IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

_____

SAN LUIS OBISPO MOTHERS FOR PEACE
Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
Respondents

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor-Respondent

NO. 08-75058

_____

On Petition for Review of an Order of the
United States Nuclear Regulatory Commission

_____

INITIAL BRIEF FOR PETITIONER

_____

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February 9, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE, Petitioner	)	
v.	)	No. 08-75058
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	
PACIFIC GAS & ELECTRIC CO., Intervenor-Respondent	)	

PETITIONER'S CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner San Luis Obispo Mothers for Peace ("SLOMFP") certifies that it is a non-profit corporation. SLOMFP has no parent company and/or subsidiary or affiliate that has issued shares to the public.

Respectfully submitted,

/s/
Diane Curran
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CERTIFICATE REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for Petitioner hereby certifies that the number of words in Petitioner's Initial Brief of February 9, 2009, excluding the Table of Contents, Table of Authorities, Addendum, and corporate disclosure statement, as counted by the Microsoft Word program, is 12,081 words.

Respectfully submitted,

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January 8, 2009

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

Dear Messrs. Mullins and Repka:

As I previously informed you both by telephone, I have been concerned that San Luis Obispo Mothers for Peace (SLOMFP) may be unable to comply with the January 26, 2009, deadline established by the U.S. Court of Appeals for its Initial Brief, due to the fact that the briefing period includes the winter holidays and the Presidential inauguration, when I have been or will be out of the office. Therefore, I have requested and obtained an extension of the briefing schedule pursuant to Local Rule 31-2.2 of the Federal Rules of Appellate Procedure.

As describe to me by an official in the clerk's office, the new briefing schedule is as follows:

SLOMFP's Initial Brief:	2/9/09
NRC Answering Brief:	3/11/09
Intervenor's Brief:	fourteen days after NRC's Answering Brief
SLOMFP's Reply Brief:	28 days after NRC's Answering Brief

As requested by the clerk, I will submit a copy of this letter to the Court when I file SLOMFP's Initial Brief.

Sincerely,

/s/
Diane Curran

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I. JURISDICTIONAL STATEMENT

This case involves an appeal of four Orders by the U.S. Nuclear Regulatory Commission ("NRC" or "Commission"). The Commission's decisions in the proceedings below are reviewable by this Court under the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(b); the Hobbs Act, 28 U.S.C. § 2342(4); and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. The appeal was timely filed pursuant to 28 U.S.C. § 2344, because it was docketed on December 12, 2008, within 60 days of the date of the Commission's final order in the proceeding below. *Pacific Gas and Electric Co.* Diablo Canyon ISFSI), CLI-08-26, __ NRC __ (October 23, 2008).

II. STATUTES AND REGULATIONS

Relevant statutes and regulations are included in an addendum to this brief.

III. ISSUES PRESENTED FOR REVIEW

1. In approving a license for the Diablo Canyon Independent Spent Fuel Storage Installation ("ISFSI"), did the NRC's refusal to grant SLOMFP a closed hearing on the adequacy of its Environmental Assessment ("EA") violate the National Environmental Policy Act's ("NEPA's") requirement to consider environmental concerns to the fullest extent possible in its decision-making process?

2. Did the NRC violate Section 189a of the AEA, 42 U.S.C. § 2239(a)(1)(A), when it refused to grant SLOMFP a closed hearing on the adequacy of the EA to comply with NEPA?

3. In refusing to prepare an environmental impact statement ("EIS") regarding the environmental impacts of attacks on the Diablo Canyon ISFSI, did the NRC unlawfully and categorically apply unreasonable and secret criteria designed to exclude consideration of significant adverse environmental impacts of attacks on the Diablo Canyon ISFSI?

4. Did the NRC violate NEPA and this Court's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), cert. denied, 549 U.S. 1166 (2007), when, as a matter of law, it characterized all scenarios for an attack on the proposed Diablo Canyon ISFSI as remote and speculative, and therefore excluded from consideration credible attack scenarios with significant environmental impacts?

5. Did the NRC violate NEPA and implementing regulation 40 C.F.R. § 1502.22(b) by arbitrarily and capriciously failing to consider the significant adverse environmental impacts of reasonably foreseeable attacks on the Diablo Canyon ISFSI?

IV. STATEMENT OF THE CASE

SLOMFP appeals the NRC's decisions on remand from *San Luis Obispo Mothers for Peace*, 449 F.3d 1016, in which this Court rejected the NRC's 2003 decision to license a spent fuel storage facility on the grounds of the Diablo Canyon nuclear power plant. The Court ruled that the NRC's four grounds for categorically refusing, as a matter of law, to consider the environmental impacts of intentional attacks on the proposed facility, violated the NEPA, 42 U.S.C. § 4321-4337. 449 F.3d at 1035.

On remand, the NRC prepared draft and final versions of an EA, which concluded that intentional attacks on the proposed spent fuel storage facility posed no significant environmental impacts and that there was therefore no need to prepare an EIS. Supplement to the Environmental Assessment and Draft Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (May 2007) ("Draft EA Supplement") (ER 87); Supplement to the Environmental Assessment and Final Finding of No Significant Impact Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation (August 2007) ("Final EA Supplement") (ER 56).

In *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-01, 67 NRC 1 (2008) ("CLI-08-01") (ER 37), the NRC partially granted SLOMFP's hearing request regarding the EA Supplement, but excluded issues related to the question of whether the EA Supplement had ignored credible attack scenarios with significant adverse impacts to the environment. The NRC also refused to hold a closed hearing and to allow SLOMFP protected access to sensitive security documents. 67 NRC at 16-17, 20-21 (ER 47).

In *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-05, 67 NRC 174 (2008) ("CLI-08-05") (ER 34), the NRC denied SLOMFP's request for reconsideration of its previous order in CLI-08-01, refusing SLOMFP protected access to sensitive security information in the hearing process.

In *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation); CLI-08-08, 67 NRC 193 (2008) ("CLI-08-08") (ER 28), the Commission refused to add a new issue to the scope of the hearing, holding that it constituted another impermissible challenge to the range of attack scenarios evaluated by the NRC.

In *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-08-26, ___ NRC ___,

(October 23, 2008) ("CLI-08-26") (ER 1), the Commission ruled against SLOMFP on the merits of the remaining contested issue and upheld the adequacy of the EA Supplement.

Therefore, on December 12, 2008, SLOMFP filed a petition for review of the NRC's decisions in this Court.

V. STATUTORY AND REGULATORY BACKGROUND

A. National Environmental Policy Act

NEPA requires federal agencies to examine the environmental consequences of their actions *before* taking those actions, in order to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizen Council*, 490 U.S. 332, 349 (1989). NEPA has "twin aims:" first to give an agency "the obligation to consider every significant aspect of the environmental impact of a proposed action;" and second to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." *San Luis Obispo Mothers for Peace*, 449 F.3d at 1020 (quoting *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

The primary method by which NEPA ensures that its mandate is met is the "action-forcing" requirement that a "detailed" EIS must be prepared

before a federal agency takes any major action which may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1; 10 C.F.R. § 51.20(a). An EIS must be searching and rigorous, providing a "hard look" at the environmental consequences of the agency's proposed action. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989). It must describe, among other things, (1) the "environmental impact" of the proposed action, (2) any "adverse environmental effects which cannot be avoided should the proposal be implemented," (3) any "alternatives to the proposed action," and (4) any "irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. . . ." 42 U.S.C. § 4332(2)(C).

Environmental impacts that must be considered in an EIS include those which are "reasonably foreseeable" and have "catastrophic consequences, even if their probability of occurrence is low." 40 C.F.R. § 1502.22(b). However, environmental impacts that are "remote and speculative" need not be considered. *Limerick Ecology Action v. NRC,* 869 F.2d 719, 745 (3rd Cir. 1989) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.,* 435 U.S. 519, 551 (1978)). The fact that the likelihood of an impact is not easily quantifiable is not an

excuse for failing to address it in an EIS. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1032. NRC regulations require that: "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." 10 C.F.R. § 51.71.

B. Atomic Energy Act Hearing Requirement

Section 189a of the AEA requires the NRC to provide interested members of the public with a prior opportunity for a hearing on any proposed licensing action for a nuclear facility. 42 U.S.C. § 2239(a)(1)(A). In order to qualify for a hearing, a party must show that it has an interest in the outcome of a proceeding and raise an admissible challenge to the licensing proceeding in the form of a "contention." *BPI v. Atomic Energy Commission,* 502 F.2d 424, 428-29 (D.C. Cir. 1974). The admissibility standard applicable to contentions in this proceeding is 10 C.F.R. § 2.714(b)(2) (1998).[1]

Once a hearing is granted on environmental issues, the NRC Staff and the license applicant share the burden of proving that a petitioner's concerns

[1] Because the licensing proceeding for the Diablo Canyon ISFSI began in 2002, the remanded proceeding has been governed by the procedural regulations that were in force at that time, including 10 C.F.R. § 2.714(b)(2). In 2004, Section 2.714 was re-numbered as 10 C.F.R. § 2.309(f)(2). Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (Jan. 14, 2004).

are without merit. *Louisiana Energy Services, L.P.*, (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 338-39 (1996), rev'd on other grounds, CLI-97-15, 46 NRC 294 (1997).

VI. STATEMENT OF FACTS

A. Previous History of the Case

This proceeding marks the second time that SLOMFP has challenged the NRC's non-compliance with NEPA with respect to the licensing of the Diablo Canyon ISFSI. After Pacific Gas and Electric Company ("PG&E") filed its application for a license for the ISFSI in late 2001, SLOMFP requested the NRC to grant a hearing on whether, in light of recent attacks on U.S. facilities, including the attacks of September 11, 2001, the NRC should address the impacts of an attack on the proposed ISFSI in an EIS.

In *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1 (2003), the Commission categorically refused to consider SLOMFP's request, on four legal grounds: (a) that attacks are not "proximately caused" by the licensing of nuclear facilities, (b) that the risk of an attack is not quantifiable, (c) that an assessment of the impacts of an attack would constitute a "worst-case" analysis that is not required by NEPA, and (d) that NEPA's open public participation processes are not suitable for discussing sensitive

information regarding terrorist threats. *Id.* at 7, citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 347 (2002).

On June 2, 2006, this Court reversed CLI-03-01 with respect to each of the four legal rationales on which it had relied. The Court rejected the NRC's assertion that there was no reasonably close causal link between the NRC's licensing of the spent fuel storage facility and the physical impacts of a terrorist attack, concluding that the NRC's own policies and procedures undercut its position that terrorist attacks are not reasonably foreseeable under NEPA. 449 F.3d at 1030-31. The Court also ruled that NEPA does not allow the NRC to ignore the environmental impacts of terrorist attacks simply because their likelihood cannot be quantified. To the contrary, the Court found that the NRC's own actions show it is capable of making a meaningful assessment of the likelihood of terrorist attacks. 449 F.3d at 1031-32.

