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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

SERVED 02/26/07

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-0219-LR
	)	
(License Renewal for Oyster Creek Nuclear Generating Station)	)	
	)	

CLI-07-08

MEMORANDUM AND ORDER

This is a proceeding to renew the operating license of the Oyster Creek Nuclear Generating Station. Several months ago, in CLI-06-24, we affirmed a Licensing Board decision[1] rejecting two contentions proposed by the New Jersey Department of Environmental Protection (New Jersey).[2] We postponed deciding one other question New Jersey raised on appeal[3] – whether the Board properly rejected a contention claiming that the National Environmental Policy Act (NEPA) requires the NRC to consider, as part of its license renewal review, the consequences of a hypothetical terrorist attack on the Oyster Creek reactor. Today, notwithstanding a recent decision by the United States Court of Appeals for the Ninth Circuit,

[1]LBP-06-07, 63 NRC 188 (2006).

[2]CLI-06-24, 64 NRC 111 (2006).

[3]Brief on Behalf of Petitioner New Jersey Department of Environmental Protection on Appeal from Order LBP-06-07 of the Atomic Safety and Licensing Board Denying Request for Hearing and Petition to Intervene (New Jersey Appeal) (March 28, 2006).

holding that the NRC may not exclude NEPA-terrorism contentions categorically,[4] we reiterate our longstanding view that NEPA demands no terrorism inquiry. We also point out that, for license renewal, the NRC has in fact examined terrorism under NEPA and found the impacts similar to the impacts of already-analyzed severe reactor accidents. Hence, we affirm the Board's rejection of New Jersey's NEPA-terrorism contention.

In addition, in today's decision we address, and find moot, pending appeals filed by AmerGen Energy Company, LLC (AmerGen)[5] and the NRC Staff[6] concerning a "dry well liner" contention filed by a coalition of organizations opposed to renewing the Oyster Creek operating license.

I. INTRODUCTION

A. Preliminary Matter

Appeals filed by AmerGen and the NRC Staff both sought reversal of the Board's decision to admit a contention filed by the Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively, "Citizens") on Oyster Creek's plan, or (alleged) lack of a

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[4] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace,* No. 06-466 (Jan. 16, 2007). Pacific Gas and Electric Company, not the government, filed a certiorari petition in the *San Luis Obispo Mothers for Peace* case. In responding to the certiorari petition, the government made clear its disagreement with the Ninth Circuit decision on the merits, but pointed out that the NEPA-terrorism issue had not yet been addressed directly by other courts of appeals, and thus was not yet ripe for Supreme Court review. *See* Brief for the Federal Respondents, *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Supreme Court, filed December 15, 2006).

[5] AmerGen Appeal of LBP-06-07 (License Renewal Proceeding for the Oyster Creek Nuclear Generating Station, Docket No. 50-219) (AmerGen Notice) (March 14, 2006) and Brief in Support of Appeal from LBP-06-07 (AmerGen Appeal) (March 14, 2006).

[6] NRC Staff Notice of Appeal of LBP-06-07 (NRC Staff Notice) (March 14, 2006) and NRC Staff's Brief in Support of Appeal from LBP-06-07 (NRC Staff Appeal) (March 14, 2006).

plan, for monitoring the reactor's dry well liner.

After AmerGen's and the NRC Staff's appeals were filed, the Board issued a new decision finding that Citizens' contention, as originally admitted, was a contention of "omission" that had later been cured.[7] The Board permitted Citizens to file a new contention based upon AmerGen's docketed commitment to perform periodic ultrasonic testing in the sand bed region of the dry well liner.

We postponed our consideration of the AmerGen and NRC Staff appeals to await the outcome of the process the Board had set in motion. Since then, the Board has granted Citizens' petition to file a new contention on the dry well liner issue.[8] While AmerGen and the NRC Staff have not formally withdrawn their appeals, the Board's latest decision effectively shifts the focus of potential future agency litigation to the newly admitted contention. In recognition of this change, we tie up loose ends today by dismissing the pending AmerGen and NRC Staff appeals – which were directed to Citizens' now-superseded original contention – as moot.

