

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

=====
No. 03-74628
=====

SAN LUIS OBISPO MOTHERS FOR PEACE, et al.

Petitioners-Appellants

v.

U.S. NUCLEAR REGULATORY COMMISISON,

Defendants-Appellees,

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors

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AMICUS BRIEF OF SAN LUIS OBISPO COUNTY
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Dated: March 22, 2004

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INTRODUCTION AND INTEREST OF THE AMICUS CURIAE

SAN LUIS OBISPO COUNTY

The case before this Court centers on a U.S. *Amicus Curiae*, the County of San Luis Obispo (“County”), has substantial interests in this case because of its unique responsibilities for dealing with the potential environmental impacts that could be experienced by the County and its residents as a result of a terrorist attack on the new Independent Spent Fuel Storage Installation (“ISFSI”) which Pacific Gas & Electric (“PG&E”) proposes to construct and operate on the site of the Diablo Canyon Nuclear Power Plant (“DCNPP”).

The ISFSI would be a new facility that would store nuclear spent fuel from DCNPP and would not be nearly as robust as a nuclear power plant. A terrorist attack on this new target could result in the release of substantial quantities of radioactive material, exposing the County’s citizens to personal injury and the County’s property to long-term radiological contamination. All normal activities, including business and education, would be disrupted. The County has significant responsibilities for responding to the full extent of environmental impacts that could reasonably result from a successful terrorist attack on the proposed ISFSI

and would be required to expend significant resources in dealing with the environmental impacts of a terrorist attack.

Despite the NRC increased security requirements at ISFSIs since the terrorist attack of September 11, 2001, the NRC determined that an attack on PG&E's ISFSI would be too remote and speculative to require consideration of its environmental impacts. Accordingly, the NRC rejected all of the terrorism-related environmental issues which the County and its citizens proffered and refused to conduct a hearing on alternatives for addressing terrorist attacks on the ISFSI and mitigation measures which could have been considered under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq*, as amended ("NEPA").

The Commission, consistent with its history of crabbed interpretations of NEPA, determined that it was not required it to consider the environmental impacts of a terrorist attack. Essentially, the NRC found that the public, except for the reactor licensees, has nothing to contribute to the agency's consideration of environmental impacts arising from terrorist attacks against an ISFSI. The NRC ignored its own precedent on holding hearings on security concerns to find that no meaningful discussion of those environmental impacts could be conducted in public without compromising security.

Had the NRC permitted the County to participate in the NRC's proceeding on the ISFSI, the County would have been able to apply its unique expertise about the local environment, health and security facilities, and response capabilities to enable a complete consideration of alternative ISFSI sites and mitigation measures for the environmental impacts of a terrorist attack on the ISFSI. The type of contribution the County could have made is illustrated by the "Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) Final Environmental Impact Report" prepared for the County's Department of Planning and Building ("EIR"). As discussed in detail in the argument, the EIR shows that terrorist-related environmental impacts can be meaningfully considered in public, without the need to consider classified information, thus refuting the NRC's unsupported claims to the contrary. The NRC's attempt to hide behind security concerns to avoid its NEPA responsibilities is not sound public policy. For the County's citizens to have confidence in the measures taken to protect them from the environmental impacts of terrorist attacks on the ISFSI, the citizens, through their elected representatives, must have an opportunity to have their concerns considered at an adjudicatory hearing. By failing to do this, the Commission has left the citizens who live nearest the ISFSI uncertain about their protection from risks created by installation and operation of this new facility.

Having been precluded from raising these issues before the NRC, the County has filed this *amicus* brief pursuant to the Federal Rules of Appellate Procedure 29(a), and in exercise of its authority to protect the health, safety, and natural resources of the County of San Luis Obispo. The County supports the San Luis Obispo Mothers for Peace in their request that this Court direct the NRC to conduct a hearing where the potential environmental impacts of a terrorist attack on PG&E's ISFSI can be evaluated and the NRC's authority to mitigate any such impacts can be exercised to the greatest extent possible.

ARGUMENT

I. The Commission Improperly Found that a Terrorist Attack Is A Speculative Consequence Of Licensing An ISFSI

The Commission's determination that a terrorist attack on the ISFSI is speculative is an unsupportable conclusion. This is clear from the Commission's inconsistent statements in the *PFS* decision incorporated into the Commission denial on appeal here.¹ On the one hand, the Commission contends that the link between licensing an ISFSI and a damaging terrorist attack is too remote and speculative to be considered under NEPA.

