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March 12, 2002



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

# REPLY OF DOMINION NUCLEAR CONNECTICUT, INC. TO CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION BRIEF IN RESPONSE TO CLI-02-05

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# REPLY OF DOMINION NUCLEAR CONNECTICUT, INC. TO CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION BRIEF IN RESPONSE TO CLI-02-05

## I. INTRODUCTION

Dominion Nuclear Connecticut, Inc. ("DNC") herein replies to the February 27, 2002, brief filed jointly by the Connecticut Coalition Against Millstone and the Long Island Coalition Against Millstone (collectively, "Intervenors") in this proceeding.[1] The Intervenors' brief, along with those of DNC and the Nuclear Regulatory Commission ("NRC") Staff, responded to the February 6, 2002, Memorandum and Order of the Commission which accepted certification of an issue relating to risks from acts of terrorism.[2] As discussed below, DNC maintains 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 — in site-specific NEPA evaluations of

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1 "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," February 27, 2002 ("Intervenors' Brief").

2 *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).

license amendments such as the one at issue here — the risk of intentional malevolent acts against commercial nuclear power reactors. Accordingly, there is no basis for an environmental contention on these risks in this license amendment proceeding.

## II. ARGUMENT

In the interest of efficiency, DNC hereby incorporates by reference its prior detailed discussion of the requested license amendment at issue, the procedural posture of this proceeding, as well as the issue posed in CLI-02-05.[3] In this reply, DNC specifically addresses only the Intervenors' fundamental concerns and claims.

First, from an overarching perspective, the Intervenors' security concerns are being properly, effectively, and comprehensively addressed by the NRC — pursuant to the agency's authority under the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2201 *et seq.* ("AEA") — as part of a national response to the events of September 11, 2001. Thus, the Intervenors' attempt to expand NEPA and apply it as a vehicle to address post-September 11 security and design basis issues at nuclear power plants is both unnecessary and bad law. These issues currently reside at the forefront of the national security agenda and will remain there regardless of whether NEPA is stretched well beyond its purpose and provisions as envisioned by the Intervenors.

Second, the Commission's "longstanding policy of refusing to consider the consequences of acts of malevolence and insanity in EIS's" (Intervenors' Brief, at 2) is most certainly rational and in conformance with NEPA. Apart from the "rule of reason," NEPA's process-driven mandates cannot — and do not — supercede the substantive provisions of

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[3] "Brief of Dominion Nuclear Connecticut, Inc. in Response to Commission Memorandum and Order CLI-02-05," February 27, 2002 ("DNC's Brief"). *See* §§ I and II.

existing law, including 10 C.F.R. § 50.13. Consistent with that regulation established in accordance with the AEA, the NRC has properly excluded consideration of enemy acts and sabotage from NRC safety and environmental reviews, and from its licensing proceedings.

Finally, specific to the Millstone Unit 3 spent fuel pool ("SFP") expansion at issue in this proceeding, the Intervenors are in error when they conclude that there is "new and significant information" relevant to SFP accidents dictating a NEPA evaluation of acts of malevolence or insanity. The information relied upon by the Intervenors does not demonstrate the existence of a beyond design basis accident that must be considered under a NEPA "rule of reason." The Intervenors continue to press for NEPA consideration of accidents and consequences that are: (1) not caused by the NRC's licensing action; (2) not quantifiable; and (3) beyond the fundamental scope of responsibility defined by 10 C.F.R. § 50.13. At bottom, notwithstanding the Intervenors' hyperbole that the impacts of a SFP accident at Millstone 3 "could be extremely severe, even apocalyptic in nature" (*id.*, at 31-32), the NEPA argument is without legal basis.

