I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the aftermath of September 11, 2001, Petitioners sought to ensure compliance by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") with its obligations under the National Environmental Policy Act ("NEPA") to protect the environment from the potentially devastating adverse environmental impacts of a terrorist attack on a proposed Independent Spent Fuel Storage Installation ("ISFSI") to be built on the site of the Diablo Canyon nuclear power plant. Thus, Petitioners requested the NRC to hold a hearing on the environmental impacts of such attacks, and evaluate reasonable alternatives for avoiding or mitigating those alternatives. Petitioners also sought to enforce the Atomic Energy Act's ("AEA's") requirement that any license issued for the Diablo Canyon ISFSI must be based on a reasonable level of assurance that the entire Diablo Canyon nuclear complex, including the ISFSI and the nuclear power plant, was protected by adequate security measures. At the threshold, the NRC completely foreclosed Petitioners from advancing either their environmental or their safety claims. *Pacific Gas & Electric Co.* (Diablo Canyon ISFSI), CLI-03-01, 57 NRC 1 (2003) (hereinafter "CLI-03-01"), EOR 33; *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel

Storage Installation), CLI-02-23, 56 NRC 230 (2002) (hereinafter "CLI-02-23"), EOR 27.

Contrary to the arguments made in its responsive brief, the NRC cannot foreclose, as a matter of law, consideration of Petitioners' environmental contentions when they raise factual issues of the foreseeability of terrorist attacks proximately resulting in devastating physical impacts on the environment. Nor can the NRC avoid its NEPA obligations when there is no explicit statutory exclusion and no impossibility of compliance. The NRC also cannot deny Petitioners a hearing on their safety claim when it has an independent statutory obligation to only issue a license that poses no undue safety risk, and contrary to its argument, the NRC has not afforded Petitioners any other effective and available forum to have such claim addressed. Therefore, both of the NRC's decisions below should be reversed and remanded to the agency for hearings on Petitioners' environmental and safety claims.

II. ARGUMENT

A. The NRC Misstates the Standard Of Review.

The NRC cites *NLRV v. Bell Aeorospace Co.,* 416 U.S. 267 (1974) for the proposition that the choice between rulemaking and adjudication lies in the first instance within an agency's discretion, and the standard of review of

such a choice is "highly deferential." NRC Brief at 24. As this Court held in *Pfaff v. U.S. Department of Housing and Urban Development,* 88 F.3d 739 (9th Cir. 1996), however, no deference is due where the agency's "'reliance on an adjudication would amount to an abuse of discretion.'" *Id.* at 748, quoting *NLRB v. Bell Aerospace,* 416 U.S. at 294. As discussed below in Section II.B, the NRC abused its discretion by basing its dismissal of Petitioners' environmental contentions on an unsupported policy statement that was issued in a separate proceeding to which Petitioners were not a party, and in which they had no opportunity to present their evidence. Thus, no deference is due.

The NRC also argues that this Court must defer to the NRC's interpretation of the AEA and implementing regulations unless it is "plainly erroneous or inconsistent with the regulation." NRC Brief at 24-25, citing *Robertson v. Methow Valley Citizen's Council,* 490 U.S. 332 (1989); *Chevron, U.S.A. Inc. v. NRDC,* 467 U.S. 837 (1984); *Brand X. Internet Services v. FCC,* 345 F.3d 1120 (9th Cir. 2003); *Vincent v. Apfel,*191 F.3d 1143 (9th Cir. 1999). The Court need not defer to the NRC's interpretation of its governing statute and regulations where, as here, the NRC failed to follow its own standards and its interpretation of the law is inconsistent with

the NRC's own "announced policy." *Sierra Club v. NRC,* 862 F.2d 222, 228 (9th Cir. 1988).

B. The NRC Was Not Entitled to Dismiss Petitioners' Environmental Contentions As a Matter of Law.

The NRC does not dispute Petitioners' assertion that the AEA and the NRC's implementing regulations required it to grant Petitioners a hearing on their environmental contentions if those contentions raise, with sufficient specificity and basis, a "genuine dispute with the applicant on a material issue of law or fact." *See* Petitioners' Initial Brief at 33, 10 C.F.R. § 2.714. The NRC argues, however, that it was entitled to dispose of Petitioners' contentions as a matter of law, without reaching the question of whether Petitioners had submitted sufficient information to raise a material factual dispute as to whether environmental impacts of terrorist attacks are reasonably foreseeable and therefore must be considered under NEPA. NRC Brief at 58-59. According to the NRC, Petitioners' environmental contentions raise a "generic legal issue" that the Commission was entitled to dispose of based on an "internal legal precedent" established in a prior adjudication. NRC Brief at 51-53, citing *Private Fuel Storage, L.L.C.,* (Independent Spent Fuel Storage Installation), CLI-02-25 (2002), 56 NRC 340, 356 n.65 (2002) (hereinafter "*Private Fuel Storage"*). *See also* NRC

Brief at 55 (asserting that the issue before the Commission in *Private Fuel Storage* "was one of legal policy, not dependent on adjudicatory facts").

As discussed below, there is no merit in either of the two alleged legal principles asserted by NRC in support of its argument: the alleged absence of proximate cause and the lack of foreseeability. Accordingly, there is no valid "internal legal precedent" that could be applied to deny Petitioners a hearing in this case.

1. The *Metropolitan Edison* doctrine is not applicable to this case.

The NRC first argues that as a matter of law, under the doctrine established in *Metropolitan Edison C. v. People Against Nuclear Energy,* 460 U.S. 766, 775 (1983) (hereinafter "*Metropolitan Edison"*), the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI are not cognizable under NEPA because licensing of the ISFSI is not the "proximate cause" of a terrorist attack. NRC Brief at 25-34. According to the NRC, "the intervention of malevolent human action 'lengthens the causal chain beyond the reach of NEPA.'" *Id.* at 26*,* quoting *Metropolitan Edison* at 775.

The NRC misconstrues *Metropolitan Edison,* which merely found that in order to be cognizable under NEPA, environmental impacts must result from actual physical changes to the environment, not just the perception of

changes. 460 U.S. at 774. Here, there can be no doubt that the environmental impacts of which Petitioners seek consideration would result from an actual physical change in the environment, *i.e.,* a radiological release caused by a successful terrorist attack.

