

RAS 3986

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

In the Matter of)
DUKE ENERGY CORPORATION) Docket Nos. 50-369, 370, 413 AND 414
(McGuire Nuclear Station,)
Units 1 and 2, and)
Catawba Nuclear Station,)
Units 1 and 2))

NRC STAFF'S BRIEF
IN RESPONSE TO CLI-02-06

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NRC STAFF'S BRIEF IN RESPONSE TO CLI-02-06

INTRODUCTION

On February 6, 2002, the Commission issued a Memorandum and Order accepting the certification of issues from the Licensing Board relating to the risks from acts of terrorism.¹ Pursuant to the Commission's Memorandum and Order, the staff of the Nuclear Regulatory Commission (Staff) hereby files its brief addressing issues relevant to the question certified to the Commission regarding the risks from acts of terrorism.

BACKGROUND

This case arises from the June 13, 2001 application by Duke Energy Corporation (Duke) to renew the facility operating licenses for McGuire Nuclear Station, Units 1 and 2 (McGuire), and Catawba Nuclear Station, Units 1 and 2 (Catawba).² On January 24, 2002, after the filing of

¹*Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC __ (2002), slip op. at 2.

²Application to Renew the Operating Licenses of McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2, June 13, 2001 (ADAMS Accession Numbers ML011660301, ML011660145, ML011660167) (License Renewal Application or LRA).

pleadings addressing standing and admissibility of contentions³ and oral argument on December 18 and 19, 2001, the Atomic Safety and Licensing Board (Licensing Board) issued an order admitting two contentions, certifying the issue of terrorism to the Commission and granting the requests for hearing.⁴ The issue certified to the Commission, as restated by the Commission, was: “whether [Duke’s] license renewal application for the four captioned facilities ‘has . . . realistically or fully analyzed and evaluated all structures, systems and components required for the protection of the public health and safety from deliberate acts of radiological sabotage.’” CLI-02-06, 55 NRC ___, slip op. at 1-2 (2002), citing LBP-02-04, 55 NRC ___, slip op. at 69.⁵

On February 6, 2002, the Commission issued CLI-02-06, accepting the certified question for review and establishing a briefing schedule. Specifically, the Commission directed the parties to file briefs addressing all issues that they determine are relevant to the certified question and to address issues associated with an agency’s responsibility under NEPA regarding malevolent acts. CLI-02-06, slip op. at 2. As more fully discussed below, the Staff submits that: 1) under NEPA, the

³Nuclear Information Resource Services Request for Hearing and Petition to Intervene, (September 14, 2001); BREDL Petition for Intervention and Request for Hearing (September 14, 2001); Contentions of Nuclear Information and Resource Service (NIRS Contentions) (November 29, 2001); Blue Ridge Environmental Defense League Submittal of Contentions in the Matter of the Renewal of Licenses for Duke Energy Corporation McGuire Nuclear Stations 1 and 2 and Catawba Nuclear Stations 1 and 2 (BREDL Contentions) (November 29, 2001); NRC Staff’s Response to Contentions Filed by [NIRS] and [BREDL] (Staff Response) (December 13, 2001); Response of Duke Energy Corporation to Amended Petitions to Intervene Filed by [NIRS] and [BREDL] (Duke Response) (December 13, 2001).

⁴Memorandum and Order (Ruling on Standing and Contentions), LBP-02-04, 55 NRC __ (January 24, 2002).

⁵The contention at issue before the Licensing Board was submitted by NIRS and asserted that the license renewal application is incomplete in that it “has not realistically or fully analyzed and evaluated all structures, systems and components required for the protection of the public health and safety from deliberate acts of radiological sabotage.” LBP-02-04, 55 NRC at __, slip op. at 69. The contention went on to list various systems, structures and components that NIRS asserted were inadequately analyzed, stating that its “concerns regarding terrorism and security” were age-related. *Id.* at 69-70. NIRS then provided a list of issues which it contended must be considered in order for a security analysis to be adequate. *Id.* at 70-72. The contention, as written, largely raises a mixture safety issues and a few environmental concerns.

NRC is not required to consider such acts; 2) such acts are beyond the scope of 10 C.F.R. Part 54; 3) 10 C.F.R. § 50.13 precludes consideration of such acts under the Atomic Energy Act; and 4) NIRS' contention on terrorism is an impermissible attack on the Commission's regulations.

DISCUSSION

I. THE NRC IS NOT REQUIRED TO CONSIDER INTENTIONAL MALEVOLENT ACTS IN AN ENVIRONMENTAL EVALUATION UNDER NEPA

In this proceeding, as well as in certain other proceedings now pending before the Commission, the Commission requested that the parties submit legal briefs that address all issues relevant to the action before the Commission on review and, in particular, the following issue:

What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history or regulatory analysis.

See, e.g., Duke, CLI-02-06, slip op. at 2.

In response to the Commission's request, the Staff submits that:

(a) Where a federal agency prepares an environmental impact statement, NEPA requires that the agency consider those impacts that are reasonably foreseeable as a consequence of the agency's action (or alternatives thereto), subject to a rule of reason, in order to assure that the agency considers those impacts in making an informed decision; and

(b) intentional malevolent acts, such as those directed at the United States on September 11, 2001, do not constitute "reasonably foreseeable" impacts resulting from the agency's action in renewing the license of a nuclear facility -- notwithstanding the fact that those attacks occurred on September 11 -- and are not amenable to the type of "meaningful analysis" and evaluation that were contemplated by Congress under NEPA -- in that there is no quantitative, qualitative, or otherwise rational means by which an agency decision-maker can reasonably predict

that such attacks will be targeted against a facility, or that they will involve any particular mode of execution, magnitude, or consequences.

Accordingly, in the absence of any means to reasonably predict or evaluate the occurrence, magnitude, or consequences of such intentional, malevolent acts, NEPA does not require that such events be evaluated in an EIS or other environmental analysis.

A. The Statutory and Regulatory Framework: NEPA and 10 C.F.R. Part 51

The National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* (“NEPA”) establishes, in part, the following requirements:

The Congress authorizes and directs that, to the fullest extent possible: . . .

(2) all agencies of the Federal Government shall -
* * * *

(C) include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id., § 102(2)(C), 42 U.S.C. § 4332(2)(C). Thus, where an Environmental Impact Statement (“EIS”) is prepared, NEPA requires that it address, *inter alia*, “the environmental impact of the proposed action” as well as “alternatives” to that action. Further, Congress has directed that in implementing this statute, federal agencies are to “utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment.” *Id.*, § 4332(A).

