IN THE UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE,
SIERRA CLUB, and PEG PINARD,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor-Respondent

NO. 03-74628

On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

BRIEF FOR PETITIONERS

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March 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB and PEG PINARD, Petitioners	)	
v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	
PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	

PETITIONERS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners certify that Petitioners San Luis Obispo Mothers for Peace ("SLOMFP") and the Sierra Club are non-profit corporations. Neither SLOMFP nor the Sierra Club has any parent company and/or subsidiary or affiliate that has issued shares to the public.

Respectfully submitted,

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SUBJECT: *San Luis Obispo Mothers for Peace v. NRC, No. 03-74628*

Dear Mr. Mullins, Mr. Repka, and Ms. Goldman,

This is to let you know that today, I received an extension for filing petitioners' brief in the above-captioned case, from March 1 until March 15, 2004. The clerk also automatically extended the deadline for the government's brief until April 14, 2004. Our reply brief is due within 14 days after the filing of the government's brief.

Thank you for your consideration and cooperation in this matter.

Sincerely,

Diane Curran

cc: Cathy A. Catterson, Clerk
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
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I. JURISDICTIONAL STATEMENT

This case involves an appeal of orders by the U.S. Nuclear Regulatory Commission ("NRC") or ("Commission"). The Court has jurisdiction pursuant to the Hobbs Act, 28 U.S.C. § 2342(4); the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(b); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The appeal was timely filed pursuant to 28 U.S.C. § 2344, because it was docketed on December 12, 2003, within 60 days of October 15, 2003, the date of the Commission's final order in the proceeding. *Pacific Gas & Electric Company* (Diablo Canyon ISFSI), CLI-03-12, 58 NRC 185 (2003), EOR 38.

II. STATUTES AND REGULATIONS

Relevant statutes and regulations are included in an addendum to this brief.

III. ISSUES PRESENTED FOR REVIEW

1. Did the NRC violate the AEA's public hearing requirement, 42 U.SC. § 2239(a), and its own implementing regulations in 10 C.F.R. § 2.714(b)(2) when it refused to grant Petitioners a hearing on whether the National Environmental Policy Act ("NEPA") [42 U.S.C. § 4332] requires consideration of the environmental impacts of terrorist attacks or other acts of malice or insanity during storage of spent reactor fuel at a proposed Independent Spent Fuel Storage Installation ("ISFSI"), and during transportation away from the ISFSI?

2. Did the NRC violate the APA by basing its denial of Petitioners' hearing

request on a fact-based policy that it had not published for notice and comment under 5 U.S.C. § 553?

3. Did the NRC violate NEPA by categorically refusing to prepare an EIS on the environmental impacts of terrorist attacks and other acts of malice or insanity on the Diablo Canyon ISFSI, where it had failed to demonstrate that it had taken a hard look at the environmental impacts of such attacks?

4. Was the NRC's refusal to prepare an EIS on the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI arbitrary and capricious, where the NRC's decision was refuted by the record and inconsistent with the NRC's own actions, including its regulations?

5. Did the NRC violate NEPA by refusing to prepare an EIS on the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI, where no statute or other law excused the NRC from complying with NEPA?

6. Did the NRC violate the hearing requirements of the AEA by refusing to grant Petitioners a hearing on what post-9/11 security measures for the entire Diablo Canyon nuclear complex are needed in order to ensure that licensing of the proposed ISFSI would not be inimical to the common defense and security or pose an unreasonable threat to public health and safety?

IV. STATEMENT OF THE CASE

In this case, Petitioners seek reversal of two NRC decisions regarding Pacific Gas & Electric Company's ("PG&E's") application to build and operate an ISFSI on the site of the Diablo Canyon nuclear power plant in coastal California. The ISFSI would store "spent" (*i.e.*, used) nuclear fuel in air-cooled casks that are to be placed outdoors on concrete pads.

In the first decision, the NRC refused to grant Petitioners a hearing on whether, in light of the terrorist attacks of September 11, 2001, and other terrorist events of recent years, the Commission should prepare an Environmental Impact Statement ("EIS") to consider the environmental impacts of a terrorist attack or other act of malice or insanity against the ISFSI. *Pacific Gas & Electric Company* (Diablo Canyon ISFSI), CLI-03-01, 57 NRC 1 (2003) (hereinafter "CLI-03-01"), Excerpts of Record ("EOR") 33.

In the second decision, the Commission refused to grant Petitioners a hearing on what additional security measures for the ISFSI and the associated nuclear power plant, in addition to compliance with the NRC's pre-9/11 security regulations, should be required to ensure that the proposed licensing of the ISFSI did not pose an undue security threat. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002) (hereinafter "CLI-02-23"), EOR 27. CLI-03-01 and CLI-02-23 were made

final in CLI-03-12, 58 NRC 185 (2003), EOR 38.

Petitioners have appealed both NRC decisions on the grounds that they violate (10 the AEA's hearing requirements and NRC implementing regulations, (2) the APA's notice-and-comment requirements, and (3) NEPA's requirement to rigorously evaluate the environmental impacts of proposed NRC actions. Petitioners also contend that the NRC's refusal to prepare an EIS was arbitrary and capricious.

V. STATUTORY FRAMEWORK

The two statutes that govern this case are the AEA and NEPA. The AEA sets a minimum standard for safe and secure operation of nuclear facilities, while NEPA requires NRC to consider and attempt to avoid or mitigate significant adverse environmental impacts of licensing those facilities. While the statutes have some overlapping concerns, they establish independent requirements. *Limerick Ecology Action v. NRC,* 869 F.2d 719,729-30 (3rd Cir. 1989) (holding that the AEA does not preclude NEPA).

A. Atomic Energy Act

1. AEA requirements for safety and security

a. Statutory requirements

The AEA authorizes and requires the NRC to protect the public against two types of hazards caused by operation of nuclear facilities: accidental releases of

radioactivity, and threats to the common defense and security. These requirements also apply to the storage and handling of spent reactor fuel. Sections 57(c) and 69 of the Act, for example, expressly prohibit the Commission from issuing a license to handle special nuclear materials or source materials, two of the radiological constituents of spent nuclear reactor fuel, if the issuance of such a license would be "inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public." 42 U.S.C. §§ 2077, 2099. Section 81 prohibits the Commission from, *inter alia,* permitting the distribution of any byproduct material to any licensee "who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission." 42 U.S.C. § 2111.

b. Implementing regulations

NRC security regulation 10 C.F.R. § 73.1 requires that ISFSIs and other nuclear facilities must be protected against "design basis threats" of sabotage and theft of special nuclear material. The design basis threat is a "hypothetical threat" that serves three purposes:

> (1) It provides a standard with which to measure changes in the real threat environment,
> (2) It is used to develop regulatory requirements, and
> (3) It provides a standard for evaluation of implemented safeguards programs.

Proposed Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power

Plants, 58 Fed. Reg. 58,804 (November 4, 1993), Exhs. at 10.[1] In order to assure the adequacy of the design basis threat, "the NRC continually monitors and evaluates the threat environment worldwide." *Id.* ISFSI license applicants are required to demonstrate to the NRC that the ISFSI provides protection against the design basis threat through security plans and design measures. 10 C.F.R. § 72.24(o); 10 C.F.R. Part 72, Subpart H; 10 C.F.R. § 73.51.

2. Atomic Energy Act public hearing requirements and implementing regulations

Section 189a of the Atomic Energy Act requires the NRC to provide interested members of the public with a prior opportunity for a hearing on any proposed licensing action for a nuclear facility. 42 U.S.C. § 2239(a)(1)(A). In order to be admitted as an intervenor to an NRC adjudicatory licensing proceeding, a petitioner must file "contentions" that set forth, with "basis and specificity," the concerns the petitioner seeks to litigate. 10 C.F.R. § 2.714(b)[2]. Contentions must be supported by "sufficient information . . . to show that a genuine dispute exists

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[1] For the convenience of the Court, Petitioners have provided a volume of exhibits containing relevant documents issued by the NRC, the Department of Homeland Security, and the Department of Energy that are not a part of the official record of the proceeding below. References to exhibits are designated as "Exhs."

[2] In recent amendments to NRC's procedural regulations for adjudications, NRC renumbered § 2.714 and made minor revisions. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (January 14, 2004). The Commission also renumbered and slightly revised other procedural regulations referred to in this brief, *i.e.*, 10 C.F.R. §§ 2.744(e) and 2.758. The revisions do not materially affect any of the procedural regulations relied on by Petitioners.

with the applicant on a material issue of law or fact." *Id.* The scope of the hearing is restricted to the contentions that have been admitted for litigation. 10 C.F.R. § 2.714(b)(1). If a petitioner is found to have demonstrated standing and pleaded at least one admissible contention, an Atomic Safety and Licensing Board ("ASLB") is convened and a public adjudicatory hearing is held.

Contentions that seek compliance with NEPA must be based on the applicant's Environmental Report ("ER"). 10 C.F.R. § 2.714(b)(2)(iii).[3] The petitioner can amend those contentions or file new contentions if the NRC draft or final EIS or environmental assessment contains data or conclusions that differ significantly from the ER. *Id.*

B. National Environmental Policy Act

NEPA, 42 U.S.C. § 4332 et seq., is the "basic charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its fundamental purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). Prior to taking actions that may have a significant impact on the human environment, NEPA requires federal agencies to

[3] *See also* 10 C.F.R. § 51.61, which requires that an ISFSI applicant must evaluate environmental issues in the first instance, in the ER. The NRC then uses the ER to prepare an EIS or Environmental Assessment, although it has an independent obligation to "evaluate and be responsible for the reliability" of the information. 10 C.F.R. § 51.70.

take a "hard look" at the environmental consequences of those actions. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211 (9th Cir. 1998) *cert. denied sub nom. MalheurLumber Co. v. Blue Mountains Biodiversity Project,* 527 U.S. 1003 (1999); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

1. Environmental Impact Statement

The primary method by which NEPA ensures that its mandate is met is the "action-forcing" requirement for preparation of an EIS. *Robertson v. Methow Valley,* 490 U.S. at 348-49. Preparation of an EIS ensures that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that "the relevant information will be made available to the larger audience that may also play a role in the decisionmaking process and implementation of that decision." *Id.* An EIS also provides decisionmakers with a reasonable array of alternatives for avoiding or mitigating the consequences of the proposed action. *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1519-20 (9th Cir. 1992).

2. Environmental impacts that must be considered

Environmental impacts that must be considered in an EIS include those which are "reasonably foreseeable" and have "catastrophic consequences, even if their probability of occurrence is low." 40 C.F.R. § 1502.22(b)(1). However,

environmental impacts that are "remote and speculative" need not be considered. *Limerick Ecology Action v. NRC,* 869 F.2d 719, 745 (3rd Cir. 1989), citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551 (1978).

The fact that the likelihood of an impact may not be easily quantifiable is not an excuse for failing to address it in an EIS. NRC regulations require that: "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." 10 C.F.R. § 51.71.

C. Nuclear Waste Policy Act

In 1982, Congress passed the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101, *et seq.* The principal purpose of the NWPA was to establish a scheme for siting and licensing a permanent repository for spent reactor fuel and other high-level radioactive waste. For interim storage of high-level radioactive waste, the NWPA authorized the Commission to take necessary actions to "encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor," to the extent these activities are consistent with "the protection of the public health and safety, and the environment," *inter alia.* 42 U.S.C. § 10152.

VI. STATEMENT OF FACTS

A. Application for ISFSI at Diablo Canyon Nuclear Power Plant

The Diablo Canyon nuclear plant, located on the California coast near San Luis Obispo, consists of two 1,100-megawatt pressurized water reactors. Unit 1 began operating in 1985, and Unit 2 began operating in 1986. The license for Unit 1 is due to expire in 2021, and the license for Unit 2 is due to expire in 2025. Declaration of 7 September 2002 by Dr. Gordon Thompson in Support of a Petition by Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, Peg Pinard, et al, par. III-1 (September 7, 2002) (hereinafter "Thompson Declaration of September 7, 2002"), EOR 162-63.

As at many other nuclear plants, disposal of spent nuclear reactor fuel has become a major problem for PG&E as it waits for the siting and licensing of a permanent spent fuel repository. According to PG&E, by 2006 it will have completely filled existing spent fuel storage capacity with spent fuel stored in high-density racks. Environmental Report, Diablo Canyon ISFSI at 1.1-1 (December 21, 2001) (hereinafter "Diablo Canyon ER"). Therefore, at the close of 2001, PG&E applied to construct and operate an ISFSI on the site of the Diablo Canyon plant, where it would store additional spent fuel in air-cooled casks that sit on concrete pads. LBP-02-23, 56 NRC at 420, EOR 5.

B. September 11, 2001 Terrorist Attacks and NRC Response

The September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon had a profound impact on the NRC's perception of, and response to, the threat of terrorist attacks on nuclear facilities. As summarized by the Chairman of the NRC:

> awareness, resources, and vigilance were there [before September 11], but all went to a higher level when 9/11 showed the determination of enemies of the United States to attack our people and our way of life.

Remarks by NRC Chairman Nils J. Diaz to the Joint NRC/DHS State Security Outreach Workshop (June 17, 2003), Exhs. at 110. In cooperation with the Department of Homeland Security ("DHS"), the NRC established a series of graded threat levels and associated protective measures. NRC Regulatory Issue Summary 2002-12A, Power Reactors, NRC Threat Advisory and Protective Measures System (August 19, 2002), Exhs. at 97. The purpose of the new threat advisory system was to keep the government in a state of readiness to respond to a threat that was now perceived as persistent. As the Department of Homeland Security stated in publishing the new advisory system:

> The world has changed since September 11, 2001. We remain a nation at risk for the foreseeable future. At all Threat conditions, we must remain vigilant, prepared, and ready to deter terrorist attacks.

Homeland Security Presidential Directive at 3 (March 11, 2002). Exhs. at 85. Thus, after September 11, the NRC began to treat terrorist attacks as an inevitable

and constant threat requiring perpetual vigilance and preparedness.

C. Petitioners' Concerns Regarding the Vulnerability and Attractiveness of Diablo Canyon Nuclear Power Plant and Proposed ISFSI to Terrorist Attack

The Petitioners are environmental and civic membership organizations and one individual, whose members reside near the Diablo Canyon nuclear power plant and proposed ISFSI, and who therefore have an interest in protecting their health and environment against the hazards posed by those facilities.[4]

The September 11 terrorist attacks gave Petitioners grave concern that the siting and design of the Diablo Canyon nuclear power plant makes it a vulnerable and attractive target for terrorism and other acts of malice or insanity. The plant lies adjacent to the Pacific Ocean, in full view of the air and sea. Thus, it is vulnerable to attack by plane or boat. The plant is also surrounded on the north, east, and south by 12,000 acres of open land that is difficult to police. Petition by Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, et al., for Suspension of ISFSI Licensing Proceeding Pending Comprehensive Review of Adequacy of Design and Operation Measures to Protect Against Terrorist Attack and Other Acts of Malice or Insanity at 21 (September 9, 2002) (hereinafter "Petition"), EOR 115.

