

Waste Specialist at NIRS, will serve as the representative at NIRS for this proceeding.

2. Don't Waste Michigan (DWM) is a nonprofit organization begun in the 1980's with 25 board of directors members, and over 1,000 general members, almost all of whom live in Michigan, and of which a number currently live within 50 miles of the former Consumers Energy Company Big Rock Point (BRP) Nuclear Power Plant and its still-present ISFSI dry cask storage for highly radioactive irradiated nuclear fuel. A number of DWM members are also Consumers Energy ratepayers. Michael Keegan, DWM board of directors member, will serve as the representative at DWM for this proceeding. He can be reached through petitioners'-interveners' counsel.

3. A Member of these organizations who lives within the 50-mile Emergency Planning Zone (EPZ) of the former Consumers Energy Company Big Rock Point (BRP) Nuclear Power Plant and its still-present ISFSI dry cask storage for highly radioactive irradiated nuclear fuel and its still-radioactively-contaminated property has requested Nuclear Information and Resource Service (NIRS) and Don't Waste Michigan (DWM) to represent him and his interests in this proceeding.

4. The Declaration of individual Member-Intervener Victor McManemy is annexed to this Request and Petition, identifying his affiliation with the petitioning organizations, NIRS and DWM. His contact information is: 7786 Peninsula Drive, Traverse City, MI 49686. His phone number is 231-995-3697.

5. Mr. Terry Lodge, Esquire, will serve as legal counsel representing Petitioners-Interveners and Member-Intervener in this proceeding. His address is: 316 N. Michigan St., Ste. 520; Toledo, OH 43624. His phone number is (419) 255-7552.

6. Petitioners-Interveners, NIRS and DWM, as organizational interveners, believe that their members' interests will not be adequately represented without this action to intervene, and without the opportunity to participate as full parties in this proceeding. If the transfer -- of License No. DPR-6 for BRP Plant and Independent Spent Fuel Storage Installation (ISFSI) License No. SFGL-16 for BRP from Consumer Energy Co. (current holder of the licenses) to Entergy Nuclear Palisades, LLC (Entergy Nuclear Palisades) to possess and own, and Entergy Nuclear Operations, Inc. (ENO), to control and operate, the ISFSI - is approved without resolving the Petitioners'-Interveners' safety and security concerns and environmental issues, this high-level radioactive waste storage facility may operate unsafely and insecurely and pose an unacceptable risk to public health and safety, the environment, and the common defense and security, thereby jeopardizing the health and welfare of the respective

Petitioners'-Interveners' members who live, own property, are ratepayers, and recreate within the vicinity of the former BRP nuclear power reactor site and its still-present dry cask storage facility for high-level radioactive waste.

In addition, the still-present radioactive contamination of the soil, groundwater, and Lake Michigan sediments at, and adjacent to, the Big Rock Point site, will continue to represent an unacceptable risk to public health and safety and the environment, thereby jeopardizing the health and welfare of the respective Petitioners'-Interveners' members who live, own property, are ratepayers, and recreate within the vicinity of the former BRP nuclear power reactor site and its still-present radioactive contamination.

PETITIONERS'-INTERVENORS' CONTENTIONS

SECURITY CONTENTIONS

As stated in the Federal Register Notice, "The Commission will approve an application for the transfer of a license, if the Commission determines that the proposed transferee is qualified to hold the license, and that the transfer is otherwise consistent with applicable provisions of law, regulations, and orders issued by the Commission pursuant thereto. Before issuance of the proposed conforming license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations." It is petitioners'-interveners' contention that Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc. is not qualified to hold the license, due to its woefully inadequate security provisions and financial arrangements for the ISFSI at BRP, thus failing to protect the common defense and security, as well as public health, safety, and the environment.

Before any license transfers, the U.S. Nuclear Regulatory Commission must determine that Entergy Nuclear Palisades, a Limited Liability Company, and Entergy Nuclear Operations, Inc., can safeguard and secure the eight high-level radioactive waste containers still present at the former site of the Big Rock Point nuclear power plant against terrorist attack or sabotage. This includes the financial wherewithal to provide sufficient safeguards and security, which petitioners-interveners contend is lacking.

Despite the permanent shutdown of the Big Rock Point reactor nearly a decade ago (in August, 1997), and its subsequent dismantlement and decommissioning (although radioactive contamination is still present in the site's soil, groundwater, and undoubtedly in the sediments of Lake Michigan as well), radioactive risks still abound at the site. This is emphasized by

the presence of 441 bundles (58 metric tons of heavy metal, or nearly 64 U.S. tons) of highly radioactive nuclear fuel rods stored in eight concrete and steel silos on a concrete pad surrounded by fencing, heavily armed security personnel, and guard dogs. [Oct. 2006 oral ISFSI site description from summer 2006 site visit by Lana Pollack, President, Michigan Environmental Council to NIRS and DWM; radioactive waste inventory from U.S. Department of Energy, "Final Environmental Impact Statement for Yucca Mountain," Feb. 14, 2002, Table A-7, "Proposed Action spent nuclear fuel inventory," page A-15.]

The casks - BNFL FuelSolutions W150 casks, about 20 feet tall, 10 feet in diameter, sitting out in full view in the open air, each weighing 155 to 160 tons when fully loaded with irradiated nuclear fuel -- represent a radioactive bull's eye on the shore of Lake Michigan, the source of drinking water for millions downstream.

[U.S. Nuclear Regulatory Commission, "Cask Registration Data for General Licensees," Nov. 11, 2006, emailed to NIRS by NRC Spent Fuel Project Office on Nov. 27, 2006; "FuelSolutions™ Storage System Final Safety Analysis Report, Revision 2," April 2005, Document No. WSNF-220, Docket No. 72-1026, BNFL Fuel Solutions Corporation, Campbell, California, Table 3.2-1 - Storage Cask Weights and Centers of Gravity, Page 3.2-2]

Even the security measures in place at Big Rock, however, are of questionable efficacy against airborne, or remotely launched land-based and waterborne, attack scenarios. Remotely fired missiles, high explosives, and shaped charges could break open the containers and release the radioactivity into the environment. In April, 2006 the investigative arm of the U.S. Congress, the Government Accountability Office, chastised the NRC for giving priority to the nuclear industry's bottom line over needed security upgrades at nuclear power plants. [<http://www.nirs.org/reactorwatch/security/sec04042006gaorpt.pdf>]

A 1998 test at the U.S. Army's Aberdeen Proving Ground in Maryland showed that radioactive waste storage casks are vulnerable to anti-tanks missiles. Specifically, a TOW anti-tank missile was used in the test. The first TOW missile obliterated the concrete shielding around the cask, and the second missile punched a hole through the cask wall to the inner waste chamber. Combined with incendiaries, the resulting fire could release catastrophic amounts of radioactivity into the environment. Still more frightening is the fact that the CASTOR cask used in that test was likely much more structurally sound than the BNFL FuelSolutions W150 casks in use at Big Rock, given their much thicker metallic walls. Thus, Big Rock's cask would stand up even worse when attacked with anti-tank missiles.

Each of the eight casks at Big Rock contains about 240 times

the long-lasting radioactivity released by the Hiroshima atomic bomb, according to Dr. Marvin Resnikoff of Radioactive Waste Management Associates in New York City, who has served as an expert witness in earlier judicial proceedings involving Consumers Energy dry cask storage.

The 58 metric tons of high-level radioactive waste still stored at Big Rock represents more than a quarter of the amount of irradiated nuclear fuel that was present in the core of the Chernobyl nuclear reactor that exploded and burned in April 1986, a catastrophe that devastated an entire region with radioactive contamination, and spewed fallout across Europe and the rest of the northern hemisphere. Thus, the scale of an attack or sabotage upon the Big Rock casks could also prove catastrophic, depending on the amount of radioactivity released. Big Rock's wastes still contain vast amounts of radioactive cesium and strontium isotopes, as well as plutonium and other trans-uranic radioactive poisons, among the worst health-damaging releases from the Chernobyl reactor.

Release of even a fraction of the contents of a single cask would be disastrous, for the Big Rock Point dry cask storage facility is located perilously near the shoreline of the Great Lakes, 20% of the world's surface fresh water supply. But of course, all eight of Big Rock's casks could be breached by a large-scale terrorist attack.

This contention about the vulnerability of Big Rock Point's ISFSI to terrorism is not speculative. The 9/11 Commission report has documented that Al Qaida had originally planned to hijack 10 jetliners on 9/11/2001. Two of the jets were going to be crashed into nuclear power plants. Al Qaida commanders, interviewed in Pakistan after the attacks, explained that the attack on nuclear facilities was called off for fear that the radiation release might "get out of hand," but that such attacks had not been ruled out in the future.

[<http://www.nirs.org/factsheets/nirsfctshdrycaskvulnerable.pdf>; the "240 times Hiroshima" calculation done by Dr. Marvin Resnikoff of Radioactive Waste Management Associates in New York City is a conservative figure, because it only accounts for the five radio-isotopes of cesium, but not the hundreds of other radioactive poisons in the waste; <http://www.9-11commission.gov/>; Giles Tremlett, The Guardian, "Al-Qaida leaders say nuclear power stations were original targets," Sept. 9, 2002; Curt Anderson, "Sept. 11 Commission: Al-Qaida Planned 10 Hijackings: White House, CIA and FBI headquarters, nuclear plants originally targeted," Associated Press, June 17, 2004, page 1.]

