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NUCLEAR REGULATORY COMMISSION

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

**REPLY BRIEF OF DUKE COGEMA STONE & WEBSTER
REGARDING AN AGENCY'S RESPONSIBILITY
UNDER NEPA TO CONSIDER TERRORISM**

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I. INTRODUCTION

On August 13, 2001, Georgians Against Nuclear Energy ("GANE") filed a set of proposed contentions regarding the adequacy of Duke Cogema Stone & Webster's ("DCS") Construction Authorization Request ("CAR") and Environmental Report ("ER") for the proposed Mixed Oxide Fuel Fabrication Facility ("MOX Facility") which is to be located on the U.S. Department of Energy's ("DOE" or "Department") Savannah River Site ("SRS"). The contention at issue—Contention 12—states in part:

a license must not be given for [the MOX Facility] because it is vulnerable to malevolent acts such as terrorism and insider sabotage which could create an unacceptable beyond design basis accident . . . malevolent acts must be analyzed as a foreseeable environmental impact under NEPA.^{1/}

The Atomic Safety and Licensing Board ("Licensing Board") admitted this contention stating:

^{1/} *Georgians Against Nuclear Energy Contentions Opposing a License for Duke Cogema Stone & Webster to Construct a Plutonium Fuel Factory at Savannah River Site* (August 13, 2001), at 45 (emphasis added).

The contention states the precise issue raised, *i.e.*, pursuant to NEPA, DCS's ER must analyze the environmental impacts of terrorist acts causing a beyond design basis accident because such terrorist acts are reasonably foreseeable.^{2/}

By Memorandum and Order dated February 6, 2002, the Commission accepted interlocutory review of this contention and instructed the parties to address what an agency's responsibility is under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001.^{3/}

DCS, GANE, and the NRC Staff filed Briefs on February 27, 2002. DCS hereby replies to GANE's Brief.^{4/}

II. GANE HAS NOT SHOWN THAT A BEYOND DESIGN BASIS TERRORIST ATTACK MUST BE CONSIDERED UNDER NEPA

A. GANE Has Not Provided Any Legal Support For Its Contention That Terrorist Attacks Should Be Considered Under NEPA

The Commission instructed the parties to discuss an agency's responsibility under NEPA to consider terrorism, and directed the parties to "cite all relevant cases, legislative history, and regulatory analysis."^{5/} GANE has essentially ignored these directions.^{6/}

GANE cites essentially no case law to support its position, and refers instead to general principles of NEPA law. In particular, GANE does not identify a single case where a court

^{2/} *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ____, slip op. at 50 (Dec. 6, 2001) (emphasis added).

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

^{4/} DCS only replies to those issues raised by GANE that were not fully addressed in DCS's prior Brief.

^{5/} CLI-02-04, slip op. at 3.

^{6/} Likewise, Blue Ridge Environmental Defense League's ("BREDL") Brief is wholly unresponsive to the Commission's question. DCS's Brief and Reply Brief adequately address any relevant issues BREDL may have raised in its Brief. In addition, although Briefs were due on February 27, 2002, BREDL served DCS via e-mail on February 28, and via First Class Mail on March 1, 2002 (as indicated by the postmark). Neither version contained a certificate of service indicating the dates of service.

required an agency to analyze terrorist attacks under NEPA. Finally, GANE ignores the case law which articulates the requirement under NEPA that there be a close nexus between the proposed action and the potential impacts, and that those impacts be likely or probable consequences of the proposed action. Thus, GANE has not provided an analysis of the relevant cases and authorities sufficient to support its position.^{7/}

B. The Events Of September 11 Do Not Make A Terrorist Attack On The MOX Facility Reasonably Foreseeable Under NEPA

GANE argues that the events of September 11 make similar acts directed against the MOX Facility reasonably foreseeable under NEPA. GANE has provided no basis for concluding that as a result of the events of September 11, a terrorist attack on the MOX Facility itself is reasonably foreseeable. Moreover, the D.C. Circuit Court of Appeals rejected a similar position in *San Luis Obispo Mothers for Peace v. NRC*.^{8/} In the aftermath of the partial core-meltdown at Three Mile Island, an intervenor argued that NEPA required the NRC to supplement an already finalized EIS for a different nuclear power plant, to include consideration of the risk of a Class Nine accident.^{9/} The court rejected this argument and concurred with the Commission that the probability of a Class Nine accident remained remote despite the fact that such an accident had already occurred at Three Mile Island.^{10/} The Court concluded that “NEPA [] does not require

^{7/} It should be noted that GANE’s Brief, like most of its pleadings in this proceeding, was prepared “with substantial assistance from GANE’s legal advisor, Diane Curran.” GANE Brief, p. 27, n.15.

