

V. RAS 4120

March 12, 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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| In the Matter of |) |
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| PRIVATE FUEL STORAGE L.L.C. |)Docket No. 72-22 |
| |) |
| (Private Fuel Storage Facility) |)ASLBP No. 97-732-02-ISFSI |

**APPLICANT'S REPLY BRIEF ON THE ADMISSIBILITY OF THE THREAT OF
TERRORISM AS A CONTENTION IN THE LICENSING PROCEEDING FOR
THE PRIVATE FUEL STORAGE FACILITY**

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In accordance with the Commission's Order, CLI-02-03, 55 NRC __ (February 6, 2002), Applicant Private Fuel Storage, L.L.C. ("Applicant" or "PFS") hereby files this reply brief on the admissibility of the threat of terrorism. We primarily address the arguments raised by intervenor State of Utah ("State" or "Utah") in its brief¹ urging the Commission to reverse the decision of the Atomic Safety and Licensing Board ("Licensing Board" or "Board") that rejected Utah's terrorism contention as "an impermissible challenge to existing agency regulatory requirements." Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Facility), LBP-01-37, 54 NRC __, slip op. at 10 (December 13, 2001). The NRC Staff has also briefed the issue of the admissibility of terrorism as a contention and urged that the Commission affirm the Licensing Board's ruling.² Pursuant to the Commission's order, parties in three other NRC licensing proceedings

¹ State of Utah's Brief in Response to CLI-02-03 and in Support of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Feb. 27, 2002) ("State Br.").

² NRC Staff's Brief in Response to CLI-02-03, Concerning the Commission's Review of the Referred Ruling in LBP-01-37 (Feb. 27, 2002) ("Staff Br.").

also briefed the issue of the admissibility of terrorism.³ PFS also responds, as pertinent, to arguments raised by the other parties who briefed this issue. We respectfully urge the Commission to affirm the Board's ruling.

PFS's initial brief addressed why the threat of terrorism was inadmissible as either a safety contention or as an environmental contention since the State of Utah's contention sought to raise both issues. Applicant's Brief on the Admissibility of the threat of Terrorism as a Contention in the Licensing Proceeding for the Private Fuel Storage Facility (Feb. 27, 2002) ("PFS Br."). However, the State is no longer pursuing its contention as a safety contention, State Br. at 4 n.2. Nor did the initial briefs from intervenors in the other proceedings in which the Commission has requested briefing, supra note 3, address the issue of admissibility as a safety contention. PFS's reply brief, therefore, focuses on the inadmissibility of terrorism as an environmental contention.

I. BACKGROUND

As described in greater detail in PFS's brief, PFS Br. at 2-7, in October 2001, one month after the September 11 terrorist attacks against the World Trade Center and the

³ 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 (Feb. 27, 2002) ("DCS Br."); Brief of Dominion Nuclear Connecticut, Inc. in Response to Commission Memorandum and Order CLI-02-05 (Feb. 27, 2002) ("Dominion Br."); Brief of Duke Energy Corporation in Response to Commission Memorandum and Order CLI-02-06 (Feb. 27, 2002) ("Duke Br."); Connecticut Coalition Against Millstone and Long Island Coalition Brief in Response to CLI-02-05 Regarding NEPA Requirement to Admit Contention Regarding Environmental Impacts of Acts of Malice and Insanity (Feb. 27, 2002) ("CCAM Br."); Georgians Against Nuclear Energy Brief in Response to CLI-02-04 Regarding NEPA Requirement to Analyze Insider Sabotage and Malevolent Acts for Plutonium Fuel (MOX) Factory at Savannah River Site (Feb. 27, 2002) ("GANE Br."); Nuclear Information and Resource Service Brief in Response to CLI-02-06 Regarding Admissibility of NEPA Issues Relating to Terrorism and Sabotage (Feb. 27, 2002) ("NIRS Br."); Blue Ridge Environmental Defense League (BREDL) response to NRC Memorandum and Order CLI-02-04 (Feb. 27, 2002) ("BREDL 04 Br."); Blue Ridge Environmental Defense League, Inc. in response to the Nuclear Regulatory Commission's Memorandum and Order CLI-02-06 (Feb. 27, 2002) ("BREDL 06 Br.").

Pentagon, the State filed Contention Utah RR in the PFS licensing proceeding.⁴ As now limited by the State to environmental issues, the Contention alleged, *inter alia*, that

the scope of the Applicant's Environmental Report ["ER"] and the Staff's Draft Environmental Impact Statement ["DEIS"]⁵ is too limited to comply with the National Environmental Policy Act ["NEPA"] and 10 CFR §§ 72.34, 51.45, 51.61 and 51.71 because they do not adequately identify and evaluate any adverse environmental effects which cannot be avoided from attacks by suicide mission terrorism or sabotage.

