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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 070-03098
	)	ASLBP No. 01-790-01-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	

BRIEF OF DUKE COGEMA STONE & WEBSTER IN RESPONSE TO THE COMMISSION'S MEMORANDUM AND ORDER REGARDING AN AGENCY'S RESPONSIBILITY UNDER NEPA TO CONSIDER TERRORISM

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I. INTRODUCTION

The Atomic Safety and Licensing Board ("Licensing Board") in the above captioned proceeding has admitted a contention submitted by Georgians Against Nuclear Energy ("GANE") which asserts that, under the National Environmental Policy Act of 1969 ("NEPA"),[1] Duke Cogema Stone & Webster ("DCS") and the Nuclear Regulatory Commission ("NRC" or "Commission") must evaluate the impacts of potential terrorist attacks against the proposed Mixed Oxide Fuel Fabrication Facility ("MOX Facility") which is to be located on the U.S. Department of Energy's ("DOE" or "Department") Savannah River Site ("SRS").[2] After the Licensing Board rejected DCS' motion to reconsider that ruling or, in the alternative, to refer the ruling to the Commission,[3] DCS petitioned the Commission for interlocutory review.[4] By

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1 42 U.S.C. § 4331 *et. seq.*

2 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ____ (Dec. 6, 2001).

3 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).

Memorandum and Order dated February 6, 2002, the Commission granted DCS' Petition and accepted the issue for review.[5]

The Commission has instructed the parties to this proceeding to address the following question:

> 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 Commission has also instructed the parties to "cite all relevant cases, legislative history or regulatory analysis" and to address "all issues that the parties determine are relevant to the matters . . ." at issue.[6]

II. SUMMARY OF DCS' POSITION

Neither the explicit statutory language of NEPA nor its legislative history requires an evaluation of terrorist attacks in an Environmental Impact Statement ("EIS") or Environmental Assessment ("EA"). Furthermore, the statutory language directs agencies to apply practical decision-making and to take into account other national policy considerations in performing their NEPA analyses. These principles, including the Commission's policy underlying 10 CFR § 50.13, favor a determination that the impacts of potential terrorist attacks need not be considered under NEPA.

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4 *Duke Cogema Stone & Webster's Petition For Interlocutory Review* (Jan. 28, 2002).

5 *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 54 NRC ___ (Feb. 6, 2002). At the same time, the Commission agreed to undertake interlocutory review of similar contentions in three other licensing proceedings. *Id.*, slip op. at 2 n.3.

6 *Id.*, slip op. at 3.

As reflected in the caselaw, the courts have applied a "rule of reason" in interpreting NEPA. In applying the rule of reason, courts have considered a number of factors to determine whether a particular event, or more importantly its related impacts, warrant inclusion in an agency's NEPA analysis. Those factors include whether it is "reasonably foreseeable" that the impacts will occur at the facility under review as a direct or indirect result of the proposed agency action. In making this determination, courts have inquired into whether there is a close causal relationship between the proposed action and the potential impacts, and whether those impacts can be considered to be a "likely" or "probable" consequence of the proposed action. Where there is no such close causal relationship and where the potential impacts are not a probable consequence of the proposed action, courts have declined to require their consideration under NEPA. Under the rule of reason, courts have also considered other factors such as whether analysis of the potential impacts would meaningfully aid the agency in its decision-making process, whether a credible analysis of the likelihood and consequences of the potential impacts is practicable, and whether consideration of other national policies warrants a NEPA analysis.

A potential terrorist attack—an intentional malevolent act by a third party determined to conceal its plans and efforts until it is ready to strike—does not create the type of impact that can reasonably be considered to have been caused by a proposed agency action. Nor can the impacts of such an attack fairly be considered to be a likely or probable consequence of any such proposed agency action. Furthermore, analysis of such impacts does not aid an agency in its decision-making process and is inappropriate when considered in light of other national policy considerations. Thus, consideration of the potential impacts of a terrorist attack on a particular facility is neither required by law, nor practically useful under NEPA.

III. NEPA DOES NOT REQUIRE AN AGENCY TO CONSIDER INTENTIONAL, MALEVOLENT ACTS SUCH AS THOSE WHICH OCCURRED ON SEPTEMBER 11, 2001

A. The Language Of The Statute Does Not Require Agency Consideration Of Potential Terrorist Attacks

There is nothing in the express language of NEPA that compels consideration of the potential impacts of a terrorist attack. The statute is entirely silent in this regard.

However, NEPA does specifically require the application of practical decision-making and the consideration of other national policy priorities in carrying out its objectives. Section 101 sets out the policy and purpose of the statute. It declares: "it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."[7] It also states that the federal government is required to use "all practicable means, consistent with other essential considerations of national policy . . ." in implementing its requirements.[8] NEPA's policies and goals are "supplementary to those set forth in existing authorization of Federal agencies."[9] As discussed in Section C.3 below, the Commission's policy rationale underlying 10 C.F.R. § 50.13 demonstrates that the federal government, not individual licensees, is responsible for protecting against hostile actions by enemies of the United States. As a result, it

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7 42 U.S.C. § 4331(a).

8 *Id.* at § 4331(b).

9 *Id.* at § 4335. Section 102 contains NEPA's "action-forcing" provisions. It requires the preparation of a "detailed" statement for each major federal action significantly affecting the quality of the human environment. This detailed statement—commonly known as an Environmental Impact Statement—must discuss "the environmental impact of the proposed action." Section 102 does not clarify or elaborate on the scope of the environmental impacts to be included in an EIS. Nowhere does this section require an evaluation of intentional acts or terrorism.

is neither practical nor consistent with national policy considerations to engage in a NEPA analysis of the potential impacts of a terrorist attack on an individual nuclear facility.