^{8/} 751 F.2d 1287 (D.C. Cir. 1984), *vacated on other grounds*, 760 F.2d 1320 (en banc), *aff’d* 789 F.2d 26 (1986) (en banc).

^{9/} *Id.*

^{10/} *Id.* at 1301.

the consideration of Class Nine accidents in future EISs, nor does it require that final EISs be supplemented to take account of the Class Nine risk.”^{11/}

Other cases discussed in DCS’ February 27 Brief also support the position that the mere occurrence of an event at one location does not necessarily make a similar event reasonably foreseeable at another location. In *Trout Unlimited v. Morton*, the Ninth Circuit concluded that the EIS for construction of the Tetan dam and reservoir was adequate even though it did not discuss the impact of “second [vacation] home development,” such as had occurred at other reservoirs.^{12/} Similarly, in *Sierra Club v. Marsh*, the First Circuit rejected claims that an EIS prepared for a marine port project was required to consider development of “water-dependent industry” even though such development had occurred at two other marine port projects in other states.^{13/}

Thus, GANE’s position that the events of September 11 make a terrorist attack on the MOX Facility reasonably foreseeable under NEPA is not supported by case law.

C. A Qualitative Analysis Of A Terrorist Attack Would Not Be Useful Or Meaningful

GANE alleges that 40 C.F.R. § 1502.22(b) requires an agency to consider environmental impacts that have “catastrophic consequences, even if their probability of occurrence is low.”^{14/} GANE further cites 10 C.F.R. § 51.71, and argues that the NRC may not be excused from evaluating an impact merely because it is not easily quantifiable. However, neither of these citations supports GANE’s argument that NEPA requires an evaluation of terrorism.

^{11/} *Id.* at 1301 (emphasis added). The NRC has, of course, voluntarily elected to discuss Class Nine accidents in more detail in its EISs, but as the D.C. Circuit Court of Appeals stated, NEPA does not require such an analysis.

^{12/} 509 F.2d 1276, 1284 (9th Cir. 1974).

^{13/} *Sierra Club v. Marsh*, 976 F.2d 763, 777-78 (1st Cir. 1992).

Under Section 1502.22(b), catastrophic impacts should be considered only if “the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” Thus, a necessary precondition to considering such an impact is that there be some credible, scientific basis for concluding that the impact is reasonably foreseeable. Mere conjecture is not a sufficient basis for determining that a particular event or impact is reasonably foreseeable: “[t]he Council [on Environmental Quality] believes that pure conjecture, that is, a conjectural analysis, lacking a credible scientific basis is *not* useful to either the decisionmaker or the public.”^{14/} Accordingly, this regulation “grounds the [agency’s] duty in evaluation of scientific opinion rather than in the framework of a conjectural ‘worst case analysis.’”^{15/}

The likelihood and consequences of an intentional and malevolent act directed against a particular nuclear facility cannot reasonably be determined through scientific analysis, and are not amenable to meaningful prediction or forecasting. For example, there obviously is no quantitative basis for evaluating the risk of terrorism. As the Commission has stated, “arbitrary selection of numbers to ‘quantify’ threat probability without demonstrable, actual, supporting event data would yield misleading results at best.”^{17/} Furthermore, as discussed below, there is no qualitative basis for predicting or forecasting the occurrence or consequences of such an event

^{14/} GANE Brief, p. 12.

^{15/} *Proposed Amendment to 40 CFR 1502.22*, 50 *Fed. Reg.* 32234, 32236 (1985) (emphasis in original).

^{16/} *Id.* at 32237.

^{17/} *Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants*, 59 *Fed. Reg.* 38889, 38890 (August 1, 1994).

either.^{18/} Thus, consideration of such events would not be useful to the NRC or to the public, and could not provide the “rigorous analysis” sought by GANE.^{19/}

Even from a qualitative basis, it would require conjecture to conclude that a terrorist attack on the MOX Facility may occur. For example, before NRC could conduct a qualitative evaluation of the risks of terrorism against the MOX Facility, the NRC would need to:

- Speculate that a terrorist would decide to target a nuclear facility rather than the myriad of other targets that are available (and easier to attack) both at home and abroad;
- Speculate that the terrorist would target the particular facility in question (i.e., the MOX Facility in this proceeding), rather than some other nuclear facility;
- Speculate regarding the means of attack;
- Speculate regarding the likelihood that the attack will actually be executed (e.g., that it will not be detected or prevented before the attack hits the facility);
- Speculate whether the terrorists will actually hit their intended target (e.g., the footprints of nuclear facilities are typically far smaller than the footprints of the Pentagon and World Trade Center); and
- Speculate whether the attacks, if successful, would actually result in the failure of sufficient safety systems to result in a release of radioactivity to the public.