In *Metropolitan Edison,* the Supreme Court found that while effects on psychological health may qualify as environmental impacts under NEPA, 460 U.S. at 771, they need not be considered in an EIS unless they are "proximately related" to an actual change in the environment. *Id.* at 774. The Court concluded that psychological harm caused by a *perception* of risk posed by the Three Mile Island nuclear plant, rather than any actual change in the environment, need not be considered. *Id.* at 775. In other words, as this Court summarized in *No GWEN Alliance v. Aldridge,* 855 F.2d 1380, 1385 (9th Cir. 1988) (hereinafter "No GWEN"), "psychological health damage from an *unrealized risk* of an accident is not an effect on the physical environment cognizable under NEPA." *Id.,* citing *Metropolitan Edison* at 772-74, 776-77 (emphasis added).

By its own terms, *Metropolitan Edison* does not apply to this case. As the Supreme Court noted, the *Metropolitan Edison* case involved:

> effects caused by the risk of an accident. *The situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs at TMI-1, is an entirely different case.* The NRC considered, in the original EIS and in the most recent

> EIA for TMI-1, the possible effects of a number of accidents that might occur at TMI-1.

Id. at 775 n.9 (emphasis added). Here, Petitioners have presented an "entirely different case" than *Metropolitan Edison,* by asking the NRC to consider actual physical effects on the environment that would occur if the risk of a terrorist attack on the Diablo Canyon ISFSI were realized. *Id.* There can be no doubt that the harm caused by a successful terrorist attack – widespread injuries to human health and the environment caused by radiological contamination – is proximately related to the actual operation of the Diablo Canyon ISFSI, rather than a human perception of harm.

Indeed, consideration of the effects of an accident caused by a terrorist attack would be consistent with the NRC's longstanding practice. When formulating EISs, the NRC considers the environmental impacts of nuclear facility accidents caused by other independent events. By itself, operation of a nuclear facility would not constitute the direct cause of an accident, because normal operation of a nuclear facility is designed to be incident-free. Accidents occur only when independent intervening events such as earthquakes, mistakes by operators, or nearby explosions cause the nuclear facility to malfunction.

Thus, for example, under the NRC's guidance for implementation of NEPA, an EIS must examine the potential for accidents caused by a range of

"accident sequences," including internal events (such as equipment failure) and external events (such as tornados, floods, earthquakes, and explosions at adjacent facilities). *See* NUREG-1555, Standard Review Plan for Environmental Review for Nuclear Power Plants at 7.2-3 (October 1999), Exhs. 39 (hereinafter "NUREG-1555"). Just as adverse physical impacts would flow from these independent initiating events, so adverse physical impacts would flow from a terrorist attack on the Diablo Canyon ISFSI.[1]

Nonetheless, the NRC argues that terrorist attacks are different from other potential accident initiators that it considers in EISs, because they involve "deliberate" and "criminal" action. NRC Brief at 31. According to the NRC, the element of criminal intent makes the risk more "attenuated." NRC Brief at 30-31. This argument is both illogical and contrary to basic

[1] Because the intervening events in a terrorist attack involve physical impacts, they are unlike the circumstances of *Presidio Golf Club v. National Park Service,* 155 F.3d 1153 (9th Cir. 1998), cited by the NRC at page 34. In that case, this Court held that the cognizable environmental impacts of constructing a new public golf club at the Presidio did not include physical impacts on a nearby private golf club that could result from economic competition between the two clubs. *Id.* at 1163. The Court concluded that Petitioners' claim that construction of the public golf club would lead to economic competition, which would then lead to physical harm to the environment of the private golf club, established too "attenuated [a] chain of causation" to warrant NEPA review. *Id.* Here, in contrast, Petitioners contend that a terrorist attack is one of a number of foreseeable independent events like an earthquake that could lead directly to an accidental release of radioactivity from the Diablo Canyon ISFSI, thus causing widespread harm to the environment.

tort law from which the concept of proximate cause derives. Whether a person causes a nuclear accident out of negligence or intent has no bearing on the nature of the environmental impacts of the accident. The amount of radiological material that escapes a punctured spent fuel storage cask in an accident does not depend on the question of whether the cask was punctured through an intentional act or a negligent act. The terrorist's intent is no more attenuated a link in the causal chain than the operator's negligence.

Moreover, under the "familiar doctrine of proximate cause from tort law," which the Supreme Court found to be useful in evaluating the circumstances of the *Metropolitan Edison* case, 460 U.S. at 774, an actor may be held liable for the intervening intentional and criminal conduct of a third party when that conduct is foreseeable.[2]

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[2] *See* Restatement (Second) of Torts, §§ 302(B), 449 (1965). Thus, in *Richardson v. Ham,* for example, the Supreme Court of California found that the owners of a bulldozer were liable for personal injury and property damage when a group of third party "intermeddlers" stole the bulldozer and took it for a joyride. 285 P.2d 269, 271 (Cal. 1955). *See also Murray v. Wright*, 333 P.2d 111, 113 (Cal. Ct. App. 1958) (automobile owner who left car keys in ignition held liable when the car was stolen and hit another person); *Palma v. U.S. Industrial Fasteners*, *Inc.,* 681 P.2d 893, 902-03 (Cal. 1984) (truck owner who left truck parked overnight, unlocked, in a high crime area held liable when truck was stolen and hit a third party); *Henderson v. United States*, No. 83-5748, 1986 U.S.App. LEXIS 37306 at *20 (9th Cir. Sept. 4, 1987) (government held liable to a thief who injured himself while stealing electrical wires from a poorly protected military facility).

The NRC tries to demonstrate the applicability of *Metropolitan Edison* by analogizing the effects of a psychological perception of danger posed by the Three Mile Island nuclear power plant to a terrorist's perception of an opportunity to attack the Diablo Canyon ISFSI. NRC Brief at 31. According to the NRC, the terrorist's perception of opportunity for attack, coupled with the "deliberate decision to act on that opportunity," amounts to the type of "non-environmental 'middle link'" that breaks the chain of causation for purposes of NEPA consideration. *Id.,* quoting *Metropolitan Edison,* 460 U.S. at 775.