B. The Legislative History Does Not Require Agency Consideration Of Potential Terrorist Attacks

The legislative history of NEPA does not compel consideration of terrorist attacks. S. 1075—the National Environmental Policy Act of 1969—was introduced in the 91st Congress on February 18, 1969. The first relevant committee report was produced on July 9, 1969. At that time, S.1075 simply required that for environmental impacts, "a finding shall be made that the proposed action has been studied and considered."[10] The committee report did not elaborate on what impacts need to be addressed, or how the requisite study and consideration was to be performed.

The requirement to prepare a "detailed" statement—as opposed to a simple "finding"—was added in an amendment to S. 1075 offered on October 8, 1969.[11] The conference committee report confirms the general purpose and intent of NEPA but does not elaborate on the "detailed" statement requirement.[12] The report does not contain any language suggesting that Congress intended agencies to consider terrorist attacks. Thus, there is nothing in the legislative history of NEPA to indicate that an agency must consider potential terrorist attacks.

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[10] Senate Report No. 91-296, at 2 (July 9, 1969) (emphasis added).

[11] Cong. Rec., S. 12109 (Oct. 8, 1969).

[12] *See* House Report No. 91-756 (Dec. 17, 1969) (91st Cong., 1st Session). A companion House bill was also considered, but it focused on establishing a Council on Environmental Quality ("CEQ"), and contained no provision for a detailed environmental impact statement. *See generally*, House Report No. 91-378, 1969 USCAAN 2751.

C. Under Applicable Judicial Precedent, Compliance With NEPA Is Guided By A "Rule of Reason" Which Does Not Require Agency Consideration Of Terrorist Attacks

NEPA requires an agency to take a "hard look" at the environmental impact of its proposed actions.[13] This hard look, however, is "tempered by a practical 'rule of reason.'"[14] Under this rule of reason:

> an EIS is required to 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.[15]

As discussed in the following sections, a number of factors should be considered in determining whether, under the rule of reason, the impacts of a potential terrorist attack should be evaluated by an agency. Specifically, only those impacts that are reasonably foreseeable need to be considered, and an analysis of a particular impact is not necessary unless it will yield information useful to the agency, Congress, and the public.

1. Terrorist Attacks Do Not Need To Be Considered Because They Are Not Reasonably Foreseeable

Under NEPA, an agency is only required to consider those impacts that can fairly be viewed as reasonably foreseeable.[16] As discussed below, a reasonably foreseeable impact must have a close causal relationship with, and must be a likely or probable environmental

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[13] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)) (*quoting NRDC v. Morton*, 458 F.2d 827, 838 (D.C. Cir. 1972)).

[14] *New York v. Kleppe,* 429 U.S. 1307, 1311 (1976)*; Marsh v. Oregon Natural Resources Council,* 490 U.S. 360 (1989) (discussing that a "rule of reason" applied to whether an agency should prepare a supplemental EIS); *NRDC*, 458 F.2d at 834 ("rule of reason" would support limiting discussion of environmental impacts of alternatives).

[15] *Kleppe*, 429 U.S. at 1311. (*quoting Natural Resources Defense Council v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975))

[16] *Potomac Alliance v. NRC*, 682 F.2d 1030, 1036 (D.C. Cir. 1982); *Swain v. Brinegar*, 542 F.2d 364, 368 (7th Cir. 1976)

consequence of, the agency action. Accordingly, an EIS need not discuss remote and speculative acts and consequences.[17] Finally, the impact must be reasonably foreseeable at the particular facility that is the subject of the proposed action, not just anywhere in the country.

a. *Terrorist attacks are not reasonably foreseeable because there is no close causal relationship between the proposed action and the impacts of such attacks*

The reasonably foreseeable standard is defined in CEQ regulations and case law to require that the impact be caused by, or have a close causal relationship to, the proposed action. Both the courts and the CEQ regulations have required consideration of "direct" and "indirect" impacts,[18] however, in order for an impact to be either direct or indirect, there must be a causal link to the proposed action. Direct impacts are those "which are caused by the action and occur at the same time and place."[19] "Indirect" impacts are those that "are caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable."[20] To place the definition of indirect impacts into perspective, the CEQ elaborates that:

> Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.[21]

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17 *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (en banc), *aff'd* 789 F.2d 26 (1986) (en banc). *New York v. Department of Transportation,* 715 F.2d 732, 754 (2d Cir. 1983). *See Garrett v. NRC*, 11 ERC 1684, 8 Envtl. L. Rep. 20510, 20512 (D. Ore. 1978) (denying an injunction because, among other things, the "possibility of . . . terrorist activities [at the Trojan nuclear power plant] is too remote and speculative to warrant relief under NEPA."). The U.S. Supreme Court has also used the term reasonably foreseeable in a NEPA case, and it did so while holding that a "worst case" analysis was not required under NEPA. *See Robertson v. Methow Valley*, 490 U.S. 332 (1989).

18 40 C.F.R. § 1508.8(a) & (b). The term "effects" is synonymous with "impacts". *Id. See generally Presidio Golf Club v. National Park Svc.*, 155 F.3d 1153, 1163 (9th Cir. 1998).

19 40 C.F.R. § 1508.8(a) (emphasis added).

20 40 C.F.R. § 1508.8(b) (emphasis added).