A. The NRC Is Engaged in a Robust Evaluation of Potential Terrorist Activities Under the Atomic Energy Act and Need Not Analyze the Plant-Specific Impacts of Such Activities Pursuant to NEPA

As a factual matter, it is impossible to deny the existence of the generalized threat that terrorists currently pose to our nation, its infrastructure, and citizens.[4] At the same time, however, the Intervenors in their brief turn a blind eye to the numerous activities and initiatives that have been launched by the United States government on both the international and national levels — including very specific actions aimed at reducing the risks posed to commercial nuclear

[4] The quantification of such risk at a particular commercial nuclear reactor, however, is quite another matter.

facilities. Reading their brief, one would conclude that the NRC is completely "ignor[ing] the potential for acts of malevolence. . . ." (Intervenors' Brief, at 2.) Such is quite clearly not the case.

DNC's Brief discusses many of the actions the United States government has implemented since September 11. (DNC's Brief, at 23-26.) All of the military actions, airline safety steps, nuclear security measures, intelligence activities, and regulatory initiatives described therein are directed at preventing the scenarios at issue. As a matter of policy, there simply is no reason to overlay plant-specific NEPA environmental evaluations onto the numerous national and international initiatives that are designed to staunch the flow of terrorist activity into the United States. To do so would be to stretch NEPA far beyond its statutory purpose.

The focal point of the issue posed by the Commission in CLI-02-05 is the proper application of NEPA. Is NEPA, in the context of plant-specific licensing determinations, a necessary and appropriate vehicle by which to assess the threat of terrorist acts? To answer this question, NEPA is an environmental statute intended to require environmental assessments of Federal actions. It is not a security statute requiring threat assessments. The Commission need not expand NEPA to serve national policy objectives outside its intended scope. It is important to look to Congress' declaration of national environmental policy, set forth in Section 101 of NEPA:

> In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, *consistent with other essential considerations of national policy*, to improve and coordinate Federal plans, functions, programs, and resources. . . .

42 U.S.C. § 4331(b)(emphasis added). While the Intervenors have offered their interpretation of NEPA's requirements, they have done so in a vacuum devoid of any and all relevant "considerations of national policy" beyond their narrow objective. Those relevant "considerations" include the fact that after September 11, the government has been fully engaged. Addressing the current foreign threat is beyond the scope and purpose of NEPA.[5]

The Intervenors argue that an environmental impact statement is required in the context of the limited Millstone Unit 3 amendment and that this would be "valuable to decisionmakers and the public," because it would provide "an analysis of reasonable alternatives. . . ." (Intervenors' Brief, at 31.) However, this line of argument imagines that the Federal government and, more particularly, the NRC is sitting idle, that the NRC is not considering the risks of terrorist attacks and reasonable compensatory actions, and that only NEPA can compel the NRC to act. This view is fantasy. Given the reality of the responsibilities and clear actions of the NRC and the Federal government to date, NEPA need not be stretched, well beyond its intended bounds, in the manner suggested by the Intervenors.

B. 10 C.F.R. § 50.13 Lawfully Precludes Consideration of the Environmental Impacts of Malevolent Acts of Terror In This Proceeding

The Intervenors also fail to give full effect to the limits on NEPA obligations imposed by 10 C.F.R. § 50.13. Pursuant to the express language of Section 102 of NEPA, an agency need only comply with the statute "to the fullest extent possible." 42 U.S.C. § 4332. This caveat in NEPA bars its applicability when "existing law makes compliance [with NEPA]

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5 NRC Chairman Meserve himself stated at the NRC's recent Regulatory Information Conference that the defense of nuclear facilities "should not be viewed in isolation, but should be part of an overall national defensive scheme." *Nucleonics Week*, March 7, 2002, at 11. Separately, Homeland Security Director Tom Ridge stated that some

impossible." *E.g., Limerick Ecology Action v. United States Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 (3d Cir. 1989); *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). It is well established that "properly promulgated, substantive agency regulations" — such as 10 C.F.R. § 50.13 — have the "force and effect of law." *E.g., Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979). Therefore, NEPA must be limited by that pre-existing regulation and the policy behind that regulation.

