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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
DUKE ENERGY CORPORATION)
(McGuire Nuclear Station,)
Units 1 and 2,)
Catawba Nuclear Station,)
Units 1 and 2))

Docket Nos. 50-369-LR
50-370-LR
50-413-LR
50-414-LR

BRIEF OF DUKE ENERGY CORPORATION IN RESPONSE TO
COMMISSION MEMORANDUM AND ORDER CLI-02-06

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BRIEF OF DUKE ENERGY CORPORATION IN RESPONSE TO
COMMISSION MEMORANDUM AND ORDER CLI-02-06

I. INTRODUCTION

Duke Energy Corporation (“Duke”) 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 the license renewal proceeding for the McGuire Nuclear Station and Catawba Nuclear Station 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” or “Board”) certification of this question to the Commission. Concurrently, the Commission has directed that this same question

¹ *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).

be briefed by the parties to three other ongoing NRC licensing proceeding being adjudicated under 10 C.F.R. Parts 50, 70, and 72, respectively.²

As discussed below, Duke 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 as part of the NRC’s licensing process.³ Furthermore, security and terrorism issues are in any event beyond the scope of the NRC’s license renewal process under 10 C.F.R. Parts 54 and 51. Accordingly, the Commission should affirm the Licensing Board’s decision to reject proposed contention 1.1.2, which is the genesis of the certified question.

II. BACKGROUND

Duke submitted a joint application to renew the original operating licenses for its McGuire and Catawba Nuclear Stations on June 13, 2001. After the NRC published notice of acceptance of the license renewal application (“LRA”) for docketing and a concurrent notice of an opportunity for hearing (66 Fed. Reg. 42,893 (Aug. 15, 2001)), the Nuclear Information and Resource Service (“NIRS”) and the Blue Ridge Environmental Defense League (“BREDL”)

² See *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) (accepting certification of terrorism question raised in *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)); *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 Duke supports the arguments and conclusions set forth in the three other briefs in response to the Commission’s Order by *Dominion Nuclear Connecticut, Inc.*, *Duke Cogema Stone & Webster*, and *Private Fuel Storage, L.L.C.*

(collectively, "Petitioners") filed petitions to intervene and requests for hearing pursuant to 10 C.F.R. § 2.714 on September 14, 2001. Petitioners submitted Amended Petitions, containing their proposed contentions, on November 29, 2001.⁴ Both Duke and the NRC Staff opposed admission of Petitioners' proposed contentions in their entirety. A pre-hearing conference was held in Charlotte, North Carolina, on December 18-19, 2001, at which the Licensing Board heard oral argument regarding the admissibility of the proposed contentions.

On January 24, 2002, the Licensing Board issued a Memorandum and Order (LBP-02-04) admitting two consolidated contentions. NIRS Consolidated Contention 1 relates to MOX fuel issues; BREDL/NIRS Consolidated Contention 2 relates to the Severe Accident Mitigation Alternatives ("SAMA") evaluation included in Duke's license renewal environmental reports. Pursuant to 10 C.F.R. § 2.714a(c), Duke has appealed the Licensing Board's decision insofar as it admits these two contentions.⁵ Duke's appeal brief recounts in detail the procedural history of this case and there is no need to repeat that discussion here.

In LBP-02-04, the Licensing Board additionally considered security and terrorism issues as raised in NIRS proposed contention 1.1.2. See LBP-02-04, at 77-78. That proposed contention alleged that the McGuire/Catawba license renewal application fails to analyze potential impacts on plant operation and surrounding communities resulting from possible

⁴ On October 23, 2001, before submission of proposed contentions, BREDL filed a petition before the Commission to dismiss or suspend this license renewal proceeding pending resolution of certain issues, including, *inter alia*, the implementation of regulatory changes to the design basis security threat for nuclear power plants. Both Duke and the NRC Staff opposed the BREDL Petition to Dismiss, and it was in fact later denied by the Commission. See *Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2)*, CLI-01-27, 54 NRC __ (slip op., Dec. 28, 2001).

⁵ See "Notice of Appeal of Duke Energy Corporation from Atomic Safety and Licensing Board Memorandum and Order LBP-02-04 (Ruling on Standing and Contentions)" and accompanying "Memorandum of Law in Support of Appeal of Duke Energy Corporation from Atomic Safety and Licensing Board Memorandum and Order LBP-02-04 (Ruling on Standing and Contentions)" (February 4, 2002) ("Duke Appeal") (pp. 2-4).

terrorist attacks (including by air, by truck, and by water) upon the facilities. The Licensing Board certified to the Commission a question related to the admissibility of this proposed contention. As characterized by the Commission, the certified question is “whether Duke Energy Corporation’s (‘Duke’) license renewal application for the four captioned facilities ‘has . . . realistically or fully analyzed and evaluated all structures, systems and components required for the protection of the public health and safety from deliberate acts of radiological sabotage.’” CLI-02-06, at 1-2. On February 6, 2002, the Commission issued CLI-02-06, to which this brief responds, defining the specific NEPA issue that bears on this question.