These wastes will remain stored on-site - and thus vulnerable to terrorist attack -- for at least another decade, and likely much longer than that. The U.S. Department of Energy (DOE) is now

saying that 2017 is the earliest possible date that the proposed national dumpsite at Yucca Mountain, Nevada can be opened. However, this estimate assumes that no litigation will delay the schedule even longer, but the State of Nevada and environmental organizations - adamantly opposed to the proposed dump due to the site's geologic unsuitability - are likely to file further legal interventions.

[http://www.ocrwm.doe.gov/info_library/newsroom/documents/ym-schedule-2006.pdf].

For this reason, DOE's director of the Office of Radioactive Waste Management, Ward Sproat, has recently admitted the Yucca dump's opening date could not be sooner than 2020 or 2021; DOE's Deputy Secretary, Clay Sell, concurs, although he added that opening Yucca by 2020 would only happen if DOE is "wildly successful".

However, DOE has stated that unless Congress passes the "fix Yucca" bill that the Bush Administration has proposed, the opening date for the Nevada repository could be delayed decades into the future. Such legislation appears dead on arrival, however, this session of Congress, for U.S. Senator Harry Reid, Senate Majority Leader, has pledged to kill it.

[Steve Tetreault, "Yucca director downplays project timelines: He says nuclear waste repository unlikely to open before 2020," Las Vegas Review Journal, Nov. 30, 2006; DOE Fiscal Year 2008 Budget Request to Congress for the Office of Civilian Radioactive Waste Management, Feb., 2007]

The Yucca Mountain Project has recently suffered additional major setbacks, including an outspoken vote of no confidence by Ed McGaffigan, the longest-serving Commissioner in NRC's history, and an admission by long-time DOE Office of Civilian Radioactive Waste Management acting director Lake Barrett that the Yucca proposal is "in jeopardy," largely due to Sen. Reid's political power.

[Steve Tetreault, "Yucca Mountain: 'It may be time to stop digging'; years of flaws have killed repository, NRC member says," Las Vegas Review Journal, Jan. 23, 2007; Steve Tetreault, "Ex-director: Yucca project in jeopardy," Las Vegas Review Journal, Feb. 16, 2007]

These developments clearly show that the NRC's "Nuclear Waste Confidence Decision" - that a national dumpsite will open

by 2025 at the latest - is false. Big Rock Point's high-level radioactive wastes seem to be doomed to remain stuck on-site indefinitely into the future.

The high-level radioactive wastes within the dry casks at Big Rock Point will remain deadly virtually forevermore into the future. The U.S. Environmental Protection Agency (EPA) is expected, in the next few months, to publish its court-mandated radiation release regulation revision for the proposed high-level radioactive waste dump at Yucca Mountain, Nevada. EPA has proposed, and will likely enact in its regulations, a one million year regulatory compliance period for high-level radioactive waste management at Yucca. This clearly shows how long these wastes will remain hazardous to human health and the environment. Thus, the wastes will certainly remain hazardous at Big Rock Point throughout their indefinite storage on-site.

[<http://www.epa.gov/radiation/yucca/index.html>]

Even if a dumpsite ever opens, however, it would still take many additional years to transport Big Rock's wastes there (DOE estimates 24 to 48 years). [DOE Yucca FEIS] Michigan law forbids the transfer of Big Rock's wastes to another site within the state ("Spent fuel rods shall not be transported from a nuclear power generating facility for storage at any other nuclear power generating facility."), such as to the Palisades nuclear plant in southwest Michigan. [RADIOACTIVE WASTE, Act 113 of 1978, Amended 1989, Section 325.491 Radioactive waste; depositing or storing in state prohibited; exceptions.] Thus, high-level radioactive waste will almost certainly remain in storage at Big Rock for many decades to come.

This begs the question, will Big Rock's high-level radioactive waste casks ever be barged upon the waters of Lake Michigan, such as to transport them to the nearest railhead, as at the Port of Muskegon?

As part of its plan to transport high-level radioactive waste to Western Shoshone Indian land at Yucca Mountain, Nevada, the U.S. Department of Energy (DOE) proposes up to 453 barges carrying giant high-level radioactive waste containers onto the waters of Lake Michigan from other nuclear power plants in Michigan (Consumers Energy's Palisades plant) and Wisconsin.

Accidents happen. But what if high-level radioactive waste is involved? U.S. Nuclear Regulatory Commission (NRC) design

criteria for atomic waste transport containers are woefully inadequate. Rather than full-scale physical safety testing, scale model tests and computer simulations are all that is required. The underwater immersion design criteria are meant to "test" (on paper, at least) the integrity of a slightly damaged container submerged under 3 feet of water for 8 hours. An undamaged cask is "tested" (on computers, at least) for a 1 hour submersion under 656 feet of water.

But if a cask were accidentally immersed under water, or sunk by terrorists, is it reasonable for NRC to assume that the cask would only be slightly damaged, or not damaged at all? Given that barge casks from Big Rock could weigh 155 to 160 tons each, how can NRC assume that they could be recovered from underwater within 1 hour, or even within 8 hours? Special cranes capable of lifting such heavy loads would have to be located, brought in, and set up. And what about the fact that Lake Michigan is deeper than 656 feet?

[“FuelSolutions™ Storage System Final Safety Analysis Report, Revision 2,” April 2005, Document No. WSNF-220, Docket No. 72-1026, BNFL Fuel Solutions Corporation, Campbell, California, Table 3.2-1 - Storage Cask Weights and Centers of Gravity, Page 3.2-2]

The dangers of nuclear waste cask submersion underwater are two fold. First, radioactivity could leak from the cask into the water. Each container would hold over 200 times the long lasting radioactivity released by the Hiroshima atomic bomb. Given high-level atomic waste's deadliness, leakage of even a fraction of a cask's contents could spell unprecedented catastrophe in the source of drinking water for tens of millions of people - Lake Michigan. Second, enough fissile uranium-235 and plutonium is present in high-level atomic waste that water, with its neutron moderating properties, could actually cause a nuclear chain reaction to take place within the cask. Such an inadvertent criticality event in Sept. 1999 at a nuclear fuel factory in Japan led to the deaths of two workers; many hundreds of nearby residents, including children, received radiation doses well above safety standards.

In response to the vulnerability of dry cask storage to terrorist attack, a national coalition of well over 100 environmental and public interest organizations, including petitioners'-interveners' NIRS and DWM and additional groups in Michigan, has petitioned the U.S. Congress to fortify radioactive waste storage such as at Big Rock against terrorist attacks (as well as to safeguard it against accidents, as by requiring radiation and heat monitoring equipment on each cask). The coalition petitioned Congress due to NRC's refusal to itself protect public health and safety and the environment, as well as the common defense and security, by requiring such security provisions from the nuclear utilities - despite the agency's legal mandate to do so.

[See "Principles for Safeguarding Nuclear Waste at Reactors," <http://www.citizen.org/documents/PrinciplesSafeguardingIrradiatedFuel.pdf>]

To make security matters much worse, Consumers Energy Company proposes to sell a 351-acre tract of its Big Rock Point property to the State of Michigan for the establishment of a state park. The state park would surround the 100-acre zone forbidden to the public because of its use to store the 64 tons of highly radioactive nuclear fuel rods in casks patrolled by armed guards. The sale of land to the State of Michigan and the establishment of a state park on the Big Rock Point site is part and parcel of Consumers Energy Company's transfer of nuclear assets and liabilities to Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc.

However, the proposal to establish a state park at Big Rock Point has proven highly controversial, in large part due to security concerns surrounding the high-level waste storage. In early December, 2006, the State of Michigan Natural Resources Trust Fund Board declined to provide the first \$3 million installment requested for the land sale to the state and the establishment of the state park. The Board Chairman, Sam Washington, cited the lack of a plan for safeguarding the high-level radioactive waste as his reason for opposing funding the state park proposal.

A state park at Big Rock Point would likely attract large numbers of visitors, thus bringing large numbers of people into close proximity to the high-level radioactive waste casks. How could the heavily armed guards guarding the waste casks distinguish between terrorists and tourists? Recreation areas and potentially catastrophic terrorist targets do not - and should not -- mix.

From a security standpoint, inviting large numbers of people into close proximity to high-level radioactive waste casks does not make sense. Would the state park require metal detectors, bomb sniffing dogs, full body searches, and intrusive vehicle searches before visitors are allowed to enter? Would Entergy be responsible for such security provisions, or would the Michigan State Police? How would Entergy and/or the U.S. Coast Guard patrol boat traffic offshore from the state park, in order to guard against potential waterborne terrorist attacks upon the high-level waste storage?

The radioactive rods at Big Rock raise obvious questions about public health, safety, and security risks, especially in regards to their susceptibility to terrorism or sabotage. The development of a state park is incongruous with a potentially catastrophic terrorist target. Inviting large numbers of families and children into close proximity to high-level radioactive waste for public recreation makes no sense.

Further complicating the security situation at the Big Rock ISFSI is the fact that the so-called "buffer zone" around the proposed state park has not been clearly delineated in any publicly available documentation.

The Federal Register Notice also states "According to an application for approval filed by Consumers, Entergy Nuclear Palisades, and ENO, Entergy Nuclear Palisades would acquire ownership of the facility following approval of the proposed license transfer, and ENO would control and operate ISFSI. No physical change to the BRP facility or operational changes are being proposed in the application."

The admission that "No physical change to the BRP facility or operational changes are being proposed in the application" confirms that Entergy Nuclear Palisades, LLC and ENO, Inc. have no plans whatsoever to adequately upgrade security protections at the BRP ISFSI, as contended throughout this petition.

