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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:

Dominion Nuclear Connecticut, Inc.

(Millstone Nuclear Power Station,
Unit No. 3)

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Docket No. 50-423-LA-3

ASLBP No. 00-771-01-LA-R

BRIEF OF DOMINION NUCLEAR CONNECTICUT, INC. IN
RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-02-05

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February 27, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)	
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Dominion Nuclear Connecticut, Inc.)	Docket No. 50-423-LA-3
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(Millstone Nuclear Power Station,)	ASLBP No. 00-771-01-LA-R
Unit No. 3))	

BRIEF OF DOMINION NUCLEAR CONNECTICUT, INC. IN
RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-02-05

I. INTRODUCTION

Dominion Nuclear Connecticut, Inc. (“DNC”) herein responds to the February 6, 2002, Memorandum and Order of the Nuclear Regulatory Commission (“Commission” or “NRC”) in the above-captioned proceeding, which accepted certification of an issue relating to risks from acts of terrorism.¹ Specifically, the Commission has directed the parties to this license amendment proceeding to brief the following question:

“What is an agency’s responsibility under [the National Environmental Policy Act] to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?”

Further, the parties are invited to address any other issues that they consider “relevant” to the Atomic Safety and Licensing Board’s (“Licensing Board”) certification of this question to the Commission. Concurrently, the Commission has directed that this same issue be briefed by the

¹ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), CLI-02-05, 55 NRC __ (slip op., Feb. 6, 2002).

parties to three other ongoing NRC licensing proceedings being adjudicated under 10 C.F.R. Parts 50, 70, and 72, respectively.²

As discussed below, DNC concludes that the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4321 *et seq.* (“NEPA”), does not require the NRC to consider the risk of intentional malevolent acts against U.S. nuclear power reactors in an NRC license amendment proceeding.³ The proposed late-filed environmental contention that is the source of the certified question should be rejected for reasons similar to those given by the Licensing Board in its decision below.

II. BACKGROUND

This proceeding arises out of a request by Northeast Nuclear Energy Company⁴ for a license amendment to increase the storage capacity of the Millstone Unit No. 3 spent fuel

² See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC __ (slip op., Feb. 6, 2002) (accepting certification of radiological sabotage issue raised in *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), LBP-02-04, 55 NRC __ (slip op., Jan. 24, 2002)); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC __ (slip op., Feb. 6, 2002) (granting applicant’s petition to review the licensing board’s ruling admitting contentions on terrorism in *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __ (slip op., Dec. 6, 2001)); and *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-03, 55 NRC __ (slip op., Feb. 6, 2002) (accepting certification of terrorism issues raised in *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (slip op., Dec. 13, 2001)).

³ DNC supports the arguments and conclusions set forth in the three other briefs filed in response to the Commission’s Order by *Duke Energy Corp.*, *Duke Cogema Stone & Webster*, and *Private Fuel Storage, L.L.C.*

⁴ At the time this proceeding began, Northeast Nuclear Energy Company was the licensee for Millstone Unit 3. On March 31, 2001, DNC became the operating licensee and party in interest in this matter.

pool from 756 assemblies to 1,860 assemblies (the "License Amendment").⁵ The Licensing Board in this case granted standing to the Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively, "Intervenors") as intervenors and admitted three of their contentions for adjudication in a proceeding under 10 C.F.R. Part 2, Subpart K.⁶ On October 26, 2000, after submission of papers and oral argument, the Licensing Board issued a Memorandum and Order that denied the request for an evidentiary hearing.⁷

On December 18, 2000, the Intervenors filed a motion to stay appellate proceedings and reopen the record on Contention 4 based upon the licensee's notification to the NRC regarding a loss of accountability for two Millstone Unit 1 spent fuel rods. The Commission subsequently remanded the motion to reopen the record to the Licensing Board "for its consideration in the first instance."⁸ On May 10, 2001, the Licensing Board issued a

⁵ The NRC issued the License Amendment on November 28, 2000, after finding that it posed "no significant hazards considerations" under 10 C.F.R. § 50.92. *See* 65 Fed. Reg. 75,736 (2000).

⁶ *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-00-2, 51 NRC 25 (2000). The Board admitted Contentions 4, 5, and 6 — all dealing with criticality questions — and rejected eight other proposed contentions.

⁷ *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), LBP-00-26, 52 NRC 181 (2000). The Commission later affirmed that decision in two parts. *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-10, 53 NRC 353 (2001); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-01-3, 53 NRC 22, 25-27 (2001).

⁸ *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit No. 3), CLI-00-25, 52 NRC 355, 357 (2000).

Memorandum and Order that granted the Intervenors' motion to reopen the record.⁹ This issue remains before the Licensing Board in a Subpart K proceeding.

On November 1, 2001, CCAM and CAM filed a Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contentions.¹⁰ This Motion to Reopen, accompanied by a declaration from Dr. Gordon Thompson, pointed to the September 11, 2001, terrorist attacks and asserted the need for an Environmental Impact Statement ("EIS") to analyze potential impacts of such attacks and possible alternatives to the license amendment at issue in this matter. Dr. Thompson specifically focused on the postulated environmental consequences of a loss of spent fuel pool water caused by a deliberate airline crash into the spent fuel pool at Millstone Unit 3.¹¹ Both DNC and the NRC filed responses opposing the Intervenors' motion and, in the alternative, seeking directed certification.¹² The Intervenors then sought permission

⁹ See *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-01-17, 53 NRC 398 (2001).

¹⁰ "Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention," November 1, 2001 ("Motion to Reopen").

¹¹ The NRC Staff previously completed an environmental assessment of the license amendment of the license amendment at issue in this matter and concluded that the license amendment — and the additional spent fuel storage at Millstone Unit 3 — do not involve a significant environmental impact. See "Northeast Nuclear Energy Co. (NNECO), et al., Millstone Nuclear Power Station, Unit No. 3, Environmental Assessment and Finding of No Significant Impact." 64 Fed. Reg. 48,675 (Sept. 7, 1999), and 64 Fed. Reg. 70,076 (Dec. 15, 1999) (correction). The EA included a discussion of "accident considerations" as well as "alternatives" to the proposed action. The EA concluded that the additional spent fuel storage racks will not increase the probability or consequences of accidents, 64 Fed. Reg. at 48,676, and that denial of the amendment would result in no change in current environmental impacts, *id.*, at 48,677.