The Commission has adopted regulations that implement the requirements of NEPA, as set forth in 10 C.F.R. Part 51, Subpart A (“[NEPA] - Regulations Implementing Section 102(2)”). Pursuant to 10 C.F.R. § 51.20, the Commission has identified the types of actions that require preparation of an EIS;⁶ included among those actions is the renewal of a Part 50 license to operate a nuclear power reactor pursuant to 10 C.F.R. Part 50. 10 C.F.R. § 51.20(b)(2). Where an EIS is prepared, the regulations require publication of both a Draft EIS (“DEIS”) and Final EIS (“FEIS”); and they describe the required contents of these two documents. See 10 C.F.R. §§ 51.70 - 51.71 (DEIS), and 51.90 - 51.91 (FEIS).⁷

B. Under NEPA, An Agency is Required to Provide a Detailed Evaluation of “Reasonably Foreseeable” Effects or Impacts, Subject to a Rule of Reason.

It is well established that an agency is required to take a "hard look" at the environmental impacts of its actions under NEPA. See, e.g., *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97 (1983); *Natural Resources Defense Council, Inc. v. Morton*, 458 F. 2d 827, 838 (D.C. Cir. 1972). Further, the Supreme Court has stated that one of the “twin aims” of NEPA (along with ensuring that federal agencies inform the public that they have considered environmental concerns in their decisionmaking processes), is to ensure that such agencies will “consider every significant aspect of the environmental impact of a proposed action.” *Baltimore Gas & Electric Co.*, 462 U.S. at 97, citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978).

While it is clear that an agency must consider the environmental impacts of its proposed actions, the type and scope of the environmental impacts that must be considered in an EIS is not

⁶This threshold determination is guided by NEPA, Council on Environmental Quality (CEQ) regulations, and the agency’s procedures or regulations. See, e.g., 10 C.F.R. §§ 51.20 - 51.23, and 51.25 (classification of NRC licensing and regulatory actions under NEPA).

⁷The regulations further describe the role and timing of the FEIS in the agency’s decision-making process. See, e.g., 10 C.F.R. §§ 51.100 - 51.104.

defined in NEPA or the Commission's regulations in 10 C.F.R. Part 51, except in the case of nuclear power plant license renewals, where the regulations specifically address the scope of the impacts to be considered. See, e.g., 10 C.F.R. §§ 51.53, 51.71, 51.95, and Part 51, Appendix B. Moreover, the courts have clearly held that an agency's responsibility to consider the environmental impacts of an action under NEPA is subject to a "rule of reason." See, e.g., *New York v. Kleppe*, 429 U.S. 1307, 1311 and n.1 (1976). Thus, the courts have recognized that while agencies are required by NEPA to evaluate the "reasonably foreseeable significant adverse impacts" of a proposed action, that evaluation is governed by the "rule of reason." See, e.g., *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 745 (3d Cir. 1989) ("consideration of impacts must be guided by a rule of reasonableness," citing *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972)).

Further, only impacts which are "reasonably foreseeable" to result from the agency's action must be evaluated; remote and speculative impacts need not be evaluated. See, e.g., *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission ("SIPI")*, 481 F.2d 1079, 1092 (D.C. Cir. 1973). In *SIPI*, the Court of Appeals held as follows:

Section 102(C)'s requirement that the agency describe the anticipated environmental effects of [a] proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting. . . . "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible * * *."

Accordingly, . . . if the Commission makes a good faith effort in the [environmental] survey to describe the reasonably foreseeable environmental impact of the program, alternatives to the program and their reasonably foreseeable environmental impact, . . . we see no reason why the survey will not fully satisfy the requirements of Section 102(C).

Id. at 1092; footnotes omitted.⁸ See also *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972) (NEPA requires consideration of the environmental impacts of reasonable alternatives, subject to a rule of reason; the discussion of reasonable alternatives does not require either "crystal ball" inquiry or consideration of the effects of alternatives that "cannot be readily ascertained" where "the alternatives are deemed only remote and speculative possibilities.").

Commission case law similarly has recognized that the agency's responsibility under NEPA is subject to a rule of reason, and that NEPA does not require an evaluation of impacts that are not reasonably foreseeable. See, e.g., *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 49-50 (1989), *rev'd and remanded on other grounds*, CLI-90-4, 31 NRC 333 (1990) (*citing Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989)). As one Licensing Board observed:

We must judge the adequacy of the Staff's treatment of the various impacts in the FEIS by the rule of reason. See, e.g., *Maine Yankee Atomic Power Co.* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1011-012 (1973). That standard is not one of perfection; rather, it is a question of reasonableness. As the Appeal Board long ago recognized, "absolute perfection in a FES [Final Environmental Statement] being unattainable, it is enough that there is 'a good faith effort . . . to describe the reasonably foreseeable environmental impact' of a proposed action." *Id.* at 1012 (citations omitted).

⁸The Court of Appeals in *SIFI* further concluded that NEPA requires full disclosure "of all environmental effects *likely* to stem from agency action." *Id.* at 1099 (emphasis added). Similarly, the D.C. Circuit Court elsewhere stated:

NEPA does not require federal agencies to examine every possible environmental consequence. Detailed analysis is required only where impacts are *likely* . . . So long as the environmental impact statement identifies areas of uncertainty the agency has fulfilled its mission under NEPA.

Izaak Walton League of America v. Marsh, 655 F.2d 346, 377 (D.C. Cir. 1981) (emphasis added).

Louisiana Energy Services, L.P. (Claiborne Enrichment Center), LBP-97-8, 45 NRC 367, 399 (1997), *aff'd in part and rev'd in part on other grounds*, CLI-98-3, 47 NRC 77 (1998). Similarly, it has been held that "NEPA's requirement that environmental effects of a proposed agency action be described is subject to a rule of reason. An agency need not foresee the unforeseeable." *Louisiana Power and Light Co.* (Waterford Steam Electric Station), LBP-82-100, 16 NRC 1550, 1571 (1982), *aff'd*, ALAB-732, 17 NRC 1076 (1983) (*citing SIPI*, 481 F.2d at 1092).