Petitioners-interveners contend that Entergy Nuclear Palisades, LLC and ENO, Inc. lack the financial wherewithal to adequately provide security for the Big Rock ISFSI.

In the applications for transfer of licenses at both the Palisades and Big Rock nuclear sites, Entergy claims "Proprietary" any disclosure of finances. Consumers Energy is not even privy to information either, so how can the seller be confident that the buyer has adequate finances to provide security at the BRP ISFSI? How can the petitioners-interveners know if Entergy's finances are adequate? Petitioners-interveners demand financial disclosure from Entergy in a hearing, so that their legal counsel and experts can review the adequacy of

Entergy's finances to provide adequate security at the BRP ISFSI. ["Palisades - Application for Order and Conforming License Amendment for License Transfer," Entergy, August 31, 2006, Enclosure 7.]

The "Palisades - Application for Order and Conforming License Amendment for License Transfer" [Entergy, August 31, 2006] speaks of a \$25 million credit line from Entergy for maintenance of the Big Rock ISFSI. A \$25 million credit line is insufficient for unexpected but very possible problems with the ISFSI or individual dry casks at Big Rock.

Consumers Energy has had a troubled history with its ISFSIs and dry casks at Palisades, for example. In May, 1993 local environmental groups and the State of Michigan filed for an injunction in federal court against the loading of VSC-24 dry casks at Palisades, alleging that there was no proven safe method for unloading the casks. The NRC and Consumers Energy assured the court that in an emergency, casks could be safely unloaded simply by reversing the loading procedure. The court denied the injunction and allowed the casks to be loaded. Just over a year later, in August, 1994 Consumers Energy discovered that its fourth loaded VSC-24 dry cask had weld flaws. To demonstrate its commitment to public safety and the environment, as well as to live up to its promise to the court, Consumers announced it would unload the irradiated fuel in the cask back into the storage pool. Only then were the difficulties discovered.

Reintroducing the 400 degree Fahrenheit fuel assemblies back into the 100 degree fuel pool water would result in a radioactive steam flash hazardous to workers, and would thermally shock the fuel assemblies threatening to further degrade them. Also, the welded-shut inner canister would have to be cut open in a timeframe of less than 50 hours, for the cooling process could not be maintained during the unloading procedure and the fuel within would begin to overheat. In addition, there was no procedure yet developed to remove steel shims that were pressure fit inside the cask lid. Rather than leading to a pause for reflection, however, Consumers rushed to immediately load nine more VSC-24's, a move taken by local concerned citizens to be in very bad faith. Thirteen years after Consumers announced it would unload the defective cask #4, it still sits fully loaded on the Lake Michigan shoreline, alongside two dozen more fully loaded VSC-24's of questionable structural integrity.

(Please see the following February 6, 1997 letter from Dr. Mary Sinclair, Ph.D., co-chair of Don't Waste Michigan, to the U.S. Nuclear Regulatory Commissioners, highlighting possible perjury - as well as clearly established incompetence - by NRC staff when it assured a federal judge that dry storage casks could be safely unloaded at Palisades:

<http://www.nirs.org/reactorwatch/licensing/sinclairltr020697.pdf>)

The \$25 million line of credit that Entergy cites is woefully inadequate to deal with a cask emergency at Big Rock. Big Rock's waste storage pool has been dismantled. Big Rock has no on-site dry cell. Petitioners-interveners question the safety and security of having no adequate radiation shielding (whether a pool or hot cell) with which to deal with a cask emergency. \$25 million is far from enough for such potential emergencies.

In Consumers Energy and Entergy Nuclear LLC's JOINT APPLICATION FOR APPROVAL UNDER SECTION 203 OF THE FEDERAL POWER ACT to the U.S. Federal Energy Regulatory Commission, Entergy Nuclear LLC listed nearly 150 subsidiaries and affiliates within the Entergy Nuclear holding company scheme, of which Entergy Nuclear Palisades LLC is but a single one. [Exhibit B: Energy-Related Subsidiaries And Affiliates, Entergy Nuclear Palisades LLC, List of All Energy Affiliates and Subsidiaries, August 25, 2006]. Petitioners-interveners contend that this Entergy Nuclear holding company/limited liability company scheme walls off the financial resources of the Entergy Nuclear parent company from the financial needs of Entergy Nuclear Palisades LLC at the Palisades nuclear power plant site, but most especially at the shutdown and dismantled (that is, generating no income) Big Rock Point site and ISFSI.

Despite the company's secrecy, there are nonetheless significant and troubling indications that Entergy's finances are not adequate. For example, for the time period 2004 to 2006, Entergy's bond ratings are not high. Entergy's bonds are rated at BAA3 by Moodys, and BBB by Standard & Poors. ["Palisades - Application for Order and Conforming License Amendment for License Transfer," Entergy, August 31, 2006, Enclosure 5.] For Moodys, Baa3 means that the bonds lack outstanding investment characteristics and have speculative characteristics as well. For S&P, BBB means adverse economic conditions are more likely to lead to a weakened capacity of the issuer to meet its financial commitment. Such low bond ratings, on the verge of becoming below investment grade, do not bode well for Entergy's ability to provide adequate security at the Big Rock ISFSI.

Further undermining Entergy's claims to adequate financial resources to provide security at Big Rock's ISFSI is the fact that its flagship utility in its home service area including and surrounding New Orleans, Louisiana was bankrupted by the devastating damage suffered from Hurricane Katrina and the resulting flood in late August 2005. Entergy is still in the process of restoring electricity in its home service district, New Orleans and surrounding areas. Entergy is preoccupied with bankruptcy and disaster recovery, undermining its ability to

adequately safeguard and secure Big Rock's high-level radioactive wastes.

Similar to concerns over Entergy's financial ability to provide adequate security for Big Rock's dry casks, petitioners-interveners are also concerned about Entergy's financial ability to shoulder liability for the radioactively contaminated Big Rock site, especially if a state park or condominium complex is built there. Despite decommissioning, Consumers and NRC have documented lingering radioactive contamination of the soil and groundwater on site. The sediments of Lake Michigan have not been analyzed, but it is very likely that radioactive contamination has settled and concentrated there from Big Rock's discharges into the Lake over 35 years of operations. Petitioners-interveners question Entergy's ability to finance liability over the long-term, such as do to eventual leakage of radioactivity from the ISFSI over time, as well as the documented radioactive contamination of Big Rock Point's soils and groundwater, and the suspected radioactive contamination of the Lake Michigan sediments.

Consumers Energy has, remarkably, received permission from NRC to only inspect the Big Rock dry casks once every two weeks, rather than daily. The casks do not have radiation or heat monitors directly installed upon them. Thus, it would be possible for a radiation release or overheating incident to unfold for two weeks before being detected by the company. Entergy's headquarters being in Jackson, Mississippi rather than Jackson, Michigan (Consumers Energy's headquarters) concerns petitioners-interveners that even less rigor will be applied to the maintenance and upkeep of Big Rock's dry casks, which could worsen deterioration, lead to accidental radiation releases, and make casks even more vulnerable to terrorist attack given their degraded condition.

Petitioners further bring to the Commission's attention the recently decided case of San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission (Ninth Circuit, No. 03-74628, June 2, 2006) (copy attached for consideration). Under this decision, the NRC is required to consider terrorist prospects at individual facilities and, at least, to accept comments and information from the public on the issue. This opinion concludes that "it is unreasonable for the NRC to categorically dismiss the possibility of terrorist attack". The U.S. Supreme Court has denied cert. on the Pacific Gas and Electric Company's appeal against the 9th Circuit decision, further affirming the decision's binding nature.

Petitioners request that the NRC fulfill its legal obligation, pursuant to this decision, to complete a NEPA analysis of the potential environmental effects of a terrorist attack at the Big Rock Point site.

Contrary to what is stated in the application, the requested NRC action does not fall within the categorical exclusion from environmental review for approvals of transfers of NRC licenses and any associated amendments established by 10 C.F.R. § 51.22(c)(21). The San Luis Obispo decision requires consideration of terrorist impacts under NEPA, negating the categorical exclusion.

In addition, Consumers, Entergy Nuclear Palisades, and ENO's application for approval of the BRP ISFSI license transfer is premature, in that the nuclear sale (including the Palisades nuclear power plant) from Consumers Energy to Entergy Nuclear Palisades and ENO is not yet consummated. In fact, proceedings relevant to the sale are still in process before the Michigan Public Service Commission and the Federal Energy Regulatory Commission. In addition, the deadline for appeals to the federal courts -- regarding NRC rulings in the Palisades license extension licensing proceeding and the associated Final Environmental Impact Statement for the Palisades license extension -- has not passed. These NRC rulings are themselves central to the nuclear sale from Consumers Energy to Entergy Nuclear, including not only the Palisades nuclear power plant, but also the Big Rock Point radioactively-contaminated property and ISFSI that is the subject of this petition. For NRC to approve this license transfer would be premature, until the proceedings listed above are concluded.

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Respectfully submitted for the Petitioners,

A handwritten signature in black ink that reads "Terry Lodge". The signature is written in a cursive, flowing style.

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR
PEACE; SANTA LUCIA
CHAPTER OF THE SIERRA CLUB; PEG
PINARD,

Petitioners,

PACIFIC GAS AND ELECTRIC
COMPANY,

Intervenor,

v.

NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

No. 03-74628

NRC No.
CLI-03-01;
CLI-02-23
OPINION

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

Argued and Submitted
October 17, 2005—San Francisco, California

Filed June 2, 2006

Before: Stephen Reinhardt and Sidney R. Thomas,
Circuit Judges, and Jane A. Restani,* Chief Judge,
United States Court of International Trade

Opinion by Judge Thomas

*The Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

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OPINION

THOMAS, Circuit Judge:

This case presents the question, *inter alia*, as to whether the likely environmental consequences of a potential terrorist

attack on a nuclear facility must be considered in an environmental review required under the National Environmental Policy Act. The United States Nuclear Regulatory Commission ("NRC") contends that the possibility of a terrorist attack on a nuclear facility is so remote and speculative that the potential consequences of such an attack need not be considered at all in such a review. The San Luis Obispo Mothers for Peace and other groups disagree and petition for review of the NRC's approval of a proposed Interim Spent Fuel Storage Installation. We grant the petition in part and deny it in part.

1

The NRC is an independent federal agency established by the Energy Reorganization Act of 1974 to regulate the civilian use of nuclear materials. Intervenor Pacific Gas and Electric Company ("PG&E") filed an application with the NRC under 10 C.F.R. Part 72 for a license to construct and operate an Interim Spent Fuel Storage Installation ("Storage Installation" or "ISFSI") at PG&E's Diablo Canyon Power Plant ("Diablo Canyon") in San Luis Obispo, California. The NRC granted the license. The question presented by this petition for review is whether, in doing so, the NRC complied with federal statutes including the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4437, the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011-2297g, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706.

NEPA establishes a "national policy [to] encourage productive and enjoyable harmony between man and his environment," and was intended to reduce or eliminate environmental damage and to promote "the understanding of the ecological systems and natural resources important to" the United States. *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). The Supreme Court has identified NEPA's "twin aims" as "plac[ing] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action[, and] ensur[ing] that the agency

will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Counsel, Inc.*, 462 U.S. 87, 97 (1983).

Rather than mandating particular results, NEPA imposes on federal agencies procedural requirements that force consideration of the environmental consequences of agency actions. *Pub. Citizen*, 541 U.S. at 756. At NEPA’s core is the requirement that federal agencies prepare an environmental impact statement (“EIS”), or:

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.

Id. at 757 (quoting 42 U.S.C. § 4332(2)(C)).

As an alternative to the EIS, an agency may prepare a more limited environmental assessment (“EA”) concluding in a “Finding of No Significant Impact” (“FONSI”), briefly presenting the reasons why the action will not have a significant impact on the human environment. *Id.* at 757-58 (citing 40 C.F.R. §§ 1501.4(e), 1508.13). If, however, the EA does not lead to the conclusion that a FONSI is warranted, the agency remains obligated to prepare an EIS. *Id.* at 757.

While NEPA requires the NRC to consider environmental effects of its decisions, the AEA is primarily concerned with setting minimum safety standards for the licensing and operation of nuclear facilities. The NRC does not contest that the two statutes impose independent obligations, so that compliance with the AEA does not excuse the agency from its NEPA obligations. The AEA lays out the process for consideration of the public health and safety aspects of nuclear power plant licensing, and requires the NRC to determine whether the licensing and operation of a proposed facility is “in accord with the common defense and security and will provide adequate protection to the health and safety of the public.” 42 U.S.C. § 2232(a).

The NRC is not, however, required to make this determination without assistance; federal law provides a framework for hearings on material issues that interested persons raise by specific and timely petition. 42 U.S.C. § 2239(a); 10 C.F.R. §§ 2.308-.348; 5 U.S.C. §§ 551-706. The initial hearing is held before a three-person Atomic Safety and Licensing Board (“Licensing Board”). 10 C.F.R. § 2.321. The Licensing Board’s findings and decision constitute the agency’s initial determination, although a party may file a petition for review with the Commission within 15 days of the Licensing Board’s decision. 10 C.F.R. § 2.341. If the petition is granted, the Commission specifies the issues to be reviewed and the parties to the review proceedings, 10 C.F.R. § 2.341(c)(1), and renders a final decision. 10 C.F.R. § 2.344. A party may then petition this court for review of the Commission’s final decision. 28 U.S.C. § 2344.

II

With this general statutory background, we turn to the facts underlying the petition for review. On December 21, 2001, PG&E applied to the NRC pursuant to 10 C.F.R. Part 72 for a license to construct and operate a Storage Installation at Diablo Canyon. The Storage Installation would permit the

necessary and on-site storage of spent fuel, the byproduct of the two nuclear reactors at that site. PG&E expects to fill its existing spent fuel storage capacity at Diablo Canyon sometime this year. Therefore, unless additional spent fuel storage capacity is created, the Diablo Canyon reactors cannot continue to function beyond 2006.

PG&E proposes to build a dry cask storage facility. The basic unit of the storage system is the Multi-Purpose Canister ("Canister"), a stainless steel cylinder that is filled with radioactive waste materials and welded shut. The Canisters are loaded into concrete storage overpacks that are designed to permit passive cooling via the circulation of air. The storage casks, or the filled Canisters loaded into overpacks, are then placed on one of seven concrete pads. The Storage Installation would house a total of 140 storage casks, 2 more than the 138 projected to be required for storage of spent fuel generated at Diablo Canyon through 2025.

On April 22, 2002, the NRC published a Notice of Opportunity for Hearing. Under the regulatory scheme, interested parties could then request a hearing or petition for leave to intervene. 10 C.F.R. § 2.309(a). A written hearing request, which must contain the contentions the party wants litigated at the hearing, will be granted if the petitioner has standing, and has posed at least one admissible contention.¹ *Id.*

On July 19, 2002, the San Luis Obispo Mothers for Peace, a non-profit corporation concerned with Diablo Canyon's

¹In order to be admissible, a contention must: be set forth with particularity, 10 C.F.R. § 2.309(f)(1); provide a specific statement of the disputed issue of law or fact, 10 C.F.R. § 2.309(f)(1)(i); provide the basis for the contention, 10 C.F.R. § 2.309(f)(1)(ii); demonstrate that the issue is within the scope of the proceeding, 10 C.F.R. § 2.309(f)(1)(iii); demonstrate that the issue is material to the findings the NRC must make, 10 C.F.R. § 2.309(f)(1)(iv); provide supporting references and expert opinions, 10 C.F.R. § 2.309(f)(1)(v); and provide sufficient information to show the existence of a genuine issue of law or fact, 10 C.F.R. § 2.309(f)(1)(vi).

local impact, the Sierra Club, a non-profit corporation concerned with national environmental policy, and Peg Pinard, an individual citizen, (collectively “Petitioners”) submitted a hearing request and a petition to intervene, asserting contentions for admission.

In Licensing Board Proceeding LBP-02-23, 56 NRC 413 (“LBP 02-23”), the Atomic Safety and Licensing Board addressed the admissibility of the July 19 petition’s five Technical and three Environmental Contentions.² One Technical Contention, TC-1, dealing with the state of PG&E’s finances, was deemed admissible; the acceptance of at least one contention meant that the petition was granted. Although the Licensing Board deemed two Environmental Contentions, EC-1, dealing with the failure to address environmental impacts of terrorist or other acts of malice or insanity, and EC-3, dealing with the failure to evaluate environmental impacts of transportation of radioactive materials³ inadmissible, the Licensing Board nonetheless referred the final ruling as to the admissibility of these two contentions to the NRC, “in light of the

²Technical Contention Number One (“TC-1”) alleged Inadequate Seismic Analysis. TC-2 alleged PG&E’s Financial Qualifications Are Not Demonstrated. TC-3 alleged PG&E May Not Apply for a License for a Third Party. TC-4 alleged Failure to Establish Financial Relationships Between Parties Involved in Construction and Operation of Installation. TC-5 alleged Failure to Provide Sufficient Description of Construction and Operation Costs. Environmental Contention Number One (“EC-1”) alleged Failure to Address Environmental Impacts of Destructive Acts of Malice or Insanity. EC-2 alleged Failure to Fully Describe Purposes of Proposed Action or to Evaluate All Reasonably Associated Environmental Impacts and Alternatives. EC-3 alleged Failure to Evaluate Environmental Impacts of Transportation.

³Because the Storage Installation is not a permanent repository, this contention assumes the eventual transport of the materials stored there to a permanent site. Among the materials submitted to support the contention were some dealing with possible terrorist or other malicious attacks on the spent fuel while in transit. The ruling on the contention was “referr[ed] . . . to the Commission to the extent terrorism and sabotage matters are proffered in support of its admission.” 56 NRC at 453.

Commission's ongoing 'top to bottom' review of the agency's safeguards and physical security programs." 56 NRC at 448.

In a memorandum and order, CLI-03-1, 57 NRC 1 ("CLI 03-01"), the NRC accepted the Licensing Board's referral of its decision to reject the environmental contentions related to terrorism. Although the Commission affirmed the Licensing Board's rejection of the contentions, it based its decision on a different rationale. The NRC relied on four prior decisions in which it held that the NEPA does not require a terrorism review.⁴ These decisions, most particularly *Private Fuel Storage*, CLI-02-25, 56 NRC 340 (2002), outlined four reasons for this holding: (1) the possibility of terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a "worst-case" analysis; and (4) NEPA's public process is not an appropriate forum for sensitive security issues. The NRC concluded:

Our decision today rests entirely on our understanding of NEPA and of what means are best suited to dealing with terrorism. Nonetheless, 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

⁴Those cases include: *Private Fuel Storage, L.L.C.*, CLI-02-25, 56 NRC 340 (2002) (Storage Installation); *Duke Cogema Stone & Webster* (Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Dominion Nuclear Connecticut, Inc.* (Nuclear Power Station), CLI-02-27, 56 NRC 367 (2002); and *Duke Energy Corp.* (Nuclear Power Station), CLI-02-26, 56 NRC 358 (2002). All four cases were decided on December 18, 2002.

years and will continue whether or not we license the proposed Installation.