¹² See "Dominion Nuclear Connecticut, Inc.'s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention and Motion for Directed Certification," November 13, 2001; "NRC Staff Response Opposing the Motion of Connecticut Coalition Against Millstone/Long Island Coalition Against Millstone to

from the Licensing Board to reply to the DNC and the NRC Staff responses to their motion. On December 10, 2001, the Licensing Board issued a Memorandum and Order permitting the Intervenor to submit a reply to the “alleged factual errors in the other parties’ responses” and directing the Intervenor to address the applicability of 10 C.F.R. § 50.13 to the proposed contention and the existence of any “special circumstances” under 10 C.F.R. § 2.758.¹³ On December 21, 2001, Intervenor filed their reply.¹⁴ DNC answered the reply on January 3, 2002.¹⁵

On January 24, 2002, the Licensing Board ruled that the Intervenor’s late-filed contention on the terrorism issue was, at least in its view, procedurally valid, but the Licensing Board nonetheless found the proposed contention to be inadmissible due to 10 C.F.R. § 50.13.¹⁶ The Licensing Board concluded that the contention must be rejected because “the Commission’s current policy is to apply 10 C.F.R. § 50.13 to environmental contentions.” LBP-02-05, slip op.

Reopen the Record to Admit a Late-filed Environmental Contention,” November 16, 2001.

¹³ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), “Memorandum and Order (CCAM/CAM Motion for Leave to Reply to Responses of Licensee and Staff),” 54 NRC __ (slip op., Dec. 10, 2001).

¹⁴ See “Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contentions,” December 21, 2001.

¹⁵ See “Dominion Nuclear Connecticut’s Response to Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone Reply to Oppositions to Motion to Reopen the Record and Request for Admission of Late-Filed Environmental Contention,” January 3, 2002.

¹⁶ *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3; Facility Operating License NPF-49), LBP-02-05, 55 NRC __ (slip op., Jan. 24, 2002).

at 18. However, the Licensing Board referred the question of the applicability of 10 C.F.R. § 50.13 to an environmental contention to the Commission. *Id.*, at 19.

In its Memorandum and Order accepting certification of the issue, the Commission characterized the certified issue as follows:

Section 50.13 provides that reactor licensees are ‘not required to provide for design features or other measures for the specific purpose of protection against the effects of ... attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States.’ The Board stated that ‘[t]his provision is part of the safety regulations of the NRC, but its substantive terms appear to have been applied as well to environmental issues, such as is presented by ... Contention 12.’ *Id.*, at 14. The Board indicated that ‘[a]lthough calculating the risk of sabotage or terrorism may fall within the purview of current analytical methodologies, a matter that would be litigated in resolving proposed Contention 12 if it were admitted, we conclude that the Commission’s current policy is to apply 10 C.F.R. § 50.13 to environmental contentions.’ *Id.*, at 18. Hence, the Board ‘perforce’ rejected proposed Contention 12, but referred its ruling to the Commission. *Id.*, at 18-19.

CLI-02-05, slip op. at 1-2. As discussed below, the Licensing Board’s decision to reject the contention should be upheld as a matter of Commission precedent and NEPA law.

III. ARGUMENT

A. As a Matter of Law, NEPA Does Not Require the NRC to Consider Intentional Malevolent Acts When To Do So Would Irreconcilably Conflict With the Exercise of Existing NRC Authority Under the Atomic Energy Act

The duties that NEPA imposes upon Federal agencies are “essentially procedural” in nature.¹⁷ In pertinent part, NEPA requires that Federal agencies prepare a “detailed statement,” known as an EIS, for major Federal actions “significantly affecting the quality of the human environment.”¹⁸ 42 U.S.C. § 4332(2)(C). That “detailed statement” under NEPA Section

¹⁷ *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 558 (1978); *Kelley v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995).

¹⁸ *Kelley*, 42 F.3d at 1512.

102(2)(C) must address the environmental impact of the proposed Federal action, any unavoidable adverse environmental effects if the proposal is implemented, alternatives to the proposed action, the relationship between local short-term use of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources involved. *Id.*

Significantly, NEPA “was not intended to repeal by implication any other statute.”¹⁹ It mandates that the Federal government use “all practicable means, consistent with the essential considerations of national policy . . .” to implement its provisions. 42 U.S.C. § 4331(b). Furthermore, NEPA Section 102 expressly requires that, “*to the fullest extent possible,*” the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with NEPA policies. *Id.*, § 4332 (emphasis added). Nevertheless, when there is a clear and unavoidable conflict in existing law applicable to an agency’s operations, as there is here, the Supreme Court has recognized that “NEPA must give way.”²⁰

As explained below, the NRC’s regulations implementing Section 161 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201 (“AEA” or “Act”), do not require licensees to design their commercial reactor facilities, or take other measures, to protect the power plant against the effects of “attacks and destructive acts” by an “enemy of the United States.” 10 C.F.R. § 50.13. Rather, the plant and the related security plans are designed to protect against a design basis security threat as defined in accordance with 10 C.F.R. § 73.1(a). To require an evaluation of beyond-design-basis threats under NEPA would be directly and

¹⁹ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973).

²⁰ *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Oklahoma*, 426 U.S. 776, 788 (1976).

fundamentally inconsistent with this NRC implementation of its authority under the AEA. Such a result cannot stand as a matter of logic or law.

1. *The AEA and NRC Regulations Establish a Robust Framework for the Protection and Security of Commercial Nuclear Power Reactors*

The AEA states that the NRC is authorized to issue licenses in accordance with the rules and regulations it establishes to effectuate the purposes of the Act; namely, to “promote the common defense and security or to protect health or to minimize danger to life or property.” 42 U.S.C. §§ 2201(b). Thus, pursuant to the AEA, no license may be issued by the NRC if it “would be inimical to the common defense and security or to the health and safety of the public.” *Id.*, §§ 2133(d), 2134(d).