This limitation on the scope of an agency's responsibilities under NEPA, whereby only "reasonably foreseeable" impacts of an action need to be evaluated in an EIS, based on scientific evaluation, is manifested as well in the regulations promulgated by CEQ.⁹ The CEQ regulations provide that where an EIS is prepared, it must include a "scientific and analytic" comparison of the environmental impacts of the proposed action and alternatives considered, including both direct and indirect effects. 40 C.F.R. § 1502.16(a)-(b).¹⁰ Further, where an agency evaluates "reasonably foreseeable significant adverse effects on the human environment" in an EIS, and there is "incomplete or unavailable information," the evaluation is to be "based upon theoretical approaches or research methods generally accepted in the scientific community, . . . provided that the analysis

⁹The Commission has stated that because it is an independent regulatory agency, it does not consider substantive CEQ regulations as legally binding on the NRC. *See, e.g.*, Statement of Consideration, "Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments," 49 Fed. Reg. 9352, 9356 (1984). *See also Limerick Ecology Action v. NRC*, 869 F.2d 719, 743 (3d. Cir. 1989) (CEQ regulations are not binding on an agency unless they have been expressly adopted). Nonetheless, while the Commission is not bound by CEQ regulations which it has not expressly adopted, the Commission has indicated that those regulations are entitled to "substantial deference." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 72 n.2 (1991).

¹⁰"Direct" effects or impacts are defined as those "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). "Indirect" effects or impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." 40 C.F.R. § 1508.08(b) (emphasis added).

of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason. . . .” 40 C.F.R. § 1502.22(b)(4) (emphasis added).¹¹

C. Intentional, Malevolent Acts, Such as the September 11 Attacks, Do Not Constitute “Reasonably Foreseeable” Impacts Resulting From the Renewal of a License for A Nuclear Facility and Are Not Amenable to “Meaningful Analysis” under NEPA.

As discussed above, the Commission is required to consider in an EIS only “reasonably foreseeable” consequences of the proposed action and alternatives thereto, subject to a rule of reason. In the following discussion, the Staff provides its view that intentional, malevolent acts, such as the attacks of September 11, do not constitute the “reasonably foreseeable” impacts of

¹¹In a 1986 amendment to its NEPA regulations (requiring, *inter alia*, a detailed analysis of “reasonably foreseeable” adverse impacts and eliminating the need to perform a worst case analysis), the CEQ explained the “rule of reason” as follows:

The regulation also requires that analysis of impacts in the face of unavailable information be grounded in the “rule of reason”. The “rule of reason” is basically a judicial device to ensure that common sense and reason are not lost in the rubric of regulation. The rule of reason has been cited in numerous NEPA cases for the proposition that, “An EIS need not discuss remote and highly speculative consequences. . . . This is consistent with the (CEQ) Council on Environmental Quality Guidelines and the frequently expressed view that adequacy of the content of the EIS should be determined through use of a rule of reason.” *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). In the seminal case which applied the rule of reason to the problem of unavailable information, the court stated that, “[NEPA’s] requirement that the agency describe the anticipated environmental effects of a proposed action is subject to a rule of reason. The agency need not foresee the unforeseeable, but by the same token, neither can it avoid drafting an impact statement simply because describing the environmental effects of alternatives to particular agency action involves some degree of forecasting” The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible” *Scientists’ Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1092 (D.C. Cir. 1973), citing *Calvert Cliffs’ Coordinating Committee v. Atomic Energy Commission*, 499 F. 2d 1109, 1114 (D.C. Cir. 1971).

Final Rule, “National Environmental Policy Act Regulations; Incomplete or Unavailable Information,” 51 Fed. Reg. 15,618, 15,621 (April 25, 1986).

license renewal and therefore need not be evaluated in an EIS. Further, there does not appear to be any credible scientific information or analysis that would support a determination that such an attack or any particular consequence thereof is a “reasonably foreseeable” consequence of the agency’s action.

First, the CEQ has stated (upon amending its regulations in 40 C.F.R. § 1502.22 to require consideration of reasonably foreseeable impacts in lieu of the “worst case” analysis which the regulation had previously required),¹² the term “reasonably foreseeable” includes “low probability/severe consequence impacts, provided that the analysis of such impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” 51 Fed. Reg. at 15,622. The CEQ further explained that an agency’s “evaluation must be carefully conducted, based upon credible scientific evidence, and must consider those reasonably foreseeable significant adverse impacts which are based upon scientific evidence.” *Id.* at 15,621. Further, the CEQ indicated that the requirement that the impact analysis be based on “credible scientific evidence” is a specific component of the “rule of reason.” *Id.* at 15,624.¹³

¹²Prior to the 1986 amendments, the CEQ regulation had provided that if certain information relevant to an agency’s evaluation of a proposed action is either unavailable or too costly to obtain, the agency must include in its EIS a “worst case analysis and an indication of the probability or improbability of its occurrence.” 40 C.F.R. § 1502.22 (1985). The Commission has indicated that it did not consider itself to be bound by this former “substantive” requirement that a worst case analysis be performed. *See Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681, 700 (1985) (*citing* Statement of Consideration, “Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments,” 49 Fed. Reg. 9352, 9356-58 (1984)), *review declined*, CLI-86-5, 23 NRC 125 (1986), *aff’d sub nom Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989).

¹³In abolishing the requirement that a worst case analysis be prepared, the CEQ explained that it “does not maintain that a worst case analysis is impossible to prepare”; rather, the CEQ explained that it “view[s] the worst case analysis requirement as a flawed technique to analyze impacts in the face of incomplete or unavailable information. The new requirement will provide more accurate and relevant information about reasonably foreseeable significant adverse impacts.” 51 Fed. Reg. at 15,624. Further, the CEQ noted that NEPA requires federal agencies to make a “good faith effort . . . to describe the reasonably foreseeable environmental impact(s)” of the proposal and alternatives thereto -- even “in the face of incomplete or unavailable information, consistent with the ‘rule of reason.’” *Id.* at 15,625, *citing SIPI*, 481 F.2d at 1092.

The CEQ's adoption of this standard was explicitly approved by the Supreme Court in *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989). As the Court observed, the amended regulation does not necessarily exclude an agency's duty to consider remote but potentially severe impacts, but it "grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" *Id.* at 354-55. The Court's decision further establishes that the threshold determination as to whether an impact is "reasonably foreseeable" under NEPA must be supported by "credible scientific evidence" if it is to be "meaningfully" evaluated in an EIS. *Id.*¹⁴

This focus on the need for credible scientific evidence or analysis to support a determination that an impact is reasonably foreseeable supports the view that intentional malevolent acts such as the attacks of September 11 need not be evaluated in an EIS.¹⁵ Based on currently available information and analytical techniques, the probability that such an act may be directed against a nuclear facility or other structure cannot reasonably be determined through scientific analysis, and is not amenable to meaningful prediction or forecasting. Rather, such events may at best be described as random and unpredictable, in that they result not from the licensing or construction of a particular facility but, instead, from the independent decision by another person or entity to

¹⁴The Court further found that the CEQ's determination to eliminate the need for a "worst case" analysis was not inconsistent with prior NEPA case law and was a permissible interpretation of NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 354-55. See also Note, *Federal Agency Treatment of Uncertainty in Environmental Impact Statements Under the CEQ's Amended NEPA Regulation § 1502.22: Worst Case Analysis or Risk Threshold?*, 86 Mich. L. Rev. 777, 798 (1988). Thus, subsequent to *Methow Valley*, federal agencies that are bound by the CEQ regulations are not required to conduct a worst case analysis.

