

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
)  
PACIFIC GAS AND ELECTRIC ) Docket No. 50-275-LR  
COMPANY ) Docket No. 50-323-LR  
)  
(Diablo Canyon Power Plant, Units 1 and 2) )

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APPLICANT'S OPPOSITION TO PETITION TO SUSPEND FINAL  
DECISIONS AND PROPOSED NEW CONTINUED STORAGE CONTENTION

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INTRODUCTION

In accordance with the Commission’s Order, dated October 7, 2014, Pacific Gas and Electric Company (“PG&E”) herein responds to both the Petition to Suspend Final Decisions and the Proposed Contention filed by the San Luis Obispo Mothers for Peace (“SLOMFP”) in the Diablo Canyon license renewal proceeding.<sup>1</sup> The Petition to Suspend and the Proposed Contention allege that the NRC’s recent final Continued Storage rule (“CS Rule”) and the supporting Generic Environmental Impact Statement (“GEIS”) fail to include specific “safety findings” regarding the feasibility and availability of spent fuel disposal at a geologic repository and that the NRC may not make final licensing decisions until the NRC makes those safety findings.

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<sup>1</sup> “Petition To Suspend Final Decisions In All Pending Reactor Licensing Proceedings Pending Issuance Of Waste Confidence Safety Findings,” dated September 29, 2014 (“Petition to Suspend”); “San Luis Obispo Mothers For Peace Motion For Leave To File A New Contention Concerning The Absence Of Required Waste Confidence Safety Findings,” dated September 29, 2014 (“Proposed Contention”). The Petition to Suspend and the Proposed Contention were filed in substantially similar form in connection with other NRC licensing proceedings.

The Commission should deny the Petition to Suspend and reject the Proposed Contention as a matter of law. The Petition to Suspend is unnecessary and is not in accord with established NRC processes. The Proposed Contention is not supported by the Atomic Energy Act (“AEA”), is contrary to relevant precedent, and inaccurately characterizes the NRC’s historic practice. Moreover, the “safety” findings that SLOMFP argues are necessary are in fact now addressed within the GEIS.

### BACKGROUND

In 2012, the D.C. Circuit found that the NRC’s 2010 update of the Waste Confidence Decision (“WCD”) and accompanying Temporary Storage Rule (“TSR”) failed to comply with the National Environmental Policy Act (“NEPA”) in three specific areas.<sup>2</sup> First, the Court of Appeals concluded that the NRC must examine the environmental impacts of a “no repository” scenario. Second, the Court of Appeals found that the NRC had not adequately assessed the risk of spent fuel pool leaks. Third, the Court of Appeals decided that the NRC had not adequately considered the consequences of potential spent fuel pool fires.

After an extensive review and numerous opportunities for public comment, the NRC promulgated a final rule on Continued Storage of Spent Nuclear Fuel adopting the generic environmental review in the GEIS.<sup>3</sup> In the GEIS, the NRC specifically addressed the environmental impacts of continued storage of spent nuclear fuel and the three issues raised in

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<sup>2</sup> *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

<sup>3</sup> “Continued Storage of Spent Nuclear Fuel,” Final Rule, 79 Fed. Reg. 56238 (Sept. 19, 2014); “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel,” NUREG-2157 (Aug. 2014) (ADAMS Accession No. ML14188B749); 79 Fed. Reg. 56262 (Sept. 19, 2014).

the D.C. Circuit's decision.<sup>4</sup> Under the rule the environmental impacts described in the GEIS are incorporated into environmental impact statements for individual licensing matters.<sup>5</sup>

## DISCUSSION

### A. The Petition to Suspend Should Be Denied

For Diablo Canyon, the Petition to Suspend is simply unnecessary given the current status of the license renewal review. The NRC Staff has not yet issued the draft or final environmental review documents for Diablo Canyon. In fact, in its most recent schedule update filed with the Licensing Board, the NRC Staff stated that it does not expect to finalize its safety review, including issuance of any necessary supplements to the Safety Evaluation Report, until the end of 2015. The final supplemental environmental impact statement is not scheduled to be issued until March 2016. There is no need to prospectively suspend a final license renewal decision for Diablo Canyon at this time.