In addition, terrorists seeking to cause havoc and destruction would find many targets far more inviting than the proposed PFS facility. That facility would be located in a remote, desert location far from population centers. And it would use NRC-approved strong storage casks, which are designed to minimize the effects of off-normal events and accidents. Given this setting, a terrorist attack seemingly would be quite unlikely to result in a high-consequence release of radioactivity.

PFS, 56 N.R.C. at 351. (footnotes omitted.)

¹ It should also be noted that the NRC relied on the *PFS* decision without explaining why the differences between the proposed location of the PFS facility and the Diablo Canyon ISFSI did not make the PFS decision inapplicable to this case. Unlike the proposed PFS site, the Diablo Canyon site is not in the middle of a desert and is not far removed from population centers.

On the other hand, the Commission has required ISFSI licensees to increase the security measures for protecting the ISFSIs,² thus establishing a clear link between the licensing of an ISFSI and the threat of a terrorist attack.³

We hasten to add that our decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorist attack against NRC-regulated facilities. On the contrary, as we outlined above, the Commission and its staff have taken steps to strengthen security and are in the midst of an intense study of the effects of postulated terrorist attacks and of our relevant security and safeguards rules and policies. But we see no practical benefit in conducting that review, case-by-case, under the rubric of NEPA, nor any legal duty to do so.
PFS, 56 N.R.C. at 347-48.

The Commission cannot have it both ways. It cannot tell the world that it recognizes the threat of terrorism and is responding to it while, at the same time, tell the citizens who live near nuclear facilities and their elected representatives that the environmental impacts of terrorist attacks are so speculative that neither those impacts nor alternatives to mitigate them can be considered meaningfully

² ISFSIs have always been required to have security plans designed to protect them from attack. 10 C.F.R. Part 72, Subpart H. Since the events of September 11, 2001, the NRC has required its licensees to substantially enhance those security plans to take into account the heightened threat of terrorist attack. See, *PFS*, 56 N.R.C. at 344-45.

³ Diablo Canyon is located directly on the California coast, thus exposing the ISFSI to off-shore attack. The Coast Guard recognized this vulnerability and imposed a 2,000 yard security zone from the shoreline into the waters adjacent to the DCNPP. 67 Fed. Reg. 15117 (March 29, 2002).

under NEPA. Such inconsistent statements diminish public confidence. More importantly, the NRC has cut itself off from the practical benefit of the unique local knowledge that the County's citizens and elected representatives would bring to a consideration of alternative measures to mitigate the environmental impacts of terrorist threats. Thus, the NRC failed in its duty to comply with NEPA's mandate to the fullest extent possible, *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Com.*, 449 F.2d 1109, 1112 (D.C.Cir. 1971), *cert. denied*, 404 U.S. 942 (1972), by taking a "hard look" at alternatives that could mitigate or avoid environmental impacts arising from a federal action, *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000), and by considering every reasonable alternative in a manner sufficient to make a reasoned choice about how the environmental impacts from terrorism could be limited or mitigated. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1520 (9th Cir. 1992).

Had the County been permitted to raise NEPA issues in the licensing hearing, it would have provided information about medical, police and other services that would be called upon in the event of a successful terrorist attack on the ISFSI. The County also would have provided detailed information about the local environment and its implications for siting alternatives. Examples of what

the County could have contributed are provided in the attached relevant portions of the County's EIR.⁴

A review of the County EIR shows that it contains a meaningful qualitative analysis of the environmental impacts of a terrorist attack on the ISFSI. In presenting this report as an example, the County is not suggesting that this is exactly what the NRC should have done, or that this analysis is definitive. The County's only point is that such an analysis could have been conducted by the NRC, in public, and in a way that assures the County's citizens that the threat of terrorism has been thoroughly considered and fully addressed. This NRC refusal to consider an important aspect of the problem before it on the basis of a decision that runs counter to the evidence before it must be reversed as arbitrary and capricious. *O'Keefe's Inc. v. United States Consumer Prod. Safety Comm'n*, 92 F.3d 940 (9th Cir. 1996).

EIR Subsection 3.11, System Safety/Risk of Upset evaluated the environmental impacts of a possible terrorist attack on the ISFSI. EIR 3-199 to 3-253. Among the terrorist threats considered was an intentional aircraft strike. EIR 3-236 to 3-239. Although an intentional strike by a large aircraft was considered difficult, it was still considered feasible in light of recent events.