Pursuant to this statutory mandate, the NRC has promulgated regulations governing the issuance and amendment of commercial nuclear power plant operating licenses, found in Title 10 of the *Code of Federal Regulations*. Included in this body of regulations is a sound, yet flexible, framework for nuclear plant protection against external security threats. Specifically, 10 C.F.R. § 73.1(a)(1) enumerates the types of sabotage threats that constitute the assumptions upon which the licensee’s security plan and defense capabilities must be structured. In addition, 10 C.F.R. § 50.13 provides that applicants and licensees are not required to design and build their facilities to withstand the effects of “attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person”

Although Section 50.13 has been the subject of challenges in several NRC licensing proceedings, the rule has never required amendment. It represents a firm division of responsibility between private and public roles. In contrast, Section 73.1 is revised periodically based on current events and emerging issues that reflect potential credible threats that the NRC

believes may reasonably exist, for which licensees must provide protection.²¹ Thus, together, these two regulations define a dynamic security design basis that is responsive to current developments and new information. This design basis reflects that ultimately, however, it is the responsibility of the United States government, not power reactor licensees, to defend against attacks by enemies of the United States. These regulations establish that licensees are not required to design their commercial reactor facilities, or to take other measures, to protect the reactor facility against the effects of “attacks and destructive acts,” including sabotage, initiated by foreign governments or other enemies of the United States.

In promulgating 10 C.F.R. § 50.13, the NRC specifically underscored the division of responsibility:

The protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies having internal security functions. The power reactors which the Commission licenses are, of course, equipped with numerous features intended to assure the safety of plant employees and the public. The massive containment and other procedures and systems for rapid shutdown of the facility included in these features could serve a useful purpose in protection against the effects of enemy attacks and destructive acts, although that is not their specific purpose. One factor underlying the Commission's practice in this connection has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic “safeguards” as respects possible hostile acts by an enemy of the United States.

The circumstances which compel this recognition are not, of course, unique as regards a nuclear facility; they apply also to other structures which play vital roles within our complex industrial economy. *The risk of*

²¹ For example, Section 73.1 was revised in 1994 based on the vehicular bombing of the World Trade Center and another event at Three Mile Island Unit 1. At that time, the NRC determined that the threat of a land-borne attack with a vehicle, transporting adversarial personnel and their hand-carried equipment to the proximity of vital areas and including “a land vehicle bomb,” was in fact credible in light of then-recent events. See 59 Fed. Reg. 38,889 (Aug. 1, 1994).

*enemy attack or sabotage against such structures, like the risk of all other hostile attacks which might be directed against this country, is a risk that is shared by the nation as a whole.*²²

In *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1968), the Court upheld the validity of 10 C.F.R. § 50.13. The Court also affirmed that the Atomic Energy Commission — the predecessor to the NRC — had acted within its authority under the AEA when it excluded consideration of possible enemy action and sabotage against a nuclear plant, such as a bombing attack from Cuba, from a construction permit proceeding for a power reactor. *Siegel*, 400 F.2d at 784. The Court found no express indication, “within or without the corners of the [AEA], that the Commission was commanded to intrude the possibility of enemy action into the concepts of the ‘common defense and security’ and the ‘public health and safety.’” *Id.* Indeed, the Court held that:

Congress certainly can be taken to have expected that an applicant for a license should bear the burden of proving the security of his proposed facility as against his own treachery, negligence, or incapacity. It did not expect him to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it in [the future].

*Id.*²³ Thus, in reaching this conclusion, the Court determined that the agency was within the limits of its delegated authority when it implemented Section 50.13 and also when it excluded consideration of enemy acts and sabotage from NRC licensing proceedings.

²² 32 Fed Reg. 13,445 (Sept. 26, 1967) (NRC commentary accompanying publication of the final rule promulgating 10 C.F.R. § 50.13) (emphasis added).

²³ The Court also recognized the inherent flexibility given to the regulator to define security requirements and adjust them as necessary, stating: “In the Presidential Message recommending the legislation which culminated in the Atomic Energy Act of 1954, it was said that flexibility was a peculiar *desideratum* and that, absent an accumulation of experience with the new civilian industry hopefully to be brought into being, ‘it would be unwise to try to anticipate by law all of the many problems that are certain to arise.’ H.R. Doc. No. 328, 83d Cong., 2d Sess. 7 (1954).” *Siegel*, 400 F.2d at 783.

Consistent with this reasoning, NRC licensing boards have more recently recognized that the agency is not required to take into account — or require a showing of effective protection against — the possibilities of attack or sabotage by foreign enemies, both under the AEA and, based on Section 50.13, NEPA. NRC precedent has consistently affirmed that the responsibility for defense against such destructive acts lies with the Federal government. *See Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982), where the Licensing Board held that commercial reactors cannot be effectively protected against certain attacks (such as artillery bombardments, missiles with nuclear warheads, or kamikaze dives by large aircraft), without “turning them into virtually impregnable fortresses” Thus, the board rejected a proposed contention that would have required consideration of the consequences of a terrorist commandeering an airplane and diving it into the reactor containment.). *See also Pacific Gas and Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16 NRC 55, 73-74 at n.75 (1981), where the NRC Atomic Safety and Licensing Appeal Board (“Appeal Board”) rejected assertions regarding speculative threats to the facility by the Palestine Liberation Organization. Therein, the Appeal Board stated that “the Commission did not intend the design basis threat of radiological sabotage to include the possibility of an attack by international or transnational terrorists.”²⁴ Notwithstanding the events of September 11, 2001, there can be no doubt that terrorist acts (“intentional malevolent acts”) against the United States fall within the scope of 10 C.F.R.

²⁴ Consistent with 10 C.F.R. § 50.13, the NRC previously has rejected other proposed contentions regarding the impacts of acts of war. In *Cleveland Elec. Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 843-45 (1981), an NRC licensing board rejected a contention regarding the need to address the effects on a plant of an electromagnetic pulse (“EMP”) resulting from a detonation of a nuclear weapon. A licensing board reached a similar conclusion in *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566 (1982).

§ 50.13, at least to the extent that such acts exceed the current design basis external security threat defined in 10 C.F.R. § 73.1(a)(1).