More broadly, the Petition to Suspend has no basis in the Commission's rules of procedure. Unlike the remand from *New York v. NRC*, there is no judicial decision compelling suspension of licensing decisions at this time. In order for relief to be granted, SLOMFP must follow the applicable NRC process to assert a position. Here, SLOMFP has filed a Proposed Contention covering the issues raised in the Petition to Suspend. Only if the Commission admits a contention and ultimately finds in favor of SLOMFP on the merits would there be a reason defer a final licensing decision. Even then, a Petition to Suspend would be unnecessary.

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<sup>4</sup> 79 Fed. Reg. at 56241; GEIS at 1-4, App. E, App. F. In the GEIS the NRC also specifically rejected comments arguing that the AEA requires the NRC to make, in connection with individual reactor licensing decisions, reasonable assurance "safety" findings on spent fuel storage after a reactor's licensed life and on permanent disposal at a repository. GEIS at D-28 to D-29.

<sup>5</sup> 10 C.F.R. § 51.23(b).

B. The Proposed Contention Is Inadmissible

The basis for the Petition to Suspend and the Proposed Contention is that the CS Rule and the GEIS violate the AEA by failing to include findings regarding the safety of permanent spent fuel disposal. SLOMFP asserts that the NRC should have made findings in the CS Rule and the GEIS similar to the findings made in the 2010 WCD:

- Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.
- Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.

SLOMFP alleges that omitting these safety findings violates Sections 103 and 182 of the AEA and relevant precedent and is contrary to NRC's historic practice.<sup>6</sup> SLOMFP argues that the findings addressing the feasibility and timeframe for availability of a repository are separate from the NRC's NEPA conclusions and, in the absence of generic findings, must now be made on a case-specific basis to support each reactor licensing action. SLOMFP also argues that the additional "technical findings regarding feasibility of spent fuel disposal and repository capacity also must be supported by a [new] NEPA analysis."<sup>7</sup> None of these arguments have merit.

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<sup>6</sup> SLOMFP refers to the "removal of [these] AEA required safety findings" from the CS Rule. Petition at 1. But these findings were previously in the WCD, which was not a rule. "Waste Confidence Decision Update," Update and Final Revision of Waste Confidence Decision, 75 Fed. Reg. 81037, 81058-67 (Dec. 23, 2010). While the former 10 C.F.R. § 51.23(a) included a generic determination of the safety of interim spent fuel storage and a reasonable assurance finding on the availability of geologic repository capacity when necessary (similar to WCD Finding 2) (*see* 75 Fed. Reg. at 81032, 81037), the TSR never included any text mirroring WCD Finding 1. The Proposed Contention therefore rests, at least in part, on a faulty premise.

<sup>7</sup> *Id.* at 12.

1. *The Commission Previously Considered And Rejected the Argument in the Proposed Contention*

During the Continued Storage rulemaking, the NRC considered comments submitted by SLOMFP and others that the proposed rule violated the AEA “by eliminating previous safety findings that are essential to [AEA] compliance.”<sup>8</sup> The NRC responded in the final GEIS, explaining that, although safety determinations are necessary in the context of a particular licensing activity, those determinations are not part of the NEPA process.<sup>9</sup> The NRC noted that the comments “conflate reasonable assurance findings made in past waste confidence proceedings with AEA safety determinations made in the licensing process,”<sup>10</sup> and that “those findings are not appropriate for this GEIS and are not necessary.”<sup>11</sup> The NRC reiterated that its AEA responsibilities, including safety determinations, will continue to be met through the licensing process for specific applications. SLOMFP merely repeats its prior comments, now in the form of a Proposed Contention. SLOMFP provides no reason for the Commission to revisit the agency’s recent decision to reject those comments.

2. *The AEA Does Not Require “Safety” Findings For Spent Fuel Disposal In Connection With A Reactor Licensing Decision*

SLOMFP asserts that in order to make a final licensing decision for a renewed license the AEA requires the NRC to make “currently valid” findings of “confidence or

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<sup>8</sup> “Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule and Petition to Revise and Integrate All Safety and Environmental Regulations Related to Spent Fuel Storage and Disposal,” dated December 20, 2013 (ADAMS Accession No. ML14016A068) at 14-18.