⁴ An EIR was prepared as part of the process for evaluating the coastal development permit application that was submitted by PG&E pursuant to the California Public Resources Code, Section 30600(a).

When coupled with a cited lack of consensus among the experts regarding the capability of ISFSI storage casks to withstand a direct hit by a large airplane, the conclusion was to consider the consequences of such an attack. A breach of the storage cask's containment could cause the zirconium tubes which form the spent fuel rods to catch fire and result in the airborne spread of radioactive materials around the vicinity of the ISFSI.

Mitigation measures were proposed to deal with such a scenario. EIR 3-245 to 3-246. They include changes to the design of the cask and storage pad on which it rests, a fire protection system, and additional, specific provisions in the DCP emergency response plan.^{5,5} Here, too, the point is not that the NRC should have adopted these particular mitigating measures, but that the NRC could have developed a set of realistic mitigating measures, and reviewed them in a public forum, had it not rejected any consideration of the environmental impacts of a terrorist threat.

Several other terrorist attack scenarios were considered. EIR 3-248 to 3-251. Some were promptly dismissed as too improbable given the difficulty of implementing them under the circumstances. Two scenarios which the authors of

⁵ An alternative design measure not explicitly mentioned is the placement of all of the canisters underground, as PG&E itself has proposed to do at its ISFSI for the Humboldt Bay Nuclear Power Plant.

the EIR considered feasible were the use of a wire-guided anti-tank missile from a boat off-shore from the plant and an impact by an explosive-laden smaller aircraft.⁶

The exclusion zones for vessels seaward of DCPD was recognized, but also taken into account were the range of such missiles and the broad dispersion to “countries of less than stellar records when it comes to political stability, corruption and security.” EIR at 3-249. Also considered were the difficulty in aiming such a missile from a boat and the lack of information about whether such a missile would be effective enough to result in the release of radioactive material. Nevertheless, such an attack was considered plausible enough and its consequences significant enough to warrant consideration. No additional mitigation measures beyond those already proposed in connection with an attack by airplane were identified. EIR at 3-245 to 3-246.

Once again, the County is not suggesting that the NRC should have reached this same conclusion. Rather, had the NRC considered this scenario, and had the NRC made provisions for hearing classified information, it may have learned that such a wire-guided missile is incapable of penetrating an ISFSI storage cask, so

⁶ Recognizing the uncertainty regarding attack by large aircraft, the Germans have also considered attacks by helicopters loaded with explosives. There are no anti-aircraft installations around nuclear power plants.

that this scenario would not need to be considered. Having failed to do this, the NRC has left the County's citizens wondering whether it has taken all reasonable steps to deal with the threat of terrorism. More importantly, the consequence of the NRC's illegal refusal to consider alternatives under NEPA is that the NRC will make its decision without the benefit of the best available information and, thus, may not take the most appropriate actions to protect the County and its citizens from the environmental impacts of an attack on an ISFSI.

II. The Commission Improperly Focused On Quantifying The Risk Of Terrorist Attack

The NRC relied heavily on the non-quantifiability of the risk of terrorist attack to justify its refusal to consider the environmental impacts of such an attack for the purposes of NEPA. It is not necessary to quantify the risks of a terrorist attack on an ISFSI in order to meaningfully consider alternatives and other measures that would mitigate the environmental consequences of such an attack. *PFS*, 58 N.R.C. at 350-51. Indeed, the Commission adopted and the Supreme Court sustained the final rule, known as Table S-3, 44 Fed. Reg. 45362 (1979), as a means of generically complying with NEPA despite acknowledging unquantified uncertainties in its underlying assumptions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., Inc.*, 462 U.S. 87, 98 (1983) (“BG&E”).

Even where the risk of a terrorist attack on an ISFSI cannot be quantified, this has not prevented the NRC from requiring licensees to implement security measures to protect an ISFSI from attack. Quantifiability of the risk has not been the necessary basis for the NRC’s imposition of additional security measures as a response to the terrorist attack on September 11, 2001. This clearly shows that a

risk need not be quantifiable for it to be tangible and to require that specific actions be taken to limit that risk.