B. Background – New Jersey's NEPA-Terrorism Contention

New Jersey maintains that NEPA requires the NRC to consider the consequences of a terrorist attack on Oyster Creek. Under NEPA, in New Jersey's view, the NRC Staff's environmental analysis ought to have included a more elaborate examination of "Severe Accident Mitigation Alternatives" at Oyster Creek, including an inquiry into the consequences of a potential aircraft attack on the reactor, the vulnerability of the spent fuel pool to terrorist attack

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[7]LBP-06-16, 63 NRC 737 (2006). *See generally Duke Energy Corp.* (McGuire Nuclear Energy Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

[8]LBP-06-22, 64 NRC 229 (2006).

and to "design basis" threats,[9] and long-term compensatory measures to defend against terrorism.[10]

The Board held that terrorism and "design basis threat" reviews, while important and ongoing, lie outside the scope of NEPA in general and of license renewal in particular,[11] and rejected New Jersey's proposed NEPA contention.[12]

II. ANALYSIS

New Jersey argues that the Board erred in rejecting its proposed contention regarding the adequacy of AmerGen's Severe Accident Mitigation Alternatives analysis. This contention focused particularly on AmerGen's failure to analyze Oyster Creek's vulnerability to terrorist air attack, including risk of potential damage to the reactor core (based on the specifics of the Oyster Creek design and current design basis threat information), vulnerability of the spent fuel pool, and the sufficiency of interim compensatory measures intended to improve Oyster Creek's damage response capabilities.

Last June, in *San Luis Obispo Mothers for Peace v. NRC*, the Ninth Circuit issued a decision holding that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorism attack against a spent fuel storage facility on the Diablo Canyon reactor site in California. New Jersey points to the Ninth Circuit decision as authority for its NEPA-terrorism contention in the current license renewal proceeding.[13] Respectfully, however,

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[9]The "design basis threat" rule describes general adversary characteristics that designated NRC licensees, including nuclear power plant licensees, are required to defend against with high assurance. *See generally* 10 C.F.R. § 73.1.

[10]*See* New Jersey Petition at 3-6 (unnumbered).

[11]*See* LBP-06-07, 63 NRC at 199-204.

[12]*See id.* at 199-211.

[13] *See* New Jersey Department of Environmental Protection's Notice of Pertinent New

(continued...)

we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the *Diablo Canyon* proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question.[14] Such an obligation would defeat any possibility of a conflict between the Circuits on important issues.[15] For the reasons we gave in our prior decisions,[16] and for the reasons the Solicitor General gave in his recent Supreme Court brief in the *Diablo Canyon* case,[17] we continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.

We find that the Board properly applied our settled precedents on the NEPA-terrorism issue. "Terrorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to 'the detrimental effects of aging.' Consequently, they are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding."[18] Moreover, as a general matter, NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor

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[13](...continued)
Case Law Affecting Appeal and Request for its Consideration (June 12, 2006). As pointed out in note 4, *supra*, the Supreme Court recently declined to review the Ninth Circuit decision.

[14]An agency is not required to acquiesce in an unfavorable decision when faced with the same legal issue in another circuit: under preclusion doctrines a court of appeals decision may prevent the government from re-litigating the same issue with the same party, "but it still leaves [the government] free to litigate the same issue in the future with other litigants." *United States v. Stauffer Chemical Company*, 464 U.S. 165, 173 (1984). *See also United States v. Mendoza*, 464 U.S. 154, 160 (1984).

[15] A conflict in the Circuits is a key criterion informing the exercise of the Supreme Court's certiorari jurisdiction. *See* Supreme Court Rules, Rule 10.

[16]*See generally Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

[17] *See* note 4, *supra*.

[18]*McGuire/Catawba*, CLI-02-26, 56 NRC at 364.

license renewal applications."[19] "The 'environmental' effect caused by third-party miscreants 'is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'"[20] "[T]he claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact."[21]

Our prior precedents are consistent with Supreme Court NEPA doctrine. In two major decisions – *Metropolitan Edison Co. v. People Against Nuclear Energy* (1983) and *Department of Transportation v. Public Citizen* (2004) – the Court has said that a "reasonably close causal relationship" between federal agency action and environmental consequences is necessary to trigger NEPA; the Court analogized NEPA's causation requirement to the tort law concept of "proximate cause."[22]

The Ninth Circuit brushed aside the Supreme Court's "proximate cause" test as somehow "inapplicable" to NRC licensing decisions.[23] But the Supreme Court has held, unconditionally, that the test is "required."[24] The Ninth Circuit's view notwithstanding, there simply is no "proximate cause" link between an NRC licensing action, such as (in this case) renewing an operating license, and any altered risk of terrorist attack. Instead, the level of risk

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[19] *Id.* at 365.