¹⁵As the Supreme Court has explained, the CEQ's decision to eliminate the need for federal agencies to conduct a worst case analysis under 40 C.F.R. § 1502.22 was based upon a determination that, by requiring an EIS "to focus on reasonably foreseeable impacts," the amended rule "will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision . . . rather than distorting the decisionmaking process by overemphasizing highly speculative harms." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 356 (citations omitted).

perform that malevolent act. Further, there is no existing data base to which a decision-maker may turn, to estimate either (a) the probability that such an attack will occur, (b) that the attack would be directed against a particular facility, (c) the nature and magnitude of the attack, and (d) the "success" or consequences of the attack. Rather, any attempt to predict the occurrence or consequences of such an event at a particular nuclear facility would cause the agency to stray "beyond reasonable forecasting" into "the realm of pure speculation." See *North Dakota v. Andrus*, 483 F.Supp. 255, 260 (D. N.Dak. 1980).

This conclusion is further supported by the Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) ("PANE"). There, in determining that an EIS need not consider potential psychological health effects that might occur as a result of an agency's action (allowing restart of the Three Mile Island Unit 1 nuclear plant), the Court found, *inter alia*, that the "reasonable foreseeability" determination requires consideration of "the closeness of the relationship between the change in the environment and the 'effect' at issue." *Id.* at 772. Further, the Court observed that NEPA requires consideration of the element of "causation" and whether the impact is "proximately related" to the agency's action -- and, although "some effects may result from the agency's action "in the sense of 'but for' causation, [they] will nonetheless not fall within § 102 because the causal chain is too attenuated." *Id.* at 773-74. The Court further stated:

Our understanding of the congressional concerns that led to the enactment of NEPA suggests that the terms "environmental effect" and "environmental impact" in § 102 be read to include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law. See generally W. Prosser, *Law of Torts*, ch. 7 (4th ed. 1971).ⁿ⁷ The issue before us, then, is how to give content to this requirement. This is a question of first impression in this Court.

ⁿ⁷ In drawing this analogy, we do not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would

also be too attenuated to merit notice in an EIS; nor do we mean to suggest the converse. In the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to *draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.*

Id. at 774 (emphasis added). Further, the Court held as follows:

PANE argues that the psychological health damage it alleges "will flow directly from the risk of [a nuclear] accident." In a causal chain from renewed operation of TMI-1 to psychological health damage, the element of risk and its perception by PANE's members are necessary middle links. We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Id. at 775; footnote omitted.

Thus, under the Court's reasoning in *PANE*, it is clear that a potential effect must be "proximately related" to the agency's action. Further, at some point, the causal link between an agency's proposed action and the alleged effect of that action becomes too attenuated to permit reasonable or meaningful analysis, *i.e.*, the effects or impacts become too remote and speculative to permit reasonable evaluation.

The conclusion that NEPA does not require consideration of intentional malevolent acts is supported by the decision in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989). There, the court found, *inter alia*, that the Commission had not acted in an arbitrary and capricious manner in determining not to evaluate the risk of sabotage in an EIS, based on its conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods and that there is no current basis by which to measure such risk." *Id.* at 743. The court found that the Commission had taken the requisite "hard look" at the environmental consequences of its proposed action (issuance of a full power license) by basing its conclusion on "its contemporary evaluation of risk assessment techniques." *Id.* Further, the court found that the intervenor had not advanced any method or theory by which the Commission could have "entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks." *Id.* at 744.

Additional support for this conclusion appears in the Appeal Board's decision in *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 701 (1985), *review declined*, CLI-86-5, 23 NRC 125 (1986), which was affirmed in *Limerick Ecology Action*. There, the Appeal Board observed that the Staff's environmental evaluation did not consider the effects of sabotage, on the grounds that "such an analysis is considered to be beyond the state of the art of probabilistic risk assessment." See ALAB-819, 22 NRC at 697.¹⁶ The Appeal Board found that this was acceptable, affirming the Licensing Board's rejection of a contention which had challenged this omission as contrary to NEPA:

[T]he unknown information in [*Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983)] could reasonably be estimated from long-known, fundamental physical principles (tides and currents). We are aware of no similar principles (and LEA identifies none) *that would permit reasonable prediction of -- like the next high tide -- the kind of stochastic human behavior displayed in an act of sabotage.*

In sum, the risk of sabotage is simply not yet amenable to a degree of quantification that could be meaningfully used in the decisionmaking process. . . .

Id. at 701 (emphasis added).¹⁷ *Accord*, *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 269 (1987); *Private Fuel Storage, L.L.C.* (Independent

¹⁶It should be noted that in *Limerick*, the issue of sabotage was considered within the context of severe accidents, *i.e.*, as an initiator of an event of low probability but potentially catastrophic consequences. The Appeal Board observed that the Staff's FEIS had considered a range of design-basis and severe accident scenarios, that the intervenor had not explained "what separate consideration of sabotage as an initiator of a severe accident would add, from a qualitative standpoint," and that such consideration would "add nothing of real quantitative significance." ALAB-819, 22 NRC at 698-99. In addition, the Appeal Board found that "although the risk of sabotage cannot be quantified in a way that would permit its litigation per se, the Commission's regulations nonetheless require each plant to have a detailed security plan to protect against internal and external sabotage." *Id.* at 699. These determinations were noted by the court in *Limerick Ecology Action*, 869 F.2d at 742.

¹⁷As the court in *Limerick Ecology Action* explained, it did not hold that "the mere assertion of unquantifiability immunizes the NRC from consideration of the issue [sabotage] under NEPA"; rather, the court held that the intervenor had "failed to carry its burden to rebut the NRC's claim that it [could not] *meaningfully consider* the issue." *Id.*, 869 F.2d at 744 n.31 (emphasis added).

Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998); *PFS*, LBP-98-7, 47 NRC 142, 179, 186, 199, 201 (1998).