NEPA requires the NRC to consider environmental impacts which are not remote and speculative. *Limerick Ecology Action, Inc. v. United States Nuclear Regulatory Com.*, 869 F.2d 719, 739 (3d Cir. 1989). The NRC's security measures for ISFSIs show that the NRC does not consider terrorist attacks on them to be remote and speculative. Accordingly, the possibility that environmental impacts may result from such attacks also cannot be considered to be remote and speculative.

Recognizing this, the County's citizens and its elected representatives proffered contentions regarding the inadequacy of the ER prepared by PG&E. The County did not request the NRC to conduct a "crystal ball" inquiry but simply requested it to consider the reasonable alternative consequences of such an attack on the new potential terrorist target that would be licensed by the NRC.

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C.Cir. 1972). In particular, the County contended that the consideration of alternative sites was incomplete for the purposes of NEPA.⁷ The County believes that a

⁷ The County also noted that by not considering alternative security plans and mitigating measures, the cost-benefit analysis was incomplete because it did not include: (1) a comparison of the security costs which would be borne by the County under alternative security plans; and (2) the costs resulting from the environmental impacts that could be experienced by the County and its citizens as

consideration of alternative sites is necessary to accurately determine whether the environmental impacts of a terrorist attack on the ISFSI and the costs of security measures could be mitigated. This evaluation does not require quantification of the risk of a terrorist attack but can be performed by assuming a realistic release of radioactive material as a result of a terrorist attack, as the NRC currently does for other accidents, and then exploring the environmental impacts of that release as a function of alternative sites. Accordingly, the NRC's reliance on the non-quantifiability of the risk of terrorist attack is inconsistent with the NRC's obligation to take a "hard look" at the proposal and alternatives to it. *Marble Mountain Audubon Soc'y v. Rice*, 914 F.2d 179 (9th Cir. 1990).

a result of security plan failures.

III. The Commission Improperly Found That The Environmental Impacts Of A Terrorist Attack Are A Worst Case Scenario

The Commission improperly applied well-established NEPA law to determine that the consideration of environmental impacts of a terrorist attack on an ISFISI would constitute an excludable worst-case analysis. *PFS*, 56 N.R.C. at 351-54. This is incorrect. NEPA requires the NRC to consider reasonably foreseeable environmental impacts. *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). Since events of September 11, 2001, the environmental impacts from a possible terrorist attack on an ISFISI must be considered reasonably foreseeable and cannot reasonably be characterized as a worst-case analysis. A worst-case analysis, under the now-superseded guidelines promulgated by the Council on Environmental Quality (“CEQ”), required the consideration of remote, catastrophic impact events for which uncertain adverse impacts were assumed to occur. *Save Our Ecosystems v. Clark*, 747 F.2d 1240 (9th Cir. 1984).

Unfortunately, a terrorist attack can no longer be considered remote nor can its impacts be assumed to be uncertain. Accordingly, the Commission wrongfully denied the County and its citizens a hearing on the basis of an incorrect finding that the environmental impacts of a terrorist attack are a worst-case scenario that need not be considered under NEPA.

IV. The Commission Improperly Determined That Security Concerns Could Not Be Considered In A Public Forum

Perhaps the most unsupportable NRC reason for refusing to consider the security contentions raised by the County and SLOMFP is the Commission's statement that "NEPA's public process is not an appropriate forum for considering sensitive security issues." *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-01, 57 N.R.C. 7 (January 23, 2003). This belief was supported by claiming that "NEPA does not override [our] concern for making sure that sensitive security-related information ends up in as few hands as practicable." *PFS*, 56 N.R.C. at 347. Security concerns do not override the NRC's obligation to comply with NEPA, *Weinberger v. Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 144 (1981) ("*Weinberger*"), and NRC practice shows that hearings can be held on NEPA issues consistent with the need for secrecy.

NEPA ensures that an agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning environmental impacts. It also guarantees that the relevant information will be made available to the larger audience that may play a role in both the decisionmaking process and the implementation of that decision. *Robertson v. Methow Valley Citizens*

Council, 490 U.S. 332, 349 (1989). Thus, NEPA is intended to assure the public that the NRC has indeed considered environmental concerns in its decision making process. *BG&E, supra*, 462 U.S. at 97.

