

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

SERVED 02/26/07

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

_____)
In the Matter of)
)
SYSTEM ENERGY RESOURCES, INC.) Docket No. 52-009-ESP
)
(Early Site Permit for Grand Gulf ESP Site))
_____)

CLI-07-10

MEMORANDUM AND ORDER

In a recent order, the Commission took upon itself the task of deciding whether to admit for hearing a contention claiming the Environmental Impact Statement for the proposed Grand Gulf ESP must analyze the environmental impacts of a terrorist attack on the proposed facility.¹ Today, we answer that question in the negative.

As an initial matter, the proposed contention was impermissibly late. But even had it been submitted at the outset, it would be inadmissible, because, as explained in today's ruling in *Oyster Creek*,² the National Environmental Policy Act³ does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks at NRC-licensed facilities.

¹ CLI-06-28, 64 NRC __ (Nov. 9, 2006). On January 26, 2007, the Atomic Safety and Licensing Board issued its Initial Decision (Authorizing the Issuance of the Grand Gulf Early Site Permit), LBP-07-01, 65 NRC __ (Jan 26, 2007).

² *Amergen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), CLI-07-__, 65 NRC __ (Feb. 26, 2007).

³ 42 U.S.C. §§ 4321 *et seq.*

I. INTRODUCTION

The various public interest groups who collectively sponsored the proposed contention -- Nuclear Information and Resource Service, Public Citizen, and Sierra Club -- rely substantively and procedurally on the recent decision by the U.S. Court of Appeals for the Ninth Circuit in *San Louis Obispo Mothers for Peace v. NRC*.⁴ The Ninth Circuit held that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorist attack against a spent fuel storage facility on the Diablo Canyon reactor site in California. But we find the Ninth Circuit's decision does not compel the NRC to admit this issue for adjudication in the *Grand Gulf* proceeding.

II. ANALYSIS

The petitioners argue that the Ninth Circuit's mandate in *Mothers for Peace* constituted new information triggering the opportunity to offer a new proposed contention and excused its lateness. Ordinarily, environmental contentions must be filed on the basis of the applicant's environmental report submitted as part of its initial application.⁵ The petitioners argue that, because of our well-settled view that the environmental impact of terrorism on a facility is outside the scope of NEPA,⁶ filing a contention on this issue at that time would have been futile.

We find that the petitioners waived their right to pursue the NEPA-terrorism issue in our adjudication by not filing the contention on the basis of the environmental report. A contention filed late is excused only when the "information on which the amended or new contention is

⁴ 449 F.3d 1016 (2006), *cert. denied*, No. 06-466 (Jan. 16, 2007).

⁵ 10 C.F.R. § 2.309(f)(2) ("On issues arising under the National Environmental Policy Act, the petitioner *shall file* contentions based on the applicant's environmental report" (emphasis added)).

⁶ See, e.g., *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

based was not previously available.”⁷ There has been no change in the facts surrounding the application – SERI has not changed its proposed project, nor do the petitioners point to any new information about environmental impacts of siting a new reactor unit at Grand Gulf. The petitioners do not even suggest there is new information available about the threat of terrorism (or this agency’s ability to assess that threat). The only change is the law controlling within the Ninth Circuit, and, as we will discuss subsequently, the Ninth Circuit decision does not control in this case concerning the Grand Gulf site.

Although it is no doubt true that the Licensing Board would have rejected the contention on the basis of our settled law had the petitioners submitted it earlier, the submission would not have been entirely “futile,” as it would have preserved the right to ask the Commission to reconsider it or to appeal to a higher court later. As the NRC Staff pointed out in its answer to the petitioners’ request, had the petitioners in *Mothers for Peace* delayed filing their NEPA-terrorism contention, there would be no Ninth Circuit ruling on the issue.⁸

As stated in the *Oyster Creek* decision issued today, we continue to believe that the National Environmental Policy Act does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities. The *Oyster Creek* decision explains in depth our reasoning for refusing to follow the *Mothers for Peace* decision outside the Ninth Circuit. Those reasons pertain here as well. As we stated in *Oyster Creek*, there is no basis for admitting this terrorism contention in this early site permit proceeding. The ‘environmental’ effect caused by third-party miscreants ‘is....simply too far removed from the

⁷ 10 C.F.R. §2.309(f)(2)(i).

⁸ See NRC Staff Answer to Petitioners’ Request for Admission of Late-Filed Environmental Contention (Nov. 6, 2006), at 7-8 & n.7.

natural or expected consequences of agency action to require a study under NEPA.”⁹ The claimed impact is too attenuated to find the proposed federal action to be the ‘proximate cause’ of that impact.¹⁰

III. CONCLUSION

Thus, for the foregoing reasons, and the reasons given in the *Oyster Creek* decision issued today, the proposed contention is rejected.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, MD
this 26th day of February, 2007

⁹ *Oyster Creek*, CLI-07- , slip op. at 6, quoting *Private Fuel Storage*, CLI-02-25, 56 NRC at 349.

¹⁰ *Id.*

Commissioner Gregory B. Jaczko, Respectfully Dissenting:

As I explain in more detail in my dissent in *Oyster Creek*, I respectfully disagree with my colleagues on the majority's decision to ignore the Ninth Circuit's ruling outside of the Ninth Circuit's geographical boundary. The majority's decision to maintain its posture of no NEPA terrorism reviews outside of the Ninth Circuit is, I believe, an unnecessary and risky decision that, unfortunately, will not provide regulatory stability or national consistency. And, 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, I believe the right policy answer is to have a consistent, nationwide approach to a NEPA terrorism analysis.