Other courts have similarly recognized that the risk of an event must be amenable to meaningful (albeit not necessarily quantitative) analysis if it is to be included in an EIS. For example, the Second Circuit Court of Appeals recognized the importance of risk considerations based on scientific data under statutes such as NEPA, in which the courts are “obliged to review agency consideration of sophisticated data concerning the potential gravity of adverse consequences and the probability of their occurrence.” *City of New York v. U.S. Dept. of Transportation*, 715 F.2d 732, 736 (2d Cir. 1983). There, the court declined to invalidate a rule published by the Department of Transportation designed to reduce the risk of highway transportation of radioactive materials, where the agency had determined that its rulemaking action would not “significantly affect” the environment and that it therefore need not prepare an EIS. *Id.*, 715 F.2d at 745-49. With respect to the risk of sabotage, the court reversed the District Court’s finding that “[DOT] was obliged to state its view on the probability of such an event, even if that view was only that no estimate could reasonably be made.” *Id.* at 750. The court further stated as follows:

With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess. . . . Here, DOT simply concluded that the risks of sabotage were too far afield for consideration. To a large degree, this judgment was justified by the record. Substantial evidence indicated that sabotage added nothing to the risk of high- consequence accidents. Even the least sanguine commentators could say only that sabotage added an unascertainable risk. In light of these conflicting points of view, it was within DOT’s discretion not to discuss the matter further beyond adopting the NRC security requirements.

Id. But see *id.* at 757 (Oakes, J., dissenting).

In sum, to fall within the proper scope of an agency’s environmental evaluation under NEPA, intentional malevolent acts such as the September 11 attacks must be determined to

constitute “reasonably foreseeable” effects of the proposed licensing action. However, in the absence of any “credible scientific evidence” to support that determination, an evaluation of the probability or consequences of such an attack can only be based on “pure conjecture” and is therefore outside the “rule of reason.” That these random acts occurred on September 11th does not make them now susceptible of meaningful evaluation or provide a reasonable basis to predict that such acts are likely or foreseeable in the future at any particular facility.

While, in theory, the Commission could attempt to develop a “worst case” estimate of the consequences of an intentional malevolent act like the September 11 attacks if it is assumed those acts are directed against a particular facility, any such evaluation would not contribute meaningfully to a determination as to whether those acts constitute “reasonably foreseeable” effects of the agency’s licensing action under NEPA.¹⁸ Rather, one can only speculate that such intentional malevolent acts might be directed against a particular structure or facility; moreover, no rational means appear to exist whereby a decision-maker could reasonably predict or foresee that such an attack will be targeted against that facility, nor could there be any meaningful prediction of the

¹⁸Significantly, the intervenors in this proceeding have not demonstrated that such data exist with respect to the types of attacks directed against the United States on September 11, 2001, nor have they advanced any “method or theory” which would allow the Commission to conduct a “meaningful analysis of the risk” posed by such attacks.

likelihood that any particular consequences would ensue from those events.¹⁹ Any such prediction would necessarily be based upon mere speculation and conjecture, in contrast to the reasoned consideration and scientifically-informed analysis that is contemplated by NEPA.²⁰ Further, because the precise nature, magnitude, timing, target, and actual consequences of such acts cannot be foreseen based on any "credible scientific evidence," any meaningful environmental evaluation of such acts under NEPA is precluded. Rather, the agency would be able to do no more

¹⁹In deciding that NEPA does not require preparation of an EIS based on the possibility that a "worst case" event could occur, the majority in *City of New York v. U.S. Dept. of Transportation* reasoned as follows:

Our dissenting colleague appears to take the view that the very existence of the "worst case" possibility would be sufficient to require preparation of an EIS, regardless of the infinitesimal probability that the "worst case" accident will happen. *We do not doubt the general proposition that "worst cases" do occur. Planes crash, and the Titanic sank.* What we reject is an automatic rule requiring preparation of an EIS for every action that has any possibility, however remote, of causing serious accidental injury. Such a rule would routinely require an EIS for federal actions, since it is hard to imagine any agency action involving people or equipment that is not subject to some estimatable risk of causing serious accidental injury.

Id., 715 F.2d at 752 n.20 (emphasis added). This same reasoning supports a conclusion here that, even where an agency decides to prepare an EIS, worst case events need not be considered if there is no reasonable basis upon which an agency can fairly estimate the probability that the event may occur, despite the recognition that it "could" occur. *But see Natural Resources Defense Council v. NRC*, 685 F.2d 459, (D.C. Cir. 1982).

²⁰*See also* Statement of Consideration, "Changes to Requirements for Environmental Review for Renewal of Power Plant Operating Licenses," 64 Fed. Reg. 48,496, 49,505 (1999) (stating, in part, that "the NRC has not quantified the likelihood of the occurrence of sabotage in this analysis because the likelihood of an individual attack cannot be determined with any degree of certainty."). Similarly, DOE has concluded that the probability of occurrence of intentional acts of sabotage or terrorism is not amenable to quantification or estimation. *See, e.g., Hirt v. Richardson*, 127 F. Supp. 2d 833, 839-40 (W.D. Mich. 1999); *Contra Costa County v. Pena*, 1998 U.S. Dist. LEXIS 3711 (N.D. Cal. 1998) ("it is impossible to determine with certainty the probability of a deliberate act of sabotage or terrorist attack"). *Cf. City of New York, supra*, 715 F.2d at 750 (citing a Sandia report which stated that "sabotage involves human motivations and the probability of human actions which are unquantifiable with our present knowledge").

than provide something akin to a worst case analysis -- which is not required by the courts, CEQ, or the Commission's regulations.²¹

Finally, the risk that an intentional malevolent act of any particular type or magnitude may be directed at any particular facility and may result in any particular consequence, is not proximately related to the agency's decision to renew the license of the facility, inasmuch as the necessary causal link is broken by the intervention of the person or entity which independently decides to carry out the intentional malevolent act. Because the risk that such an act would occur is dependent upon some individual's malevolent determination to perform that act -- wholly independent of the Commission's consideration as to whether to grant a license for a particular facility -- that person's independent conduct and involvement in the chain of causation would appear to constitute a "necessary middle link" that "lengthens the causal chain beyond the reach of NEPA." *PANE, supra*, 460 U.S. at 775. Intentional malevolent acts such as the attacks of September 11, 2001, like the risk of sabotage considered in *Limerick Ecology Action*, involve the

²¹The difficulty in relying upon a worst case analysis to support a finding that an impact is reasonably foreseeable under NEPA, has been described by one commentator as follows:

Even assuming it is possible to identify the worst potential consequence of a proposed federal action, this consequence may or may not be within the range of reasonably foreseeable effects. For instance, the worst potential consequence of a proposed action may be based on a lengthy series of purely conjectural assumptions. In such a case, the worst potential consequence of the proposed action is possible, yet it is so hypothetical as to be outside of the range of reasonably foreseeable effects.