Contrary to the Commission's views, NEPA's public process is the quintessentially appropriate forum for considering the potential environmental impacts of terrorist attacks and the alternatives to mitigate those impacts. This is especially so here because the success of a security plan is measured not only by its ability to provide security, but also by its ability to reassure the public by giving it confidence that the new federally licensed facility is safe. To the extent that the County shares in that confidence-building role, it has been foreclosed from performing its role by being denied an opportunity to participate in a hearing on behalf of the County's citizens.⁸

The NRC's conclusion regarding the inappropriateness of NEPA as a forum for considering these environmental issues is based on its earlier decision in *PFS*. A review of the *PFS* analysis shows it is not a legally supportable reasoned decision. The Commission justified its position by stating:

⁸ An opportunity to comment on the NRC's Environmental Assessment ("EA") was not a meaningful substitute because the EA did not include a discussion of alternatives, commenting does not provide a meaningful substitute for the in-depth evaluation that would have resulted from a hearing, and, the Commission consistently excluded consideration of the issue.

Although we conclude in the previous discussion that there is no basis on which to provide a reasonable measure of the risk of terrorism and that the risk of terrorism is far afield from issues involving the natural environment of the facility, the Commission is presently engaged in analyzing how to keep such risk at a minimum. Part of this effort is to protect sensitive information from falling into the hands of those with malevolent intention. The public aspect of NEPA processes conflicts with the need to protect certain sensitive information. NEPA requires agencies to include the public in NEPA reviews. Indeed, public information and public participation form a large part of NEPA *raison d'être*. At the NRC, public input includes not just an opportunity to comment on draft EIS's, but also an opportunity to contest environmental findings at agency hearings on the licensing action in question.

In our view, the public interest would not be served by inquiries at NRC hearings and public meetings into where and how nuclear facilities are vulnerable, how they are protected and secured, and what consequences would ensue if security measures failed at a particular facility. Such NEPA reviews may well have the perverse effect of assisting terrorists seeking effective means to cause a release of radioactivity with potential health and safety consequences.

PFS, 56 N.R.C. at 354 (footnotes omitted).

To see how the public interest could be served without assisting terrorists, contrary to the NRC's claims, it is sufficient to review the consideration of security issues in the County EIR. Five alternative on-site locations were considered for the ISFSI. EIR 4- to 4-9. Safety, including the threat of a terrorist attack, was among the decision criteria applied to choose from among the

alternative sites. EIR at 4-16. The analysis of the terrorist threat was not complicated nor did it involve classified information. Consideration was simply given to the off-site visibility of the ISFSI at each of the locations to determine which of them provided a clear line of sight for would be terrorists. Four of the five locations were found to present the possibility of increased impact on safety as a result of clear lines of sight to the ISFSI. EIR at 3-249.

This experience shows that the threat of a terrorist attack can be addressed under NEPA in public. It also shows that even a simplified analysis of the threat can add meaningfully to the choice of a site from among the possible alternatives. As before, the County is not suggesting that this analysis should have been conducted by the NRC. The County expects that had the NRC conducted such an analysis, it would have been far more sophisticated and might have involved some non-public elements. The County is simply saying that the NRC could have meaningfully factored the impacts of such attacks into its review of the available alternatives and mitigation measures.

As for the Commission's concern about preventing sensitive information from falling into the hands of persons with malevolent intentions, the NRC has successfully addressed that concern when litigating security plans for nuclear power plants. Indeed, the physical security plan for Diablo Canyon was the

subject of challenge. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 & 2), CLI-80-24, 11 N.R.C. 775, 777 (1980). The NRC has essentially ignored its precedent to state, without explanation, that no protective measures would be adequate, although agencies are required to consider the environmental consequences of their decisions even where those considerations cannot be made public for security reasons.

In the past, the NRC has used protective orders to prevent sensitive information from becoming public. See, *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-600, 12 N.R.C. 3 (1980). NRC adjudicatory boards assume that protective orders will be obeyed unless a concrete showing to the contrary is made. *Consumers Power Co.* (Midland Plant, Units 1 & 2), ALAB-764, 19 N.R.C. 633, 643, n.14 (1984). No one could seriously believe that the County would fail to comply with any protective order. Moreover, the County already has responsibilities as an off-site responder in PG&E's Security Plan, and therefore it is already privy to some sensitive Security Plan-related information. Finally, certain issues could be reviewed *in camera* before an audience limited to those with a "need to know."

Rather than follow its own precedent, the NRC chose an unsophisticated approach to protecting security-related information.