2. *There is a Fundamental Conflict Between the AEA and NEPA Regarding the Need to Evaluate the Impact of Intentional Malevolent Acts — So NEPA Must Give Way*

Section 102(2)(C) of NEPA expressly states that its policies should be applied “to the fullest extent possible.” 42 U.S.C. § 4332; *see supra*. This phrase, “to the fullest extent possible” is not accidental. *Flint Ridge*, 426 U.S. at 787. According to the Senate and House conferees who wrote the “fullest extent possible” language into NEPA, its purpose was “to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency’s operations expressly prohibits or makes full compliance with one of the directives impossible”²⁵

Interpreting this language in Section 102 of NEPA, the Federal courts have held that an agency need not comply with NEPA’s requirements when to do so would fundamentally conflict with the duties imposed by its organic enabling statute. In *Flint Ridge*, the Supreme Court ruled that NEPA must “give way” if there is an “irreconcilable and fundamental conflict” of this nature. 426 U.S. at 788.²⁶ The fundamental conflict need not arise solely from the

²⁵ 115 Cong. Rec. 39,703 (1969) (House conferees) (emphasis added), *cited in Flint Ridge*, 426 U.S. at 787-88, *citing* 115 Cong. Rec. 40,418 (Senate conferees).

²⁶ In *Flint Ridge*, the Supreme Court held that the U.S. Department of Housing and Urban Development (“HUD”) was not required to prepare an EIS, when to do so would create “an irreconcilable and fundamental conflict” with the agency’s duties under the Interstate Land Sales Full Disclosure Act. The statute required developers to file a statement of record, disclosing information important to potential purchasers of unimproved tracks of land, to be effective 30 days after filing. *See generally* 426 U.S. at 780-85. Petitioners had claimed that HUD needed to prepare an EIS prior to registering a developer’s statement of record. The Court found that “[t]he [HUD] Secretary cannot comply with the statutory duty to allow statements of record to go into effect within 30 days of filing, absent inaccurate or incomplete disclosure, and simultaneously prepare impact statements on proposed developments.” *Id.*, at 791. *See also Texas Comm. on Natural Resources v.*

express language of the enabling statute, but even when “existing law makes compliance with NEPA impossible.” *E.g., Limerick Ecology Action v. United States Nuclear Regulatory Comm’n*, 869 F.2d 719, 729 (3d Cir. 1989) (emphasis added); *Public Serv. Co. of New Hampshire v. United States Nuclear Regulatory Comm’n*, 582 F.2d 77, 81 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978).²⁷

In *Long Island Lighting Co. (Shoreham Nuclear Power Station)*, ALAB-156, 6 AEC 831, 851 (1973), the Appeal Board explicitly found that Section 50.13 limits the scope of the agency’s NEPA responsibilities as well as the scope of its safety reviews. The Appeal Board found the rationale for 10 C.F.R. § 50.13 — presumably its division of responsibilities — “to be as applicable to the Commission’s NEPA responsibilities as to its health and safety responsibilities.” *Id.* Therefore, that regulation, and Commission precedent, precludes contentions exactly like the one at issue before the Commission in connection with Millstone Unit 3. For the Commission to determine that the risk of intentional malevolent acts of terrorists must be considered under NEPA would be to require the NRC to ignore, or act inconsistent with, the existing law of 10 C.F.R. § 50.13. Stated simply, as inherently recognized by the Appeal

Bergland, 573 F.2d 201, 206 (5th Cir.) (“The rule of reasonableness does not apply, however, when there is a fundamental conflict of statutory purpose between NEPA and an agency’s organic statute.”), *cert. denied*, 439 U.S. 966 (1978); *Atlanta Gas Light Co. v. Federal Power Comm’n*, 476 F.2d 142, 150 (5th Cir. 1973) (“[T]he legislative history of NEPA interprets ‘to the fullest extent possible’ to mean compliance unless compliance would give rise to a violation of statutory obligations.”); *Lakeland, Tallahassee & Gainesville Regional Utils. v. Federal Energy Regulatory Comm’n*, 702 F.2d 1302, 1314 (11th Cir. 1983) (“A federal agency need not comply with NEPA’s requirement when to do so would preclude the agency from carrying out its statutory purpose.”).

²⁷ It has been well established that properly promulgated, substantive agency regulations have the “force and effect of law.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979), *citing Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Foti v. INS*, 375 U.S. 217, 223 (1963); *United States v. Mersky*, 361 U.S. 431, 437-38 (1960); *Atchison, T. & S.F.R. Co. v. Scarlett*, 300 U.S. 471, 474 (1937).

Board in *Shoreham*, it would be illogical for the NRC to conclude that enemy attacks need not be addressed from a security perspective, but that environmental impacts must be evaluated under NEPA. The agency's NEPA responsibilities, like its AEA responsibilities, must be bounded by the scope of the agency's role as reflected in Section 50.13. The inherent inconsistency that would be presented by expanding the NEPA obligation beyond the AEA obligation must be resolved consistent with the NRC's organic enabling statute (the AEA) and the implementing regulations.²⁸

In *Limerick Ecology Action*, the Third Circuit interpreted the "fullest extent possible" language in Section 102 of NEPA, in the context of a challenge to the NRC's decision to exclude consideration of the environmental consequences of severe accident mitigation design alternatives ("SAMDA") under NEPA. 869 F.2d 719. The Court there ruled that the NRC had a parallel duty, under both Section 182(a) of the AEA and Section 102 of NEPA, to consider SAMDAs. The Court would give no deference to the Commission's generic policy statement excluding consideration of severe accident risks, because it was only a policy statement. *Id.*, at 736. Moreover, in that context the agency could not claim that it was sufficient to examine the issue only under the AEA and avoid its NEPA obligation. *Id.*, at 730-31. However, with respect to the current circumstances related to hypothetical terrorist attacks, any NRC obligation under NEPA to evaluate the environmental impact of such attacks as part of the license amendment process would stand in "irreconcilable and fundamental conflict" with the NRC's prior exercise of its authority under the AEA. The Commission has properly exercised the authority conferred