<sup>9</sup> GEIS at D-29.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at D-30.



reasonable assurance” regarding the safety of spent fuel disposal,<sup>12</sup> and that in the absence of generic findings in the new rule those findings must be made in every individual reactor licensing proceeding.<sup>13</sup> SLOMFP cites only general statutory provisions as support and fails to draw a connection between those provisions and a requirement for an express safety finding for geologic disposal at the time of a reactor licensing decision.<sup>14</sup>

SLOMFP first argues that Section 182 of the AEA requires the NRC to “provide adequate protection to the health and safety of the public.”<sup>15</sup> SLOMFP also points to Section 103(d), which prohibits the NRC from issuing a license that would be “inimical to the health and safety of the public.”<sup>16</sup> But neither of these provisions (nor any other in the AEA) mandates the safety findings that SLOMFP now demands. Rather, the cited statutes are general standards that the NRC must follow in developing its regulatory programs and in making application-specific licensing decisions. These general provisions simply do not require the NRC to make express safety findings on ultimate spent fuel disposal in connection with reactor licensing.

SLOMFP’s overbroad reading of the statutory obligation would tether individual reactor licensing decisions to all of the safety findings to be made in connection with licensing facilities across the nuclear fuel cycle — from uranium mining to enrichment to storage and to later disposal in a geologic repository. This is a stretch too far. The NRC has always held that the scope of a safety review (and hearing) for an application is limited to the specific

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<sup>12</sup> Proposed Contention at 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 5-7.

<sup>15</sup> *Id.* at 5.

<sup>16</sup> *Id.* at 6.

authorization at issue.<sup>17</sup> The NRC fulfills its AEA responsibilities for each and every approval requested by an applicant or licensee. The NRC’s regulatory structure provides that separate licenses (and the attendant safety findings) are necessary for reactor operation, extended operation, spent fuel storage of any duration, and a repository. At each stage, the application must satisfy the statutory provisions cited by SLOMFP — but only for the specific activities being licensed at the time.<sup>18</sup>

In the present case, the Proposed Contention raises issues that are not directed to the Diablo Canyon license renewal application. The Proposed Contention does not identify any specific aspect of that application that it alleges to be deficient and never explains how the “missing” safety findings would lead to a different outcome than those presented in the license renewal application. In contrast, the licensing of a geologic repository will be (and is) the subject of a separate application, NRC safety review, and hearing process. SLOMFP’s arguments have no basis in the AEA or the agency’s regulatory framework.

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<sup>17</sup> See, e.g., “Policy on Conduct of Adjudicatory Proceedings; Policy Statement,” 48 NRC 18, 22 (1998) (“The scope of a proceeding, and, as a consequence, the scope of contentions that may be admitted, is limited by the nature of the application...”); 10 C.F.R. § 2.309(f)(1)(vi) (explaining that a proposed contention must show a genuine dispute with the applicant on a material issue, including references to specific portions of the application that the petitioner disputes) (emphasis added); *Amergen Energy Co., LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-08-28, 68 NRC 658, 672 n.54 (2008) (certain issues not within scope of proceeding, which was limited to specific license application at hand).

<sup>18</sup> The GEIS includes the NEPA findings required by the Court in *New York v. NRC* related to the future issues of continued storage and the availability of a repository. In the context of AEA safety findings, there is no analogue to the NEPA prohibition on improper segmentation of the review.

3. *The Cases SLOMFP Cites Do Not Require Express Safety Findings Regarding Disposal in Connection with a Reactor License*

SLOMFP points to judicial precedent to support its argument that the AEA requires findings on the safety and availability of a repository in connection with individual reactor licensing decisions. However, the decisions SLOMFP cites do not require any such findings. Specifically, in *Natural Resources Defense Council v. NRC*, the Court of Appeals examined the NRC's denial of a rulemaking petition filed by the NRDC. NRDC had requested — citing the AEA — that the NRC stop issuing reactor operating licenses until it made a determination.<sup>19</sup> The Court of Appeals held, as SLOMFP acknowledges (at 9-10), that under the AEA the NRC did not need to make definitive findings on repository safety until repository licensing.<sup>20</sup> This should be the end of the inquiry.

But, SLOMFP argues that *NRDC* was premised on the “NRC’s promise that in the meantime, it ‘would not continue to license reactors if it did not have reasonable assurance [*sic.*] that the wastes can and will in due course be disposed of safely.’”<sup>21</sup> The Court of Appeals, however, did not equate any such “promise” to a legal obligation to make a repository “safety” finding prior to issuing a reactor license.<sup>22</sup> Instead, the Court of Appeals explained that no such finding was required:

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<sup>19</sup> 582 F.2d 166 (2d Cir. 1978).