21 *Id.*

These examples of indirect impacts in the regulations are all probable impacts that have a close causal relationship to the proposed action.[22]

The causation principle contained in the CEQ regulations is supported by NEPA case law. For example, in *Airport Neighbors Alliance v. U.S.*, petitioners argued that the Federal Aviation Administration ("FAA") was required to consider noise impacts from the reconstruction of one runway (#8-26) as a direct or indirect effect of the proposed action, which was to expand a different runway (#3-21) at the same airport.[23] The Tenth Circuit Court of Appeals stated that "Section 1508.8 defines direct or indirect effects as 'effects, which are caused by the [proposed] action.'"[24] In upholding the FAA's environmental analysis, the Court found that there was "no basis to conclude that the expansion of Runway 3-21 is the cause of the reconstruction of Runway 8-26."[25] Thus, an agency "must consider only those indirect effects that are 'reasonably foreseeable,'" and implicit in this standard is the requirement for a close causal relationship between the proposed action and the potential impact.[26]

Other cases also hold that there must be a causal connection between an impact and the proposed action. For example, in *No GWEN Alliance of Lane County v. Aldridge*, the Ninth Circuit Court of Appeals held that the construction of a system of communication towers linking

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22 *See generally Friends of the Earth v. Army Corps of Engineers*, 109 F. Supp. 2d. 30, 41 (D.D.C. 2000) ("increased growth in the area is the only reasonable prediction of what will occur if the casinos are built" since "economic development . . . is the announced goal and anticipated consequence of the casino.").

23 90 F.3d 426 (10th Cir. 1996).

24 *Id.* at 433.

25 *Id.* (emphasis added).

26 *See also Presidio Golf Club.*, 155 F.3d at 1163 (a "highly attenuated chain of causation" that supports standing does not necessarily "lead to injuries cognizable under NEPA."). *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983) ("In the context of . . . NEPA, Courts must look to the underlying policies and 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.").

military installations across the country (and designed solely to remain functional in the event of an enemy nuclear detonation) did not require the Air Force to consider the effects of a nuclear attack on the tower system because "the nexus between construction of [the towers] and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war" under NEPA.[27] The Court found that "the contention that [the tower system] would be a primary target in a nuclear war to be . . . speculative."[28] A nuclear attack was viewed as too attenuated from the proposed federal action in that case, even though the federal action was proposed for the very purpose of surviving and communicating after a nuclear attack.[29]

Similarly, in *Seattle Community Council Federation v. FAA*, the Ninth Circuit was asked to review the adequacy of an EIS which, in supporting implementation of a flight-track pattern Plan for Sea-Tac airport, did not consider the increase in air traffic into the airport as an indirect impact.[30] The Court determined that although air traffic into Sea-Tac airport could increase after implementation of a flight-track pattern Plan, the increase would not be an indirect effect of the Plan because the Plan "merely allows Sea-Tac to handle *existing* traffic with greater efficiency."[31] Accordingly, when an impact is too attenuated or is not caused by the proposed action, it is appropriate to omit its consideration under NEPA because it cannot be considered reasonably foreseeable.

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27 855 F.2d 1380, 1386 (9th Cir. 1988); *Accord Conservation Law Foundation of New England v. Air Force*, 26 E.R.C. 2146, 1987 WL 46370 at *4 (D. Mass.) (lack of "close causal connection" between construction of towers and nuclear war).

28 *No GWEN Alliance of Lane County*, 855 F.2d at 1386.

29 *Id. See also Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1028, 1037 (10th Cir. 2001) (commercial flight activity is not a direct or indirect impact caused by the Colorado Air Space Initiative even though the Initiative was designed to "respond to changes in commercial aircraft arrival and departure corridors at Denver International Airport").

30 961 F.2d 829, 835-36 (9th Cir. 1992).

31 *Id.* (emphasis in original).

The impacts associated with a potential terrorist attack are clearly not direct impacts of an agency's action. Nor should such impacts be characterized as indirect impacts. While the impacts of a terrorist attack may fairly be characterized as "later in time or farther removed in distance," they are not caused by the agency action. A terrorist attack is not caused by licensing, construction, or operation of a nuclear facility, nor is there a close causal relationship between these activities and a terrorist attack. Thus, a potential terrorist attack is not reasonably foreseeable as that term is applied under NEPA because there is an insufficient causal connection between construction and operation of the proposed facility and a potential terrorist attack.

Furthermore, it is not sufficient to argue that "but for" the licensing of a particular facility, a terrorist attack on that facility would not occur. As the Supreme Court has stated, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within § 102 [of NEPA] because the causal chain is too attenuated."[32] Like the possibility of a nuclear detonation from an enemy of the United States in the *No GWEN* case, an intentional malevolent act such as the attack on September 11 is performed by a third-party, independent of the licensing of a nuclear facility. Because there is no close causal relationship between the licensing of the nuclear facility and a terrorist attack, the impacts of such an act need not be analyzed under NEPA.

b. *Terrorist attacks are not reasonably foreseeable at any particular proposed facility*

NEPA does not require an inquiry into whether an event, and its associated impacts, are reasonably foreseeable anywhere in the country. Instead, NEPA requires a determination as to whether such an event and its impacts are reasonably foreseeable at the particular facility that is

[32] *Metropolitan Edison Co.*, 460 U.S. at 774.

the subject of the proposed action. NEPA explicitly requires analysis of the "environmental impacts of the proposed action,"[33] and the NRC has adopted this view.[34]

The Commission and reviewing courts have long concluded that a terrorist attack at a particular nuclear facility is an extremely speculative event. For example, in *Garrett v. NRC*, plaintiff requested a preliminary injunction to prevent indefinite storage of spent nuclear fuel in the Trojan nuclear power plant's spent fuel pool.[35] Plaintiff argued that NEPA required an EIS to be prepared for that action because of the possibility, among other things, of "terrorist activities."[36] The District Court denied the injunction in part because it found that at Trojan, the "possibility of . . . terrorist activities is too remote and speculative to warrant relief under the NEPA."[37] Even in the aftermath of September 11, licensing boards in three other ongoing proceedings have not admitted contentions that argued for a NEPA evaluation of terrorist attacks at specific nuclear facilities.[38]

In promulgating 10 C.F.R. § 50.13 "Attacks and destructive acts by enemies of the United States; and defense activities," the Commission specifically stated:

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[33] 42 U.S.C. § 4332(c)(i) (emphasis added).

