IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-75058

SAN LUIS OBSIPO MOTHERS FOR PEACE,
Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and
the UNITED STATES OF AMERICA,
Respondents,

PACIFIC GAS & ELECTRIC COMPANY
Intervenor.

On Petition for Review of an Order of the
U.S. Nuclear Regulatory Commission

BRIEF FOR THE FEDERAL RESPONDENTS

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Subject: Extension of briefing schedule in *San Luis Obispo Mothers for Peace v. NRC*, No. 08-75058 (9th Cir.).

Counselors:

As I have previously informed you by email, I have obtained a two-week extension of the briefing schedule pursuant to Local Rule 31-2.2 of the Ninth Circuit in which to file the Response Brief for the Federal Respondents. This extension is caused in large part by the continuing difficulties I am having after my recent surgery. In addition, the NRC is required to coordinate its brief with the U.S. Department of Justice, and that coordination may take some time, given the issues in this case.

As described to me by a member of the Clerk's Office, the new briefing schedule is as follows:

Brief for Federal Respondents:	March 25, 2009;
PG&E's Brief	14 days after service of Federal Respondents' Brief;
SLOMFP's Reply Brief	28 days after service of Federal Respondents' Brief.

As requested by the Clerk, I will submit a copy of this letter to the Court when I file the NRC Response Brief.

Sincerely,

/s/
Charles E. Mullins
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JURISDICTION

Petitioner San Luis Obispo Mothers for Peace (SLOMFP) challenges a decision by the Nuclear Regulatory Commission (NRC). This Court has jurisdiction to review Commission decisions under provisions of the Atomic Energy Act, 42 U.S.C. §2239(b), and the Hobbs Act, 28 U.S.C. §2342(4). SLOMFP timely filed suit within 60 days of the final NRC decision. *See* 28 U.S.C. §2344.

ISSUE PRESENTED

Whether, after reviewing an environmental assessment (EA) examining possible impacts of credible terrorist attacks and conducting an adjudicatory hearing, NRC reasonably and lawfully rejected challenges to the EA.

STATEMENT OF THE CASE[1]

A. Nature of the Case.

This is the second petition for review of NRC's granting of a license application by the Pacific Gas & Electric Company (PG&E) for a spent fuel storage facility at the Diablo Canyon nuclear power plant site in California. NRC has granted the license, but on judicial review this Court held that the National Environmental Policy Act (NEPA) required NRC to consider potential environmental impacts from terrorism and remanded the case for further review. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007).

On remand, NRC examined its Staff's newly-issued supplemental environmental assessment (EA) and response to public comments, presided at an adjudicatory hearing to consider SLOMFP's contentions attacking the EA, and reviewed Classified and other sensitive threat assessment information. Based on this record, NRC rejected SLOMFP's contentions and found that licensing the facility would not result in significant environmental impacts from terrorism and thus did not require a full-scale environmental impact statement.

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[1] This Brief will cite to "ER" for SLOMFP's Excerpts of Record, "SER" for NRC's Supplemental Excerpts of Record and "OB" for SLOMFP's Opening Brief.

SLOMFP challenges NRC's finding, chiefly complaining that NRC did not grant it access to Classified and sensitive national security information.

B. Statutory and Regulatory Framework.

1. Spent Fuel Storage.

Nuclear power reactors produce "spent" fuel that is "hot," both thermally and radioactively. Reactor operators transfer the spent fuel from the reactor into a "spent fuel pool," where deep water provides both cooling and radiation shielding. Over the years spent fuel has accumulated, requiring nuclear plants to increase onsite storage capacity. Thus, many nuclear power plants have turned to dry storage -- arrays of large, robust casks designed to withstand severe impacts. These are known as independent spent fuel storage installations (ISFSIs).

2. Physical Security at Nuclear Facilities.

After the September 11, 2001 attacks, NRC issued security orders to all ISFSI licensees, requiring them to strengthen their capabilities and readiness to respond to potential attacks, and ensuring that all ISFSIs had a consistent protective strategy.[2] (SER1). NRC also reevaluated the agency's security requirements, including its threat assessment framework and "design basis threats," *i.e.*, the threats against which licensees are required to defend. (*Id.*).

[2] *See* 67 Fed. Reg. 65,150 (Oct. 23, 2002) (generally licensed ISFSIs); 67 Fed. Reg. 65,152 (Oct. 23, 2002) (specifically-licensed ISFSIs).

As a part of that re-evaluation, NRC contracted with Sandia National Laboratories to analyze potential threat scenarios and associated releases of radioactive material. In November, 2004, Sandia issued numerous reports, three dealing with casks similar to those proposed for Diablo Canyon. These reports analyzed: (1) a large plane attack; (2) scenarios involving large explosives; and (3) other general attack scenarios. (SER51, #1-3). A portion of the "general attack" report (SER51, #3) is included in the Supplemental Excerpts. (SER7-21). Much of the information in the Sandia reports is Classified. (*E.g.*, SER13-14).

NRC Staff then developed a plan to assess the adequacy of NRC security requirements for NRC-regulated facilities and activities, including ISFSIs, based partially on the analysis in the Sandia reports. (ER143). Under that plan, NRC Staff would use Classified threat information (ER151) to screen the scenarios in the Sandia reports to determine if they were plausible. NRC Staff would assess the consequences of plausible scenarios based on the Sandia calculations. The Commission directed the Staff to proceed, but emphasized that the Staff should not share the Sandia reports with industry or release them outside NRC. (SER22).

NRC Staff screened the Sandia scenarios (SER104) and conducted an assessment of plausible attacks on spent fuel storage casks generally. (ER103). The Staff determined some scenarios were "remote and speculative," removing

them from further analysis. (ER124). The Staff included a brief overview of this security review in both the draft EA (ER93-94) and the final EA. (ER62-63).

3. NRC Authority to License ISFSIs.

Under the Atomic Energy Act, NRC has authority to license ISFSIs. *See* 42 U.S.C. §§2073, 2093, 2111; *Bullcreek v. NRC*, 359 F.3d 536 (D.C. Cir. 2004). In 1983 Congress passed the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §10101, *et seq.*, to "encourage and expedite the effective use of existing storage facilities and the addition of needed new storage capacity at the site of each civilian nuclear power reactor." *See* 42 U.S.C. §10151. The NWPA authorized NRC to approve dry storage technologies, including casks, for use at civilian reactors. *See Kelley v. Selin*, 42 F.3d 1501, 1504 (6th Cir. 1995) (citing 42 U.S.C. §10153). "The impetus behind Congress' action was the belief that existing on-site storage facilities at most reactors, which consist of pools for underwater storage, would be insufficient to meet storage needs prior to the opening of [a] federal [high-level waste] repository." *Id.* at 1504.

NRC's regulations for licensing ISFSIs are in 10 C.F.R. Part 72. A *site-specific license* under 10 C.F.R. §72.40 requires a separate license application, which creates an opportunity for an NRC hearing under 42 U.S.C. §2239(a). Before issuing a site-specific license, the NRC must determine, *inter alia*, that issuance will not be inimical to the common defense and security and that there is

reasonable assurance that the licensing activities can be conducted without endangering the public health and safety. *See* 10 C.F.R. §72.40(a)(13)-(14). In addition, NRC's regulations at 10 C.F.R. §72.210, *et seq.*, provide a *general license* authorizing storage of spent fuel in pre-approved casks. This lawsuit, however, involves PG&E's application for a site-specific license.

4. National Environmental Policy Act (NEPA).

NEPA, 42 U.S.C. §4321, *et seq.*, requires federal agencies to prepare an environmental statement for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(c). But NEPA does not require a full environmental impact statement (EIS) for actions that do not "significantly affect" the environment. Agencies may prepare a brief environmental assessment (EA) to determine whether an action requires an EIS. *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 372 (2008). The Supreme Court has held that NEPA does not require agencies to take particular action based on their environmental analysis; NEPA simply requires the agency to be aware of environmental impacts of any action when making a decision. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

After reviewing potential environmental impacts, each NRC EA concludes with a "finding of no significant impact" or a decision to prepare an EIS. *See* 10 C.F.R. §§51.30-51.31.

5. NRC Hearing Process.

Under 42 U.S.C. §2239(a)(1)(A), members of the public whose health and safety concerns are affected by a proposed NRC licensing action may request an NRC hearing. NRC hearing rules allow challenges to a staff decision not to prepare an EIS for the proposed licensing action. *See* 10 C.F.R. §51.104(b). In such proceedings, "[t]he adjudicatory record and Board decision (and, of course, any Commission appellate decisions) become, in effect, part of" the EA and record of decision. *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 89 (1998) (citations omitted) (ER23, n.7).

To initiate an NRC hearing, a petitioner must submit at least one admissible "contention," *i.e.*, an issue to litigate. 10 C.F.R. §2.714(b)(2) (2004).[3] That contention must be supported by a "brief explanation" of its "bases," *i.e.*, concrete support for the issue, 10 C.F.R. §2.714(b)(2)(i)(2004); "a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely," 10 C.F.R. §2.714(b)(2)(ii) (2004); and "[s]ufficient

[3] The current contention admissibility standards are listed at 10 C.F.R. §2.309(f). This case uses the former (nearly identical) standards, because this proceeding began before the 2004 revisions. *See* 69 Fed. Reg. 2180, 2221 (Jan. 14, 2004). SLOMFP's Brief contains an Addendum with most regulations cited in this case. Our Addendum reproduces a provision SLOMFP did not include.

information ... to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. §2.714(b)(2)(iii) (2004).

Petitioners must raise their claims "at the earliest possible moment." *Duke Energy Corp.* (McGuire & Catawba Nuclear Stations, Units 1&2), CLI-03-17, 58 NRC 419, 429 (2003), 2003 WL 22992241. Contentions submitted after an initial filing must satisfy NRC's late-filing standards, which consider: (i) good cause, if any, for lateness of the filing; (ii) the availability of other means to protect the filer's interest; (iii) the extent to which the late filing will assist in developing a sound record; (iv) the extent to which the filer's interest is already represented; and (v) the extent to which the late filing will broaden the issues or delay the proceeding. *See* 10 C.F.R. §2.714(a)(1) (2004).

