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October 5, 1987

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
PACIFIC GAS AND ELECTRIC COMPANY	)	Docket Nos. 50-275 OLA 50-323 OLA
(Diablo Canyon Nuclear Power Plant Units 1 and 2)	)	(Spent Fuel Pool)

RESPONSE OF NRC STAFF TO INTERVENOR SIERRA CLUB'S REQUEST FOR STAY

I. INTRODUCTION

On September 24, 1987, the Sierra Club filed with the Atomic Safety and Licensing Appeal Board its request for a stay of the Atomic Safety and Licensing Board's September 11, 1987 Initial Decision in this matter. The Initial Decision authorized the Director, Office of Nuclear Reactor Regulation, to issue operating license amendments (OLAs) to the Licensee, Pacific Gas and Electric Company, to permit reracking of the spent fuel storage pools at the Licensee's Diablo Canyon Nuclear Power Plant.

For the reasons set forth below, the NRC staff opposes the Sierra Club's request for stay (Motion) and urges that it be denied.

II. BACKGROUND

On October 30, 1985, the Licensee requested amendments authorizing it to increase the spent fuel pool storage capacity from 270 to 1324 storage locations for each unit, by reracking the spent fuel pools with a combination of high-density, free-standing racks in a two-region arrangement. On January 13, 1986, the Commission published in the Federal Register its notice of "Consideration of Issuance of Amendments to Facility Operating Licenses DPR-80 and DPR-82 for Diablo Canyon Nuclear Power Plant, Units 1 and 2, respectively, and Proposed No Significant Hazards Consideration Determination

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and Opportunity for Hearing." 51 Fed. Reg. 1451. In this notice the Commission stated:

> On the basis of the foregoing discussion of the elements of 10 C.F.R. § 50.92 and because the proposed reracking technology has been well developed and demonstrated, the Commission proposes to determine that operation of the facility in accordance with the proposed amendment does not involve a significant hazards consideration. Id. at 1455.

In response to the above Commission notice, a petition for leave to intervene was filed by the Sierra Club. On June 27, 1986, [1/] the Licensing

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1/ In accordance with 10 C.F.R. § 50.91, the Commission, on May 30, 1986, approved the proposed amendments on the basis of its Safety Evaluation and made them immediately effective, prior to any hearing on the proposed amendments, having made a final determination that the proposed action involved no significant hazards consideration. 51 Fed. Reg. 20,725 (June 6, 1986). An Environmental Assessment supporting the license amendment, which found that the amendment entailed no significant environmental impacts, had also been issued on May 21, 1986, and notice thereof given in the Federal Register. 51 Fed. Reg. 19,430 (May 29, 1986).

On June 16, 1986, Intervenors Mothers for Peace and Sierra Club jointly filed an Application for a Stay of the Commission's May 30th action amending the license. On June 18, both the Licensing Board and the Appeal Board denied the Intervenors' stay request. On June 19, 1986, the Intervenors filed Emergency Motions and a Petition for Review before the U.S. Court of Appeals for the Ninth Circuit. On July 2, 1986, the Court, after briefs and oral argument, granted a partial stay and ordered expedited consideration of the Intervenors' petition for review. On July 22, 1986, the Commission denied Intervenors' application for a stay except to the extent that it prohibited the Licensee from storing more than 270 spent fuel assemblies in either of the spent fuel pools and subject to those restrictions previously imposed by the Court of Appeals. CLI-86-12, 24 NRC 1 (1986).

On September 11, 1986, the Court issued an Order that concluded:

> The NRC failed to comply with its own regulations in denying petitioners a hearing prior to making the Diablo Canyon reracking license amendments effective. Accordingly, the existing stay of those amendments is continued. PG&E shall not deposit any spent fuel rods in the pool for Unit 1 and shall not rerack the pool for Unit 2 until hearings have been held in compliance with the requirements of the Atomic Energy Act. 799 F.2d 1268 (9th Cir. 1986); dissent, 804 F.2d 523 (9th Cir. 1986).