In addition, the Court rejected the NRC's assertion that Petitioners sought a "worst-case" analysis not required by NEPA. As the court observed, Petitioners did not "seek to require the NRC to analyze the most extreme (i.e., the 'worst') possible environmental impacts of a terrorist attack," but rather sought "an analysis of the range of environmental

impacts likely to result in the event of a terrorist attack" on the dry storage facility. 449 F.3d at 1032-33. Finally, the Court rejected as unreasonable the NRC's claim that "it cannot comply with its NEPA mandate because of security risks." The court found that while security considerations may permit or require modifications of some NEPA procedures to protect sensitive information, NEPA contains no waiver or exemption for security or defense-related issues. 449 F.3d at 1034-35 (citing *Weinberger v. Catholic Action of Hawaii,* 454 U.S. 139 (1981).

"In sum," the Court concluded, "none of the four factors upon which the NRC relies to eschew consideration of the environmental effects of a terrorist attack satisfies the standard of reasonableness." 449 F.3d at 1035. The U.S. Supreme Court subsequently refused to review the Court's decision in *Pacific Gas and Electric Co. v. San Luis Obispo Mothers for Peace,* 549 U.S. 1166 (2007).

B. Remanded Proceeding

1. Commission order for preparation of Environmental Assessment

On February 26, 2007, the Commission initiated this remanded licensing proceeding by giving the agency's technical staff 90 days to prepare a revised EA for the Diablo Canyon ISFSI, and giving the public thirty days after publication of the revised EA to request a hearing and/or

submit comments on the revised EA. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 NRC 148 (2007) ("CLI-07-11") (ER 53). In "the interest of expeditious resolution," the Commission announced that instead of delegating the management of a hearing to an Atomic Safety and Licensing Board panel, the Commission itself would "determine the admissibility of contentions and whether oral argument or other further action is required." 65 NRC at 150 (ER 54).

CLI-07-11 also contained a footnote stating that the majority of the Commission, with Commissioner Jaczko dissenting, "remains convinced that NEPA does not require a terrorism review in connection with NRC licensing decisions." 65 NRC at 149 n.5 (ER 53).

2. Environmental Assessment

On May 29, 2007, the NRC issued the Draft EA Supplement, revising the EA that the NRC had prepared in 2003 to support of PG&E's original application for a license for the ISFSI. ER 87. In a brief and undocumented analysis, the Draft EA Supplement conceded that some types of unspecified attacks on the Diablo Canyon ISFSI are "plausible," but asserted that no plausible attack would have significant adverse impacts on the environment. *Id.* at 7 (ER 94).

While the NRC stated it had performed a technical analysis of the consequences of an attack on the Diablo Canyon ISFSI, not a single reference document was identified or provided, other than the original license application of 2001, the defective EA of 2003, and the invalid license from 2004. Draft EA Supplement at 8 (ER 95).

3. SLOMFP hearing request and contentions

In a hearing request filed June 28, 2007, SLOMFP submitted five contentions to the Commission, challenging the Draft EA Supplement's failure to comply with NEPA in several key respects. San Luis Obispo Mothers for Peace's Contentions and Request for a Hearing ("Hearing Request") (ER 315).[2]

In Contention 1, SLOMFP charged that the NRC Staff had violated NEPA by failing to identify the reference documents on which it had relied in preparing the Draft EA Supplement. Hearing Request at 3 (ER 317). Contention 1 also demanded access, under a protective order, to any security studies on which the NRC may have relied in concluding that the environmental impacts of an attack on the Diablo Canyon spent fuel storage facility would be insignificant. *Id.* at 10 (ER 324).[3]

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[2] Only Contentions 1, 2 and 3, and subsequently-filed Contention 6 (discussed in Section VI.B.9 below) are at issue on this appeal.

[3] SLOMFP also noted that its attorney and one of its experts had obtained

In addition, Contention 1 challenged the Draft EA Supplement's failure to define its terms or explain the reasoning process that it followed. For instance, SLOMFP charged that the Draft EA Supplement "fails to provide a clear description of the NRC's process for identifying plausible or credible attack scenarios and assessing their consequences to determine whether they are significant." Hearing Request at 5 (ER 319). SLOMFP also complained that in describing attacks, the Draft EA Supplement used the term "plausible" in a manner inconsistent with its ordinary meaning. *Id.* In addition, SLOMFP challenged the Draft EA Supplement's failure to describe its criteria for distinguishing between attack scenarios that are "plausible" and those that are "remote and speculative." *Id.* at 6 (ER 320).

Contention 2 asserted that the Draft EA Supplement was based on a hidden and unjustified assumption that the only environmental impacts worthy of consideration in an EIS are "early fatalities." Hearing Request at 10-13 (ER 324-27). For instance, the EA Supplement appeared to assume that the environmental impacts of an attack on a spent fuel storage cask would be insignificant if they do not result in early fatalities. Hearing Request at 11 (ER 325). SLOMFP asserted that the Staff thus appeared to have used early fatalities as a criterion to categorically screen out

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appropriate security clearances for review of classified documents. Hearing Request at 10 n.13 (ER 324).

consideration of any threat scenarios that cause impacts other than early fatalities. *Id.* SLOMFP argued that to exclude consequences other than early fatalities wrongly ignores the dominant consequences of an attack on the Diablo Canyon facility, which would consist of serious land contamination that renders large areas of land uninhabitable and causes significant health, economic and social impacts. *Id.* at 12 (ER 326).

Contention 3 asserted that the Draft EA Supplement violated NEPA and Council on Environmental Quality ("CEQ") implementing regulations by failing to consider credible threat scenarios that could cause significant environmental damage by contaminating the environment. Hearing Request at 12-14 (ER 326-28). Citing 40 C.F.R. § 1502.22(b), which requires consideration of low-probability but reasonably foreseeable catastrophic impacts, SLOMFP charged that the Draft EA Supplement failed to consider credible scenarios in which commonly used weapons could be used to ignite the combustible zirconium cladding of spent fuel, causing a release of volatile radionuclides from each affected canister. The ensuing airborne radioactive release could contaminate and render uninhabitable an area of about 7,500 square kilometers, causing cancers and other adverse health effects and incurring significant economic and social damage. *Id.*

In response, the NRC Staff argued that attack scenarios constitute sensitive security information that could not be discussed in the EA Supplement but must be protected from public disclosure. NRC Staff's Answers to Contentions at 21 (July 13, 2007). SLOMFP replied that this should not preclude the NRC from holding a closed hearing on the subject. San Luis Obispo Mothers for Peace's Reply (July 18, 2007) (ER 309).

4. SLOMFP's comments on draft EA Supplement

On July 2, 2007, SLOMFP commented on the Draft EA Supplement, by submitting a copy of its hearing request and contentions. Letter from Diane Curran to NRC Chief, Rulemaking, Directives, and Editing Branch (ER 86).

5. Final EA Supplement and Amendment

On August 30, 2007, the NRC Staff published the Final EA Supplement (ER 56). The Final EA Supplement was virtually identical to the draft EA Supplement, except that the NRC identified eleven security-related reference documents that had not been identified in the Draft EA Supplement. *Id.* at 9-10 (ER 65-66).

The Final EA Supplement also included an appendix in which the NRC Staff responded to public comments on the Draft EA Supplement. The Staff asserted that the Final EA Supplement "is premised on analyses of the

potential consequences of a terrorist attack on an ISFSI," but refused to provide "specific details of the analyses" such as source terms[4] or supporting background documents, because of "the sensitive nature of the information." Final EA Supplement at A-4 (ER 70). The Staff assured commenters, however, that it had selected and analyzed plausible scenarios based on "intelligence information," and had excluded from further consideration only those scenarios that were deemed "not reasonable," i.e. "not plausible." *Id.* at A-5 (ER 71).

On November 15, 2007, the NRC Staff amended the Final EA Supplement to add six more reference document titles, for a total of seventeen security-related reference documents not previously identified in the EA Supplement. Notice of Issuance of Addendum to the Supplement to the Environmental Assessment for the Diablo Canyon Independent Spent Fuel Storage Installation. 72 Fed. Reg. 64252 (ER 55).

6. SLOMFP response to Final EA Supplement

On October 1, 2007, SLOMFP filed a response to the Final EA Supplement with the Commissioners, stating that the Final EA Supplement had not affected its contentions in any significant respect. SLOMFP also

[4] In a radiological consequences analysis, the "source term" is an estimate of the quantity of radioactivity released to the atmosphere during a given event, the time frame of the event, and other indicators.

repeated its previous request for protected access to non-public reference documents identified in the EA Supplement. San Luis Obispo Mothers for Peace's Response to NRC Staff's Supplement to the Environmental Assessment (ER 275).

7. CLI-08-01 (ruling on admissibility of contentions)

On January 15, 2008, the Commission ruled on the admissibility of SLOMFP's contentions, partially admitting Contention 1 and Contention 2, but refusing to admit other parts of Contentions 1 and 2 and denying admission of Contention 3 in its entirety. CLI-08-01, 67 NRC 1 (ER 37).

With respect to Contention 1, the Commission ruled that NEPA requires compliance with the document disclosure requirements of the Freedom of Information Act ("FOIA"), and ordered the NRC Staff to prepare a *Vaughn* Index identifying all reference documents, reviewing them for releasable portions, and justifying any decisions to withhold portions of the documents. 67 NRC at 16 (ER 45). The Commission summarily refused, however, to give SLOMFP access to non-public documents under a protective order. *Id.* at 17 (ER 45). The Commission also refused to admit the portion of Contention 1 seeking clarification of the meaning of the word "plausible" as used in the EA Supplement on the ground that the Staff had provided enough information about the definition of the term "plausible"

that was "consistent with information security constraints and the *Weinberger* decision." 67 NRC at 11 (ER 42).

The Commission partially admitted Contention 2, holding that SLOMFP's concern that the environmental assessment ignores environmental effects on the surrounding land and nonfatal diseases caused by land contamination was worthy of "further inquiry." 67 NRC at 18 (ER 46).

The Commission refused, however, to admit the portion of Contention 2 which asserted that the EA Supplement relied on a hidden assumption or screening criterion to exclude consideration of attacks causing significant land contamination. *Id.*[5] Thus, for purposes of litigating Contention 2, SLOMFP was forced to accept the presumption that the NRC had considered all plausible attack scenarios, and the only question to be addressed was whether the NRC had correctly assessed the impacts of the unspecified scenarios that the NRC had secretly considered. This restriction reduced the litigation of Contention 2 to an almost meaningless exercise.

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[5] *See also* CLI-08-26, slip op. at 17 n.68 (ER 17) (clarifying that in CLI-08-01, the Commission had "*rejected*" the aspect of Contention 2 which asserted "that the NRC Staff inappropriately used terrorist attacks' potential for 'early fatalities' as an inappropriate criterion to screen out other kinds of terrorist attacks or as a proxy for environmental effects." (emphasis in original).

The Commission refused to admit any aspect of Contention 3, finding that the Staff's approach to the selection of "plausible threat scenarios" for consideration in the EA Supplement was "reasonable on its face" because it was "grounded in the NRC Staff's access to classified threat assessment information." 67 NRC at 20 (ER 47). The Commission also found that the Supreme Court's "controlling *Weinberger* decision" precluded the NRC from conducting a closed hearing because such a hearing "would inevitably lead to the disclosure of matters which the law itself regards as confidential, and which it will not allow the confidence to be violated." 67 NRC at 20-21 (footnotes omitted) (citing *Weinberger,* 454 U.S. at 145; *Totten v. United States,* 92 U.S. 105, 107 (1876); *Tenet v. Doe,* 544 U.S. 1, 8 (2005); *United States v. Reynolds,* 345 U.S. 1, 10-11 (1953); AEA § 141, 42 U.S. C. § 2161 (2000); AEA § 147, 42 U.S.C. § 2167 (2000)). Finally, the Commission declared that to adjudicate "alternate terrorist threat scenarios" would be "impracticable" because "[t]he range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity." 67 NRC at 20 (ER 47) (footnotes omitted).