²⁸ The Licensing Board construes Section 50.13 as a "policy choice" adopted by the Commission "during an earlier time frame." LBP-02-05, slip op. at 2. DNC does not construe it as a policy, but as a regulation. Any suggestion that the regulation itself should be changed in the context of an individual licensing matter should be rejected as contrary to the Administrative Procedure Act.

by Section 161 of the AEA in adopting a rule — 10 C.F.R. § 50.13 — to “disregard the factor of enemy attack as a matter of substantive law. . . .”²⁹ In doing so, the Commission has determined that terrorist attacks are not only potentially beyond the plant security design basis, but also fundamentally different in kind because, for these scenarios, national defense, intelligence, and law enforcement capabilities can be credited to guard against such attacks. A NEPA obligation to assume that these defenses have failed would create a “clear and unavoidable conflict” with the Commission’s “existing law” of 10 C.F.R. § 50.13 properly enacted pursuant to its AEA authority.³⁰

In sum, 10 C.F.R. § 73.1(a) of the Commission’s regulations establishes a specific, evolving security design basis. While it may not be enough under NEPA to simply exclude an impact from a scenario because that scenario is “beyond design basis,” Section 50.13 reflects a regulatory dividing line that overrides the plant-specific design basis which is the subject of Section 73.1(a). Section 50.13 specifies that power reactor licensees are not responsible for protection against the effects of attacks or destructive acts by an enemy of the United States (whether a foreign government or other “person”). Any obligation to evaluate the consequences of these acts under NEPA would directly and irreconcilably conflict with the division of responsibility adopted under the AEA and reflected in Section 50.13. Accordingly,

²⁹ *Siegel*, 400 F.2d at 784.

³⁰ NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the AEA. *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n. 10 (1985), *citing Public Serv. Elec. and Gas Co.* (Hope Creek Generating Station, Units 1 and 2), ALAB-518, 9 NRC 14, 39 (1979). An inevitable effect of an expanded NEPA scope would be to drive specific plant and security modifications that may exceed those determined by the NRC to be necessary pursuant to its AEA safety and security responsibilities.

consistent with the longstanding precedent of the NRC's Appeal Board in *Shoreham*, NEPA does not extend to these matters.

B. Even If NEPA Were to Apply, The NEPA "Rule of Reason" Dictates That NRC Need Not Consider the Environmental Impacts of Intentional Malevolent Acts

Even if, as a matter of law, consideration of intentional malevolent acts under NEPA were somehow not precluded at the threshold by the combination of the AEA and 10 C.F.R. § 50.13, the environmental impacts of such acts need not — in any event — be evaluated by NRC under NEPA itself. The scope of a NEPA review is limited by a "rule of reason." An exercise of that rule of reason precludes the evaluation of intentional malevolent acts such as those at issue here.

NEPA requires an evaluation of, among other things, (1) the environmental impact of the proposed action, and (2) any adverse environmental effects that cannot be avoided should the proposal be implemented. 42 U.S.C. § 4332(2)(C)(i)-(ii). In this context, and consistent with Council on Environmental Quality ("CEQ") guidelines, "impacts" and "effects" include direct and indirect effects. *See* 40 C.F.R. § 1508.8. Direct effects are those that are caused by the proposed action and that occur at the same time and place as the action. *Id.*, Section 1508.8(a). Indirect effects are those that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.*, Section 1508.8(b). While an agency must take a "hard look" at environmental impacts, *Edwardsen v. United States Dep't of the Interior*, 268 F.3d 781, 785 (9th Cir. 2001), *citing Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000), the scope of the assessment is subject to a "rule of reason." *Deukmejian v. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1300 (D.C. Cir. 1984), *vacated in part on other grounds and hearing en banc granted sub nom. San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Comm'n*, 760 F.2d 1320, *aff'd en banc*,

789 F.2d 26 (1985), *cert. denied*, 479 U.S. 923 (1986). The agency “need not speculate about all conceivable impacts” *Dubois v. United States Dep’t of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996).³¹

Several factors must be considered in applying the NEPA “rule of reason.” As a threshold matter of logic, postulated environmental effects — be they direct or indirect — must be causally linked to the Federal action at issue. Second, the risk of a consequence must be subject to reasonable quantification, and not simply based on “conjecture.”³² Finally, given the national and international reach of the intentional malevolent acts such as those posited here, it is necessary to look beyond the scope of the NRC’s and the licensee’s own activities to determine “whether it is reasonably probable that the situation will obtain.” *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 & 2), ALAB-455, 7 NRC 41, 48 (1978). Consistent with the division of responsibility reflected in 10 C.F.R. § 50.13, the Federal government has implemented numerous actions, on both a national and international level, to

³¹ The rationale supporting the “rule of reason” is one of logic and resource conservation. “The statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research — and time — available to meet the Nation’s needs are not infinite.” *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). Pursuant to the rule of reason, an EIS need “furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.” *New York v. Kleppe*, 429 U.S. 1307, 1311, (1976) (quoting *Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975)).

³² See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-4, 31 NRC 333, 334 (1990) (“NEPA does not require consideration of an accident merely because it presents a ‘worst case’”); see also 40 C.F.R. § 1502.22. In the most recent version, CEQ guidelines on NEPA analyses suggested that an analysis of “reasonably foreseeable” impacts of a project should include low probability, high consequence events only if the scenarios are supported by “credible scientific evidence” and are not based on “pure conjecture,” and are within the “rule of reason.” A prior version of the guidelines requiring a “worst case analysis” was repealed in 1986.

address the issue of malevolent attacks against the United States — including its commercial nuclear facilities. Thus, as discussed below, each of these factors dictates against the “reasonableness” of considering the consequences of hypothetical intentional malevolent acts under NEPA in the context of a limited site-specific licensing action.

1. *Intentional Malevolent Acts Are Neither Direct Nor Indirect Effects of the Proposed NRC Action At Issue and Therefore Need Not Be Considered Under NEPA*

Under a “rule of reason,” NEPA does not require the NRC to consider any and all environmental impacts that may conceivably be traced to an agency action. Intentional malevolent acts of terrorists, by their very nature, cannot in any way be construed to be either “direct effects” or “indirect effects” of an NRC licensing action. Such attacks would not be caused by the proposed action. 40 C.F.R. § 1508.8(a). They involve malicious acts by third parties. Given this external involvement, the consequences of such attacks cannot reasonably be viewed as being proximately linked to the NRC’s licensing activities.