Section 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. . . ." 10 C.F.R. § 50.13. Consistent with the longstanding precedent of *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973), this regulation reflects a dividing line that can and must apply to defining the proper scope of a NEPA evaluation as well as the scope of a public safety and security review. The Intervenors conclude that Section 50.13 "does not automatically exclude the impacts of destructive acts of malice by an enemy of the United States from the category of environmental impacts that must be considered in an EIS." (Intervenors' Brief, at 13.) However, each of the reasons cited in support of this conclusion is groundless.

The Intervenors claim that "because 10 C.F.R. § 50.13 was promulgated in 1967, before passage of [NEPA]," it is "not possible that the Commission had any intention that [Section 50.13] would apply to bar consideration of issues related to its subject matter in an

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physical changes may be made to nuclear plants, but it would be up to the NRC to decide on the need for "structural improvements." *Id.*, at 2.

environmental contention. . . ." (Intervenors' Brief, at 13.) Contrary to this assertion, the fact that Section 50.13 has never been amended by the NRC is important. It demonstrates the NRC's continuing and long-held determination that power reactor licensees are not responsible for protection against the effects of attacks or destructive acts by an enemy of the United States. That the regulation was promulgated prior to the enactment of NEPA actually supports a conclusion that it limits NEPA. The regulation was and remains a proper exercise of the agency's statutory authority under the Atomic Energy Act. Consistent with the case law and the discussion in DNC's Brief, Section 50.13 serves as a pre-existing and still-existing boundary on the scope of NEPA. NEPA cannot and did not create obligations inconsistent with other pre-existing laws.

Intervenors' claim that Section 50.13 is "irrelevant here" (Intervenors' Brief, at 16) because its scope is "narrower than the scope of malevolent and insane acts that are of concern in [Intervenors'] contention" (*id.*, at 14) is also unpersuasive. By virtue of the express language of the regulation, the scope of "attacks and destructive acts" encompassed by Section 50.13 certainly includes the type of malevolent, terrorist acts of concern to the Intervenors. Contrary to their assertion, the regulation was not meant to address only the threat of attack by "missiles or similar weapons wielded by a foreign state. . . ." (*Id.*, at 14-15.) On its face, Section 50.13 refutes this crabbed interpretation. The regulation includes the words "attacks and destructive acts . . . by an enemy of the United States, whether a *foreign government or other person*. . . ." 10 C.F.R. § 50.13 (emphasis added). The current threat of attacks by operatives of Al Qaeda falls within the scope of Section 50.13.[6]

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[6] To the extent the Intervenors wish to evaluate risks of attacks by others, even they have made no showing that such a hypothesis is anything other than speculative.

As discussed in DNC's Brief, Section 50.13 constitutes a constant regulatory dividing line that overrides and transcends the evolving plant-specific security design basis defined by 10 C.F.R. § 73.1(a). 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.

C. The "Rule of Reason" Would Be Stretched to the Breaking Point If NEPA Is Interpreted as Requiring Plant-Specific Evaluations of Intentional Malevolent Acts

The core premise of the Intervenors' argument is that there is "new information and changed circumstances" such that spent fuel pool accidents "caused by acts of malevolence or insanity" are now "reasonably foreseeable" and therefore must be addressed under NEPA as part of the NRC's evaluation of the license amendment authorizing an increase in spent fuel pool storage at Millstone Unit 3. This argument still fails for the reasons discussed in DNC's Brief. In particular, the Intervenors' focus on whether these acts of insanity and spent fuel pool "accidents" are "reasonably foreseeable" takes an unduly restrictive view of the NEPA "rule of reason." In fact, that "rule of reason" encompasses an assessment of a number of factors beyond "forseeability" and precludes the need for such an evaluation. Moreover, the Intervenors' reliance on a technical report on spent fuel pool accident risk is misplaced. The report does not demonstrate that NEPA must apply to "intentional malevolent acts."

*1. Intervenors Take an Unduly Restrictive View of the NEPA "Rule of Reason"*

In all of the briefs filed on the Commission's question, on several dockets, at least one point of common ground emerges. While other arguments may exist limiting NEPA in the current context (as discussed above), it is undisputed that the scope of NEPA is limited by a "rule of reason." *See 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 . . ." associated with a project, and needs to consider only those within the rule of reason. *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1286 (1st Cir. 1996). The rationale for the "rule of reason" is one of logic and a practical recognition that the resources of energy, research, and time to prepare environmental analyses are not infinite. *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972).