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[4] Both SLOMFP and the Sierra Club have members who live within 17 miles of the Diablo Canyon nuclear plant, and Peg Pinard also lives within 17 miles of the plant. LBP-02-23, 56 NRC at 429-430, EOR 9-10. In LBP-02-23, the ASLB ruled that residence within a distance of 17 miles was sufficient to show harm for purposes of establishing standing. *Id.* at 428-29, EOR 8-9.

The Diablo Canyon containment, like most other nuclear reactor containments, cannot ensure protection of the reactor core against an aircraft crash. *Id.* at 21, EOR 140. Moreover, PG&E stores a very large inventory of spent reactor fuel at the Diablo Canyon site in pools that have no containment at all. If the pools were attacked and partially drained, the ensuing fire could result in a radiological release with consequences far worse than the Chernobyl reactor accident of 1986. *Id.* at 23, EOR 142; Thompson Declaration of September 7, 2002, par. III-12 and Section VII, EOR 166, 182-186.

The addition of the proposed ISFSI to the Diablo Canyon site would add to the vulnerability and attractiveness of Diablo Canyon as a terrorist target. Petition at 22, EOR 141. At a licensed ISFSI, PG&E could significantly increase the inventory of radioactive material on the Diablo Canyon site, thus posing an additional attractive target for sabotage. Thompson Declaration of September 7, 2002, par. III-11, EOR 166. Moreover, the design of the ISFSI provides poor protection against a terrorist attack. Design parameters for the facility encompass only comparatively minor threats to cask integrity, such as the impact of a tornado-driven automobile at 33 miles per hour, or the explosion of a vehicle fuel tank at a distance of 50 feet. Supplemental Request For Hearing And Petition To Intervene by San Luis Obispo Mothers For Peace, Avila Valley Advisory Council, Peg Pinard, Cambria Legal Defense Fund, Central Coast Peace And Environmental

Council, Environmental Center Of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers For Peace International, San Luis Obispo Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter Of the Sierra Club, and Ventura County Chapter Of the Surfrider Foundation at 28 (July 19, 2002) (hereinafter "Petitioners' Contentions"), EOR 71.

Terrorist attacks or other destructive acts of malice or insanity against the ISFSI could employ much more powerful instruments, such as anti-tank ordnance or an impacting aircraft. A successful attack could cause a significant release of radioactive material, contaminating a large area of land and leading to substantial impacts to public health, the natural environment, and the regional economy. *Id.*

D. Petitioners' Intervention in ISFSI Licensing Proceeding

On April 22, 2002, the NRC published a Federal Register notice providing an opportunity to request a hearing on PG&E's application for a license for its proposed ISFSI. Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for Hearing for a Materials License for the Diablo Canyon Spent Fuel Storage Installation, 67 Fed. Reg. 19,600. Petitioners filed hearing requests and petitions to intervene. LBP-02-23, 56 NRC at 421, EOR 5. A three-member panel of the ASLB was appointed to hear the case.

In the NRC licensing proceeding, Petitioners attempted to redress their

concerns about the vulnerability and the attractiveness of the ISFSI and associated nuclear plant in the NRC licensing proceeding in two ways. First, Petitioners filed contentions demanding the preparation of an EIS regarding the environmental impacts of terrorist attacks and other acts of malice or insanity on the proposed ISFSI. Petitioners' Contentions at 24-40, EOR 67-83.[5] Second, Petitioners requested the NRC Commissioners to impose emergency security upgrades on the power plant and ISFSI, and to give Petitioners a hearing on those measures. Petition, EOR 115.

1. Petitioners' Environmental Contentions

Petitioners filed three contentions challenging PG&E's failure to evaluate the environmental impacts of a terrorist attack or other acts of malice or insanity in its ER. The lead contention, EC-1, asserted that:

> The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI.

Petitioners' Contentions at 24, EOR 67. Contention EC-3 challenged the ER's failure to evaluate the environmental impacts of transporting spent fuel away from the ISFSI to a final repository, including the impacts of a terrorist attack or other

[5] In addition to their environmental contentions, Petitioners also submitted safety contentions challenging PG&E's financial qualifications to build and operate the proposed ISFSI, and the inadequacy of the seismic design for the facility. Petitioners' Contentions at 2-23, EOR 45-66. Those contentions are not at issue in this appeal.

acts of malice or insanity against the fuel shipments. *Id.* at 39, EOR 82.[6]

At the outset, Contention EC-1 acknowledged the NRC's policy of refusing to consider the environmental impacts of intentional destructive acts in EISs on the ground that it could not make a meaningful evaluation of the risks. Petitioners' Contentions at 24 [EOR 67], citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985) (hereinafter "*Limerick*"), *aff'd on this ground and rev'd on other grounds, Limerick Ecology Action v. NRC,* 869 F.2d at 743-44. Noting that in the aftermath of the terrorist attacks of September 11, 2001, the NRC had declared that it would reconsider this policy, Petitioners set forth new factual information supporting a reversal of the policy. Petitioners supported their factual assertions with documentation and an expert declaration by Dr. Gordon Thompson of the Institute for Resource and Security Studies. Declaration of Dr. Gordon Thompson in Support of Intervenors' Environmental Contentions (July 18, 2002) (hereinafter "Thompson Declaration of July 18, 2002"). EOR 86.

In the "basis" statement of Contention EC-1, Petitioners discussed in detail a number of events and NRC pronouncements demonstrating that the Commission's factual determination in *Limerick* was no longer valid. First, the terrorist attacks of September 11, 2001, made it clear that "terrorists are both capable of and intent

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[6] Contention EC-2, which sought a revision of the ER's statement of purpose, is not on appeal here.

upon causing major damage to life and property in the United States." Petitioners' Contentions at 25, EOR 68. Significantly, although terrorists "have openly admitted that nuclear power stations are near the top of their lists as targets for attacks on civilians in the United States," nuclear facilities are not designed to protect against such assaults. *Id.*

Second, Petitioners pointed to numerous terrorist attacks of recent years, previously discounted by the NRC, which highlight the vulnerability of U.S. facilities and institutions, the sophistication of the attackers, and the persistence of efforts to damage major U.S. facilities. *Id.* at 26, EOR 69.[7]

Third, Petitioners cited the Commission's own regulatory actions, which reflected a change in the Commission's perception of the foreseeability of destructive acts of malice or insanity against nuclear facilities. Petitioners showed that in a 1994 rulemaking, the Commission had abandoned its previous position that the difficulty of quantifying the probability of sabotage and terrorist attacks means that they can be ignored. This change cleared the way for imposition of a

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[7] In addition to September 11, these events include: the 1983 bombing of the Marine barracks in Beirut; the 1993 bombing of the World Trade Center; the February 1993 intrusion into the Three Mile Island site, in which the intruder crashed his station wagon through the security gate and rammed it under a partly opened door in the turbine building; the 1995 bombing of a federal building in Oklahoma City; the 1993 plot to bomb the United Nations Building, FBI offices in New York City, the Lincoln Tunnel, the Holland Tunnel, and the George Washington Bridge; the 1998 bombing of the U.S. embassies in Tanzania and Kenya; and the 2000 bombing of the U.S.S. Cole. *Id.*

new requirement that nuclear power plant licensees erect barriers against vehicle bombs. Petitioners' Contentions at 26 [EOR 69], citing Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (August 1, 1994) (hereinafter "Vehicle Bomb Rule"), Exhs. at 14.

Only two years earlier, the NRC had *refused* to require vehicle barriers in response to a petition for rulemaking, on the ground that the likelihood of a truck bomb was so low as to be "remote." Nuclear Control Institute et al., Denial of Petition for Rulemaking, 56 Fed. Reg. 26,782, 26,788 (June 11, 1991). Exhs. at 26. Two events in 1993, however, caused the Commission to reconsider and reverse this decision: the terrorist bombing of the World Trade Center and the intrusion of the Three Mile Island security area and turbine building. In the Vehicle Bomb Rule, the Commission found for the first time that it was not necessary to be able to quantify the probability of a vehicle bomb attack, and instead turned to qualitative factors and questions of conditional probability, stating in pertinent part that:

> The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that ... eroded [our prior] basis for concluding that vehicle bombs could be excluded from any consideration of the domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open market in the United States.

Petitioners' Contentions at 27, EOR 70, quoting 59 Fed. Reg. at 38,891, Exhs. at 14. Petitioners asserted that these same considerations continue to apply in the post-September 11 environment, and that "motive, capacity, and the pattern of past incidents are relevant to a qualitative analysis." *Id.* at 28, EOR 71.

Petitioners demonstrated, moreover, that the Diablo Canyon ISFSI design is vulnerable to terrorist attack. The ISFSI is designed to withstand "comparatively minor threats to cask integrity, such as the impact of a tornado-driven automobile at 33 miles per hour, or the explosion of a vehicle fuel tank at a distance of 50 feet. *Id.*

Given these facts, Petitioners demanded that the ER provide: (a) a complete discussion of "the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI;" and (b) an evaluation of a "range of reasonable alternatives to the proposed action," including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than PG&E intended to use. *Id.*

2. Petitioners' request for comprehensive review of design measures to protect against terrorist attacks

In addition to raising environmental contentions, on September 9, 2002, petitioners SLOMFP and Peg Pinard, *inter alia* (hereinafter "SLOMFP") filed a petition seeking the imposition of emergency post-9/11 security upgrades on the

entire the Diablo Canyon nuclear complex, including the nuclear plant and the proposed ISFSI. Petition, EOR 115. In support of the Petition, Petitioners submitted a detailed expert declaration by Dr. Gordon Thompson. Thompson Declaration of September 7, 2002, EOR 156.[8]

SLOMFP's Petition charged that the NRC's current safety and security requirements are grossly inadequate to provide reasonable protection to the public from the effects of terrorist attack or other acts of malice or insanity on the Diablo Canyon complex, because they focus on perimeter security and neglect "defense-in-depth." *Id.* at 13-23, EOR .[9]

SLOMFP also contended that in the absence of substantially improved protective measures for the Diablo Canyon nuclear complex, construction and operation of the proposed ISFSI would compound the attractiveness and vulnerability of the nuclear complex to such attacks and destructive acts. Thus, any NRC decision to license the proposed ISFSI would violate the Atomic Energy Act's prohibition against licensing actions that would be inimical to the common

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[8] The Sierra Club did not join in the Petition, and therefore does not participate in this portion of the appeal.

[9] For instance, facilities that house radioactive material should be fortified to reduce their vulnerability if perimeter security is breached. If facilities housing radioactive material are successfully damaged, measures should be provided to mitigate the effects of such damage. Finally, rigorous emergency planning measures should be in place, in order to protect the public if an offsite radiological release should occur. *Id.* at 2, EOR 121. *See also* Thompson Declaration of September 7, 2002, at 32, 39; EOR 187, 194.

defense and security and would constitute an unreasonable risk to public health and safety. *Id.* at 7, 11-23 [EOR 126, 130-142], citing 42 U.S.C. §§ 2077, 2099, 2111.

SLOMFP asked the Commission to suspend the ISFSI licensing proceeding and consider additional measures to protect the Diablo Canyon complex from terrorist attack. In the event that the Commission refused to suspend the proceeding, SLOMFP requested that the Commissioners expand the scope of the pending licensing proceeding to permit consideration of interim measures to protect public health and safety and the common defense and security while evaluation of longer-term measures is underway.

SLOMFP proposed that the interim measures encompass four categories that would provide a defense-in-depth strategy against a range of threats: (1) site security, such as a mandatory aircraft exclusion boundary; (2) increased facility robustness, such as automated shutdown of the reactors upon initiation of a high-alert status at the plant; (3) damage control measures, such as patching and restoring water to a breached spent fuel pool; and (4) emergency response measures, such as criteria for long-term protective actions. *Id.* at 30-32 [EOR 150-51], citing Thompson Declaration of September 7, 2002, Sections VIII and XI, EOR 186-87, 192-95.

Finally, SLOMFP demanded that, for whatever measures the NRC chose to consider, it grant the public an opportunity to participate in the decisionmaking

process pursuant to the hearing requirements of the AEA and the rulemaking requirements of the APA. *Id.* at 32-33, EOR 151-52. SLOMFP also suggested procedures for identifying sensitive information that could not be widely disseminated, and for restricting access to the information. *Id.*

E. Decisions Below

1. Decisions on Environmental Contentions

a. LBP-02-23

On December 2, 2002, the ASLB issued a ruling granting Petitioners standing, but denying admission of their environmental contentions. LBP-02-23, 56 NRC 413 (2002), EOR 1. The ASLB ruled that the environmental contentions posed an impermissible challenge to NRC regulations that exempt NRC licensees from having to design their nuclear facilities against malevolent attacks by land-based or airborne vehicles. *Id.,* 56 NRC at 447, citing 10 C.F.R. §§ 73.51, 50.13. EOR 18. In light of the Commission's ongoing "top to bottom" review of the agency's safeguards and security programs, however, the ASLB referred its ruling on Petitioners three environmental contentions to the Commission for its consideration. *Id.,* 56 NRC at 448, EOR 19.

b. *Private Fuel Storage* decision

At the time that the ASLB issued LBP-02-23, the Commission had before it four other cases in which citizen groups and the State of Utah had requested

hearings on the environmental impacts of terrorist attacks on proposed nuclear facilities. In light of the events of September 11, 2001, the Commission declared that it would consider the question of: "[w]hat is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"[10]

On December 18, 2002, the Commission issued orders in each of the four cases, flatly refusing to prepare an EIS addressing the environmental impacts of terrorist attacks.[11] In the lead case, *Private Fuel Storage,* the Commission rejected a contention by the State of Utah that the EIS for the facility should consider the environmental impacts of a suicidal crash of a jumbo jetliner into a proposed ISFSI. In that decision, the Commission provided the most detailed explanation of its four-fold grounds for refusing to address the environmental impacts of terrorist attacks and other "malevolent acts" in an EIS: (a) terrorist attacks are not

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[10] *See* CLI-03-01 at 5 note 13 [EOR 35], citing *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-03, 55 NRC 155 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-05, 55 NRC 161 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-04, 55 NRC 164 (2002).

[11] *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) (hereinafter "*Private Fuel Storage*") (Exhs. at 1); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

reasonably foreseeable because they are not predictable; (b) terrorist attacks are not a natural or inevitable byproduct of licensing nuclear facilities, and therefore do not fall within the scope of impacts that must be considered; (c) terrorist attacks are "worst-case" events that need not be considered in an EIS; and (d) NEPA's open public participation processes are not suitable for discussing sensitive information regarding terrorist threats. *Private Fuel Storage,* 56 NRC at 347, Exhs. at 4.

At the same time that it refused to consider environmental impacts of terrorist attacks in an EIS, the Commission "stress[ed]" its determination, in the "wake of the horrific September 11 terrorist attacks, to "strengthen security at the facilities we regulate." *Id.,* 56 NRC at 343, Exhs. at 2. As the Commission explained:

> We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect 'public health and safety' and the 'common defense and security.' We are reexamining, and in many cases have already improved, security and safeguards matters such as guard force size, physical barriers, access control, detection systems, alarm stations, response strategies, security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and the design basis threat. We also are reviewing our own infrastructure, resources, and communications.