The NRC's analogy is inapt. In *Metropolitan Edison,* the "middle link" constituted a subjective perception of an "unrealized" physical impact. 460 U.S. at 775. The ensuing psychological harm flowed entirely from this perception and not from any physical change in the environment. *Id.* Here, in stark contrast, the "middle link" constitutes actual physical harm to the ISFSI caused by a physical attack that leads to a radiological release. The attackers do not "perceive" a risk that may or may not exist; they *know* the facility possesses vulnerabilities, and may act on that knowledge. The

ensuing environmental harm flows from the attackers' actions, not their mere perceptions.[3]

Accordingly, the NRC fails in its attempt to exclude, as a matter of law, the environmental impacts of terrorist attacks or other acts of malice or insanity from the class of impacts that must be considered under NEPA.

2. The question of whether the environmental impacts of terrorist attacks are foreseeable cannot be disposed of as a matter of law.

The NRC also claims that as a matter of law, the environmental impacts of a terrorist attack are "too speculative" to rise to the level of the

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[3] The NRC also makes an inapt analogy to *Glass Packaging Institute v. Reagan,* 737 F.2d 1083 (D.C. Cir.), *cert. denied,* 469 U.S. 1035 (1984), *overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA,* 861 F.2d 277, 283 n. 2 (D.C. Cir. 1988). In that case, the D.C. Circuit held that in proposing to allow the packaging of liquor in plastic bottles, the Bureau of Alcohol, Tobacco and Firearms was not required to address the environmental impacts of tampering with the plastic bottles by a "deranged criminal." *Id* at 1091.

The NRC contends that "[i]n essence, *Glass Packaging* held that the postulated criminal activity that would introduce contaminated material into the plastic bottles was an 'intervening action' that was outside the scope of NEPA." NRC Brief at 33. In fact, the "essence" of *Glass Packaging* is that the "'natural and physical environment'" that is protected by NEPA cannot reasonably be interpreted to include the stomachs of the few individuals who are unlucky enough to ingest adulterated liquor. 737 F.2d at 1091, quoting Council on Environmental Quality regulations for implementation of NEPA, 40 C.F.R. § 1508.14 (1983). Here, in contrast, the impacts of acts of malice or insanity against the Diablo Canyon ISFSI could include widespread adverse impacts of radiological contamination on human health and the environment.

"reasonably foreseeable" impacts that must be considered under NEPA. NRC Brief at 36. As discussed below, however, the NRC has no rational basis for treating the foreseeability of terrorist attacks as a legal issue; and indeed, the NRC's position is directly contradicted by the record.

a. The NRC has no rational basis for declaring that the environmental impacts of terrorist attacks are speculative as a matter of law.

If there was ever a time when the speculative nature of terrorist attacks could be declared as a matter of law, that era ended conclusively on September 11, 2001. As the NRC's Atomic Safety and Licensing Board observed in a 2002 licensing case:

> Regardless of how foreseeable terrorist attacks that could cause a beyond-design-basis accident were prior to the terrorist attacks of September 11, 2001, involving the deliberate crash of highjacked jumbo jets into the twin towers of the World Trade Center in New York City and the Pentagon in the Nation's capital, killing thousands of people, it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact that these terrorist attacks occurred demonstrates that massive and destructive terrorist attacks can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.

Duke Cogema Stone and Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 446 (2001), *reversed in relevant part,* CLI-02-24, 56 NRC 335 (2002). For this reason, no valid

comparison can be made between this case and *No GWEN,* on which the NRC relies. NRC Brief at 36-38. In *No GWEN,* the plaintiffs argued that the Air Force's installation of numerous 300-foot radio towers, which would become components of the Ground Wave Emergency Network (GWEN), would make prolonged nuclear war more likely and the environmental impact of such a nuclear war should be considered under NEPA. Noting that the plaintiffs themselves acknowledged that the possibility of nuclear war was speculative and had never been realized, the Court refused to require preparation of an EIS regarding impacts of an attack on the towers. *Id.,* 855 F.2d at 1386.

Unlike the specter of nuclear war, terrorist attacks against major United States facilities have, in fact, been realized and continue to constitute a real and present danger as Petitioners maintained in their contentions. President Bush and other senior government officials have repeatedly referred to potential terrorist threats against nuclear facilities, clearly deeming them to be reasonably foreseeable and credible.[4] It is no longer

[4] *See* Amicus Brief of the States of California, Massachusetts, Utah and Washington and at 6-11 for detailed examples. Although NEI points out that the White House has retracted President Bush's announcement in his 2002 State of the Union Address that U.S. nuclear facility blueprints were found in Afghanistan, NEI Brief at 20 n.13, the staff of the National Commission on Terrorist Attacks on the United States recently reported that Al Qaeda's original plan for September 11, 2001, included attacking two

possible to declare, as a matter of law, that the potential for such events is merely speculative.

b. The question of whether the environmental impacts of terrorist attacks are foreseeable is a factual in nature, not legal.

Moreover, as the NRC's own brief makes clear, the question of the foreseeability of terrorist attacks or other acts or malice or insanity on the Diablo Canyon ISFSI is essentially factual in nature, not legal. For instance, the judicial standard cited by the NRC for evaluating the foreseeability of environmental impacts is fact-based:

> Whether a particular set of impacts is definite enough to take into account, or too speculative to warrant consideration, reflects several factors. With what confidence can one say that the impacts are likely to occur? Can one describe them "now" with sufficient specificity to make their consideration useful? If the decisionmaker does not take them into account "now," will the decisionmaker be able to take account of them before the agency is so firmly committed to the project that further environmental knowledge, as a practical matter, will prove irrelevant to the government's decision?

NRC Brief at 35-36, quoting *Sierra Club v. Marsh,* 769 F.2d 868, 878 (1st Cir. 1985). Not surprisingly, the NRC responds to these questions with broad factual assertions:

> No one can say with any confidence whether the claimed impacts are likely to occur, much less describe "how" exactly those impacts might

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unidentified nuclear plants with jetliners. Dan Eggen, *Al Qaeda Scaled Back 10-Plane Plot,* WASH. POST, June 17, 2003, at A-1.

> happen or describe them with "sufficient specificity to make their consideration useful."

NRC Brief at 36, quoting *Sierra Club v. Marsh,* 769 F.2d at 878. Thus, on their face, the considerations that are relevant to the question of whether terrorist attacks are foreseeable are factual in nature, not legal. Therefore, they cannot be decided as a matter of law.[5]

c. The Vehicle Bomb Rule contradicts the NRC's argument that the environmental impacts of terrorist attacks are not foreseeable.