The 1982 NWPA added an expedited process for conducting a hearing on amendments to expand spent fuel storage capacity at a nuclear plant. The NWPA process permits any party to request an "oral argument," which triggers a summary proceeding consisting of discovery, sworn testimony or affidavits, sworn written summaries of facts, data, and arguments on which the party intends to rely, and a hearing (oral argument). *See* 42 U.S.C. §10154(a). NRC's rules implementing this process appear at 10 C.F.R. Part 2, Subpart K (§§2.1101-2.1117).

Under the NWPA, after the "oral argument" process, NRC decides whether an evidentiary hearing is necessary to resolve key factual disputes "with sufficient accuracy." 42 U.S.C. §10154(b). *See Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383-86 (2001), 2001 WL 520923.

6. Access to Sensitive Information.

NEPA provides that copies of federal agencies' environmental impact analyses "shall be made available to ... the public as provided in section 552 of Title 5." 42 U.S.C. §4332(2)(C). "Section 552 of Title 5" is the Freedom of Information Act (FOIA). Thus, the disclosure of NEPA documents "is expressly governed by FOIA," and such documents may be withheld "in whole or in part, under the authority of an FOIA exemption." *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). "[A]ny material properly classified pursuant to Executive Order ... is exempt from disclosure under Exemption 1, and therefore is exempt from the public disclosure requirements under NEPA." *Id.* at 144-45. The FOIA exemptions, listed at 5 U.S.C. §552(b), were "intended by Congress to balance the public's need for access to official information with the Government's need for confidentiality." *Id.* at 144 (citing *EPA v. Mink*, 410 U.S. 73, 80 (1973)).

Exemptions 1, 2 and 3 are the most commonly-cited FOIA provisions concerning security-sensitive agency information. Under Exemption 1, the

handling and distribution of – and access to – Classified National Security Information are governed by Executive Order ("EO") 12958, 60 Fed. Reg. 19,825 (April 17, 1995), as amended by EO 13292, 68 Fed. Reg. 15,315 (March 25, 2003).[4] Section 4.1(c) of EO 13925 is identical to 4.2(b) of EO 12958, which was operative when this case opened, and restricts agency disclosures of information classified by another agency:

> Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization.

68 Fed. Reg. at 15324. *See also* 10 C.F.R. §2.905(h)(2) (NRC cannot disclose Classified information received from another agency without written permission from the originating agency). NRC has adopted rules, 10 C.F.R. Part 2, Subpart I, establishing a process by which participants in NRC proceedings may seek access to Classified information. (ER18-19).

Under Exemption 2, the agency may withhold documents "where disclosure may risk circumvention of agency regulation," *Dep't of the Air Force v. Rose*, 425 U.S. 352, 369 (1976), or where disclosure would enable criminal acts. *Maricopa Audubon Soc'y v. United States Forest Serv.*, 108 F.3d 1082, 1087 (9th Cir. 1997).

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[4] This Executive Order is a direct successor to the Executive Order under which information at issue in *Weinberger v. Catholic Action*, *supra*, was classified.

Congress enacted this exemption in part because ordering an agency to reveal confidential "operational directives" would in effect "dig a den for the fox inside the chicken coop." *Dirksen v. United States Dep't of Health & Human Servs.*, 803 F.2d 1456, 1459 (9th Cir. 1986) (citation omitted).

FOIA Exemption 3 allows agencies in certain cases to withhold documents exempted from disclosure by other statutes. *See* 5 U.S.C. §552(b)(3). Section 147 of the Atomic Energy Act, 42 U.S.C. §2167, requires NRC to protect Safeguards information (SGI) which "specifically identifies a licensee's or applicant's detailed ... security measures ... for the physical protection of special nuclear material" (including spent nuclear fuel) in significant quantities. *Id.* Section 147 is "subject to" Exemption 3. *See, e.g., Virginia Sunshine Alliance v. NRC*, 509 F. Supp. 863 (D.D.C. 1981). NRC regulations provide a means of accessing SGI found "necessary to a proper decision" in an NRC proceeding. 10 C.F.R. §2.774(e) (2004).

C. Statement of Facts.

1. General Background.

In 2006, this Court directed NRC to analyze the "likely" range of environmental impacts resulting from a terrorist attack on Diablo Canyon's proposed spent fuel storage facility, while reminding the parties that "the issues

raised ... may involve questions of national security, requiring sensitive treatment on remand." *SLOMFP*, 449 F.3d at 1034-35.

This proceeding began in 2001, when PG&E applied to NRC for a specific license under 10 C.F.R. Part 72 to build and operate an ISFSI at the Diablo Canyon nuclear power plant. (ER57). The ISFSI is needed to provide additional spent fuel storage capacity so that the two Diablo Canyon reactors can continue to generate electricity beyond the date when the pools where spent fuel is currently stored will reach capacity. (ER58). The proposed ISFSI would provide sufficient space to store each reactor's spent fuel until the current operating licenses for the reactors expire in 2021 and 2025. (*Id.*)

As part of its review of the license application, NRC Staff issued an EA in 2003. (ER55). Based on the EA, NRC Staff issued a Finding of No Significant Impact for this action. (*Id.*) After a safety review and an adjudicatory hearing, NRC issued a license authorizing PG&E to store spent nuclear fuel in the Diablo Canyon ISFSI for 20 years. (*Id.*) SLOMFP, an intervenor in the NRC adjudication, filed a petition for review, asking this Court to require NRC to consider terrorist acts in its NEPA review.

This Court held that NRC could not categorically refuse to consider the consequences of a terrorist attack under NEPA and directed NRC "to fulfill its

responsibilities under NEPA," but acknowledged that "[o]ur 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." *SLOMFP,* 449 F.3d at 1035. This Court noted that "the issues raised by the petition may involve questions of national security, requiring sensitive treatment on remand," and thus NRC would need to "analyze the questions raised by SLOMFP in an appropriate manner consistent with national security." *Id.*

On remand, the Commission directed NRC Staff to prepare a supplemental EA addressing the likelihood and potential consequences of a terrorist attack at the Diablo Canyon ISFSI site. CLI-07-11, 65 NRC 148 (2007) (ER53). The Commission directed the Staff, to "the extent practicable," to rely on "already available" information, "to rely, where appropriate, on qualitative rather than quantitative considerations," and to "make public as much of its revised environmental analysis as feasible," while also recognizing "that it may prove necessary to withhold some facts underlying the Staff's findings and conclusions as 'safeguards' information ...or even as classified national security information." (ER54). NRC Staff issued a draft EA, seeking public comment. 72 Fed. Reg. 30398 (May 31, 2007) (SER25).

NRC received comments from 32 individuals, including a 90-page submission from SLOMFP. (ER67). SLOMFP also filed contentions asking for an adjudicatory hearing. (ER315). Ultimately, NRC Staff issued a final EA finding no significant environmental impact from a plausible terrorist attack (ER56-66), with an analysis of 17 issues raised in the comments. (ER67-78).

2. Final Supplemental EA.

The supplemental EA analyzed potential radiological impacts of a successful terrorist attack on spent fuel storage casks at the Diablo Canyon ISFSI. (ER57-64). Initially, the EA reviewed the security requirements for ISFSIs and found that there was "high assurance" that the public health and safety was "adequately protected in the current threat environment." (ER62). Next, the EA found the probability of an attack "that results in a significant radiological event to be very low." (*Id.*) The EA discussed the strengths of the cask to be used in this facility and found that the "design features and additional security measures in place provide high assurance that the spent fuel stored in an ISFSI is adequately protected." *Id.* The EA then reviewed the Staff's security assessment following the 9-11 attacks and noted that NRC had found no need for additional security measures at ISFSIs. (ER62-63). The EA also discussed attack scenarios developed earlier by Sandia and noted that those scenarios included "a large aircraft impact similar" to the 9/11 event and "ground assaults using expanded adversary characteristics consistent with" the

types of attacks in the design basis threat scenarios for nuclear power plants. (ER63).

The EA then analyzed the consequences of a plausible terrorist attack on an ISFSI and concluded that, based on calculations using generic assessments, the dose to the nearest resident from a successful attack would be less than 5 rem.[5] (ER63). Finding the assumptions in the generic assessments "representative, and in some cases, conservative, relative to the actual conditions at Diablo Canyon[,]" the EA concluded that given the site-specific conditions at Diablo Canyon and the type of fuel present in the casks, an attack would result in a dose lower than the generic "less than 5 rem" calculation. (*Id.*) The EA found that "the dose to the nearest affected resident, from even the most severe plausible threat scenarios – the ground assault and aircraft impact scenarios" would be less than 5 rem. (*Id.*)

NRC Staff later explained its methodology in its pre-argument evidentiary filing and at oral argument before the Commission. The Staff considered the three Sandia reports and "to obtain a conservative estimate of environmental impacts," Staff health physics experts investigated the "plausible attack that results in the largest release of radioactive material." (SER138, 141). Staff experts then

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[5] A "rem" is a unit used to measure radiation dose. 10 C.F.R. §20.1004(a). For example, NRC regulations allow annual exposures of up to 5 rem per year for nuclear facility employees. 10 C.F.R. §20.1201(a)(1).

calculated the radiological dose to the nearest resident from exposure to a cloud of radioactive matter, inhalation of airborne radioactive material, and radioactive land contamination. (SER64, 71-74). The calculated dose was less than 5 rem. (SER73). The Staff experts concluded that "[t]he likelihood of an individual developing any discernible health effect from a radiation dose on the order of 5 rem is very small." (SER73).

In sum, NRC Staff experts determined that "the construction, operation, and decommissioning of the Diablo Canyon ISFSI, even when potential terrorist attacks on the facility are considered, will not result in a significant effect on the human environment." (ER64). Therefore, the Supplemental EA concluded that licensing the ISFSI did not warrant preparation of an EIS. (*Id.*)

3. SLOMFP's Contentions.

SLOMFP asked NRC for a hearing to consider five contentions, three of which are relevant to this Court's review.[6] (ER37-39; 315-32).