57 NRC at 7.

In September of 2002, prior to the NRC's decision on the first petition, Petitioners submitted a second petition, this time requesting suspension of the Storage Installation licensing proceeding pending comprehensive review of the adequacy of Diablo Canyon's design and operation measures for protection against terrorist attack and other acts of malice or insanity. Unlike the July 19 petition, this one addressed security measures for the entire Diablo Canyon complex, not merely the Storage Installation. Petitioners explained that 10 C.F.R. § 2.335, which prohibits challenges to any NRC rule or regulation in an adjudicatory proceeding involving initial or renewal licensing, prevented the raising of contentions contesting the adequacy of NRC safety requirements protecting against terrorist or other malicious attacks on the entire complex in the July 19 Petition. Petitioners also stated that 10 C.F.R. § 72.32 prevented them from raising emergency planning contentions in the earlier petition. Thus, Petitioners insisted that the second petition "d[id] not constitute a request for rulemaking, nor . . . for enforcement action," and instead defined it, without reference to any particular hearing-granting provision of the regulations, as "a request for actions that are necessary to ensure that any licensing decision made by the Commission with respect to the proposed Diablo Canyon Installation complies with the Commission's statutory obligations under the Atomic Energy Act."

In a memorandum and order, CLI-02-23, 56 NRC 230 ("CLI 02-23"), the NRC denied the September 2002 petition. Because the petition did not, according to the NRC, "fit comfortably in any specific category, [the Commission] treat[ed] it as a general motion brought under the procedural requirements of 10 C.F.R. § 2.730."⁵ In rejecting the petition, the

⁵Since renumbered as 10 C.F.R. § 2.323, this regulation provides, simply, for "motions".

Commission reasoned that by not suspending operating licenses at installations and power plants following the September 11, 2001 terrorist attacks, it had demonstrated its implicit conclusion that the continued operation of these facilities neither posed an imminent risk to the public health, nor was inimical to the common defense. Further, the Commission concluded that because it had already initiated a thorough review of its safeguards and physical security program, there was no reason to suspend the Diablo Canyon licensing proceeding to address the terrorism-related concerns raised by the Petitioners. It stated that “[t]here certainly is no reason to believe that any danger to public health and safety would result from mere continuation of this adjudicatory proceeding,” given that the proceeding was in its initial stages, that construction was not scheduled to begin for several years, and that the Petitioners would be able to comment on any changes in the rules resulting from the Commission’s ongoing review of terrorism-related matters if and when they were to occur.

In a memorandum and order, CLI-03-12, 58 NRC 185 (2003) (“CLI 03-02”), the NRC denied the petitions for agency review of the Licensing Board’s decisions that “cumulatively, rejected challenges to [the PG&E] Installation application.” This denial thus became a final order, reviewable by this court on petition for review. 28 U.S.C. § 2344.

In October of 2003, the Spent Fuel Project Office of the NRC’s Office of Material Safety and Safeguards released its Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation. The 26-page document contains the NRC’s conclusion “that the construction, operation, and decommissioning of the Diablo Canyon Installation will not result in significant impact to the environment,” and therefore that “an [EIS] is not warranted for the proposed action, and pursuant to 10 C.F.R. [§] 51.31, a Finding of No Significant Impact is appropriate.”

The EA is not devoid of discussion of terrorist attacks. Indeed, the document contains the Commission's response to a comment submitted by the California Energy Commission in response to an earlier draft that "there is no discussion in the EA of the potential destruction of the casks or blockage of air inlet ducts as the result of sabotage or a terrorist attack . . . [nor is there] a description of how decisions are being made regarding the configuration, design and spacing of the casks, the use of berms, and the location of the ISFSI to minimize the vulnerability of the ISFSI to potential attack." The NRC responded:

In several recent cases, . . . the Commission has determined that an NRC environmental review is not the appropriate forum for the consideration of terrorist acts. The NRC staff considers the security of spent fuel as part of its safety review of each application for an ISFSI license. In addition to reviewing an ISFSI application against the requirements of 10 CFR Part 72, the NRC staff evaluates the proposed security plans and facility design features to determine whether the requirements in 10 CFR Part 73, "Physical Protection of Plants and Materials," are met. The details of specific security measures for each facility are Safeguards Information, and as such, can not be released to the public.

The NRC has also initiated several actions to further ensure the safety of spent fuel in storage. Additional security measures have been put in place at nuclear facilities, including ISFSIs currently storing spent fuel. These measures include increased security patrols, augmented security forces and weapons, additional security posts, heightened coordination with law enforcement and military authorities, and additional limitations on vehicular access. Also, as part of its comprehensive review of its security program, the NRC is conducting several technical

studies to assess potential vulnerabilities of spent fuel storage facilities to a spectrum of terrorist acts. The results of these studies will be used to determine if revisions to the current NRC security requirements are warranted.

Petitioners argue that, in denying their petitions, the NRC violated the AEA, the APA, and NEPA. Although we reject the AEA and APA claims, we agree with Petitioners that the agency has failed to comply with NEPA. We have jurisdiction over those final orders of the NRC made reviewable by 42 U.S.C. § 2239, which includes final orders entered in licensing proceedings, under 28 U.S.C. § 2342(4).

III

We turn first to Petitioners' AEA argument. Specifically, Petitioners argue that the NRC violated its regulations implementing the AEA, as well as the AEA's hearing provisions, when it denied Petitioners a hearing on whether NEPA required consideration of the environmental impact of a terrorist attack on the Storage Installation; they also argue that the NRC violated the AEA's hearing provisions in denying Petitioners a hearing on post-September 11th security measures for the entire Diablo Canyon complex. Both of these challenges fail.

A

[1] The NRC did not violate the AEA or its implementing regulations when it failed to explain its rejection of Petitioners' contentions by addressing each of their arguments. Nothing in the regulations or the AEA requires the NRC to provide such an explanation.

Section 189(a) of the AEA grants public hearing rights "upon the request of any person whose interest may be affected" by an NRC licensing proceeding. 42 U.S.C. § 2239. The

NRC public hearing regulations, at 10 C.F.R. § 2.309, “promulgated pursuant to the AEC’s⁶ power to make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of” the AEA, 12 U.S.C. § 2201(p), specify the procedures required of both petitioners and the NRC in making and deciding hearing petitions.

[2] Petitioners correctly observe that the NRC, in its decision, did not discuss whether Petitioners satisfied the regulatory standard. They are mistaken, however, in their unsupported contention that this omission amounts to the agency’s failure to follow its own regulations and thus is “reversible error.” The regulations simply do not require the NRC to explain its decisions in any particular manner. Although the NRC regulations are specific and demanding in what they require of petitioners, they demand far less of the NRC in responding to a petition: the regulations require only a timely “decision.” *See* 10 C.F.R. § 2.714(i) (“Decision on request/petition. The presiding officer shall, within 45 days after the filing of answers and replies . . . issue a decision on each request for hearing/petition to intervene.”). Because Petitioners do not claim that the NRC violated this requirement, we must reject this challenge.

B

[3] The NRC’s denial of a hearing on whether NEPA requires consideration of the environmental effects of a terrorist attack on the Storage Installation did not violate the AEA’s hearing provisions.

[4] Petitioners contend that the NRC relied on an improper ground in denying their request for a hearing on whether

⁶In 1974, Congress eliminated the Atomic Energy Commission (“AEC”). Regulatory functions went to the NRC, and promotional functions to the Energy Research and Development Administration. *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5814.

NEPA requires the Commission to consider the environmental impacts of terrorism — namely, the ground that it had determined in earlier decisions that NEPA imposes no such obligation. Thus, Petitioners do not challenge the substantive validity or coherence of those earlier opinions in making their AEA claim, but rather the reliance upon a prior determination of the merits in order to reject a petition presenting the same issues. As such, *Sierra Club v. NRC*, 862 F.2d 222 (9th Cir. 1988), on which Petitioners rely, does not apply. In that case, the NRC rejected the petitioners' contentions as lacking in reasonable specificity, and yet went on to analyze the merits of those supposedly unacceptable contentions. *Id.* at 228. Here, however, where the agency is rejecting the contentions as contrary to a prior decision, the “merits” and the reason for the inadmissibility of the contention collapse. Put differently, the NRC did not reach the merits of the petition as much as it assessed the issues raised against issues resolved by prior decisions. We hold that in doing so, the Commission complied fully with the AEA. To hold otherwise would unduly restrict the agency's evaluation of hearing petitions, by requiring it to grant a hearing on issues it has already resolved whenever a petitioner claims to have new evidence. We can find, and Petitioners point to, nothing in the AEA that would require this result.

C

[5] The NRC's denial of a hearing on security measures for Diablo Canyon as a whole also did not violate the AEA. Petitioners argue that the AEA requires the NRC to grant petitioners a hearing on all issues of material fact, including the security of the entire Diablo Canyon complex. Petitioners therefore conclude, citing *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984), that the NRC violated the AEA when it denied a hearing on that issue.

Petitioners' argument misreads *Union of Concerned Scientists*, in which the D.C. Circuit held only that the agency can-

not by rule presumptively eliminate a material issue from consideration in a hearing petition. *Union of Concerned Scientists* requires the agency to consider a petition; it does not require that the agency grant it.