Commissioner Jaczko dissented from the ruling on multiple grounds, asserting that the Commission had improperly required that SLOMFP meet too high a standard for the admission of a contention; that the Commission's

reasoning for denying the contention was "circular" and "weak" because it rested on the denial of information to SLOFMP; that the EA Supplement provided no indication that the NRC Staff had, in fact, fulfilled its NEPA obligations in conducting its environmental assessment; and that the majority had no justification for refusing to hold a closed hearing. 67 NRC at 27 (ER 50).

8. NRC Staff filing of *Vaughn* Index

On February 13, 2008, the NRC Staff submitted a *Vaughn* Index to the Commission, along with copies of all the reference documents it had relied on in the EA Supplement. Security-related documents were redacted to remove information exempt from disclosure under the FOIA.

One of the reference documents released in redacted form was a high-level NRC Staff memorandum which set forth a policy for performing security assessments for NRC-licensed materials facilities, namely, that it was not necessary to protect against attacks with non-fatal consequences, and therefore they could be ignored in security analyses. SECY-04-0222, Memorandum from Luis A. Reyes to the Commissioners (November 24, 2004) ("SECY-04-0222") (ER 143).[6] Although SECY-04-0222 was not

[6] The policy was approved by the NRC Commissioners in SRM-SECY-04-0222, Staff Requirements Memorandum re: Decision-making Framework for Materials and Research and Test Reactor Vulnerability Assessments

technically applicable to a spent fuel storage facility, another reference document revealed that the Staff had "performed framework assessments" for spent fuel storage casks and transportation packages "in accordance with SRM-SECY-04-0222." Memorandum by Jack R. Strosnider, NRC, to Roy P. Zimmerman, NRC (December 9, 2005) (ER 103).

9. SLOMFP response to *Vaughn* Index, new Contention 6, and renewed request for closed hearing

On February 20, 2008, SLOMFP responded to the NRC's *Vaughn* Index. San Luis Obispo Mothers for Peace's Response to NRC Staff's *Vaughn* Index (ER 263). SLOMFP asked the Commission to reconsider its refusal in CLI-08-01 to allow SLOMFP protected access to sensitive security-related information in a closed hearing. *Id.* at 7-11 (ER 269-73). SLOMFP argued that the "paucity" of information disclosed by the Staff in the set of redacted reference documents released with the *Vaughn* Index warranted reconsideration by the Commission of its earlier refusal to grant SLOMFP protected access to the information. *Id.* at 2 (ER 264). SLOMFP argued that in order to comply with the hearing requirement of the AEA and longstanding Commission policy, the Commission should grant SLOMFP

January 15, 2005).

full access to the reference documents under a protective order. *Id.* at 2, 8-11 (ER 264, 270-73).[7]

On February 27, 2008, SLOMFP also submitted a new Contention 6 to the Commission, based on a redacted version of a classified reference document that had been produced in connection with the *Vaughn* Index. The reference document, a report by Sandia National Laboratories, described a quantitative indicator known as "Ease," which can be used in threat assessment as a proxy for the probability of a threat scenario. San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 (ER 254). SLOMFP charged that use of the mathematical formula presented in the Sandia Study could result in the arbitrary exclusion of reasonably foreseeable attack scenarios, and therefore was inappropriate. *Id.*

10. CLI-08-05 (refusing to hold closed hearing)

On March 27, 2008, the Commission issued CLI-08-05. 67 NRC 174 (ER 34). The Commission refused to revisit its earlier decision refusing to allow SLOMFP access to non-public reference documents under a protective order. 67 NRC at 176 (ER 35).

[7] SLOMFP also challenged the adequacy of the *Vaughn* Index to justify some of the redactions from the reference documents. *Id.* at 5-7 (ER 267-69). These concerns were later resolved, as discussed in Section VI.B.11 below.

In a dissenting opinion, Commissioner Jaczko stated his disagreement with the Commission's decision to only allow the presiding officer to resolve the FOIA issues associated with Contention 1(b). 67 NRC at 178 (ER 36). He concluded that the Commission "should have also allowed the presiding officer to determine whether there is a need to grant access through an appropriate protective order to documents exempt from disclosure under FOIA, as the agency has done in previous adjudicatory hearings."

11. Resolution of Contention 1(b)

On April 18, 2008, the NRC Staff filed a motion for summary disposition of Contention 1(b), asserting that it had identified all of the EA Supplement's reference documents and explained how they were used. Attached to the motion was an NRC Staff affidavit, conceding that the NRC "did refer to the consequence evaluation criteria in SECY-04-0222 (and its enclosures) when developing the set of assumptions used to calculate the estimated doses to the nearest resident to the Diablo Canyon ISFSI." Affidavit of James Randall Hall, et al, at 2-3 (ER 189-90).

On April 26, 2008, SLOMFP responded that it believed the Staff had provided sufficient information to confirm that in fact, the NRC had relied on SECY-04-0222 to exclude consideration of attack scenarios that did not

result in immediate fatalities, thereby arbitrarily excluding significant land contamination from the analysis of reasonably foreseeable environmental impacts. San Luis Obispo Mothers for Peace's Response at 2 (ER 186).

Without conceding that the NRC Staff had fully complied with the FOIA in redacting the reference documents, SLOMFP stated that it would not seek additional public disclosure of information in the reference documents. Instead, SLOMFP stated that "it continues to believe that as a general matter, under the Atomic Energy Act and its implementing regulations, the NRC was required to give SLOMFP access to the reference documents under a protective order." *Id.* at 3 (ER 187). Therefore SLOMFP did not oppose the motion.

12. SLOMFP's Evidentiary Presentation on Contention 2

On April 14, 2008, SLOMFP submitted its evidentiary presentation on Contention 2. San Luis Obispo Mothers for Peace's Detailed Summary (ER 194).[8] Using publicly available documents, SLOMFP showed that the Staff's finding of no significant impact is contradicted by information that can be gleaned from publicly available documents, applying knowledge of

[8] The presentation was supported by the expert declaration and report that Dr. Thompson had initially submitted in support of SLOMFP's Hearing Request (ER 333 and 350, respectively), and by an additional declaration (ER 228).

engineering and related disciplines. This information shows that attacks causing significant environmental damage are reasonably foreseeable. By using available weapons, an attacker could penetrate a spent fuel storage module and cause a fire in the fuel and its cladding. As a result, volatile radioactive material in the module could escape to the atmosphere in a radioactive plume that could be carried over a wide geographic area. Fallout from the radioactive plume would cause widespread radioactive land contamination, leading to human cancers, abandonment of property, and other adverse social and economic impacts, including billions of dollars in economic damage. SLOMFP Detailed Summary at 20-21 (ER 218-19); *See also* Thompson Report at 33-37 (ER 382-386).

SLOMFP charged that the EA Supplement failed to consider these reasonably foreseeable events by categorically excluding attack scenarios causing other types of significant impacts such as severe land contamination. SLOMFP also showed that the NRC Staff excluded such scenarios from the EA based on (a) the fact that the EA Supplement provided only *one* direct indicator of an adverse outcome of an attack on an ISFSI, *i.e.*, the potential for early fatalities; and (b) the fact that SECY-04-0222, the Commission-approved policy of screening out non-early-fatal impacts from security

assessments of materials facilities, was listed as a reference document supporting the EA Supplement. Detailed Summary at 21-23 (ER 219-20).

Shortly after filing its evidentiary presentation, SLOMFP received the NRC Staff's motion for summary disposition of Contention 1(b), to which the Staff had attached a declaration admitting that it had applied the screening criteria of SECY-04-0222 to the Diablo Canyon ISFSI. *See* Section VI.B.11 above. SLOMFP submitted the declaration to the Commission as a supplement to its evidentiary presentation in San Luis Obispo Mothers for Peace's Request to Supplement Subpart K Presentation with NRC Staff Affidavit (April 26, 2008).

13. CLI-08-08

On April 30, 2008, the Commission issued CLI-08-08, refusing to admit SLOMFP's Contention 6, which challenged the use of the "Ease" criterion as a basis for excluding consideration of reasonably foreseeable attack scenarios. The Commission ruled that this contention raised the same inadmissible challenge to the NRC Staff's criteria for selecting attack scenarios as had been rejected in CLI-08-01. 67 NRC 193 (ER 28).

14. CLI-08-26

On July 1, 2008, the Commission held an oral argument on the parties' evidentiary presentations regarding Contention 2. On October 23,

2008, in CLI-08-26, a majority of the Commission rejected Contention 2 on the merits, ruling that no EIS was required to support the licensing of the Diablo Canyon ISFSI. (ER 15-16). The majority found that the NRC Staff and PG&E had provided "essentially uncontradicted evidence that the probability of a significant radioactive release caused by a terrorist attack was low, and that the potential latent health and land contamination effects of the most severe plausible attack would be small." *Id.,* slip op. at 8 (ER 8). The majority also found that the probability that an attack would even be attempted was low. *Id.,* slip op. at 15 (ER 15).

The majority revisited its earlier decision to reject Contention 3 and portions of Contentions 1 and 2 related to the consideration of attack scenarios, asserting that "NEPA does not require us to reveal sensitive government security information regarding the agency's environmental analysis, and there is no compelling policy reason to do so in this case." *Id.,* slip op. at 17 (ER 17).

Finally, the majority reported that "as we pledged earlier in this remanded proceeding [*i.e.,* in CLI-08-01], and as required by *Weinberger,* we ourselves, outside the adjudicatory proceeding, have reviewed the non-public information underlying the NRC Staff's selection of terrorist attack

scenarios, and are satisfied that the selection was reasonable." *Id.*, slip op. at 21 (ER 21).

Commissioner Jaczko submitted a detailed and scathing dissent. *Id.*, slip op. at 24-26 (ER 24-26). Observing that it was the NRC Staff and not SLOMFP who carried the burden of proof in the proceeding, Commissioner Jaczko concluded that nothing in the EA Supplement or the record of the proceeding showed that the NRC Staff had considered land contamination as an environmental impact of an attack on the Diablo Canyon ISFSI. *Id.* at 24 (ER 24). Calling the Staff's support for its argument "remarkably thin," Commissioner Jaczko noted the internal contradictions in the Staff's position: on the one hand the Staff stated that it had "considered" the effects of land contamination, and on the other it admitted that it had not "analyzed" those impacts. *Id.*

Commissioner Jaczko also criticized the majority's defense of its ruling on Contention 3, noting that the majority had "categorically dismissed any link between consideration of terrorist scenarios and the admitted contention, without addressing SLOMFP's argument that it is difficult to separate an analysis of consequences from the event that causes them." *Id.*, slip op. at 26 (ER 26). And once again, he challenged the majority's reliance on *Weinberger* to deny SLOMFP a closed hearing. *Id.*

Finally, Commissioner Jaczko disputed the majority's assertion that the Commission had fulfilled its pledge to review the Staff's selection of attack scenarios: "We put in place no process to collectively do so and I am aware of no discussion among the members of the Commission about the results of their ad hoc reviews." *Id.*, slip op. at 27 (ER 27).