Id., 56 NRC at 343, Exhs. at 2. The Commission also stated that its comprehensive review may "yield permanent rule or policy changes." *Id.* Finally, the Commission cited enforcement orders in which it had ordered all nuclear power plant licensees to implement interim compensatory security upgrades. *Id.* at 344,

Exhs. at 3.[12]

c. CLI-03-01

On January 23, 2003, the Commission issued CLI-03-01, affirming the ASLB's refusal to admit Petitioners' environmental contentions for a hearing. 57 NRC 1, EOR 33. The Commission announced that it was rejecting the contentions "for the same reasons" stated in the *Private Fuel Storage* case. *Id.* Citing the Nuclear Waste Policy Act, the decision also stated that:

> our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository. Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the propose ISFSI.

Id. 57 NRC at 7 (footnotes omitted), EOR 36. Finally, in a footnote, the Commission suggested that it would be better to focus on preventing a terrorist attack in the "near term" at the Diablo Canyon nuclear power plant, rather than focusing on future spent fuel storage at the ISFSI. *Id.*, 57 NRC at 7 note 24.

The Commission did not rest on, and declined to address, the ASLB's rationale for deciding that Petitioners were not entitled to a hearing. *Id.* at 7, note 22, EOR 36.

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[12] *See* EA-02-026, All Operating Power Reactor Licensees; Order Modifying Licenses Effective Immediately), 67 Fed. Reg. 9,792 (March 4, 2002), Exhs. at 44.

2. Commission decision on Petition

On November 21, 2002, the Commission issued CLI-02-23, denying SLOMFP's Petition for comprehensive review of design measures to protect against acts of terrorism. 56 NRC 230, EOR 27. The Commission did not dispute SLOMFP's claim that it could not lawfully license the proposed ISFSI if the existing Diablo Canyon nuclear power plant posed an unacceptable threat to the common defense and security in violation of the Atomic Energy Act, 42 U.S.C. §§ 2077, 2099, and 2111. Instead, it found that it had already given SLOMFP some of the relief it sought, by undertaking "a comprehensive review of our security rules and policies," and imposing new "interim security measures for ISFSIs." *Id.* at 236, EOR 30, citing EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,150 (October 23, 2002) (Exhs. at 49); EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,152 (October 23, 2002) (Exhs. at 51).

The NRC declared that "SLOMFP is free to make its positions known during this adjudication (as they relate to this proceeding) and in any rulemakings that emerge from our comprehensive security review." *Id.* at 236 and note 10, EOR 30. The Commission also refused to suspend the ISFSI licensing proceeding, on the ground that the ISFSI licensing proceeding could go forward "in parallel with our security review and the interim compensatory measures we have

ordered." *Id.* (footnote omitted).

3. Conclusion of the proceeding below

Following an oral argument on Petitioners' financial qualifications contention, the ASLB ruled against Petitioners in LBP-03-11, 58 NRC 47 (2003). On October 15, 2003, the Commission issued CLI-03-12, denying Petitioners' request that it take review of the ASLB's decision. EOR 38.

On October 24, 2003, after the conclusion of the adjudicatory proceeding, the NRC Staff issued an Environmental Assessment and Finding of No Significant Impact regarding the proposed ISFSI. Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation at 24 (hereinafter "Environmental Assessment"), EOR 211. The Environmental Assessment reiterated the Commission's determination "that an NRC environmental review is not the appropriate forum for consideration of terrorist attacks." *Id.* at 23, EOR 236.

F. NRC Enforcement Orders

In the spring of 2003, the NRC issued permanent orders, making upgrades to the design basis threat, security force work hours, and training requirements on all operating nuclear power plants, including Diablo Canyon.[13] While the general

[13] EA-03-038, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,510 (May 7, 2003) (Exhs. at

contents of these orders were made public, the details were withheld from public disclosure.[14] Moreover, although the orders changed the regulatory requirements for security measures at each operating nuclear power plant, the Commission did not treat them as license amendments, which would have triggered public hearing requirements under the Atomic Energy Act, 42 U.S.C. § 2239(a). Neither did the Commission treat the regulatory revisions as rulemakings, which would have required notice and opportunity for comment under the APA, 5 U.S.C. § 553.[15]

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54); EA-03-039, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,514 (May 7, 2003) (Exhs. at 58); EA-03-086, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,517 (May 7, 2003), Exhs. at 62.

It should be noted that these orders affected the Diablo Canyon nuclear power plant, but not the ISFSI.

[14] The details of the orders were contained in Attachment 2 to each order. The Commission did not include the contents of Attachment 2 in the Federal Register notices for the enforcement orders. *See* orders cited in note 13, *supra*.

[15] In a case now pending before the District of Columbia Circuit, SLOMFP has challenged the NRC's issuance of the orders cited above in note 13, on the ground that the NRC unlawfully used the orders to revise its security regulations, without complying with APA and AEA notice-and-comment requirements. *Public Citizen and San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission,* No. 03-1181. The briefing in that case is proceeding approximately in parallel with this proceeding.

VII. SUMMARY OF THE ARGUMENT

The terrorist attacks of September 11, 2001, combined with other terrorist attacks on U.S. facilities in the 1990's, transformed the NRC's regulatory response to the threat of destructive and malicious acts against nuclear facilities in the United States. In order to prevent and protect against the potentially devastating effects of terrorist attacks, the NRC has developed a system to maintain a constant state of alert, undertaken a comprehensive review of the adequacy of its safety and security regulations, and upgraded its security requirements for all operating nuclear facilities in the United States.

Despite the tremendous attention that the NRC has focused on the risks of terrorist attacks and means to prevent them, the NRC has completely foreclosed the public from participating in its decisionmaking process for addressing the risks of terrorist attacks. Thus, at the critical juncture of licensing a new ISFSI at the Diablo Canyon nuclear power plant, the Commission deprived Petitioners of any legal forum for addressing the extraordinary implications of the September 11 attacks for the NRC's licensing decision. In CLI-03-01, the NRC categorically refused Petitioners' request for a hearing on its environmental contentions that NEPA requires consideration of the environmental impacts of terrorist attacks and other acts of malice or insanity on the Diablo Canyon ISFSI and during related transportation of spent fuel. In CLI-02-23, the Commission refused to grant

SLOMFP a hearing on what emergency security upgrades for the entire Diablo Canyon nuclear complex should be imposed to ensure that licensing of the proposed ISFSI would not compound the existing security threat posed by the nuclear power plant, and thereby pose an unacceptable risk to the common defense and security and public health and safety.

By refusing to allow Petitioners to be heard regarding the implications of the September 11 attacks on its licensing decision for the Diablo Canyon ISFSI, the Commission violated the AEA, the APA, and NEPA. In CLI-03-01, the Commission violated the AEA's public hearing requirement, 42 U.S.C. § 2239(a), by unlawfully denying Petitioners a hearing on their environmental contentions. In rejecting Petitioners' contentions, the Commission unlawfully failed to apply its own regulations for evaluating the admissibility of contentions at the threshold stage of a hearing, and instead improperly decided the merits of the contention without affording Petitioners an opportunity to be heard. Moreover, in violation of the APA, 5 U.S.C. § 553, the Commission unlawfully relied for its decision on a fact-based statement of policy that was never subjected to the rigors of public comment or an evidentiary hearing.

The Commission's decision to deny Petitioners a hearing also violated NEPA, because it was based on an arbitrary and capricious determination that an EIS is never required to address the environmental impacts of terrorist attacks

because those impacts are not foreseeable or capable of meaningful analysis. In making these factual determinations, the Commission completely ignored contradictory evidence presented by Petitioners, including the Commission's own rules, regulatory actions, and practices. By failing to provide a "convincing explanation" for its conclusion, the Commission failed to satisfy NEPA's requirement for a "hard look" at environmental issues raised by its decisions. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d at 1211.

The Commission also violated Section 189a of the AEA by refusing to hold a hearing on appropriate post-9/11 measures for upgrading security at the entire Diablo Canyon nuclear complex, including the nuclear plant and the proposed ISFSI. The Commission did not deny that Petitioners had a right to be heard on these measures, but instead directed Petitioners to participate in illusory rulemaking proceedings that did not exist, and which the agency had no apparent intention of conducting. While the NRC had the right to choose between offering Petitioners a hearing or an opportunity to participate in a rulemaking, it did not have the right to completely deny Petitioners any forum for participating in the decisionmaking process regarding appropriate upgrades to the security measures for the Diablo Canyon nuclear complex.

Accordingly, the Commission's decisions in CLI-03-01 and CLI-02-23 should be overturned, and Petitioners should be granted the hearings to which they

are legally entitled.

VIII. ARGUMENT

A. Reviewability and Standard of Review

1. Reviewability

The Commission's decisions in this proceeding are reviewable by the Court under the Atomic Energy Act, 42 U.S.C. § 2239(b); and the Hobbs Act, 28 U.S.C. § 2342(4). *See also Sierra Club v. NRC,* 862 F.2d 222, 224-25 (9th Cir. 1988).

2. Standard of Review

The standard of review in this case is established by the APA, 5 U.S.C. § 706. Purely legal questions are reviewed de novo. *Akiak Native Community v. U.S. Postal Service,* 213 F.3d 1140, 1144 (9th Cir. 2000). Predominantly legal decisions must be overturned if they are unreasonable. *Alaska Wilderness Recreation and Tourism v. Morrison,* 67 F.3d 723, 727 (9th Cir. 1995).

Factual decisions under NEPA must be reviewed under the arbitrary and capricious standard. *California v. Norton,* 311 F.3d 1162, 1170 (9th Cir. 2002); *Akiak Native Community v. U.S. Postal Service,* 213 F.3d at 1144. An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

B. The Commission Improperly Denied Petitioners a Hearing on Their Environmental Contentions, in Violation of Section 189a of the AEA.

1. The Commission failed to follow its own admissibility regulations, thereby depriving Petitioners of their rightful hearing.

Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), affords interested members of the public a right to request a hearing on the lawfulness of proposed licensing actions by the NRC, including the NRC's compliance with NEPA. The scope of the hearing is governed by the "contentions" that are successfully raised by a petitioner. 10 C.F.R. § 2.714(b)(1).

In order to gain admission of a contention for litigation, a petitioner to the NRC must present "[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii).[16]

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[16] The information must consist of:

> references to the specific portions of the application (including applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioners' belief.

Id. In addition, the petition must provide a "brief explanation of the contention," and:

> [a] concise statement of the alleged facts or expert opinion which support the

Petitioners satisfied the NRC's admissibility standard with respect to their contentions that the Diablo Canyon ER's discussion of environmental impacts of licensing the proposed ISFSI, including storage and transportation of spent fuel, is inadequate because it does not include the consequences of destructive acts of malice or insanity. Contentions at 24-28, EOR 67-71. Noting that the Commission had recently made a commitment to reconsider its previous position that such impacts are not cognizable under NEPA, Petitioners presented new and relevant evidence undermining the NRC's underlying factual conclusion, as set forth in the 1985 *Limerick* case, that the environmental impacts of terrorist attacks are not foreseeable or capable of meaningful analysis. Contentions at 24-28, EOR 67-71. This evidence consisted of:

- the targeting of nuclear facilities as terrorist targets after September 11, 2001;
- the vulnerability of nuclear facility structures to terrorist attack;
- the pattern of terrorist attacks in recent years, highlighting the vulnerability of U.S. facilities and institutions, the sophistication of the attackers, and the persistence of efforts to damage major U.S. facilities; and
- the NRC's own recognition, in the 1994 Vehicle Bomb Rule, that it is both possible and necessary to make a meaningful evaluation of the potential for

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contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

10 C.F.R. §§ 2.714(b)(2)(i) and (ii).

terrorist attacks.

See discussion, *supra,* in Section VI.D.1.

In rejecting Petitioners' environmental contentions, the Commission completely failed to address the question of whether the information submitted by Petitioners was sufficient to meet the NRC's admissibility standard, *i.e.,* whether it demonstrated a genuine factual dispute regarding the NRC's ability to evaluate the risk of terrorist attacks in a meaningful way. Nowhere in the decision is it possible to find a discussion of whether Petitioners satisfied 10 C.F.R. § 2.714(b)(2).

By failing to follow its own regulations, the NRC committed reversible error. *Dyniewicz v. United States,* 742 F.2d 484, 485 (9th Cir. 1984) ("Agencies are generally bound by the regulations they promulgate"); *Cherokee Nation of Oklahoma v. Babbitt,* 117 F.3d 1484, 1499 (D.C. Cir. 1997), citing *Service v. Dulles,* 354 U.S. 363 (1957).

2. The Commission improperly judged the merits of Petitioners' environmental contentions, thereby depriving them of their rightful hearing.

The Commission has consistently ruled that in deciding whether the NRC's admissibility standard is satisfied, the substantive merits of a contention may not be reached. *Sierra Club v. NRC,* 862 F.2d at 228, citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931 (1987); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant),

ALAB-837, 23 NRC 525, 541 (1986); *Limerick,* 22 NRC at 694. The purpose of this limitation is to "ensure that the parties are not required to prove their contentions before they are admitted in the proceedings." *Sierra Club v. NRC,* 862 F.2d at 228 (reversing a decision in which the NRC's Appeal Board reached the merits of a contention in judging its admissibility).

Contrary to this requirement, the Commission went straight to the merits of Petitioners' environmental contentions, holding that (a) the possibility of a terrorist attack is "speculative" and "too far removed from the natural or expected consequences of agency action to require study under NEPA"; and (b) it is not possible to evaluate the risk of terrorist attacks in a "meaningful" way, either quantitatively or qualitatively. 57 NRC at 7, EOR 36.

By judging the merits of Petitioners' environmental contentions, the Commission short-circuited the hearing process and violated its own well-established precedents of declining to reach the merits of a contention at the admissibility stage of the proceeding. *Sierra Club v. NRC,* 862 F.2d at 228. The Commission thereby unlawfully deprived Petitioners of their statutory right to a hearing under Section 189a of the Atomic Energy Act. As this Court held in *Sierra Club v. NRC,* because "[t]he disputed contention has never been appropriately considered," a hearing is required now. 862 F.2d at 228.

C. The Commission Violated the APA By Establishing a Binding Substantive Norm Without Providing Notice or Opportunity to Comment or Subjecting it to a Public Hearing.