Board issued a Memorandum and Order, LBP-86-21, 23 NRC 849 (1986), admitting the Sierra Club as a party to the proceeding. A hearing on the Sierra Club's contentions was held on June 16-18, 1987 at Avila Beach, California.

On June 16, 1987, the Sierra Club orally moved for the admission of a new contention regarding the possibility of zircaloy cladding fires in the Diablo Canyon spent fuel pools and asked that the Board direct the preparation of an EIS on this matter. Sierra Club argued that the basis for the admission of the new late filed contention was information contained in a draft report issued by BNL. On September 2, 1987, the Licensing Board, in a Memorandum and Order, denied the Sierra Club's motion. On September 11, 1987, the Licensing Board in an Initial Decision determined that the application to rerack the spent fuel pools at Diablo Canyon will adequately protect the public health and safety and the environment and, as noted earlier, authorized the issuance of the OLAs.

III. DISCUSSION

A. The Standards For A Stay

The requirements for determining whether to grant or deny a stay are contained in 10 C.F.R. § 2.788(e). These factors are set forth in the Sierra Club's Request for a Stay, Motion at 3, are not in dispute and will not be restated herein.

In addressing the stay factors, the Appeal Board has noted:

> The burden of persuasion on these factors rests on the moving party. While no single factor is dispositive, the most crucial is whether irreparable injury will be incurred by the movant absent a stay. To meet the standard of making a strong showing that it is likely to prevail on the merits of its appeal, the movant must do more than merely establish possible grounds for appeal. In addition, an "overwhelming showing of likelihood of success on the merits" is necessary to obtain a stay where the showing on the other three factors is weak. Alabama Power Company (Joseph M. Farley Nuclear Plant, Units 1 and 2), CLI-81-27, 14 NRC 795, 797 (1981) (footnotes omitted).

The significance of the first two factors was recently confirmed by the U.S. Court of Appeals:

> To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury or vice versa. Cuomo v. NRC, 772 F.2d 972, 974 (D.C. Cir. 1985).

By any measure the Sierra Club has failed to sustain its burden.

1. Likelihood Of Prevailing On The Merits

With respect to this factor, the Sierra Club advances three basic issues on which it contends it is likely to prevail. Motion at 3-7. Because the first two issues are related, they will be considered together. The first is that the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for an amendment as important as the proposed reracking of the Diablo Canyon fuel pools; the second is that the Environmental Assessment (EA) issued in connection with this reracking improperly relies on a seven year old GEIS.

This is not the first time the Sierra Club has requested a stay on the basis that the Staff has not prepared an EIS for this matter. See, page 2, fn. 1 supra. However, even though the Ninth Circuit granted a limited stay in Mothers for Peace, 799 F.2d 1268, supra, that stay was not based on the Commission's violation of the National Environmental Policy Act. See, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), Memorandum and Order (September 2, 1987) at 3-4. Moreover, neither NEPA nor the Commission's regulations require the preparation of an EIS discussing beyond design basis accidents on a spent fuel pool reracking application. Id. at 13-15. The Sierra Club's allegations that the OLAs are likely to result in significant adverse impacts to the environment, Motion at 4, are not supported by record or the findings and conclusions of the Licensing

Board. Initial Decision at 60. Sierra Club made no offer of proof pursuant to 10 C.F.R. § 2.743(e) nor did it present any evidence at the hearing to support its assertion concerning "significant adverse impacts". Consequently, Sierra Club is seeking a stay based largely on an argument concerning the age of the existing GEIS. Indeed, the Licensing Board concluded that the amendment "meets or exceeds" the requirements of 10 C.F.R. Parts 50 and 51 and the related Commission regulations. Id. The record herein clearly supports the Staff's determination that the preparation of an EIS for this matter is not required. See, Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-869, 26 NRC ___, (July 21, 1987), reconsideration den'd., ALAB-876, Slip op. October 2, 1987. The allegations that the EA relies on a seven year old GEIS and fails to consider alternatives are without merit. Sierra Club did not introduce evidence to support its present allegation that the EA improperly relied upon the GEIS for its conclusions. Further, the status of the GEIS was not raised herein by the Sierra Club as a contention. Nevertheless, the EA (Exhibit 2) at pages 13-14 establishes that the Staff used seventeen references in addition to the GEIS in assessing the impacts of the proposed amendment. Thus, Sierra Club's allegation that the EA improperly relies upon the GEIS for its conclusions is incorrect. Further, the Licensing Board found that the Licensee did consider alternatives to the proposed reracking and that such considerations as set forth in its Reracking Report were sufficient to comply with NRC requirements. Initial Decision, Finding 34, see also, Findings 25-33. Thus, the record herein clearly reflects that the Staff's EA is predicated upon more than the GEIS, is site specific and, further, that the Staff and the Licensee did consider alternatives to the proposed reracking. Id. Sierra Club's allegations in this regard are without record support or other factual basis.