VII. SUMMARY OF THE ARGUMENT

In *San Luis Obispo Mothers for Peace,* this Court overturned an NRC decision which refused, as a matter of law, to consider the environmental impacts of attacks in its licensing decisions for proposed nuclear facilities. On remand, the NRC prepared a supplemental EA for the Diablo Canyon ISFSI that purported to consider all "plausible" attacks on the facility, yet reached the patently absurd conclusion that the environmental effects of an attack on the facility would be negligible. The EA Supplement gave no indication that the NRC had addressed credible attack scenarios involving penetration of a storage module and ignition of a fire in the spent fuel, leading to the airborne release of a large quantity of radioactive cesium, widespread land contamination, and potentially devastating environmental and health effects.

No longer able to claim that an environmental analysis of attack impacts was not legally required, the Commission now attempted to erect an

impregnable legal barrier to any criticisms of its decision not to prepare an EIS regarding the environmental impacts of an attack on the Diablo Canyon ISFSI: the Commission refused to admit for a hearing any contentions that questioned whether it had given adequate consideration to attack scenarios that could cause significant adverse environmental impacts, on the ground that to admit such a contention would require the NRC to unlawfully disclose to SLOMFP sensitive security information protected by federal law.

While federal law does prohibit unrestricted public disclosure of sensitive security information, however, it contains no prohibition against the disclosure of sensitive security information to interested parties in a closed and protected hearing. The NRC had a statutory obligation, under NEPA, to fully consider environmental issues in its decision-making process by granting SLOMFP the closed hearing to which it was entitled under the AEA.

While SLOMFP was entitled to a closed hearing on its criticisms of the EA Supplement, sufficient information was available in the public record to show that the NRC had violated NEPA by categorically refusing to consider the reasonably foreseeable and significant environmental impacts of an attack on the Diablo Canyon ISFSI, applying irrational and sometimes secret criteria to avoid consideration of those impacts. The public record

shows that in preparing the EA Supplement, the NRC Staff arbitrarily screened out attacks that would not cause immediate fatalities, even though the dominant impact of an attack on a spent fuel storage facility would be land contamination and ensuing long-term illnesses and economic effects. The NRC also screened out consideration of attacks that were time-consuming or demanded significant resources, thus arbitrarily and irrationally excluding consideration of reasonably foreseeable attacks with a greater level of sophistication.

The public record also showed that the entire case was tainted by the Commission's categorical threshold determination that the potential for any attack on the Diablo Canyon ISFSI is remote and speculative. In making that determination, the Commission repeated, almost word-for-word, the same rationale whose reasonableness was rejected by this Court in *San Luis Obispo Mothers for Peace.* The Commission further showed that it attached little meaning to the concept of a "plausible" attack scenario as used in the EA Supplement when it was revealed in CLI-08-26 that a promised review of the NRC Staff's selection of plausible attack scenarios in the EA Supplement amounted to nothing more than *ad hoc* reviews by individual Commissioners.

Finally, the EA Supplement is fatally defective because it completely

fails to justify the NRC's refusal to prepare an EIS. The record of the proceeding contains no evidence that the NRC gave reasoned consideration to the reasonably foreseeable potential for an attack on the Diablo Canyon ISFSI that could cause severe environmental contamination. As Commissioner Jaczko noted in his dissent from CLI-08-26, the public statements made by the Staff in the EA Supplement and in the course of the proceeding were evasive and circular. *Id.*, slip op. at 26 (ER 26). The need to protect sensitive security information does not excuse such a basic lack of public accountability under NEPA.

The Court should order the NRC to comply with NEPA and the AEA by granting SLOMFP a closed hearing on the adequacy of the EA Supplement. The Court should also reverse the NRC's finding of no significant impact with respect to attacks on the Diablo Canyon ISFSI, because the NRC relied on arbitrary and unlawful criteria for screening out consideration of reasonably foreseeable environmental impacts, and because the EA Supplement utterly failed to provide a "convincing statement" of the NRC's reasons for refusing to prepare an EIS. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, (9th Cir. 1998), cert. denied sub. nom. *Malheur Lumber Co. v. Blue Mountains Biodiversity Project*, 527 U.S. 1003 (1999).

VIII. ARGUMENT

A. Standard of Review

The APA requires a court to "hold unlawful and set aside agency action" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Agency action must also be reversed if it was taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

In reviewing "primarily legal questions" under the APA, this Court applies a standard of reasonableness. *San Luis Obispo Mothers for Peace,* 449 F.3d at 1028, citing *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995); *Ka Makani'o Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002). Factual or technical agency decisions, in contrast, are entitled to a "strong level of deference." *Alaska Wilderness Recreation and Tourism Ass'n*, 67 F.3d at 727.

B. The NRC Violated NEPA and the AEA by Refusing to Grant SLOMFP a Hearing on the Ground That it Would Require Public Disclosure of National Security Information.

In CLI-07-11, in accordance with NEPA and the AEA, the Commission offered SLOMFP an opportunity to request a hearing on the Draft EA Supplement by filing contentions challenging the adequacy of the

Draft EA Supplement to comply with NEPA.[9] 65 NRC at 149 (ER 53). The set of five contentions that SLOMFP submitted in response to CLI-07-11 included several contentions which criticized the Draft EA Supplement's failure to consider significant adverse environmental impacts that would result from credible scenarios of attack on the proposed ISFSI.[10] SLOMFP Hearing Request at 11-25 (ER 299-313). In light of the fact that admission of these contentions could require consideration of sensitive security information, SLOFMP repeatedly requested a closed hearing where disclosure of sensitive information would be restricted to those hearing participants authorized to review such information. *Id.* at 26 (ER 314). *See also* Sections VI.B.6, VI.B.9, VI.B.11, above.

However, the NRC categorically refused to grant SLOMFP a hearing on any contention (or portion of a contention) questioning whether the NRC had considered credible attack scenarios that could cause significant environmental damage, on the ground that "protecting national security

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[9] The Commission did not require SLOMFP to demonstrate standing, which was previously approved in *Pacific Gas and Electric Co.* (Diablo Canyon Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413, 429 (2002).

[10] For instance, Contention 1 criticized the vagueness of the NRC's terminology and criteria for evaluating attacks, its apparent use of irrational screening criteria to exclude credible attack scenarios from consideration, and Contentions 2 and 3 challenged the NRC's failure to consider a range of plausible attack scenarios that could have significant impacts on the environment.

information overrides ordinary NEPA disclosure requirements." CLI-08-1, 67 NRC at 8 (ER 41). According to the NRC, "NEPA does not require us to reveal sensitive government security information regarding the agency's environmental analysis, and there is no compelling policy reason to do so in this case." CLI-08-26, slip op. at 17 (ER 17).

By refusing to grant SLOMFP a closed hearing, the NRC violated NEPA's requirement that it must engage environmental considerations to the fullest possible extent in its decision-making process, and it also violated the AEA's requirement to grant SLOMFP a hearing on its contentions. Neither applicable case law nor applicable statutory requirements excuse the NRC from fulfilling these statutory obligations under NEPA and the AEA.

1. NEPA requires the NRC to fully consider environmental values in its decision-making process, including the hearing process.

As identified by the Supreme Court, NEPA has twin purposes. The first purpose is to ensure that environmental values are fully considered in the agency's decision-making process, and the second purpose is to inform the general public of what the agency has considered during the agency process. *Baltimore Gas & Elec. Co.*, 462 U.S. at 97. *See also San Luis Obispo Mothers for Peace*, 449 F.3d at 1020. With respect to the first purpose, NEPA requires that the NRC must consider environmental values

in its decision-making process "to the fullest extent, unless there is a clear conflict of *statutory* authority." *Calvert Cliffs Coordinating Comm. v. United States Atomic Energy Comm.*, 449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original) (reversing Atomic Energy Commission[11] regulations that failed to fully subject the contents of EISs to the hearing process).

As the Supreme Court recognized in *Weinberger*, the "thrust" of NEPA is that "environmental concerns be integrated into the *very process* of agency decisionmaking.'" 454 U.S. at 143 (quoting *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979)) (emphasis added). An agency's obligation to include environmental considerations in its decision-making process, which arises under the first purpose of NEPA, is separate from the obligation to *publicly disclose* NEPA documents and decisions, which arises under NEPA's second purpose. *Weinberger*, 454 U.S. at 143.

For the NRC, the "very process of agency decisionmaking" includes the adjudicatory hearing guaranteed by Section 189a of the Atomic Energy Act to any person with an interest in the outcome of a licensing decision. 42 U.S.C. § 2239(a). Section 189a of the AEA gives petitioners the right to participate in the NRC's decision-making process through adjudicatory hearings, so long as they have standing and meet the contention

[11] The Atomic Energy Commission ("AEC") was the predecessor agency to the NRC.

admissibility standards. *BPI v. Atomic Energy Commission,* 502 F.2d at 428-29.

In a hearing on environmental issues, the NRC Staff and the license applicant share the burden of proving that a petitioner's concerns are without merit. *Louisiana Energy Services, L.P.*, LBP-96-25, 44 NRC at 338-39. The Commission has recognized that this adjudicatory process for confronting the evidence on environmental issues assists in ensuring informed agency decisions:

> [T]he Commission's objectives are to provide a fair hearing process, to avoid unnecessary delays in the NRC's review and hearing processes, and *to produce an informed adjudicatory record that supports agency decision making on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment*.

Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 19 (1998) (emphasis added). *See also* Statement of Policy on Conduct of Licensing Proceedings, CLI-81-08, 13 NRC 452, 453 (1981); Final Policy Statement, Conduct of New Reactor Licensing Proceedings, 73 Fed. Reg. 20,963, 20,969 (April 17, 2008). NRC's regulations for the implementation of NEPA also specifically provide for challenges to the adequacy of EISs and EAs in the hearing process. 10 C.F.R. § 51.104(a) (challenges to EISs) and 10 C.F.R. § 51.104(b) (challenges to EAs).

Thus, the right of the interested public to participate in environmental

decisions arises not from NEPA's requirement of public disclosure, but instead from petitioners' statutory rights under the AEA as an interested party, to participate in an NRC decision-making process on environmental issues. As the Court explained in *Calvert Cliffs Coordinating Comm.*:

> What possible purpose could there be in the Section 102(2)(C) requirement (that the "detailed statement" accompany proposals through agency review processes) if "accompany" means no more than physical proximity – mandating no more than the physical act of passing certain folders and papers, unopened, to review officials along with other folders and papers? What possible purpose could there be in requiring the "detailed statement" to be before hearing boards, if the boards are free to ignore entirely the contents of the statement? NEPA was meant to do more than regulate the flow of papers in the federal bureaucracy. The word "accompany" in Section 102(2)(C) must not be read so narrowly as to make the Act ludicrous. It must, rather, be read to indicate a congressional intent that environmental factors, as complied in the "detailed statement," be *considered* through agency review processes.

449 F.2d at 1117-18 (emphasis in original).

2. The NRC improperly excluded SLOMFP from participating in its NEPA decisionmaking process by misconstruing its obligations for handling national security information under NEPA.