> Contention 1 – alleged that the EA (a) failed to define terms or explain its methodology, and (b) failed to identify all of its scientific sources.
>
> Contention 2 – alleged that the EA relied on hidden and unjustified assumptions to reach its conclusions, failed to consider non-fatal health effects, and ignored environmental effects on the land.

[6] Contentions 4 and 5 are not at issue here. (OB12, n.2).

Contention 3 – alleged that the EA failed to consider credible threat scenarios with significant environmental impacts.

SLOMFP later proposed an additional contention, which is contested here:

Contention 6 – alleged that the EA inappropriately relied on a so-called "Ease" factor to exclude reasonably foreseeable and significant environmental impacts.

4. CLI-08-01: Initial Ruling on SLOMFP's Contentions.

In CLI-08-01, 67 NRC 1 (2007) (ER37), the Commission found Contention 1(b) admissible for hearing "to the extent that it alleges that the Staff failed to provide source documents or information underlying its analysis, and failed to identify appropriate FOIA exemptions for [its] withholding decisions," (ER45) and found Contention 2 admissible to the extent it challenged the Staff's analysis of land contamination and non-fatal health effects from a terrorist attack. (ER46). The Commission found Contentions 1(a) and 3-5 inadmissible. (ER39-49).

The Commission found Contention 1(a) inadmissible because it failed to identify a specific, genuine issue of material fact or law. The Commission ruled that NRC staff had provided a sufficient analysis and had adequately explained its criteria, scenario identification process, and the significance of associated consequences. (ER42).

The Commission found Contention 3 inadmissible because the Commission could not "practicably" and "meaningfully" adjudicate which specific threat scenarios were "plausible" or "credible:"

> Adjudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity. And hearings on such claims could not be conducted in a meaningful way without substantial disclosure of classified and safeguards information on threat assessments and security arrangements and without substantial litigation over their significance. Such information - disclosure of which is prohibited by law - would lie at the center of any adjudicatory inquiry into the probability and success of various terrorist scenarios.

(ER47). The Commission pointed out that NEPA incorporates FOIA's exemptions, and that the Supreme Court's *Weinberger* decision held that an agency was not required to adjudicate disputes over the information in such a setting. (*Id.*)

Commissioners Jaczko and Lyons dissented in part. Commissioner Jaczko would have allowed Contention 3 to proceed. (ER50). Commissioner Lyons would have disallowed Contention 2. (ER51-52).

5. CLI-08-05: Reconsideration of SLOMFP's Access to Sensitive Documents.

In CLI-08-01, the Commission ordered the Staff to list the EA's source documents and issue a "*Vaughn* index" stating the basis for withholding or

redacting documents.[7] (ER45). The Staff issued a *Vaughn* index (ER49, 60, 103), withholding portions of various documents under Exemptions 1, 2 and 3 of FOIA,[8] and placed redacted versions of the documents in the agency's public document access system. The Commission then issued CLI-08-05, 67 NRC 174 (2008), reaffirming that SLOMFP was not entitled to NEPA-based access to documents exempt from disclosure under FOIA. (ER35). The Commission directed an administrative judge to resolve SLOMFP's contention that the Staff had improperly withheld information supporting the EA. (*Id.*)

The administrative judge ruled, on an unopposed motion for summary disposition, that NRC Staff had listed all of the documents relied upon in the supplemental EA, and upheld its redactions based on FOIA exemptions. (LBP-08-07, 67 NRC 361, 374, 376 (2008) (SER32, 45, 47). SLOMFP did not appeal this decision to the Commission.

6. CLI-08-08: Contention 6 and Additional Reconsideration of Contention 1(b).

In CLI-08-08, 67 NRC 193 (2008) (ER28), the Commission considered SLOMFP's motion to reconsider the prior decision denying access to Safeguards

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[7] *See Vaughn v. Rosen*, 484 F.2d 820, 823-25 (D.C. Cir. 1973).

[8] For example, Staff did not provide un-redacted copies of those exempt materials, including the Classified threat assessment (ER151), that "would provide information that could aid an adversary in . . . sabotaging an [ISFSI]." (SER55).

and Classified information. The Commission denied the motion, stressing this Court's remand decision, which stated that "security considerations may permit or require modification of some ... NEPA procedures," and that in some circumstances, "a *Weinberger*-style limited proceeding might be appropriate." (ER30, citing 449 F.3d at 1034). Likewise, the Commission noted that "Staff (and the Commission, on review) has ... performed the evaluation the Ninth Circuit directed, consistent with *Weinberger*," although "certain information cannot be made public for security reasons." (ER30). The Commission determined that "the Supreme Court's controlling decision in *Weinberger* ... makes clear that NEPA does not contemplate adjudications resulting in the disclosure of matters under law considered secret or confidential." (ER32, citing 454 U.S. at 146-47).

The Commission also considered a new contention that SLOMFP had filed, Contention 6, which argued that NRC inappropriately had relied on the "Ease" factor in its supplemental EA. The Commission determined that SLOMFP had not demonstrated "good cause" for lateness under NRC's late-filed contention standards, 10 C.F.R. §2.714(a)(1) (2004). (ER30-33). In particular, the Commission found Contention 6 nearly identical to the previously-rejected Contention 3 in key aspects such as its language, proffered expert and witness

support, and the fact that at heart, both contentions "challeng[e] the range of threat scenarios examined by the Staff" in the EA. (ER32).

Commissioner Jaczko dissented in part, arguing that the Commission's reliance on *Weinberger* to refuse to adjudicate SLOMFP's "alternate scenarios" claims was misplaced. (ER33).

7. Oral Argument on Contention 2.

On July 1, 2008 the Commission heard oral argument on SLOMFP's Contention 2 – its land contamination and latent health effects claim – under the Subpart K procedures. (SER124-218).

NRC Staff argued that based on "the enhanced security requirements, our ongoing threat assessments, and the protective nature of these casks," the probability of "any significant radioactive release" from a terrorist attack was "very low." (SER133-134). Assuming that the plausible attack with the most severe release was successfully completed, Staff explained that the 50-year dose (the total effective dose equivalent or "TEDE;" *see* 10 C.F.R. §20.1003) to the nearest resident would be less than 5 rem, a "very low dose" that "would satisfy all of our regulatory requirements for worker doses" and cause "no significant latent health effects." (SER72; 137; 140). Moreover, Staff maintained that when measuring potential exposure from land contamination, it had cautiously assumed that the dose recipient would stay "in the same place for four days." (SER150).

PG&E agreed with Staff, citing the "very conservative estimate of dose consequences" and the unique characteristics of the Diablo Canyon facility. (SER166-170).

SLOMFP disagreed with NRC Staff's assertion that "the potential impacts of this facility are negligible" and claimed that NRC Staff had not considered the "reasonable spectrum of threats . . . posed to this facility." (SER188-190). SLOMFP acknowledged lacking access to intelligence information on threat assessments (SER192-193), but insisted its concerns were focused around "a type of attack that has not been considered." (SER200). Staff responded that it was "aware" of SLOMFP's postulated threat scenario, but that scenario did "not alter the Staff's conclusion that there would not be any significant environmental consequences from a terrorist attack." (SER149, 213).

8. CLI-08-26: Commission Decision on Contention 2.

After considering the parties' arguments, the Commission issued CLI-08-26, finding Contention 2 "without merit," upholding NRC Staff's position by a "preponderance of the evidence," and concluding that "SLOMFP's arguments do not require the Staff to prepare an environmental impact statement" on the Diablo Canyon ISFSI or require a further hearing. (ER3, 8, 15). Commissioner Jaczko dissented, arguing that Contention 2 should be sustained and the EA remanded to

the Staff to supplement its findings on land contamination and non-fatal health effects after a closed hearing. (ER24-27).

First, the Commission stressed that "SLOMFP offered little evidence" on the land-contamination and latent health effects issues at the core of Contention 2; according to the Commission SLOMFP had instead again tried "to re-litigate elements ... relating to attack-scenario selection." (ER8). Meanwhile, the Staff and PG&E "provided essentially uncontradicted evidence that the probability of a significant radioactive release caused by a terrorist attack was low, and that the potential latent health and land contamination effects of the most severe plausible attack would be small." (*Id.*)

Second, the Commission noted that the "Staff's selection of plausible attack scenarios ... was based on information gathered through the agency's regular interactions with the law enforcement and intelligence communities regarding the capabilities of potential adversaries, as well as the Staff's expert judgment in intelligence analysis." (ER20-21). The Staff chose the "worst-consequence scenario," quantitatively analyzed the impacts from that scenario, and "conservatively assumed that the attack would be attempted and successfully completed." (ER21). The resulting projected dose to the nearest resident was less than 5 rem, a level permitted under federal health guidelines. (ER21-22). The

Commission also concluded that the Staff's methodology "took into account the contribution of air and land contamination ... and we find it reasonable." (ER22). The Commission found that "the Staff reasonably concluded that further analysis of the economic or other environmental impacts was not necessary." (*Id.*)

The Commission relied on Staff's study of the "robustness" of the PG&E storage casks to support its finding that "there is a very low probability that there will be any significant release from the casks in the event of a terrorist attack." (ER12-13) (Internal citation omitted). The Commission also pointed to specific conditions at Diablo Canyon, finding that "significant health or environmental consequences" from an attack were "particularly unlikely" there, given the site's size, physical isolation, and emergency plans. (ER13-14). The Commission cited the Staff intelligence experts' determination that a successful terrorist attack on the Diablo Canyon site would be "unlikely" (ER15), and that even the most severe plausible terrorist attack "would cause no [significant] immediate or latent health effects." (ER15-16).

Finally, the Commission again addressed SLOMFP's continued claims regarding plausible threat scenarios. The Commission reaffirmed its earlier conclusion that "NEPA does not require us to reveal sensitive government security information regarding the agency's environmental analysis, and there is no

compelling policy reason to do so in this case." (ER17). The Commission determined that "[f]urther disclosure of sensitive, security-related information would not assist the Commission in determining whether the agency's environmental review was reasonable under NEPA." (ER18). The Commission emphasized that it had previously granted hearing participants access to sensitive security information only when Atomic Energy Act-based "security" issues were at stake. (ER18-19).