The Intervenors' premise is that the "rule of reason" mandates an assessment of every scenario that is deemed "reasonably foreseeable." However, the premise is not valid. A scenario that is not "reasonably foreseeable," or alternatively is "remote and speculative," clearly need not be addressed under the NEPA "rule of reason." *See, e.g., Deukmejian,* 751 F.2d at 1300. But the "rule of reason" encompasses more than a qualitative "forseeability" test such as the one the Intervenors presume (and then proceed to argue).[7] In fact, based on clear precedent, and as discussed in DNC's Brief, the "rule of reason" includes an assessment of whether the scenario at issue is proximately caused by the Federal action and whether a meaningful quantitative analysis can be made of the specific risk consequences at issue. In addition, as also discussed in DNC's Brief, the "rule of reason" must encompass the unique requirement of 10 C.F.R. § 50.13 and the reality of the Commission's and the government's response to the current-day Al Qaeda terrorist threat.

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[7] For example, in the most recent version, Council on Environmental Quality 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. 51 Fed. Reg. 15,618, 15,621 (April 25, 1986).

First, NEPA and the cases establish that there must be a link between environmental consequences and a major Federal action. *See, e.g., Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774-75 (1983); *Conservation Law Foundation of New England v. United States Dep't of the Air Force,* 1987 WL 46370, *4 (D.Mass.). The Intervenors devote substantial attention and speculation to attempting to establish the "forseeability" of a terrorist attack at a nuclear plant. (Intervenor's Brief, at 21-23.) Setting aside that none of the Intervenors' speculation establishes any particular threat with respect to Millstone Station or the Unit 3 spent fuel pool more specifically (the Unit 3 SFP being the matter before the Licensing Board in this case), the Intervenors never establish — nor could they ever establish — any causative link between the licensing action before the NRC and the consequences they want to consider in an environmental impact statement. *Compare Glass Packing Inst. v. Regan,* 737 F.2d 1083, 1091-92 (D.C. Cir.) *cert. denied,* 469 U.S. 1035 (1984), *overruled in part on other grounds, Hazardous Waste Treatment Council v. United States Environmental Protection Agency,* 861 F.2d 277, 283 (D.C. Cir. 1988). As DNC has stated before, the consequences of a terrorist attack on the Millstone Unit 3 would not be the consequences of the NRC's license amendment to allow an increase in maximum storage from 756 fuel assemblies to 1,860 assemblies or of any "accident" at Millstone.[8] They would be the consequences of the act of a terrorist. Stated differently, a terrorist attack is not a "major Federal

[8] Indeed, given that fuel assemblies can and will remain in the spent fuel pool at Millstone Unit 3 regardless of NRC's ultimate decision on the actual license amendment at issue here, the risk exists completely independent of the NRC's licensing action. High density wet storage of spent fuel continues to be an authorized and appropriate means for licensees to meet their obligations under the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10101 *et seq.* ("NWPA"). In enacting the NWPA, Congress recognized that several methods of on-site spent fuel storage were available, including the "use of high-density fuel storage racks." *Id.,* at § 10154(a).

action" subject to NEPA and therefore the consequences of a terrorist attack need not be addressed in an environmental impact statement.