NEPA does not override the AEC's (and our) concern for making sure that sensitive security-related information ends up in as few hands as practicable. NEPA itself includes limiting provisions. Section 101(b) of NEPA requires agencies to implement the statute's policies using "all *practicable* means, consistent with *other essential considerations of national policy*." Another passage in the same section provides that the federal government's efforts to "attain the widest range of beneficial uses of the environment" are subject to restraints based on "risks to health and safety, or other undesirable consequences." These provisions caution against using the NEPA process for a terrorism review. A full-scale NEPA process inevitably would require examination not only of how terrorists could cause maximum damage but also how they might be thwarted. But keeping those kinds of information secret is vital. To use NEPA's own terms, confidentiality in this area is an "essential consideration of national policy," protects against "risks to health and safety," and avoids "undesirable and unintended consequences."
PFS, 56 N.R.C. at 355. (footnotes omitted) (emphasis in original)

There is no doubt that security interests must be accommodated in the NEPA process. But the Commission's reliance on those interests to refuse to consider environmental impacts, instead of using alternatives to implement its NEPA responsibilities to the maximum extent possible under the circumstances, is contrary to NEPA requirements. *Weinberger, supra*, 454 U.S. at 143.⁹

⁹ The Commission recognized this precedent but dismissed it by stating that "a formal NEPA review, secret or otherwise, would not add meaningfully to our understanding of the terrorism issue." *PFS*, 56 NRC at 356. Thus, contrary to the bedrock principles of NEPA, the Commission has determined that it knows it all and that the public has nothing to contribute, even when the public is a knowledgeable County government responsible for the health and welfare of its citizens.

Finally, the NRC attempted to argue that it has no choice under the Atomic Energy Act of 1954, as amended, (“AEA”), specifically 42 U.S.C. § 2167, but to preclude consideration of the environmental impacts of a terrorist attack in an ISFSI licensing proceeding.

For the NRC, protecting safeguards information is not simply a policy choice. It is *required* by law. Section 147 of the AEA provides that the NRC “shall” prohibit unauthorized disclosures of key security-related information. Consequently, the NRC cannot make publicly available the kind of information necessary for more than a superficial NEPA review. This limitation on information availability supports our decision not to use NEPA, in part a public information statute, as our vehicle to analyze terrorism.

And widespread NEPA terrorism reviews, even if we attempted to keep EISs and hearings confidential, increase the risk of dangerous security breaches.

PFS, 56 N.R.C. at 355-56 (footnotes omitted).

Here, again, the NRC ignores prior precedent. The prohibition against unauthorized dissemination does not prevent the NRC from making authorized disclosures to individuals who satisfy the NRC’s criteria for the disclosure of such security-related information. The County’s counsel and expert witnesses could be authorized by the NRC to obtain the information necessary for meaningful participation in a NEPA consideration of alternatives and mitigation measures. A conclusory, unsupported statement that confidentiality will not work simply does not provide a reasoned basis for excluding all consideration of environmental

alternatives, especially when it involves the County, which is intimately involved in response plans for security events.

Moreover, contrary to the NRC's characterization, NEPA is not being proposed as a vehicle to analyze terrorism. It is being proposed as a vehicle to do what NEPA requires the NRC to do, consider alternatives that could mitigate the environmental impacts of terrorism. As discussed above, security information is not required for that activity.

An agency decision cannot be upheld where the agency's reasoning does not support its conclusions. The NRC's failure to acknowledge its precedent, or to explain why it is not following that precedent, cannot be sustained. *Motor Vehicles Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.* 463 U.S. 29, 44 (1983). The NRC's decision is based on faulty reasoning which does not even acknowledge, let alone, distinguish its prior precedent for permitting security issues to be adjudicated under protective order. For these reasons, the Commission's decision is fatally flawed and must be reversed and remanded to require a hearing on the alternatives and mitigation measures associated with the environmental impacts resulting from a terrorist attack on the ISFSI.

CONCLUSION

By refusing to consider the environmental issues raised by the County and its citizens, the NRC has created the possibility that the County will bear all the risks and burdens of NRC errors in judgment, without any opportunity to have its concerns addressed meaningfully. Accordingly, for all of the foregoing reasons, the NRC's refusal to admit the NEPA contentions proffered by SLOMFP and the County must be reversed, the NRC must be directed to conduct a hearing on those contentions, the NRC must be directed to permit interested governmental entities, including the County, to participate in that hearing, and the Court should also grant such other relief as it determines is warranted.