The NRC in CLI 02-23 did not deny that security requirements for the entire complex might need to be upgraded, but rather maintained that a licensing proceeding hearing (and one regarding an installation, not the entire complex) was not the correct forum in which to address the issue. The Commission directed Petitioners to participate in a rulemaking or to raise their concerns in a hearing then pending before the Licensing Board. Petitioners contend that these alternative fora are illusory, and that rejection of their petition amounted to the denial of any opportunity to participate in the consideration of post-9/11 security measures for the Diablo Canyon complex.

Petitioners argue “[i]f the NRC were going to resolve Petitioners’ concerns that grossly inadequate security made the Diablo Canyon facility vulnerable to terrorist attacks generically, through a rulemaking, such a rulemaking would have been initiated as a result of the ‘comprehensive security review’ undertaken by the NRC.” Thus, Petitioners argue that it would have been futile to submit a rulemaking petition. This argument must fail, as Petitioners did not use the available procedures for initiating a rulemaking. Petitioners cannot complain that NRC failed to institute a rulemaking they never requested.

[6] Given that rulemaking may have been an avenue for Petitioners’ participation, had they chosen to pursue it, their argument that they had no forum in which to raise their contentions loses its force. However, even were Petitioners correct in their assertion that they were unfairly denied the opportunity to participate in a rulemaking proceeding, the argument that the Licensing Board hearing was similarly illusory would fail. In fact, Petitioners were attempting to use the present Storage Installation licensing proceeding as a means

of launching a much broader challenge to the Diablo Canyon complex. The NRC correctly observes that a petition alleging that existing NRC regulations are “grossly inadequate to protect against terrorist attack, and therefore must be supplemented by additional requirements” cannot in fact be raised before the Licensing Board, which cannot hear challenges to NRC rules. The limited scope of licensing proceedings does not, however, amount to the arbitrary denial of a forum, as Petitioners claim. While Petitioners could have raised site-specific issues “relating to the ‘common defense and security’ ” that were not controlled by existing rules or regulations to the Licensing Board, they are not entitled to expand those proceedings to include the entire complex, and issues already covered by agency rules.

D

In short, the NRC did not violate the AEA in denying the petitions for a hearing. Neither the AEA nor its implementing regulations required the NRC to grant Petitioners a hearing on whether NEPA required a consideration of the environmental impact of a terrorist attack on the Storage Installation or the security measures adopted for the entire Diablo Canyon complex.

IV

[7] The NRC’s reliance on its own prior opinions in its decision in this case does not violate the APA’s notice and comment provisions. Petitioners argue that the decisions in CLI 03-01 and *PFS* amount to the announcement “of a general policy of refusing to consider the environmental impacts of terrorist attacks in Environmental Impact Statements.” Petitioners rely on *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987) to claim that this policy depends on factual determinations not found subsequent to an evidentiary proceeding, and constitutes a “binding substantive norm,” the promulgation of which, without a public hearing, violates the

APA notice and comment provisions contained in 5 U.S.C. §§ 553(b), (c).⁷ The flaw in Petitioners' argument is the mistaken assertion that the NRC's decisions were factual and not legal. If the NRC's conclusion that terrorism need not be examined under NEPA were factual, then Petitioners would be correct that its determination would have to comply with APA rulemaking requirements, including notice and comment, or else the agency would have to permit petitioners to challenge it in every proceeding where it was disputed.

[8] That NEPA does not require consideration of the environmental impacts of terrorism is a legal, and not a factual, conclusion. *Cf. Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1993) (reasoning that a challenge to the adequacy of an EA turned on factual, not legal, principles where both NEPA's applicability and the requirements it imposed were uncontested); *see also Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995) (noting that although "challenges to agency actions which raise predominantly legal, rather than technical questions, are rare," the court was there required to address "just such a challenge"). Petitioners' analysis is therefore inapposite. The agency has the discretion to use adjudication to establish a binding legal norm. *See Sec. & Exch. Comm'n v. Chenery*, 332 U.S. 194, 199-203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation, is one that lies primarily in the informed discretion of the administrative agency."). We therefore agree with the NRC's characterization in its brief to this court: having come to the legal conclusion that NEPA does not require consideration of the environmental consequences of terrorist attacks, "[w]hen

⁷U.S.C. § 553(b) states that "[g]eneral notice of proposed rulemaking shall be published in the Federal Register," and outlines the requirements that such notice must meet. 5 U.S.C. § 553(c) states that after such notice has been given, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."

petitioners in this case presented a proposed contention seeking an EIS that analyzed the impacts of possible terrorist acts at the proposed Diablo Canyon Installation, the NRC reasonably concluded that this request was sufficiently similar to the request in *PFS* to justify the application of that decision here.”

V

Although we hold that the agency did not violate the APA when it relied on the prior resolution of a legal issue through adjudication, we come to a different conclusion as to that determination’s compliance with NEPA. Because the issue whether NEPA requires consideration of the environmental impacts of a terrorist attack is primarily a legal one, we review the NRC’s determination that it does not for reasonableness. See *Alaska Wilderness Recreation & Tourism Ass’n*, 67 F.3d at 727 (reviewing predominately legal issue for reasonableness because “it makes sense to distinguish the strong level of deference we accord an agency in deciding factual or technical matters from that to be accorded in disputes involving predominately legal questions”); *Ka Makani’o Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002) (“Because this case involved primarily legal issues . . . based on undisputed historical facts, we conclude that the ‘reasonableness’ standard should apply to this case.”).

Here, the NRC decided categorically that NEPA does not require consideration of the environmental effects of potential terrorist attacks. In making this determination, the NRC relied on *PFS*, where it “consider[ed] in some detail the legal question whether NEPA requires an inquiry into the threat of terrorism at nuclear facilities.” 56 NRC 340, 343 (2002). In that case, intervenor State of Utah filed a contention claiming that the September 11 terrorist attacks “had materially changed the circumstances under which the Board had rejected previously proffered terrorism contentions by showing that a terrorist attack is both more likely and potentially more dangerous than previously thought.” *Id.* at 345. The NRC concluded that

even following the September 11th attacks, NEPA did not impose such a requirement, reasoning:

In our view, an EIS is not an appropriate format to address the challenges of terrorism. The purpose of an EIS is to inform the decisionmaking authority and the public of a broad range of environmental impacts that will result, with a fair degree of likelihood, from a proposed project, rather than to speculate about ‘worst-case’ scenarios and how to prevent them.

Id. at 347.

The NRC determined that four grounds “cut[] against using the NEPA framework” to consider the environmental effects of a terrorist attack: (1) the possibility of a terrorist attack is far too removed from the natural or expected consequences of agency action; (2) because the risk of a terrorist attack cannot be determined, the analysis is likely to be meaningless; (3) NEPA does not require a “worst-case” analysis; and (4) NEPA’s public process is not an appropriate forum for sensitive security issues. *Id.* at 348. We review each of these four grounds for reasonableness, and conclude that these grounds, either individually or collectively, do not support the NRC’s categorical refusal to consider the environmental effects of a terrorist attack.

A

[9] The Commission relied first on finding that the possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action. *Id.* at 347. Section 102 of NEPA requires federal agencies to prepare “a detailed statement . . . on the environmental impact” of any proposed major federal action “significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(1)(C)(i). The question thus becomes whether a given action “significantly affects” the environment.

The NRC claims that the appropriate analysis of Section 102 is that employed by the Supreme Court in *Metropolitan Edison Co. v. People Against Nuclear Power*, 460 U.S. 766, 773 (1983). In *Metropolitan Edison*, the Court noted that “[t]o determine whether Section 102 requires consideration of a particular effect, we must look to the relationship between that effect and the change in the physical environment caused by the major federal action at issue,” looking for “a reasonably close causal relationship . . . like the familiar doctrine of proximate cause from tort law.” 460 U.S. at 774. The Commission claims that its conclusion that the environmental impacts of a possible terrorist attack on an NRC-licensed facility is beyond a “reasonably close causal relationship” was a reasonable application of this “proximate cause” analogy.

The problem with the agency’s argument, however, is that *Metropolitan Edison* and its proximate cause analogy are inapplicable here. In *Metropolitan Edison*, the petitioners argued that NEPA required the NRC to consider the potential risk of psychological damage upon reopening the Three Mile Island nuclear facilities to those in the vicinity. Noting that NEPA is an environmental statute, the Supreme Court held that the essential analysis must focus on the “closeness of the relationship between the change in the environment and the ‘effect’ at issue.” 460 U.S. at 772.

The appropriate analysis is instead that developed by this court in *NoGwen Alliance v. Aldridge*, 855 F.2d 1380 (9th Cir. 1988). In *NoGwen*, the plaintiffs argued that NEPA required the Air Force to consider the threat of nuclear war in the implementation of the Ground Wave Emergency Network (“GWEN”). We held “that the nexus between construction of GWEN and nuclear war is too attenuated to require discussion of the environmental impacts of nuclear war in an [EA] or [EIS].” 855 F.2d at 1386.

[10] The events at issue here, as well as in *Metropolitan Edison* and *NoGwen*, form a chain of three events: (1) a major

federal action; (2) a change in the physical environment; and (3) an effect. *Metropolitan Edison* was concerned with the relationship between events 2 and 3 (the change in the physical environment, or increased risk of accident resulting from the renewed operation of a nuclear reactor, and the effect, or the decline in the psychological health of the human population). The Court in *Metropolitan Edison* explicitly distinguished the case where the disputed relationship is between events 1 and 2: “we emphasize that in this case we are considering effects caused by the risk of accident. The situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs . . . is an entirely different case.” *Id.* at 775 n.9. In *NoGwen*, we followed the Court’s admonition and, in addressing the relationship between events 1 and 2, we held that the *Metropolitan Edison* analysis did not apply “because it discusse[d] a different type of causation than that at issue in this case . . . [which] require[d] us to examine the relationship between the agency action and a potential impact on the environment.” *Id.* at 1386. *NoGWEN* relied on our decision in *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1026 (9th Cir. 1980), which held that “an impact statement need not discuss remote and highly speculative consequences.” Applying that standard to the plaintiffs’ claims that the military GWEN system’s installation would “increase the probability of nuclear war,” and “that GWEN would be a primary target in a nuclear war,” we held both propositions to be “remote and highly speculative,” and, therefore, NEPA did not require their consideration.

