt accidents ("Class 9" accidents). The premise was that occurrence of a Class 9 accident was of such low probability that neither NEPA nor the Atomic Energy Act required its consideration. The accident at Three Mile Island ("TMI") destroyed that premise, and the Commission recognized this fact in its "Statement of Interim Policy" by amending its prior policy to require NEPA consideration of Class 9

1/ The factors prescribed by 10 C.F.R. § 2.788(e) to be considered by the Appeal Board in connection with a request for stay are:

(1) whether the moving party has made a strong showing that it is likely to prevail on the merits;

(2) whether the party will be irreparably harmed unless a stay is granted;

(3) whether the granting of a stay would harm other parties; and

(4) where the public interest lies.

accident sequences.[2/] But despite the Commission's explicit recognition that the prior policy was erroneous, it limited this amendment to prospective application absent "special circumstances," and as a result has repeatedly denied Joint Intervenors' requests for NEPA consideration of a Class 9 accident. The Commission's action is illegal for two reasons. First, NEPA imposes a statutory duty to supplement an Environmental Impact Statement ("EIS") to reflect significant new information or changed circumstances occurring after the filing of the final EIS.[3/] By the Commission's own admission, the TMI accident constitutes such significant new information, and the Commission cannot legally limit a pre-existing statutory requirement merely by stating that it shall apply only to future EISs. Second, apart from NEPA requirements, the Commission has violated its own policy that consideration of a Class 9 accident is required where special circumstances exist, including -- as at Diablo Canyon -- the proximity of the plant to a man-made or natural hazard.[4/] On either basis, therefore, issuance of a license for Diablo Canyon absent consideration of the effects of a Class 9 accident is unlawful.

[2/] "Nuclear Power Plant Accident Consideration Under the National Environmental Policy Act of 1969," 45 Fed.Reg. 40101 (June 1980).

[3/] See, e.g., Warm Springs Dam TAsk Force v. Gribble, 621 F.2d 1017, 1023-24, (9th Cir. 1980) (per curiam); Aluli v. Brown, 437 F.supp. 602, 606 (D.Hawaii 1977), rev'd in part on other grounds, 602 F.2d 876 (9th Cir. 1979).

[4/] In the Matter of Public Service Company of Oklahoma (Black Fox Station, Units 1 and 2), CLI-80-8, at 434-35 (March 21, 1980).

2. Earthquake Emergency Preparedness. The Commission's regulations explicitly provide that "no operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1) (emphasis added). Particularly in light of the Commisison's appreciation of the greater seismic risk associated with nuclear plants in California and the continuing importance of seismic safety in this proceeding, the failure to permit consideration of seismic effects on emergency response is a critical deficiency in emergency preparedness at Diablo Canyon. Nevertheless, the Appeal Board concluded that the licensing board was without jurisdiction to consider the issue, citing the Commission's San Onofre decision, issued in December 1981. In so doing, the Board violated the Joint Intervenors' right to a hearing guaranteed by § 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a), with respect to a safety issue unique to Diablo Canyon. Because its decision was without independent factual basis, there has been a clear failure by the agency to consider a relevant safety issue, either on a generic basis or within individual licensing proceedings.[5/] Accordingly, issuance of a license is unlawful.

3. Operator Training and Experience. The Commission's regulations regarding reactor operator training explicitly require "extensive actual operating experience" as a prerequisite to

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5/ See Natural Resources Defense Council v. Nuclear Regulatory Commission, 685 F.2d 459 (D.C.Cir. 1982), rev'd on other grounds sub nom. Baltimore Gas and Electric Co. v. Natural Resources Defense Council, ___ U.S. ___, 103 S.Ct. 2246 (1983).

issuance of such a license based on a test taken on a simulator rather than in an operating plant. 10 C.F.R. § 55.25(b). As the Commission's own General Counsel has conceded, neither the regulations nor their legislative history contemplates the use of simulators as an adequate or acceptable substitute for such "actual operating experience."

Because it is undisputed that the reactor operators at Diablo Canyon have not satisfied this requirement, the Commission cannot find (1) that the "facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission," or (2) that the "applicant is technically . . . qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter." 10 C.F.R. § 50.57(a). Accordingly, no license for Diablo Canyon may legally be issued by the Commission.

4. FEMA Finding on State Emergency Plan. Section 50.47(a)(1) of 10 C.F.R. Part 50 explicitly requires that no license may be issued prior to a finding of reasonable assurance that the various emergency plans for the facility in question can and will be implemented in the event of a radiological emergency. Section 50.47(a)(2) requires, with regard to offsite plans, that the NRC's finding "shall" be based on findings and determinations by the Federal Emergency Management Agency ("FEMA").

In this case, there is no dispute that such detailed findings have not been made by FEMA regarding the State of California Emergency Response Plan, and the Licensing Board so found in its August 30, 1982 Initial Decision. Although the Licensing Board conditioned licensing of Diablo Canyon on the

issuance of a finding by FEMA, this Board reversed, and the Commission has not yet ruled on the Joint Intervenors' appeal. Because issuance of a license in the absence of a formal FEMA finding would violate the express terms of the Commission's regulations, no license may be issued until the requisite FEMA findings have been issued and fully reviewed.

5. Seismic Safety. In ALAB-644, this Board approved the seismic design criteria for Diablo Canyon, concluding that they satisfied 10 C.F.R. Part 100, Appendix A, of the Commission's regulations. Since that decision was issued -- and, in particular, within the past six months -- significant new information has arisen out of recent seismic events and geologic studies, which establish that this Board's findings and conclusions in ALAB-644 were erroneous. In particular, the new information undermines the Board's findings regarding ground acceleration, focusing, location and nature of the Hosgri Fault, and seismicity of the region.