Dated: March 22, 2004

Respectfully submitted,

James B. Lindholm, Esq. Timothy McNulty, Esq. Office of the County Counsel County of San Luis Obispo	<hr style="border: 0.5px solid black; margin-bottom: 5px;"/> Robert K. Temple, Esq. Sheldon L. Trubatch, Esq. Offices of Robert K. Temple, Esq. Attorneys for Amicus County of San Luis Obispo
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APPENDIX

Excerpts from Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI), Final Environmental Impact Report, Prepared for County of San Luis Obispo Department of Planning and Building by Marine Research Specialists (MRS), 3140 Telegraph Road, Suite A, Ventura, California and certified pursuant to the California Public Resources Code, § 21151 on February 26, 2004.

Appendix Contents

Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) Final Environmental Impact Report Cover Page.

Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) Final Environmental Impact Report, Section 3.11, System Safety/Risk of Upset, pp. 3-236 – 3-239; 3-248 – 3-253.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

=====

SAN LUIS OBISPO MOTHERS FOR PEACE, et al.

Petitioners-Appellants

v.

U.S. NUCLEAR REGULATORY COMMISISON,

Defendants-Appellees,

PACIFIC GAS AND ELECTRIC COMPANY, et al.

Intervenors

=====

STATEMENT OF RELATED CASES

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The following related cases are pending before the United States Court of Appeal for the Ninth Circuit:

California Public Utilities Commission, et al. v. U.S. Nuclear Regulatory Comm'n, Docket No. 02-72735 (filed August 25, 2002)

In re Pacific Gas and Electric Co., Docket No. 02-16990 (filed September 30, 2002)

Dated this 22 day of March, 2004

James B. Lindholm, Esq. Robert K. Temple, Esq.
Timothy McNulty, Esq. Sheldon L. Trubatch, Esq.
Office of the County Counsel Offices of Robert K. Temple, Esq.
County of San Luis Obispo Attorneys for Amicus
County of San Luis Obispo

ADDENDUM OF PERTINENT STATUTES AND REGULATIONS

UNITED STATES CODE (U.S.C.)

42 U.S.C. § 2167. Safeguards information

(a) Confidentiality of certain types of information; issuance of regulations and orders; considerations for exercise of Commission's authority; disclosure of routes and quantities of shipment; civil penalties; withholding of information from Congressional committees

In addition to any other authority or requirement regarding protection from disclosure of information, and subject to subsection (b)(3) of section 552 of title 5, the Commission shall prescribe such regulations, after notice and opportunity for public comment, or issue such orders, as necessary to prohibit the unauthorized disclosure of safeguards information which specifically identifies a licensee's or applicant's detailed -

(1) control and accounting procedures or security measures (including security plans, procedures, and equipment) for the physical protection of special nuclear material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security;

(2) security measures (including security plans, procedures, and equipment) for the physical protection of source material or byproduct material, by whomever possessed, whether in transit or at fixed sites, in quantities determined by the Commission to be significant to the public health and safety or the common defense and security; or

(3) security measures (including security plans, procedures, and equipment) for the physical protection of and the location of certain plant equipment vital to the safety of production or utilization facilities involving nuclear materials covered by paragraphs (1) and (2) (FOOTNOTE 1)

(FOOTNOTE 1) So in original. Probably should be followed by a semicolon.

if the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the

likelihood of theft, diversion, or sabotage of such material or such facility.
The Commission shall exercise the authority of this subsection -

(A) so as to apply the minimum restrictions needed to protect the health and safety of the public or the common defense and security, and

(B) upon a determination that the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility.

Nothing in this chapter shall authorize the Commission to prohibit the public disclosure of information pertaining to the routes and quantities of shipments of source material, by-product material, high level nuclear waste, or irradiated nuclear reactor fuel. Any person, whether or not a licensee of the Commission, who violates any regulation adopted under this section shall be subject to the civil monetary penalties of section 2282 of this title. Nothing in this section shall be construed to authorize the withholding of information from the duly authorized committees of the Congress.

(b) Regulations or orders issued under this section and section 2201(b) of this title for purposes of section 2273 of this title

For the purposes of section 2273 of this title, any regulations or orders prescribed or issued by the Commission under this section shall also be deemed to be prescribed or issued under section 2201(b) of this title.

(c) Judicial review

Any determination by the Commission concerning the applicability of this section shall be subject to judicial review pursuant to subsection (a)(4)(B) of section 552 of title 5.