O'Meara Masterman, Vicki, *Worst Case Analysis: The Final Chapter?*, 19 Env'tl. L. Rep. 10026 (1989).

element of “stochastic human behavior” -- which was found by Court of Appeals in that case to preclude any “meaningful” or “scientifically credible” analysis of the risk of sabotage.²²

For these reasons, as more fully set forth above, the Staff submits that the Commission is not required to consider intentional malevolent acts such as the attacks of September 11, 2001, in its environmental evaluations under NEPA. While the Commission could, in theory, consider intentional malevolent acts like the attacks of September 11 in a manner similar to a worst case analysis -- whereby the consequences of such an attack are described, without any estimate of the probability that the event or its consequences would occur -- the Staff believes that such an evaluation would not constitute a meaningful evaluation that could contribute to the agency's consideration of a proposed action. Rather, the Staff believes that the approach followed by the CEQ, which now eschews the performance of a worst case analysis, is appropriate.²³

II. CONSIDERATION OF ACTS OF TERRORISM IS BEYOND THE SCOPE OF 10 C.F.R. PART 54.

The issues related to license renewal that are within the scope of 10 C.F.R. Part 54 are unrelated to the terrorism issue. Part 54 and the Commission's Order referring this matter to the ASLBP²⁴ limit the scope of this proceeding to: “a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging

²²Probability considerations are inherently an important component in assessing whether an impact is reasonably foreseeable. See, e.g., *City of New York v. Dep't of Transportation*, 715 F.2d 732, 746 n.14 (2d Cir. 1983) (an agency must estimate “both the consequences that might occur and the probability of their occurrence The fact that effects are only a possibility does not insulate the proposed action from consideration under NEPA, but it does accord an agency some latitude in determining whether the risk is sufficient to require preparation of an EIS”).

²³See, e.g., 40 C.F.R. § 1502.22; *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 344-45; *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d at 744.

²⁴Order Referring Petitions for Interventions and Requests for Hearing to the Atomic Safety and Licensing Board Panel, CLI-01-20, 54 NRC ___, (2001) slip op. at 2-3.

analyses . . . [and] . . . review of environmental issues . . . limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c).” CLI-01-20, 54 NRC at ___ (sl.op. at 2). Thus, consideration of the matters raised by the certified issue are outside the scope of the renewal process and NIRS’ contention is an attack on the Commission’s regulations.

The Commission has specifically excluded consideration of security matters in the statement of considerations accompanying the final revision of Part 54.

In developing the previous license renewal rule, the Commission concluded that issues material to the renewal of a nuclear power plant operating license are to be confined to those issues that the Commission determines are uniquely relevant to protecting the public health and safety and preserving common defense and security during the period of extended operation. Other issues would, by definition, have a relevance to the safety and security of the public during current plant operation.

“Nuclear Power Plant License Renewal; Revisions,” Final Rule, 54 F.R. 6136, 6139 (1995).

When the design bases of systems, structures, and components can be confirmed either indirectly by inspection or directly by verification of functionality through test or operation, a reasonable conclusion can be drawn that the [current licensing basis] is or will be maintained. This conclusion recognizes that the portion of the CLB that can be impacted by the detrimental effects of aging is limited to the design-bases aspects of the CLB. All other aspects of the CLB, e.g., quality assurance, physical protection (security), and radiation protection requirements, are not subject to physical aging processes that may cause noncompliance with those aspects of the CLB.

Id. at 6155. Therefore, consideration of such measures is beyond the scope of the license renewal proceeding. The arguments raised below by NIRS were without support or basis. There is nothing about the issues raised in the contention (see NIRS Contentions at 5) that relates to aging or aging management and the Commission has specifically excluded consideration of such issues in license

renewal proceedings.²⁵ Therefore, the contention is inadmissible on the ground that it is beyond the scope of license renewal.

III. CONSIDERATION OF ACTS OF TERRORISM IS SPECIFICALLY PRECLUDED BY 10 C.F.R. § 50.13.

While the Commission has begun consideration of its regulations and requirements in light of the September 11 events, a fact recognized by the Licensing Board in its decision,²⁶ the existing regulations continue to govern the consideration of license renewal applications. Sabotage or

²⁵The issue of terrorism, as it pertains to license renewal, is also beyond the scope of Part 51. Appendix B to Part 51 identifies the issues that should be addressed in a license renewal site-specific EIS. In Table B-1, the Commission codified the findings from its "Generic Environmental Impact Statement for License Renewal of Nuclear Plants" (GEIS), NUREG-1437 (May 1996). In the GEIS, the Commission generically looked at several issues it termed as "Category 1" issues that were considered to be impacts common to all nuclear power plants. However, there were some issues that the Commission determined would require a site specific evaluation and termed those as "Category 2" issues. The Commission never identified terrorism as an issue that should be considered within the scope of a site-specific EIS prepared to support a license renewal decision. In fact, as the Board observed below, if NIRS wished to raise issues related to terrorism within the context of a site-specific EIS for license renewal, it would need to request a waiver of the Commission's rules. See Memorandum and Order (Ruling on Standing and Contentions), LBP-02-04, 55 NRC __, at 75. Since NIRS has not made such a request, 10 C.F.R. §2.758 would preclude it from attacking the findings codified in Appendix B. See Section IV, *infra*.

²⁶LBP-02-04, slip op. at 74 ("We also recognize that these issues [related to terrorism and the events of September 11] carry special concerns as they relate specifically to nuclear plants, which has indeed, . . . led the Commission to undertake a 'top-to-bottom' analysis and reevaluation of all aspects of NRC safeguards and physical security requirements."). In fact, the Commission has issued orders to all operating nuclear power plants, setting forth interim measures with respect to the physical protection of facilities licensed under 10 C.F.R. Part 50. See Press Release No. 02-025, "NRC Orders Nuclear Power Plants to Enhance Security" (Feb. 26, 2002).

The nature of the Commission's actions of February 26, 2002, pertaining to physical protection at operating nuclear power plants, does not affect the conclusion that sabotage and terrorism are precluded from consideration pursuant to 10 C.F.R. § 50.13. Nor does it affect the conclusion that they are not required to be evaluated in an EIS under NEPA -- in that the underlying rationale for that conclusion has not changed. Rather, just as an evaluation of such acts is not required under NEPA as a result of the Commission's previous adoption of regulatory requirements governing physical protection, a NEPA review is not required as a result of the Commission's recent adoption of these interim physical protection measures.

terrorism is excluded from consideration. The Commission's regulations at 10 C.F.R. § 50.13 provide that:

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.