The Commission emphasized that its decision to restrain litigation of plausible attack scenarios did not mean that it was not interested in the views and opinions of SLOMFP or the public. (ER19). The Commission pointed out that NRC Staff was familiar with SLOMFP's proposed threat scenario although it did not alter Staff's final finding of no significant environmental impacts. (*Id.*). The Commission also noted that the Commissioners themselves, consistent with *Weinberger*'s admonition that an agency must perform a NEPA review even if results could not be publicized for security reasons, had performed their own "supervisory review of the non-public information underlying portions of the Staff's analysis." (ER22-23). The Commission concluded that the Staff's selection of scenarios was "reasonable." (ER21).

The Commission stated that its final resolution struck "a reasonable balance between public disclosure and information protection while permitting informed agency decision making," and was "guided by the Ninth Circuit, which recognized the value of qualitative analysis and the importance of protecting sensitive, security-related information." (ER20, citing 449 F.3d at 1031-32, 1034-35). The Commission concluded that the EA, supplemented by the adjudicatory record, was "more than sufficient to satisfy the agency's NEPA obligations." (ER22-23).

SUMMARY OF ARGUMENT

NRC reasonably rejected each of SLOMFP's "terrorism" contentions. SLOMFP's attack on NRC's decisions lacks substance.

1. SLOMFP purports to challenge NRC's disposition of Contention 1 – challenging the clarity of the EA's methodology (1(a)) and the completeness of the EA's reference document list (1(b)) -- but SLOMFP expressly conceded below that it no longer was pursuing Contention 1(b) and its brief in this Court does not explicitly challenge NRC's holding on Contention 1(a). Thus, SLOMFP has waived its Contention 1 claims.

2. SLOMFP argues that NRC unreasonably rejected Contention 2's claims that the EA: (1) used an inappropriate "early fatalities" screen to eliminate plausible terrorist scenarios; and (2) did not adequately address land contamination and latent health effects. SLOMFP's position is incorrect on the first and unpersuasive on the second.

A. Not only did the EA explicitly state that it did not eliminate scenarios based on "early fatalities," but also NRC Staff explicitly restated that point at oral argument. The Commission held accordingly and the record supports its decision. The record shows that "early fatalities" was a criterion NRC Staff used to determine the effectiveness of NRC's security requirements during post-9/11

security reviews. Likewise, the EA at issue here discusses "early fatalities" only in the context of discussing post-9/11 security reviews. Nothing in the record suggests that the EA used "early fatalities" to eliminate scenarios from environmental consideration.

B. In its final decision, the Commission stressed that SLOMFP had "offered little evidence" on land contamination and latent health effects, while NRC Staff and PG&E did address those issues. Thus, the Commission ruled against SLOMFP by a "preponderance of the evidence." This fact finding was reasonable and rooted in the record.

First, the EA's calculated dose to the individual living nearest the plant is so low (5 rem at most) that there will likely be no discernable latent health effects. Second, while the EA does not contain a comprehensive calculation of potential land contamination (as was done for individual dose), the EA considered land contamination as it contributed to the dose received by the individual living nearest the plant, and recognized that there will be some land contamination from a successful attack. But the record also shows a low probability and the small effects of a successful attack. This, in short, is a low-probability and low-consequences event, not requiring further comprehensive analyses.

3. SLOMFP also alleges that NRC unreasonably used a method called "Ease" to further screen potential terrorist scenarios. But SLOMPF raised that claim in Contention 6, which was a late-filed contention (filed after the initial contention-filing deadline). NRC dismissed SLOMFP's Contention 6 upon finding it failed to meet NRC admissibility standards for a late-filed contention. SLOMFP's brief does not challenge that ruling; thus, SLOMFP has waived any challenge to Contention 6. In any event, the record indicates that, contrary to SLOMFP's understanding, neither Sandia nor NRC Staff used Ease to eliminate scenarios from consideration.

4. SLOMFP challenges the dismissal of Contention 3, which alleged that SLOMFP's expert had developed a credible terrorist attack scenario not addressed in the EA, and sought to litigate whether the EA should address this "alternate terrorist scenario." SLOMFP's argument again is unpersuasive.

A. First, NRC noted that this Court's remand decision explicitly held that security considerations may justify a "*Weinberger*-style limited proceeding[,]" and that *Weinberger* held that disclosure of NEPA-related information is covered by FOIA. Second, NRC reasonably found that "adjudicating alternate terrorist scenarios is impracticable." Allowing such challenges would encourage litigants to exercise their imagination to allege a wide variety of hypothetical terrorist

scenarios, thereby claiming access to Classified information. And there is no standard for reviewing a decision that a particular scenario is not "credible."

Fundamentally, there is no way to litigate the "alternate scenario" claim at an NRC hearing without disclosing Classified threat assessment and vulnerability information, as well as other FOIA-exempt security information. *Weinberger* holds that NEPA does not contemplate such disclosures. And SLOMFP has not demonstrated that it could meaningfully assist at a hearing. Its expert has not demonstrated expertise or experience in threat assessment or military issues.

B. SLOMFP seeks a "closed" hearing under procedures (10 C.F.R. Part 2, Subpart I) NRC has put in place for handling Classified and other sensitive information in NRC hearings. But NEPA, as construed in *Weinberger*, excludes such information, regardless of the circumstances. After all, the Supreme Court did not remand *Weinberger* for a "closed" hearing; neither has any case since. Thus, whether NRC "has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny in this case." *Weinberger*, 454 U.S. at 146. Following the *Weinberger* template, NRC Staff and Commissioners reviewed the exempt information in conducting their own NEPA review, but *Weinberger* does not even hint at an additional "closed" hearing requirement.

NEPA disclosure is governed by NEPA's own specific non-disclosure provision, not the more general provisions of the AEA or NRC regulations. At heart, this is a NEPA case, not an AEA case. NRC reasonably held that Subpart I was intended for use in security-related proceedings under the AEA, not NEPA proceedings. NRC's reading of its own regulations and enabling legislation is entitled to deference.

C. SLOMFP claims that this case is similar to two previous adjudications where NRC used protective orders to keep security information confidential and then held "closed" proceedings. But both of those cases were "security-related" cases under the AEA, not NEPA-compliance cases. While NRC allows "closed" hearings in security-related cases, there have been fewer than five such cases since 1974. There are currently 12 pending administrative cases raising NEPA-terrorism issues before NRC. NRC has sensibly found that widespread disclosure of Classified and other FOIA-exempt information in NRC's numerous NEPA cases may well result in unfortunate security breaches.

D. SLOMFP also mischaracterizes NRC's handling of Classified information. Although NRC licensees may – with "need to know" – have access to Safeguards information (which impacts NRC licensees' own security plans), contrary to SLOMFP's claims NRC does *not* share Classified information with

licensees. In fact, PG&E, the licensee here, did not have access to the Classified information upon which the EA was based.

5. SLOMFP claims that NRC refused to consider "credible attacks" in preparing the EA and that it treated all potential attacks as "remote and speculative." Those claims are frivolous. The EA, on its face, *did* consider a "credible attack" and did not treat it as "remote and speculative." While NRC did find some attacks "remote and speculative" as a matter of *fact*, NRC did not consider all attacks remote and speculative as a matter of *law*. Finally, contrary to SLOMFP's claim, the record shows that NRC (both Staff and Commission) reviewed and considered SLOMFP's own "alternate terrorist scenario."

STANDARD OF REVIEW

"An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *DOT v. Public Citizen*, 541 U.S. 752, 763 (2004) (quoting 5 U.S.C. §706(2)(A)). This Court's "proper role is simply to ensure that the [agency] made no 'clear error of judgment' that would render its action 'arbitrary and capricious' . . . . This approach respects our law that requires us to defer to an agency's determination in an area involving a 'high level of technical expertise.'" *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (*en banc*)

(citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377-78 (1989)). Courts "are to be 'most deferential' when the agency is 'making predictions, within its area of special expertise . . ..'" *Id.*

When petitioners argue that the agency "failed to adequately identify and analyze . . . potentially significant impacts," this Court has "consistently rejected" attempts to "engage in a battle of the experts . . . offering their own studies to contradict those of the agencies." *Price Rd. Neighborhood Ass'n v. DOT*, 113 F.3d 1505, 1511 (9th Cir. 1997). Rather, "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.*, quoting *Marsh*, 490 U.S. at 378. Likewise, "NEPA does not require that [a court] decide whether an [agency's environmental analysis] is based on the best scientific methodology available, nor does NEPA require [a court] to resolve disagreements among various scientists as to methodology." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). And it is settled law that a "court may not substitute its judgment for that of the agency regarding environmental consequences of the agency's actions." *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 573 (9th Cir. 1998).

To the extent SLOMFP challenges NRC's interpretation of its own regulations, "courts should give 'substantial deference to [the] agency's interpretation....'" *Fones4All Corp. v. FCC*, 550 F.3d 811, 820 (9th Cir. 2008) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The agency's interpretation of its regulations is "controlling . . . unless 'plainly erroneous or inconsistent with the regulation.'" *Love Korean Church v. Chertoff*, 549 F.3d 749, 754 (9th Cir. 2008) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). In particular, the agency has broad discretion in determining its procedural requirements. *See Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003). "[A]dministrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 543 (1978)).

Finally, where the agency interprets its statutory authority "in the course of adjudication, its interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous." *United States v. Eurodif S.A.*, 129 S. Ct. 878, 886-87 (2009) (citations omitted). *See also Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

ARGUMENT

After Reviewing An Environmental Assessment (EA) Examining Credible Terrorist Attacks And Conducting An Adjudicatory Hearing, NRC Reasonably And Lawfully Rejected Challenges To The EA.

I. Overview.

In its 2006 decision remanding this case to NRC for further NEPA review, this Court deliberately, and properly, abjured imposing any particular procedure on the agency. As noted above, the Supreme Court has held that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." *Vermont Yankee*, 435 U.S. at 543. This Court's remand decision went out of its way not to dictate any particular *process* for performing a NEPA review and emphasized that it was not "constraining the NRC's consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis." *SLOMFP*, 449 F.3d at 1035. This Court recognized the NRC's NEPA review might require examining sensitive security information and explicitly noted that a "*Weinberger*-style limited proceeding might be appropriate." *Id.* at 1034-35. This Court gave NRC wide latitude in conducting the remand.