The NRC must provide a "convincing statement of reasons" for any decision not to prepare an EIS. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211 (9th Cir. 1998), *cert. denied sub. nom. Malheur Lumber Co. v. Blue Mountains Biodiversity Project,* 527 U.S. 1003 (1999). *Id.* The NRC's rationale for declaring that impacts of terrorist attacks are not foreseeable is utterly unconvincing, because it cannot be

[5] Tellingly, in attempting to reassure the Court that "Diablo Canyon is not a particularly vulnerable or attractive terrorist target," the NRC engages in its own factual evaluation of the foreseeability of terrorist attacks against the Diablo Canyon ISFSI and the credibility of various terrorist attack scenarios. NRC Brief at 27 n.7. For instance, the Commission argues that Diablo Canyon is unlikely to be attacked by land because of its "remote" location. *Id.* While Petitioners disagree with the result of the NRC's assessment, which glaringly omits consideration of the vulnerability of the site to airborne attack, it demonstrates that the NRC considers itself capable of evaluating the foreseeability of a terrorist attack against the Diablo Canyon ISFSI, and that resolution of the issue depends on the specific factual circumstances of this case.

reconciled with the NRC's analysis in the Vehicle Bomb Rule, on which Petitioners relied for their environmental contentions. EOR 69-71; Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (August 1, 1994), Exhs. 14-25.

In the Vehicle Bomb Rule, the Commission addressed the same factual questions posed in *Sierra Club v. Marsh* and reached completely different conclusions regarding the foreseeability of terrorist attacks using vehicle bombs. The Commission abandoned its previous position that such attacks are too speculative to plan for and found that the threat, "although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence." *Id.* at 38,890-91, Exhs.15-16.

Moreover, the Commission identified factors that could be used in such a qualitative analysis, such as the motive and capacity of potential attackers and the pattern of past incidents. *Id.* at 38,891, Exhs.16. The Commission also found that it was capable of determining how such an attack might happen by using conditional probabilistic analysis to evaluate the vulnerability of a facility. *Id.* Thus, the Commission demonstrated that the environmental impacts of terrorist attacks meet the *Sierra Club v. Marsh* test of foreseeability, because their likelihood can be qualitatively evaluated

with a reasonable degree of confidence, and they can be described with sufficient specificity to make their consideration useful.[6]

In its brief, the Commission argues that the reasoning of the Vehicle Bomb Rule does not apply to this case, because it addressed:

> one specific type of threat, which -- while unpredictable -- was relatively easy to ascertain: vehicles operate in a certain manner and by a certain method and the Commission issued guidance to protect against certain threat scenarios.

NRC Brief at 46. In "contrast," according to the NRC, Petitioners ask the NRC to analyze "an open-ended threat by any and all possible scenarios -- and results." *Id.*

Neither the NRC's narrow characterization of the rationale for the Vehicle Bomb Rule nor its broad characterization of Petitioners' contentions is supported by the record. The NRC's statement that the threat of a vehicle

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[6] Intervenor-Respondent Pacific Gas & Electric Company ("PG&E") argues that under NEPA's "rule of reason," the NRC should not be required to consider the environmental impacts of terrorist attacks in an EIS because it is not possible to quantify the risks of such events. PG&E Brief at 27-28. *See also* NEI Brief at 21-22. In making this argument, PG&E ignores NRC regulation 10 C.F.R. § 51.71, which specifically requires that "important qualitative considerations" must be discussed in qualitative terms, even where they can't be quantified. PG&E's argument also ignores the Commission's conclusion in the Vehicle Bomb Rule that even though it was not capable of quantifying the risk of a vehicle bomb attack, it could devise qualitative criteria for evaluating the potential for those attacks. 59 Fed. Reg. at 38,891, Exhs.16. These qualitative criteria are presented in general terms, such that they can be applied with equal effectiveness to other types of terrorist attacks.

bomb was "relatively easy to ascertain" in comparison with other types of terrorist attacks is belied by the Vehicle Bomb rule itself, which is based on general principles that would also be applicable to other types of terrorist attacks, including the attacks of September 11, 2001:

> The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that . . . eroded [our prior] basis for concluding that vehicle bombs could be excluded from any consideration of the domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open market in the United States.

See Petitioners' Contentions at 27, EOR 70, quoting 59 Fed. Reg. at 38,891, Exhs. 16. As Petitioners asserted in Contention EC-1, these same considerations continue to apply in the post-September 11 environment. Petitioners' Contentions at 28, EOR 71.

Moreover, nothing in the record supports the argument by NRC, PG&E, and amicus Nuclear Energy Institute ("NEI"), that Petitioners seek an open-ended or "worst-case" inquiry into every conceivable mode of attack by a terrorist. NRC Brief at 38-40, citing *Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017 (9th Cir. 1980); *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 354-55 (1989). *See also* PG&E Brief

at 31, NEI Brief at 23-25. Petitioners do not seek a worst-case analysis of the environmental impacts of terrorist attacks. Instead, they seek an evaluation of reasonably foreseeable impacts of terrorist attacks on the Diablo Canyon ISFSI -- the same type of inquiry that is outlined in the Vehicle Bomb rule. Just as the Commission did not consider such an inquiry to be open-ended in the case of the Vehicle Bomb Rule, it would not be open-ended in the Diablo Canyon ISFSI licensing proceeding.

In fact, the evaluation of environmental impacts sought by Petitioners would be no more "open-ended" than the inquiries that the NRC conducts into other types of accident scenarios. As demonstrated in the NRC's guidance document for EISs regarding nuclear power plant licensing, the NRC performs a consequence analysis for "dominant" severe-accident sequences, not every conceivable sequence. NUREG-1555 at 7.2-2, Exhs. 38. Similarly, and reasonably, Petitioners seek consideration of the impacts of credible terrorist attacks, not *any* conceivable terrorist attack.