In this case, the NRC improperly denied SLOMFP its section 189a right to participate in the agency hearing process, even where SLOMFP otherwise met the standards for obtaining an adjudicatory hearing, on the ground that denial of a hearing was necessary in order to protect national security information. CLI-08-01, 67 NRC at 20-21 (ER 47). The NRC's

decision was based on a misreading of the Supreme Court's *Weinberger* case and statutory provisions and a disregard of the dual NEPA obligations discussed above.

Because the issues SLOMFP sought to litigate in this case involved sensitive information, the NRC concluded that the *Weinberger* decision allowed it to categorically deny SLOMFP the right to participate in the decision-making process even through a closed agency hearing. 67 NRC at 20-21. In doing so, the NRC read *Weinberger* as not requiring any disclosure of its environmental analysis if the material would be exempt from FOIA disclosure as national security information. CLI-08-26, slip op. at 17-18 (ER 17-18).

Under the holding of *Weinberger,* however, while NEPA does not require the NRC to *disclose to the public at large* sensitive government security information if such information is exempt under the FOIA, NEPA does still require the NRC to consider environmental issues to the fullest possible extent in its decision-making process, which under section 189a involves allowing qualified interested parties to participate in the hearing process. As the Supreme Court recognized, the requirement to "inject environmental considerations into the federal agency's decision-making process" is separate from the requirement to prepare an EIS as an "outward

sign that environmental values and consequences have been considered during the planning stage of agency actions." 454 U.S. at 143. "The decisionmaking and public disclosure goals of § 102(2)(C), though certainly compatible, are not necessarily coextensive." *Id.*

Thus, the NRC ignored the first prong of its two-pronged NEPA obligation by wrongly claiming that NEPA, as interpreted by *Weinberger,* mandates nondisclosure. The NRC focused solely on the public disclosure NEPA obligation, without complying with its equally critical obligation to include SLOMFP in the decisionmaking process.

In disallowing SLOMFP from receiving sensitive security information during a closed hearing, the NRC also misread its statutory obligations to protect sensitive information. Granting SLOMFP a closed hearing on its contentions would in no way result in "substantial disclosure of classified and safeguards information" in violation of the NRC's "statutory duty to protect national security information." 67 NRC at 20-21 (ER 47), citing 42 U.S.C. §§ 2161, 2167. The sections of the AEA cited by the NRC in CLI-08-01 for the proposition that the NRC "has a statutory obligation to protect national security information" (67 NRC at 19, ER 46) do not prohibit the NRC from sharing sensitive security information in a protected setting. Instead, they call for the "control" of the dissemination of classified

information (*i.e.*, "Restricted Data") (42 U.S.C. § 2161) and protection of safeguards information from "unauthorized disclosure." 42 U.S.C. § 2167. The regulations in 10 C.F.R. §§ 2.744(e) and 73.21 and Subpart I of 10 C.F.R. Part 2 implement these statutes.[12]

The NRC also erred by characterizing the information it sought to withhold from disclosure as "state secrets" and therefore entitled to "absolute" protection. CLI-08-01, 67 NRC at 21 n.97 (ER 47). Unlike *Weinberger*, this case does not involve information held solely by the government, whose very existence cannot be acknowledged. As Commissioner Jaczko noted in his dissent, "[t]he proceeding before us does not involve military or state secrets and we do have mechanisms to ensure that sensitive information provided to the participants in the proceeding is protected from disclosure." CLI-08-26, slip op. at 26 (ER 26). While in

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[12] As discussed above in note 1, because the licensing proceeding for the Diablo Canyon ISFSI began in 2002, the remanded proceeding has been governed by the procedural regulations that were in force at that time, and therefore SLOMFP has cited those regulations in this brief. Since then, some of the regulations have been re-numbered, revised or upgraded in response to the 9/11 attacks. For instance, although the content of 10 C.F.R. § 2.744(e) remains the same, the regulation was re-numbered 10 C.F.R. § 2.709(f) in 2004. The Commission also upgraded the requirements of 10 C.F.R. § 73.21 after the 9/11 attacks.

In a remanded proceeding, SLOMFP would not object to the application of revised or upgraded regulations for the protection of sensitive security information.

Weinberger, the very existence of a bomb facility was a state secret known only to a handful of government employees, here the contents of NRC security measures are not only routinely communicated to the private businesses that are licensed to operate nuclear facilities, but those businesses may be offered an opportunity to comment on them, in a protected setting, before they are imposed. *See* examples of NRC post-9/11 discussions with industry representatives of their views on appropriate security measures in SLOMFP's Reply Regarding Hearing Request at 6-7 (ER 294-95).[13] Similarly here, SLMFP can receive sensitive information in a closed hearing in the course of its statutory right to participate in the agency process.

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[13] More recently, the NRC consulted licensees in developing measures to mitigate the environmental impacts of temporary storage of spent fuel in high-density fuel storage pools and thereby avoid the preparation of an EIS. The Attorney General of the Commonwealth of Massachusetts, the Attorney General of California; Denial of Petitions for Rulemaking, 73 Fed. Reg. 46,204, 46,209 (August 8, 2008). This information was thus shared with interested parties even while protected from disclosure in the Federal Register.

Similarly, in 2003 the NRC announced that before imposing post-9/11 "enhancements" to the hypothetical design basis threat ("DBT") against which nuclear power plant licensees are required to protect their facilities, the NRC "solicit[ed] and receive[ed] comments from Federal, State, and local agencies, and industry stakeholders." Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705 (March 19, 2007). Neither the content of the orders nor the details of the DBT rule was made available to the general public.

3. The NRC can comply with its obligation under section 189a and NEPA to allow SLOMFP to participate in the agency decision-making process and to protect national security information by holding a closed hearing.

Here, the NRC can comply with its obligation to fully take environmental values into account by granting a closed hearing to SLOMFP on concerns that it legitimately raised through the submission of admissible contentions, even though those contentions may relate to national security issues. The Commission has available to it well-established procedures for protecting classified, safeguards and other sensitive information during a hearing. *See, e.g.,* 10 C.F.R. § 2.744(e) (procedures for handling safeguards information in NRC hearings); 10 C.F.R. § 73.21 (general requirements for protection of safeguards information) 10 C.F.R. Part 2, Subpart I (procedures for handling classified information in NRC hearings.) Under these regulations, the NRC has conducted at least two closed hearings that involved sensitive security issues. *See, e.g., Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-410, 5 NRC 1398 (1977) (allowing protected discovery in a hearing on the Diablo Canyon security plan); *Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), LBP-04-10, 59 NRC 296 (2004) (commencing a closed hearing on the security plan for the Catawba nuclear power plant and issuing

a redacted ruling on the admissibility of contentions).[14]

Thus, this case is fundamentally distinct from *Weinberger* with respect to the relief requested by the petitioners. In *Weinberger,* the petitioners asked the court to create new procedures for public disclosure of information, *i.e.*, to prepare a "hypothetical" EIS. 454 U.S. at 145. Here, in contrast, SLOMFP simply requests the Court to order the NRC to implement its long-established procedures for conducting closed hearings where sensitive security information is relevant to the agency's decision.

C. The NRC Violated NEPA By Refusing to Consider Reasonably Foreseeable and Significant Environmental Impacts of an Attack on the Diablo Canyon Spent Fuel Storage Facility.

In concluding that an attack on the Diablo Canyon spent fuel storage facility would have no significant environmental impacts, the NRC's EA Supplement ignored a whole range of credible, *i.e.*, reasonably foreseeable, attack scenarios involving the instigation of a fire in the fuel storage modules that could lead to release of an airborne radioactive plume. The

[14] In CLI-08-01, the Commission implicitly acknowledged that it had previously held closed hearings on AEA-based security issues, but asserted that it did not have to grant SLOMFP a closed hearing in a "NEPA-based" proceeding because it had "never" done so before. 67 NRC at 21 (ER 47). The NRC may be excused from full NEPA compliance only by a statutory prohibition which makes NEPA compliance impossible. *Natural Resources Defense Council v. Winter*, 518 F.3d 658, 685 (9th Cir. 2008), rev'd on other grounds, *Winter v. Natural Resources Defense Council*, 129 S.Ct. 365 (2008). NRC tradition is not the equivalent of a statutory prohibition.

ensuing fallout of radioactive contamination over a wide land area could have devastating impacts on human health and the environment in the form of illness, latent mortalities, displacement of populations, and enormous socioeconomic effects. SLOMFP Hearing Request at 13-14 (ER 327-28). Under NEPA and its implementing regulations, the NRC must consider these reasonably foreseeable environmental impacts that result in catastrophic effects.

However, the NRC repeatedly refused to engage SLOMFP, either by granting SLOMFP a hearing on any contention that challenged the NRC's consideration of attack scenarios, or by responding to SLOMFP's comments in the EA Supplement. Instead, at each stage of the proceeding, the NRC categorically refused to consider evidence of reasonably foreseeable and significant adverse environmental impacts of an attack on the Diablo Canyon ISFSI. The record showed that it did so based on arbitrary, irrational and sometimes secret screening criteria that not only violated NEPA, but also this Court's previous decision in *San Luis Obispo v. NRC.*

1. The NRC must consider the environmental impacts of credible attacks on the Diablo Canyon ISFSI.

As this Court recognized in *San Luis Obispo Mothers for Peace,* CEQ regulations for the implementation of NEPA require that an EIS must address "events with potentially catastrophic consequences 'even if their

probability of occurrence is low, provided that the analysis of impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.'" 449 F.3d at 1033 (quoting 40 C.F.R. § 1502.22(b)(4)). Thus, even though the NRC may consider the likelihood of a catastrophic attack on the Diablo Canyon ISFSI to be low, it must consider the impacts of such attacks if they are reasonably foreseeable.

In its Contentions 2, 3, and 6, SLOMFP submitted extensive and unrefuted expert evidence that the NRC should have considered a group of credible attacks which could result in severe impacts and in fact required preparation of an EIS. ER 324-28 (Contentions 2 and 3), ER 350-405 (Thompson Report) and ER 254-62 (Contention 6 and supporting Thompson Declaration). The NRC was required to consider and evaluate the impacts of such attacks as part of its NEPA decision-making process.[15]

2. The NRC violated NEPA by categorically and unlawfully refusing, as a matter of law, to consider credible attack scenarios based on the use of unreasonable and unsupported screening criteria.

In this case, the NRC improperly excluded from consideration in the EA Supplement the consequences of these credible attack scenarios causing

[15] As the Supreme Court held in *Weinberger*, the NRC's obligation to comply with NEPA in its decision-making process is independent of its obligation to publicly disclose the basis for its decision, and is not excused by any national security exemption. 454 U.S. at 144-46.

severe land contamination, by categorically and secretively applying criteria designed to exclude such scenarios from consideration. These criteria were applied at each critical juncture in this proceeding so as (i) to only consider attacks that did not cause immediate fatalities and (ii) to use a mathematical formula known as "Ease" as a proxy for the probability of a threat scenario. Hearing Request at 10-11 (ER 324-25), San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 (ER 254).