On remand, NRC directed its Staff to prepare a draft Supplemental EA and publish it for comment. (ER53-54). NRC Staff received and reviewed comments

(including SLOMFP's), and published a Final EA, which included responses to comments. (ER56-78). NRC also offered an opportunity for an adjudicatory hearing on the EA. (ER54). Thus, NRC gave SLOMFP (and the general public) ample opportunity to "weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Dev. v. Army Corps of Engineers*, 524 F.3d 938, 953 (9th Cir. 2008).

In preparing the EA, NRC Staff experts considered the likelihood and consequences of various attack scenarios previously analyzed by Sandia National Laboratories. (ER31; SER8; 212). First, the EA found that "the probability of a malevolent act against an ISFSI that results in a significant radiological event to be very low." (ER62). The EA's approach to probability is the archetype of an agency qualitative analysis, based upon the judgment of experts – an approach endorsed by this Court in its remand decision. *See* 449 F.3d at 1031-32.

Next, NRC Staff reasonably decided that the EA should focus on the plausible scenario causing the largest release of radioactive material (ER21; SER138; 141), and analyzed the radiological impact of that release on the person living nearest to the plant. The analysis demonstrated that the impact to the person living nearest to the plant was likely to be very small – less than 5 rem if the person is conservatively assumed to remain on site for 4 days. (ER63; SER134). Based

on the very low probability of a successful terrorist attack on the ISFSI, combined with the low expected dose from a successful attack, the EA reasonably concluded that granting the license involved no significant environmental impacts. (ER64). The Staff also reviewed an "alternate terrorist scenario" proposed by SLOMFP's expert and found it did not change their conclusion. (SER149, 213).

In a separate adjudicatory proceeding, the NRC Commissioners themselves, acting as a hearing tribunal, reviewed SLOMFP's six contentions challenging the EA. The Commission admitted for hearing the two claims that satisfied NRC pleading requirements and rejected for hearing four others. Adhering closely to the Supreme Court's *Weinberger* decision, the Commission reasonably declined to give SLOMFP access to FOIA-exempt Classified and other sensitive security information and denied SLOMFP's request for a "closed" hearing to litigate whether an "alternative terrorist scenario" proposed by SLOMFP's expert was "plausible." Finally, after discovery, pre-hearing evidentiary submissions, and an oral argument-style hearing, the Commission rejected all SLOMFP claims and upheld the EA. (ER23). In sum, NRC conducted a thoroughly reasonable remand proceeding along lines suggested by this Court.

II. The Commission Correctly Resolved SLOMFP's Contentions.

SLOMFP's Petition for Review challenges NRC adjudicatory decisions rejecting SLOMFP's six contentions. SLOMFP claims (OB12, n.2) to challenge the disposition of Contentions 1, 2, 3 and 6, but its brief raises only general arguments and does not explicitly break down NRC's action on individual Contentions. SLOMFP, of course, may seek judicial review only on issues it has exhausted before NRC. *See, e.g., Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004). At times SLOMFP's brief improperly veers into alleged deficiencies in the EA without specifically linking its arguments to the contentions raised during the adjudicatory process. (*E.g.*, OB48-54).

Our arguments below defend NRC decisions on SLOMFP's Contentions, *seriatim*, and respond to SLOMFP's associated arguments.

A. SLOMFP Waived Any Challenge to Dismissal of Contention 1 (Methodology and Documents).

SLOMFP claims (OB12, n.2) to challenge NRC's resolution of Contention 1, but we cannot find any argument related to the dismissal of Contention 1 in SLOMFP's Brief. In Contention 1(a) SLOMFP alleged that EA did not adequately explain its terms and methodology. (ER42; 319-23). But SLOMFP nowhere addresses NRC's contention-admissibility rules or NRC's ruling that SLOMFP failed to establish a "genuine issue of material fact or law" with regard to

Contention 1(a). Thus, SLOMFP has waived any challenge to NRC's resolution of Contention 1(a). This Court "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal citations omitted). "Ordinarily, a party's failure to raise an issue in the opening brief constitutes a waiver of that issue." *Sanchez v. Pacific Powder Co.*, 147 F.3d 1097, 1100 (9th Cir. 1998) (internal citation omitted).

SLOMFP's brief is equally silent with respect to Contention 1(b). Indeed, the administrative record shows that before an administrative judge, SLOMFP *conceded* Contention 1(b), *i.e.*, whether NRC Staff properly designated the documents underlying the EA and whether those documents were properly released in redacted form. (ER185). SLOMFP has waived any objection to NRC's resolution of Contention 1.[9]

B. The Commission Correctly Resolved Contention 2 (Early Fatalities, Latent Health Effects, and Land Contamination).

In Contention 2, SLOMFP alleged that (1) NRC Staff had used "early fatalities" as an unreasonable screening device to limit the number of "plausible scenarios" considered for the EA, and (2) the EA did not adequately address land

[9]SLOMFP states (OB12) that Contention 1 also sought "access, under a protective order, to any security studies" on which the EA relied. We address the "protective order issue" in defending NRC's denial of Contention 3, *infra*.

contamination and latent health effects. NRC rejected SLOMFP's "early fatalities" claim twice, both in its initial decision (ER46) and in its final decision. (ER17, n.68): "Contrary to SLOMFP's repeated assertions, the record shows that the Staff did not use an 'early fatalities' criterion to avoid analyzing environmental effects." (*Id.*)

NRC held an adjudicatory hearing on Contention 2's "land contamination" and "latent health effects" claims. The hearing process included pre-hearing discovery, pre-hearing evidentiary submissions, and an oral argument. NRC held that "after considering the entire record, we find by a preponderance of the evidence that ... Contention 2 lacks merit." (ER15). SLOMFP challenges those decisions, *see* OB47 and OB53-54, and we address them below.

1. "Early Fatalities" Criterion. In Contention 2, SLOMFP "inferred" that NRC Staff had inappropriately screened the various scenarios under consideration to eliminate those not causing "early fatalities." (*E.g.*, ER325). *See also* OB46-47 ("NRC improperly excluded from consideration" those scenarios that would not cause immediate fatalities.). The Commission correctly rejected that claim (ER46; 17, n.68) because the record does not support it. Not only did the EA itself reject that claim (ER72), but also NRC Staff explicitly stated at oral argument that it "did

not apply a threshold of early fatalities in screening out security scenarios." (SER211) (Emphasis added).

"[E]arly fatalities" was a criterion used to determine the adequacy of NRC security requirements during the post-9/11 review; it had nothing to do with the selection of the scenario used in the EA. NRC's security review took the release analyses previously developed by Sandia Laboratories and, based on a Classified threat assessment (ER151), determined whether those scenarios were plausible. NRC then projected the potential consequences of the plausible scenarios. (ER152-56). NRC Staff prepared a decision matrix (ER152), and if the potential consequences indicated that the potential for early fatalities existed from a given scenario, Staff used the matrix to assess whether additional security requirements were needed at all ISFISs. (ER156). If necessary, NRC would impose additional requirements by issuing orders directing licensees to improve their security plans. (*Id.*)

The EA (a completely separate document developed using a different process) discusses "early fatalities" only in describing the earlier post-9/11 security review and not for screening plausible threat scenarios:

> Separately, NRC made conservative assessments of consequences, to assess the potential for early fatalities from radiological impacts from those plausible scenarios. NRC then looked at the combined effect of the

> attractiveness and the consequence analysis, to determine whether additional security measures for ISFSIs were necessary.

(ER63). In essence, the EA informs readers that NRC Staff had previously reviewed the scenarios for "early fatalities" (the post-9/11 review) to determine whether additional security measures were necessary in an effort to explain why successful attacks on ISFSIs are unlikely. After all, if analysis of a scenario indicates a significant number of "early fatalities," it would be logical to take additional protective measures. And "early fatalities" scenarios might be attractive to terrorists. But there is no suggestion in the EA – and no reasonable grounds for an inference – that the scenarios the EA considered plausible was limited by NRC's "separate" analysis of "early fatalities" in the post-9/11 security review.

Instead, the EA includes a general description of threat scenarios and their screening to determine plausibility that does not consider early fatalities as a criterion. (ER63). "This screening was informed by information gathered through NRC's regular interactions with the law enforcement and intelligence communities. For those scenarios deemed plausible, NRC assessed [additional criteria.]" (*Id.*) The EA also discusses the types of plausible threat scenarios considered for ISFSIs in general, which included "a large aircraft impact ... and ground assaults using expanded adversary characteristics . . . ." (*Id.*) Again, there is no suggestion that the "separate" analysis of security requirements using "early

fatalities" limited the choice of scenarios considered in the EA. Instead, the EA included that generalized discussion of the background of security reviews simply to explain why successful terrorist attacks were unlikely. SLOMFP misconstrues that discussion.

Thus, contrary to SLOMFP's "inference" (ER325), "early fatalities" was only used as an indicator to assess the adequacy of NRC security requirements in the post-9/11 security review, not as a criterion to eliminate scenarios from consideration in the subsequent (and unrelated) NEPA analysis. Instead, the EA eliminated scenarios only if they were not "credible." (SER148-49; 211).

2. Land Contamination and Latent Health Effects. After the Subpart K oral argument, NRC found that SLOMFP's land contamination and latent health effects claims lacked merit "by a preponderance of the evidence[.]" (ER15):

> [A]t the oral argument, SLOMFP offered little evidence on Contention 2, as admitted, but instead attempted to re-litigate elements relating to [Contention 3]. In contrast, the NRC Staff and PG&E provided essentially uncontradicted evidence that the probability of a significant radioactive release caused by a terrorist attack was low, and that the potential latent health and land contamination effects of the most severe plausible attack would be small.

(ER8). The administrative record supports this finding.