In CLI-03-01 and *Private Fuel Storage*, the NRC announced a general policy of refusing to consider the environmental impacts of terrorist attacks in EISs. The NRC has applied this policy in all of the post-9/11 cases in which citizen groups and state governments have sought hearings regarding the question of whether NEPA requires consideration of the impacts of terrorist attacks in EISs for NRC licensing decisions. *See* cases cited in note 11, *supra.*

By precluding Petitioners from challenging the adequacy of NRC's consideration of measures to protect the human environment from the environmental impacts of terrorist attacks on nuclear facilities, the NRC's policy sets a "binding substantive norm" *Mad-Luna v. Fitzpatrick,* 813 F.2d 1006, 1014 (9th Cir. 1987). Thus, it is subject to the public participation requirements of the APA, as set forth in 5 U.S.C. § 553. *Id. See also Mt. Diablo Hospital District v. Bowen,* 860 F.2d 951, 956 (9th Cir. 1988); *Citizens Awareness Network v. NRC,* 59 F.3d 284, 290-91 (1st Cir. 1995). Because the NRC established its policy without first seeking public comment, it must be overturned as invalid. *Id.*

Moreover, when applying a policy in a particular situation, an agency "must be prepared to support the policy just as if the policy statement had never been issued." *Limerick Ecology Action v. NRC,* 869 F.2d at 733, quoting *Pacific Gas &*

Electric Co. v. Federal Power Commission, 506 F.2d 33, 37 (D.C. Cir. 1974). Here, the NRC has conducted no evidentiary proceeding that would support the factual determinations on which its policy rests. Therefore, the NRC cannot rely on the policy to deny Petitioners a hearing.

D. The NRC violated NEPA by failing to take a hard look at the environmental impacts of a terrorist attack on the Diablo Canyon ISFSI.

As discussed in *Sierra Club v. NRC,* by unlawfully deciding, at the threshold stage, the merits of Petitioners' contention that NEPA requires consideration of the environmental impacts of terrorist attacks and other acts of malice or insanity, the Commission deprived the Court of "any basis to hold that the agency decision was correct on the merits." 862 F.2d at 229. Even if the Court finds that it can reach the merits of the Commission's decision, however, CLI-03-01 must be reversed because it fails to demonstrate that the Commission took a "hard look" at the environmental issues raised by the Petitioners. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d at 1211.

In order to demonstrate that its refusal to prepare an EIS on the environmental impacts of terrorist attacks and other acts of malice or insanity on the proposed ISFSI resulted from a "hard look" at the environmental issues, the NRC must provide a "convincing statement of reasons" for its decision. *Id.* Here, the NRC's asserted reasons for refusing to prepare an EIS are far from convincing.

Rather, they demonstrate that the NRC "offered an explanation for its decision that runs counter to the evidence before the agency" or is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Southwest Center v. U.S. Forest Service,* 100 F.3d 1443, 1448 (9th Cir. 1996), quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.,* 463 U.S. 29, 43 (1983). As demonstrated below, the NRC's stated reasons for refusing to consider Petitioners' environmental contentions either improperly ignore record evidence, including the Commission's own regulations, or claim an unfounded exception to NEPA's statutory requirements. Accordingly, CLI-03-01 must be reversed.

1. The NRC unlawfully ignored record evidence, including its own rule, establishing that it is capable of making a meaningful evaluation of the potential for terrorist attacks.

NRC regulations at 10 C.F.R. § 51.71 require that "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." In CLI-03-01, the Commission argued that it lacks the capacity to perform any meaningful analysis of the potential for terrorist attacks, whether quantitative or qualitative. *Id.,* 57 NRC at 7, EOR 36. This argument, must be rejected because it "runs counter to the evidence before the agency." *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448.

In CLI-03-01, the NRC completely ignored Petitioners' evidence that the Commission has "the capacity and information necessary to perform a qualitative analysis of the potential for acts of malice or insanity." Petitioners' Contentions at 26; EOR 69. Significantly, Petitioners' principal evidence consisted of the Commission's own Vehicle Bomb Rule, wherein the Commission had fundamentally changed its previous position that the threat of terrorists attacks must be quantifiable in order to be capable of a meaningful evaluation, and now concluded that "the threat, although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence." Contentions at 27, EOR 70, quoting 59 Fed. Reg. at 38,890-91, Exhs. at 15. *See also* discussion in Section VI.D.1, *supra.* The Vehicle Bomb Rule also identified factors that could be used in such a qualitative analysis, such as the motive and capacity of potential attackers, and the pattern of past incidents. Contentions at 28, EOR 71. Moreover, the Commission explained how conditional probabilistic analysis could be used to evaluate the vulnerability of a facility. *Id.* at 26, EOR 69.

The Commission's own Vehicle Bomb Rule unequivocally demonstrates that the Commission has means of making a meaningful evaluation of the potential for terrorist attacks. Failing to address Petitioners' critical evidence on this point, CLI-03-01 does not provide a "convincing rationale" for its conclusion that the risks of terrorist attacks are not capable of meaningful evaluation. *Blue Mountains*

Biodiversity Project v. Blackwood, 161 F.3d. at 1214 (rejecting environmental assessment that failed to address the record, either "in support of or in opposition to its conclusions").

In fact, the *Private Fuel Storage* decision demonstrates the irrationality of the Commission's claim that it cannot make a meaningful assessment of the potential for terrorist attacks. That decision effectively concedes that the Commission has been conducting *exactly* the type of analysis of which it claims to be incapable:

> [w]orking closely with the Office of Homeland Security and with other agencies, the NRC after September 11 has shifted substantial resources and personnel to a study of the terrorism threat. We already have upgraded security requirements, with more improvements in the pipeline. Our agency is engaged in intensive research on facility vulnerabilities; it is considering additional or alternate means of protection; and it is looking in particular at the effects of suicidal crashes of large commercial airplanes, the focus of Utah's contention here.

Id., 56 NRC at 356, Exhs. at 9. Thus, the Commission's own actions in the aftermath of the September 11 terrorist attacks further demonstrate the implausibility of the Commission's rationale for refusing to prepare an EIS in this case. *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448. Accordingly, the Commission's refusal, in CLI-03-01, to prepare an EIS violates NEPA because it is arbitrary and capricious.

2. In denying the existence of a direct causal relationship between licensing of the ISFSI and the risk of terrorist attacks, the Commission improperly ignored record evidence and contradicts its own findings and policies.

The Commission also argued that the possibility of a terrorist attack is "too far removed from the natural or expected consequences of agency action to require a study under NEPA." CLI-03-01, 57 NRC at 6-7 [EOR 36], quoting *Private Fuel Storage,* 56 NRC at 349, Exhs. at 5. Once again, this argument must be rejected because it "runs counter to the evidence before the agency." *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448.

The Commission simply ignored the evidence presented by Petitioners that the September 11 attacks show that nuclear facilities are highly attractive targets to terrorists, who are both capable of, and intent upon, causing major damage to life and property in the United States, and who have made persistent attempts to do so. Petitioners' Contentions at 25-26, EOR 68-69. Indeed, as held by the ASLB in another NRC licensing case, this is the inescapable lesson of September 11:

> Regardless of how foreseeable terrorist attacks that could cause a beyond-design-basis accident were prior to the terrorist attacks of September 11, 2001, involving the deliberate crash of hijacked jumbo jets into the twin towers of the World Trade Center in New York City and the Pentagon in the Nation's capital, killing thousands of people, it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact that these terrorist attacks occurred demonstrates that massive and

> destructive terrorist acts can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.

Duke Cogema Stone and Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 446 (2001), *reversed in relevant part,* CLI-02-24, 56 NRC 335 (2002).

Moreover, as discussed above in Section VI.B, *supra,* the NRC's actions in the aftermath of September 11 demonstrate that it considers the threat of terrorist attacks to be inevitable and constant threat. In light of its own efforts to maintain a constant state of vigilance against the terrorist threat and to review the adequacy of its entire regulatory program to protect against that threat, the NRC's claim that the threat of terrorist attacks is too far removed from the licensing of the Diablo Canyon ISFSI is so implausible that it could not be attributed to NRC's expertise or a difference of opinion with Petitioners. *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448.

The Commission's ruling is inconsistent with the agency's own long-established policy and practice of addressing the environmental impacts of external events in accident analyses conducted under NEPA. *See Sierra Club v. NRC,* 862 F.2d at 228 (reversing a decision that was "contrary to the NRC's own policy (and one that accords with common sense)"). Under its own NEPA guidance, NRC considers accidents caused or exacerbated by a range of initiating events, including

internal events (such as equipment failure) and external events (such as tornados, floods, earthquakes, and explosions at adjacent facilities). NUREG-1555, Environmental Standard Review Plan for Environmental Review for Nuclear Power Plants at 7.2-3 (October 1999). Exhs. at 37.[17]

None of these external events would constitute "natural" consequences of operation of the ISFSI. If they were to occur while the ISFSI is operating, however, they could cause an accidental release of radioactivity to the environment, which would not have occurred had the nuclear facility not been licensed.

In a footnote to *Private Fuel Storage,* the Commission attempted to distinguish "natural" events from terrorist attacks on the ground that natural events are "closely linked to the natural environment of the area within which a facility will be located, and are reasonably predictable by examining weather patterns and geological data for that region." 56 NRC at 347, note 18. This distinction is irrational. Terrorists attacks on nuclear facilities, are also "closely linked" to those facilities, in the sense that they are desirable targets. Furthermore, the

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[17] Thus, for example, the Diablo Canyon ER, on which the NRC based its Finding of No Significant Impact, evaluates four classes of "design events." *Id.* at 5.1-1 (December 21, 2001). Exhs. at 37. Design Events III and IV "include such events as earthquakes; tornados and missiles generated by natural phenomena; floods, fire and explosions; canister leakage under hypothetical accident conditions; . . . 100 percent blockage of air inlet ducts; . . . and transmission collapse." *Id.* at 5.1-3. *See also* Environmental Assessment at 19 (approving the accident analysis in the ER). Exhs. at 232.

Commission's argument that natural events are "reasonably predictable" amounts to a reprise of the claim that environmental impacts must be quantifiable in order to be cognizable. *See Limerick,* 22 NRC at 701. As discussed above in Section VI.D.1, the Commission itself disavowed this position in the Vehicle Bomb Rule. The Commission's position is also inconsistent with 10 C.F.R. § 51.71, which requires a discussion of qualitative factors that cannot be quantified.

3. The NRC ignored its own rule by concluding that evaluation of environmental impacts of terrorist attacks is not "manageable."

The Commission argued that inquiries into the environmental impacts of terrorist attacks are not "manageable." CLI-03-01, 57 NRC at 6-7, quoting *Private Fuel Storage,* 56 NRC at 349 and note 33, quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 776 (1983).[18] According to the NRC, those who seek a NEPA evaluation of the environmental impacts of terrorist attacks effectively seek an open-ended, "worst-case" analysis that has "no stopping

[18] The Commission's citation to *Metropolitan Edison Co. v. People Against Nuclear Energy* is completely inapposite. In that case, the Supreme Court ruled that psychological effects posed by the risk of an accident at the Three Mile Island nuclear power plant were "too remote from the physical environment" to warrant preparation of an EIS. 460 U.S. at 774. The Supreme Court "emphasize[d]" that in that case, it was considering "the effects caused by the *risk* of an accident." *Id.* (emphasis added). Here, in contrast, Petitioners are concerned about actual physical environmental effects in the event that a terrorist attack occurs at the Diablo Canyon ISFSI. As the Court recognized in *Metropolitan Edison,* "[t]he situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs at TMI-1, is an entirely different case," where its holding would not apply. *Id.* at 775.

point." *Private Fuel Storage,* 56 NRC at 354, Exhs. at 8.

The Commission's argument is directly contradicted by the agency's own pragmatic approach to evaluating the potential for specific types of terrorist attacks, as outlined in the 1994 Vehicle Bomb Rule. The Vehicle Bomb Rule demonstrates that it is possible to evaluate the potential for and credibility of attack scenarios, and to identify a range of reasonable alternatives for avoiding or mitigating the impacts of such attacks. Here, Petitioners seek a hearing on whether just such an analysis is required for the Diablo Canyon ISFSI.

As discussed in Contention EC-1, Petitioners seek "a full discussion of the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI." Contentions at 28, EOR 71. They also seek an evaluation of a "range of reasonable alternatives to the proposed action, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks" than the casks proposed by PG&E. *Id.* It is only common sense that the analysis requested by Petitioners is no more open-ended than the analysis the NRC performed in promulgating the Vehicle Bomb Rule.

4. The NRC cannot excuse itself from the requirements of NEPA without a statutory basis.

Compliance with NEPA is required "unless specifically excluded by statute or existing law makes compliance impossible." *Limerick Ecology Action v. NRC,* 869 F.2d at 729, citing *Public Service Co. of New Hampshire v. NRC,* 582 F.2d 77, 81 (1st Cir.), *cert. denied,* 439 U.S. 1046 (1978). While the Commission asserts that it is excused from compliance with NEPA by various factors, it cites no statute or existing law that makes compliance impossible. Accordingly, the Commission's excuses are without basis in law. *Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787-88 (1976).

a. Sensitivity of information does not preclude NEPA analysis.

The Commission attempted to justify its exclusion of Petitioners' environmental contentions on the ground that "NEPA's public process is not an appropriate forum for considering sensitive security issues." CLI-03-01, 57 NRC at 7, EOR 36. The Commission has not cited any law that would excuse it from compliance with NEPA. Without a specific and conflicting statutory basis, the mere sensitivity of information does not provide an excuse for noncompliance with NEPA. *Limerick Ecology Action v. NRC,* 869 F.2d at 729.

To the extent that the Commission is bound by legal requirements to protect sensitive information, the Commission has failed to demonstrate that those

requirements render it "impossible" to consider the environmental impacts o terrorist attacks and acts of malice or insanity against the proposed ISFSI.

In fact, the Commission's position is inconsistent with its own practice under another public participation statute, Section 189a of the Atomic Energy Act. 42 U.S.C. § 2239. The NRC has never denied a licensing hearing simply because sensitive, proprietary, or safeguards information may be discussed in the hearing. Instead, it implements procedures that limit access to sensitive information to parties who have signed confidentiality agreements.[19] The NRC can also use these procedures to limit access to sensitive information regarding the vulnerability of the Diablo Canyon ISFSI to the parties and interested government participants.[20]

The NRC also failed to recognize that it can *solicit* public comment, even if it does not disclose all the details of its environmental analysis. SLOMFP, for example, has proposed a defense-in-depth concept for protection against acts of malice or insanity, including measures ranging from perimeter protection to hardening of facility structures and strengthened emergency planning measures.

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[19] *See, e.g,* 10 C.F.R. §§ 2.744(e) (procedures for handling safeguards information in NRC hearings), 10 C.F.R. Part 2 Subpart I (procedures for handling classified information in NRC hearings); *Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant), ALAB-410, 5 NRC 1398, 1405 (1977) (granting intervenor's security expert access to confidential security plans during the operating license proceeding for Diablo Canyon).

[20] SLOMFP's Petition also recommended a process for ensuring that sensitive information is appropriately identified and protected during the adjudication regarding the Diablo Canyon ISFSI. Petition at 32-33 [EOR 151-52], Thompson Declaration of September 7, 2002, Section X, EOR 189-92.

See Petition at 24, 30-32 [EOR 143, 149-151]; Declaration of Dr. Gordon Thompson of September 7, 2002, Sections VIII, XI; EOR 186-87, 192-95. This proposal is far more comprehensive than the NRC's apparent focus on perimeter protection, as described in *Private Fuel Storage,* 56 NRC at 344, Exhs. at 3. State and local governments, which have expertise in and responsibility for implementing back-up security and emergency response measures, also have valuable contributions to make to the decisionmaking process.