State Req. at 3-4. Based on the events of September 11, the State asserted that "[n]ow a suicide mission to crash a hijacked commercial airliner loaded with jet fuel into a nuclear facility is a reasonably foreseeable event." *Id.* at 3.⁶ In response, PFS and the NRC Staff set forth a host of reasons why Utah RR should be dismissed, including, as pertinent here, that the contention is a challenge to the NRC's requirements concerning the preparation of environmental reports and environmental impact statements.⁷

The Licensing Board held the contention to be inadmissible as it "constitutes an impermissible challenge to existing agency regulatory requirements" that bar the consideration of the terrorist threat asserted by the State. LBP-01-37, slip op. at 10. As a safety issue, the contention impermissibly challenged the Commission's security requirements

⁴ State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (October 10, 2001) ("State Req.").

⁵ Draft Environmental Impact Statement for the Construction and Operation of an Independent Spent Fuel Storage Installation on the Reservation of the Skull Valley Band of Goshute Indians and the Related Transportation Facility in Tooele County, Utah, U.S. Nuclear Regulatory Commission, Office of Nuclear Material Safety and Safeguards, NUREG-1714 (June 2000). The Final Environmental Impact Statement for the PFSF had not been published at the time the State filed its contention nor at the time the Board rendered its decision. CLI-02-03, slip op. at 2 n.3.

⁶ In addition, the State claimed—with no factual support—that other terrorist attacks against the Private Fuel Storage Facility, such as attacks with truck bombs, military weapons, and multiple coordinated groups of terrorists, were now reasonably foreseeable. *Id.* at 14. The State also claimed that transportation of spent fuel to the PFSF and the PFS intermodal transfer facility may be terrorist targets. *Id.* at 11-13. The State, however, did not address these claims in its brief.

⁷ Applicant's Response to State of Utah's Request for Admission of Late-Filed Contention Utah RR (Oct. 24, 2001) at 3-4 ("PFS Resp."); NRC Staff's Response to State of Utah's Request for Admission of Late-Filed Contention Utah RR (Suicide Mission Terrorism and Sabotage) (Oct. 26, 2001) at 7-14 ("Staff Resp.").

for ISFSIs, which, consistent with longstanding Commission policy, do not require ISFSI licensees to defend their facilities against attacks by enemies of the United States. LBP-01-37, slip op. at 12-14. With respect to the consideration of the effects of terrorism as environmental impacts under NEPA, the Board held that those issues were barred by Appeal Board precedent that applied to the preparation of environmental impact statements (“EISs”) the Commission’s rationale behind its not requiring facilities to defend themselves against enemy attacks. *Id.* at 13 (quoting Long Island Lighting Co. (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973)). The Board also ruled that the risk of terrorism need not be considered in environmental impact statements because uncertainty in current risk assessment techniques would not allow its meaningful assessment. *Id.* (citing Limerick Ecology Action v. NRC, 869 F.2d 719, 743-44 (3d Cir. 1989)). The Board then referred the question to the Commission for early review. *Id.* at 15.

II. DISCUSSION

In its brief to the Commission, the State argues that 1) NEPA requires the consideration of all reasonably foreseeable impacts, including those caused by intentional malevolent acts; 2) an airborne terrorist attack against the PFSF is reasonably foreseeable; and 3) the rationale under which NRC case law has barred the consideration of enemy attacks under NEPA does not support the Board’s rejection of Contention Utah RR. *See* State Br. at ii. Intervenors in the other proceedings in which the Commission requested briefing argued similar points. As shown in PFS’s brief and as further elaborated below, the State and the other intervenors are wrong—NEPA does not require the consideration of terrorism or other potential enemy attacks.

A. NEPA Does Not Require Consideration of Assertedly Foreseeable Terrorist Acts or War

The State claims that as a general rule, all “reasonably foreseeable” impacts of a proposed federal action need to be discussed in an EIS. State Br. at 4 (citing Sierra Club

v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992)). The State claims further, without support, that “NEPA does not distinguish between environmental impacts caused by intentional malevolent acts and environmental impacts caused by other types of acts.” Id. The question of “reasonable foreseeability” allegedly turns on the facts and, in the case of intentional malevolent acts, whether such acts are predictable. Id.⁸ The State asserts that “if a perpetrator announces . . . his intention to commit a certain act and has the capacity to do so, that act is obviously reasonably foreseeable for purposes of NEPA.” Id.