(d) Reports to Congress; contents

Upon prescribing or issuing any regulation or order under subsection (a) of this section, the Commission shall submit to Congress a report that:

(1) specifically identifies the type of information the Commission intends to protect from disclosure under the regulation or order;

(2) specifically states the Commission's justification for determining that unauthorized disclosure of the information to be protected from disclosure under the regulation or order could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of such material or such facility, as specified under subsection (a) of this section; and

(3) provides justification, including proposed alternative regulations or orders, that the regulation or order applies only the minimum restrictions needed to protect the health and safety of the public or the common defense and security.

42 U.S.C. § 4321, et seq.

National Environmental Policy

Sec. 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

CODE OF FEDERAL REGULATIONS (C.F.R.)

10 C.F.R. Part 72, Subpart H

10 C.F.R. § 72.180: Physical protection plan.

The licensee shall establish, maintain, and follow a detailed plan for physical protection as described in § 73.51 of this chapter. The licensee shall retain a copy of the current plan as a record until the Commission terminates the license for which the procedures were developed and, if any portion of the plan is superseded, retain the superseded material for 3 years after each change or until termination of the license. The plan must describe how the applicant will meet the requirements of § 73.51 of this chapter and provide physical protection during on-site transportation to and from the proposed ISFSI or MRS and include within the plan the design for physical protection, the licensee's safeguards contingency plan, and the security organization personnel training and qualification plan. The plan must list tests,

inspections, audits, and other means to be used to demonstrate compliance with such requirements.

10 C.F.R. § 72.182: Design for physical protection.

The design for physical protection must show the site layout and the design features provided to protect the ISFSI or MRS from sabotage. It must include:

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

10 C.F.R. § 72.184: Safeguards contingency plan.

- (a) The requirements of the licensee's safeguards contingency plan for responding to threats and radiological sabotage must be as defined in appendix C to part 73 of this chapter. This plan must include Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix, the first four categories of information relating to nuclear facilities licensed under part 50 of this chapter. (The fifth and last category of information, Procedures, does not have to be submitted for approval.)
- (b) The licensee shall prepare and maintain safeguards contingency plan procedures in accordance with appendix C to 10 CFR part 73 for effecting the actions and decisions contained in the Responsibility Matrix of the licensee's safeguards contingency plan. The licensee shall retain a copy of the current procedures as a record until the Commission terminates the license for which the procedures were developed and, if any portion of the

procedures is superseded, retain the superseded material for three years after each change.

10 C.F.R. § 72.186: Change to physical security and safeguards contingency plans.

(a) The licensee shall make no change that would decrease the safeguards effectiveness of the physical security plan, guard training plan or the first four categories of information (Background, Generic Planning Base, Licensee Planning Base, and Responsibility Matrix) contained in the licensee safeguards contingency plan without prior approval of the Commission. A licensee desiring to make a change must submit an application for a license amendment pursuant to § 72.56.

(b) The licensee may, without prior Commission approval, make changes to the physical security plan, guard training plan, or the safeguards contingency plan, if the changes do not decrease the safeguards effectiveness of these plans. The licensee shall maintain records of changes to any such plan made without prior approval for a period of three years from the date of the change, and shall, within two months after the change is made, submit a report addressed to Director, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, in accordance with § 72.4, containing a description of each change. A copy of the report must be sent to the Regional Administrator of the appropriate NRC Regional Office specified in appendix A to part 73 of this chapter.

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED.R.APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

**Form 8. Certificate of Compliance Pursuant to Fed.R.App. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 03-74628.
(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *And Attached to the Back of Each Copy of the Brief***

I certify that: **(check appropriate option(s))**

 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

- Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words), or is
- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

 2. The attached brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

- This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;
- This brief complies with a page or size-volume limitation established by separate court order dated _____ and is
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3. Briefs in Capital Cases

- This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 and is
- Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words) or is
- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

X 4. Amicus Briefs

- Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less, or is
- Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text, or is
- Not subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

Dated this 22 day of March, 2004,

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United States Court of Appeals for the Ninth Circuit

San Luis Obispo Mothers for Peace, et al.)	
Petitioners)	
)	
v.)	
)	
U.S. Nuclear Regulatory Commission)	No. 03-74628
Respondent)	
)	
Pacific Gas and Electric Company)	
Intervenors)	
)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of the Amicus Curiae San Luis Obispo County have been served upon the following persons by U.S. mail, first class on this ____ day of March, 2004:

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