[11] In the present case, as in *NoGwen*, the disputed relationship is between events 1 and 2 (the federal act, or the licensing of the Storage Installation, and the change in the physical environment, or the terrorist attack). The appropriate inquiry is therefore whether such attacks are so “remote and highly speculative” that NEPA’s mandate does not include consideration of their potential environmental effects.

[12] The NRC responds by simply declaring without support that, as a matter of law, “the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.” 56 NRC at 349. In doing so, the NRC failed to address Petitioners’ factual contentions that licensing the Storage Installation would lead to or increase the risk of a terrorist attack because (1) the presence of the Storage Installation would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack. We conclude that it was unreasonable for the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation and on the entire Diablo Canyon facility as too “remote and highly speculative” to warrant consideration under NEPA.

[13] In so concluding, we also recognize that the NRC’s position that terrorist attacks are “remote and highly speculative,” as a matter of law, is inconsistent with the government’s efforts and expenditures to combat this type of terrorist attack against nuclear facilities. In the PFS opinion, the NRC emphasized the agency’s own post-September 11th efforts against the threat of terrorism:

At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. 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 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 design basis threat. We also are reviewing our own infrastructure, resources, and communications.

Our comprehensive review may also yield permanent rule or policy changes that will apply to the proposed PFS facility and to other NRC-related facilities. The review process is ongoing and cumulative. It has already resulted in a number of security-related actions to address terrorism threats at both active and defunct nuclear facilities.

56 NRC at 343. Among these actions is the establishment of an Office of Nuclear Security and Incident Response, "responsible for immediate operational security and safeguards issues as well as for long-term policy development[,] work[ing] closely with law enforcement agencies and the Office of Homeland Security[,] . . . coordinat[ing] the NRC's ongoing comprehensive security review." *Id.* at 344-45.

We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is "remote and speculative," with its stated efforts to undertake a "top to bottom" security review against this same threat. Under the NRC's own formulation of the rule of reasonableness, it is required to make determinations that are consistent with its policy statements and procedures. Here, it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are "remote and highly speculative" for NEPA purposes.⁸

⁸The view that a terrorist attack is too speculative to be a required part of NEPA review would seem to be inconsistent with the NRC's pre-9/11 security procedures. Since 1977, the NRC has required licensed plants to have a security plan that is designed to protect against a "design basis

[14] In sum, in considering the policy goals of NEPA and the rule of reasonableness that governs its application, the possibility of terrorist attack is not so “remote and highly speculative” as to be beyond NEPA’s requirements.

B

[15] The NRC’s reliance upon the second *PFS* factor, that the Risk of a Terrorist Attack Cannot be Adequately Determined, 56 NRC at 350, is also not reasonable. First, the NRC’s dismissal of the risk of terrorist attacks as “unquantifiable” misses the point. The numeric probability of a specific attack is not required in order to assess likely modes of attack, weapons, and vulnerabilities of a facility, and the possible impact of each of these on the physical environment, including the assessment of various release scenarios. Indeed, this is precisely what the NRC already analyzes in different contexts. It is therefore possible to conduct a low probability-high consequence analysis without quantifying the precise probability of risk. The NRC itself has recognized that consideration of uncertain risks may take a form other than quantitative “probabilistic” assessment. In its “Proposed Policy Statement on Severe Accidents and Related Views on Nuclear Reactor Regulation,” 48 Fed.Reg. 16,014 (1983), the Commission stated that:

threat” for radiological sabotage. See General Accounting Office, *Nuclear Regulatory Commission: Oversight of Security at Commercial Nuclear Power Plants Needs to be Strengthened*, GAO-030752 (2003) at 6. “The design basis threat characterizes the elements of a postulated attack, including the number of attackers, their training, and the weapons and tactics they are capable of using.” *Id.*

Thus, the NRC—even before the terrorist attacks of 9/11—did not consider such attacks too “remote and speculative” to be considered in agency planning. To the contrary, the agency has long required analysis of means and methods of hypothetical attacks against specific facilities, with the goal of establishing effective counter-measures.

In addressing potential accident initiators (including earthquakes, sabotage, and multiple human errors) where empirical data are limited and *residual uncertainty is large*, the use of conceptual modeling and scenario assumptions in Safety Analysis Reports will be helpful. They should be based on *the best qualified judgments of experts*, either in the form of subjective numerical probability estimates or *qualitative assessments of initiating events and casual [sic] linkages in accident sequences*.

48 Fed.Reg. at 16,020 (emphasis added).

[16] No provision of NEPA, or any other authority cited by the Commission, allows the NRC to eliminate a possible environmental consequence from analysis by labeling the risk as “unquantifiable.” See *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 754 (3rd Cir. 1989) (J. Scirica, dissenting) (finding no “statutory provision, no NRC regulation or policy statement, and no case law that permits the NRC to ignore any risk found to be unquantifiable”). If the risk of a terrorist attack is not insignificant, then NEPA obligates the NRC to take a “hard look” at the environmental consequences of that risk. The NRC’s actions in other contexts reveal that the agency does not view the risk of terrorist attacks to be insignificant. Precise quantification is therefore beside the point.

Even if we accept the agency’s argument, the agency fails to adequately show that the risk of a terrorist act is unquantifiable. The agency merely offers the following analysis as to the quantifiability of a potential terrorist attack:

The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained

with confidence by any state-of-the-art methodology. That being the case, we have no means to assess, usefully, the risks of terrorism at the PFS facility.

56 NRC at 350. The agency nonetheless has simultaneously shown the ability to conduct a “top to bottom” terrorism review. This leaves the Commission in the tenuous position of insisting on the impossibility of a meaningful, i.e. quantifiable, assessment of terrorist attacks, while claiming to have undertaken precisely such an assessment in other contexts. Further, as we have noted, the NRC has required site-specific analysis of such threats, involving numerous recognized scenarios.⁹

[17] Thus, we conclude that precise quantification of a risk is not necessary to trigger NEPA’s requirements, and even if it were, the NRC has not established that the risk of a terrorist attack is unquantifiable.

C

The NRC’s third ground, that it is not required to conduct a “worst-case” analysis, is a non sequitur. Although it is a true statement of the law, the agency errs in equating an assessment of the environmental impact of terrorist attack with a demand for a worst-case analysis.

The Council on Environmental Quality (“CEQ”) regulations, 40 C.F.R. §§ 1500.1 - 1518.4, promulgated with the “purpose [of] tell[ing] federal agencies what they must do to comply with [NEPA] procedures and achieve the goals of

⁹The NRC’s assertion that a risk of terrorism cannot be quantified is also belied by the very existence of the Department of Homeland Security Advisory System, which provides a general assessment of the risk of terrorist attacks. *See, e.g.*, World Market Research Centre, Global Terrorism Index 2003/4 (offering a probabilistic risk assessment of terrorist activities over a 12-month period).

[NEPA],” have been interpreted by the Supreme Court as “entitled to substantial deference.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (citing *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979)). These regulations mandated worst-case analyses until 1986, when CEQ replaced the former 40 C.F.R. § 1502.22, requiring an agency, when relevant information was either unavailable or too costly to obtain, to include in the EIS a “worst-case analysis and an indication of the probability or improbability of its occurrence,” with the new and current version of the regulation, which requires an agency to instead deal with uncertainties by including within the EIS “a summary of existing credible scientific evidence which is relevant to evaluating the reasonable foreseeable significant adverse impacts on the human environment, and . . . the agency’s evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.” 40 C.F.R. §§ 1502.22(b)(3), (4). The current requirement applies to those events with potentially catastrophic consequences “even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” 40 C.F.R. § 1502.22 (b)(4). The Supreme Court held in *Robertson* that the amendment of the regulations had nullified the worst-case analysis requirement. 490 U.S. at 355; *Edwardsen v. U.S. Dep’t of Interior*, 268 F.3d 781, 785 (9th Cir. 2001).

The Commission is therefore correct when it argues that NEPA does not require a worst-case analysis. It is mistaken, however, when it claims that “Petitioners’ request for an analysis of [the environmental effects of] a successful terrorist attack at the Diablo Canyon ISFSI approximates a request for a ‘worst-case’ analysis that has long since been discarded by the CEQ regulations . . . and discredited by the Federal courts.” According to the NRC, “[m]aking the various assumptions required by [P]etitioners’ scenario requires the NRC to venture into the realm of ‘pure conjecture.’” We disagree.

[18] An indication of what CEQ envisioned when it imposed the worst-case analysis requirement can be gleaned from a 1981 CEQ memorandum, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, reprinted at 46 FR 18026-01 (March 23, 1981). CEQ answered one of those questions, "[w]hat is the purpose of a worst-case analysis? How is it formulated and what is the scope of the analysis?" with the following:

The purpose of the analysis is to . . . cause agencies to consider th[]e potential consequences [of agency decisions] when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery. In addition to an analysis of a low probability/catastrophic impact event, the worst-case analysis should also include a spectrum of events of higher probability but less drastic impact.