Contrary to the State’s claim, the need to discuss asserted impacts of a federal action does not merely turn on their foreseeability as a matter of fact. As a general rule, NEPA requires agencies to consider reasonably foreseeable environmental impacts of proposed actions. See Robertson v. Methow Valley Citizens’ Council, 490 U.S. 332, 356 (1989); see also Kleppe v. Sierra Club, 427 U.S. 390, 401 (1976) (EIS must include statement of “expected adverse environmental consequences of an action.”). The Supreme Court has explained, however, that “impacts” must be “environmental”—they do not include “every impact or effect of [an agency’s] proposed action.” Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 772 (1983) (emphasis added). Further, there must be “a reasonably close causal relationship between [the proposed action] and the effect at issue.” Id. at 774. Therefore, “[i]n the context of . . . NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.” Id. n.7.

As explained in PFS’s brief, given the underlying policy and legislative intent behind NEPA, the statute does not require an agency to assess the consequences of terrorist attacks or war. PFS Br. at 16-21. First, the potential consequences of terrorism involve

⁸ Other intervenors similarly argued that foreseeability is a factual question. E.g., CCAM Br. at 12, 19-20.

issues of foreign policy, national defense, intelligence gathering, and law enforcement, not environmental policy. Id. at 16. The NEPA process, including potential litigation in NRC licensing hearings and federal court, is simply not equipped to handle complex national security issues and highly sensitive information that would be required to accurately assess the threat posed by terrorism. See Romer v. Carlucci, 847 F.2d 445, 456-57 (8th Cir. 1988) (en banc). Assessing the likelihood and consequences of terrorism would require the NRC to inquire deeply into matters of national security that lie far beyond the concerns of environmental policy and hence the scope of NEPA. See id.

Second, the consequences of potential malevolent third party acts, be they crime, terrorism, or war, lie outside the scope of NEPA, in that they lack the requisite nexus with the proposed action and environmental policy. See Glass Packaging Institute v. Regan, 737 F.2d 1083, 1091-94 (D.C. Cir.), cert. denied, 469 U.S. 1035 (1984), overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988). “[M]ere foreseeability does not trigger a duty to consider an alleged environmental effect. The limits to which NEPA’s causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA.” Glass Packaging Institute, 737 F.2d at 1092. Terrorism and war would stretch that chain too far. Nor is NEPA meant to transplant specific regulatory burdens from one federal agency to another under the rubric of environmental protection. Id. Protection against terrorism is the responsibility of the various national security and law enforcement agencies. Requiring the NRC to address the potential likelihood and consequences of terrorism in an EIS would impermissibly impose that responsibility upon it.⁹

⁹ This is not to say that the NRC, given information and assistance from the national security and law enforcement agencies, is incapable of assessing the threat from terrorism in a general sense or, more specifically, determining a prudent level of security for nuclear facilities. It is to say that NEPA does not require the NRC to assess the impacts of potential terrorist attacks and document them in an EIS.

Therefore, the State goes too far when it claims that mere foreseeability as a matter of fact is the criterion that determines whether an asserted effect must be addressed in an EIS. The courts are clear that the consequences of terrorism and war simply lie outside the scope of environmental policy and NEPA.

B. The Fact that the NRC May Amend Facility Security Requirements Because of Potential Terrorist Threats Does Not Mean That NEPA Requires EISs to Address the Effects of Terrorism

The State claims that under NEPA an impact is “reasonably foreseeable” and must be considered in an EIS if it “is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.” State Br. at 5 (quoting Sierra Club, 976 F.2d at 767). Under the State’s NEPA theory, terrorism must assertedly be assessed in EISs because the NRC considered potential terrorist attacks in amending the “design basis threat” against which nuclear power plant security must defend. And this assessment must be made despite the fact that the NRC did not quantify the probability of an attack. Id. at 5-6 (citing Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (1994)).¹⁰ The State requests that the Commission require its EISs to discuss terrorism “to protect the public health and safety” and to inform the public. Id. Such discussion should assertedly be “based simply on the public knowledge of the events of September 11 and the organization and intent of the terrorist group responsible for the events.” Id. The State concludes by quoting NRC Chairman Meserve’s statement that the NRC should be “realistic and prudent” in assess-

¹⁰ Other intervenors argued the foreseeability of terrorism based on the recent history of terrorist attacks and the alleged ineffectiveness of the military in deterring or thwarting such attacks, as well as the Commission’s changes to its security requirements. See, e.g., CCAM Br. at 19-20, 22-23, 27-29; GANE Br. at 20-22, 24-27, 32; NIRS Br. at 16-18.

ing the effectiveness of its current security measures and the Savannah River Licensing Board's statement that terrorist attacks are now reasonably foreseeable. See id. at 8-9.¹¹

The State's argument is thoroughly flawed. First, as pointed out in the previous section and explained in greater detail in PFS's brief, the threat and the effects of terrorism and war are issues of national security, not environmental policy, and hence they lie outside the scope of NEPA. The asserted foreseeability of an enemy attack on the PFSF (for which the State provides no basis), or the fact that the NRC considers the possibility of terrorist attacks in amending its security regulations, does not require the effects of an attack to be considered in an EIS. The Sierra Club "person of ordinary prudence" test is not applicable to the subject of enemy attacks, as is made clear by the courts' treatment under NEPA of potential malevolent acts of third parties. Indeed, Sierra Club did not concern malevolent acts in any respect. See 976 F.2d at 768-69.¹²