The NRC conveniently ignored the fact that in numerous instances, other agencies such as the U.S. Department of Energy ("DOE") have prepared EISs containing information that was not accessible to the general public. For instance, the DOE has restricted circulation of some sensitive information, and withheld other information under the classification of "Official Use Only."[21] The DOE has

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[21] For example, Appendix H of the DOE's recently published EIS for the proposed Yucca Mountain high-level radioactive waste repository, which discusses consequences of accidents at the repository, is not in the hard copy of the EIS that was circulated to the public, nor is it on the internet. DOE/EIS-0250F, Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada at H-1 (February 2002). Exhs. at 80. Instead, it was placed in Volume 4 of the Final EIS, which must be specially ordered from the DOE. *Id.,* Readers Guide at 3. Exhs. at 81.

Another EIS prepared by the DOE contains an air transportation accident analysis that is not published in the publicly available version of the EIS, but is contained in an "Official Use Only document." DOE/EIS-236-S2, Draft Supplemental Programmatic Environmental Impact Statement on Stockpile Stewardship and Management for a Modern Pit Facility, Vol. II at C-15 and Tables

also prepared EISs containing highly sensitive classified information.[22] In none of these instances did the DOE refuse to prepare an EIS because it would involve the discussion of sensitive information. Instead, the publicly available version of the EIS redacted sensitive information. By following appropriate procedures and/or obtaining appropriate clearances, interested citizens and state and local governments may gain access to the information.

b. The NWPA does not preclude NEPA compliance.

The Commission asserted that its refusal to prepare an EIS on the environmental impacts of a terrorist attack "comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository." CLI-03-01, 57 NRC at 7, EOR 36. Nothing in the NWPA, however, exempts spent fuel storage from the requirements of NEPA. In fact, the statute specifically requires that the Commission's actions must be consistent with NEPA. 42 U.S.C. § 10152.

C.4-1, C.4-2, C.4-3 (May 2003), Exhs. at 102.

[22] *See, e.g.*, DOE/EIS-0161, Final Programmatic Environmental Impact Statement for Tritium Supply and Recycling, Vol. I at 2-1 (October 1995) (evaluating environmental impacts of recycling and production of tritium for nuclear weapons), Exhs. at 67; DOE/EIS-0319, Final Environmental Impact Statement for the Proposed Relocation of Technical Area 18 Capabilities and Materials at the Los Alamos National Laboratory at iii, 5-1 (August 2002) (evaluating environmental impacts of sabotage on a DOE research facility), Exhs. at 91.

c. Compliance with NEPA is independent of AEA safety and security requirements.

In both CLI-03-01 and *Private Fuel Storage,* the Commission cited its determined and ongoing effort to combat the potential for terrorism and its comprehensive review of security measures as compensation for its failure to comply with NEPA. CLI-03-01, 57 NRC at 8 [EOR 37]; *Private Fuel Storage,*56 NRC at 343, 347, Exhs. at 2, 4. As stated in *Private Fuel Storage,*

> [w]e hasten to add that our decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorist attack against NRC-regulated facilities. On the contrary, as we outlined above, the Commission and its Staff have taken steps to strengthen security and are in the midst of an intense study of the effects of postulated terrorist attacks and of our relevant security and safeguards rules and policies.

Id., 56 NRC at 347, Exhs. at 4. As the NRC also observed, however, the activities described above "are rooted in the NRC's ongoing responsibilities under the AEA to protect public health and safety and the common defense and security." *Id.*

As discussed above in Section V, *supra,* the requirements of the AEA are distinct from those of NEPA. While the AEA sets minimum standards for safe and secure operation of nuclear facilities, NEPA requires the NRC to consider and attempt to avoid or mitigate the environmental impacts which flow from the licensing of such facilities. Although the statutes overlap to some degree, compliance with the AEA does not excuse compliance with NEPA. *Limerick*

Ecology Action v. NRC, 869 F.2d at 729-30.

Moreover, the Commission's comment that "it is not obvious what additional information or insights a formal NEPA review might bring into play," 56 NRC at 356 [Exhs. at 9], only serves to highlight the insular and uninformed type of decisionmaking that NEPA's "action-forcing" requirement for an EIS is designed to correct. *Robertson v. Methow Valley,* 490 U.S. at 349. By refusing to grant Petitioners a hearing, the NRC has shielded itself from the "action-forcing" requirement to consider Petitioners' evidence of (a) the manner in which the Diablo Canyon ISFSI is, in fact, vulnerable to a terrorist attack; (b) the potential consequences of such an attack; and (c) design features, not apparently considered by the NRC, that can be implemented to avoid or mitigate those vulnerabilities. *See* Contentions at 27-28, EOR 70-71; discussion in Section VI.D.2, *supra.* None of Petitioners' insights have been taken into account in the licensing of the Diablo Canyon facility, because the NRC has completely ignored the relevance of the terrorist attacks of September 11.

E. The Commission's Decision to Deny SLOMFP's Request for a Hearing on New Security Measures for the Diablo Canyon Nuclear Complex Violates Section 189a of the AEA.

Pursuant to Section 189a, the Commission must offer Petitioners an opportunity to request a hearing on all issues that are material to the issuance of a license for the Diablo Canyon ISFSI. *Union of Concerned Scientists v. NRC,* 735

F.2d 1437, 1443 (D.C. Cir.1984), cert. denied, 469 U.S. 1132 (1985). Such material issues include the question of whether licensing of the proposed ISFSI would be inimical to public health and safety and the common defense and security under the statutory standard established in 42 U.S.C. §§ 2077(c), 2099, and 2111. *Id..*, 735 F.2d at 1445 (hearing must cover all issues of material fact, including basis for "ultimate finding" that adequate protective measures can and will be taken).

SLOMFP's Petition charged that this statutory standard could not be met if the NRC licensed a new nuclear facility on the Diablo Canyon site without first ensuring that the entire Diablo Canyon nuclear complex was adequately protected against terrorist attacks. SLOMFP thus sought to be heard on what security upgrades should be imposed on the entire Diablo Canyon nuclear complex, in the aftermath of the terrorist attacks of September 11, 2001, in order to ensure that licensing of the proposed ISFSI would not be inimical to common defense and security or pose an unreasonable risk to public health and safety. Therefore, the Commission's refusal to give SLOMFP a hearing on additional security measures required to protect the Diablo Canyon nuclear complex violates the hearing requirements of the Atomic Energy Act, 42 U.S.C. § 2239(a).

In CLI-02-23, the Commission did not deny that it was appropriate to upgrade security requirements for the entire Diablo Canyon nuclear complex; nor

did it deny that SLOMFP was entitled to be heard on the adequacy of those upgrades under Section 189a of the Atomic Energy Act. Instead, the Commission held that SLOMFP had come to the wrong forum, *i.e,* that it could participate instead "in any rulemakings that emerge from [the NRC's] comprehensive security review." *Id.*,56 NRC at 236, EOR 30. The Commission also asserted that SLOMFP could raise its concerns in the hearing that was then pending before the ASLB. *Id.*

Despite the Commission's claim that SLOMFP would have these two fora in which to be heard regarding the adequacy of security for the Diablo Canyon nuclear complex, in fact the Commission precluded SLOMFP from being heard at all. To date, the Commission has not instituted a single rulemaking to establish changes in the design basis threat and other security-related measures for the Diablo Canyon nuclear plant or the ISFSI.

SLOMFP was also foreclosed from raising this issue before the ASLB in the hearing that was then pending, because the premise of the Petition was that existing NRC security regulations are grossly inadequate to protect against terrorist attack, and therefore must be supplemented by additional requirements. *See* Petition at 2, EOR 121. As the Commission stated elsewhere in CLI-02-23, "hearing petitioners may not challenge NRC rules." 56 NRC at 236 note 10. Such challenges to NRC regulations during licensing proceedings are specifically

prohibited by 10 C.F.R. § 2.758. That is why, in fact, SLOMFP raised these issues before the Commission in the first instance, rather than before the ASLB. Petition at 8-10, EOR 127-29. Only the Commission has the authority to change the security rules for the facility. *Id.*

The only forum in which the Commission has addressed the matters raised in SLOMFP's Petition is a forum in which SLOMFP has no right to participate. For Diablo Canyon, as for all nuclear power plants and ISFSIs, security upgrades have been made solely through individual enforcement orders. *See* Section VI.F, *supra.* Members of the public, however, lack standing to obtain a hearing on the adequacy of the terms of enforcement orders. *Bellotti v. NRC,* 725 F.2d 1380, 1382 (D.C. Cir. 1983).[23]

As the U.S. Court of Appeals for the D.C. Circuit recognized in *Union of Concerned Scientists v. NRC,* 711 F.2d 370, 380 n. 24 (D.C. Cir. 1987), the Commission had the discretion to offer SLOMFP an opportunity to participate in a rulemaking instead of a hearing specific to the Diablo Canyon nuclear complex. The Commission lacks the discretion, however, to completely deny SLOMFP any opportunity to be heard on on its claims. *Id.* The Commission's refusal to grant

[23] Thus, for instance, although the enforcement orders upgrading security requirements offer any person who would be "adversely affected" an opportunity to request a hearing (*see, e.g.,*67 Fed. Reg. at 9,793 [Exhs. at 45], 67 Fed. Reg. at 65,151 [Exhs. at 50], 67 Fed. Reg. at 65,153 [Exhs. at 52], 68 Fed. Reg. at 24,511 [Exhs. at 55], 68 Fed. Reg. at 24,515 [Exhs. at 60]), only the licensee would be deemed "adversely affected" by such orders under *Bellotti.* 725 F.2d at 1382.

SLOMFP a hearing in this proceeding, without having offered a rulemaking in which SLOMFP could participate, violated SLOMFP's statutory right to a hearing under section 189a of the AEA, 42 U.S.C. § 2239(a). *Id.*

XII. CONCLUSION

For the foregoing reasons, Petitioners request the Court to reverse CLI-03-01 and remand this case for an adjudicatory hearing on Petitioners' Contentions EC-1 and EC-3. In addition, Petitioners request the Court to reverse CLI-02-23, and remand this case for an adjudicatory hearing on security upgrades that must be made to the entire Diablo Canyon complex in order to ensure that licensing of the proposed ISFSI is not inimical to the common defense and security and does not pose an unreasonable risk to public health and safety.

Respectfully submitted,

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March 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD, Petitioners,	)	
v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	
PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	

CERTIFICATE REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for Petitioners hereby certifies that the number of words in Petitioners' Brief of March 15, 2004, excluding the Table of Contents, Table of Authorities, Addendum, and corporate disclosure statement, as counted by the Microsoft Word program, is 11,712.

Respectfully submitted,

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March 15, 2004

STATUTORY ADDENDUM

Statutes

Administrative Procedure Act

5 U.S.C. § 553. Rule making

- (a) This section applies, according to the provisions thereof, except to the extent that there is involved -
- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.
- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -
- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply -
- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
- (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.
- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -
- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.
- (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on

judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Atomic Energy Act

42 U.S.C. § 2077

Sec. 57. Prohibition.

a. Unless authorized by a general or specific license issued by the Commission, which the Commission is authorized to issue pursuant to section 53, no person may transfer or receive in interstate commerce, transfer, deliver, acquire, own, possess, receive possession of or title to, or import into or export from the United States any special nuclear material.

b. It shall be unlawful for any person to directly or indirectly engage in the production of any special nuclear material outside of the United States except (1) as specifically authorized under an agreement for cooperation made pursuant to section 123, including a specific authorization in a subsequent arrangement under section 131 of this Act, or (2) upon authorization by the Secretary of Energy after a determination that such activity will not be inimical to the interest of the United States: *Provided*, That any such determination by the Secretary of Energy shall be made only with the concurrence of the Department of State and after consultation with the Nuclear Regulatory Commission, the Department of Commerce, and the Department of Defense. The Secretary of Energy shall, within ninety days after the enactment of the Nuclear Non-Proliferation Act of 1978, establish orderly and expeditious procedures, including provision for necessary administrative actions and inter-agency memoranda of understanding, which are mutually agreeable to the Secretaries of State, Defense, Commerce, and the Nuclear Regulatory Commission for the consideration of requests for authorization under this subsection. Such procedures shall include, at a minimum, explicit direction on the handling of such requests, express deadlines for the solicitation and collection of the views of the consulted agencies (with identified officials responsible for meeting such deadlines), an inter-agency coordinating authority to monitor the processing of such requests, predetermined procedures for the expeditious handling of intra-agency and inter-agency disagreements and appeals to higher authorities, frequent meetings of inter-agency administrative coordinators to review the status of all pending requests, and similar administrative mechanisms. To the extent practicable, an applicant should be advised of all the information required of the applicant for the entire process for every agency's needs at the beginning of the process. Potentially controversial requests should be identified as quickly as possible so that any required policy decisions or diplomatic consultations can be initiated in a timely manner. An immediate effort should be undertaken to establish quickly any necessary standards and criteria, including the nature of only required assurances or evidentiary showings, for the decision required under this subsection. The processing of any requests proposed and filed as of the date of enactment of the Nuclear Non-Proliferation Act of 1978 shall not be delayed pending the development and establishment of procedures to implement the requirements of this subsection. Any trade secrets or proprietary information submitted by any person seeking an authorization under this subsection shall be afforded the maximum degree of protection allowable by law: *Provided further,* That the export of component parts as defined in subsection 11v.(2) or 11cc.(2), or shall be governed by sections 109 and 126 of this Act: *Provided further*, That notwithstanding subsection 402(d) of the Department of Energy Organization Act (Public Law 95-91), the Secretary of Energy and not the Federal Energy Regulatory Commission, shall have sole jurisdiction within the Department of Energy over any matter arising from any function of the Secretary of Energy in this section, section 54d., section 64, or section 111b.

c. The Commission shall not–

(1) distribute any special nuclear material to any person for a use which is not under the jurisdiction of the United States except pursuant to the provisions of section 54; or

(2) distribute any special nuclear material or issue a license pursuant to section 53 to any person within the United States if the Commission finds that the distribution of such special nuclear material or the issuance of such license would be

inimical to the common defense and security or would constitute an unreasonable risk to the
health and safety of the public.

d. The Commission is authorized to establish classes of special nuclear material and to exempt certain classes or quantities of special nuclear material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of special nuclear material or such kinds of uses or users would not be inimical to the common defense and security and would not constitute unreasonable risk to the health and safety of the public.

e. Special nuclear material, as defined in section 11, produced in facilities licensed under section 103 or 104 may not be transferred, reprocessed, used, or otherwise made available by any instrumentality of the United States or any other person for nuclear explosive purposes.

42 U.S.C. § 2099

Sec. 69. Prohibition.

The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

42 U.S.C. § 2111

Sec. 81. Domestic Distribution.