[34] *See Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), LBP-00-2, 51 NRC 25, 45 (2000) (inadequate demonstration that "such an accident might occur at this facility") (emphasis added). *See e.g., Sierra Club v. Marsh*, 976 F.2d 763, 778-779 (1st Cir. 1992) ("The fact that auto processing developed as an indirect effect of a port project in Georgia, for example, does not, without more, make the development of auto processing [at the proposed facility] reasonably foreseeable.")

[35] 11 ERC 1684, 8 Envtl. L. Rep. 20510 (D. Ore. 1978).

[36] *Id.* at 20512.

[37] *Id.*

[38] *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC ___, slip op. (Dec. 13, 2001); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC ___, slip op. (Jan. 24, 2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC ___, slip op. (Jan. 24, 2002).

> [A]ssessment of whether, at some time during the life of a facility, another nation actually would use force against that particular facility, the nature of such force and whether that enemy nation would be capable of employing the postulated force against our defense and internal security capabilities are matters which are speculative in the extreme.[39]

The fact that a terrorist attack occurred on the World Trade Center and Pentagon on September 11, 2001, does not render it reasonably foreseeable that a similar attack will occur against a particular nuclear facility. The World Trade Center and the Pentagon are not nuclear facilities and the attacks on those buildings were unrelated to nuclear facilities or nuclear power in general. Furthermore, to the best of DCS' knowledge and belief, there has never been a terrorist attack against any nuclear facility in the United States.

Furthermore, a terrorist attack occurring at a particular nuclear facility is arguably less foreseeable today than it was before September 11. There has been a dramatic increase in the level of attention and resources being paid to the prevention of a terrorist attack in the United States since September 11 by federal, state, and local authorities and industry, including increased airport, airspace, and coastal security, and increased security at NRC and DOE nuclear facilities. This effort should reduce the potential for a terrorist attack, and the Commission should take judicial notice of this national effort. Finally, because the MOX Facility is located well within the boundaries of a secure government reservation, there is even less basis for believing that a terrorist attack targeting the MOX Facility is reasonably foreseeable.

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[39] *Exclusion of Attacks and Destructive Acts by Enemies of the U.S. in Issuance of Facility Licenses*, 32 *Fed. Reg.* 13445 (Sept. 26, 1967) (emphasis added). The Commission repeated this conclusion in its August 4, 1967 Memorandum and Order in *Florida Power & Light Co*, a case in which the prospect of an attack from Cuba was raised. 4 AEC 9 (1967).

c. *Terrorist attacks are not reasonably foreseeable because they are not likely or probable environmental consequences of the proposed action.*

CEQ guidelines and NEPA case law both demonstrate that for an impact to be reasonably foreseeable, it must be a probable environmental consequence of the proposed action. It is certainly not probable that an intentional malevolent act will occur at any particular site, let alone at the MOX Facility.

In providing guidance to agencies on assessing the indirect effects from, for example, future land use, the CEQ states:

> if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decision."[40]

This is consistent with initial CEQ guidance issued immediately after passage of NEPA which required agencies to include in an EIS only the "probable impact" of the proposed action.[41] It is also consistent with the CEQ's 1996 Annual Report which interprets NEPA to require agencies

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[40] CEQ, *40 Most Frequently Asked Questions*, #18, 46 *Fed. Reg.* 18026, 18031 (Mar. 23, 1981) (emphasis added).

[41] CEQ, *Statement On Proposed Federal Actions Affecting the Environment, Interim Guidelines*, 35 *Fed. Reg.* 7390, 7391 (May 12, 1970). *See also* CEQ, *Preparation of Environmental Impact Statements, Proposed Guidelines*, 38 *Fed. Reg.* 10856, 10858 (May 2, 1973).

"to analyze the likely environmental impacts of any major federal action they propose to undertake."[42]

The line of cases discussing Class 9 accidents at nuclear power plants also supports the proposition that the NRC is not required to analyze, under NEPA, improbable or unlikely environmental impacts. In *Carolina Envt'l Study Group v. U.S.*, the D.C. Circuit Court of Appeals concurred with the Commission that "the probability of a Class 9 accident is remote and that its consequences would be catastrophic."[43] The Court stated:

> we cannot say that the A.E.C.'s general consideration of the probabilities and severity of a Class 9 accident amounts to a failure to provide the required detailed statement of its environmental impact. That the probability of a Class 9 accident is remote and that its consequences would be catastrophic are undisputed.[44]

Accordingly, the Court found that the NRC did not err by omitting from its EIS an analysis of Class 9 accidents.[45]

Similarly, in *San Luis Obispo Mothers for Peace v. NRC*, intervenors challenged the NRC's issuance of operating licenses for the Diablo Canyon nuclear power plant in California.[46] In the aftermath of the Three Mile Island accident, the NRC had issued a Statement of Interim Policy requiring EISs to include an analysis of Class 9 accidents. The Policy exempted already-Final EISs from the requirement. Intervenors challenged the non-retroactive effect of the Policy, and sued to force the NRC to supplement Diablo Canyon's EIS with an analysis of the

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42 1996 Annual Report of the Council on Environmental Quality at 4. The 1997 Annual Report does not discuss this issue, and no annual report has been issued since 1997.

43 510 F.2d 796, 799 (D.C. Cir. 1975).

44 *Id.* at 799.

45 *Id* at 799-800. The NRC apparently included a single-paragraph discussion of such accidents in its Final Environmental Statement, stating that "the consequences could be severe." *Id.* at 799.