Such speculation is neither meaningful nor useful under NEPA. In reality, the NRC can do no more than provide something akin to a worst case analysis—which is not required by the courts, CEQ, or the Commission’s regulations.^{20/} Accordingly, since there is no credible scientific evidence to support a qualitative analysis of a beyond design basis terrorist attack, 40 C.F.R. §1502.22 and 10 C.F.R. § 50.71 do not support GANE’s position.^{21/}

^{18/} Thus, GANE’s citation to 10 C.F.R. § 50.71 is not relevant. DCS agrees that qualitative analyses are permissible under NEPA. However, they must be grounded in credible science.

^{19/} GANE Brief, p. 3.

^{20/} *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989).

^{21/} *See No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 1380, n.1 (9th Cir. 1988) (Section 1502.22 does not apply because an enemy attack with nuclear weapons is speculative and not supported by credible

D. The 1994 Truck Bomb Rulemaking And GESMO Proceeding Do Not Support GANE's Arguments That Terrorist Attacks Must Be Considered Under NEPA

GANE cites the NRC's 1994 truck bomb rulemaking and a 1975 safeguards supplement prepared for the "Generic Environmental Statement on the Use of Recycle Plutonium in Mixed Oxide Fuel in Light Water Cooled Reactors" ("GESMO") as evidence that the Commission has now "recognized the foreseeability of malevolent acts of terrorism and sabotage."^{22/} GANE's two examples do not support its contention that the NRC must consider the impacts of beyond design basis terrorist attacks under NEPA.

1. *The 1994 Truck Bomb Rule Does Not Support A Requirement Under NEPA To Assess Attacks Similar To September 11*

The NRC's 1994 truck bomb rule modified the design basis threat ("DBT") to include an attack from a domestic truck bomb.^{23/} GANE argues that the rationale for the 1994 rule supports consideration under NEPA of a terrorist attack on a nuclear facility similar to that which occurred on September 11. However, the NRC's statements in support of the 1994 rule did not conclude that a truck bomb attack was reasonably foreseeable under NEPA. Instead, the NRC considered adding a truck bomb as a DBT "as a matter of prudence" since, although the

scientific evidence). Furthermore, DCS believes that Section 1502.22 (as amended) is inconsistent with judicial precedent. Although CEQ's regulation uses the term "low probability" events, the CEQ clarified that the regulation "retains the duty to describe the consequences of a remote, but potentially severe impact, . . ." 50 *Fed. Reg.* at 32237 (emphasis added). NEPA, however, does not require consideration of impacts where the probability of occurrence is remote and speculative. See *San Luis Obispo Mothers for Peace*, 751 F.2d 1287; *New York v. Department of Transportation*, 715 F.2d 732, 754 (2d Cir. 1983); *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 the Trojan nuclear power plant] is too remote and speculative to warrant relief under NEPA").

^{22/} GANE Brief at Section D.1 and D.2.

^{23/} 59 *Fed. Reg.* at 38889.

likelihood of an attack could not be quantified, the NRC recognized the importance in the regulatory analysis of “the perception of the likelihood” of such an attack.^{24/}

NEPA does not require an analysis of an environmental impact of a proposed action merely because there is a perception of the likelihood of that impact. In fact, the U.S. Supreme Court ruled that perceptions are not the types of harm Congress intended to be considered under NEPA.^{25/} Thus, contrary to GANE’s argument, the 1994 truck bomb rule does not provide a basis for concluding that terrorist attacks against a particular facility are reasonably foreseeable under NEPA.

Furthermore, GANE is requesting consideration of a beyond design basis accident at the MOX Facility resulting from a terrorist attack. The 1994 rule defined a truck bomb as a DBT. In contrast, an attack similar to that of September 11 is beyond the DBT established for the MOX Facility, and clearly involves the type of threat that must remain within the defense responsibilities of federal, state, and local governments. Thus, the 1994 rulemaking provides no basis whatsoever for an argument that NRC must evaluate beyond design basis threats under NEPA, or that NEPA requires consideration of any type of terrorist attack.

2. *The Record Of The GESMO Draft EIS Also Does Not Support A Requirement To Assess Beyond Design Basis Threats Under NEPA*

GANE next references a January 20, 1975 letter from the CEQ to the Atomic Energy Commission (“AEC”) suggesting that the AEC prepare a safeguards supplement to the Draft GESMO.^{26/} Specifically, the CEQ letter commented that the Draft GESMO was “incomplete because it failed to present a detailed and comprehensive analysis of the environmental impacts

^{24/} *Id.* at 38891.

^{25/} *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

of potential diversions of special nuclear materials and of alternative safeguards programs to protect the public from such a threat.”^{27/} The AEC responded by preparing a safeguards supplement, which was published as a staff technical report in NUREG-0414.^{28/}

GANE implies that the CEQ’s letter and the AEC response indicate that diversion of special nuclear material (“SNM”) is foreseeable and that NEPA requires analysis of not only the diversion of SNM, but a nuclear explosion when terrorists assemble and detonate a bomb constructed of the diverted SNM. These implications are incorrect.