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.⁶ In pertinent part, NEPA requires that Federal agencies prepare a “detailed statement,” known as an Environmental Impact Statement (“EIS”), for major Federal actions “significantly affecting the quality of the human environment.”⁷ 42 U.S.C. § 4332(2)(C). That “detailed statement” under NEPA Section 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.*

⁶ *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).

⁷ *Kelley*, 42 F.3d at 1512.

Significantly, NEPA “was not intended to repeal by implication any other statute.”⁸ It mandates that the Federal government use “all practicable means, consistent with other 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.”⁹

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

⁸ *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 694 (1973).

⁹ *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Oklahoma*, 426 U.S. 776, 788 (1976).

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 renewal 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 between private and public responsibilities. 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.¹⁰ 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 enemy attack or sabotage against such structures, like the risk of all other

¹⁰ For example, Section 73.1 was revised in 1994 based on the vehicular bombing of the World Trade Center and another event at the Three Mile Island Unit 1 station. At that time, the NRC determined that the threat of a land-borne attack with a vehicle, transporting adversarial personnel and their 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).

*hostile attacks which might be directed against this country, is a risk that is shared by the nation as a whole.*¹¹

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.*¹² 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.

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

¹¹ 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).

¹² 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.

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.”¹³ Notwithstanding the events of September 11, 2001, there can be no doubt that acts of terrorists (“intentional malevolent acts”) against the United States fall within the scope of 10 C.F.R. § 50.13.¹⁴

¹³ 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).

¹⁴ Obviously, to the extent a threat does not exceed the current design basis external security threat defined in 10 C.F.R. § 73.1(a)(1), licensees will be prepared to address that threat regardless of the perpetrator.

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”¹⁵

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 788.¹⁶ The fundamental conflict need not arise solely from the

¹⁵ 115 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).

¹⁶ 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. 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

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).¹⁷

In *Long Island Lighting Co. (Shoreham Nuclear Power Station)*, ALAB-156, 6 AEC 831, 851 (1973), the Appeal Board explicitly found that 10 C.F.R. § 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 — and presumably its division of responsibility between licensees and the government — “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 such as the one at issue in NIRS proposed contention 1.1.2. For the Commission to determine that 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 Board in *Shoreham*, 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. While NEPA may be procedural, and not specifically action-forcing, any evaluation of consequences of terrorist attacks would serve no purpose other than to identify further defensive and mitigation measures.

(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.”).

¹⁷ 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).

Such a result would inherently conflict with the limitation of 10 C.F.R. § 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.

In *Limerick Ecology Action*, the Third Circuit interpreted the “fullest extent possible” language of NEPA Section 102 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 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 renewal 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 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”¹⁸ In doing so, the Commission has determined that terrorist attacks are not only potentially beyond the plant design basis, but also fundamentally different in kind. For these scenarios the national defense, intelligence assets, and law enforcement capabilities can be credited. A NEPA obligation to assume that these defenses

¹⁸ *Siegel*, 400 F.2d at 784.

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.¹⁹

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 more overriding dividing line than the design basis 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, 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.

¹⁹ 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).

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.” 40 C.F.R. § 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).²⁰

²⁰ 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)).

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.”²¹ 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 national and international levels, to 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 site-specific licensing actions.

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

²¹ 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.

“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 the decision of the 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 *Airport Impact Relief, Inc. v. Wykle*, where 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.²²

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 in connection with a license renewal review. The risk exists today and is not created by the proposed action. Moreover, the effects of a terrorist attack would not be a consequence of the NRC's licensing action; 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

²² 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).

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 reactor license renewal 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* decision²³ 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 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.*²⁴ To have prevailed, the petitioner would have had

²³ *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).

²⁴ *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.

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.²⁵ Risk is a function of probability and consequences. Even though it may be theoretically possible to evaluate the consequences of a sabotage event (although even this would vary greatly depending upon the assumptions), without past experience of attacks on nuclear plants it is not possible to quantify the probability. Certainly the basis offered for NIRS proposed contention 1.1.2 (which included the declaration prepared by Dr. Gordon Thompson for the Millstone Unit 3 case also under review by the Commission) did not include any such quantitative assessment. Absent such data, the results of any analysis would neither be reliable nor useful.²⁶

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*

²⁵ *See 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.”).