46 751 F.2d at 1297, 1300.

environmental effects of a core meltdown (a Class 9 accident).[47] In rejecting this challenge, the Court noted that:

> NEPA [ ] does not require the consideration of Class Nine accidents in future EISs, nor does it require that final EISs be supplemented to take account of the Class Nine risk. The approach adopted in the Statement of Interim Policy—to include discussion of such accidents in future EISs—was a discretionary policy choice of the Commission. Because it need not have imposed upon itself the burden it did, the Commission was perfectly free to deny its new policy [*sic*] retroactive effect. We conclude that the Commission did not violate its obligations under NEPA by declining to supplement the Diablo Canyon EIS with a discussion of the environmental impacts of a Class Nine accident.[48]

The NRC has, of course, elected to discuss Class 9 accidents in more detail in its EISs, but, as the D.C. Circuit Court of Appeals stated, NEPA does not require such an analysis.[49]

There are also a number of cases which hold that an impact does not become probable or likely, merely because such an impact has occurred on another project under different circumstances. For example, in *Trout Unlimited v. Morton*, the Ninth Circuit concluded that the EIS for construction of the Tetan dam and reservoir was adequate even though it did not discuss the impact of "second [vacation] home development," such as had occurred at other reservoirs.[50] The Court found that since "the land immediately surrounding the reservoir...was a highly developed agricultural area with only a few small towns, no significant change could be expected either in population or land use patterns," despite the allure of the future reservoir.[51] The Court

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47 *Id.*

48 *Id.* at 1301 (emphasis added).

49 Section C.3 below discusses why it would be impractical and inconsistent with national policy to evaluate the impacts of a terrorist attack under NEPA, even as a matter of discretion.

50 509 F.2d 1276, 1284 (9th Cir. 1974).

51 *Id.*

elaborated that many consequences of a proposed action "while possible, are improbable" and, therefore, need not be considered.[52]

Similarly, in *Sierra Club v. Marsh*, the First Circuit rejected claims that an EIS prepared for a marine port project was required to consider "unlikely" events.[53] Sierra Club argued that the EIS should have included indirect impacts of "water-dependent industry," and identified a study which showed auto processing, stevedoring, and chemical industries development at two other marine port projects in other states.[54] The Court found that the EIS properly limited its analysis of indirect impacts, relying on the agency's conclusion that heavy industry development "was unlikely to develop."[55] This interpretation of the reasonably foreseeable standard—requiring that the impact of the proposed action be probable or likely—is mentioned in other cases.[56]

Thus, the fact that a terrorist attack occurred at the World Trade Center and Pentagon on September 11 does not make it likely or probable that such an attack will occur on a nuclear facility. The D.C. Circuit made a similar finding in *Glass Packaging Institute v. Regan*.[57] Petitioners argued that agency approval of plastic bottles (as opposed to glass) to hold liquor

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52 *Id.* at 1283 (emphasis added).

53 976 F.2d 763 (1st Cir. 1992).

54 *Id.* at 777-78.

55 *Id.* at 777, 779 (emphasis added).

56 *E.g., Dubois v. U.S.D.A.*, 102 F.3d 1273, 1287 (1st Cir. 1996) ("rule of reason in determining whether an EIS contains a reasonably thorough discussion . . . of the probable environmental consequences") (emphasis added); *North Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533, 1540 (11th Cir. 1990) ("'twin aims' of NEPA [includes] ensuring that agency attention will be focused on the probable environmental consequences of the proposed action ...") (emphasis added); *Young v. General Svcs. Admin.*, 99 F. Supp 2d. 59, 74 (D.D.C. 2000) ("purpose of NEPA is for the government agency to make a reasonably thorough discussion of the significant aspects of the probable environmental consequences of a proposed action.") (emphasis added) (internal quotations omitted).

57 737 F.2d 1083, 1093 (D.C. Cir. 1984).

required consideration of the impacts of criminal tampering and poisoning of the liquor.[58] The Court rejected this argument, doubting that "unrelated highly publicized incidents" of tampering of plastic medicine containers makes the impacts of tampering of plastic liquor bottles "within the realm of realistically probable consequences" for purposes of NEPA.[59]

In summary, case law, including judicial rulings on Class 9 accidents, demonstrates that only probable or likely impacts need to be considered under NEPA. Furthermore, case law indicates that the fact that an event or impact has occurred under different circumstances elsewhere in the country does not render it likely or probable with respect to the proposed action. Thus, the terrorist acts of September 11 do not lead to any requirement to discuss the impacts of terrorist attacks on nuclear facilities.

2. Under The Rule Of Reason, Analysis Of The Impacts Of A Terrorist Attack Is Not Required Because Such An Analysis Is Not Meaningful

The purpose of the EIS requirement is to provide decision-makers with sufficiently detailed information to aid in determining whether to proceed with an action in light of the environmental consequences of the proposed action.[60] The EIS also has the purpose of "assuring the public that the agency has considered environmental concerns in its decision making process."[61] But "the scope of an agency's inquiries must remain manageable if NEPA's goals of ensuring a fully-informed and well-considered decision are to be accomplished."[62] As explained

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58 *Id.*

59 *Id.*

60 *See North Buckhead Civic Assoc.*, 903 F.2d at 1540; *Dubois*, 102 F.3d at 1287.

61 *North Buckhead Civic Assoc.*, 903 F.2d at 1540 (citing *Baltimore Gas & Elect. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983)).