[20] *Id.,* quoting *Private Fuel Storage,* CLI-02-25, 56 NRC at 349.

[21] *Private Fuel Storage,* CLI-02-25, 56 NRC at 349, citing *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 772-75 (1983). *See also Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004).

[22] *Department of Transportation,* 541 U.S. at 767; *Metropolitan Edison*, 460 U.S. 774.

[23] *See* 449 F.3d at 1029.

[24] *Department of Transportation,* 541 U.S. at 767; *Metropolitan Edison*, 460 U.S. 774. 460 U.S. 774, 541 U.S. at 767.

depends upon political, social, and economic factors *external* to the NRC licensing process. [25] It is not sensible to hold an NRC licensing decision, rather than terrorists themselves, the "proximate cause" of an attack on an NRC-licensed facility.

In any event, a NEPA-driven review of the risks of terrorism would be largely superfluous here, given that the NRC has undertaken extensive efforts to enhance security at nuclear facilities,[26] including (most recently) proposing a new and more stringent "design basis threat rule."[27] These ongoing post- 9/11 enhancements provide the best vehicle for protecting the public.[28] And, as the NRC has pointed out in other cases, substantial practical difficulties

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[25] The terrorism risk at Oyster Creek remains the same during the renewal period as it was the day before when the plant still operated under its original license. In fact, since renewal applications typically are processed before the expiration of the initial license, a plant may continue to operate under the terms of its original license for some time after the renewal decision. Consequently, even if NEPA required a terrorism analysis of the sort advocated by New Jersey, any such analysis would leave Oyster Creek's present operation unaltered.

A license renewal proceeding is distinguishable from the situation considered in *San Luis Obispo Mothers for Peace*, where the NRC had before it a proposal to construct a dry cask storage facility at a nuclear reactor site. Unlike the situation in that case, a license renewal application does not involve new construction. So there is no change to the physical plant and thus no creation of a new "terrorist target."

[26] *See, e.g., Private Fuel Storage,* CLI-02-25, 56 NRC at 343-44.

[27] *See* Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005); Final Rulemaking to Revise 10 C.F.R. 73.1, Design Basis Threat, 72 Fed. Reg. ____ (approved on Jan. 29, 2007).

[28] New Jersey argues that a 10 C.F.R. Part 51 NEPA review differs from a Part 54 review because a Part 54 review "centers on 'the detrimental effects of aging' on the components of the facility." New Jersey Appeal at 9. But New Jersey concedes the limited nature of the Part 51 environmental review, acknowledging that it "focuses on the potential environment impacts anticipated to occur *over the 20 years of proposed license renewal*." *Id*. (emphasis added). The NRC's ongoing security program covers current operations and extends into the renewal period. We do not see the value in diverting limited agency resources from our ongoing anti-terrorist efforts to undertake a special NEPA review of terrorism risks and consequences over the renewal period.

impede meaningful NEPA-terrorism review,[29] while the problem of protecting sensitive security information in the quintessentially *public* NEPA and adjudicatory process presents additional obstacles.[30]

Beyond all of this, and even if as a general matter we were to accede to the Ninth Circuit's view and decide to consider terrorism under NEPA, there is no basis for admitting New Jersey's NEPA-terrorism contention in this license renewal proceeding. As the Licensing Board pointed out, the NRC Staff's Generic Environmental Impact Statement (GEIS) for license renewal has already "performed a discretionary analysis of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events."[31] And, as required by the GEIS,[32] the NRC Staff performed a site-specific analysis of

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[29] See, *e.g., Private Fuel Storage,* CLI-02-25, 56 NRC at 350-51. *See also Limerick Ecology Action v. NRC,* 869 F.2d 719, 743-44 (3d Cir. 1989). As in *Limerick Ecology Action*, where the court of appeals upheld an NRC refusal to admit for hearing a NEPA-terrorism contention, it's not clear from New Jersey's contention how the NRC Staff, or the Licensing Board, is to go about assessing, meaningfully, the risk of terrorism at the particular site in question (Oyster Creek).