²⁶ 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.*

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 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.”²⁷

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. 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

²⁷ It is important to recognize that if these scenarios were found to be “remote and speculative,” 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*.

Homeland Security²⁸ to act as a clearinghouse for Federal agency responses to threats against homeland security.²⁹ 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 Act³⁰ and the Aviation and Transportation Security Act,³¹ 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, 2001, 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 to all nuclear power plant licensees, including Duke, addressing interim safeguards and security

²⁸ "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).

²⁹ *See id.*, §§ 3(a), 3(c) and 3(d).

³⁰ 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.

³¹ P.L. 107-71, 115 Stat. 597 (Congressional Record p. D1168, November 19, 2001).

compensatory measures. These orders call for responses and actions within specified time frames and include specific requirements imposed on licensees.³² 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.³³

From a practical perspective, consideration of the environment 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.³⁴ While the data resulting from a process-driven review of terrorist attack 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

³² 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.

³³ 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).

³⁴ *Vermont Yankee*, 435 U.S. at 558.

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.³⁵

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.

C. Consideration of Intentional Malevolent Acts Is Beyond the Scope of NRC License Renewal Proceedings and NIRS Proposed Contention 1.1.2 Should Not Be Admitted

In its Memorandum and Order (CLI-02-06), the Commission directed the parties to this proceeding to address any other issues they consider relevant to the Licensing Board's certification of this matter to the Commission. Paraphrasing from the Licensing Board's decision, LBP-02-04, slip op. at 76, the issue it posed for Commission review is whether a security contention based on potential terrorist attacks can be a subject matter in a license renewal proceeding. The Licensing Board came to the correct conclusion that, absent a waiver

³⁵ 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.").

under 10 C.F.R. § 2.758, Section 50.13 would bar the issue from the proceeding. However, the Licensing Board left open the possibility that this proposed contention may involve “new and significant information” or “special circumstances” warranting review. Contrary to this suggestion, nuclear plant security issues do not present any plant-specific special circumstances or new information that warrants a review in a license renewal proceeding. Apart from the merits of the NEPA issue framed by the Commission, issues relating to terrorism and radiological sabotage, as articulated in the proposed contention, are beyond the scope of an NRC license renewal proceeding. Plant security is a component of the current licensing basis (“CLB”), and the proposed contention is barred as a matter of law. No matter how framed, NIRS proposed contention 1.1.2 should be deemed inadmissible.

The “nature of the application and pertinent Commission regulations” governs the scope of any NRC proceeding (and, consequently, the scope of contentions that may be admitted in that proceeding).³⁶ That scope, as described in the agency’s notice of opportunity for hearing and in the subsequent Commission order referring the proceeding to the Atomic Safety and Licensing Board, determines the delegated powers of the Licensing Board.³⁷ Thus, to be cognizable, a proposed contention must be material to a matter that falls within the scope of the proceeding.³⁸

³⁶ *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 22 (1998).

³⁷ *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170 (1976) (citing *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear 1), ALAB-249, 8 AEC 980, 987 (1974)).

³⁸ See *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), LBP-90-6, 31 NRC 85, 91 (1990); *Public Service Co. of Indiana*, 3 NRC at 170; *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). See also 54 Fed. Reg. at 33,169-71 (revised rules on admissibility of contentions did not alter pre-existing case law).

The Commission's 1998 *Statement of Policy on Conduct of Adjudicatory Proceedings* makes clear the narrow scope of license renewal proceedings.³⁹ More recently, the Commission provided clear direction regarding the scope of the proceeding in its Referral Order on the Duke license renewal docket:

The scope of this proceeding is limited to discrete safety and environmental issues. *Florida Power and Light* (Turkey Point Nuclear Generating Plant Units 3 and 4), CLI-01-17, 54 NRC 3, 6-13 (2001). This encompasses a review of the plant structures and components that will require an aging management review for the period of extended operation and the plant's systems, structures and components that are subject to an evaluation of time-limited aging analyses. See 10 C.F.R. §§ 54.21(a) and (c), 54.4; *Nuclear Power Plant License Renewal; Revisions, Final Rule*, 60 Fed. Reg. 22,461 (1995). In addition, review of environmental issues is limited in accordance with 10 C.F.R. §§ 51.71(d) and 51.95(c). See NUREG-1437, "Generic Environmental Impact Statement (GEIS) for License Renewal of Nuclear Plants;" *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, Final Rule*, 61 Fed. Reg. 28,467 (1996), amended by 61 Fed. Reg. 66,537 (1996). The Licensing Board shall be guided by these regulations in determining whether proffered contentions meet the standard in 10 C.F.R. § 2.714(b)(2)(iii).⁴⁰

The scope of an NRC license renewal proceeding with respect to safety matters is necessarily limited because, "with the exception of the detrimental effects of aging and a few other issues related to safety only during the period of extended operations, the [NRC's] existing regulatory processes are sufficient to ensure that the licensing bases of operating plants provide an acceptable level of safety to protect the public health and safety."⁴¹ The review to be conducted under 10 C.F.R. Part 54 (and any associated hearing) therefore "is confined to the small number of issues uniquely determined by the Commission to be relevant for protecting the

³⁹ See 48 NRC 18, 22.