The Joint Intervenors have filed a motion to reopen the record to consider this new information, but no decision has yet been issued. Because this new information undermines conclusions essential to the issuance of an operating license for Diablo Canyon, no license may be issued until the Joint Intervenors' motion has been decided, the record reopened, and PGandE has demonstrated that the plant complies with the Commission's seismic design regulations.

6. Quality Assurance. As a precondition to licensing, the Commission's regulations require compliance with certain standards for quality assurance in design and construction of the

facility. When the facility was licensed for low power operation in 1981, the full record on this issue consisted of a half day hearing at which only the NRC and PGandE witnesses were allowed to present evidence. Since 1981, thousands of errors in the design and construction of the plant have been discovered, and further hearings have been held, but limited only to certain design issues.

Now pending before the Commission are several petitions for review filed by the Joint Intervenors with respect to this Board's (1) denial of reopening on construction quality assurance (ALAB-756); (2) denial of reopening on construction and certain design quality assurance issues (ALAB-775); and (3) approval of PGandE's design quality assurance program (ALAB-763). For the reasons stated in those petitions,[6/] copies of which have previously been served on this Board, the Commission, and the parties, the Joint Intervenors submit that this Board has failed adequately to address the issue of quality assurance in this proceeding; that this Board's approval of the quality assurance record is arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence; and, consequently, that there is no reasonable assurance that Diablo Canyon has been

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6/ The specific challenges to this Board's adjudication of the quality assurance issues include, inter alia, its misapplication of the standard of review, both as to the motions to reopen and the evidence offered at hearing; its failure to state adequately its reasons for rejecting competent evidence; its treatment of the 1977 NSC Pullman audit report and the testimony of the Joint Intervenors' expert testimony on construction quality assurance; its failure to require compliance with 10 C.F.R. Part 50, Appendix A; and, generally, the lack of substantial evidence to conclude that Diablo Canyon has been designed and constructed consistent with 10 C.F.R. Part 50, Appendix B.

designed and constructed consistent with the Commission's regulations. Accordingly, no full power license may be issued for Diablo Canyon.

B. Joint Intervenors Will Be Irreparably Injured in the Absence of a Stay

If a license is issued for full power operation at Diablo Canyon, Joint Intervneors will be irreparably harmed in several significant respects. First, the Joint Intervneors and the public generally will be endangered by the full power operation of the facility, an activity generally recognized to pose substantial risk, particularly where, as here, the facility is not designed and constructed consistent with the Commission's regulations. As the TMI accident demonstrated, the consequences in the event of a major accident at a facility operating at full power could be catastrophic, both in terms of injury and death to persons and property damage. See Affidavit of Dale Bridenbaugh (attached hereto as Exhibit 1).

Second, the level of radioactive contamination of the facility will be significantly increased, thereby prejudicing the Joint Intervenors' rights on appeal and making future necessary plant modifications less likely, more costly, and more difficult to implement. See Bridenbaugh Affidavit, Exhibit 1.

Third, when an agency has taken an action in violation of NEPA -- such as the failure to supplement in the instant case -- there is a presumption that injunctive relief should be granted against the continuation of that action until the agency complies with the Act. See Realty Income Trust v. Eckerd, 564 F.2d 447,

456 (D.C.Cir. 1977).[7/] Environmental factors must be fully considered not only before actual harm occurs, but before the agency's plans are so advanced that they acquire "irreversible momentum." Id. at 511; Lathan v. Volpe, 455 F.1d 1111, 1121 (9th Cir. 1971) (It is "especially important" that an EIS be prepared early so that "flexibility in selecting alternative plans" is not lost.)

C. The Granting of a Stay Will Not Harm Others

The grant of a stay will postpone full power operation only until review has been completed. While some delay is inherent when a stay is granted, the period of several months necessary in this case is de minimis relative to (1) the fifteen year history of this administrative proceeding, necessitated in substantial part by PGandE's own failures in siting, designing, and constructing the facility, and (2) the long and intense participation in this proceeding by the Joint Intervenors for over a decade.

D. The Public Interest Favors a Stay

The public interest would be best served by granting a stay in order to ensure that operation of the plant will be safe

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7/ The purpose of such relief is two-fold. First, NEPA was intended not only to prevent harm to the environment, but to ensure that agency decision-makers fully explore the consequences of their actions. Consequently, "courts will not hesitate to stop projects that are in the process of affecting the environment when the agency is in illegal ignorance of the consequences, as when it should have prepared an EIS but failed to do so." Id. (emphasis in original). Second, injunctive relief against non-compliance with NEPA preserves the agency's freedom to choose alternative, less environmentally damaging methods of proceeding in the future. State of Alaska v. Andrus, 580 F.2d 465, 485 (D.C.Cir. 1978).

and will comply with all applicable regulations. Deferring safety reviews until after the plant has already been licensed and commenced operation makes a mockery of the regulatory process and undermines public confidence in the agency's willingness to place the public health and safety ahead of the economic interests of those whom the agency is charged to oversee.

IV. CONCLUSION

For the reasons stated above, Joint Intervenors hereby request this Appeal Board to stay the effectiveness of the decisions cited herein.

Dated: July 25, 1984

Respectfully submitted,

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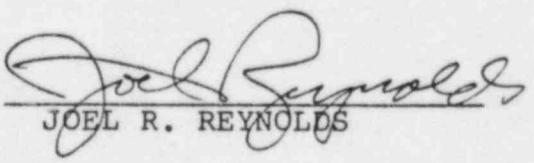
By 
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