No person may transfer or receive in interstate commerce, manufacture, produce, transfer, acquire, own, possess, import, or export any byproduct material, except to the extent authorized by this section, section 82 or section 84. The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed. The Commission may distribute, sell, loan, or lease such byproduct material as it owns to qualified applicants with or without charge: *Provided, however,* That, for byproduct material to be distributed by the Commission for a charge, the Commission shall establish prices on such equitable basis as, in the opinion of the Commission, (a) will provide reasonable compensation to the Government for such material, (b) will not discourage the use of such material or the development of sources of supply of such material independent of the Commission, and (c) will encourage research and development. In distributing such material, the Commission shall give preference to applicants proposing to use such material either in the conduct of research and development or in medical therapy. The Commission shall not permit the distribution of any byproduct material to any licensee, and shall recall or order the recall of any distributed material from any licensee, who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission or who uses such material in violation of law or regulation of the Commission or in a manner other than as disclosed in the application therefor or approved by the Commission. The Commission is authorized to establish classes of byproduct material and to exempt certain classes or quantities of material or kinds of uses or users from the requirements for a license set forth in this section when it makes a finding that the exemption of such classes or quantities of such material or such

kinds of uses or users will not constitute an unreasonable risk to the common defense and security and to the health and safety of the public.

42 U.S.C. § 2239(a)

Sec. 189. Hearings and Judicial Review.

a. (1)(A) In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award, or royalties under sections 153, 157, 186c., or 188, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104b. for a construction permit for a facility, and on any application under section 104c. for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date schedules for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185b., the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent,

render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

Hobbs Act

28 U.S.C. § 2342 (4)

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of –

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42.

28 U.S.C. § 2344

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies.

National Environmental Policy Act

42 U.S.C. § 4332

Sec. 102

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall --

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

Nuclear Waste Policy Act

42 U.S.C. §10101

DEFINITIONS

Sec. 2. For purposes of this Act [42 U.S.C. 10101 et seq.]:

(1) The term "Administrator" means the Administrator of the Environmental Protection Agency.

(2) The term "affected Indian tribe" means any Indian tribe—

(A) within whose reservation boundaries a monitored retrievable storage facility, test and evaluation facility, or a repository for high-level radioactive waste or spent fuel is proposed to be located; and

(B) whose federally defined possessory or usage rights to other lands outside of the reservation's boundaries arising out of congressionally ratified treaties may be substantially and adversely affected by the locating of such a facility: Provided, that the Secretary of the Interior finds, upon the petition of the appropriate governmental officials of the tribe, that such effects are both substantial and adverse to the tribe.

(3) The term "atomic energy defense activity" means any activity of the Secretary performed in whole or in part in carrying out any of the following functions:

(A) naval reactors development;

(B) weapons activities including defense inertial confinement fusion;

(C) verification and control technology;

(D) defense nuclear materials production;

(E) defense nuclear waste and materials by-products management;

(F) defense nuclear materials security and safeguards and security investigations; and

(G) defense research and development.

(4) The term "candidate site" means an area, within a geologic and hydrologic system, that is recommended by the Secretary under section 112 [42 U.S.C. 10132] for site characterization, approved by the President under section 112 [42 U.S.C. 10133] for site characterization, or undergoing site characterization under section 113 [42 U.S.C. 10133].

(5) The term "civilian nuclear activity" means any atomic energy activity other than an atomic energy defense activity.

(6) The term "civilian nuclear power reactor" means a civilian nuclear powerplant required to be licensed under section 103 or 104 b. of the Atomic Energy Act of 1954 [42 U.S.C. 2133, 2134(b)].

(7) The term "Commission" means the Nuclear Regulatory Commission.

(8) The term "Department" means the Department of Energy.

(9) The term "disposal" means the emplacement in a repository of high-level radioactive waste, spent nuclear fuel, or other highly radioactive material with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.

(10) The terms "disposal package" and "package" mean the primary container that holds, and is in contact with, solidified high-level radioactive waste, spent nuclear fuel, or other radioactive materials, and any overpacks that are emplaced at a repository.

(11) The term "engineered barriers" means manmade components of a disposal system designed to prevent the release of radionuclides into the geologic medium involved. Such term includes the high-level radioactive waste form, high-level radioactive waste canisters, and other materials placed over and around such canisters.

(12) The term "high-level radioactive waste" means—

(A) the highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in

sufficient concentrations; and

(B) other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

(13) The term "Federal agency" means any Executive agency, as defined in section 105 of title 5, United States Code [5 U.S.C. 105].

(14) The term "Governor" means the chief executive officer of a State.

(15) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary of the Interior because of their status as Indians, including any Alaska Native village, as defined in section 3(c) of the Alaska Native Claims Settlement Act [43 U.S.C. 1602(c)].

(16) The term "low-level radioactive waste" means radioactive material that—

(A) is not high-level radioactive waste, spent nuclear fuel, transuranic waste, or by-product material as defined in section 11e(2) of the Atomic Energy Act of 1954 [42 U.S.C. 2014(e)(2)]; and

(B) the Commission, consistent with existing law, classifies as low-level

(C) radioactive waste.

(17) The term "'Office" means the Office of Civilian Radioactive Waste Management established in section 304 [42 U.S.C. 10224].

(18) The term "repository" means any system licensed by the Commission that is intended to be used for, or may be used for, the permanent deep geologic disposal of high-level radioactive waste and spent nuclear fuel, whether or not such system is designed to permit the recovery, for a limited period during initial operation, of any materials placed in such system. Such term includes both surface and subsurface areas at which high-level radioactive waste and spent nuclear fuel handling activities are conducted.

(19) The term "reservation" means—

(A) any Indian reservation or dependent Indian community referred to in clause (a) or (b) of section 1151 of title 18, United States Code [18 U.S.C. 1151]; or

(B) any land selected by an Alaska Native village or regional corporation under the provisions of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.).

(20) The term "Secretary" means the Secretary of Energy.

(21) The term "site characterization" means—

(A) siting research activities with respect to a test and evaluation facility at a candidate site; and

(B) activities, whether in the laboratory or in the field, undertaken to establish the geologic condition and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

(22) The term "siting research" means activities, including borings, surface excavations, shaft excavations, subsurface lateral excavations and borings, and in situ testing, to determine the suitability of a site for a test and evaluation facility.

(23) The term "spent nuclear fuel" means fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing.

(24) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

(25) The term "storage" means retention of high-level radioactive waste, spent nuclear fuel, or transuranic waste with the intent to recover such waste or fuel for subsequent use, processing, or disposal.

(26) The term "Storage Fund" means the Interim Storage Fund established in section

136(c).
(27) The term "test and evaluation facility" means an at-depth, prototypic, underground cavity with subsurface lateral excavations extending from a central shaft that is used for research and development purposes, including the development of data and experience for the safe handling and disposal of solidified high-level radioactive waste, transuranic waste, or spent nuclear fuel.
(28) The term "unit of general local government" means any borough, city, county, parish, town, township, village, or other general purpose political subdivision of a State.
(29) The term "Waste Fund" means the Nuclear Waste Fund established in section 302(c) [42 U.S.C. 10222].
(30) The term "Yucca Mountain site" means the candidate site in the State of Nevada recommended by the Secretary to the President under section 112(b)(1)(B) [42 U.S.C. 10132(b)(1)(B)] on May 27,1986.
(31) The term "affected unit of local government" means the unit of local government with jurisdiction over the site of a repository or a monitored retrievable storage facility. Such term may, at the discretion of the Secretary, include units of local government that are contiguous with such unit.
(32) The term "Negotiator" means the Nuclear Waste Negotiator.
(33) As used in title IV, the term "Office" means the Office of the Nuclear Waste Negotiator established under title IV of this Act.
(34) The term "monitored retrievable storage facility" means the storage facility described in section 141(b)(1) [42 U.S.C. 10161(b)(1)].

42 U.S.C. § 10152

AVAILABLE CAPACITY FOR INTERIM STORAGE OF SPENT NUCLEAR FUEL

Sec. 132. The Secretary, the Commission, and other authorized Federal officials shall each take such actions as such official considers necessary to encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor consistent with—

(1) the protection of the public health and safety, and the environment;

(2) economic considerations;

(3) continued operation of such reactor;

(4) any applicable provisions of law; and

(5) the views of the population surrounding such reactor.

Regulations

NRC Regulations

10 C.F.R. § 2.714(b)

54 FR 33168

(b)(1) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or if no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

54 FR 33168

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

10 C.F.R. § 2.744

(a) A request for the production of an NRC record or document not available pursuant to § 2.790 by a party to an initial licensing proceeding may be served on the Executive Director for Operations, without leave of the Commission or the presiding officer. The request shall set forth the records or documents requested, either by individual item or by category, and shall describe each item or category with reasonable particularity and shall state why that record or document is relevant to the proceeding.

(b) If the Executive Director for Operations objects to producing a requested record or document on the ground that (1) it is not relevant or (2) it is exempted from disclosure under § 2.790 and the disclosure is not necessary to a proper decision in the proceeding or the document or the information therein is reasonably obtainable from another source, he shall so advise the requesting party.

(c) If the Executive Director for Operations objects to producing a record or document, the requesting party may apply to the presiding officer, in writing, to compel production of that record or document. The application shall set forth the relevancy of the record or document to the issues in the proceeding. The application shall be processed as a motion in accordance with § 2.730 (a) through (d). The record or document covered by the application shall be produced for the "in camera" inspection of the presiding officer, exclusively, if requested by the presiding officer and only to the extent necessary to determine:

(1) The relevancy of that record or document;

(2) Whether the document is exempt from disclosure under § 2.790;

(3) Whether the disclosure is necessary to a proper decision in the proceeding;

(4) Whether the document or the information therein is reasonably obtainable from another source.

(d) Upon a determination by the presiding officer that the requesting party has demonstrated the relevancy of the record or document and that its production is not exempt from disclosure under § 2.790 or that, if exempt, its disclosure is necessary to a proper decision in the proceeding, and the document or the information therein is not reasonably obtainable from another source, he shall order the Executive Director for Operations, to produce the document.

(e) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.790, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating pursuant to § 2.715(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

(f) A ruling by the presiding officer, or the Commission for the production of a record or document will specify the time, place, and manner of production.

(g) No request pursuant to this section shall be made or entertained before the matters in controversy have been identified by the Commission or the presiding officer, or after the beginning of the prehearing conference held pursuant to § 2.752 except upon leave of the presiding officer for good cause shown.

(h) The provisions of § 2.740 (c) and (e) shall apply to production of NRC records and documents pursuant to this section.

10 C.F.R. § 2.758

(a) Except as provided in paragraphs (b), (c), and (d) of this section, any rule or regulation of the Commission, or any provision thereof, issued in its program for the licensing of production and utilization facilities, source material, special nuclear material, or byproduct material is not subject to attack by way of discovery, proof, argument, or other means in any adjudicatory proceeding involving initial or renewal licensing subject to this subpart.

(b) A party to an adjudicatory proceeding involving initial or renewal licensing subject to this subpart may petition that the application of a specified Commission rule or regulation or any provision thereof, of the type described in paragraph (a) of this section, be waived or an exception made for the particular proceeding. The sole ground for petition for waiver or exception shall be that special circumstances with respect to the subject matter of the particular proceeding are such that the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted. The petition shall be accompanied by an affidavit that identifies the specific aspect or aspects of the subject matter of the proceeding as to which the application of the rule or regulation (or provision thereof) would not serve the purposes for which the rule or regulation was adopted, and shall set forth with particularity the special circumstances alleged to justify the waiver or exception requested. Any other party may file a response thereto, by counter affidavit or otherwise.

(c) If, on the basis of the petition, affidavit and any response thereto provided for in paragraph (b) of this section, the presiding officer determines that the petitioning party has not made a prima facie showing that the application of the specific Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding would not serve the purposes for which the rule or regulation was adopted and that application of the rule or regulation should be waived or an exception granted, no evidence may be received on that matter and no discovery, cross-examination or argument directed to the matter will be permitted, and the presiding officer may not further consider the matter.

(d) If, on the basis of the petition, affidavit and any response provided for in paragraph (b) of this section, the presiding officer determines that such a prima facie showing has been made, the presiding officer shall, before ruling thereon, certify directly to the Commission for determination the matter of whether the application of the Commission rule or regulation or provision thereof to a particular aspect or aspects of the subject matter of the proceeding, in the context of this section, should be waived or an exception made. The Commission may, among other things, on the basis of the petition, affidavits, and any response, determine whether the application of the specified rule or regulation (or provision thereof) should be waived or an exception be made, or the Commission may direct such further proceedings as it deems appropriate to aid its determination.

(e) Whether or not the procedure in paragraph (b) of this section is available, a party to an initial or renewal licensing proceeding may file a petition for rulemaking pursuant to § 2.802.

10 C.F.R. Part 2, Subpart I--Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

Source: 41 FR 53329, Dec. 6, 1976, unless otherwise noted.

§ 2.900 Purpose.

This subpart is issued pursuant to section 181 of the Atomic Energy Act of 1954, as amended, and section 201 of the Energy Reorganization Act of 1974, as amended, to provide such procedures in proceedings subject to this part as will effectively safeguard and prevent disclosure of Restricted Data and National Security Information to unauthorized persons, with minimum impairment of procedural rights.

§ 2.901 Scope of subpart I.

This subpart applies, as applicable, to all proceedings under subparts G, J, K, L, M, and N of this part.
[69 FR 2264, Jan. 14, 2004]

§ 2.902 Definitions.

As used in this subpart:
(a) *Government agency* means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America, which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.
(b) *Interested party* means a party having an interest in the issue or issues to which particular Restricted Data or National Security Information is relevant. Normally the interest of a party in an issue may be determined by examination of the notice of hearing, the answers and replies.
(c) The phrase *introduced into a proceeding* refers to the introduction or incorporation of testimony or documentary matter into any part of the official record of a proceeding subject to this part.
(d) *National Security Information* means information that has been classified pursuant to Executive Order 12356.
(e) *Party*, in the case of proceedings subject to this subpart includes a person admitted as a party under § 2.309 or an interested State admitted under § 2.315(c).
[41 FR 53329, Dec. 6, 1976, as amended at 47 FR 56314, Dec. 16, 1982; 69 FR 2264, Jan. 14, 2004]

§ 2.903 Protection of restricted data and national security information.

Nothing in this subpart shall relieve any person from safeguarding Restricted Data or National Security Information in accordance with the applicable provisions of laws of the United States and rules, regulations or orders of any Government Agency.

§ 2.904 Classification assistance.

On request of any party to a proceeding or of the presiding officer, the Commission will designate a representative to advise and assist the presiding officer and the parties with respect to security classification of information and the safeguards to be observed.

§ 2.905 Access to restricted data and national security information for parties; security clearances.