Second, despite the Intervenors' obfuscation of the holding in the case, the Court of Appeals in *Limerick Ecology Action v. United States Nuclear Regulatory Comm'n* was crystal clear in its conclusion that NEPA does not extend to intentional, malicious acts of sabotage. 869 F.2d at 743. The lack of a "meaningful" quantitative approach to evaluate these risks makes such assessments inherently unreliable and unhelpful — and therefore beyond the scope of an appropriate allocation of government resources and the NEPA "rule of reason." The Intervenors argue that the Commission's regulations, 10 C.F.R. § 51.71(d), and Council on Environmental Quality regulations, 40 C.F.R. § 1502.22, require a qualitative assessment of environmental "factors" where a quantitative assessment is not possible. (Intervenors' Brief, at 26-27.) However, these regulations by their terms apply only after a determination has been made that an environmental "factor" must be addressed in a NEPA assessment. The regulations are irrelevant to the issue of whether intentional malevolent acts are within the scope of NEPA in the first place.[9]

The Intervenors argue that the NRC's approach to developing a vehicle bomb rule in 1994 somehow supports their NEPA argument. (Intervenors' Brief, at 27-30.) The Intervenors argue that the Commission used a "conditional probabilistic risk analysis" to develop the rule (*id.*, at 27), and recognized that factors such as "motive, capacity, and the pattern of past

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[9] For example, Section 1502.22 applies "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment. . . and there is incomplete or unavailable information." The regulation says nothing about defining the scope of the "rule of reason" or "forseeability." It presupposes that the effects under review are within the scope of the statute.

incidents are relevant to a qualitative [risk] analysis." *Id.*, at 29. However, this argument also does not follow for two reasons.

First, the NRC employed that qualitative or conditional risk assessment in exercising its public safety and security jurisdiction to develop a substantive rule. The use of that approach was not in the context of NEPA. The NRC presumably is performing a similar public safety and security assessment right now in the context of its ongoing reassessment of the nuclear plant security design basis. Whether the NRC uses qualitative or conditional risk assessment in that review is irrelevant to whether NEPA applies in the current context.

Moreover, the Intervenors ignore the central fact of that prior NRC assessment — that it was qualitative, not quantitative. As discussed in DNC's Brief, the vehicle bomb rulemaking actually highlights the difficulty of performing quantitative, meaningful risk analyses related to intentional malevolent acts.[10] Accordingly, the rulemaking in 1994 does nothing to undercut the premise of *Limerick Ecology Action.*

Finally, as discussed in DNC's Brief and above, 10 C.F.R. § 50.13 plays a unique role in applying a NEPA "rule of reason" to the present issue. The division of responsibility reflected in this regulation is completely distinct from the security design basis defined by 10 C.F.R. § 73.1(a). Section 50.13 reflects that private entities (nuclear power plant licensees) are not primarily responsible for defending nuclear plants from enemy attacks (although they can and do defend themselves at least to the point of the design basis security threat). The final responsibility in that regard lies with the government of the United States. While Intervenors argue that this is an "irrational" policy (Intervenors Brief, at 30), it is nonetheless the law. In fact, with due regard to Section 50.13 and the ability of the United States to defend itself, it

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10 *See* DNC's Brief, at 21 n.36.

would be irrational to conclude that NEPA analyses should encompass the impacts of acts of war.

In sum, the Intervenors create an overly restrictive straw man standard: a "reasonably foreseeable" standard. They argue that for terrorist attacks this standard is met, and therefore that NEPA applies. However, they ignore that the cases they cite as support for their standard refer to the reasonably foreseeable impacts *of the proposed licensing action.* Moreover, they ignore other factors and issues that, in a more rational approach, dictate that intentional malevolent actions are beyond the scope of a "rule of reason" and therefore beyond the scope of NEPA.

*2. Intervenors' Reliance on the NRC Staff Spent Fuel Pool Risk Study Is Misplaced*

The Intervenors next rely heavily upon the generic NRC Staff risk report, NUREG-1738, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* (October 2000) ("NUREG-1738"). However, this report does not support their argument that there is "new information" such that intentional malevolent acts are now somehow within the scope of NEPA.[11] It also does not raise any plant-specific issue that needs to be addressed in this licensing proceeding for Millstone Unit 3.