⁴⁰ *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-01-20, 54 NRC 211 (2001).

⁴¹ *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 152 (2001).

public health and safety during the renewal term, leaving all other issues to be addressed by the agency's existing regulatory processes."⁴²

Security issues, such as those raised in the proposed contention and the certified question, clearly are beyond the scope of license renewal. In the Supplementary Information accompanying the 1991 final Part 54 rule, the Commission wrote: "[T]he Commission concludes that a review of the adequacy of existing security plans is not necessary as part of the license renewal review process." See "Final Rule, Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,967 (Dec. 13, 1991). Indeed, the Commission in promulgating its 1995 license renewal rule stated that the first principle of license renewal is that, "with the exception of age-related degradation unique to license renewal and possibly a few other issues related to safety only during the period of extended operation of nuclear power plants, the regulatory process is adequate to ensure that the licensing bases of all currently operating plants provides and maintains an acceptable level of safety so that operation will not be inimical to public health and safety or common defense and security." 60 Fed. Reg. 22,461, 22,464 (May 8, 1995); see also 56 Fed. Reg. 64,943, 64,946 (Dec. 13, 1991). Therefore, given that the proposed contention challenges the security CLB, it is outside the scope of a license renewal review. Generic regulatory processes are available and are being used to address evolving security threats.

In LBP-02-04, the Licensing Board in this renewal proceeding found most aspects of NIRS proposed contention 1.1.2 inadmissible because those aspects are generic to U.S. nuclear plants, not specific to McGuire and Catawba. It also correctly noted that "security

⁴² *Id.*; see also *Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 10 (2001) ("Adjudicatory hearings in individual license renewal proceedings will share the same scope of issues as our NRC staff review, for our hearing process (like our staff's review) necessarily examines only the questions our safety rules make pertinent.").

concerns are outside the scope of safety-related aspects of license renewal proceedings.” Additionally, the Board affirmed the applicability of 10 C.F.R. § 50.13 in this license renewal proceeding, which excludes NIRS’s terrorism concerns absent a rule waiver. LBP-02-04, slip op. at 75-76. The Licensing Board, however, perceived a possible “door” with respect to “new information offered by NIRS on plant-specific environmentally-related concerns.” *Id.*, slip op. at 75-76.

Notwithstanding the Licensing Board’s suggestion, consideration of environmental issues in the context of license renewal proceedings was specifically limited by NRC regulations in 10 C.F.R. Part 51 (see in particular Section 51.53(c)), by the NRC’s GEIS for license renewal of nuclear plants (NUREG-1437), and by NRC case precedent. A number of environmental issues potentially relevant to license renewal are classified in 10 C.F.R. Part 51, Subpart A, Appendix B as “Category 1” issues, which means that “the Commission resolved the[se] issues generically for all plants and those issues are not subject to further evaluation in any license renewal proceeding.”⁴³ A very limited number of additional environmental issues, designated as “Category 2” issues in the GEIS, are addressed on a docket-specific basis in renewal cases. Significantly, plant security, terrorism, and sabotage issues are not included as either Category 1 or Category 2 environmental issues; these ongoing matters are deemed to be outside the scope of license renewal.⁴⁴

⁴³ *Turkey Point*, LBP-01-6, 53 NRC at 152-53.

⁴⁴ In issuing its Part 51 regulations for environmental review of license renewal applications, the Commission acknowledged that license renewal involves nuclear plants that are already operating, with environmental impacts of operations that are well understood as a result of operating experience, and that the activities to be authorized would be within this current range of operating experience. *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, Final Rule, 61 Fed. Reg. 28,467, 28,467-68 (June 5, 1996).