To be within the scope of a NEPA review, there must be a close causal relationship between potential environmental effects and the proposed federal action. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983), the Supreme Court emphasized that the “risk” itself is not an effect, and that with respect to any postulated indirect effects (*i.e.*, the consequences allegedly associated with the risk) “we must look at the relationship between [the] effect and the change in the physical environment caused by the major Federal action at issue.” *See also Presidio Golf Club v. National Park Serv.*, 115 F.3d 1153, 1163 (9th Cir. 1998) (affirming decision of National Park Service, due to the lack of causal nexus, not to consider the “remote” environmental effects on a historic private clubhouse that might result from the economic impact of competition from the new public clubhouse). In

Conservation Law Foundation of New England v. United States Dep't of the Air Force, 1987 WL 46370, *4 (D.Mass.), the Court found that NEPA does not require consideration of the effects of nuclear war purportedly caused by the major Federal action under review — because the plaintiff had failed to establish any “close causal relationship” between the two. The case concerned the construction of five radio towers in New England that were to become part of a Ground Wave Emergency Network (“GWEN”), a communications system linking military installations throughout the country. GWEN was designed to remain functional in the event of a nuclear war. The petitioner claimed that the environmental assessment was inadequate. Citing *Metropolitan Edison*, the Court rejected the argument that NEPA required an assessment of the effects of an actual nuclear war.

The limit on the scope of indirect effects to be analyzed under NEPA is also reflected in cases such as in *Airport Impact Relief, Inc. v. Wykle*, where the appellants challenged a determination of the Federal Highway Administration that changes to a state highway project did not require preparation of a supplemental EIS. 192 F.3d 197 (1st Cir. 1999). Among other things, the appellants claimed that airport expansion was an indirect effect of part of the highway project, extension of a service road. The court upheld the district court’s finding that possible airport expansion was contingent on several events “that may or may not occur over an eight-year span.” *Id.*, at 206. These events included “the acquisition of permits, the arrangement of funding, [and] the drafting of expansion plans.” *Id.* In the view of the court, these contingencies rendered “any possibility of airport expansion speculative and . . . neither imminent nor

inevitable.” *Id.* As a result, the Federal Highway Administration was not required to address expansion in its cumulative impact analysis, as it did not qualify as an indirect effect.³³

Thus, while it may be indisputable that there is currently a “risk” of an attack on a nuclear plant, the existence of that risk does not trigger a NEPA responsibility to address possible environmental consequences of such an attack. The effects of a terrorist attack would not be a consequence of the NRC’s licensing action to allow increased spent fuel storage at Millstone Unit 3; they would be the consequence of an act of a terrorist. There is no precedent of which we are aware that would extend NEPA to assessments of the effects of such acts of war. Indeed, given the lack of a causal connection, NEPA does not require that the risk and consequences of terrorist attacks be considered by the NRC under a “rule of reason.”

2. *NEPA’s Rule of Reason Does Not Require the NRC to Consider Unpredictable, Unquantifiable Risks of Sabotage or Terrorist Acts*

The assertion that NEPA mandates consideration of intentional malevolent acts in connection with a license amendment proceeding also should be rejected under the “rule of reason” because the risk of this type of externally-driven event is neither quantifiable nor predictable. This rationale is reflected in the Appeal Board’s *Limerick* decision³⁴ and the Third Circuit’s subsequent decision in *Limerick Ecology Action* affirming the NRC’s decision in that case, 869 F.2d 719 (1989).

In *Limerick Ecology Action*, the Court specifically found, without even relying on Section 50.13 of the Commission’s regulations, that the NRC was not required by NEPA to

³³ See also *Airport Neighbors Alliance v. United States*, 90 F.3d 426, 433 (10th Cir. 1996); *No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 1380, 1385-86 (9th Cir. 1988).

³⁴ *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, ALAB-819, 22 NRC 681 (1985), *affirming* 20 NRC 446 (1984). The Commission subsequently affirmed the Appeal Board decision by declining to review it. See *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, CLI-86-5, 23 NRC 125 (1986).

entertain an environmental contention on “sabotage risk.” 869 F.2d at 743. The petitioner there argued that the NRC’s refusal to consider the risk of sabotage as a specific, separate issue either in the Final Environmental Statement for a power reactor or as a contention in the reactor licensing proceeding, violated NEPA. The Court rejected this argument because the petitioner had failed to rebut the NRC’s conclusion that “sabotage risk analysis is beyond current probabilistic risk assessment methods.” *Id.*³⁵ To have prevailed, the petitioner would have had to present “some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks.” *Id.*, at 744.

The risk of an “intentional, malevolent” act by a terrorist, or of an act of war, at a particular commercial nuclear power plant remains an unpredictable, unquantifiable human component that defies any “meaningful” analysis of the risk.³⁶ The Intervenors, in their original

³⁵ See also *Limerick*, ALAB-819, 22 NRC at 699. In so ruling, the Third Circuit affirmed the NRC’s conclusion that assessment of such risks was “attended by a great deal of uncertainty,” thereby satisfying NEPA’s requirement that the agency take a “hard look” at the issue. *Limerick Ecology Action*, 869 F.2d at 743.