[30] *See, e.g., Private Fuel Storage,* CLI-02-25, 56 NRC at 354-357.

[31] LBP-06-07, 63 NRC at 201 n.8. New Jersey apparently believes that the NRC's ongoing attention to protecting nuclear facilities against terrorism equates to an obligation to perform a site-specific NEPA-terrorism review. *See* New Jersey Appeal at 21-22. This is not so. The NRC's decision to use its *Atomic Energy Act* authority to require all of its power reactor licensees to take precautionary measures against improbable, but potentially destructive, terrorist attacks does not compel the agency to analyze the consequences of successful attacks at particular sites under NEPA. *See Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy,* 383 F.3d 1082, 1090 (9th Cir. 2004).

[32] The GEIS provides:

> With regard to sabotage, quantitative estimates of risk from sabotage are not made in external event analyses because such estimates are beyond the current state of the art for performing risk assessments. The [C]ommission has long used deterministic criteria to establish a set of regulatory requirements for the physical protection of nuclear power plants from the threat of sabotage, 10 CFR Part 73, "Physical Protection of Plants and

(continued...)

alternatives to mitigate severe accidents.[33] As though the NRC had conducted no site-specific inquiry at all, New Jersey argues that the Board mistakenly relied on a "general rule that plant-specific issues relating to a plant's 'current licensing basis' are *ordinarily* beyond the scope of a license renewal review."[34] According to New Jersey, this reliance was misplaced because of specific distinguishing characteristics of the Oyster Creek site, which make it particularly

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[32](...continued)
Materials", delineates these regulatory requirements. In addition, as a result of the World Trade Center bombing, the Commission amended 10 CFR Part 73 to provide protection against malevolent use of vehicles, including land vehicle bombs. This amendment requires licence[e]s to establish vehicle control measures, including vehicle barrier systems to protect against vehicular sabotage. The regulatory requirements under 10 CFR [P]art 73 provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the [C]ommission believes that acts of sabotage are not reasonably expected. Nonetheless, if such events were to occur, the [C]ommission would expect that resultant core damage and radiological releases would be no worse that those expected from internally initiated events.

Based on the above, the [C]ommission concludes that the risk from sabotage and beyond design basis earthquakes at existing nuclear power plants is small and additionally, that the risks f[ro]m other external events, are adequately addressed by a generic consideration of internally initiated severe accidents.

Although external events are not discussed in further detail in this chapter, it should be noted that the NRC is continuing to evaluate ways to reduce the risk from nuclear power plants from external events. For example, each licensee is performing an individual plant examination to look for plant vulnerabilities to internally and externally initiated events and considering potential improvements to reduce the frequency or consequences of such events. Additionally, as discussed in Section 5.4.1.2, as part of the review of individual license renewal applications, a site-specific consideration of alternatives to mitigate severe accidents will be performed in order to determine if improvements to further reduce severe accident risk or consequences are warranted.

Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, Vol. 1, p. 5-18 (May 1996).

[33] *See* Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 (Oyster Creek Nuclear Generating Station), *Final Report* (January 2007), especially at pp. 5-3 to 5-11 and Appendix G ("NRC Staff Evaluation of Severe Accident Mitigation Alternatives for Oyster Creek Nuclear Generating Station in Support of License Renewal Application").

[34] New Jersey Appeal at 16 (emphasis in original).

vulnerable to terrorist threats. These characteristics, New Jersey argues, justify the exercise of the Commission's "discretion to consider serious safety, environmental or common defense and security matters in extraordinary circumstances."[35]

New Jersey identifies Oyster Creek's special distinguishing characteristics as: the (allegedly) obsolete Mark 1 containment design of the reactor and the elevated spent fuel pool; the location of the reactor, specifically its proximity to both Philadelphia, Pennsylvania and Newark, New Jersey; and the facts that nuclear facilities (purportedly) were among the original al Qaeda targets and that the Coast Guard "has implemented a permanent safety zone" around Oyster Creek because of its finding that there is a "'specific and continuing threat' to Oyster Creek."[36]

We agree with AmerGen[37] that, as a legal matter, the specific characteristics of the Oyster Creek facility now identified by New Jersey as special risk factors amount to new information, not part of the original contention and improperly introduced for the first time on appeal.[38] Moreover, New Jersey's site-specific claims go to the safe *ongoing* operation of Oyster Creek, but are not matters peculiar to plant aging or to the license extension period. If New Jersey believes it has in hand information requiring license amendments or other protective measures at Oyster Creek, it may petition the NRC for relief under 10 C.F.R. § 2.206 (providing for petitions for enforcement relief).