62 *Metropolitan Edison Co.*, 460 U.S. at 776.

below, the environmental risks of a terrorist attack are not susceptible to any meaningful evaluation and, therefore, need not be considered under NEPA's rule of reason.

a. *Terrorist attacks against nuclear facilities are not subject to meaningful evaluation under NEPA*

The "rule of reason" permits agencies to avoid meaningless analyses that may unwisely exhaust valuable agency resources.[63] In *Limerick Ecology Action, Inc. v. NRC*,[64] the Third Circuit upheld the NRC's determinations that the risk of a sabotage event was beyond the state of the art of probabilistic risk assessment methodology, was not amenable to quantification, and need not be considered in an EIS.[65] The Appeal Board in the underlying case was aware of "no...principle that would permit reasonable prediction of—like the next high tide—the kind of stochastic human behavior displayed in an act of sabotage."[66] Similarly, the Court stated that "the risk of sabotage is simply not yet amenable to a degree of quantification that could be meaningfully used in the decision making process."[67] As a result, the Court upheld the NRC's decision to omit an evaluation of such risks after making a contemporary evaluation of risk assessment techniques and concluding that "such risks were attended by a great deal of uncertainty."[68]

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63 *Pogliani v. Army Corp of Engineers*, 166 F. Supp. 2d 673, 698 (N.D. 2001) (NEPA requires a "meaningful and reasonable" environmental review); *Limerick Ecology Action v. NRC,* 869 F.2d 719, 743 (3rd Cir. 1989) (petitioner was required to identify meaningful methods to either assess or predict sabotage risks).

64 869 F.2d 719 (3rd Cir. 1989).

65 *Id.* at 741-44.

66 *Id.* at 742, *citing* 22 NRC at 698-701.

67 *Id.*

68 *Id.* at 743.

This position is also consistent with the decision of the Second Circuit in *New York v. U.S. Dept. of Transportation*.[69] In that case, the City of New York challenged the Department of Transportation's ("DOT") NEPA analysis for a final rule regulating transportation of large quantities of radioactive materials.[70] The DOT declined to assess the possibility that "terrorists might disrupt nuclear shipments and precipitate high-consequence accidents," because the NRC's physical security regulations regulate the prevention of malicious or deliberate releases of radioactive materials.[71] The Second Circuit acknowledged the NRC's position that "sabotage presents a real although unquantifiable risk for the transportation of large-quantity radioactive materials."[72] The court quoted a Sandia National Laboratories Report which stated that "[s]abotage involves human motivations and the probability of human actions which are not quantifiable with our present knowledge."[73] However, because "sabotage added an unascertainable risk," the Second Circuit held that the risks of a terrorist attack were "too far afield for consideration" under NEPA.[74]

It has long been the position of the Commission that it is not possible to ascertain the risks posed by terrorist attacks. As the Commission has stated: "The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified."[75] Nothing about September 11 should change this position. It still is not possible to provide a

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69 *New York v. U.S. Dept. of Transportation*, 715 F.2d 732 (2d Cir. 1983).

70 *Id.* at 732, 741-42.

71 *Id.* at 750.

72 *Id.*

73 *Id.*

74 *Id.*

meaningful evaluation of the environmental risks of terrorism. Because the risks of terrorism are not subject to meaningful evaluation, such risks need not be considered under NEPA.

b. *An analysis of a terrorist act similar to September 11 would be akin to a worst case analysis, which is not required by NEPA*

An EIS is not required to include an analysis of a catastrophe or "worst case" event because such analysis does not provide the agency, Congress, or the public with any meaningful information. In *Warm Springs Dam Task Force v. Gribble*, the Ninth Circuit refused to require the Army Corp of Engineers to include an analysis of the catastrophic failure of a proposed dam.[76] The Court stated that since "[e]veryone recognizes the catastrophic results of the failure of a dam; to detail these results would serve no useful purpose."[77] Similarly, in *No GWEN Alliance of Lane County v. Aldridge*, the Court stated that a nuclear war is so obvious a catastrophe that it need not be analyzed under NEPA even if the proposed agency action was to construct a facility whose sole purpose was to function in the event of an enemy nuclear explosion, and petitioners argued it could provoke such an explosion.[78]

Evaluation of terrorist attacks similar to September 11 would be equivalent to evaluation of a catastrophic dam failure or a nuclear explosion. It would not provide decision-makers with any useful information. It would also appear to run afoul of the U.S. Supreme Court's ruling that a worst case scenario is not required by NEPA.

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[75] The NRC has maintained its position since *Limerick Ecology. See Protection Against Malevolent Use of Vehicles at Nuclear Power Plants*, 59 *Fed. Reg.* 38889, 38890 (Aug. 1, 1994)

[76] *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980).

[77] *Id.* at 1026-27.

[78] 855 F.2d at 1386.

In *Robertson v. Methow Valley Citizens Council*,[79] the Supreme Court specifically ruled that NEPA does not require a "worst case" analysis, and noted that the CEQ had modified its regulations to delete any requirement for such an analysis.[80] The Court quoted from the CEQ's response to rulemaking comments on the issue as follows:

> Many respondents to the Council's Advance Notice of Proposed Rulemaking pointed to the limitless nature of the inquiry established by this requirement; that is, one can always conjure up a worse "worst case" by adding an additional variable to a hypothetical scenario. Experts in the field of risk analysis and perception stated that the "worst case analysis" lacks defensible rationale or procedures, and that the current regulatory language stands without any discernible link to the disciplines that have devoted so much thought and effort toward developing rational ways to cope with problems of uncertainty. It is therefore, not surprising that no one knows how to do a worst case analysis.... Moreover, in the institutional context of litigation over EIS(s) the "worst case" rule has proved counterproductive, because it has led to agencies being required to devote substantial time and resources to preparation of analyses which are not considered useful to decisionmakers and divert the EIS process from its intended purpose.[81]

This is particularly relevant to an evaluation of the environmental impacts of a terrorist attack. Requiring an environmental evaluation of an attack similar to those that occurred on September 11 would essentially be equivalent to a requirement for a worst-case analysis."[82]

At almost any commercial or industrial facility in this country, another terrorist attack like that of September 11 would be potentially catastrophic and a tragedy. It is difficult to

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79 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

80 *Id.* at 354. The CEQ regulation that replaced the requirement to conduct a "worst case" scenario only applies to reasonably foreseeable effects and, therefore, remains inapplicable to terrorist attacks. *See* 40 C.F.R. § 1502.22.