The NRC completely fails to explain why the general qualitative criteria for evaluating the foreseeability of vehicle bomb attacks and other types of accidents would be inapplicable to the evaluation of the potential for terrorist attacks on the Diablo Canyon ISFSI. Furthermore, it is unlikely that the NRC could come up with such a rationale, given that the NRC is

engaged in exactly this type of analysis with respect to the vulnerability of ISFSIs and other nuclear facilities. As the Commission announced in *Private Fuel Storage*:

> [T]he NRC, in conjunction with DOE laboratories, is continuing a major research and engineering effort to evaluate the vulnerabilities and potential effects of a large commercial aircraft impacting a nuclear power plant. This effort also includes consideration of possible additional preventive or mitigative measures to further protect health and safety in the event of a deliberate aircraft crash into a nuclear power plant or spent fuel storage facility.

56 NRC at 356 n.65, quoting *PSEG Nuclear LLC* (Salem Nuclear Generating Station, Units 1 and 2); Hope Creek Generating Station), DD-02-3, 56 NRC 243, 262 (2002), *review declined,* unpublished letter of NRC Secretary (Dec. 6, 2002). The NRC offers no plausible rationale for refusing to perform such an analysis under NEPA.[7]

[7] NEI argues that if Petitioners' contentions were admitted, it would open a broad inquiry into such subjects as U.S. military and law enforcement capabilities and intelligence assessments, law enforcement plans to defend against terrorism, and foreign policy decisions. NEI Brief at 17. As demonstrated in the Vehicle Bomb Rule, however, the inquiry is more narrowly focused on a "purely domestic" capability to use "readily available" weapons. 59 Fed. Reg. at 38,893, Exhs.18.

3. The Commission may not lawfully deny Petitioners a hearing based on a factual determination made in a prior adjudication to which Petitioners were not parties.

The NRC contends that in denying Petitioners' request for a hearing on their environmental contentions, it had the right to apply the legal "policy" announced in the *Private Fuel Storage* decision to resolve the concerns raised in the contention. NRC Brief at 52. In support of its argument, the NRC cites a number of precedents holding that an agency may prospectively apply legal "principles" developed in prior adjudications. NRC Brief at 52, citing *Cities of Anaheim, Riverside, Banning, Colton and Azusa v. FERC,* 723 F.2d 656 (9th Cir. 1984); *NLRB v. Bell Aerospace Company,*416 U.S. 267 (1974); *Securities Exchange Commission v. Chenery,* 332 U.S. 194 (1947); *Sheet Metal Workers International Association, Local No. 355 v. NLRB,* 716 F.2d 1249 (9th Cir. 1983).

These decisions do not apply to the instant case, however, because *Private Fuel Storage* does not establish any valid legal principles that dispose of Petitioners' contentions. As discussed above in Sections II.B.(1) and (2), the NRC's reliance on the legal principle of the *Metropolitan Edison* case is misplaced, and the NRC's decision that terrorist attacks are not reasonably foreseeable constitutes a factual determination rather than a statement of legal principle. The Commission is entitled to announce its

factual conclusion as a policy, but it must defend that policy in each new adjudication where the basis for the policy is challenged. *Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719, 733-39 (3rd Cir. 1989) (hereinafter *"Limerick Ecology Action"*) (holding that the NRC could not deny the petitioners a hearing regarding alternatives for mitigating the impacts of severe nuclear reactor accidents on the basis of a policy statement concluding that severe accidents are speculative).

If the NRC considers the question of the foreseeability of terrorist attacks to be generic in nature, and does not wish to address it in each individual adjudication in which the issue arises, it may initiate a rulemaking. It cannot, however, avoid the issue altogether by citing the result of a previous adjudication, in which Petitioners took no part, as if it were such a generic rulemaking. *Minnesota v. NRC,* 602 F.2d 412, 416-17 (D.C. Cir. 1979) (allowing agency to resolve contested NEPA issue in a rulemaking or "in each proceeding in which [the issue] is raised"). *See also Natural Resources Defense Council v. NRC,* 547 F.2d 633, 641 (D.C. Cir. 1976), *rev'd on other grounds, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978). [8]

[8] The NRC vainly attempts to bolster the applicability of *Private Fuel Storage* to this case by analogizing it to a rulemaking. NRC Brief at 55-56. According to the NRC, it "analyz[ed] all aspects" of several

Notably, in *Minnesota v. NRC,* the Commission narrowly avoided reversal in circumstances similar to these by instituting a rulemaking. The petitioners had appealed an NRC ruling refusing to grant them a hearing on the environmental impacts of storing spent nuclear reactor fuel at a particular nuclear power plant. The NRC based its refusal to hold a hearing on a previous decision in which it rejected a rulemaking petition by the petitioners, based on the "policy" that NRC had reasonable confidence that spent nuclear reactor fuel could be disposed of safely. 602 F.2d at 415-16. As the Court observed, the "conclusion" on which the NRC's statement of policy was based "did not stem from a formal record developed in a

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decisions that were before it, and took "input" from both "the nuclear industry and members of the public who were participating in that case" before issuing the *Private Fuel Storage* decision. NRC Brief at 55-56. In fact, the *Private Fuel Storage* briefing was nothing like a rulemaking, in name or form. It was not described as a rulemaking, nor was it open to the general public, nor did the NRC articulate or attempt to justify a proposed determination regarding the foreseeability of terrorist attacks on nuclear facilities. Instead the Commission simply asked for a legal briefing from the handful of parties who were involved in the four cases before it, on the question of:

> What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?

Private Fuel Storage, L.L.C. (Independent Fuel Storage Installation), CLI-02-03, 55 NRC 155, 156 (2002). If the NRC intended *Private Fuel Storage* to function as a binding regulation, it was required to say so. Neither this Court nor the general public can be held to a standard of "divining the actual function" of the decision. *Limerick,* 869 F.2d at 735.

rulemaking or adjudicatory proceeding." *Id.* The Court found that it did not need to reach the question of whether it was lawful for the NRC to deny the petitioners a hearing based on the prior unsupported decision, because the NRC had recently begun a rulemaking to develop factual support for the decision. *Id.* at 417. The Court remanded the case to the NRC for consideration of Petitioners' concerns in the course of that rulemaking. *Id.* at 419.

Here, the NRC failed to institute a rulemaking to resolve the allegedly "generic" question raised by Petitioners' contentions in a rulemaking, nor did it use the adjudicatory proceeding below to resolve the question. Having taken neither course, the Commission violated the hearing requirements of the AEA and the public participation requirements of the Administrative Procedure Act.