New Jersey also asks the NRC, as part of its NEPA review, to revisit the vulnerability of

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[35] *Id.*

[36] *Id.* at 21.

[37] AmerGen Brief in Opposition to New Jersey Department of Environmental Protection Appeal from LBP-06-07 (Apr. 10, 2006), at 9.

[38] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006). It is unfair to other litigants and to our licensing boards to consider issues and allegations raised for the first time on appeal.

Oyster Creek's spent fuel pool to "design basis" accidents. In rejecting this aspect of New Jersey's contention as beyond the scope of this proceeding, the Board pointed to existing regulations that define design basis accidents at reactors, as well as spent fuel storage, as so-called "Category 1" (or generically resolved) issues.[39] Our GEIS and our regulations characterize the impacts as "small."[40] So no site-specific NEPA review of design basis accidents is required.[41] If New Jersey believes there is reason to depart from the license renewal GEIS and related regulations, its remedy is a petition for rulemaking to modify our rules or a petition for a waiver of our rules based on "special circumstances", not an adjudicatory contention.[42]

We also agree with the Board's analysis of New Jersey's argument on the adequacy of interim compensatory measures to counter design basis threats. As the Board pointed out, the "design basis threat" – the nature of a terrorist attack that NRC reactor licensees must be prepared to defend against -- is the subject of an ongoing agency rulemaking.[43] In New Jersey's view, this fact should not have barred the admission of New Jersey's proposed contention, because the uncertain conclusion of the rulemaking, both in terms of content and timing, makes the rulemaking an inadequate vehicle for addressing "the imminent risk of

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[39] LBP-06-07, 63 NRC at 201-02.

[40] Part 51, Subpart A, Appendix B.

[41] *See* LBP-06-07, 63 NRC at 201-02.

[42] *See* 10 C.F.R. §§ 2.335, 2.802. *See generally Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

[43] *See* LBP-06-07, 63 NRC at 203-04, citing Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). In addition, the Board correctly noted that "[w]here, as here, the Commission has initiated rulemaking proceedings that apply to the facility in question and that directly implicate a proposed contention, a Board ordinarily should refrain from admitting that contention." LBP-06-07, 63 NRC at 203 (citation omitted).

irreparable harm posed to Oyster Creek by the threat of terrorist attack by aircraft."[44] But agencies have discretion to proceed case-by-case or by rulemaking. And here, the Commission has determined that a rulemaking is the appropriate vehicle for addressing the current terrorism risk – a risk faced by nuclear facilities in general (and for that matter by other industrial facilities), rather than a risk peculiarly related to operating a nuclear facility beyond its initial license.

As we have previously held, "[p]articularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities."[45]

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[44]New Jersey Appeal at 22.

[45]*McGuire/Catawba*, CLI-02-26, 56 NRC at 365.

III. CONCLUSION

For the foregoing reasons and for the reasons given by the Board, we *affirm* the Board's decision in LBP-06-07 with respect to New Jersey's appeal of the rejection of its first contention (its NEPA-terrorism contention). We *dismiss* as moot the appeals from LBP-06-07 filed by AmerGen and the NRC Staff.

IT IS SO ORDERED.

For the Commission,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February, 2007.

Commissioner Gregory B. Jaczko, Respectfully Dissenting:

As I indicated in response to the Commission's last Order in this proceeding postponing the decision on the NEPA terrorism issue, I respectfully disagreed with my colleagues then on not quickly resolving the issue, and I continue to respectfully disagree with my colleagues now on the majority's decision to ignore the Ninth Circuit's ruling outside of the Ninth Circuit's geographical boundary.