NRC pointed to several considerations leading to its result. NRC stressed its Staff's qualitative analysis showing that the probability of a significant radioactive

release from a terrorist attack was very low, based in part on evidence from Staff and PG&E on the "robust" characteristics of the storage casks. (ER12-13). NRC also relied on PG&E's submission, which noted several factors that would limit the health and land contamination effects of a successful attack, including the size of the site, area demographics, and the site evacuation plan. (ER14). In addition, oral argument showed that applying generic environmental assumptions to the specific characteristics of the Diablo Canyon site indicated that "significant health or environmental consequences are particularly unlikely under site conditions at Diablo Canyon." (ER14, 63). Finally, NRC noted its Staff's finding, based on its expertise and Classified intelligence information, that the likelihood of a terrorist attack even being attempted at the site was low. (ER15; SER83).

The EA does not contain a comprehensive mathematical analysis of potential land contamination similar to its analysis of a potential dose (and attendant health effects) to the nearest resident. But as NRC Staff's pre-hearing submission noted, "[b]ecause of the nature of the radioactive material which would be released, which would disperse and settle as it goes downwind, members of the public beyond the nearest resident would be expected to receive lower doses and consequently have a lower likelihood of developing discernible health effects." (SER84). In other words, the EA (and its supporting record) recognize that one result of a plausible

successful attack will be that radioactive material will become airborne, disperse, and ultimately settle on the ground as it continues downwind, but in very small amounts.

The EA also considered land contamination to the extent that it contributed to dose. (ER63). The EA assumed (conservatively) that the exposed individual would not be evacuated for four days; thus that person would be exposed to the material in the radioactive cloud, inhalation during cloud passage, and four days of "groundshine" from radiation deposited on the ground from the attack. (SER73; 84; 150). When the "groundshine" is combined with the inhaled dose and cloud dose, the total dose from the scenario with the greatest radioactive release was still less than 5 rem. That dose is so low that it not expected to cause any discernible latent health effects. (SER73-74; 134; 152). Based on the low probability of a successful attack and the low dose consequences of a successful attack, the EA reasonably found the environmental impact not significant.

In sum, the EA expressly recognized that there would be some land contamination at the Diablo Canyon site if there were a successful attack. (SER143-44; 154-55). But given the low probability of a successful attack, and the low level of radioactive release even if such an attack occurred, NRC "reasonably

concluded that further analysis of the economic or other environmental impacts was not necessary." (ER22). *See also* SER155.

Judicial deference is at its zenith when reviewing this kind of factual and technical determination. "Where ... an agency action involve[es] primarily issues of fact, and where the analysis of the relevant documents requires a high level of technical expertise, [a reviewing court] must defer to the informed discretion of the responsible federal agencies." *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1212 (9th Cir. 2008) (internal citations omitted). *See also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992), citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 378. ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.").

C. SLOMFP Waived Any Challenge to Dismissal of Contention 6 (Ease Formula).

SLOMFP alleges that the EA improperly eliminated scenarios by using a "formula" known as "Ease." (OB48). But SLOMFP raised this issue below only when it submitted Contention 6 under NRC's "late-filed contention" rule, 10 C.F.R. §2.714(a)(1) (2004). (ER31). The Commission denied Contention 6 because SLOMFP did not satisfy the factors governing admission of late-filed

Contentions. (ER32). SLOMFP's Brief fails to challenge that finding; thus, this challenge is waived. *Alcaraz v. INS*, 384 F.3d at 1161; *Sanchez v. Pacific Powder Co.*, 147 F.3d at 1100.

Regardless, the record does not support SLOMFP's claim. In the Sandia security review where "Ease" was developed, Sandia started with a number of scenarios that were "defined and screened." (SER11). Sandia screened the scenarios to remove the scenarios "not considered possible" [*i.e.*, plausible], and reached a specific number that Sandia concluded "had the potential for non-zero release." (*Id.*). Then, "[t]o provide a relative ranking based upon a risk analog" [*i.e.*, probability] for those scenarios, Sandia developed "a relative measure for ranking sabotage scenarios [.]" (SER12). This measure was called "Ease," which "employs simple estimates for time required, complexity and technology." (*Id.*). Thus, Sandia used Ease as a tool to *rank* the various scenarios, *after* it had already screened for plausibility, to determine the probability of a scenario to provide a risk-based analysis; it did not use Ease to *eliminate* any scenario. NRC chose from the "non-zero" release scenarios when choosing scenarios for the post-9/11 review and the scenario used in the EA. Accordingly, contrary to Contention 6, neither Sandia nor NRC Staff used Ease to eliminate any scenario from consideration.

D. The Commission Correctly Denied Contention 3 (Alternate Terrorist Scenario).

Contention 3 alleged that SLOMFP's expert, Dr. Gordon Thompson, had constructed a credible scenario of a possible terrorist attack not addressed in the EA. (ER327). SLOMFP claimed that it should be allowed to litigate whether this "alternate terrorist scenario" was "plausible," requiring a NEPA review of its consequences. (ER327, 46). SLOMFP also claimed that the EA should identify all potential scenarios and their consequences. (ER328, 46).

NRC refused to admit Contention 3 for hearing. Pointing to this Court's remand decision and the Supreme Court's seminal *Weinberger* decision, NRC concluded that "[a]djudicating alternate terrorist scenarios is impracticable" and could not be conducted in a "meaningful" way without access to Classified, Safeguards, or other sensitive security information. (ER47). NRC found that the "controlling *Weinberger* decision makes clear that NEPA does not contemplate such adjudications." (*Id.*) A number of considerations support the reasonableness and lawfulness of NRC's holding.

1. NRC reasonably rejected SLOMFP's demand for access to Classified information and for a "closed" hearing to litigate the credibility of alternate terrorist scenarios. (ER47). As NRC observed, this Court's remand decision explicitly held that "security considerations" may justify a "*Weinberger*-style limited proceeding" (*Id.*, quoting 449 F.3d at 1035). And *Weinberger*'s core

holding is that disclosure of NEPA-related information, especially Classified information, "is expressly governed by FOIA." 454 U.S. at 143, citing 42 U.S.C. §4332(2)(C). Information exempt under FOIA is also exempt under NEPA. *See id.*[10] Here, SLOMFP does not challenge NRC's determination that Classified threat assessment information, as well as Safeguards and other security-sensitive information on which the EA relied, is exempt from disclosure under FOIA exemptions 1, 2, and 3. *See* p. 19, *supra.*

Not only is key information not publicly available, but as NRC also held, "adjudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity." (ER47). NRC is correct. Any petitioner could easily construct a hypothetical, "credible" scenario and then ask for a security clearance and a hearing to obtain information, including Classified information, which is exempt from disclosure under FOIA and *Weinberger.* This Court should be loath to open the door to that possibility. Furthermore, it is not clear how a court realistically could review an NRC decision that a given scenario

[10] *Accord State of Mo. ex rel. Shorr v. U.S. Army Corps of Engineers*, 147 F.3d 708, 710-711 (8th Cir. 1998); *Hudson River Sloop Clearwater, Inc. v. Dept. of the Navy*, 891 F.2d 414, 420 (2d Cir. 1989).

is not "credible." This lack of a clear standard of judicial review reinforces the reasonableness of NRC's conclusion.

Moreover, as NRC stressed, there is no way to address SLOMFP's proposed scenario at a hearing – or even explain publicly whether any particular scenario was "credible" – without revealing to the litigants Classified and Safeguards information on terrorist threat assessments and facility vulnerabilities. (ER47; SER157-58). *Weinberger* makes clear that NEPA does not contemplate disclosing such information or holding such hearings. "[P]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow that confidence to be violated." 454 U.S. at 146-47 (quoting *Totten v. United States*, 92 U.S. 105, 107 (1876)). Here, there could be no meaningful hearing on alternate terrorist scenarios without disclosing Classified and other significant security information exempt from disclosure under FOIA (and thus, NEPA).

Additionally, it is unclear how SLOMFP could meaningfully assist at such a hearing. SLOMFP's expert, Dr. Gordon Thompson, is a highly-credentialed mathematician (ER339), but has not demonstrated qualifications on national security matters or terrorism prevention. For example, he does not claim, much

less demonstrate training, experience, or expertise in intelligence issues (such as threat analysis) or military issues (either strategic or tactical) and does not claim a proper security clearance. (E.g., SER211) By contrast, as NRC noted, NRC Staff expert Roberta Warren has over 30 years of experience working with threat assessment and terrorism prevention for Federal agencies. (ER15, n.62; SER88).

2. SLOMFP argues (OB36) that NEPA – which has no hearing requirement of its own[11] – obligates an agency to integrate environmental concerns into "the very process of agency decision-making" and thus gives SLOMFP "the right to participate" in a hearing process on NEPA issues under Section 189a of the AEA, 42 U.S.C. §2239(a). Thus, according to SLOMFP (OB43), NRC was obligated to hold a "closed" hearing on the "alternate scenario" contention, using the procedures of 10 C.F.R. Part 2, Subpart I, an NRC regulation establishing a process for NRC litigants to view and use restricted information in NRC hearings. SLOMFP is incorrect.

First, SLOMFP ignores the fundamentally different purposes of the AEA (and its implementing regulations) and NEPA. As NRC reasonably found, Subpart

[11] "[T]he only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vermont Yankee*, 435 U.S. at 548. "NEPA does not require agencies to adopt any particular internal decisionmaking structure." *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 100 (1983). And this Court has held that NEPA does not require an administrative hearing on NEPA claims. *Jicarilla Apache Tribe v. Morton*, 471 F.2d 1275, 1284-86 (9th Cir. 1973).

I was not created for use in NEPA proceedings. NEPA disclosure issues are governed by that statute's own specific non-disclosure provision, as construed by *Weinberger*, instead of the more general provisions in the AEA or NRC regulations. (ER17). In statutory construction, "the specific prevails over the general." *See, e.g., Bonneville Power v. FERC*, 422 F.3d 908, 916 (9th Cir. 2005). *Accord Guidry v. Sheet Metal Workers Pension Fund*, 493 U.S. 365, 375 (1990).