The thrust of the Intervenors' argument is that the NRC Staff in this report has "conceded" that a loss-of-spent fuel pool water could lead to "exothermic oxidation reactions" in spent fuel and ultimately to "release to the atmosphere of a substantial fraction of the radioactive isotopes in the spent fuel." (Intervenors' Brief, at 23-24.) Further, the Intervenors refer to subsequent Staff discussions of policy options related to "the credibility of a sabotage event

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[11] DNC, before the Licensing Board, also pointed out that this October 2000 report was not "new information" that could support a motion to reopen the record and to add a late-filed contention in November 2001 (over a year after the report was released).

initiating a spent fuel pool fire." (*Id.*, at 24-25.) The Intervenors then leap to the conclusion that "the Staff has effectively conceded that acts of malice against a spent fuel [pool] are credible and worthy of consideration in the NRC's NEPA decisionmaking process." (*Id.* at 25.) Of course, the Staff has made no such concession. The Intervenors' argument is a bit like the logic inherent in a game of "Six Degrees of Separation."

NUREG-1738 was a study of spent fuel pool accident risk at decommissioning plants (which Millstone Unit 3 is not). It was undertaken to serve as a generic basis for a risk-informed regulatory framework for decommissioning facilities. The report recognized that the consequences of a spent fuel pool zirconium fire could be serious (not a new revelation), but concluded that the risk is low and well within the Commission's safety goals. *See, e.g.*, NUREG-1738, at viii, x.

Security was one of the regulatory issues specifically implicated by the risk study in NUREG-1738. *See* NUREG-1738, Section 4.2.2, at 4-14 — 4-15. The study specifically considered the implications of the risk insights for the continuation of physical security requirements after a plant begins decommissioning (and more particularly, whether a reduced number of "target sets" is appropriate). In the NUREG-1738 Executive Summary the NRC Staff highlighted that:

> For security, risk insights can be used to determine what targets are important to protect against sabotage. However, any revisions in security provisions should be constrained by an effectiveness assessment of the safeguards provisions against a design-basis threat. Because the possibility of zirconium fire leading to a large fission product release cannot be ruled out even many years after final shutdown, the safeguards provisions at decommissioning plants should undergo further review.

*Id.*, at x. The NRC Staff in NUREG-1738 therefore recognized the issue of a potential for a zirconium fire and agreed that it is a scenario relevant to defining design basis security

requirements — as an exercise of the agency's ongoing public safety and security authority. This approach is precisely analogous to how the NRC is effectively and comprehensively addressing the current terrorist threat and the security design basis on a generic basis. None of this, however, has anything to do with the agency's NEPA responsibilities. The fact that the NRC is exercising its authority under the Atomic Energy Act does not bring "intentional malevolent acts" into the scope of NEPA.[12]

Notwithstanding the Intervenors' assertions, the NUREG-1738 risk study does not establish that terrorist attacks at Millstone are "reasonably foreseeable;" that the consequences of such attacks would be proximately caused by License Amendment 189; that the risk of such an event is quantifiable and meaningfully analyzed; or that 10 C.F.R. § 50.13 and the defense of the United States cannot be credited in applying a NEPA "rule of reason." In sum, the Intervenors' reliance on NUREG-1738 is misplaced. The report stands only for the proposition that the threat to the spent fuel pool should be — as it will be — considered in the context of the NRC's ongoing safety and security reviews.

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12 Since the Intervenors raise NUREG-1738, it is interesting that they omit the fact that the study also included an evaluation of the "likelihood that an aircraft crashing into a nuclear power plant site would seriously damage the spent fuel pool or its support systems." *See* NUREG-1738, Section 3.5.2, at 3-23 — 3-24. The NRC Staff concluded that: "As an initiator of failure of a support system leading to fuel uncovery and a zirconium fire, an aircraft crash is bounded by other more probable events. Recovery of the support system will reduce the likelihood of spent fuel uncovery." *Id.*, at 3-24.

## III. CONCLUSION

For the reasons discussed in DNC's Brief and above, NEPA does not require the NRC to consider the consequences of intentional malevolent acts in the context of an environmental review or a specific licensing action. The Intervenors' proposed late-filed environmental contention should not be admitted.

Respectfully submitted,

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Dated in Washington, D.C.
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