Following the horrific events of September 11, the Commission worked admirably and diligently to deal with a variety of difficult questions raised regarding issues of terrorism and nuclear energy. The Commission reached a decision regarding the issues of terrorism and NEPA in that context. Since then, the agency successfully walked the difficult line between engaging in public discussion and protecting vital security information in the context of the recent proposed rule on the design basis threat (DBT). Thus, I have confidence in our ability to do the same in the NEPA context without jeopardizing our nation's security.

The Commission, in originally addressing NEPA and terrorism, was faced with a difficult legal issue. But now, the Commission is faced with a policy issue – whether or not to implement the Ninth Circuit's mandate nationwide. I believe doing so is the right policy decision today. The majority's decision not to do so is an unnecessary and risky decision that, unfortunately, will not provide regulatory stability or national consistency.

Moreover, several assumptions must be made in order to support the majority's position – namely that another Circuit will answer this question differently than the Ninth Circuit and then that the Supreme Court will take review of the issue. None of this, however, forecloses the possibility that, in the end, even if all these steps occur as the majority hopes, the Supreme Court will not eventually agree, at least to some extent, with the Ninth Circuit's ruling. Ultimately, the majority position paints a portrait of a long and arduous path filled with

uncertainty and frustration. I am concerned about the implications of such a potentially time-consuming and circuitous path, especially when the Commission could instead, resolve the issue by directing the use of a well-established and traveled road.

While the majority contends that following the Ninth Circuit's mandate nationwide is unnecessary and superfluous, I believe the opposite to be true. Regardless of what eventually is determined to be the "right" legal answer, the practical reality is that the agency must and will find a way to consider the impacts of terrorism in a NEPA analysis, at least regarding applications within the jurisdiction of the Ninth Circuit. Thus, it appears to me to be unnecessary and superfluous to place all non-Ninth Circuit applicants at risk of years of regulatory instability in the hope that a different legal answer is ultimately reached. In the end, the "important questions" surrounding this decision are not important because they are legal, but are important because they have broad policy implications. Thus, I believe the right policy answer is to have a consistent, nationwide approach to a NEPA terrorism analysis.

Furthermore, I also have confidence that this agency is capable of performing a NEPA terrorism review as to any potential application. As the majority notes, in the NRC's Generic Environmental Impact Statement (GEIS) for license renewal, the staff performed a discretionary analysis of terrorist acts in connection with license renewal, concluding that the core damage and radiological release from such acts was not expected to be worse than the damage and release to be expected from internally initiated events. Because the staff has already reviewed this issue to some extent, applying the Ninth Circuit's mandate nationwide should not be particularly challenging – and may, in fact, be satisfied by the GEIS, at least regarding license renewal.

For all of these reasons, I believe it is in the best interest of the agency and its stakeholders to move forward with a discussion of the best way to address this issue rather

than continuing to focus on whether to address this issue. In the long term, one approach for resolution of this issue might be for the Commission to direct preparation of a generic environmental impact statement on the effect of terrorism on nuclear facilities and their surrounding communities. As I mentioned, the agency has successfully engaged the public, while protecting security information, in the context of the DBT rulemaking. Thus, the agency now has the benefit of some experience in this realm. But if this is determined to be the best long-term approach, it will only come after much public discussion and dialogue. I am concerned that belaboring the discussion of whether or not to do this analysis will only lengthen the amount of time before we reach consensus on how to do the analysis. Given this, I believe that the Commission and our stakeholders would be best served by beginning the discussion now.

Until a long-term solution is reached, I believe the best approach in this case and others is to direct the staff to include a terrorism analysis in its NEPA documents (EIS or EA) in each case, preparing a supplement if necessary. The NEPA analysis should discuss, in general terms, what, if any, environmental impacts result from a particular licensing action by terrorism-caused radiation releases, whether better alternatives exist, and whether effective mitigating measures are planned. While any revised NEPA documents would then be open to late-filed contentions, this is not a basis not to proceed with the Ninth Circuit's mandate. Instead, in assessing the appropriate path forward, the Commission should revisit the procedures currently in place regarding access to Safeguards or classified information and create any necessary modifications to them in order to ensure that there is no question that vital security information will be protected.