Subpart I is a *process* regulation, not a substantive one. Thus, a party seeking access to information must first demonstrate that it is entitled to a hearing under the relevant statute. At its heart, this case is a NEPA case, not an AEA case. SLOMFP challenges the sufficiency of the EA under NEPA, not PG&E's compliance with the AEA's security requirements. The AEA-provided hearing process is simply a convenient vehicle for bringing that challenge, just as general federal question jurisdiction (28 U.S.C. §1331) provides a convenient vehicle for NEPA challenges in non-Hobbs Act situations, such as arose in *Weinberger*.

Here, NRC reasonably found that Subpart I was intended for use in security-related proceedings under the AEA, not NEPA proceedings.[12] (ER17-18). Subpart I was adopted to implement Section 181 of the AEA, 42 U.S.C. §2231, not NEPA.

[12] NRC also did not apply 10 C.F.R. §2.744(e)(2004), which governs access to Safeguards information. That provision implements Section 147 of the AEA, 42 U.S.C. §2167, not NEPA, and is intended for security-related adjudications, not NEPA hearings.

See 41 Fed. Reg. 53328 (Dec. 6, 1976). Subpart I's roots are in security provisions of the AEA, which was enacted (1954) well before NEPA (1969). NRC has never used Subpart I in a NEPA case. NRC's decision below thus interprets Subpart I's provisions to apply to security-related cases only. (ER17). That interpretation is of "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945). "Courts should give 'substantial deference to an agency's interpretation of its own regulations.'" *Fones4AllCorp. V. FCC*, 550 F.3d at 820 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. at 512. Similarly, NRC's interpretation of the applicability of Section 181 of the AEA is also entitled to full judicial deference from this Court. *United States v. Eurodif S.A.*, 129 S.Ct. at 886-87.

Second, SLOMFP ignores *Weinberger*'s pointed command that Congress has excluded FOIA-exempt information from disclosure in NEPA-based litigation. The Supreme Court did not remand *Weinberger* to the District Court with instructions to consider providing a security clearance to the plaintiffs in that case and holding a "closed hearing" or to conduct any other process where commenters would review the information and provide input. Instead, *Weinberger* found that Congress intended by limiting any disclosure to materials that would be available to the public under FOIA, that FOIA-exempt information be completely withheld

from public disclosure. "Since the public disclosure requirements of NEPA are governed by FOIA, it is clear that Congress intended that the public's interest in ensuring that federal agencies comply with NEPA must give way to the Government's need to preserve military secrets." *Id.* at 145. "Ultimately, whether ... the Navy has complied with NEPA 'to the fullest extent possible' is beyond judicial scrutiny in this case." *Id.* at 146.

Weinberger made clear that even where security concerns block NEPA's "public participation" purpose, an agency still must satisfy NEPA's "informed decision-making" purpose through non-public agency review of exempt information – a review that NRC performed here. Faithful to *Weinberger*, NRC (both Staff and Commissioners) reviewed the critical Classified information (and other security information) in performing its NEPA review. (ER21). There is no suggestion in *Weinberger* or subsequent cases that holding a "closed" adjudicatory hearing is also required.

3. Subpart I provides that NRC "will not grant access to . . . [Classified] information unless it determines that the granting of the access will not be inimical to the common defense and security." 10 C.F.R. §2.905(h)(1). Here, SLOMFP did not show, and NRC did not find, that giving SLOMFP access to Classified information was consistent with Subpart I's "inimical" clause. To the contrary,

NRC reasonably found that "disclosure of sensitive, security-related information would not assist the Commission in determining whether the agency's environmental review was reasonable under NEPA." (ER18). "[A]ny benefit to be gained in this case from further disclosure is outweighed by the risks inherent in disseminating security-related information, even under a protective order." (ER19). The EA, after all, rested on Staff security experts' judgments, and "SLOMFP brought no equivalent expertise to the proceeding." (ER15, n.62). *See also* SER211.

In short, even if (contrary to our view) Subpart I allowed access to Classified information to facilitate NRC hearings on NEPA claims, the record in this particular case does not justify such a disclosure to SLOMFP.

4. SLOMFP argues (OB43) that this case should be treated similarly to two previous cases where NRC held "closed" proceedings. *See Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398 (1977), 1977 WL 15890; *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), LBP-04-10, 59 NRC 296 (2004), 2004 WL 1398219. But those cases are inapposite. First, both dealt with challenges to security plans under the AEA, not NEPA. Thus, neither ran afoul of *Weinberger*'s directive that an agency was not required to disclose FOIA-exempt information in a NEPA proceeding.

Second, in both cases the information involved was Safeguards information, not Classified information. Here, crucial documents undergirding the EA – the Sandia Reports and the threat assessment – contain Classified information. Also, by obtaining a hearing, petitioners in the cases SLOMFP cites would have demonstrated that they had an admissible contention and experts with relevant subject-matter knowledge – something SLOMFP has not shown here. In fact, the 1977 *PG&E* ruling was based primarily on: (1) the fact that the facility's security plan was not Classified but, at that time, was considered "commercial" information, 5 NRC at 1402; and (2) the plan could only be disclosed to a witness possessing the "relevant expertise for evaluating it." 5 NRC at 1404-05.

It is one thing to have an occasional "closed" security-related hearing (NRC has held fewer than 5 since 1974); it is quite another to have them repeatedly. The NEPA/terrorism issue has now been raised in 12 currently pending NRC administrative cases.[13] As NRC indicated below (ER19), with the increased disclosure and circulation of Classified information comes the attendant and inevitable risk that some of that information will leak to the public. *See also Duke*

[13] Those cases include: (1) the Yucca Mountain waste repository proceeding; (2) four new reactor combined operating license proceedings (Bellefonte, Sumner, North Anna, and Shearon Harris); (3) two license renewal proceedings (Oyster Creek and Indian Point); (5) 2 materials license proceedings (Pa'ina Hawaii and Crowe Butte); and (6) the Shaw Areva MOX Services license proceeding.

Energy Corporation (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 73 (2004) (2004 WL 385230). And as this Court has noted, there is "no practical way of assuring that the information disclosed will not fall into the hands of others." *Hughes Salaried Retirees Action Committee v. Administrator of Hughes Non-Bargaining Retirement Plan*, 72 F.3d 686, 693 (9th Cir. 1995) (*en banc*).

In cases involving sensitive government information, "[p]rotective orders cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result." *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1979). Courts "must assume that if the requested [records] are released, they will eventually make their way to foreign governments and others who may have interests that diverge from those of the United States." *Students Against Genocide v. Dep't of State*, 257 F.3d 828, 837 (D.C. Cir. 2001).

Moreover, because this is a NEPA case, whose disclosure standards are governed by FOIA, and the AEA does not apply, any disclosure of documents might implicate the waiver provisions of FOIA, which under certain case law "does not permit selective disclosure of information only to certain parties;" "once the information is disclosed ... it must also be made available to all members of the public who request it." *Maricopa Audubon Soc'y v. United States Forest Serv.*,

108 F.3d at 1088 (9th Cir. 1997).[14] This possibility also counsels against holding a "closed" hearing in this NEPA case.

5. SLOMFP also argues (OB38) that a "closed" hearing is mandated by *Calvert Cliffs Coordinating Committee v. AEC*, 449 F.2d 1109 (D.C. Cir. 1971). But the D.C. Circuit long ago expressly held that "our decision in [*Calvert Cliffs*] does not establish that NEPA confers on parties the absolute right to a hearing on the documents that Act requires agencies to compile." *Union of Concerned Scientists v. NRC*, 920 F.2d 50, 56 n.6 (D.C. Cir. 1990).

Instead, *Calvert Cliffs* held that NEPA requires that the agency entity responsible for issuing a license must also consider the environmental impacts of that decision. In other words, *Calvert Cliffs* requires that the ultimate decision-maker – in that case NRC's Licensing Board, in this case, the Commission – must also make any NEPA decisions. 449 F.2d at 1117-18. Here, the ultimate decision-maker – the Commission – reviewed the EA, evaluated challenges to the EA in an adjudicatory process, considered all Classified and other redacted information, and made the finding that issuing the license would not have any significant impact on the environment. *Calvert Cliffs* does not mandate a hearing, "closed" or otherwise here.

[14] Even in the context of a protective order, the government would object to making such documents available to the general public.

6. SLOMFP claims (OB42) that "the contents of NRC security measures are not only routinely communicated to the private businesses that are licensed to operate nuclear facilities, but those businesses may be offered an opportunity to comment on them, in a protected setting." SLOMFP refers to instances of NRC sharing information about plant security measures, including the design basis threat ("DBT") against which plants are required to defend themselves, during several NRC security proceedings after 9/11, and then claims that "[s]imilarly here, SLOMFP can receive sensitive information in a closed hearing in the course of its statutory right to participate in the agency process." (*Id.*)

The two situations are entirely different. It is true that during some rulemaking proceedings NRC licensees were able to see information related to DBT and other security matters. But the information at issue in those proceedings was Safeguards information (related to each plant's own security measures), not Classified information, key information at issue in this case. In any event, NRC does not provide Safeguards or DBT information to licensees except on a "need-to-know" basis. And it should be obvious that all licensees must have occasional access to Safeguards information – on a "need-to-know" basis – because their security plans must comply with NRC requirements. Thus, licensees' "need-to-

know" access to Safeguards information is not surprising and hardly compels disclosing Classified security information to SLOMFP.