C. The NRC Has No Statutory Basis to Excuse Compliance with NEPA.

Compliance with NEPA is required "unless specifically excluded by statute or existing law makes compliance impossible." Petitioners' Initial Brief at 47, quoting *Limerick Ecology Action,* 869 F.2d at 729. While the respondents protest that NEPA should not apply to this case, they do not point to any specific provision in the AEA that excludes NEPA compliance,

nor do they identify any statutory provision or regulation which makes NEPA compliance impossible.

1. Regulation of safety and security under the Atomic Energy Act does not excuse compliance with NEPA.

PG&E argues that under *Siegel v. Atomic Energy Commission,* 400 F.2d 778 (D.C. Cir. 1968) and 10 C.F.R. § 50.13, protection of nuclear facilities against terrorist attacks is a responsibility of the government, *i.e,* the military, rather than nuclear facility licensees. PG&E Brief at 20 & n.15, 41-42. In *Siegel,* the D.C. Circuit Court held that the licensee of a nuclear plant in Florida did not need to design the plant to withstand a missile attack from Cuba. In 10 C.F.R. § 50.13, the Commission essentially codified *Siegel* to provide that it is the responsibility of the U.S. government, not power reactor licensees, to protect against attacks by enemies of the United States.

As the NRC ruled in *Private Fuel Storage,* however, 10 C.F.R. § 50.13 applies only to "production and utilization facilities," *i.e.,* nuclear power plants, not ISFSIs. 56 NRC at 346 n.12. Moreover, while the NRC subsequently suggested that the "principle" of 10 C.F.R. § 50.13 might apply to this proceeding, it specifically declined to reach the question of whether Section 50.13 excuses NEPA compliance in this case. CLI-03-01, 57 NRC at 7 n.22, EOR 36. Thus, if the Court believes that 10 C.F.R. § 50.13 may

be applicable, the appropriate remedy is to remand the question to the NRC. *Garcia Martinez v. Ashcroft,* No. 02-74068, 2004 U.S. App. LEXIS 11589, at *29-30 (9th Cir. June 14, 2004).

In any event, the NRC has already concluded that the rationale behind 10 C.F.R. § 50.13 does not excuse nuclear licensees from protecting their facilities against a domestic terrorist threat. As the Commission observed in the preamble to the Vehicle Bomb Rule:

> The statement of considerations for 10 CFR 50.13 makes it clear that the scope of that regulation is to relieve applicants of the need to provide protective measures that are the assigned responsibility of the nation's defense establishment. The Atomic Energy Commission recognized that it was not practical for the licensees of civilian nuclear power reactors to provide design features that could protect against the full range of the modern arsenal of weapons. The statement concluded with the observation that assessing whether another nation would use force against a nuclear power plant was speculative in the extreme and, in any case would involve the use of sensitive information regarding both the capabilities of the United States' defense establishment and diplomatic relations.
>
> The new rule, with its addition to the design basis threat and added performance requirements, is in response to a clearly demonstrated capability for acts of extreme violence directed at civilian structures. The participation or sponsorship of a foreign state in the use of an explosives-laden vehicle is not necessary. The vehicle, explosives, and know-how are all readily available in a purely domestic context. it is simply not the case that a vehicle bomb attack on a nuclear power plant would almost certainly represent an attack by an enemy of the United States, within the meaning of that phrase in 10 CFR 50.13.

59 Fed. Reg. at 38,893, Exh. 18. Moreover, as the Second Circuit Court of Appeals recognized in *Riverkeeper Inc. v. Collins,* 359 F.3d 156, 168 n.14

(2nd Cir. 2004), today's circumstances are "sufficiently different" from the circumstances of the Cuban missile crisis and the Cold War such that *Siegel* is no longer a compelling precedent. Thus, by the Commission's own reasoning, the rationale behind 10 C.F.R. § 50.13 is inapplicable to the type of domestic terrorist threat that is the subject of Petitioners' environmental contentions.

The NRC also contends that it is excused from compliance with NEPA by virtue of its allegedly "aggressive" post-9/11 reforms under the AEA. NRC Brief at 42. Aside from the fact that neither Petitioners nor the Court has any means of assessing the vigor of these secret measures, the NRC fails to cite any AEA provisions that conflict with NEPA. Thus, this argument has no merit. *Calvert Cliffs Coordinating Committee v. AEC,* 449 F.2d 1109, 1125 (D.C. Cir. 1971) (agencies must comply with NEPA unless their obligations under other statutes are "mutually exclusive").

NRC's other argument, to the effect that the issues related to protection of a nuclear facility from a terrorist attack relate primarily to law enforcement and weaponry rather than protection of the environment, reflect the agency's improperly narrow understanding of the type of review that is required by NEPA. NRC Brief at 43. *See also* NEI Brief at 13. The NEPA analysis sought by Petitioners encompasses a much broader scope of issues

than the weaponry and law enforcement issues focused on by the NRC's AEA-based security reforms.

Compliance with NEPA would require the NRC to take a "hard look" into the vulnerability of the Diablo Canyon ISFSI to credible forms of terrorist attack, the environmental consequences of such credible attacks, and appropriate alternative measures to prevent or mitigate those consequences. *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1519 (9th Cir. 1992). The "heart" of this analysis would constitute the evaluation of reasonable alternatives for mitigating or avoiding the impacts of a terrorist attack. *Id.* Such an analysis would go beyond the question of whether PG&E complies with NRC security regulations and enforcement orders relating to weaponry and guard forces, to consideration of alternative design measures for reducing or avoiding the impacts of terrorist attacks. As discussed in Petitioners' Contention EC-1, these alternatives could include design features such as dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than proposed. *See* Petitioners' Contentions at 28, EOR 71. This analysis of alternatives would be similar to the evaluation of severe accident mitigation damage alternatives ("SAMDAs") required in *Limerick Ecology Action,* 869 F.2d at 731. Such "action-forcing" considerations would go beyond the question of

whether PG&E complies with the NRC's AEA-based security requirements.[9] *Robertson v. Methow Valley,* 490 U.S. 332, 349 (1989).