The AEC appears to have conducted the requested analysis voluntarily, and there is no indication that AEC believed that it was required to do so under NEPA. Nothing in the Statements of Consideration indicate that the AEC thought it was required to conduct such an analysis under NEPA. To the contrary, the Commission stated:

In light of its review of comments received in response to the May 8th [public] Notice, and its further deliberations, and consistent with the foregoing policy objectives, the Commission has concluded that a decision on wide-scale use of mixed oxide fuel in light water nuclear power reactors should be preceded by a full assessment of relevant safeguards issues.

This indicates that the Commission was persuaded—as a matter of policy—to conduct a safeguards analysis for a wide-scale, generic EIS. The statement does not indicate that the Commission was persuaded as a matter of NEPA law or that it would reach the same decision in the context of an individual licensing proceeding. That the AEC did not believe it was obligated under NEPA to conduct a safeguards analysis is also supported by the fact that it did not include

^{26/} GANE Brief, p. 23; *Mixed Oxide Fuel, Scope, Procedures and Schedule for Generic Environmental Impact Statement and Criteria for Interim Licensing Actions*, 40 *Fed. Reg.* 53056, 53058 (1975).

^{27/} 40 *Fed. Reg.* at 53058.

^{28/} *Safeguarding A Domestic Mixed-Oxide Industry Against a Hypothetical Subnational Threat* (NUREG-0414) (May 1978).

such an analysis in the Draft GESMO. Such voluntary consideration is within the discretion of the agency but does not re-write NEPA to require such consideration.

Furthermore, the CEQ's comments were prior to the U.S. Supreme Court's (and CEQ's) revocation of the worst case analysis requirement. The evaluation of potential diversions of SNM in NUREG-0414 was indeed a worst case analysis.^{29/} For example, the safeguards supplement analyzed the impacts of "detonation of a nuclear explosive" obtained from diverted SNM, concluding that "a major civil disaster could result."^{30/} However, in the wake of the CEQ's revocation of its regulation on worst case analyses and *Robertson v. Methow Valley Citizens Council*, a worst case analysis for impacts similar to, or more severe than that conducted for the safeguards supplement, is not required under NEPA.^{31/} Therefore, GANE's citation to the worst case analysis in NUREG-0414 does not provide a sufficient basis for the NRC to conduct a NEPA analysis of a terrorist attack similar to that which occurred on September 11 (which would indeed be a worst case analysis).^{32/}

Thus, after the AEC prepared NUREG-0414, CEQ regulations and the state of NEPA law changed. Agencies are no longer required to perform worst case analyses such as those contained in NUREG-0414, and therefore NUREG-0414 does not provide a sufficient basis to support GANE's arguments.

29/ GANE Brief, n.9 (citing NUREG-0414).

30/ NUREG-0414, at ES-5.

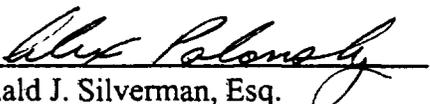
31/ 490 U.S. 332 (1989). In addition, the safeguards supplement stated that the possibility of diversion "appears extremely low" and that "the possibilities of illicit use of [special nuclear materials] are judged to be remote, . . .". NUREG-0414, p. ES-5. Discussion of such remote effects does not meaningfully aid the agency, and need not be considered under NEPA.

32/ The "other [NRC] pronouncements" GANE cites to support its position that the NRC already considers terrorist attacks reasonably foreseeable under NEPA, including the NRC's February 25 Order to nuclear power plant licensees to modify their operations to respond to the "generalized high-level threat environment," also are inapplicable. The fact remains that a beyond design basis accident resulting from a terrorist attack is, among other things, remote, and need not be considered under NEPA.

III. CONCLUSION

GANE has failed to show that a beyond design basis terrorist attack must be considered under NEPA, and has not been able to cite any cases supporting its position. Although GANE cites the events of September 11, the occurrence of those events does not make a beyond design basis terrorist attack on the MOX Facility reasonably foreseeable. The regulations GANE does cite do not apply because the foreseeability of beyond design basis terrorist attacks and their consequences cannot be predicted—quantitatively or qualitatively—through any credible scientific method. Finally, the NRC’s 1994 truck bomb rulemaking and the GESMO proceeding are not evidence that an event similar to September 11 is reasonably foreseeable at the MOX Facility. Neither speaks to the issue of whether NEPA requires an agency to consider beyond design basis accidents triggered by a terrorist attack. Accordingly, DCS respectfully requests that the Commission issue an order in this proceeding holding that beyond design basis terrorist acts need not be considered under NEPA, and reversing that portion of LBP-01-35 which admitted a contention calling for a NEPA analysis of such acts.

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

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