That the Staff screened out attacks that would not cause immediate fatalities is demonstrated by the fact that the EA Supplement provides only one direct indicator of an adverse outcome of an attack on an ISFSI: the potential for early fatalities. Hearing Request at 11 (ER 325). The EA Supplement gave no indication that it considered any other factor, such as land contamination or illness, to constitute an indicator of an adverse outcome. In addition, the Staff's affidavit submitted in support of its summary disposition motion on Contention 1(b) admits that the Staff excluded events that did not cause immediate fatalities in determining the range of attacks to consider in connection with the Diablo Canyon ISFSI. *See* discussion above in Section VI.B.11. This screening criterion was kept a secret until its disclosure was forced by litigation on Contention 1(b). The criterion was irrational because it ensures disregard of the dominant effect of

credible attacks on spent fuel storage facilities, land contamination. While the effects of land contamination are not immediately fatal, they are nevertheless potentially catastrophic.

Similarly, the Staff screened out credible attacks by its reliance on the "Ease" factor as a proxy for the probability of a threat scenario. The more time-consuming, complex, and technically demanding a scenario is, the lower the "Ease" value it is given. San Luis Obispo Mothers for Peace's Request for Admission of Late-Filed Contention 6 at 4-5 (ER 257-58). As a result, the use of the Ease factor appears to inappropriately screen out credible attack scenarios if they require sophistication and resources. *Id.* This criterion is irrational because, as stated in Dr. Thompson's expert report, nuclear facilities are especially attractive targets for attack by sub-national groups that are comparatively sophisticated in their approach, and comparatively well provided with funds and skills. *Id.* (ER 258).

3. The NRC made an unlawful threshold determination that any attack on the Diablo Canyon ISFSI is remote and speculative.

While the NRC Staff claimed in the EA Supplement to have considered the environmental impacts of "plausible" attacks (EA Supplement at 6, ER 62), the record indicates that at the very threshold of this proceeding, the Commission determined that any attacks on the Diablo

Canyon ISFSI are remote and speculative and therefore unworthy of consideration in a NEPA analysis. The Commission's categorical refusal to consider the plausibility of attack scenarios fatally taints the NRC Staff's claim to have evaluated plausible scenarios in the EA Supplement.

At the very outset of this proceeding, in CLI-07-11, the Commission majority announced that it "remains convinced that NEPA does not require a terrorism review in connection with NRC licensing decisions." CLI-07-11, 65 NRC at 149 n.5 (ER 53). Consistent with that pronouncement, in refusing to admit Contention 3, the Commission declared that "[a]djudicating alternate terrorist scenarios is impracticable. The range of conceivable (albeit highly unlikely) terrorist scenarios is essentially limitless, confined only by the limits of human ingenuity." CLI-08-01, 67 NRC at 20 (ER 47).

Six years earlier, the Commission had used almost exactly the same words to claim that the environmental impacts of an attack on a proposed nuclear facility are "remote and speculative" as a matter of law, and therefore need not be addressed in an EIS. *Private Fuel Storage, L.L.C.*, CLI-02-25, 56 NRC at 350.[16] That very reasoning was overturned by this Court in *San Luis Obispo Mothers for Peace*:

[16] In its early decision CLI-02-25, the Commission asserted that:

> We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is "remote and speculative," with its stated efforts to undertake a "top to bottom" security review against the same threat. Under the NRC's own formulation of the rule of reasonableness, it is required to make determinations that are consistent with its policy statements and procedures. Here, it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are "remote and highly speculative" for NEPA purposes.

449 F.3d at 1031 (footnote omitted). Thus, a majority of the Commission appears to have disregarded the Court's holding in *San Luis Obispo Mothers for Peace* with respect to the lawfulness of its "remote and speculative" rationale.

The Commission majority further demonstrated that it attaches little or no meaning to the concept of a plausible attack scenario when it claimed to have fulfilled a commitment made in CLI-08-01 to conduct a non-public

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> It is sensible to draw a distinction between the likely impacts of the PFS facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process becomes *truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse effect,* no matter how indirect its connection to agency action. In our view, the causal relationship between approving the PFS facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility.

56 NRC at 350 (emphasis added).

review of "the range of terrorist events considered by the Staff." *See* CLI-08-01, 67 NRC at 21 n.98 (ER 47). The majority in CLI-08-26 claims that such an *in camera* review process took place and that it forms the basis for the Commission's judgment that the EA Supplement complies with NEPA:

> We have read the Staff's supplemental environmental assessment, *reviewed outside of this adjudication the non-public documents that provide the basis for the Staff's selection of the attack scenarios evaluated*, and considered the pleadings and transcripts developed by the parties in support of our public hearing in this case. In our judgment, the environmental information developed by the Staff and the parties is more than adequate to permit informed decision making by the Commission in this case, which is what NEPA requires.

CLI-08-26, slip op. at 18 (ER 18) (emphasis added). But the record shows that in fact, the Commissioners as a regulatory body never conducted any review of "the range of terrorist events considered by the Staff." CLI-08-01, 67 NRC at 21. Instead, as described by dissenting Commissioner Jaczko, any reviews that took place were at best *ad hoc* reviews by individual Commissioners:

> In the absence of holding a closed session, the Commission committed in CLI-08-01 to review the range of terrorist events considered by the Staff. We put in place no process to collectively do so and I am aware of no discussion among the members of the Commission about the results of their ad hoc reviews.

CLI-08-26, slip op. at 27 (ER 27). Individual reviews, conducted without the benefit of discussion or any record that they were even conducted, by a majority of Commissioners who have stated that they consider the

plausibility of attack scenarios to be incapable of meaningful evaluation, cannot be considered to satisfy the NRC's own obligation to engage in the decision-making process and determine that all credible attack scenarios had been considered.

4. The EA Supplement is defective because it fails to demonstrate that the NRC had a reasoned basis for rejecting SLOMFP's scenarios and for its refusal to prepare an EIS.

As this Court held in *Blue Mountains*, an agency's decision not to prepare an EIS "will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant." 161 F.3d at 1211 (quoting *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)). An agency's refusal to prepare an EIS must also be rejected if the agency has "entirely failed to consider an important aspect of the problem; offered an explanation for its decision that runs counter to the evidence before the agency; or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Southwest Center for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1448 (9th Cir. 1996).

The EA Supplement fails to support the NRC's finding of no significant impact, because it does not address the evidence submitted by SLOMFP in its hearing request and its comments on the Draft EA

Supplement, that credible attack on the Diablo Canyon ISFSI, involving the instigation of a fire in a dry storage cask and release of a radioactive plume from the casks, would have significant environmental impacts in the form of widespread radioactive land contamination.

Nothing in the record of the entire proceeding demonstrates that the NRC gave reasoned consideration to the potential that an attacker could cause a fire in a spent fuel storage canister, causing the fuel and its cladding to burn and radioactive material to escape to the atmosphere, resulting in widespread environmental contamination. During oral argument, the Staff was not even able to respond to Commissioner Jaczko's "straightforward question" on the topic, thus indicating it had not even looked. CLI-08-26, slip op. at 26 (ER 26). The Staff was not even able to represent that it had performed a technical analysis of the impact of land contamination. As Commissioner Jaczko noted in his dissent from CLI-08-26: "[t]he Staff says it *considered* land contamination but did not *analyze* it – 'we did not explicitly do an analysis of land contamination.'" Transcript at 21 (Ms. Clark), *see also* Transcript at 23, 29. CLI-08-26, slip op at 24 (ER 24) (emphasis in original). Regardless of any claim by NRC regarding the need to protect sensitive security information, there is no excuse for the presentation of such evasive and misleading public statements. *Hughes*

Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1999); *Johnston v. Davis*, 698 F.2d 1088, 1094 (10th Cir. 1983); *South Louisiana Envtl. Council v. Sand*, 629 F.2d 1005, 1011-12 (5th Cir. 1980).

As observed by Commission Jaczko, the EA is "silent" on the question of how the radiation dose calculated by the NRC Staff as the result of an attack "relates to land contamination or non-fatal health effects." CLI-08-26, slip op. at 24 (ER 24). As Commissioner Jaczko concluded, the NRC Staff entirely failed, in the EA Supplement, to demonstrate that it had considered land contamination as an environmental impact of an attack on the ISFSI. And, of course, the EA Supplement made no attempt whatsoever to explain how it had managed to exclude consideration of any attack on the Diablo Canyon ISFSI that caused more than the most minor environmental consequences. The EA Supplement is therefore utterly inadequate to justify the NRC's refusal to prepare an EIS. *Southwest Center for Biological Diversity*, 100 F.3d at 1448.

IX. STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, SLOMFP respectfully submits that this case raises issues that are closely related to a NEPA issue raised in *Public Citizen, Inc. and San Luis Obispo Mothers for Peace v. NRC*, Nos. 07-71868 and 07-72555, now pending before this Court.

X. CONCLUSION

For the foregoing reasons, SLOMFP requests the Court to reverse CLI-08-26, CLI-08-01, CLI-08-05, and CLI-08-08, and remand this case for a closed adjudicatory hearing on SLOMFP's disallowed contentions. In addition, SLOMFP requests the Court to reverse the NRC's finding of no significant impact with respect to the environmental impacts of attacks on the Diablo Canyon ISFSI. Finally, consistent with NEPA's requirement that an agency may not take action before it has complied with NEPA, *Robertson*, 490 U.S. at 349, SLOMFP requests the Court to revoke the Commission's decision to issue a license for the Diablo Canyon ISFSI.

Respectfully submitted,

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February 9, 2009

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE Petitioner	)	
v.	)	No. 08-75058
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	

CERTIFICATE OF SERVICE

I certify that on February 9, 2009, an electronic version of copies of the foregoing Petitioner's Initial Brief was served on the following by posting it on the website of the U.S. Court of Appeals for the Ninth Circuit.

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STATUTORY ADDENDUM

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Council on Environmental Quality Regulations

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

ATOMIC ENERGY ACT

42 U.S.C. § 2161. Policy of Commission

It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. Consistent with such policy, the Commission shall be guided by the following principles:

(a) Until effective and enforceable international safeguards against the use of atomic energy for destructive purposes have been established by an international arrangement, there shall be no exchange of Restricted Data with other nations except as authorized by section 2164 of this title; and

(b) The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding and to enlarge the fund of technical information.

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) 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. § 2239. Hearings and judicial review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application

under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefore by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

…

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section.

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f(c) of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

THE HOBBS ACT

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

…

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
…

28 U.S.C § 2344. Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of--

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

NATIONAL ENVIRONMENTAL POLICY ACT

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the
policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

CODE OF FEDERAL REGULATIONS

NRC Regulations

10 C.F.R. § 2.714 Intervention (2001).

…

(b)(1) Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751a, or if no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her

petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

(2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:

(i) A brief explanation of the bases of the contention.

(ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.

(iii) Sufficient information (which may include information pursuant to paragraphs (b)(2) (i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief. On issues arising under the National Environmental Policy Act, the petitioner shall file contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's document.