2. The NRC is not exempted from NEPA by virtue of the sensitivity of the information involved.

The NRC argues that holding hearings regarding the environmental impacts of terrorist attacks on nuclear facilities would conflict with its responsibility under Section 147 of the AEA, 42 U.S.C. § 2167, to protect sensitive information from public disclosure. NRC Brief at 44. Section 147 prohibits "unauthorized" disclosure of "safeguards information" that identifies a licensee's or applicant's security measures. This argument is defective in several respects.

First, to the extent that information relevant to the environmental impacts of terrorist attacks constitutes "safeguards" information as defined in 42 U.S.C. § 2167, the NRC has procedures for restricting access to this information to authorized individuals, including protective orders and nondisclosure agreements. *See* NRC regulations cited in Petitioners Initial

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[9] The NRC also contends that NEPA's purpose is "different" from the purpose of the AEA, because it only covers "probable" environmental costs and benefits, not costs based on "pure conjecture." NRC Brief at 43, quoting *Selkirk Conservation Alliance v.Forsgren,* 336 F.3d 944, 958 (9th Cir. 2003). But this argument is simply a reprise of NRC's earlier claim that environmental impacts of terrorist attacks are not foreseeable as a matter of law. *See* Section II.B.2, *supra.* It does not demonstrate any conflict between NEPA and the AEA.

Brief at 48, n.19. Thus, compliance with 42 U.S.C. § 2167 does not make NEPA compliance "impossible." *Limerick Ecology Action,* 869 F.2d at 729. Moreover, the NRC's argument that despite such protections the information could "fall into the wrong hands," NRC Brief at 44, is undercut by the NRC's own presumption that individuals who enter into nondisclosure agreements will abide by them. *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777-78 (1980) (hereinafter "CLI-80-24").[10]

Second, not all of the NRC's information regarding the vulnerability of nuclear facilities to terrorist attack constitutes safeguards information subject to statutory or regulatory protection. Some of the information is

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[10] In CLI-80-24, the Commission rejected an argument similar to the NRC's in this case, that "the best method of preventing public disclosure" of the contents of a security plan was to "make it available to the fewest number of individuals possible," stating that:

> [t]he Commission recognizes PG&E's concern, but emphasizes that intervenors in Commission proceedings may raise contentions relating to the adequacy of the applicant's proposed physical security arrangements, and that the Commission's regulations, 10 C.F.R. 2.790, contemplate that sensitive information may be turned over to intervenors in NRC proceedings under appropriate protective orders.

11 NRC at 777 (footnote omitted). The Commission also noted that the regulations in 10 C.F.R. § 2.790, which govern the issuance of protective orders, "are consistent with the policy set forth in Section 181 of the Atomic Energy Act," 42 U.S.C. § 2231, which prohibits disclosure of safeguards information to "unauthorized persons." *Id.* at 777 & n.2.

public, and other information has been deemed "sensitive" by the NRC – a new category for which the NRC has devised "interim criteria," but which has not been defined in any regulations. *See* COMSECY-02-0015, Memorandum to NRC Commissioners from William D. Travers, Executive Director for Operations, re: *Withholding Sensitive Homeland Security Information From the Public* at 1 (April 4, 2002).[11] Thus, there is no law regarding protection of this information that makes compliance with NEPA impossible.[12]

Finally, unlike *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981), cited in the NRC's Brief at 45-46, this is not a case in which the federal government is the *only* party that is privy to pivotal, sensitive information regarding the environmental impacts of a proposed action. In *Weinberger,* the only significant impacts of a proposed ammunition and weapons storage facility consisted of the impacts that would arise if the facility were used to store nuclear weapons. The question of whether the

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[11] This memorandum is available on the NRC's website at http://www.nrc.gov/reading-rm/adams/web-based.html (Accession No. ML020870144 or ML021120075).

[12] Petitioners note that they share the NRC's concern about protecting such sensitive information, and in fact suggested measures for identifying sensitive information and ensuring that it would be protected. *See* Declaration of Gordon Thompson, Section X, EOR 189-92. However, the NRC completely ignored Petitioners' proposal.

facility would actually be used to store nuclear weapons was classified information available only to the U.S. Navy. 454 U.S. at 146-47.

Here, in contrast, the Commission has established a policy of sharing information regarding post-September 11 security measures with nuclear licensees and their trade association representatives in the NEI, including "weekly closed meetings" with NEI. Letter from Roy P. Zimmerman via Michael F. Weber, NRC Office of Nuclear Security and Incident Response Operations, to Joe F. Colvin, President and Chief Executive Officer, NEI (September 17, 2003).[13] The NRC has not invited interested members of the public to attend any of these meetings.[14]

Thus, unlike the Navy in *Weinberger,* the NRC does not maintain the information at issue in complete confidence; instead it grants access to the information to nuclear licensees and their lobbyists, while barring access by the interested public. The NRC should not be permitted to use its confidentiality requirements to trump NEPA for the purpose of granting such one-sided access to crucial environmental information.

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[13] This letter is available on the NRC's website at http://www.nrc.gov/reading-rm/adams/web-based.html (Accession No. ML032521459).

[14] These weekly closed meetings with nuclear industry representatives stand in sharp contrast to the handful of open public meetings cited in the NRC's brief at page 12.

D. The NRC Unlawfully Denied Petitioners a Hearing on New Security Measures for the Diablo Canyon Nuclear Complex.

In defending CLI-02-23, its decision to deny Petitioners a hearing on appropriate post-9/11 upgrades to the security of the entire Diablo Canyon nuclear complex, the NRC accuses Petitioners of failing to follow "proper and available Commission procedures." NRC Brief at 62, citing CLI-02-23, 56 NRC at 236, EOR 30. In fact, however, the "procedures" cited by the NRC in its brief were either illusory or ineffective to ensure that the NRC would comply with the AEA in licensing the Diablo Canyon ISFSI.

The NRC argues that Petitioners should have submitted a petition for rulemaking to address their concerns. NRC Brief at 60. If the NRC were going to resolve Petitioners' concerns that grossly inadequate security made the Diablo Canyon facility vulnerable to terrorist attacks generically, through a rulemaking, such a rulemaking would have been initiated as a result of the "comprehensive security review" undertaken by the NRC. 56 NRC at 236, EOR 30. Yet, while CLI-02-23 promised Petitioners the opportunity to participate in "any rulemakings that emerge from our comprehensive security review," *id.*, not a single rulemaking emerged from that review. Instead, the NRC decided to address security issues entirely through individual enforcement orders in 2002 and 2003, which separately imposed security upgrades on each then-operating nuclear power plant and

ISFSI, although not on the Diablo Canyon ISFSI. *See* Petitioners' Initial Brief at 55 and citations therein.[15] Thus, it would have been futile for Petitioners to submit a rulemaking petition.