<sup>20</sup> *Id.* at 175.

<sup>21</sup> Proposed Contention at 9-10, *citing NRDC v. NRC*, 582 F.2d at 174 n.13. SLOMFP materially alters the cited quotation by changing the word “confidence” in the decision to “assurance” in their brief.

<sup>22</sup> SLOMFP also misquotes and as a result seriously mischaracterizes the decision when it states that the “Second Circuit concluded that:

[T]he NRC’s long-continued regulatory practice of issuing operating licenses, with an implied finding of reasonable assurance that safe

It is our conclusion that NRDC simply reads too much into the AEA. Indeed, if the [Atomic Energy Commission] had interpreted the statute to require the affirmative determination regarding permanent disposal of high-level waste sought by NRDC, no commercial production or utilization facilities would be in operation today. We are satisfied that Congress did not intend such a condition.<sup>23</sup>

The Court of Appeals specifically remarked that “NRC is not required to ... withhold action on pending or future applications for nuclear power reactor operating licenses until it makes a determination that high-level radioactive wastes can be permanently disposed of safely.”<sup>24</sup> NRDC therefore provides no support for SLOMFP’s position.

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permanent disposal of [spent reactor fuel] can be available when needed, is in accord with the intent of Congress underlying the AEA and the [Energy Reorganization Act].”

Proposed Contention at 9, *citing NRDC v. NRC*, 582 F.2d at 170 (emphasis added). SLOMFP has omitted the first part of the quoted sentence. In fact, as is made clear in the missing part, the quoted passage is the Court’s summary of the NRC’s position, not the Court’s holding. And, the NRC’s position was that it need not make AEA “reasonable assurance” safety findings for disposal in connection with reactor licensing decisions.

<sup>23</sup> *Id.* at 171.

<sup>24</sup> *Id.* at 175. The Second Circuit stated in no uncertain terms:

Finally, if there were any doubt over the intent of Congress (1) not to require NRC to make the definitive determination requested by NRDC and (2) not to require a moratorium on nuclear power reactor licensing pending an affirmative determination, we are persuaded that the matter was laid to rest by enactment of the Energy Reorganization Act of 1974. ... Therein, Congress expressly recognized and impliedly approved NRC’s regulatory scheme and practice under which the safety of interim storage of high-level radioactive wastes at commercial nuclear power reactor sites has been determined separately from the safety of Government-owned permanent storage facilities which have not, as yet, been established.

*Id.* at 174 (footnote omitted).

A different “waste confidence” issue was addressed in *Minnesota v. NRC*.<sup>25</sup> The Court of Appeals addressed the petitioners’ claim that, “[p]rior to issuance of a license amendment permitting expansion of on-site storage capacity [at two nuclear plants], the NRC must make a determination of probability that the wastes be safely handled and disposed of.”<sup>26</sup> One issue involved whether the NRC could rely on a generic “declaration of policy”<sup>27</sup> — rather than an adjudication — to address the feasibility of disposal.<sup>28</sup> Contrary to SLOMFP’s argument here, the Court of Appeals did not require the NRC to make specific findings regarding safe repository disposal prior to licensing or reach a conclusion contrary to *NRDC*. Instead, *Minnesota* addressed only the NRC’s consideration of interim storage of spent fuel until a repository became available. The Court of Appeals remanded to the NRC “the specific problem isolated by the petitioners [of] determining whether there is reasonable assurance that an off-site storage solution will be available by . . . the expiration of the plants’ operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.”<sup>29</sup> *Minnesota* does not require the NRC to make express findings on the feasibility of safe disposal or the availability of repository capacity.<sup>30</sup>

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<sup>25</sup> 602 F.2d 412 (D.C. Cir. 1979).

<sup>26</sup> *Id.* at 416.

<sup>27</sup> The “declaration of policy” was the denial of the *NRDC* petition for rulemaking discussed in *NRDC v. NRC*.

<sup>28</sup> *Id.* at 416-417.

<sup>29</sup> *Id.* at 418.