The third issue on which the Sierra Club asserts it is likely to prevail, the Licensing Board's denial of its late filed contention concerning Generic Issue 82, is also without merit. Sierra Club maintains that it established a nexus between the Licensee's proposed OLAs and the Brookhaven National Laboratory Report and that the Licensing Board's dismissal of its contention in the face of such a nexus endangers the public health and safety. Motion at 6-7. The Sierra Club's allegations in view of the record evidence in this proceeding and the reasoning underlying the Licensing Board's September 2, 1987 Memorandum and Order denying the late-filed contention are without support. The Licensing Board found the Sierra Club's Motion to be insufficient and determined. . . "[T]here is no link shown between the very generic conclusions drawn in the BNL Report from the theoretical, computer model based on the older Ginna reactor and the high density reracking proposed for Diablo Canyon. In fact, the Report warns against drawing specific conclusions as to individual reactors throughout its length." Memorandum and Order, slip op. at 11 (citations to BNL Report omitted). Based upon its review of the matter the Licensing Board concluded there was no evidence to connect the generic report to Diablo Canyon and in the absence of any suggestion of a related accident initiator there was no nexus by which the contention might establish a specifically stated basis. Id. In view of the foregoing, Sierra Club's continued incantations about establishing a nexus between the BNL Report and the requested OLAs with the resultant harm to the public health and safety is without merit. In sum, the Sierra Club has failed to make even a minimal showing that it is likely to prevail on any of the above issues.

2. Whether The Sierra Club Will Be Irreparably Injured Unless A Stay Is Granted.

Of the three factors that must be considered in determining whether a stay should be granted in a particular situation, the question of irreparable harm is generally considered the most significant. 2/ In order to establish irreparable harm a party must do more than assert an injury; he must also demonstrate that the injury to be incurred is both certain and great. 3/ The argument that the operation of the facility may result in an increased risk of injury is, without more, inadequate to meet this criterion. Id. Where the risk is so low as to be remote and speculative the requisite irreparable harm is not established. 4/ Unless a showing is made as to the manner in which an accident may occur and the probability of the occurrence of such an accident, a claim of irreparable injury must be rejected as pure speculation. 5/ Speculation about a nuclear accident does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. 6/

In this proceeding, the Sierra Club asserts that it will "be irreparably injured in several significant respects." Motion at 7. The Sierra Club argues that its members and the pubiic will be endangered because "the facility will not be designed consistently with the Commission's mandate to protect the health and safety and to consider the environmental impacts of and rea-

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2/ Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), CLI-84-17, 20 NRC 801, 804 (1984).

3/ Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), ALAB-820, 22 NRC 743, 747.

4/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-85-14, 22 NRC 177, 180 (1985).

5/ Duke Power Company (Catawba Nuclear Station, Units 1 and 2), ALAB-794, 20 NRC 1630, 1634 (1985).