81 490 U.S. at 356 n.17, *quoting* 50 *Fed. Reg.* 32236 (1985) (emphasis added).

82 Indeed, in the context of the MOX Facility proceeding, the Licensing Board admitted a contention that NEPA requires the analysis of beyond-design basis events caused by terrorist attacks, and referred to such acts as "massive and destructive acts." LBP-01-35, slip op. at 53.

imagine any event that more qualifies as a "worst case" event than the September 11 World Trade Center and Pentagon attacks. The analysis of such terrorist attacks in an EIS would not provide any new meaningful information to decision-makers, Congress, or the public. Accordingly, NEPA does not require the NRC to assess the impact of a catastrophic terrorist attack on a proposed or existing facility in the aftermath of September 11.

3. Under The Rule Of Reason It Would Be Impractical And Inconsistent With National Policy To Consider The Impacts Of Terrorist Attacks Under NEPA

The Commission has a well-established policy of not requiring an applicant for an NRC license to demonstrate the ability to protect against attacks and destructive acts carried out by enemies of the United States. That policy is embodied in 10 C.F.R. § 50.13 which states, for commercial power reactor construction permit and operating license applicants, that:

> An applicant . . . is 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 facility by an enemy of the United States, whether a foreign government or other person . . . .

Section 50.13, of course, applies directly only to commercial reactor construction permit and operating license applicants and it was also, of course, adopted before NEPA was promulgated. Nevertheless, the policy underlying Section 50.13 has been properly extended to the consideration of terrorist attacks under NEPA and to facilities licensed by the NRC other than commercial reactors.

In promulgating section 50.13, the Commission explained its underlying policy as follows:

> 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 . . . . 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 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.[83]

The Commission elaborated further on this policy in *Florida Power & Light Co.* (Turkey Point Nuclear Generating Units, No. 3 and 4), 4 AEC 9 (1967). In rejecting a claim that the AEC must consider possible attacks and intentional destructive acts by enemies of the United States in issuing construction permits for Turkey Point, the Commission not only restated the above policy as reflected in the Statements of Consideration of Section 50.13, but also stated:

> [E]xamination into [the potential for such attacks and destructive acts] would involve information singularly sensitive from the standpoint of both our national defense and our diplomatic relations. These matters are clearly not amenable to board consideration and determination in the licensing process and we would not propose to make them cognizable issues in the absence of a clear Congressional direction to that end.[84]

The Commission's determination in Turkey Point—and the recitation of its underlying policy rationale—was upheld by the D.C. Circuit in *Siegel v. AEC.*[85]

That policy, furthermore, was extended by the Atomic Safety and Licensing Appeal Board to the Commission's NEPA responsibilities in *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973) ("Shoreham"). In *Shoreham*, an

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[83] 32 *Fed. Reg.* at 13445.

[84] *Turkey Point*, 4 AEC at 14.

[85] 400 F.2d 778 (D.C. Cir. 1968).

intervenor asserted that the risks of sabotage—both foreign and industrial—should have been considered in the Commission's NEPA analyses. In upholding the Licensing Board's decision to exclude consideration of foreign sabotage under NEPA, the Appeal Board stated:

> As far as wartime sabotage is concerned, the Commission regulation which obviates the necessity of its consideration in a licensing proceeding (10 C.F.R. § 50.13) was upheld by the ruling of the District of Columbia Circuit in *Siegel v. AEC* . . . [86]

The Appeal Board went on to state:

> Taking into account the 'rule of reason' which we believe must govern the interpretation of NEPA [citation omitted], 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.[87]

Furthermore, in two of the four Licensing Board decisions presently before the Commission on interlocutory review, the Licensing Boards have concurred with the reasoning in *Shoreham* and with the application of the policy underlying Section 50.13 to the Commission's NEPA obligations.[88] In the *Private Fuel Storage* proceeding, the policy was applied in the context of an independent spent fuel storage installation to be licensed under 10 C.F.R. Part 72, rather than under Part 50.[89] This is clearly the correct result.

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86 *Shoreham*, 6 AEC at 851.

87 *Id.* The NRC has applied the substantive terms of 10 C.F.R. § 50.13 to requirements under NEPA in other cases as well. *See, e.g., Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985), *review declined*, CLI-86-5, 23 NRC 125, *aff'd sub. nom Limerick Ecology Action Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989).

88 *Private Fuel Storage* (Independent Spent Fuel Storage Installation), LBP-01-37, 54 NRC ___, slip op. (Dec. 13, 2001); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit No. 3), LBP-02-05, 55 NRC ___, slip op. (Jan. 24, 2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), LBP-02-04, 55 NRC ___, slip op. (Jan. 24, 2002).

89 *Private Fuel Storage* (ISFSI), LBP-01-37, 54 NRC ___ (2001).

Moreover, inquiry into the potential likelihood and consequences of such acts, whether under the Atomic Energy Act or NEPA, could involve information "singularly sensitive" from a national security perspective.[20] This is particularly the case with the proposed MOX Facility which involves weapons-grade plutonium and access to restricted data and national security information. NEPA's goal of informing the public would not be served by an EIS that could not contain within its publicly-available portions, any such classified information.

Thus, for all of the reasons stated in the Commission's policy rationale underlying Section 50.13, it would neither be practical nor consistent with national policy to undertake an evaluation of the impacts of a terrorist attack under NEPA. Again, the "rule of reason" militates against requiring such an evaluation.

