



18 March 2019

Controller Betty Yee
Lieutenant Governor Eleni Kounalakis
Finance Director Keely Bosler
Commissioners
State Lands Commission

by email

Re: Final Environmental Impact Report for San Onofre Nuclear Generating Station
(SONGS) Units 2 and 3 Decommissioning Project

Dear Controller Yee, Lieutenant Governor Kounalakis, and Finance Director Bosler:

We write regarding the decision pending before the State Lands Commission (CSLC) whether to certify the San Onofre Decommissioning Project Final Environmental Impact Report (FEIR) and approve the new lease. The pending action is one of the more consequential that the CSLC has had to face. It has important ramifications for controversial plans to continue storing large quantities of highly irradiated nuclear fuel a hundred feet from the ocean and just a few feet above the water table. These plans have generated substantial public concern and desire that more appropriate alternatives be put in place. CSLC has the ability to help induce implementation of a better alternative and it should take advantage of the opportunity to do so rather than unconditionally agree to the FEIR and lease.

We recognize that the CSLC may feel that the storage matter is federally pre-empted and/or is outside its jurisdiction. We wish to propose a path forward for your consideration, however, whereby CSLC can be responsive to the legitimate issues about the spent fuel storage plans while not facing pre-emption issues and remaining within your jurisdiction. *The CSLC can utilize its land use authority—which the U.S. Supreme Court has recognized is not pre-empted by federal law—to demand the spent fuel be moved off the beach and up to the safer Mesa site before CSLC will certify the FEIR or issue the license.*

Federal Pre-Emption of Nuclear Safety Matters Does Not Bar Exercise of CSLC's Land Use Authority Regarding San Onofre Decommissioning Plans

The Atomic Energy Act, 42 U.S.C. § 2011, *et seq.*, generally reserves to the federal government the power to regulate nuclear safety. We have long been critical of this restriction of state power to protect its residents, especially in contrast to how environmental law works in every other context, and we have long supported proposed legislative fixes to this problem. We would

welcome CSLC support in these efforts to address federal pre-emption of nuclear safety matters. Nonetheless, that is the situation at present.

With the above caution in mind, we remind the CSLC that full pre-emption of states' roles in regulating nuclear plants within their borders is by no means absolute. Indeed, the kind of authority that rests within CSLC's jurisdiction—land use—is precisely one of the areas of authority over nuclear plants and high level waste long recognized by the courts.

The seminal case on pre-emption arose out of a challenge to a California law. The law prohibited (and to this day still does) new nuclear power plants in California unless the California Energy Commission determined that there would be adequate storage space for spent nuclear fuel and an approved means for permanent disposal. PG&E sued, arguing federal pre-emption barred the California law. The U.S. Supreme Court found that while there is federal pre-emption of purely safety matters related to nuclear plants, “the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, *land use*, ratemaking, and the like.” *Pacific Gas and Electric Company v. State Energy Commission* (1983) 461 U.S. 190, 212 (emphasis added). On that basis, the Supreme Court upheld the California law, even though it dealt with high level nuclear waste and the conditions under which new nuclear plants would be allowed in California. Put simply, federal law does not absolutely pre-empt land use decisions affecting nuclear facilities.

CSLC Has Previously Successfully Used Its Land Use Authority to Address Nuclear Matters

In at least two prior, high-visibility nuclear matters, CSLC has exercised its land use powers in ways that limit nuclear power and waste storage to protect Californians.

The first occurred two years ago, when CSLC employed its power over leases for state-controlled submerged lands offshore from the Diablo Canyon Nuclear Plant. CSLC's role in the Diablo Canyon nuclear plant matter rests on the fact that it is responsible for state lands offshore, the same role CSLC pays at San Onofre. The nuclear plants required leases from the state for coolant inlets and outfalls placed on those offshore stand lands. In the Diablo Canyon case, the leases were expiring and PG&E requested CSLC extend the leases so that the plant could continue to operate beyond the expiration dates of the leases. That decision facing CSLC on Diablo was completely discretionary—the land was CSLC land, and CSLC was free to extend or not extend the leases as it chose. Thus, CSLC decided to use its authority in a salutary way to facilitate the phase-out of the reactors and replacement with renewables. The situation is quite analogous to the San Onofre matter, where CSLC's involvement comes from CSLC ownership of and leases for the submerged lands on which coolant inlets and outfalls are located.