6/ Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-84-5, 19 NRC 953, 964 (1984).

sonable alternatives to the reracking before approving the OLAs." Id. This allegation, particularly in light of the Licensing Board's findings with respect to the fuel pool amendment, does not provide a basis for concluding that there is a reasonable possibility that anyone will suffer any harm let alone irreparable harm. The determination has been made by the Licensing Board, with respect to the litigated contentions, that the proposed reracking meets or exceeds the Commission's regulations and requirements. Initial Decision at 60. Furthermore, the Sierra Club has not indicated why it could not obtain the relief it desires, without the need for a stay, if this matter is remanded to the Licensing Board in the event it is successful in convincing this Appeal Board that it was error for the Licensing Board to approve this amendment. See, e.g. ALAB-820, supra, at 749.

The Sierra Club argues that the consequences of a major accident involving spent fuel pools at a nuclear power plant can be catastrophic. Motion at 7. While the consequences of a major accident could indeed be catastrophic, the occurrence of such an accident at the Diablo facility during the pendency of the review of the Licensing Board's decision is pure unsupported speculation and does not, as a matter of law, constitute the imminent, irreparable injury required for staying a licensing decision. CLI-84-5 at 964. The mere allegation that the Sierra Club, its members and the public will be endangered does not establish that an injury is both certain and great. See, ALAB-820, supra.

Finally, the Sierra Club argues that, in this case, there is justification for injunctive relief since there has been noncompliance with the National Environmental Policy Act of 1969 (NEPA), [7/] in that there was a failure to assess environmental impacts and to consider reasonable alternatives. Mo-

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7/ 42 U.S.C. § 4321 et. seq.

tion at 8. With regard to environmental concerns, the Licensing Board found that the Staff's Environmental Assessment considered the environmental impacts of the proposed action and concluded that there would be none of significance. Initial Decision at 34, Finding 30. In support of its position that a stay is appropriate the Sierra Club relies upon Realty Income Trust v. Eckerd. 8/ However, Eckerd does not support the Sierra Club's request for a stay in this situation. In Eckerd the Court of Appeals determined that in the circumstances of that case, even though noncompliance with NEPA was found, an injunction against further work on an ongoing construction project was not appropriate. Id. at 458.

The Court in Eckerd did state, in considering the rationale relied upon by other courts in determining when an injunction is warranted, that when an agency "is in illegal ignorance of the consequences" of a project on the environmemt an injunction would be appropriate. Id. at 456. In that situation, where the decision makers would not have had the benefit of all the information necessary to a determination with respect to a project, the reason for an injunction is apparent. However, such a situation does not exist in this case.

For the reasons set forth above, the Sierra Club has not established that it will suffer irreparable harm if the fuel pool amendment is issued subject to consideration of an appeal on the merits.

3. Harm To Other Parties

In connection with this factor, the Sierra Club merely states that given the irreparable harm it will incur if a stay is not granted, any harm to other parties is insufficient to justify denying their stay request. Motion at 10. Given that the Sierra Club has failed to satisfy the first two factors

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8/ 564 F.2d 447 (D.C. Cir. 1977).

for the issuance of a stay, its meager showing on this factor does not warrant the relief requested.

4. Public Interest

The fourth factor, where the public interest lies, similarly does not favor the issuance of a stay. The Sierra Club merely asserts that to allow reracking without first requiring full disclosure of the project's consequences and alternatives is not in the public interest. Motion at 10. This statement, implying that there has not been full compliance with pertinent safety and environmental laws, is not supported by the record evidence in this proceeding and is directly contrary to the Findings and Conclusions reached by the Licensing Board in its Initial Decision. See, e.g. Initial Decision at 60. In view of the Sierra Club's failure to satisfy the first two factors, its showing here clearly fails to support the relief it has requested.

IV. CONCLUSION

For the foregoing reasons, the Sierra Club has failed to satisfy the requirements of 10 C.F.R. § 2.788 and thus, the Request for a Stay should be denied.

Respectfully submitted,

Benjamin H. Vogler
Senior Supervisory Trial Attorney

Dated at Bethesda, Maryland
this 5th day of October, 1987

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "RESPONSE OF NRC STAFF TO INTERVENOR SIERRA CLUB'S REQUEST FOR STAY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first first class, or as indicated by an asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk by use of express mail service, or as indicated by a triple asterisk by hand-delivery, this 5th day of October, 1987:

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