Moreover, a rulemaking petition, on which the NRC could take years to act, would not have been an effective tool for achieving Petitioners' goal of ensuring the adequacy of NRC security requirements for the Diablo Canyon nuclear complex to support the licensing of the Diablo Canyon ISFSI. Under the unique statutory framework of the AEA, even though the NRC generally defines the concept of adequate protection through its regulations, *see* 42 U.S.C. § 2201(b), the NRC also has a statutory obligation before issuing each individual license to find that its issuance will pose no undue risk to the public health and safety or the common defense and security. *See* 42 U.S.C. §§ 2077(c), 2099, and 2111. Thus, as the Appeal Board recognized in *Maine Yankee Atomic Power Company* (Maine Yankee Atomic Power Station), ALAB-161, 6 AEC 1003, 1010 (1973), there are "some circumstances" in which "compliance with the promulgated regulations might not be sufficient." Such circumstances existed in the case

[15] Contrary to the implication in NEI's brief at 3-4, these post-9/11 security orders were *not* issued to PG&E for the Diablo Canyon ISFSI. To date, there is no public record that the NRC has issued enforcement orders imposing any security upgrades on the Diablo Canyon ISFSI. Thus, since receiving its licensing on March 22, 2004, the Diablo Canyon ISFSI has operated under outdated pre-9/11 security requirements.

below, where the September 11 attacks had demonstrated that the domestic security threat was far beyond the scope of NRC security regulations, and indeed the NRC was in the midst of a comprehensive review of its regulations. Thus, Petitioners sought a hearing on whether the NRC had satisfied this separate undue risk obligation, since mere compliance with existing NRC security requirements would not be sufficient. Accordingly, Petitioners were not barred as a matter of "hornbook law" from challenging the sufficiency of NRC regulations in the proceeding below, as the NRC contends. NRC Brief at 60.

The NRC's suggestions that Petitioners could have raised their concerns before the Licensing Board is similarly disingenuous. As the NRC is well aware and indeed has held in this case, "hearing petitioners may not challenge NRC rules." CLI-02-23, 56 NRC at 236 note 10. In any event, the NRC explicitly ruled in CLI-02-23 that Petitioners were not required to bring their petition before the Licensing Board in the first instance. *Id.* at 237, EOR 237.

The NRC also vaguely suggests that "a citizens' petition" under 10 C.F.R. § 2.206 "might be appropriate." NRC Brief at 61. The granting of an enforcement petition, however, is committed to the discretion of the NRC. *Massachusetts Public Interest Research Group, Inc. v. NRC,* 852

F.2d 9, 18 (1st Cir. 1988). The action sought by Petitioners here – new security measures to ensure adequate protection of the Diablo Canyon nuclear complex – was not discretionary, but mandatory under the AEA. A petition for discretionary enforcement action would not have been an effective vehicle for seeking that relief.

E. The Court May Consider Petitioners' Extra-Record Exhibits.

The NRC does not object to the Court's consideration of Petitioners' exhibits to the extent that they consist of prior decisions or orders; but it renews an objection, made in an earlier motion, to other exhibits submitted by the Petitioners and by the State and San Luis Obispo County amici. These exhibits generally consist of excerpts of EISs prepared by the U.S. Department of Energy ("DOE"), documents containing speeches and other statements by federal officials, and press articles.[16]

Relying on *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 420 (1971), the NRC argues that the Court's review must be limited to the administrative record. Petitioners respectfully submit, however, that this case falls under an exception to that doctrine. As recognized by this Court in

[16] Some of the exhibits were provided by Petitioners in a separate volume. For other exhibits, a reference to a website is provided.

National Audubon Society v. U.S. Forest Service, 46 F.3d 1437 (9th Cir. 1993), a court:

> may extend its review beyond the administrative record and permit the introduction of new evidence in NEPA cases where the plaintiff alleges "that an EIS has neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug."

Id. at 1447, quoting *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1447 (9th Cir. 1988), *amended,* 867 F.2d 1244 (9th Cir. 1989), quoting *County of Suffolk v. Secretary of the Interior,* 562 F.2d 1368, 1384-5 (2nd Cir. 1977). Petitioners' and amici's exhibits fall under the *National Audubon Society* exception, because they illustrate the arbitrariness of the NRC's determination that the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI are not foreseeable, and that it is impossible to consider sensitive information in a NEPA review. Speeches and news articles cited by Petitioners and amici, for example, demonstrate that at the same time the NRC is denying the foreseeability of terrorist attacks under NEPA, it is treating them as foreseeable in other statements and actions. The excerpts from DOE's EISs show that involvement of sensitive information in a NEPA review need not prevent the review from going forward. In addition, Petitioners' Reply Brief cites NRC correspondence

further undermining NRC's claim that the sensitivity of information relating to the risk of terrorist attacks prevents it from complying with NEPA.

In considering the NRC's objection to Petitioners' and amici's exhibits, it is important to bear in mind that the NRC made its determination that NEPA does not apply to this case without ever giving Petitioners an opportunity to submit evidence in support of its claims. Moreover, the first time that Petitioners received notice of the factual grounds for the NRC's decision was when the decision itself was issued. Thus, this appeal constitutes the first proceeding in which the Petitioners have had an opportunity to submit factual evidence contradicting the NRC's position. Had the NRC held a hearing or a rulemaking, as it was required to do, Petitioners would not be in this position.

III. CONCLUSION

For the foregoing reasons, the Court should reverse CLI-03-01 and remand this case for an adjudicatory hearing on Petitioners' Contentions EC-1 and EC-3. In addition, the Court should reverse CLI-02-23 and remand this case for an adjudicatory hearing on security upgrades that must be made to the entire Diablo Canyon nuclear complex, in order to ensure that licensing of the proposed ISFSI is not inimical to the common defense and security and does not pose an unreasonable risk to public health and safety.

Respectfully submitted,

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June 28, 2004