…

10 C.F.R. § 2.744 Production of NRC records and documents (1981).

…

(e) In the case of requested documents and records (including Safeguards Information referred to in sections 147 and 181 of the Atomic Energy Act, as amended) exempt from disclosure under § 2.790, but whose disclosure is found by the presiding officer to be necessary to a proper decision in the

proceeding, any order to the Executive Director for Operations to produce the document or records (or any other order issued ordering production of the document or records) may contain such protective terms and conditions (including affidavits of non-disclosure) as may be necessary and appropriate to limit the disclosure to parties in the proceeding, to interested States and other governmental entities participating pursuant to § 2.715(c), and to their qualified witnesses and counsel. When Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, is received and possessed by a party other than the Commission staff, it shall also be protected according to the requirements of § 73.21 of this chapter. The presiding officer may also prescribe such additional procedures as will effectively safeguard and prevent disclosure of Safeguards Information to unauthorized persons with minimum impairment of the procedural rights which would be available if Safeguards Information were not involved. In addition to any other sanction that may be imposed by the presiding officer for violation of an order issued pursuant to this paragraph, violation of an order pertaining to the disclosure of Safeguards Information protected from disclosure under section 147 of the Atomic Energy Act, as amended, may be subject to a civil penalty imposed pursuant to § 2.205. For the purpose of imposing the criminal penalties contained in section 223 of the Atomic Energy Act, as amended, any order issued pursuant to this paragraph with respect to Safeguards Information shall be deemed an order issued under section 161b of the Atomic Energy Act.

10 C.F.R. Part 2, Subpart I—Special Procedures Applicable to Adjudicatory Proceedings Involving Restricted Data and/or National Security Information

§ 2.900 Purpose.

This subpart is issued pursuant to section 181 of the Atomic Energy Act of 1954, as amended, and section 201 of the Energy Reorganization Act of 1974, as amended, to provide such procedures in proceedings subject to this part as will effectively safeguard and prevent disclosure of Restricted Data and National Security Information to unauthorized persons, with minimum impairment of procedural rights.

§ 2.901 Scope of subpart I.

This subpart applies, as applicable, to all proceedings under subparts G, J, K, L, M, and N of this part.

§ 2.902 Definitions.
As used in this subpart:
(a) *Government agency* means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America, which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.
(b) *Interested party* means a party having an interest in the issue or issues to which particular Restricted Data or National Security Information is relevant. Normally the interest of a party in an issue may be determined by examination of the notice of hearing, the answers and replies.
(c) The phrase *introduced into a proceeding* refers to the introduction or incorporation of testimony or documentary matter into any part of the official record of a proceeding subject to this part.
(d) *National Security Information* means information that has been classified pursuant to Executive Order 12356.
(e) *Party,* in the case of proceedings subject to this subpart includes a person admitted as a party under § 2.309 or an interested State admitted under § 2.315(c).

§ 2.903 Protection of restricted data and national security information.
Nothing in this subpart shall relieve any person from safeguarding Restricted Data or National Security Information in accordance with the applicable provisions of laws of the United States and rules, regulations or orders of any Government Agency.

§ 2.904 Classification assistance.
On request of any party to a proceeding or of the presiding officer, the Commission will designate a representative to advise and assist the presiding officer and the parties with respect to security classification of information and the safeguards to be observed.

§ 2.905 Access to restricted data and national security information for parties; security clearances.
(a) *Access to restricted data and national security information introduced into proceedings.* Except as provided in paragraph (h) of this section, restricted data or national security information introduced into a proceeding subject to this part will be made available to any interested party having the

required security clearance; to counsel for an interested party provided the counsel has the required security clearance; and to such additional persons having the required security clearance as the Commission or the presiding officer determined are needed by such party for adequate preparation or presentation of his case. Where the interest of such party will not be prejudiced, the Commission or presiding officer may postpone action upon an application for access under this paragraph until after a notice of hearing, answers, and replies have been filed.

(b) *Access to Restricted Data or National Security Information not introduced into proceedings.*

(1) On application showing that access to Restricted Data or National Security Information may be required for the preparation of a party's case, and except as provided in paragraph (h) of this section, the Commission or the presiding officer will issue an order granting access to such Restricted Data or National Security Information to the party upon his obtaining the required security clearance, to counsel for the party upon their obtaining the required security clearance, and to such other individuals as may be needed by the party for the preparation and presentation of his case upon their obtaining the required clearance.

(2) Where the interest of the party applying for access will not be prejudiced, the Commission or the presiding officer may postpone action on an application pursuant to this paragraph until after a notice of hearing, answers and replies have been filed.

(c) The Commission will consider requests for appropriate security clearances in reasonable numbers pursuant to this section. A reasonable charge will be made by the Commission for costs of security clearance pursuant to this section.

(d) The presiding officer may certify to the Commission for its consideration and determination any questions relating to access to Restricted Data or National Security Information arising under this section. Any party affected by a determination or order of the presiding officer under this section may appeal forthwith to the Commission from the determination or order. The filing by the staff of an appeal from an order of a presiding officer granting access to Restricted Data or National Security Information shall stay the order pending determination of the appeal by the Commission.

(e) *Application granting access to restricted data or national security information.*

(1) An application under this section for orders granting access to restricted data or national security information not received from another Government agency will normally be acted upon by the presiding officer, or if a proceeding is not before a presiding officer, by the Commission.

(2) An application under this section for orders granting access to restricted data or national security information where the information has been received by the Commission from another Government agency will be acted upon by the Commission.

(f) To the extent practicable, an application for an order granting access under this section shall describe the subjects of Restricted Data or National Security Information to which access is desired and the level of classification (confidential, secret or other) of the information; the reasons why access to the information is requested; the names of individuals for whom clearances are requested; and the reasons why security clearances are being requested for those individuals.

(g) On the conclusion of a proceeding, the Commission will terminate all orders issued in the proceeding for access to Restricted Data or National Security Information and all security clearances granted pursuant to them; and may issue such orders requiring the disposal of classified matter received pursuant to them or requiring the observance of other procedures to safeguard such classified matter as it deems necessary to protect Restricted Data or National Security Information.

(h) *Refusal to grant access to restricted data or national security information.*

(1) The Commission will not grant access to restricted data or national security information unless it determines that the granting of access will not be inimical to the common defense and security.

(2) Access to Restricted Data or National Security Information which has been received by the Commission from another Government agency will not be granted by the Commission if the originating agency determines in writing that access should not be granted. The Commission will consult the originating agency prior to granting access to such data or information received from another Government agency.

§ 2.906 Obligation of parties to avoid introduction of restricted data or national security information.

It is the obligation of all parties in a proceeding subject to this part to avoid, where practicable, the introduction of Restricted Data or National Security Information into the proceeding. This obligation rests on each party whether or not all other parties have the required security clearance.

§ 2.907 Notice of intent to introduce restricted data or national security information.

(a) If, at the time of publication of a notice of hearing, it appears to the staff that it will be impracticable for it to avoid the introduction of Restricted Data or National Security Information into the proceeding, it will file a notice of intent to introduce Restricted Data or National Security Information.

(b) If, at the time of filing of an answer to the notice of hearing it appears to the party filing that it will be impracticable for the party to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall state in the answer a notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(c) If, at any later stage of a proceeding, it appears to any party that it will be impracticable to avoid the introduction of Restricted Data or National Security Information into the proceeding, the party shall give to the other parties prompt written notice of intent to introduce Restricted Data or National Security Information into the proceeding.

(d) Restricted Data or National Security Information shall not be introduced into a proceeding after publication of a notice of hearing unless a notice of intent has been filed in accordance with § 2.908, except as permitted in the discretion of the presiding officer when it is clear that no party or the public interest will be prejudiced.

§ 2.908 Contents of notice of intent to introduce restricted data or other national security information.

(a) A party who intends to introduce Restricted Data or other National Security Information shall file a notice of intent with the Secretary. The notice shall be unclassified and, to the extent consistent with classification requirements, shall include the following:

(1) The subject matter of the Restricted Data or other National Security Information which it is anticipated will be involved;

(2) The highest level of classification of the information (confidential, secret, or other);

(3) The stage of the proceeding at which he anticipates a need to introduce the information; and

(4) The relevance and materiality of the information to the issues on the proceeding.

(b) In the discretion of the presiding officer, such notice, when required by § 2.907(c), may be given orally on the record.

§ 2.909 Rearrangement or suspension of proceedings.

In any proceeding subject to this part where a party gives a notice of intent to introduce Restricted Data or other National Security Information, and the presiding officer determines that any other interested party does not have required security clearances, the presiding officer may in his discretion:

(a) Rearrange the normal order of the proceeding in a manner which gives such interested parties an opportunity to obtain required security clearances with minimum delay in the conduct of the proceeding.

(b) Suspend the proceeding or any portion of it until all interested parties have had opportunity to obtain required security clearances. No proceeding shall be suspended for such reasons for more than 100 days except with the consent of all parties or on a determination by the presiding officer that further suspension of the proceeding would not be contrary to the public interest.

(c) Take such other action as he determines to be in the best interest of all parties and the public.

§ 2.910 Unclassified statements required.

(a) Whenever Restricted Data or other National Security Information is introduced into a proceeding, the party offering it shall submit to the presiding officer and to all parties to the proceeding an unclassified statement setting forth the information in the classified matter as accurately and completely as possible.

(b) In accordance with such procedures as may be agreed upon by the parties or prescribed by the presiding officer, and after notice to all parties and opportunity to be heard thereon, the presiding officer shall determine whether the unclassified statement or any portion of it, together with any appropriate modifications suggested by any party, may be substituted for the

classified matter or any portion of it without prejudice to the interest of any party or to the public interest.

(c) If the presiding officer determines that the unclassified statement, together with such unclassified modifications as he finds are necessary or appropriate to protect the interest of other parties and the public interest, adequately sets forth information in the classified matter which is relevant and material to the issues in the proceeding, he shall direct that the classified matter be excluded from the record of the proceeding. His determination will be considered by the Commission as a part of the decision in the event of review.

(d) If the presiding officer determines that an unclassified statement does not adequately present the information contained in the classified matter which is relevant and material to the issues in the proceeding, he shall include his reasons in his determination. This determination shall be included as part of the record and will be considered by the Commission in the event of review of the determination.

(e) The presiding officer may postpone all or part of the procedures established in this section until the reception of all other evidence has been completed. Service of the unclassified statement required in paragraph (a) of this section shall not be postponed if any party does not have access to Restricted Data or other National Security Information.

§ 2.911 Admissibility of restricted data or other national security information.

A presiding officer shall not receive any Restricted Data or other National Security Information in evidence unless:

(a) The relevance and materiality of the Restricted Data or other National Security Information to the issues in the preceeding, and its competence, are clearly established; and

(b) The exclusion of the Restricted Data or other National Security Information would prejudice the interests of a party or the public interest.

§ 2.912 Weight to be attached to classified evidence.

In considering the weight and effect of any Restricted Data or other National Security Information received in evidence to which an interested party has not had opportunity to receive access, the presiding officer and the Commission shall give to such evidence such weight as is appropriate under

the circumstances, taking into consideration any lack of opportunity to rebut or impeach the evidence.

§ 2.913 Review of Restricted Data or other National Security Information received in evidence.

At the close of the reception of evidence, the presiding officer shall review the record and shall direct that any Restricted Data or other National Security Information be expunged from the record where such expunction would not prejudice the interests of a party or the public interest. Such directions by the presiding officer will be considered by the Commission in the event of review of the determinations of the presiding officer.

10 C.F.R. § 51.20 Criteria for and identification of licensing and regulatory actions requiring environmental impact statements.