In Romer v. Carlucci, 847 F.2d at 456-57, and No GWEN Alliance of Lane County v. Aldridge, 855 F.2d 1380, 1385-86 (9th Cir. 1988), Courts of Appeals rejected claims that EISs for a nuclear intercontinental ballistic missile system (Romer) and an Air Force nuclear command and control radio tower system (No GWEN) had to discuss the effects of nuclear war that those systems were intended to deter (or allegedly could have caused) and in which those systems could have been used.¹³ This was despite the fact that throughout the Cold War, the United States spent billions of dollars per year, employed thousands of people, and built systems like these for the very purpose of deterring

¹¹ Quoting Dr. Richard A. Meserve, Nuclear Issues in the Post-September 11 Environment, No. S-01-029 at 1 (Nov. 8, 2001); Duke Cogema Stone & Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ___, slip op. at 29 (Dec. 6, 2001).

¹² The question there was whether the EIS had correctly assessed the types of industries that were likely to develop as a result of the building of a new marine cargo terminal in Maine. Id.

¹³ As discussed in the PFS brief, PFS Br. at 21-22, No GWEN rejected the claim because whether any particular tower would be a target was speculative and because the nexus between the construction of the towers and nuclear war was too attenuated to require discussion in the EIS.

and potentially fighting a nuclear war with the Soviet Union. Under the Sierra Club test of whether “a person of ordinary prudence would take it into account in reaching a decision,” the United States very clearly took the possibility of nuclear war into account in reaching its national security decisions. Yet, NEPA does not require the analysis of the effects of nuclear war.

In Glass Packaging Institute, 737 F.2d at 1091-94, the court rejected a claim that an environmental assessment regarding a decision to allow the packaging of liquor in plastic bottles had to discuss the potential injury or death that could result from criminal tampering with the bottles. This was despite the fact that Congress had specifically conferred upon the Food and Drug Administration the power to control tampering with food, drugs, and consumer products. Id. at 1092. Thus, the possibility of criminal tampering was being taken into account in substantive decisions, but NEPA did not require a discussion of the effects of tampering.

Similarly, in Limerick Ecology Action, 869 F.2d at 743-44, and City of New York v. DOT, 715 F.2d 732, 750 (2d Cir. 1982), the courts held that the NRC and DOT did not need to consider, respectively, the effects of sabotage in EISs for nuclear power plants (Limerick) and in environmental assessments for the transportation of nuclear material (City of New York). This was despite the fact that the NRC mandated security measures against external and internal sabotage at the plants, see Limerick, 869 F.2d. at 742, and security measures against sabotage or terrorist attack against the DOT-regulated material shipments, see City of New York, 715 F.2d at 750.

Therefore, the fact that the NRC imposes substantive security requirements against threats that include some types of terrorist attacks does not mean that the NRC must analyze the consequences of terrorist attacks under NEPA. Although the State seeks to transform the NRC’s changes in the design basis threat to address vehicle bombs into an acknowledgement of NEPA responsibility, State Br. at 6-8, the Commission quite

clearly recognizes that the design basis threat concept is a safety concept, not a NEPA one. As it stated in proposing the vehicle bomb threat rule on which the State relies, “The design basis threat is a hypothetical threat that is not intended to represent a real threat.” 58 Fed. Reg. 58,804 (1993). NEPA does not require consideration of “hypothetical threats.” Furthermore, the fact that the government takes actions to deter or thwart enemy attacks does not mean that attacks against a facility like the PFSF are likely or that they are likely to succeed. On the contrary, the entire purpose of security measures is to deter and prevent such attacks.¹⁴ Indeed, in holding that NEPA does not require the discussion of the consequences of various malevolent third party acts, courts have found the threats to be speculative, see No GWEN, 855 F.2d at 1386; City of New York v. DOT, 715 F.2d at 750; Limerick Ecology Action, 869 F.2d at 743, or the risks to be low, see Glass Packaging Institute, 737 F.2d at 1092 & n.49, 1094;¹⁵ City of New York, 715 F.2d at 750.

The State’s argument that an NRC EIS discussion should be “based simply on the public knowledge” of the attacks of September 11 and the terrorist group that committed them, State Br. at 7,¹⁶ is also highly flawed. As PFS pointed out in its brief, PFS Br. at 25-26, merely assuming that the attacks of September 11 would be repeated at the PFSF without considering all of the measures the government has taken to respond to terrorism since then would paint a distorted picture of the actual threat posed to the PFSF. Such a misleading approach is impermissible under NEPA, in that at best it would not help or at

¹⁴ Deterrence is relevant even to “suicide mission” terrorism, in that the planners of the attacks do not wish to fail. They have limited resources for conducting attacks and for political reasons, such as attracting further support, they do not wish to be seen as ineffective.