³⁶ In connection with its 1994 rulemaking amending the design basis threat for radiological sabotage to provide for protection against malevolent use of vehicles at nuclear power plants, the NRC noted that it had examined the use of probabilistic risk assessment (“PRA”) to predict sabotage as an initiating event and had concluded that its use “would not be credible or valid because terrorist attacks, by their very nature, may not be quantified.” 59 Fed. Reg. 38,889, 38,890. The Staff further stated that past attempts to apply PRA techniques to acts of sabotage had resulted in similar findings, citing as examples the 1978 Risk Assessment Review Group Report to the U.S. Nuclear Regulatory Commission (NUREG/CR-0400), the Reactor Safety Study (WASH-1400), the 1983 Policy Statement on Safety Goals for the Operation of Nuclear Power Plants, 48 Fed. Reg. 10,772, and a 1991 petition to institute an individual plant examination program for threats beyond the design basis. See 59 Fed. Reg. at 33,890. Even the conclusions in more recent National Intelligence Estimates “are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood.” *Id.* See also *Greenpeace v. Stone*, 748 F. Supp. 749, 762 (D. Hawaii 1990); *Garrett v. NRC*, 11 ERC 1684, 8 Env’tl. L Rep. 20510, 20512 (D. Ore. 1978) (denying an injunction because, among other things, the “possibility of . . . terrorist activities [at Trojan nuclear power plant] is too remote and speculative to warrant relief under NEPA.”).

Motion to Reopen on the Millstone docket, offered Dr. Thompson's affidavit on terrorist risks, along with various newspaper clippings of post-September 11 current events. However, none of this established any basis on which to quantify the probability of a terrorist attack. Indeed, Dr. Thompson emphasized only that "from a qualitative perspective," he perceived the probability of a terrorist attack "within the U.S. homeland" to be "significantly greater" than it was in the 1980's. See Motion to Reopen, Thompson Declaration, Paragraph V-11 (October 31, 2001). While Dr. Thompson elaborates at length on the consequences he perceives for a spent fuel pool draindown event, his declaration does not meaningfully quantify the probability of such an event — particularly one caused by a terrorist attack.³⁷

Consistent with the decision of the Third Circuit in *Limerick Ecology Action*, the Courts have recognized that NEPA is bounded by some notion of feasibility. See, e.g., *Lake Erie Alliance for Protection of Coastal Corridor v. U.S. Army Corps of Eng'rs*, 526 F. Supp. 1063, 1071 (W.D. Pa. 1981), citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 551 (1978). Regardless of assertions that terrorist attacks are no

³⁷ In *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-876, 26 NRC 277, 282 (1987), the Appeal Board emphasized that a NEPA analysis does not need to consider the environmental impacts of certain severe, beyond design basis spent fuel pool events. The Commission subsequently stated, in the context of technical design issues, that the probability of the scenario would be the key in applying the NEPA "rule of reason." *Vermont Yankee*, CLI-90-4, 41 NRC at 334-35. In light of the discussion above, this same probabilistic "key" would not seem to apply to deliberate, human acts of sabotage and war. However, beyond newspaper articles regarding current events, neither Intervenors nor Dr. Thompson offer any plausible probabilistic assessment of an attack on the Millstone Unit 3 spent fuel pool. Compare *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44-48 (1989). The Intervenors have invoked the Court of Appeals decision in *Limerick Ecology Action* for the argument that the NRC must under that case consider Severe Accident Mitigation Damage Alternatives. However, nothing in that case or the Commission's regulations of 10 C.F.R. Part 51 would require an assessment of severe accident mitigation measures for an operating license amendment, where that amendment is not a major federal action requiring an EIS.

longer “remote and speculative” within the meaning of NEPA, there is still no basis for requiring an analysis of the risk and environmental consequences of such attacks under NEPA. Given the available information, and the limits of risk assessment methodology, these matters are speculative and exceed the NEPA “rule of reason.”³⁸

3. *It Is Reasonable For Licensees and the NRC To Rely On The Federal Government To Carry Out Its Duty To Defend The United States From All Enemies, Foreign And Domestic*

Even if 10 C.F.R. § 50.13 is not read as an absolute bar to a NEPA evaluation of intentional malevolent acts by enemies of the state, an assessment of the scope of a NEPA evaluation under a “rule of reason” must still consider the division of responsibility reflected in this regulation.³⁹ The reaction to the events on September 11, 2001, has been global in scope, swift, and aggressive. Unprecedented security measures have been implemented at airports and aboard aircraft. Major industrial facilities, such as chemical and nuclear plants, also have been enveloped by these heightened security measures. Military and intelligence forces have been engaged to eliminate terrorist organizations abroad and to stop future malevolent acts from reaching our shores. The President issued an Executive Order establishing an Office of

³⁸ It is important to recognize that if these scenarios were found to be “remote and speculative,” then they would *per force* exceed the “rule of reason” and, therefore, the bounds of NEPA. *See, e.g., Deukmejian*, 751 F.2d at 1300. However, even if in some sense these events are viewed as “foreseeable,” that does not mean they must be considered. The NEPA “rule of reason” contemplates a number of factors, including foreseeability, causal nexus, and the quantifiability of the risk, as discussed in *Limerick Ecology Action*.

³⁹ Indeed, Section 101 of NEPA directs Federal agencies to use “all practicable means, consistent with other essential considerations of national policy. . . .” 42 U.S.C. § 4331(b) (emphasis added).

Homeland Security⁴⁰ to act as a clearinghouse for Federal agency responses to threats against homeland security.⁴¹ All of these efforts are directed at *preventing* the scenarios at issue, obviating a NEPA evaluation of the environmental consequences of the scenarios.

The Executive Branch and Congress also have spoken and set a course of action on the issue of malevolent use of aircraft. Federal legislation, including the USA PATRIOT Act⁴² and the Aviation and Transportation Security Act,⁴³ has been enacted to provide protective resources aimed at preventing terrorists from hijacking aircraft and otherwise engaging in intentional malevolent action. As noted above, the White House established the Office of Homeland Security. The Department of Defense established Combat Air Patrols over key U.S. metropolitan areas and facilities. The U.S. Coast Guard has established security zones around strategic maritime locations. The NRC is coordinating with the Federal Bureau of Investigation, other intelligence and law enforcement agencies, and the Department of Defense.

Since September 11, the Commission also has been engaged in a broad reexamination of NRC's own regulations relating to design basis threats, physical protection of plants and materials, plant security, and access authorization. This effort has been and will continue to be thorough and deliberate. Indeed, on February 25, 2002, the agency issued orders

⁴⁰ "EO 13228: Executive Order Establishing the Office of Homeland Security and the Homeland Security Council," signed October 8, 2001. 66 Fed. Reg. 51812 (October 10, 2001).