46 FR 18026, 18032. While it is true that the agency is not required to consider consequences that are "speculative,"¹⁰ the

¹⁰Because we disagree with the agency's interpretation of worst-case analysis, we do not reach the agency's characterization of the possibility of terrorist attack as "speculative." We note, however, that this characterization stands out as contrary to the vigilant stance that Americans are encouraged to take by the Department of Homeland Security. See www.dhs.gov/dhspublic/display?theme=29 (urging that "[a]ll Americans should continue to be vigilant" and noting that "[t]he country remains at an elevated risk . . . for terrorist attack.")

NRC's argument wrongly labels a terrorist attack the worst-case scenario because of the low or indeterminate probability of such an attack. The CEQ memo, by including as worst-case scenarios events of both higher and lower probability, reveals that worst-case analysis is not defined solely by the low probability of the occurrence of the events analyzed, but also by the range of outcomes of those events. *See also Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003) (citing a witness's testimony that the loss of bald eagle nesting sites was both "likely" and "a worst-case scenario"). Petitioners do not seek to require the NRC to analyze the most extreme (i.e., the "worst") possible environmental impacts of a terrorist attack. Instead, they seek an analysis of the range of environmental impacts likely to result in the event of a terrorist attack on the Storage Installation. We reject the Commission's characterization of this request as a demand for a worst-case analysis.

D

[19] The NRC's reliance on the fourth *PFS* factor, that it cannot comply with its NEPA mandate because of security risks, is also unreasonable. There is no support for the use of security concerns as an excuse from NEPA's requirements. While it is true, as the agency claims, that NEPA's requirements are not absolute, and are to be implemented consistent with other programs and requirements, this has never been interpreted by the Supreme Court as excusing NEPA's application to a particularly sensitive issue. *See Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 (1981) (holding that the Navy was required to perform a NEPA review and to factor its results into decisionmaking even where the sensitivity of the information involved meant that the NEPA results could not be publicized or adjudicated). *Weinberger* can support only the proposition that security considerations may permit or require modification of some of the NEPA procedures, not the Commission's argument that sensitive security issues result in some kind of NEPA waiver.

The application of NEPA's requirements, under the rule of reason relied on by the NRC, is to be considered in light of the two purposes of the statute: first, ensuring that the agency will have and will consider detailed information concerning significant environmental impacts; and, second, ensuring that the public can both contribute to that body of information, and can access the information that is made public. *Pub. Citizen*, 541 U.S. at 768. To the extent that, as the NRC argues, certain information cannot be publicized, as in *Weinberger*, other statutory purposes continue to mandate NEPA's application. For example, that the public cannot access the resulting information does not explain the NRC's determination to prevent the public from *contributing* information to the decisionmaking process. The NRC simply does not explain its unwillingness to hear and consider the information that Petitioners seek to contribute to the process, which would fulfill both the information-gathering and the public participation functions of NEPA. These arguments explain why a *Weinberger*-style limited proceeding might be appropriate, but cannot support the NRC's conclusion that NEPA does not apply. As we stated in *NoGWEN*: "There is no 'national defense' exception to NEPA . . . 'The Navy, just like any federal agency, must carry out its NEPA mandate to the fullest extent possible and this mandate includes weighing the environmental costs of the [project] even though the project has serious security implications.'" 855 F.2d at 1384 (quoting *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1977)).

E

[20] In sum, none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness. We must therefore grant the petition in part and remand for the agency to fulfill its responsibilities under NEPA.

[21] Our identification of the inadequacies in the agency's NEPA analysis should not be construed as constraining the

NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis. There remain open to the agency a wide variety of actions it may take on remand, consistent with its statutory and regulatory requirements. We do not prejudge those alternatives. Nor do we prejudge the merits of the inquiry. We hold only that the NRC's stated reasons for categorically refusing to consider the possibility of terrorist attacks cannot withstand appellate review based on the record before us.

We are also mindful that the issues raised by the petition may involve questions of national security, requiring sensitive treatment on remand. However, the NRC has dealt with our nation's most sensitive nuclear secrets for many decades, and is well-suited to analyze the questions raised by the petition in an appropriate manner consistent with national security.

VI

We deny the petition as to the claims under the AEA and the APA. However, because we conclude that the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review, we hold that the EA prepared in reliance on that determination is inadequate and fails to comply with NEPA's mandate. We grant the petition as to that issue and remand for further proceedings consistent with this opinion.

**PETITION GRANTED IN PART; DENIED IN PART;
REMANDED.**

**UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of
CONSUMERS ENERGY COMPANY
BIG ROCK POINT PLANT (BRP)

)
) Docket Nos. 50-155
) and 72-043
)

Regarding the Notice of
Consideration of Approval
of Transfer of Facility
Operating License and
Conforming Amendment
and Opportunity for a Hearing
on the Transfer of License
No. DPR-6 for BRP Plant and
Independent Spent Fuel Storage
Installation (ISFSI) License No.
SFGL-16 for BRP from Consumers
Energy Co. to Entergy Nuclear

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) February 20, 2007
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NOTICE OF APPEARANCE OF KEVIN KAMPS

Pursuant to 10 CFR 2.713(b), Kevin Kamps hereby enters an appearance on behalf of Nuclear Information and Resource Service (NIRS) and provides the following information:

1. I am Nuclear Waste Specialist for Nuclear Information and Resource Service at 6930 Carroll Avenue, Suite 340, Takoma Park, MD 20912, Tel. 301-270-6477 ext. 14 and my email address is <kevin@nirs.org>.

2. I have been appointed by NIRS to jointly represent the organization and its members in this proceeding.


Kevin Kamps

2/20/2007
Date

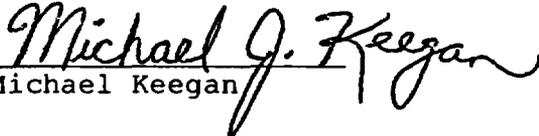
**UNITED STATES OF AMERICA
BEFORE THE NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
CONSUMERS ENERGY COMPANY)	Docket Nos. 50-155
BIG ROCK POINT PLANT (BRP))	and 72-043
)	
Regarding the Notice of)	
Consideration of Approval)	
of Transfer of Facility)	
Operating License and)	February 20, 2007
Conforming Amendment)	
and Opportunity for a Hearing)	
on the Transfer of License)	
No. DPR-6 for BRP Plant and)	
Independent Spent Fuel Storage)	
Installation (ISFSI) License No.)	
SFGL-16 for BRP from Consumers)	
Energy Co. to Entergy Nuclear)	

NOTICE OF APPEARANCE OF Michael Keegan

Pursuant to 10 CFR 2.713(b), Michael Keegan hereby enters an appearance on behalf of Don't Waste Michigan (DWM) and provides the following information:

1. I am a board member of DWM and my email address is <mkeeganj@comcast.net>.
2. I have been appointed by DWM to jointly represent the organization and its members in this proceeding.


Michael Keegan

2/20/2007
Date

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE SECRETARY

In the Matter of
Consumers Energy Company
Big Rock Point Plant
Regarding the Notice of Consideration of
Approval of Transfer of Facility Operating
License and Conforming Amendment and
Opportunity for a Hearing on the Transfer
of License No. DPR-6 for BRP Plant and
Independent Spent Fuel Storage Installation
(ISFSI) License No. SFGL-16 for BRP
from Consumers Energy Co. to Entergy
Nuclear

Docket No. 50-155
and 72-043

DECLARATION OF Victor McManemy

The following statements are true under the penalty of perjury:

1. My name is Victor McManemy. I am a member of both Nuclear Information and Resource Service (NIRS) and Don't Waste Michigan.
2. I live at 7786 Peninsula Drive, Traverse City, MI 49686. My phone number is 231-995-3697. My home lies within 50 miles of the Big Rock Point nuclear power plant site where Consumers Energy Company is seeking to transfer its licenses for the property as well as for the dry cask storage facility for high-level radioactive waste.
3. I believe that my interests will not be adequately represented without this action to intervene, and without the opportunity to participate as a full party, represented by NIRS and DWM, in this proceeding. If the transfer -- of License No. DPR-6 for BRP Plant and Independent Spent Fuel Storage Installation (ISFSI) License No. SFGL-16 for BRP from Consumer Energy Co. (current holder of the licenses) to Entergy Nuclear Palisades, LLC (Entergy Nuclear Palisades) to possess and own, and Entergy Nuclear Operations, Inc. (ENO), to control and operate, the ISFSI -- is approved without my safety and security concerns and environmental issues, this high-level radioactive waste storage facility may operate unsafely and insecurely and pose an unacceptable risk to not only my health and safety, but also to the general public's health and safety, as well as to the environment, and the common defense and security, thereby jeopardizing the health and welfare of myself and others who live, own property, are ratepayers, and recreate within the vicinity of the former BRP nuclear power reactor site and its still-present dry cask storage facility for high-level radioactive waste. In addition, the still-present radioactive contamination of the soil, groundwater, and Lake Michigan sediments at, and adjacent to, the Big Rock

Point site, will continue to represent an unacceptable risk to public health and safety and the environment, thereby jeopardizing the health and welfare of myself and others who live, own property, are ratepayers, and recreate within the vicinity of the former BRP nuclear power reactor site and its still-present radioactive contamination.

4. Therefore, I have authorized NIRS and DWM to represent my interests in this proceeding by opposing the transfer of licenses from Consumers Energy Company to Entergy Nuclear Palisades, LLC and Entergy Nuclear Operations, Inc.

Victor McManemy
[Signature]

Date: Feb. 20, 2007