The Commission has processes by which to address “new and significant” environmental information in the context of license renewal:

The Commission recognizes that even generic findings sometimes need revisiting in particular contexts. Our rules thus provide a number of opportunities for individuals to alert the Commission to new and significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. *See* 10 C.F.R. § 2.758 Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking. *See* 10 C.F.R. § 2.802. Such petitioners may also use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings, pending a rulemaking or updating of the GEIS. *See* 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11.⁴⁵

The Licensing Board suggested that the Petitioners may have raised “new and significant information” on plant-specific environmental concerns which might form a basis for a rule waiver under 10 C.F.R. § 2.758. LBP-02-04, slip op. at 75. However, the Petitioners did not make that argument and did not request such a waiver. The Licensing Board cannot properly create a Section 2.758 waiver petition where none existed. Moreover, the Licensing Board itself acknowledged that, to admit any aspect of NIRS proposed contention 1.1.2, the contention and bases must show that the concerns are so unusual that they might be said to raise implicitly (since Petitioners did not raise them explicitly) the “special circumstances” needed for 10 C.F.R. §2.758 (*i.e.*, the special circumstances needed to justify waiving the application of Section 50.13, as well as “relevant security and license renewal rules”). *Id.*, at 76-77. The proposed contention made no such plant-specific showing.

⁴⁵ *Turkey Point*, CLI-01-17, 54 NRC at 12. Moreover, the license renewal Environmental Report “must contain any new and significant information regarding the environmental impacts of license renewal of which the applicant is aware.” 10 C.F.R. § 51.53(c)(iv). Of course, any such “new and significant information” considered must relate to the environmental impacts of *license renewal*. *See* 10 C.F.R. § 51.53(c)(3)(iv).

The Commission was specific in its decision in the past not to address security in a license renewal context. It would be wrong to conclude that the generic threat posed to nuclear plants in the post-September 11 world is new information that must be addressed in a plant-specific license renewal review. There is no nexus between this current-day regulatory issue and license renewal. Protection against terrorist threats, and against any hypothetical environmental impacts of those threats, is a current and continuing process that is not uniquely related to license renewal. Moreover, this is a generic issue, not a McGuire/Catawba issue. There has been no showing of anything unique about McGuire and Catawba vis-à-vis security or terrorists.⁴⁶ As such, the vehicle for addressing the issue is a petition for rulemaking under 10 C.F.R. § 2.802, not litigation in an individual license renewal docket.⁴⁷

In sum, the issue of security and the risk of terrorism at nuclear plants should not be addressed in a license renewal proceeding. These are legitimate matters for concern, but they should continue to be addressed as a current and generic regulatory matter through the ongoing regulatory processes. Whether considered to be a security design issue or an environmental

⁴⁶ The proposed contention included a suggestion that, somehow, Duke's still future plans to utilize mixed-oxide ("MOX") fuel at McGuire and/or Catawba may change the situation at McGuire and Catawba related to security issues. However, there has been no showing with a basis that use of MOX fuel would impact either the probability or consequences of a terrorist attack at either McGuire or Catawba. In this regard, the use of MOX fuel seemingly would be well within the range and bounds of other plant-to-plant differences in plant design, location, and security measures that might, in somebody's mind, relate to these plants' relative attractiveness as a terror target.

⁴⁷ The Commission in *Turkey Point* underscored the dichotomy between Section 2.758 (plant-specific) and Section 2.802 (generic) in the context of explaining two avenues available to intervenors and petitioners to raise "new and significant" environmental information argued to be related to a license renewal application. CLI-01-17, 54 NRC at 7 (petitioners with "new information" related to a particular plant may seek a waiver under 10 C.F.R. § 2.758; petitioners with "evidence" that a generic finding is incorrect may petition for rulemaking under 10 C.F.R. § 2.802). However, even the rulemaking vehicle — assuming that it would involve a request for a new Category 2 environmental issue — would fail because the terrorism issue is neither a direct nor indirect impact of license renewal, as discussed above.

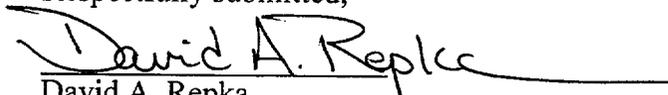
issue, there is insufficient nexus between these matters and the proposed period of extended operation at McGuire and Catawba to justify litigating these matters in the present license renewal proceeding.

IV. CONCLUSION

Consideration of intentional, malevolent acts against McGuire and Catawba is not required by either NRC regulation or NEPA. Furthermore, plant security matters such as these are beyond the scope of a license renewal proceeding. The Commission should reject the NIRS proposed contention 1.1.2 that is the source of the certified issue.

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 a license renewal context or any other NRC licensing context.

Respectfully submitted,



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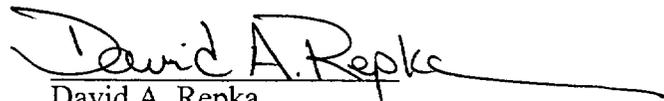
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