¹⁵ “A decision that no significant environmental impact will occur is buttressed by the conformity of the proposed federal action to federal regulations governing other aspects of that action’s interrelationship with the physical environment.” Id. at 1092. Thus, even if terrorist attacks fell within the scope of NEPA, the fact that the NRC explicitly considers the possibility of terrorism in setting its security standards would support a finding that the ultimate risk posed terrorism is very low.

¹⁶ Intervenor GANE made a similar argument. GANE Br. at 23.

worst it would positively distort the environmental decisionmaking process. See Methow Valley, 490 U.S. at 356. Further, as the Commission has recognized, an accurate assessment of the threat posed by terrorism would require the Commission to inquire deeply into “singularly sensitive” matters of foreign policy and defense. Florida Power & Light Co. (Turkey Point Nuclear Generating Units 3 and 4), 4 AEC 9, 14 (1967), aff’d sub nom, Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968); see PFS Br. at 16, 18. As the Commission and the courts have also recognized, “These matters are clearly not amenable to board consideration and determination in the licensing process” Turkey Point, 4 AEC at 14; see Romer, 847 F.2d at 456-57.

Finally, the State’s claim that “[o]nce again, members of the nuclear industry are resisting taking the newly-revealed threat seriously in terms of their own facilities” simply because PFS opposed the admission of the State’s contention, State Br. at 7, is utterly false. PFS takes security very seriously and must comply in all respects with the Commission’s security requirements, whatever the Commission ultimately decides they should be.

C. The Rationale Behind 10 C.F.R. § 50.13 Supports the Rejection of Terrorism as a NEPA Issue

The State’s final argument is that the Licensing Board’s reliance on the rationale underlying 10 C.F.R. § 50.13 as adopted by the Appeal Board in Shoreham, was misplaced. State Br. at 9. The State claims that section 50.13 was not intended to control whether terrorist attacks need to be considered under NEPA and that the reasons relied on by the Commission in adopting that rule do not (or no longer) support the Board’s rejection of the contention. Id. at 10.

The State is incorrect. Its argument artificially splinters the Commission’s rationale behind section 50.13 into ostensibly unrelated pieces and attempts to show that the pieces, out of context, do not support the Shoreham Appeal Board’s holding. The Com-

mission's fundamental points were that protection against enemy attacks is a matter of foreign policy and national security, that assessing the nature of potential enemy attacks against a given facility is a speculative endeavor, and that because of the complex and highly sensitive nature of the information required to accurately assess the threat of an enemy attack, it is unwise as a matter of public policy to litigate the issue before NRC licensing boards. As explained in PFS's brief, those points remain sound reasons for not considering the consequences of terrorism in an EIS.

1. The Fact that Section 50.13 Was Promulgated Under the Atomic Energy Act Does Not Require the Consideration of Terrorism In EISs

Before addressing the Commission's rationale behind section 50.13, the State first argues that section 50.13 was promulgated under the Atomic Energy Act, while Contention Utah RR is (now) a NEPA contention.¹⁷ State Br. at 11.¹⁸ The State asserts that the Atomic Energy Act does not limit or preclude NEPA. *Id.* (quoting Limerick Ecology Action, 869 F.2d at 729).

The State's suggestion that the PFS Licensing Board or the Shoreham Appeal Board assumed that the Atomic Energy Act precluded or limited NEPA is misplaced. The Appeal Board stated:

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 the regulation.

Shoreham, ALAB-156, 6 AEC at 851 (emphasis added, footnote omitted). The Appeal Board quoted the factors that had led the Commission to conclude that defense against enemy attacks was a matter of national security, not NRC licensing. *Id.* (quoting Siegel, 400 F.2d at 782). In rejecting Contention Utah RR as an environmental contention, the

¹⁷ Other intervenors made similar arguments. *E.g.*, CCAM Br. at 13-14.

¹⁸ As noted earlier, the State is no longer pursuing the admission of Contention Utah RR as a safety contention. State Br. at 3 n.2.