(a) Access to restricted data and national security information introduced into proceedings. Except as provided in paragraph (h) of this section, restricted data or national security information introduced into a proceeding subject to this part will be made available to any interested party having the required security clearance; to counsel for an interested party provided the counsel has the required security clearance; and to such additional persons having the required security clearance as the Commission or the presiding officer determined are needed by such party for adequate preparation or presentation of his case. Where the interest of such party will not be prejudiced, the Commission or presiding officer may postpone action upon an application for access under this paragraph until after a notice of hearing, answers, and replies have been filed.
(b) Access to Restricted Data or National Security Information not introduced into proceedings.
(1) On application showing that access to Restricted Data or National Security Information may be required for the preparation of a party's case, and except as provided in paragraph (h) of this section, the Commission or the presiding officer will issue an order granting access to such Restricted Data or National Security Information to the party upon his obtaining the required security clearance, to counsel for the party upon their obtaining the required security clearance, and to such other individuals as may be needed by the party for the preparation and presentation of his case upon their obtaining the required clearance.
(2) Where the interest of the party applying for access will not be prejudiced, the Commission or the presiding officer may postpone action on an application pursuant to this paragraph until after a notice of hearing, answers and replies have been filed.
(c) The Commission will consider requests for appropriate security clearances in reasonable numbers pursuant to this section. A reasonable charge will be made by the Commission for costs of security clearance pursuant to this section.
(d) The presiding officer may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising under this section. Any party affected by a determination or order of the presiding officer under this section may appeal forthwith to the Commission from the determination or order. The filing by the staff of an appeal from an order of a presiding officer granting access to Restricted Data or National Security Information shall stay the order pending determination of the appeal by the Commission.
(e) Application granting access to restricted data or national security information.
(1) An application under this section for orders granting access to restricted data or national security information not received from another Government agency will normally be acted upon by the presiding officer, or if a proceeding is not before a presiding officer, by the Commission.
(2) An application under this section for orders granting access to restricted data or national security information where the information has been received by the Commission from another Government agency will be acted upon by the Commission.
(f) To the extent practicable, an application for an order granting access under this section shall describe the subjects of Restricted Data or National Security Information to which access is desired and the level of classification (confidential, secret or other) of the information; the reasons why access to the information is requested; the names of individuals for whom clearances are requested; and the reasons why security clearances are being requested for those individuals.
(g) On the conclusion of a proceeding, the Commission will terminate all orders issued in the proceeding for access to Restricted Data or National Security Information and all security clearances granted pursuant to them; and may issue such orders requiring the disposal of classified matter received pursuant to them or requiring the observance of other procedures to

safeguard such classified matter as it deems necessary to protect Restricted Data or National Security Information.
(h) Refusal to grant access to restricted data or national security information.
(1) The Commission will not grant access to restricted data or national security information unless it determines that the granting of access will not be inimical to the common defense and security.
(2) Access to Restricted Data or National Security Information which has been received by the Commission from another Government agency will not be granted by the Commission if the originating agency determines in writing that access should not be granted. The Commission will consult the originating agency prior to granting access to such data or information received from another Government agency.

§ 2.906 Obligation of parties to avoid introduction of restricted data or national security information.

It is the obligation of all parties in a proceeding subject to this part to avoid, where practicable, the introduction of Restricted Data or National Security Information into the proceeding. This obligation rests on each party whether or not all other parties have the required security clearance.

§ 2.907 Notice of intent to introduce restricted data or national security information.

(a) If, at the time of publication of a notice of hearing, it appears to the staff that it will be impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding, it will file a notice of intent to introduce Restricted Data or National Security Information.
(b) If, at the time of filing of an answer to the notice of hearing it appears to the party filing that it will be impracticable for the party to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall state in the answer a notice of intent to introduce Restricted Data or National Security Information into the proceeding.
(c) If, at any later stage of a proceeding, it appears to any party that it will be impracticable to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall give to the other parties prompt written notice of intent to introduce Restricted Data or National Security Information into the proceeding.
(d) Restricted Data or National Security Information shall not be introduced into a proceeding after publication of a notice of hearing unless a notice of intent has been filed in accordance with § 2.908, except as permitted in the discretion of the presiding officer when it is clear that no party or the public interest will be prejudiced.

§ 2.908 Contents of notice of intent to introduce restricted data or other national security information.

(a) A party who intends to introduce Restricted Data or other National Security Information shall file a notice of intent with the Secretary. The notice shall be unclassified and, to the extent consistent with classification requirements, shall include the following:
(1) The subject matter of the Restricted Data or other National Security Information which it is anticipated will be involved;
(2) The highest level of classification of the information (confidential, secret, or other);
(3) The stage of the proceeding at which he anticipates a need to introduce the information; and
(4) The relevance and materiality of the information to the issues on the proceeding.
(b) In the discretion of the presiding officer, such notice, when required by § 2.907(c), may be given orally on the record.

§ 2.909 Rearrangement or suspension of proceedings.

In any proceeding subject to this part where a party gives a notice of intent to introduce Restricted Data or other National Security Information, and the presiding officer determines that any other interested party does not have required security clearances, the presiding officer may in his discretion:
(a) Rearrange the normal order of the proceeding in a manner which gives such interested parties an opportunity to obtain required security clearances with minimum delay in the conduct of the proceeding.
(b) Suspend the proceeding or any portion of it until all interested parties have had opportunity to obtain required security clearances. No proceeding shall be suspended for such reasons for more than 100 days except with the consent of all parties or on a determination by the presiding officer that further suspension of the proceeding would not be contrary to the public interest.
(c) Take such other action as he determines to be in the best interest of all parties and the public.

§ 2.910 Unclassified statements required.

(a) Whenever Restricted Data or other National Security Information is introduced into a proceeding, the party offering it shall submit to the presiding officer and to all parties to the proceeding an unclassified statement setting forth the information in the classified matter as accurately and completely as possible.
(b) In accordance with such procedures as may be agreed upon by the parties or prescribed by the presiding officer, and after notice to all parties and opportunity to be heard thereon, the presiding officer shall determine whether the unclassified statement or any portion of it, together with any appropriate modifications suggested by any party, may be substituted for the classified matter or any portion of it without prejudice to the interest of any party or to the public interest.
(c) If the presiding officer determines that the unclassified statement, together with such unclassified modifications as he finds are necessary or appropriate to protect the interest of other parties and the public interest, adequately sets forth information in the classified matter which is relevant and material to the issues in the proceeding, he shall direct that the classified matter be excluded from the record of the proceeding. His determination will be considered by the Commission as a part of the decision in the event of review.
(d) If the presiding officer determines that an unclassified statement does not adequately present the information contained in the classified matter which is relevant and material to the issues in the proceeding, he shall include his reasons in his determination. This determination shall be included as part of the record and will be considered by the Commission in the event of review of the determination.
(e) The presiding officer may postpone all or part of the procedures established in this section until the reception of all other evidence has been completed. Service of the unclassified statement required in paragraph (a) of this section shall not be postponed if any party does not have access to Restricted Data or other National Security Information.

§ 2.911 Admissibility of restricted data or other national security information.

A presiding officer shall not receive any Restricted Data or other National Security Information in evidence unless:
(a) The relevance and materiality of the Restricted Data or other National Security Information to the issues in the preceeding, and its competence, are clearly established; and
(b) The exclusion of the Restricted Data or other National Security Information would prejudice the interests of a party or the public interest.

§ 2.912 Weight to be attached to classified evidence.

In considering the weight and effect of any Restricted Data or other National Security Information received in evidence to which an interested party has not had opportunity to receive access, the presiding officer and the Commission shall give to such evidence such weight as is appropriate under the circumstances, taking into consideration any lack of opportunity to rebut or impeach the evidence.

§ 2.913 Review of Restricted Data or other National Security Information received in evidence.

At the close of the reception of evidence, the presiding officer shall review the record and shall direct that any Restricted Data or other National Security Information be expunged from the record where such expunction would not prejudice the interests of a party or the public interest. Such directions by the presiding officer will be considered by the Commission in the event of review of the determinations of the presiding officer.

10 C.F.R. Part 50 - DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

Source: 21 FR 355, Jan. 19, 1956, unless otherwise noted.

§ 50.13 Attacks and destructive acts by enemies of the United States; and defense activities.

An applicant for a license to construct and operate a production or utilization facility, or for an amendment to such license, is not required to provide for design features or other measures for the specific purpose of protection against the effects of (a) attacks and destructive acts, including sabotage, directed against the facility by an enemy of the United States, whether a foreign government or other person, or (b) use or deployment of weapons incident to U.S. defense activities.
[32 FR 13445, Sept. 26, 1967]

10 C.F.R. Part 51 - ENVIRONMENTAL PROTECTION REGULATIONS FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

Source: 49 FR 9381, Mar. 12, 1984, unless otherwise noted.

§ 51.61 Environmental report--independent spent fuel storage installation (ISFSI) or monitored retrievable storage installation (MRS) license.

Each applicant for issuance of a license for storage of spent fuel in an independent spent fuel storage installation (ISFSI) or for the storage of spent fuel and high-level radioactive waste in a monitored retrievable storage installation (MRS) pursuant to part 72 of this chapter shall submit with its application to: ATTN: Document Control Desk, Director, Office of Nuclear Material Safety and Safeguards, a separate document entitled "Applicant's Environmental Report--ISFSI License" or "Applicant's Environmental Report--MRS License," as appropriate. If the applicant is the U.S. Department of Energy, the environmental report may be in the form of either an environmental impact statement or an environmental assessment, as appropriate. The environmental report shall contain the information specified in § 51.45 and shall address the siting evaluation factors contained in subpart E of part 72 of this chapter. Unless otherwise required by the Commission, in accordance with the generic determination in § 51.23(a) and the provisions in § 51.23(b), no discussion of the environmental impact of the storage of spent fuel at an ISFSI beyond the term of the license or amendment applied for is required in an environmental report submitted by an applicant for an initial license for storage of spent fuel in an ISFSI, or any amendment thereto.
[53 FR 31681, Aug. 19, 1988; 68 FR 58811, Oct. 10, 2003]

§ 51.70 Draft environmental impact statement--general.

(a) The NRC staff will prepare a draft environmental impact statement as soon as practicable after publication of the notice of intent to prepare an environmental impact statement and completion of the scoping process. To the fullest extent practicable, environmental impact statements will be prepared concurrently or integrated with environmental impact analyses and related surveys and studies required by other Federal law.
(b) The draft environmental impact statement will be concise, clear and analytic, will be written in plain language with appropriate graphics, will state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and of any other relevant and applicable environmental laws and policies, will identify any methodologies used and sources relied upon, and will be supported by evidence that the necessary environmental analyses have been made. The format provided in section 1(a) of appendix A of this subpart should be used. The NRC staff will independently evaluate and be responsible for the reliability of all information used in the draft environmental impact statement.
(c) The Commission will cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, in accordance with 40 CFR 1506.2 (b) and (c).

§ 51.71 Draft environmental impact statement--contents.

(a) *Scope.* The draft environmental impact statement will be prepared in accordance with the scope decided upon in the scoping process required by §§ 51.26 and 51.29. As appropriate and to the extent required by the scope, the draft statement will address the topics in paragraphs (b), (c), (d) and (e) of this section and the matters specified in §§ 51.45, 51.50, 51.51, 51.52, 51.53, 51.54, 51.61 and 51.62.

(b) *Analysis of major points of view.* To the extent sufficient information is available, the draft environmental impact statement will include consideration of major points of view concerning the environmental impacts of the proposed action and the alternatives, and contain an analysis of significant problems and objections raised by other Federal, State, and local agencies, by any affected Indian tribes, and by other interested persons.

(c) *Status of compliance.* The draft environmental impact statement will list all Federal permits, licenses, approvals, and other entitlements which must be obtained in implementing the proposed action and will describe the status of compliance with those requirements. If it is uncertain whether a Federal permit, license, approval, or other entitlement is necessary, the draft environmental impact statement will so indicate.

(d) *Analysis.* The draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects. Except for supplemental environmental impact statements for the operating license renewal stage prepared pursuant to § 51.95(c), draft environmental impact statements should also include consideration of the economic, technical, and other benefits and costs of the proposed action and alternatives and indicate what other interests and considerations of Federal policy, including factors not related to environmental quality if applicable, are relevant to the consideration of environmental effects of the proposed action identified pursuant to paragraph (a) of this section. Supplemental environmental impact statements prepared at the license renewal stage pursuant to § 51.95(c) need not discuss the economic or technical benefits and costs of either the proposed action or alternatives except insofar as such benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. In addition, the supplemental environmental impact statement prepared at the license renewal stage need not discuss other issues not related to the environmental effects of the proposed action and associated alternatives. The draft supplemental environmental impact statement for license renewal prepared pursuant to § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in Appendix B to subpart A of this part. The draft supplemental environmental impact statement must contain an analysis of those issues identified as Category 2 in Appendix B to subpart A of this part that are open for the proposed action. The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms. Due consideration will be given to compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable zoning and land-use regulations and water pollution limitations or requirements promulgated or imposed pursuant to the Federal Water Pollution Control Act. The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by such standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained.[3] While satisfaction of Commission standards and criteria pertaining to radiological effects will be necessary to meet the licensing requirements of the Atomic Energy Act, the analysis will, for the purposes of NEPA, consider the radiological effects of the proposed action and alternatives.

(e) Preliminary recommendation. The draft environmental impact statement normally will include a preliminary recommendation by the NRC staff respecting the proposed action. This preliminary recommendation will be based on the information and analysis described in paragraphs (a) through (d) of this section and §§ 51.75, 51.76, 51.80, 51.85, and 51.95, as

appropriate, and will be reached after considering the environmental effects of the proposed action and reasonable alternatives,[4] and, except for supplemental environmental impact statements for the operating license renewal stage prepared pursuant to § 51.95(c), after weighing the costs and benefits of the proposed action. In lieu of a recommendation, the NRC staff may indicate in the draft statement that two or more alternatives remain under consideration.

[49 FR 9381, Mar. 12, 1984, as amended at 61 FR 28488, June 5, 1996; 61 FR 66544, Dec. 18, 1996]

3. Compliance with the environmental quality standards and requirements of the Federal Water Pollution Control Act (imposed by EPA or designated permitting states) is not a substitute for and does not negate the requirement for NRC to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects. Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable at the license renewal stage. When no such assessment of aquatic impacts is available from the permitting authority, NRC will establish on its own or in conjunction with the permitting authority and other agencies having relevant expertise the magnitude of potential impacts for striking an overall cost-benefit balance for the facility at the construction permit and operating license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable at the license renewal stage.

4. The consideration of reasonable alternatives to a proposed action involving nuclear power reactors (e.g., alternative energy sources) is intended to assist the NRC in meeting its NEPA obligations and does not preclude any State authority from making separate determinations with respect to these alternatives and in no way preempts, displaces, or affects the authority of States or other Federal agencies to address these issues.

10 C.F.R. Part 72 - LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED GREATER THAN CLASS C WASTE

Source: 53 FR 31658, Aug. 19, 1988, unless otherwise noted.

Subpart B--License Application, Form, and Contents

§ 72.24 Contents of application: Technical information.

Each application for a license under this part must include a Safety Analysis Report describing the proposed ISFSI or MRS for the receipt, handling, packaging, and storage of spent fuel, high-level radioactive waste, and/or reactor-related GTCC waste as appropriate, including how the ISFSI or MRS will be operated. The minimum information to be included in this report must consist of the following:

(o) A description of the detailed security measures for physical protection, including design features and the plans required by subpart H. For an application from DOE for an ISFSI or MRS, DOE will provide a description of the physical protection plan for protection against radiological sabotage as required by subpart H.