(a) Licensing and regulatory actions requiring an environmental impact statement shall meet at least one of the following criteria:

(1) The proposed action is a major Federal action significantly affecting the quality of the human environment.

(2) The proposed action involves a matter which the Commission, in the exercise of its discretion, has determined should be covered by an environmental impact statement.

10 C.F.R. § 51.71 Draft environmental impact statement—contents.

…

(d) *Analysis.* Unless excepted in this paragraph or § 51.75, the draft environmental impact statement will include a preliminary analysis that considers and weighs the environmental effects of the proposed action; the environmental impacts of alternatives to the proposed action; and alternatives available for reducing or avoiding adverse environmental effects and consideration of the economic, technical, and other benefits and costs of the proposed action and alternatives and indicate what other interests and considerations of Federal policy, including factors not related to environmental quality if applicable, are relevant to the consideration of environmental effects of the proposed action identified under paragraph (a) of this section. The draft supplemental environmental impact statement prepared at the license renewal stage under § 51.95(c) need not discuss the economic or technical benefits and costs of either the proposed action or alternatives except if benefits and costs are either essential for a determination regarding the inclusion of an alternative in the range of alternatives considered or relevant to mitigation. In addition, the

supplemental environmental impact statement prepared at the license renewal stage need not discuss other issues not related to the environmental effects of the proposed action and associated alternatives. The draft supplemental environmental impact statement for license renewal prepared under § 51.95(c) will rely on conclusions as amplified by the supporting information in the GEIS for issues designated as Category 1 in appendix B to subpart A of this part. The draft supplemental environmental impact statement must contain an analysis of those issues identified as Category 2 in appendix B to subpart A of this part that are open for the proposed action. The analysis for all draft environmental impact statements will, to the fullest extent practicable, quantify the various factors considered. To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms. Consideration will be given to compliance with environmental quality standards and requirements that have been imposed by Federal, State, regional, and local agencies having responsibility for environmental protection, including applicable zoning and land-use regulations and water pollution limitations or requirements issued or imposed under the Federal Water Pollution Control Act. The environmental impact of the proposed action will be considered in the analysis with respect to matters covered by environmental quality standards and requirements irrespective of whether a certification or license from the appropriate authority has been obtained. While satisfaction of Commission standards and criteria pertaining to radiological effects will be necessary to meet the licensing requirements of the Atomic Energy Act, the analysis will, for the purposes of NEPA, consider the radiological effects of the proposed action and alternatives. Compliance with the environmental quality standards and requirements of the Federal Water Pollution Control Act (imposed by EPA or designated permitting states) is not a substitute for, and does not negate the requirement for NRC to weigh all environmental effects of the proposed action, including the degradation, if any, of water quality, and to consider alternatives to the proposed action that are available for reducing adverse effects. Where an environmental assessment of aquatic impact from plant discharges is available from the permitting authority, the NRC will consider the assessment in its determination of the magnitude of environmental impacts for striking an overall cost-benefit balance at the construction permit and operating license and early site permit and combined license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable at the license renewal

stage. When no such assessment of aquatic impacts is available from the permitting authority, NRC will establish on its own, or in conjunction with the permitting authority and other agencies having relevant expertise, the magnitude of potential impacts for striking an overall cost-benefit balance for the facility at the construction permit and operating license and early site permit and combined license stages, and in its determination of whether the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decision-makers would be unreasonable at the license renewal stage.

§ 51.104 NRC proceeding using public hearings; consideration of environmental impact statement.

(a)(1) In any proceeding in which (i) a hearing is held on the proposed action, (ii) a final environmental impact statement has been prepared in connection with the proposed action, and (iii) matters within the scope of NEPA and this subpart are in issue, the NRC staff may not offer the final environmental impact statement in evidence or present the position of the NRC staff on matters within the scope of NEPA and this subpart until the final environmental impact statement is filed with the Environmental Protection Agency, furnished to commenting agencies and made available to the public.

(2) Any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing.

(3) In the proceeding the presiding officer will decide those matters in controversy among the parties within the scope of NEPA and this subpart.

(b) In any proceeding in which a hearing is held where the NRC staff has determined that no environmental impact statement need be prepared for the proposed action, unless the Commission orders otherwise, any party to the proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chapter applicable to that proceeding or in accordance with the terms of the notice of hearing. In the proceeding, the presiding officer will decide any such matters in controversy among the parties.

10 C.F.R. § 73.21 Requirements for the protection of safeguards information (2004).

(a) *General performance requirement.* Each licensee who (1) possesses a formula quantity of strategic special nuclear material, or (2) is authorized to operate a nuclear power reactor, or (3) transports, or delivers to a carrier for transport, a formula quantity of strategic special nuclear material or more than 100 grams of irradiated reactor fuel, and each person who produces, receives, or acquires Safeguards Information shall ensure that Safeguards Information is protected against unauthorized disclosure. To meet this general performance requirement, licensees and persons subject to this section shall establish and maintain an information protection system that includes the measures specified in paragraphs (b) through (i) of this section. Information protection procedures employed by State and local police forces are deemed to meet these requirements.

(b) *Information to be protected.* The specific types of information, documents, and reports that shall be protected are as follows:

(1) *Physical protection at fixed sites.* Information not otherwise classified as Restricted Data or National Security Information relating to the protection of facilities that possess formula quantities of strategic special nuclear material, and power reactors. Specifically:

(i) The composite physical security plan for the nuclear facility or site.

(ii) Site specific drawings, diagrams, sketches, or maps that substantially represent the final design features of the physical protection system.

(iii) Details of alarm system layouts showing location of intrusion detection devices, alarm assessment equipment, alarm system wiring, emergency power sources, and duress alarms.

(iv) Written physical security orders and procedures for members of the security organization, duress codes, and patrol schedules.

(v) Details of the on-site and off-site communications systems that are used for security purposes.

(vi) Lock combinations and mechanical key design.

(vii) Documents and other matter that contain lists or locations of certain safety-related equipment explicitly identified in the documents as vital for purposes of physical protection, as contained in physical security plans, safeguards contingency plans, or plant specific safeguards analyses for production or utilization facilities.

(viii) The composite safeguards contingency plan for the facility or site.

(ix) Those portions of the facility guard qualification and training plan which disclose features of the physical security system or response procedures.

(x) Response plans to specific threats detailing size, disposition, response times, and armament of responding forces.

(xi) Size, armament, and disposition of on-site reserve forces.

(xii) Size, identity, armament, and arrival times of off-site forces committed to respond to safeguards emergencies.

(xiii) Information required by the Commission pursuant to 10 CFR 73.55(c) (8) and (9).

(2) *Physical protection in transit.* Information not otherwise classified as Restricted Data or National Security Information relative to the protection of shipments of formula quantities of strategic special nuclear material and spent fuel. Specifically:

(i) The composite transportation physical security plan.

(ii) Schedules and itineraries for specific shipments. (Routes and quantities for shipments of spent fuel are not withheld from public disclosure. Schedules for spent fuel shipments may be released 10 days after the last shipment of a current series.)

(iii) Details of vehicle immobilization features, intrusion alarm devices, and communication systems.

(iv) Arrangements with and capabilities of local police response forces, and locations of safe havens.

(v) Details regarding limitations of radio-telephone communications.

(vi) Procedures for response to safeguards emergencies.

(3) *Inspections, audits and evaluations.* Information not otherwise classified as National Security Information or Restricted Data relating to safeguards inspections and reports. Specifically:

(i) Portions of safeguards inspection reports, evaluations, audits, or investigations that contain details of a licensee’s or applicant’s physical security system or that disclose uncorrected defects, weaknesses, or vulnerabilities in the system. Information regarding defects, weaknesses or vulnerabilities may be released after corrections have been made. Reports of investigations may be released after the investigation has been completed, unless withheld pursuant to other authorities, e.g., the Freedom of Information Act (5 U.S.C. 552).

(4) *Correspondence.* Portions of correspondence insofar as they contain Safeguards Information specifically defined in paragraphs (b)(1) through (b)(3) of this paragraph.

(c) *Access to Safeguards Information.*

(1) Except as the Commission may otherwise authorize, no person may have access to Safeguards Information unless the person has an established ‘‘need to know’’ for the information and is:

(i) An employee, agent, or contractor of an applicant, a licensee, the Commission, or the United States Government. However, an individual to be authorized access to Safeguards Information by a nuclear power reactor applicant or licensee must undergo a Federal Bureau of Investigation criminal history check to the extent required by 10 CFR 73.57;

(ii) A member of a duly authorized committee of the Congress;

(iii) The Governor of a State or designated representatives;

(iv) A representative of the International Atomic Energy Agency (IAEA) engaged in activities associated with the U.S./IAEA Safeguards Agreement who has been certified by the NRC;

(v) A member of a state or local law enforcement authority that is responsible for responding to requests for assistance during safeguards emergencies; or

(vi) An individual to whom disclosure is ordered under § 2.709(f) of this chapter.

(2) Except as the Commission may otherwise authorize, no person may disclose Safeguards Information to any other person except as set forth in paragraph (c)(1) of this section.

(d) *Protection while in use or storage.*

(1) While in use, matter containing Safeguards Information shall be under the control of an authorized individual.

(2) While unattended, Safeguards Information shall be stored in a locked security storage container. Knowledge of lock combinations protecting Safeguards Information shall be limited to a minimum number of personnel for operating purposes who have a ‘‘need to know’’ and are otherwise authorized access to Safeguards Information in accordance with the provisions of this section.

(e) *Preparation and marking of documents.*

Each document or other matter that contains Safeguards Information as defined in paragraph (b) in this section shall be marked ‘‘Safeguards

Information'' in a conspicuous manner to indicate the presence of protected information (portion marking is not required for the specific items of information set forth in paragraph § 73.21(b) other than guard qualification and training plans and correspondence to and from the NRC). Documents and other matter containing Safeguards Information in the hands of contractors and agents of licensees that were produced more than one year prior to the effective date of this amendment need not be marked unless they are removed from storage containers for use.

(f) *Reproduction and destruction of matter containing Safeguards Information.*

(1) Safeguards Information may be reproduced to the minimum extent necessary consistent with need without permission of the originator.

(2) Documents or other matter containing Safeguards Information may be complete destruction of the Safeguards Information they contain.

(g) *External transmission of documents and material.*

(1) Documents or other matter containing Safeguards Information, when transmitted outside an authorized place of use or storage, shall be packaged to preclude disclosure of the presence of protected information.

(2) Safeguards Information may be transported by messenger-courier, United States first class, registered, express, or certified mail, or by any individual authorized access pursuant to § 73.21(c).

(3) Except under emergency or extraordinary conditions, Safeguards Information shall be transmitted only by protected telecommunications circuits (including facsimile) approved by the NRC. Physical security events required to be reported pursuant to § 73.71 are considered to be extraordinary conditions.

(h) *Use of automatic data processing (ADP) systems.* Safeguards Information may be processed or produced on an ADP system provided that the system is self-contained within the licensee's or his contractor's facility and requires the use of an entry code for access to stored information. Other systems may be used if approved for security by the NRC.

(i) *Removal from Safeguards Information category.* Documents originally containing Safeguards Information shall be removed from the Safeguards Information category whenever the information no longer meets the criteria contained in this section.

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40 C.F.R. § 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

…

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and

(4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is

supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

…