Apart from the Commission's longstanding policy with respect to acts of war and terrorist attacks, there are other practical reasons why, under the rule of reason, agencies should not be required to assess the impacts of such events under NEPA. No criteria exist for determining the likelihood or consequences of a terrorist attack. Risk assessment is not possible using contemporary risk assessment techniques.[21] Furthermore, a qualitative evaluation would not be particularly meaningful, or have any value. After September 11, agencies are not any better able to characterize, even qualitatively, the likelihood of a terrorist attack occurring at a particular location than they were before that date. Instead, a qualitative evaluation of the environmental risks of terrorism would simply degenerate into a worst case analysis, which is

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[20] *Turkey Point*, 4 AEC at 14.

[21] *Limerick Ecology Action*, 869 F.2d at 742; 59 *Fed. Reg.* at 38890 (1994) ("The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified.").

not mandated by NEPA as stated by the U.S. Supreme Court in *Methow Valley Citizens Council.*[92]

One might argue that an "analysis" of the impacts of terrorism could be used to evaluate the proposed action in relation to a "no action" alternative such as license denial. We believe that Chairman Meserve has addressed this point eloquently, however, in stating:

> If we allow the threats of terrorists to determine what we build and what we operate, we would be headed into the past, back to an era without suspension bridges harbor tunnels, stadiums, hydroelectric damns, let alone skyscrapers, liquid natural gas terminals, chemical factories, or nuclear power plants . . . . The problem is not the terrorists' targets, but the terrorists themselves . . . . It is they who need to be eliminated, not the creations of a modern, industrial society.[93]

Similarly, to determine potential consequences, one must consider such factors as the impact of the attack on important structures, systems and components, the source term, and dispersion. However, the range of postulated damage to the facility to the public could run the gamut from *de minimis* to catastrophic, depending upon the assumptions used to determine the mode and success of the attack. There are no criteria for selecting any of these factors. Similarly, if it were assumed that a terrorist attack would result in a catastrophic failure of safety systems, there simply is no method for determining meaningful release fractions for radioactive materials at risk or for determining what the atmospheric dispersion should be. Thus, there is little basis for bounding or characterizing the consequences of a terrorist attack as anything less

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92 490 U.S. 332 (1989).

93 *Nucleonics Week*, Vol. 43, No. 4, at 3 (Jan. 24, 2002). Moreover, the purpose of the MOX Facility is to promote non-proliferation and prevent diversion to terrorists. *See DOE, Record of Decision for the Surplus Plutonium Disposition Final Environmental Impact Statement*, 65 *Fed. Reg.* 1608, 1617-18 (Jan. 11, 2000) ("Carrying out disposition of excess U.S. weapons plutonium, [would] ... reduce long-term proliferation risks posed by this material by further helping to ensure that weapons-usable material does not fall into the hands of rogue states or terrorist groups.").

than worst-case conditions—which, of course, is not required by NEPA and would not meaningfully aid in agency decision-making.

D. It Would Be Inappropriate To Conduct Case-by-Case Evaluations Of Terrorism Given The Commission's Generic Evaluations Of Terrorism

In response to the events of September 11, the Commission is currently conducting a top-to-bottom evaluation of its security requirements for protection against radiological sabotage. As a result of this review, the Commission will most likely place hostile actions against nuclear facilities into one of two categories: 1) hostile actions that fall within the design basis threat for nuclear facilities, and against which the facilities must provide measures to protect the health and safety of the public, or 2) hostile actions that fall within the responsibility of federal, state, and local governments to protect against.

It makes no sense, and would be contrary to the concepts of administrative efficiency, for licensing boards in individual licensing proceedings to reconsider the balance that is being struck by the Commission. Allowing licensing boards to inquire into this area would raise the potential for inconsistent rulings, which would be contrary to the purpose of the Commission's generic evaluation of this very issue.

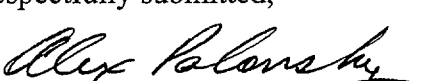
In summary, identification of which hostile actions a nuclear facility must protect against is fundamentally a policy issue that is being resolved by the Commission. Given the Commission's generic evaluation, it would be inappropriate for licensing boards in individual proceedings to attempt to reach their own resolution of this matter.

IV. CONCLUSION

NEPA does not require an agency to consider intentional malevolent acts such as those which occurred on September 11, 2001. Although NEPA requires a hard look at the environmental consequences of a proposed action, this hard look is tempered by a rule of reason. Impacts from a terrorist attack are not reasonably foreseeable at a particular facility since they do not share a close causal relationship with, and are not a likely or probable environmental consequence of, the agency action. Even if the impacts from a terrorist attack are reasonably foreseeable at a particular facility, it would be impractical and inconsistent with national policy to consider such impacts under NEPA. The probability of an attack can not be quantified and any qualitative assessment would degenerate into a worst case analysis, which is not required by NEPA. As a policy matter, the Commission should decide such matters and not permit case-by-case consideration by licensing boards which, as evident from current proceedings, can produce disparate results.

For the foregoing reasons, DCS respectfully requests that the Commission issue an order in this proceeding holding that terrorist acts need not be considered under NEPA and reversing that portion of LBP-01-35 which admitted a contention calling for a NEPA analysis of terrorism.

Respectfully submitted,



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February 27, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of BRIEF OF DUKE COGEMA STONE & WEBSTER IN RESPONSE TO THE COMMISSION'S MEMORANDUM AND ORDER REGARDING AN AGENCY'S RESPONSIBILITY UNDER NEPA TO CONSIDER TERRORISM, were served this day upon the persons listed below, by both e-mail and United States Postal Service, first class mail.

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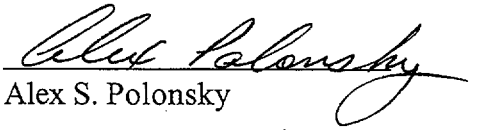

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