While this is certainly not the only path forward that would comply with the Ninth Circuit's mandate, I believe it is a consistent and familiar approach that would provide regulatory stability

and NEPA compliance. This approach does not ensure an end to litigation in this area. But it does move us past the legal debate, and the accompanying years of uncertainty, and into the policy debate of where to go from here.

Concurring Opinion of Commissioner Merrifield:

I fully agree with both the reasoning and the outcome of the majority opinion. I write separately to emphasize my strong disagreement with the dissent.

The dissent ignores the compelling reasons not to follow the Ninth Circuit decision in *San Luis Obispo Mothers for Peace* outside of the Ninth Circuit. Our reason for not applying the holding of *San Luis Obispo Mothers for Peace* nationwide is, as the majority opinion states, that the Ninth Circuit decision is wrong and conflicts with Supreme Court precedent, the actual law of the land. The National Environmental Policy Act (NEPA) only requires federal agencies to analyze the reasonably foreseeable environmental effects of proposed federal actions. Thus, in preparing agency NEPA documents we examine the environmental impacts of the proposed action and alternatives, as appropriate. Examining the alleged effects of terrorism in a NEPA document sets the process into a potentially limitless quest to predict how the irrational behavior of terrorism may impact a nuclear facility and then to connect this prediction to the environment surrounding the facility. Unlike traditional matters examined in NEPA documents, the issue of terrorism has no connection to the environment or to the proposed federal action. The proximate cause of any possible environmental effects of a hypothetical terrorist attack would be the terrorist attack, not the NRC licensing action. It is sensible to draw a distinction between the likely impacts of an NRC licensed facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process could become truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse

effect, no matter how indirect its connection to agency action.

The dissent asserts that because we were successfully challenged in the Ninth Circuit, we should apply this erroneous decision nationwide in order to avoid "regulatory uncertainty." The logical outgrowth of this position is that any time a party challenges a NRC licensing decision as legally erroneous, we should agree with the party and impose additional requirements and perform additional environmental reviews, not just in the challenged action, but nationwide in the name of regulatory certainty. I'm not sure why, if we were to adopt this position, we should stop at challenges lodged in a court. Perhaps we should revamp our licensing processes nationwide every time we receive a public comment that has generic applicability suggesting that a particular review was insufficient. This would quickly lead not to regulatory certainty, but to regulatory strangulation with an ever increasing regulatory burden not based on ensuring adequate protection of the public health and safety, but rather, based on political expediency.

In my view, the better approach is the approach we have taken in this case. When we were first confronted with the question of whether we should include a terrorism review under NEPA we carefully considered the issue, received input from many stakeholders, and we ultimately determined that such a review was unnecessary. Upon receipt of the Ninth Circuit decision disagreeing with that determination, we carefully considered the decision and decided that our previous determination was still correct. In my mind, this is how we provide regulatory certainty, we do not disturb previous determinations without adequate justification.

The dissent's implication that this issue can be easily resolved by preparing a generic environmental impact statement is simply wrong. There will be nothing easy about resolving this issue on a generic basis. While we may eventually determine that some limited scope rulemaking is the best course to resolve these issues, one cannot ignore the obvious practical

difficulties with this approach. We were able to resolve certain issues related to license renewal generically since, among other reasons, the location of the operating nuclear power plants was known, and the proposed federal action was the same, renewal of an operating license. In order to attempt a generic analysis of all potential impacts of a hypothetical terrorist attack at a hypothetical facility we would presumably have to postulate a location and type of facility that would result in the most significant consequences. Assuming it could be done at all, I think it would tend to lead to an extremely misleading impression of environmental effects. For example, no one is likely to site a category one facility in lower Manhattan. Rather than informing our decision-making about actual environmental consequences of an actual licensing decision, we would be constantly distinguishing the generic analysis to demonstrate why the alleged greater consequences do not apply to any particular facility.

We must comply with this decision in the Ninth Circuit. I believe this decision was wrongly decided, and I do not think other courts reviewing this issue will reach the same result.[46] Unless and until we are forced to comply elsewhere, I am not willing to require this type of review in all currently pending and future licensing decisions nationwide.

[46]This issue is currently being considered by the Court of Appeals of the D.C. Circuit as part of the *Private Fuel Storage* appeal.