<sup>30</sup> In response to the remand in *Minnesota*, the NRC initiated a hybrid evidentiary hearing and rulemaking “to assess generically the degree of assurance now available that radioactive waste can be safely disposed of, to determine when such disposal or off-site storage will be available, and to determine whether radioactive wastes can be safely stored on-site past the expiration of existing facility licenses until off-site disposal or

In *New York v. NRC*, the Court of Appeals considered only whether the NRC complied with NEPA in the 2010 WCD update and TSR.<sup>31</sup> The Court of Appeals did not address the NRC’s AEA responsibilities at all. The Court of Appeals mentioned *Minnesota* only to explain the genesis of the WCD and TSR, and to support the acceptability of a generic approach to the issues.<sup>32</sup> The Court did not examine AEA issues and reached no conclusion on the need for affirmative repository safety determinations as part of a reactor licensing review.

At bottom, none of the three cases cited by SLOMFP support the Proposed Contention. No court has interpreted the AEA to require specific safety findings on the feasibility and availability of a disposal repository in connection with reactor licensing. Instead, the cases establish that explicit findings on repository safety are not necessary for reactor licensing under the AEA.

4. *NRC’s Prior Statements And Waste Confidence Decision Do Not Suggest That Safety Findings Regarding Disposal Are Required For Reactor Licensing*

SLOMFP next contends that the NRC previously interpreted the AEA to require express findings on the safety of repository disposal.<sup>33</sup> As noted above, SLOMFP cites the NRC’s 1977 statement that it “would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”<sup>34</sup> SLOMFP reads

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storage is available.” This effort led the NRC in 1984 to promulgate the TSR at 10 C.F.R. § 51.23, accompanied by the findings in the first WCD “Storage and Disposal of Nuclear Waste; Notice of Proposed Rulemaking,” 44 Fed. Reg. 61372, 61373 (Oct. 25, 1979).

<sup>31</sup> 681 F.3d 471 (D.C. Cir. 2012).

<sup>32</sup> *Id.* at 473, 474, 476, and 480.

<sup>33</sup> Proposed Contention at 7.

<sup>34</sup> *Id.* (citations omitted).

too much into this statement. In the 2010 WCD update, the NRC made clear that its previous statement in *NRDC* was “a matter of policy.”<sup>35</sup> The NRC has never stated that the AEA requires an affirmative safety finding regarding repository disposal before a reactor license may be issued.<sup>36</sup> That the NRC *chose* to address general “assurances of confidence” in the feasibility and availability of a disposal facility through “Findings” in the WCD does not mean that the AEA *mandates* express repository safety findings for each licensing action.

SLOMFP next claims that “the NRC has stated that henceforth, it will make all AEA-based safety findings in individual licensing proceedings.”<sup>37</sup> As support, SLOMFP cites a statement in the GEIS in which the NRC states that it makes no AEA safety determinations regarding continued spent fuel storage in the GEIS, but rather, will make those determinations in individual licensing actions.<sup>38</sup> However, the discussion in the GEIS applies only to spent fuel *storage*, and is not relevant to SLOMFP’s claims directed (and limited) to spent fuel *disposal*.<sup>39</sup> In any event, the NRC has not abandoned its assurances of confidence in safe repository

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<sup>35</sup> 75 Fed. Reg. at 81038.

<sup>36</sup> SLOMFP also cites the NRC’s brief in *New York v. NRC*, in which the NRC stated that “[t]he Waste Confidence decision and related environmental rule in 10 C.F.R. § 51.23, like those that preceded it since 1984 ... also fulfill NRC’s important responsibilities under the AEA.” Proposed Contention at 7, Attachment. The NRC’s statement demonstrates nothing more than an acknowledgement that, at most, an *implied* finding of confidence in repository safety is necessary. This is entirely consistent with *NRDC* and *Minnesota*.

<sup>37</sup> Proposed Contention at 14, *citing* GEIS at D-9.

<sup>38</sup> *Id.*

<sup>39</sup> Compare GEIS at D-9 (explaining that the NRC is not making a safety determination under the AEA to allow for the continued storage of spent fuel because those determinations are made as part of individual licensing actions) *with* Proposed Contention at 2, 3 n.6 (contesting the lack of a safety finding for ultimate spent fuel disposal and conceding that “the validity of [] storage-related findings ... are not challenged in the attached Contention or this Petition to Suspend”).

disposal. As discussed below, the GEIS amply demonstrates that those assurances are stronger than ever.