PFS Board quoted part of the passage above and cited Limerick Ecology Action's holding that sabotage risk need not be included in an EIS because current risk assessment techniques would not allow meaningful risk assessment. LBP-01-37, slip op. at 13. Nowhere did the PFS Licensing Board or the Shoreham Appeal Board state or suggest that the scope of NEPA was controlled by the Atomic Energy Act.¹⁹

2. The NRC Has Not Taken Responsibility from the National Security Apparatus for Protection Against Enemy Attacks

The State argues next that the Commission's first rationale in support of section 50.13, that the protection of the United States against hostile attacks is a responsibility of the national security apparatus, does not allow it to exclude the effects of terrorism from its EISs. State Br. at 11. First, since the function of NEPA is informational rather than regulatory, the State argues that a discussion of terrorism in an EIS "would not be intruding on the prerogatives of the defense establishment or the agencies responsible for internal security." Id. at 12. Second, the NRC allegedly no longer leaves the issue of defense against enemy attacks to the national security apparatus in that it considers terrorism in establishing its physical security requirements for licensees. Id. at 12-15.²⁰

Contrary to the State's first line of attack, looking to the military to deal with the problem of enemy attacks is not a matter of legal prerogative, but one of practicality and defining the scope of environmental policy. As a practical matter, neither the NEPA process nor NRC public hearings are equipped to handle complex national security issues and highly sensitive national security information. See Romer, 847 F.2d at 456-57; Turkey Point, 4 AEC at 14; section II.A, supra; PFS Br. at 17-18. Moreover, the potential

¹⁹ Therefore, the Savannah River Licensing Board was wrong when it concluded that, because section 50.13 states that it is applicable to reactors, the Shoreham Appeal Board ruling is only applicable to reactors. Savannah River, LBP-01-35, supra note 13, slip op. at 52. See also Florida Power and Light Co. (Turkey Point Nuclear Generating Units No. 3 and No. 4), 3 AEC 173 (1967) (Commission policy of not requiring licensees to defend against enemy attacks applies to facilities generally, not just reactors).

²⁰ Other intervenors made similar arguments. E.g., CCAM Br. at 15-16.

consequences of terrorism and war are issues of national security, not environmental policy. See Romer, 847 F.2d at 456-57; Glass Packaging Institute, 737 F.2d at 1091-92; section II.A, supra; PFS Br. at 16-21. Thus, they lie outside the scope of NEPA.

Contrary to the State's second claim, the Commission's ongoing consideration of terrorism in establishing its security requirements does not mean that the Commission has taken responsibility for protecting U.S. nuclear facilities from enemy attacks. While the Commission's security requirements are more stringent now than when it promulgated section 50.13, the Atomic Energy Act has always mandated that facility licensees provide security against loss or diversion of nuclear material and sabotage. See Siegel, 400 F.2d at 784; Turkey Point, supra note 19, 3 AEC 173.²¹ It has long been recognized that there is a line between "design basis" threats against which licensees must defend and hostile attacks to which licensees can look to the government for protection. See, e.g., Siegel, 400 F.2d at 784; Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126, 137-38 (1985). The Commission's recent strengthening of its security requirements in no way suggests that it is no longer relying on the national security apparatus for protecting U.S. nuclear facilities against enemy attacks. It only reflects what is prudent, based on the assessment of the intelligence community, in light of the current high-level threat environment. All Operating Power Reactor Licensees (Order Modifying Licenses (Effective Immediately)) (Feb. 25, 2002).

In any event, as discussed in section II.B, supra, the fact that the NRC now considers terrorism in establishing its substantive security requirements does not require it to

²¹ Even prior to the 1973 Shoreham ruling, the AEC considered the potential for external attacks against nuclear facilities in evaluating the facilities' security. See, e.g., Trustees of Columbia University, ALAB-3, 4 AEC 349, 353 (1970) (security against "industrial sabotage" and "civil disturbance"); Commonwealth Edison Co. (Zion Station, Units 1 and 2), LBP-73-35, 6 AEC 861, 891-92 (1973) (security against "subversive actions").

discuss the consequences of terrorism in its EISs. The consequences of terrorism simply lie outside the scope of environmental policy and NEPA.

3. Terrorism Remains Outside the Scope of NEPA Whether or Not Facilities Can Be Designed to Withstand the Effects of Military Weapons

The State claims that the Commission's second rationale underlying section 50.13, that it is impractical to design nuclear facilities to withstand the effects of modern military weapons and that the nation's defense establishment constitutes the basic safeguard against enemy attack, is irrelevant to NEPA's requirement to discuss environmental impacts. State Br. at 13-14.²²

The State is incorrect. The specific rationale relied upon by the Shoreham Appeal Board in this regard was:

(1) the impracticality, particularly in the case of civilian industry, of anticipating accurately the nature of enemy attack and of designing defenses against it [and] (2) the settled tradition of looking to the military to deal with this problem and the consequent sharing of its burdens by all citizens,

....

Shoreham, ALAB-156, 6 AEC at 851. This goes to the fact that assessing the threat of enemy attack is a speculative endeavor (which is not required under NEPA) and that the consequences of terrorism are issues of national security, not environmental policy. The extremely speculative nature of assessing enemy attacks is discussed in the PFS brief, PFS Br. at 15, 21-23, and has consistently been recognized by the Commission, Turkey Point, 4 AEC at 13-14, and the courts, see No GWEN, 855 F.2d at 1386; Limerick Ecology Action, 869 F.2d at 743-44; City of New York v. DOT, 715 F.2d at 750. The fact that the consequences of terrorism lie outside the scope of environmental policy has also been discussed previously. Section II.A, supra; PFS Br. at 16-21.