⁴¹ *See id.*, §§ 3(a), 3(c) and 3 (d).

⁴² P.L. 107-56, 115 Stat. 272 (Congressional Record p. D1064, October 26, 2001). This Act enhanced the definitions of terrorist acts and was intended to deter and punish terrorist acts in the United States and abroad. The Act also enhanced law enforcement investigatory tools to aid in intelligence activities to minimize the possibilities of future terrorist activities.

⁴³ P.L. 107-71, 115 Stat. 597 (Congressional Record p. D1168, November 19, 2001).

to all nuclear power plant licensees, including DNC, addressing interim safeguards and security compensatory measures. These orders call for responses and actions within specified time frames and include specific requirements imposed on licensees.⁴⁴ As it has done in the past, the NRC is also still specifically re-evaluating which credible scenarios should be assessed to define the design basis threat in accordance with 10 C.F.R. § 73.1(a). However, reliance on a dividing line between Federal and private responsibilities as reflected in Section 50.13 remains reasonable. As in the past, this division of responsibility must be an important consideration in defining how a NEPA “rule of reason” should apply to these issues.⁴⁵

From a practical perspective, consideration of the environmental impacts of intentional malevolent acts at plant-specific locations under NEPA would provide NRC decision makers with little additional, substantive information relevant to the Federal actions at issue. It has long been recognized that the duties NEPA imposes on Federal agencies are “essentially procedural” in nature.⁴⁶ While the data resulting from a process-driven review of terrorist attack

⁴⁴ As early as October 2, 2001, the NRC initially issued a “safeguards advisory” delineating certain prompt and long-term actions to strengthen licensee capability to respond to a “terrorist attack at or beyond the design basis threat.” Letter from Chairman Meserve to Mr. Markey, October 16, 2001. For safeguards reasons, the details of the advisory, subsequent advisories, and the recent orders, are not public information.

⁴⁵ See *Shoreham*, ALAB-156, 6 AEC at 851 (1973) (“Taking into account the ‘rule of reason’ which we believe must govern the interpretation of NEPA, we find the rationale for 10 CFR § 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.”) (citation omitted). A more recent NRC decision holding that the strictures of Section 50.13 do apply to the NRC’s obligations under NEPA is *Private Fuel Storage, L.L.C* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC __ (slip op. Dec. 13, 2001 at 13) (Licensing Board rejected a proposed contention seeking to require consideration of a September 11, 2001-style terrorist act in an EIS for a Part 72 ISFSI facility as an impermissible attack upon NRC regulations in Section 50.13, as well as being beyond the scope of that 10 C.F.R. Part 72 licensing proceeding).

⁴⁶ *Vermont Yankee*, 435 U.S. at 558.

scenarios, such as a fully-fueled jet aircraft crash into either a reactor or spent fuel pool, may reasonably be expected to identify significant environmental impacts, the more important questions of mitigation and defensive alternatives already are the focus of intense, ongoing NRC scrutiny. Creating a NEPA review of the environmental results of such scenarios is not a productive exercise; planning to avoid those scenarios is and should remain the focal point of NRC and national policymaker activities.⁴⁷

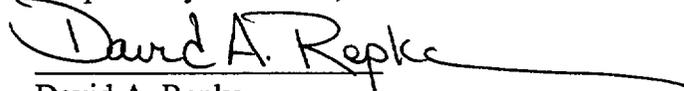
In sum, in light of the extensive ongoing NRC and Federal efforts to evaluate and respond to the possible threat posed by terrorists, including the threat of intentional, malevolent use of aircraft against commercial nuclear plants, terrorist scenarios remain speculative and beyond the scope of a NEPA review. As a matter of policy, and consistent with 10 C.F.R. § 50.13, the NRC's generic efforts to continually assess threats and ensure that licensees maintain an appropriate security level should remain the priority. The NRC's response should continue to focus on prevention of these threats on a generic basis, and should not be splintered into plant-specific evaluations of speculative environmental impacts. Such a result would not be reasonable under any circumstances, and should not be driven by an overly expansive reading of NEPA.

⁴⁷ Compare *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026-27 (9th Cir. 1980) ("An impact statement need not discuss remote and highly speculative consequences Everyone recognizes the catastrophic results of the failure of a dam; to detail these results would serve no useful purpose.").

IV. CONCLUSION

Consideration of the environmental consequences of intentional, malevolent acts is not required by either NRC regulations or NEPA. Concerns related to security risks at nuclear plants should be addressed, as they are being addressed, as a current, ongoing, and generic issue related to the proper security design basis threat. The ongoing NRC regulatory reviews and the Federal response to the events of September 11, 2001, can reasonably be relied upon to assure that there is no basis for a contention related to environmental impacts of terrorist attacks in any NRC licensing context. Accordingly, the proposed late-filed environmental contention in this matter should not be admitted for lack of any basis in fact or law.

Respectfully submitted,



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Dated in Washington, D.C.
this 27th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

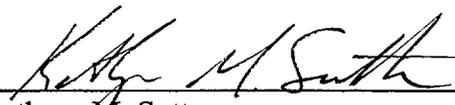
BEFORE THE COMMISSION

In the Matter of:)
)
Dominion Nuclear Connecticut, Inc.) Docket No. 50-423-LA-3
)
(Millstone Nuclear Power Station,) ASLBP No. 00-771-01-LA-R
Unit No. 3))

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Counsel for Dominion Nuclear Connecticut, Inc.

Dated at Washington, District of Columbia
this 27th day of February 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of:)

Dominion Nuclear Connecticut, Inc.)

(Millstone Nuclear Power Station,)
Unit No. 3))

Docket No. 50-423-LA-3

ASLBP No. 00-771-01-LA-R

CERTIFICATE OF SERVICE

I hereby certify that copies of the "BRIEF OF DOMINION NUCLEAR CONNECTICUT, INC. IN RESPONSE TO COMMISSION MEMORANDUM AND ORDER CLI-02-05" and a NOTICE OF APPEARANCE for Kathryn M. Sutton in the captioned proceeding have been served on the following by deposit in the United States mail, first class, this 27th day of February 2002. Additional e-mail service has been made this same day as shown below.

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