Subpart H--Physical Protection

§ 72.180 Physical protection plan.

The licensee shall establish, maintain, and follow a detailed plan for physical protection as described in § 73.51 of this chapter. The licensee shall retain a copy of the current plan as a record until the Commission terminates the license for which the procedures were developed and, if any portion of the plan is superseded, retain the superseded material for 3 years after each change or until termination of the license. The plan must describe how the applicant will meet the requirements of § 73.51 of this chapter and provide physical protection during on-site transportation to and from the proposed ISFSI or MRS and include within the plan the design for physical protection, the lice safeguards contingency plan, and the security organization personnel training and qualification plan. The plan must list tests, inspections, audits, and other means to be used to demonstrate compliance with such requirements.
[63 FR 26961, may 15, 1998]

§ 72.182 Design for physical protection.

The design for physical protection must show the site layout and the design features provided to protect the ISFSI or MRS from sabotage. It must include:
(a) The design criteria for the physical protection of the proposed ISFSI or MRS;
(b) The design bases and the relation of the design bases to the design criteria submitted pursuant to paragraph (a) of this section; and

(c) Information relative to materials of construction, equipment, general arrangement, and proposed quality assurance program sufficient to provide reasonable assurance that the final security system will conform to the design bases for the principal design criteria submitted pursuant to paragraph (a) of this section.

§ 72.184 Safeguards contingency plan.

(a) The requirements of the licensee's safeguards contingency plan for responding to threats and radiological sabotage must be as defined in appendix C to part 73 of this chapter. This plan must include Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix, the first four categories of information relating to nuclear facilities licensed under part 50 of this chapter. (The fifth and last category of information, Procedures, does not have to be submitted for approval.)
(b) The licensee shall prepare and maintain safeguards contingency plan procedures in accordance with appendix C to 10 CFR part 73 for effecting the actions and decisions contained in the Responsibility Matrix of the licensee's safeguards contingency plan. The licensee shall retain a copy of the current procedures as a record until the Commission terminates the license for which the procedures were developed and, if any portion of the procedures is superseded, retain the superseded material for three years after each change.
[53 FR 31658, Aug. 19, 1988, as amended at 57 FR 33429, July 29, 1992]

§ 72.186 Change to physical security and safeguards contingency plans.

(a) The licensee shall make no change that would decrease the safeguards effectiveness of the physical security plan, guard training plan or the first four categories of information (Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix) contained in the licensee safeguards contingency plan without prior approval of the Commission. A licensee desiring to make a change must submit an application for a license amendment pursuant to § 72.56.
(b) The licensee may, without prior Commission approval, make changes to the physical security plan, guard training plan, or the safeguards contingency plan, if the changes do not decrease the safeguards effectiveness of these plans. The licensee shall maintain records of changes to any such plan made without prior approval for a period of three years from the date of the change, and shall, within two months after the change is made, submit a report addressed to Director, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, in accordance with § 72.4, containing a description of each change. A copy of the report must be sent to the Regional Administrator of the appropriate NRC Regional Office specified in appendix A to part 73 of this chapter.
[53 FR 31658, Aug. 19, 1998, as amended at 67 FR 3586, Jan. 25, 2002; 68 FR 58819, Oct. 10, 2003]

10 C.F.R. Part 73 - PHYSICAL PROTECTION OF PLANTS AND MATERIALS

Source: 38 FR 35430, Dec. 28, 1973, unless otherwise noted.

§ 73.1 Purpose and scope.

(a) *Purpose.* This part prescribes requirements for the establishment and maintenance of a physical protection system which will have capabilities for the protection of special nuclear material at fixed sites and in transit and of plants in which special nuclear material is used. The following design basis threats, where referenced in ensuing sections of this part, shall be used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material. Licensees subject to the provisions of § 72.182, § 72.212, § 73.20, § 73.50, and § 73.60 are exempt from § 73.1(a)(1)(i)(E) and § 73.1(a)(1)(iii).

(1) *Radiological sabotage.* (i) A determined violent external assault, attack by stealth, or deceptive actions, of several persons with the following attributes, assistance and equipment:

(A) Well-trained (including military training and skills) and dedicated individuals,

(B) Inside assistance which may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both,

(C) suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long range accuracy,

(D) hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safeguards system, and

(E) a four-wheel drive land vehicle used for transporting personnel and their hand-carried equipment to the proximity of vital areas, and

(ii) An internal threat of an insider, including an employee (in any position), and

(iii) A four-wheel drive land vehicle bomb.

(2) *Theft or diversion of formula quantities of strategic special nuclear material.* (i) A determined, violent, external assault, attack by stealth, or deceptive actions by a small group with the following attributes, assistance, and equipment:

(A) Well-trained (including military training and skills) and dedicated individuals;

(B) Inside assistance that may include a knowledgeable individual who attempts to participate in a passive role (e.g., provide information), an active role (e.g., facilitate entrance and exit, disable alarms and communications, participate in violent attack), or both;

(C) Suitable weapons, up to and including hand-held automatic weapons, equipped with silencers and having effective long-range accuracy;

(D) Hand-carried equipment, including incapacitating agents and explosives for use as tools of entry or for otherwise destroying reactor, facility, transporter, or container integrity or features of the safe-guards system;

(E) Land vehicles used for transporting personnel and their hand-carried equipment; and

(F) the ability to operate as two or more teams.

(ii) An individual, including an employee (in any position), and

(iii) A conspiracy between individuals in any position who may have:

(A) Access to and detailed knowledge of nuclear power plants or the facilities referred to in § 73.20(a), or

(B) items that could facilitate theft of special nuclear material (e.g., small tools, substitute material, false documents, etc.), or both.

(b) *Scope.* (1) This part prescribes requirements for:

(i) The physical protection of production and utilization facilities licensed pursuant to part 50 of this chapter,

(ii) The physical protection of plants in which activities licensed pursuant to part 70 of this chapter are conducted, and

(iii) The physical protection of special nuclear material by any person who, pursuant to the regulations in part 61 or 70 of this chapter, possesses or uses at any site or contiguous sites subject to the control by the licensee, formula quantities of strategic special nuclear material or special nuclear material of moderate strategic significance or special nuclear material of low strategic significance.
(2) This part prescribes requirements for the physical protection of special nuclear material in transportation by any person who is licensed pursuant to the regulations in parts 70 and 110 of this chapter who imports, exports, transports, delivers to a carrier for transport in a single shipment, or takes delivery of a single shipment free on board (F.O.B.) where it is delivered to a carrier, formula quantities of strategic special nuclear material, special nuclear material of moderate strategic significance or special nuclear material of low strategic significance.
(3) This part also applies to shipments by air of special nuclear material in quantities exceeding: (i) 20 grams or 20 curies, whichever is less, of plutonium or uranium-233, or (ii) 350 grams of uranium-235 (contained in uranium enriched to 20 percent or more in the U-235 isotope).
(4) Special nuclear material subject to this part may also be protected pursuant to security procedures prescribed by the Commission or another Government agency for the protection of classified materials. The provisions and requirements of this part are in addition to, and not in substitution for, any such security procedures. Compliance with the requirements of this part does not relieve any licensee from any requirement or obligation to protect special nuclear material pursuant to security procedures prescribed by the Commission or other Government agency for the protection of classified materials.
(5) This part also applies to the shipment of irradiated reactor fuel in quantities that in a single shipment both exceed 100 grams in net weight of irradiated fuel, exclusive of cladding or other structural or packaging material, and have a total radiation dose in excess of 100 rems per hour at a distance of 3 feet from any accessible surface without intervening shielding.
(6) This part prescribes requirements for the physical protection of spent nuclear fuel and high-level radioactive waste stored in either an independent spent fuel storage installation (ISFSI) or a monitored retrievable storage (MRS) installation licensed under part 72 of this chapter, or stored at the geologic repository operations area licensed under part 60 or part 63 of this chapter.
(7) This part prescribes requirements for the protection of Safeguards Information in the hands of any person, whether or not a licensee of the Commission, who produces, receives, or acquires Safeguards Information.
(8) This part prescribes requirements for advance notice of export and import shipments of special nuclear material, including irradiated reactor fuel.
(9) As provided in part 76 of this chapter, the regulations of this part establish procedures and criteria for physical security for the issuance of a certificate of compliance or the approval of a compliance plan.
[44 FR 68186, Nov. 28, 1979, as amended at 45 FR 67645, Oct. 14, 1980; 45 FR 80271, Dec. 4, 1980; 46 FR 51724, Oct. 22, 1981; 47 FR 57482, Dec. 27, 1982; 52 FR 9653, Mar. 26, 1987; 53 FR 31683, Aug. 19, 1988; 53 FR 45451, Nov. 10, 1988; 59 FR 38899, Aug. 1, 1994; 59 FR 48960, Sept. 23, 1994; 63 FR 26962, May 15, 1998; 66 FR 55816, Nov. 2, 2001]

§ 73.51 Requirements for the physical protection of stored spent nuclear fuel and high-level radioactive waste.

(a) *Applicability.* Notwithstanding the provisions of §§ 73.20, 73.50, or 73.67, the physical protection requirements of this section apply to each licensee that stores spent nuclear fuel and high-level radioactive waste pursuant to paragraphs (a)(1)(i), (ii), and (2) of this section. This includes--
(1) Spent nuclear fuel and high-level radioactive waste stored under a specific license issued pursuant to part 72 of this chapter:
(i) At an independent spent fuel storage installation (ISFSI) or

(ii) At a monitored retrievable storage (MRS) installation; or
(2) Spent nuclear fuel and high-level radioactive waste at a geologic repository operations area (GROA) licensed pursuant to part 60 or 63 of this chapter;
(b) *General performance objectives* (1) Each licensee subject to this section shall establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high level radioactive waste do not constitute an unreasonable risk to public health and safety.
(2) To meet the general objective of paragraph (h)(i) of this section, each licensee subject to this section shall meet the following performance capabilities.
(i) Store spent nuclear fuel and high level radioactive waste only within a protected area;
(ii) Grant access to the protected area only to individuals who are authorized to enter the protected area;
(iii) Detect and assess unauthorized penetration of, or activities within the protected area;
(iv) Provide timely communication to a designated response force whenever necessary; and
(v) Manage the physical protection organization in a manner that maintains its effectiveness.
(3) The physical protection system must be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in § 72.106 of this chapter.
(c) *Plan retention.* Each licensee subject to this section shall retain a copy of the effective physical protection plan f' as a record for 3 years or until termination of the license for which a procedures were developed.
(d) *Physical protection systems, components, and procedures.* A licensee shall comply with the following provisions as methods acceptable to NRC for meeting the performan capabilities of § 73.51(b)(2). The Commission may, on a specific basis and upon request or on its own initiative, authorize other alternative measures for the protection of spent fuel and high-level radioactive waste subtect to the requirements of this section if after evaluation of the specific alternative measures, it finds reasonable assurance of compliance with the performance capabilities of paragraph (b)(2) of this section.
(1) Spent nuclear fuel and high level radioactive waste must be stored only within a protected area so that access to this material requires passage through or penetration of two physical barriers, one barrier at the perimeter of the protected area and one barrier offering substantial penetration resistance. The physical barrier at the perimeter of the protected area must be as defined in § 73.2 Isolation zones, typically 20 feet wide each, on both sides of this barrier, must be provided to facilitate assessment The barrier offering substantial resistance to penetration may be provided by approved storage cask or building walls such as those of a reactor or fuel storage building.
(2) Illumination must be sufficient to permit adequate assessment of unauthorized penetrations of or activities within the protected area.
(3) The perimeter of the protected area must be subject to continual surveillance and be protected by active intrusion alarm system which is capable of detecting penetrations through the isolation zone and that is monitored in a continually staffed primary alarm station and in one additional continually staffed location The primary alarm station must be located within the protected area; have bullet-resisting walls, doors, ceiling and floor; and the interior of the statio must not be visible from outside the protected area. A timely means for assessment of alarms must also be provided. Regarding alarm monitoring the redundant location need only provide a summary indication that an alarm has been generated.
(4) The protected area must be monitored by daily random patrols.
(5) A security organization with written procedures must be established. The security organization must include sufficient personnel per shift to provide for monitoring of detection systems and the conduct of surveillance, assessment access control, and communications to assure adequate response. Members of the security organization must be trained, equipped, qualified, and requalified to perform assigned job duties in accordance with appendix B to part 73, sections I.A. (1) (a) and (b), B(I)(a), and the applicable portions of II.
(6) Documented liaison with a designated response force or local law enforcement agency (LLEA) must be established to permit timely response to unauthorized penetration or activities.
(7) A personnel identification system and a controlled lock system must he established and maintained to limit access to authorized individuals.

(8) Redundant communications capability must be provided between onsite security force members and designated response force or LLEA.
(9) All individuals, vehicles, and hand-carried packages entering the protected area must be checked for proper authorization and visually searched for explosives before entry.
(10) Written response procedures must he established and maintained for addressing unauthorized penetration of or activities within, the protected area including Category 5, "Procedures," of appendix C to pant 73. The licensee shall retain a copy of response procedures as a record for 3 years until termination of the license for which the procedures were developed. Copies of superseded material must be retained for 3 years after each change or until termination of the license.
(11) All detection systems and supporting subsystems must be tamper indicating with line supervision. These systems, as well as surveillance/assessment and illumination systems, must be maintained in operable condition. Timely compensatory measures must be taken after discovery of inoperability, to assure that the effectiveness of the of the security system is not reduced.
(12) The physical protection program must be reviewed once every 24 months by individuals independent of both physical protection program management and personnel who have direct responsibility for implementation of the physical protection program. The physical protection program review must include an evaluation of the effectiveness of the physical protection system and a verification of the liaison established with the designated response force or LLEA.
(13) The following documentation must be retained as a record for 3 years after the record is made or until termination of the license. Duplicate records to those required under § 72.180 of part 72 and § 73.71 of this part need not be retained under the requirements of this section:
(i) A log of individuals granted access to the protected area;
(ii) Screening records of members of the security organization;
(iii) A log of all patrols;
(iv) A record of each alarm received, identifying the type of alarm, location, date and time when received, and disposition of the alarm; and
(v) The physical protection program review reports.
(e) A licensee that operates a GROA is exempt from the requirements of this section for that GROA after permanent closure of the GROA.
[63 FR 26962, May 15, 1998, as amended at 63 FR 49414, Sept. 16, 1998; 66 FR 55816, Nov. 2, 2001]

Council on Environmental Quality – Regulations for Implementing NEPA

Source: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

40 C.F.R. § 1500.1 – Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains "action-forcing" provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork--even excellent paperwork--but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1502.22 – Incomplete or unavailable information.

'(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

1. A statement that such information is incomplete or unavailable.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, and PEG PINARD, Petitioners	)	
v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	

CERTIFICATE OF SERVICE

I certify that on March 15, 2004, copies of the foregoing Petitioners' Brief were served on the following by Federal Express or by hand:

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