5. *The GEIS Includes the Prior Waste Confidence Findings on Spent Fuel Disposal*  
SLOMFP's claim that the NRC now lacks "confidence" in the feasibility, availability, and safety of a disposal facility reflects a myopic reading of the record.<sup>40</sup> Although neither Finding 1 nor 2 is part of the CS Rule text, both issues are addressed in the GEIS.<sup>41</sup> Finding 1 regarding the technical feasibility of a geologic repository is discussed at length in GEIS Section B.2.1, while Finding 2 regarding the availability of geologic disposal capacity is now addressed in GEIS Section B.2.2.<sup>42</sup>

With respect to the former Finding 1, the GEIS states that the traditional safety finding on a repository's technical feasibility "continues to undergird the environmental analyses."<sup>43</sup> In concluding that a geologic repository is technically feasible, the agency notes its past findings on technical feasibility and cites subsequent evidence that further supports its conclusion. For example, the GEIS cites the Blue Ribbon Commission on America's Nuclear

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<sup>40</sup> A determination on the timing of the availability of a repository is now unnecessary. The purpose of former Finding 2 was to provide a timeframe for examining the environmental impacts of continued spent fuel storage. *See, e.g.*, 75 Fed. Reg. at 81042 (describing how different "target dates" for repository availability in Finding 2 would affect the NRC's assessment of environmental impacts). Now that the NRC has assessed the environmental impacts for an indefinite period of spent fuel storage, a determination of the timeframe for repository available is no longer necessary under NEPA.

<sup>41</sup> 79 Fed. Reg. at 56244.

<sup>42</sup> Finding 3 (reasonable assurance that spent fuel will be managed safely pending disposal) is addressed in Section B.3.3; Finding 4 (reasonable assurance that spent fuel can be stored safely and without significant environmental impacts for at least 60 years beyond a reactor's operating life) is addressed in Sections B.3.1 and B.3.2, and; Finding 5 (reasonable assurance that safe onsite or offsite spent fuel storage will be available when needed) is addressed in Section B.3.3.

<sup>43</sup> GEIS at B-1.



Future, which stated that the consensus within the scientific and technical community is that safe geologic disposal is achievable with currently available technology.<sup>44</sup> The GEIS also points to studies by the International Atomic Energy Agency, as well as the Department of Energy’s experience with Yucca Mountain and the Waste Isolation Pilot Plant.<sup>45</sup> The GEIS notes that the activities of European countries further support the technical feasibility of a repository.<sup>46</sup> Based on its comprehensive assessment and the extensive information referenced in the record, the NRC “concludes that ... a geologic repository is technically feasible.”<sup>47</sup>

The NRC similarly addresses the availability of a repository (formerly Finding 2) in the GEIS. As it did in previous WCDs, the NRC looks to the developments of other countries to inform the timeframe for siting, licensing, constructing, and opening a geologic repository.<sup>48</sup> Although it acknowledges the various factors that influence the timing of geologic disposal, such as public acceptance, Congressional action, and funding,<sup>49</sup> the NRC concludes that, “[b]ased on the evaluation of international experience with geologic repository programs — including the issues some countries have overcome — and the affirmation by the Blue Ribbon Commission of the geologic repository approach, the NRC continues to believe that 25 to 35 years is a

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<sup>44</sup> *Id.* at B-2, *citing* Blue Ribbon Commission on America’s Nuclear Future, Section 4.3.

<sup>45</sup> *Id.* at B-3 – B-4.

<sup>46</sup> *Id.* at B-5.

<sup>47</sup> *Id.* at B-33.

<sup>48</sup> *Id.* at B-5.

<sup>49</sup> *Id.* at B-8, B-9.

reasonable period for repository development (*i.e.*, candidate site selection and characterization, final site selection, licensing review, and initial construction for acceptance of waste).”<sup>50</sup>

Despite the detailed discussion of the substance of former Findings 1 and 2, SLOMFP argues that the GEIS does not actually include the safety findings because the “reasonable assurance” language in prior iterations of Findings 1 and 2 does not appear in the GEIS or CS Rule.<sup>51</sup> This argument is baseless. The NRC restates the findings as “conclusions” in the GEIS, providing an equivalent (if not greater) level of “assurance” as Findings 1 and 2 in the 2010 WCD.<sup>52</sup> SLOMFP’s argument elevates form over substance.