Thus, attacks and destructive acts by enemies of the United States, such as the acts postulated in the contention before the Licensing Board, need not be designed against and contentions alleging that they do are inadmissible in Commission proceedings regarding the renewal of power reactor operating licences.

The Commission recently reaffirmed the basis for 10 C.F.R. § 50.13:

Historically the NRC has drawn a distinction between requiring its licensees to defend their facilities against sabotage and requiring them to protect against attacks and destructive acts by enemies of the United States. Even NRC-licensed facilities that are required to meet the most stringent security requirements (because the potential consequences of sabotage are greatest) are not required to protect against enemies of the United States. For example, reactor licensees are required to protect against a prescriptive list of possible threats, referred to collectively as the "design basis threat." However, our regulations stipulate that power reactors are not required to be designed or to provide other measures to counteract destructive acts by "enemies of the United States." The basis for this distinction is that the national defense establishment and various agencies having internal security functions have the responsibility to address this contingency, and that requiring reactor design features to protect against the full range of the modern arsenal of weapons is simply not practical.

Private Fuel Storage L.L.C. (Independent Spent Fuel Storage Installation), CLI-01-26, 54 NRC ___, slip op. at 3-4 (2001). The events of September 11, 2001, are precisely the kind of threats excluded from consideration by 10 C.F.R. § 50.13. As stated in *PFS*, the rationale for 50.13—that the national defense establishment is charged with the responsibility to defend against "attacks and

destructive acts by enemies of the United States”—remains valid today, even after the events of September 11. See *id.* at 12-13.

In addition, Licensees are required to establish and maintain a physical security plan. 10 C.F.R. § 50.33(c); 10 C.F.R. Part 73. Licensees must establish an onsite physical protection system that is “designed against the design basis threat of radiological sabotage as stated in [10 C.F.R.] §73.1(a).” See 10 C.F.R. § 73.55. The specific requirements for the physical protection plan and the threats required to be designed against are contained in 10 C.F.R. §§73.1 and 73.55. Finally, 10 C.F.R. Part 73, Appendix C provides specific requirements for a licensee’s safeguards contingency plan, including a set of pre-determined decisions and actions for responding to threats, thefts and sabotage. Under the existing regulations in Parts 50 and 73, a licensee is not required to address the potential for terrorist attacks like the September 11 events.²⁷

²⁷To the extent that the certified question raises NEPA issues, the Staff submits that the preclusive effect of 10 C.F.R. § 50.13 extends to contentions based on NEPA. In *Long Island Lighting Co.*, (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), the Appeal Board cited the Federal court’s opinion in *Siegel v. AEC*, 400 F.2d 778 (1968), and the court’s finding upholding 10 C.F.R. § 50.13 and the Commission’s rationale for the regulation in holding that the preclusive effect of § 50.13 extends to contentions based on NEPA. *Shoreham*, ALAB-156, 6 AEC at 851. The Appeal Board restated the rationale:

(1) the impracticality, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it, (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens, and (3) the unavailability, through security classification and otherwise, of relevant information and the undesirability of ventilating what is available in public proceedings.

Shoreham, ALAB-156, 9 AEC at 851, *citing Siegel*, 400 F. 2d at 782. The Appeal Board then held:

Taking into account the “rule of reason” which we believe must govern the interpretation of NEPA, we find the rationale for 10 C.F.R. § 50.13 to be as applicable to the Commission’s NEPA responsibilities as it is to its health and safety responsibilities. We so construe that regulation.

(continued...)

The issue being raised is not one that is required to be considered in a license renewal review. It is not an aging issue and has no substantive relationship to renewal of these licenses.

Therefore, the contention is precluded under 10 C.F.R. § 50.13 and, therefore, is inadmissible.

IV. NIRS' CONTENTION ON TERRORISM, AS CERTIFIED TO THE COMMISSION, CONSTITUTES AN IMPERMISSIBLE ATTACK ON THE COMMISSION'S ENVIRONMENTAL REGULATIONS

In its order of February 6, the Commission accepted certification of NIRS' contention related to terrorist events. See CLI-02-06, at 1-2. As stated by the licensing board below, "NIRS [failed] to show any age-related issues" in their terrorism contention. LBP-02-04, 55 NRC at __, slip op. at 75 (agreeing with arguments presented by the Staff and Duke). Thus, the proffered contention failed to raise any issues related to the health and safety aspects of the proceeding. Therefore, in order to be admissible, the proffered contention had to raise an environmental issue within the scope of the proceeding. NIRS' contention failed to raise such an issue.

The Board, while addressing the environmental issue raised by NIRS in its terrorism contention, found what it termed as an "open door" in the contention's reliance on 10 C.F.R. § 51.53(c)(3)(iv) with regard to "new information." *Id.* at 76. The Board, however, correctly stated

²⁷(...continued)

Id. Although it took the "rule of reason" into account, the Appeal Board's holding does not rest on that rule, but instead upon the Commission's rationale for 10 C.F.R. § 50.13. The holding in *Shoreham* was relied upon by the licensing board in *PFS* in denying the admission of a contention seeking to litigate safety and environmental concerns relating to the terrorist attacks of September 11. See *Private Fuel Storage L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __, slip op. at 11-13 (2001). But see *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __, slip op. at 51-55 (2001). Moreover, as noted above, the rationale for 10 C.F.R. § 50.13 was reaffirmed, in pertinent part, in the Commission's decision in *PFS*. *PFS, supra*, CLI-01-26, 54 NRC __, slip op. at 3-4.