The second example of CSLC's prior critical—and successful—involvement in nuclear waste matters was the 1990s controversy over the proposal to bury radioactive waste from California and three other states at Ward Valley, a few miles from the Colorado River. For the project to go forward, federal land at Ward Valley had to be transferred to California. CSLC declined to approve the proposal unless serious safety issues were resolved. Again, CSLC used its discretionary land use authority to protect the state.

Our Suggested Approach to Utilize CSLC's Land Use Authority to Address the Significant Concerns About Irradiated Fuel Storage Without Implicating Federal Pre-emption

As discussed, CSLC has a history of protecting California on nuclear matters by exercising its discretionary land use authority that the Supreme Court recognizes is not pre-empted by federal law. Here, we respectfully suggest CSLC act similarly on the San Onofre matter by exercising its land use discretion and declining to grant the pending request from Edison and its partners regarding the lease of state lands and alteration of the coolant intakes and outfalls that are on those lands, unless alternative action is taken to address the larger nuclear waste matter.¹

The fundamental controversy about CSLC certifying the FEIS for the decommissioning of San Onofre Nuclear Generating Station centers on Southern California Edison's plans to bury the waste one hundred feet from the ocean and just a few feet above the water table. There are obvious risks, foremost of which is rising sea levels. Additionally, the site has unfortunate vulnerabilities to a terrorist attack, given access from the sea and the exposed nature of the site. Furthermore, issues have been raised about the corrosive nature of the salt-infused sea air on the canisters and the lack of any facility for examining, repairing, and repackaging canisters that might get damaged, nor for minimizing radioactivity release.²

There is a more sensible alternative to this waste storage plan that CSLC can require of Edison. The irradiated fuel should be moved from the beach and placed in an atmospherically controlled building located higher up on Camp Pendleton, for example at a location called the Mesa currently leased from Pendleton by Edison.³ It is at a higher elevation, protected from sea level rise. Access is controlled, unlike the far more vulnerable position currently employed, and can be much easier protected from terrorist attack. The building would be able to shut down ventilation in case of

¹ Those offshore coolant systems are important for the operation of the spent fuel pools. Right now, those pools are the only facility available in case a canister with irradiated nuclear fuel is damaged and needs to be repackaged. Dismantling the cooling systems without having in place an alternative way of repackaging damaged canisters would not be responsible, and CSLC should think twice before approving it.

We note that this issue is summarily dismissed in the FEIR, based on speculative assertions that if such damage occurred, something would be figured out. But in the absence of a functioning spent fuel pool or, as we suggest below, a hot cell or its equivalent, there is no realistic way of doing such repackaging if needed.

² These are, of course, safety matters normally restricted to the Nuclear Regulatory Commission (NRC). However, the NRC has been long criticized for its regulatory posture with respect to the industry it oversees. Indeed, the troubles involving the defective replacement steam generators that resulted in San Onofre's permanent closure bear no repeating here. Thus, we submit that public concerns are understandable.

³ We understand that the United States Marine Corp. will need to be part of this process and they should be. The current San Onofre waste storage location is currently on land Edison leases from Camp Pendleton and we suggest only a minor move on land leased from the Camp. We are aware of the objection that the nuclear waste will not be departing for good to another site. But until there are permanent national repository options, something unlikely for decades in any scenario currently under consideration, that fuel realistically will be on Pendleton land. The only question is whether the waste stored in the interim will be more or less vulnerable to attack, and more or less vulnerable to sea level rise.

a radioactivity release and thus prevent that radioactivity from getting into the environment, which is not the case with the current outdoor waste storage near the beach. It could filter out the salt in the air to reduce the corrosion to the canisters. And, critically, it could have a hot cell or similar feature whereby a damaged canister could be inspected, repaired, or repackaged.

Conclusion

We respectfully suggest that the CSLC decline to unconditionally exercise its discretion regarding the requested changes to the lease of state lands and approval of changes to the cooling inlets and outfalls. Instead, CSLC should condition approval on Edison and its partners moving the radioactive waste to an atmospherically controlled storage building, higher up and away from the ocean and more capable of being protected, where failing canisters could be repackaged and radioactive releases, if they were to occur, kept from the environment. In the alternative, CSLC could at minimum pass a resolution calling on its sister agency, the California Coastal Commission, to reconsider the spent fuel storage issue and take steps to move the spent fuel to a building at the Mesa or similar nearby location away from the beach, and urge the California Senators and the Congressional delegation from that area to undertake steps to facilitate that change.

Sincerely,

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