Licensees have much less access to Classified information. For example, NRC's SRM on SECY-04-0222 explicitly directed that the Classified analyses prepared by Sandia were not to be distributed outside the agency, and were *not* to be shown to licensees. (SER22). SLOMFP ignores that Commission directive. Moreover, the Classified threat assessment in this case (ER151) is covered by the so-called "Third-Party Rule." NRC cannot share that information with anyone else without first receiving the written permission of the originating agency. *See* EO 13292; 10 C.F.R. §2.905(h)(2). For example, even if an originating agency advised NRC that there was an imminent threat at an NRC-licensed facility, NRC could not share that information with properly-cleared personnel at that facility without the express permission of the originating agency.[15]

In this case, PG&E (the licensee) did not have access to any Classified information used by the Staff. For example, at oral argument, the Commissioners questioned PG&E counsel, Mr. Repka, about the EA. Mr. Repka responded that he

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[15] Were this Court to order a hearing as requested by SLOMFP, EO 13292 would require NRC to obtain permission from the agency that provided the Classified threat assessment to NRC before disclosing it to SLOMFP in a hearing. The originating agency has the authority to deny NRC permission to provide that information, even under a protective order.

did not have access to the Classified information. "We don't have access to the staff's threat assessment and intelligence assessment . . . ." (SER170). "[W]e are not familiar with the specific scenarios and don't have access to the threat assessment information and intelligence information that the staff presumably does." (SER172). SLOMFP simply does not understand the restrictions placed on Classified Information.[16]

7. In any event, notwithstanding the information restrictions, it cannot be gainsaid that NRC allowed meaningful public participation in the EA process – there was both a notice-and-comment phase and an adjudicatory hearing before the Commissioners themselves. NRC completed an extensive EA process. Moreover, SLOMFP fully litigated environmental claims that were admissible under NRC rules and did not require access to Classified information. As for SLOMFP's "alternative scenarios" claim, NRC Staff experts – and ultimately the Commissioners themselves – reviewed and analyzed it.

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[16] In an apparent attempt to confuse the distinction between various levels of information, SLOMFP's brief repeatedly speaks of "sensitive security information" (OB34, 40, 41), "sensitive government security information" (OB35, 39), "sensitive information" (OB39, 42, 43), "NRC security measures" (OB42), and "sensitive security issues" (OB43). But the key to this case is the presence of Classified Information, a point SLOMFP ignores. The terms SLOMFP uses are not interchangeable with "Classified" information, a key issue here.

In sum, SLOMFP was able to contribute its views to the EA process and NRC addressed those views appropriately. This process satisfied any obligation to hold a hearing on SLOMFP's NEPA claims. *See, e.g., Kelley v. Selin*, 42 F.3d at 1513 (public meeting and chance to be heard may amount to NRC "hearing" under Section 189a).

III. SLOMFP's Remaining Arguments Lack Merit.

1. SLOMFP argues (OB45-46) that NRC was obligated to consider "credible attacks" on the Diablo Canyon ISFSI. NRC did exactly that. The EA reviewed the various plausible scenarios analyzed by Sandia Laboratories and chose the scenario with the largest release. (ER21; SER138; 141). Following *Weinberger*, the EA did not explain in detail the scenarios it considered; but the EA considered scenarios that included ground assaults, a large explosive charge, and an air attack. (ER63; SER212). Thus, NRC considered likely impacts of a credible attack on the ISFSI. SLOMFP's claims to the contrary are specious.

2. SLOMFP argues (OB48-52) that the Commission made an "unlawful" threshold determination that *any* attack on the Diablo Canyon ISFSI was "remote and speculative." But that argument is frivolous. Not only is it contradicted by the EA's explicit consideration of an attack scenario and its potential consequences, but SLOMFP also cites no concrete evidence supporting its view, such as

statement or ruling by either NRC Staff or the Commission. Instead, SLOMFP asks this Court to infer that because NRC took certain actions, the EA considers any attack "remote and speculative."

SLOMFP demands such an inference (OB48-49) because (1) NRC (allegedly) took that position in the prior case before this Court, and (2) after this Court's remand NRC held that while it would obey this Court's mandate in this case, it would continue to litigate the question of whether NEPA requires a terrorism review in other Circuits.[17] In effect, SLOMFP argues that if NRC has not recanted its "remote and speculative" argument, then the EA actually *is* based on that argument.

SLOMFP's argument ignores the facts. First, NRC's brief in the previous case did not argue that terrorist attacks were "remote and speculative" as a general matter; instead, NRC argued that terrorist attacks were not "proximately caused" by issuing the license and that they were "speculative" and not "reasonably foreseeable" at particular sites. Second, in the present case NRC determined that a terrorist attack was "improbable" (ER16), but the EA still addressed the consequences of a plausible, successful attack. (ER63; SER138). SLOMFP

[17] *AmerGen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124, 128-29 (2007), 2007WL 595084; *pet. for review pending, New Jersey Dept. of Env. Protection v. NRC*, No. 07-2271 (3d Cir.).

cannot rationally claim that NRC relied on a finding that it considers *any* attack "remote and speculative" when the agency actually completed a detailed analysis of the consequences of a successful terrorist attack scenario.

Next, SLOMFP argues (OB49-50) that because NRC refused to admit Contention 3 (related to "alternate terrorist scenarios"), the EA – contrary to its actual language – considers *all* attacks "remote and speculative." Again, this argument lacks logic. While NRC did in fact reject Contention 3 (an issue addressed elsewhere in this brief), the EA considered a hypothetical, successful attack. The EA took a group of scenarios developed by Sandia Laboratories, determined which were plausible, chose the plausible scenario with the largest release, and analyzed the consequences of that release. That does *not* equate to a finding that all attacks are "remote and speculative."

SLOMFP also argues (OB51-52) that because the Commissioners each individually reviewed the Classified information concerning potential attacks on the facility (instead of reviewing the information at a group meeting), the Commission as a body "attaches little or no meaning to the concept of a plausible attack scenario" and thus has indicated that it believed any attack on the ISFSI is "remote and speculative." We are not entirely sure what this argument means, but we are aware of no requirement in the AEA, the APA, or NEPA that the

Commissioners gather at the same table to review material as a group. SLOMFP cites us to none. Here, the Commission majority reached its decision using the collective process of issuing CLI-08-26, the final decision closing this case, by circulating drafts of the decision to all offices for review and comment – a process not unlike issuing a judicial decision.

It is true that NRC Staff, based on its expertise and review of Classified threat information, found *some* terrorist scenarios "remote and speculative" as a matter of *fact*. (*E.g.*, ER124; SER148-49). But that finding does not mean that NRC found all scenarios "remote and speculative" as a matter of *law*, as SLOMFP argues. SLOMFP concedes that NRC has the authority to make factual findings that some scenarios are "remote and speculative." (OB6).

3. Finally, SLOMFP insists (OB52-54) that the EA is fatally defective because it failed to address the scenario proposed by SLOMFP's expert. But that claim is wrong. The EA as drafted did not explicitly address the scenario proposed by Dr. Thompson because it could not do so without disclosing FOIA-exempt information, including Classified information. But the record demonstrates that NRC did review Dr. Thompson's scenario.

At oral argument, a Commissioner asked whether NRC Staff had considered Dr. Thompson's scenario. Staff Counsel responded that it had considered the scenario and that consideration had not changed Staff's conclusion.

> While we cannot specifically discuss the details of his threat scenario, I can tell you that it does not alter the staff's conclusion that there would not be any significant environmental consequences from a terrorist attack.

(SER149). *See also* (SER213). Based on that exchange, the logical conclusion is that the Staff compared Dr. Thompson's scenario to the scenarios before it and determined either that (1) his scenario was not "credible" or (2) the consequences of his scenario were no more severe than the consequences of the scenario considered in the EA. But that determination was based on Classified Information. A public comparison of the radioactive releases from the various scenarios (Classified) as evaluated in light of the threat assessment (Classified) would reveal information of possible use to terrorists. NRC Staff appropriately said no more. In fact, labeling a scenario as "implausible" or "incredible" might very well be inviting a terrorist to attempt that scenario, because they might think NRC and the licensees would not be defending against it. Under *Weinberger*, the Commission was not required to take that step. In addition, each of the Commissioners reviewed both Dr. Thompson's scenario and the Classified information relied on in

the EA. The majority found the Staff's "selection [of scenarios] was reasonable." (ER21).

CONCLUSION

For the foregoing reasons, this Court should deny the petition for review.[18]

[18] SLOMFP argues that if this Court finds that NRC must perform additional NEPA analysis, then this Court should vacate the license. (OB55). But a remand because of a NEPA violation does not require revocation of a license without meeting the standards for injunctive relief. *Cheyenne Tribe v. Norton*, 503 F.3d 836, 842 (9th Cir. 2007). SLOMFP has never claimed "irreparable injury," a basic requirement for injunctive relief, and it has not sought a stay of NRC's approval of the EA from the Commission (*see* FRAP 18(a)(1)), much less this Court (FRAP 18(a)(2)). Thus, vacating the license would be inappropriate.

Respectfully submitted,

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REGULATORY ADDENDUM

10 C.F.R. § 2.714. (2004) **Intervention.**

(a)(1) ...

Nontimely filings will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petition and/or request should be granted based upon a balancing of the following factors in addition to the set out in paragraph (d)(1) of this section:

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

STATEMENT REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for the U.S. Nuclear Regulatory Commission certifies that the number of words in Federal Respondents' Brief of March 25, 2009, excluding the Table of Contents, Table of Authorities, Required Certifications, and signatures, as counted by Microsoft Word, is 13,989.

Respectfully submitted,

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March 25, 2009.

STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, Federal Respondents state that they are not aware of any "related case" within the meaning of the Rule.

SLOMFP states (OB54) that "this case raises issues that are closely related to a NEPA issue raised in *Public Citizen, Inc., et al. v. NRC*, Nos. 07-71868 and 07-72555" which was argued and submitted to this Court on November 17, 2008. We respectfully disagree. The NEPA issues in this case are largely factual in nature, *i.e.*, did NRC's Supplemental EA reasonably analyze environmental impacts and comply with this Court's remand order in a licensing proceeding.

In the *Public Citizen* case, by contrast, the NEPA issue is whether, as a matter of *law*, NRC was required to prepare an Environmental Impact Statement ("EIS") in a rulemaking proceeding. NRC argues there that NEPA does not require NRC to issue an EIS when issuing rules increasing environmental protection. *See* NRC Brief at 58-64; Petitioners' Reply Brief at 24-27.

The major legal issue in this case is the scope of *Weinberger v. Catholic Action*, 454 U.S. 139 (1981). That issue is not present in the *Public Citizen* case.

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March 25, 2009.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, Petitioner,	)	
v.	)	No. 08-78058
U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES Of AMERICA, Respondents, and	)	
PACIFIC GAS & ELECTRIC COMPANY,	)	

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2009, I electronically filed the foregoing Respondents' Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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