Thus, the rationale for 10 C.F.R. § 50.13 has previously been found to be applicable in considering the admissibility of NEPA contentions such as those proposed by NIRS in this proceeding. See *Shoreham*, ALAB-156; *PFS*, LBP-01-37. Therefore, the Staff submits that the Commission should follow prior precedent and rule that, because 10 C.F.R. § 50.13 is applicable to the Commission's NEPA responsibilities, September 11-type attacks do not need to be considered in a site-specific EIS for license renewal.

that in order to raise “new information” regarding plant-specific environmental concerns, NIRS would have to request a rule waiver under section 2.758. *Id.* at 75, 23 (citing *Turkey Point*, CLI-01-17, 54 NRC at 12).²⁸ The Board went on to conclude, *inter alia*, that “in order for us to admit any part of [the contention], NIRS’ contention and bases must demonstrate that any such concerns are so unusual that they might be said to raise implicitly (since NIRS has not raised explicitly) ‘special circumstances with respect to the subject matter of [this] particular proceeding such that the application of [section 50.13, as well as relevant security and license renewal rules] . . . would not serve the purpose for which [they were] adopted,’ as required under 10 C.F.R. § 2.758(b).” *Id.* at 76. Yet, the Board makes no findings regarding the existence of “special circumstances.” Moreover, the Licensing Board provides no support for its conclusion that the requirements of 10 C.F.R. § 2.758 may be waived if a licensing board can glean implicit special circumstances from “unusual” concerns raised in pleadings.²⁹ *Id.* at 76. The Licensing Board appears inclined to recommend waiver even if the proponent of the concerns does not raise the waiver issue or claim special circumstances.

The Licensing Board couches the issue as (1) whether the new information regarding plant specific environmental concerns meets the criteria of 10 C.F.R. § 2.714(b)(2), which they answer in the affirmative and (2) whether the new information would constitute special circumstances requiring a rule waiver. LBP-02-04, slip op. at 76-77. The Board did not resolve the second point.

²⁸The Board goes on to impose other requirements on such a waiver request. See LBP-02-04, 55 NRC at __, slip op. at 75 (stating that any such request would also have to address “any substantive rules relating to security and license renewal issues” and 10 C.F.R. §50.13).

²⁹The Licensing Board suggests that the Commission implied in *Turkey Point* that a rule waiver may be based upon “implicitly raised” special circumstances, such as discussed by the Board. *Id.* at 77, citing, *Florida Power & Light Co.* (Turkey Point Nuclear Plant, Units 3 & 4), CLI-01-17, 54 NRC 1, 12 (2001). But the Commission did not address the procedural requirements of 10 C.F.R. § 2.758. It merely stated that “petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek waiver of the rule.” *Turkey Point* at 12.

Nor did the Board decide whether any “unusual” special circumstances were raised by NIRS, but did speculate about what might be litigated in the event that both questions were answered in the affirmative.³⁰ *Id.* at 77.

The Licensing Board found that “[w]hether such ‘special circumstances’ [i.e., the issues that may emanate from a hearing on the MOX issue] are ‘such that the application of the [rules in question] would not serve the purposes for which [they] were adopted,’ however, is more of a ‘novel . . . policy question []’ of the sort the Commission has directed us to refer or certify to it on an interlocutory basis.” *Id.* at 77, citing *Commission Referral Order*, CLI-01-20, 54 NRC __ (Slip op. at 2).

The substantive requirements of section 2.758 are clear. The sole ground for a waiver is ‘special circumstances with regard to the subject matter of the particular proceeding . . . such that the application of the rule or regulation . . . would not serve the purposes for which the rule or regulation was adopted.’ The Commission has defined “special circumstances” as “one or more facts, not common to a large class of applicants or facilities, that were not considered either explicitly or by necessary implication in the rulemaking proceeding leading to the rule sought to be waived.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-88-10, 28 NRC 573 (1988). No special circumstances under 2.758 have been demonstrated here. Although NIRS alleged a possible site specific concern regarding the future use of MOX in its list of items that should be considered in an adequate analysis of the terrorism issue, the crux of the terrorism contention is a generic concern regarding terrorism. LBP-02-04, slip op. at 69-72.³¹

³⁰The Licensing Board points to possible special circumstances arising from evidence that may be elicited during future litigation relating to the admitted MOX contention. *Id.* at 77.

³¹Furthermore, NIRS has failed to meet the procedural requirements found in 10 C.F.R. §2.758. Indeed, NIRS did not submit a petition along with supporting affidavit to justify its request for a waiver. See 10 C.F.R. §2.758. Thus, unless the Board is seeking to abrogate the requirements of section 2.758, the *prima facie* case required by the regulation has not been made.

Special circumstances alone, however, are not sufficient for a waiver. The proponent must demonstrate that the special circumstances undercut the purposes of the regulation. The purpose of, for example, 10 C.F.R. § 50.13 is to clarify that “power reactors are not required to be designed or to provide other measures to counteract destructive acts by ‘enemies of the United States.’” See *e.g. PFS*, CLI-01-26, 54 NRC ___, slip op. at 4. Therefore, to deny admission of the contention based upon section 50.13 would be to apply the regulation in exactly the way it was intended to be applied. The events of September 11 are precisely the kind of threats excluded from consideration by 10 C.F.R. § 50.13. Thus, it cannot be said that “special circumstances” undercut the rationale of 10 C.F.R. § 50.13. Therefore, a waiver of 10 C.F.R. § 50.13 is not appropriate in this case.³²

Lastly, a waiver should only be granted in “unusual and *compelling* circumstances.” *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 & 2), CLI-89-20, 30 NRC 231, 235 (1989) *citing Seabrook*, CLI-89-3, 29 NRC 234, 239 (1989). Within the context of 10 C.F.R. § 2.758 and this license renewal matter, no such circumstances exist. In sum, NIRS cannot overcome the regulatory bar on challenging the Commission’s regulations because it did not request a waiver of the applicable regulations pursuant to 10 C.F.R. §2.758. Accordingly, even if one were to follow the Board’s suggestion and waive a regulation even though NIRS has not met section 2.758's requirements, the instant case is not one where NIRS has raised unusual and compelling circumstances.

³² As to the other unspecified “security and license renewal rules,” there was no demonstration below or decision by the Licensing Board that the purposes of any of these regulations would be undercut by any so-called “special circumstances”.

CONCLUSION

Based upon the foregoing, the Staff submits that under NEPA the NRC is not required to consider malevolent acts such as those directed at the United States on September 11, 2001; consideration of such acts is precluded pursuant to 10 C.F.R. § 50.13; and consideration of such acts is beyond the scope of license renewal; a waiver of any regulation relating to this license renewal matter is not justified; and the Licensing Board's decision denying admission of NIRS's terrorism contention should be affirmed.

Respectfully submitted,

/RA/

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/RA/

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Dated at Rockville, Maryland

this 27th day of February 2002.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
)
DUKE ENERGY CORPORATION) Docket Nos. 50-369, 370, 413 and 414
)
(McGuire Nuclear Station,)
Units 1 and 2, and)
Catawba Nuclear Station)
Units 1 and 2))

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO CLI-02-04" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class; or as indicated by an asterisk (*), by deposit in the Nuclear Regulatory Commission's internal mail system; as indicated by two asterisks (**), by electronic mail, this 27TH day of February 2002.

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