²² Intervenor GANE argued that this rationale is no longer valid because one could evaluate the effectiveness of various defenses against postulated terrorist attacks. GANE Br. at 22. GANE misses the point that terrorism and war lie outside the scope of NEPA and that whether an attack would be made in the first place remains a speculative question.

4. **Requiring Environmental Assessments for All Facilities to Consider the Consequences of Terrorism Would Impermissibly Distort the Decisionmaking Process**

Next, the State argues that the Commission's observation that the burden of national defense and the risk of enemy attack is shared by the nation as a whole does not relieve it from its alleged duty to consider the consequences of terrorist attack under NEPA. State Br. at 14. That observation, however, merely followed from the Commission's prior statement that "the defense and internal security capabilities of this country constitute, of necessity, the basic 'safeguards' as respects possible hostile attacks by an enemy of the United States." Turkey Point, 4 AEC at 13. Matters of national defense such as the potential consequences of enemy attacks, however, lie outside the scope of NEPA. See section II.A, supra, PFS Br. at 16-21.

Indeed, the fact that the risk of enemy attack is shared by the nation as a whole points to two problems with assessing the risk to the PFSF from terrorism in an EIS. First, as the Commission recognized in 1967 (and as is equally true today), we live in a modern, complex, industrial society, in which there are many vital facilities that an enemy might wish to attack. Turkey Point, 4 AEC at 13.²³ It is highly speculative to predict where an enemy might strike. On September 11, the terrorists attacked three large buildings of symbolic importance—but not nuclear facilities. If there are other attacks, they might occur against any of a myriad of targets of symbolic, political, or strategic importance.²⁴ Thus, the State can only speculate that there is any significant likelihood that the PFSF would be targeted. See No GWEN, 855 F.2d at 1386 (rejecting as speculative claim that particular radio tower would be targeted in nuclear war). Simply assuming

²³ Intervenor CCAM/CAM's and GANE's argument that the burden of enemy attack is unfairly borne by those living near nuclear facilities, CCAM Br. at 20; GANE Br. at 22, applies, in fact, to any facility, anywhere, that might be attacked.

²⁴ See, e.g., Eric Pianin, "Study Assesses Risk of Attack on Chemical Plant," Wash. Post, March 12, 2002 at A8.

that the PFSF would be attacked would constitute “worst case” analysis impermissible under NEPA. See Methow Valley, 490 U.S. at 356; PFS Br. at 23-26.

Second, if all federal agencies followed the State’s course and required activities for which environmental assessments were prepared to discuss the possible consequences of terrorism as asserted by the State, the assessments would simply read that major facilities would be destroyed, the occupants (and perhaps people outside the facilities) would be killed, and the impact would be “high.” But the Department of Transportation does not include in environmental assessments prepared in connection with airport construction or commercial airline activity the environmental impacts of a hijacked commercial airliner crashing into a major metropolitan area. Nor does the Federal Energy Regulatory Commission include the environmental impacts of successful terrorist attacks on dams in its EISs. This sort of worst case analysis, suggesting that a large portion of our society will be destroyed by terrorist attack, would “distort the decisionmaking process by over-emphasizing highly speculative harms” and it is not required under NEPA. See Methow Valley, 490 U.S. at 356; PFS Br. at 23-26.

5. The Assessment of the Threat of Terrorism Remains Speculative and Outside the Scope of Environmental Policy and NEPA

The State’s last argument is that the Commission’s conclusion, that the assessment of the likelihood and potential consequences of enemy attacks against a particular facility is “speculative in the extreme,” is no longer valid in light of the Commission’s consideration of terrorism in establishing its security requirements and its development of “a sophisticated capacity to assess the seriousness and likelihood of terrorist threats against nuclear facilities.” State Br. at 14-15. The State asserts that if the Commission has this capacity, it should be able to assess whether a deliberate aircraft crash at the PFSF is reasonably foreseeable. Id. at 15.

The State's argument is misplaced. Assessing whether a particular facility would be attacked, the nature of the attack, and whether the attack would be successful remain highly speculative endeavors. See PFS Br. at 22-26. The fact that the Commission prudently requires security measures against certain attacks or responds to threats with warnings or orders does not mean that those attacks will occur at the PFSF (or any other facility) or that they will be successful, or that the Commission can predict in advance the likelihood of an attack. Indeed, as discussed above, the purpose of security is to deter attack and defeat those attacks that occur. See 59 Fed. Reg. at 38,893 (NRC design basis threat is conservative vis-a-vis the threat estimate). Thus, one cannot merely say that because the Commission requires security or has warned against an attack of a certain type, a successful attack of that type is reasonably foreseeable and the consequences of that attack must be discussed in an EIS.