SLOMFP also implies that it is improper to make findings on repository safety in a GEIS, rather than in the CS Rule or a separate WCD.<sup>53</sup> This implication is misguided. The NRC’s conclusions on repository safety have always been part of the environmental analysis supporting the rule. For example, in the 2010 TSR, the NRC stated that “the update and revision of the Waste Confidence Decision is the [Environmental Assessment (“EA”)] supporting the amendment of the generic determination in 10 CFR 51.23(a).”<sup>54</sup> Both Findings 1 and 2 were

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<sup>50</sup> *Id.* at B-8 – B-9. This conclusion is further supported by the NRC’s recently released Volume 3 of the Safety Evaluation Report for Yucca Mountain, in which the NRC found that the Department of Energy’s license application demonstrated compliance with the NRC’s requirements for post-repository closure safety. NUREG-1949, Vol. 3, “Safety Evaluation Report Related to Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada: Repository Safety After Permanent Closure” (Oct. 2014).

<sup>51</sup> Proposed Contention at 12.

<sup>52</sup> The finding of feasibility is no longer qualified by “reasonable assurance” as it was in the 2010 TSR.

<sup>53</sup> Proposed Contention at 1, 11-12.

<sup>54</sup> 75 Fed. Reg. at 81034.

included in the WCD and therefore were part of the EA for the TSR.<sup>55</sup> The conclusions regarding repository safety supporting the CS Rule are also included in the environmental analysis underlying the rule: the GEIS. There is no meaningful distinction between making Findings 1 and 2 in the WCD and making equivalent conclusions in the GEIS.

6. *There Is No Required NEPA Evaluation Beyond the Continued Storage Rule And GEIS*

SLOMFP last claims that the safety findings on repository feasibility and the availability of disposal capacity must themselves be supported by a new NEPA environmental review, presumably encompassing the scope of a repository environmental review.<sup>56</sup> They argue that there is no EIS or EA “that could support the NRC’s findings ... as required by the Court of Appeals in *New York*.”<sup>57</sup> This argument is circular. As discussed above, there is no requirement that the NRC make explicit AEA-based safety findings on a disposal facility in connection with a reactor licensing proceeding. Instead, those findings (and the attendant NEPA environmental review related to those findings) would be made as part of a repository licensing review. There is no requirement to conduct a NEPA analysis for licensing decisions that have not been, and need not be, made at this time.<sup>58</sup>

Moreover, nothing in *New York* or in NEPA mandates an EIS or EA for an assessment of the technical feasibility or availability of disposal in a geologic repository. The

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<sup>55</sup> Only Finding 2 was included in the TSR.

<sup>56</sup> Proposed Contention at 12-13. SLOMFP argues that the Department of Energy’s EIS for the Yucca Mountain project is not sufficient because it addresses the impacts of a single repository and is “unfinished.” *Id.* at 13.

<sup>57</sup> *Id.* at 13-14.

<sup>58</sup> There is, however, a generic NEPA analysis of the nuclear fuel cycle, including disposal at a repository, already embodied in 10 C.F.R. Part 51, Table S-3, which supports individual reactor licensing decisions. 10 C.F.R. § 51.51.

discussion of NEPA in the context of repository availability in *New York* was limited to assessing the environmental impacts of an “indefinite storage” or “no repository” scenario. That scenario is now addressed in detail in the GEIS. And, the GEIS conclusions on repository feasibility and availability are not themselves “licensing” actions or “major federal actions” that trigger NEPA.

#### CONCLUSION

For the foregoing reasons, the Commission should deny the Petition to Suspend and Proposed Contention.

Respectfully submitted,

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Dated at Washington, District of Columbia  
this 31st day of October 2014

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
PACIFIC GAS AND ELECTRIC	)	Docket No. 50-275-LR
COMPANY	)	Docket No. 50-323-LR
	)	
(Diablo Canyon Power Plant, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of “APPLICANT’S OPPOSITION TO PETITION TO SUSPEND FINAL DECISIONS AND PROPOSED NEW CONTINUED STORAGE CONTENTION” in the above captioned proceeding have been served via the Electronic Information Exchange this 31st day of October 2014.

Respectfully submitted,

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