In the end, the State's argument is essentially the same as its earlier argument that because the Commission now takes terrorism into account in establishing its security requirements, terrorist attacks are reasonably foreseeable and their impacts must be discussed in EISs. As discussed in section II.B, supra, under the courts' interpretation of NEPA, that argument fails. There are any number of malevolent third party threats against which the government prudently takes precautions or raises defenses. Raising defenses, however, does not bring the assessment of the consequences of the materialization of those threats within the ambit of NEPA. See Romer, 847 F.2d at 456-57 (nuclear war); No GWEN, 855 F.2d at 1385-86 (nuclear war); Limerick Ecology Action, 869 F.2d at 743-44 (nuclear power plant sabotage); City of New York v. DOT, 715 F.2d at 750 (terrorist attack or sabotage against nuclear material shipments); Glass Packaging Institute, 737 F.2d at 1091-94 (criminal tampering with food).

D. NEPA Does Not Require the Consideration of Design Alternatives to Mitigate Terrorism or War Damage

Other intervenors argued in their briefs that EISs should consider design alternatives for nuclear facilities to determine how damage caused by postulated terrorist attacks could be limited.²⁵ That argument lacks merit, however, in that, as discussed previously, the assessment of the consequences of terrorism and war lies outside the scope of environmental policy and NEPA. Section II.A, *supra*, PFS Br. at 16-21.²⁶ Indeed, under the intervenors' reasoning, one should consider the mitigation of potential terrorist or war damage to all of the proposed major facilities in the United States and suggest that buildings be limited to three stories in height, airports be located 50 miles from cities, valleys beneath hydroelectric dams be evacuated, and stadiums and amphitheatres never be built, etc. This was not the purpose of NEPA and would be of no practical value to environmental decisionmakers. *See Methow Valley*, 490 U.S. at 356.

III. CONCLUSION

Fundamentally, and regardless of the Commission's actions to anticipate or defend against possible terrorist threats, the potential effects of an attack by an enemy are issues of foreign policy, national defense, intelligence gathering, and law enforcement, not environmental policy. It is not possible to accurately assess the likelihood and potential severity of enemy attack without delving deeply into those realms. Moreover, the potential effects of the attack are dictated largely by the potential actions of the attacker—a third party—not the proposed action being licensed. Assessing the likelihood

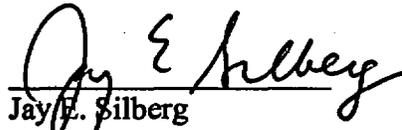
²⁵ CCAM Br. at 31-34; GANE Br. at 33-34.

²⁶ Moreover, even if terrorism fell within the scope of NEPA, in *Limerick Ecology Action*, which is the basis for the NRC's consideration of severe accident mitigation design alternatives ("SAMDA") in EISs, the court rejected the plaintiff's argument that the NRC had to consider the consequences of sabotage. *See* 869 F.2d at 743. Furthermore, the court only held for the plaintiff with respect to SAMDAs because the Commission had not found in that case that the risk of severe accidents was remote and speculative. *Id.* at 739. In subsequent cases, where the Commission has found postulated accidents to be remote and speculative, it has not considered their impacts or design alternatives to mitigate them. *E.g., Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 386, 388 & n.8 (2001).

and the effects of an enemy attack is essentially unrelated to the effects of the proposed federal action upon the environment. Therefore, the issue of enemy attacks lacks the requisite nexus with environmental policy and hence lies outside the scope of NEPA. Assessing the likelihood that a given facility would be attacked and the consequences of the attack remain speculative endeavors whose assessment NEPA does not require.

For the foregoing reasons, the Applicant requests that the Commission affirm the Board's decision denying Utah's request to admit Contention Utah RR and reaffirm that terrorism contentions are inadmissible whether cast as issues of public health and safety, common defense and security, or the environment.

Respectfully submitted,



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Dated: March 12, 2002

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

Before The Commission

| | | |
|---------------------------------|---|---------------------------|
| In the Matter of |) | |
| |) | |
| PRIVATE FUEL STORAGE L.L.C. |) | Docket No. 72-22 |
| |) | |
| (Private Fuel Storage Facility) |) | ASLBP No. 97-732-02-ISFSI |

CERTIFICATE OF SERVICE

I hereby certify that copies of the Applicant's Reply Brief on the Admissibility of the Threat of Terrorism as a Contention in the Licensing Proceeding for the Private Fuel Storage Facility were served on the persons listed below (unless otherwise noted) by e-mail with conforming copies by U.S. mail, first class, postage prepaid, this 12th day of March, 2002.

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