

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

PETITIONER'S REPLY BRIEF

Diane Curran
Anne Spielberg
Matthew Fraser
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/ 328-3500

Attorneys for Petitioner

April 22, 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

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 Reply Brief of April 22, 2009, excluding the Table of Contents, Table of Authorities, and Statutory Addendum, as counted by the Microsoft Word program, is 4,926 words.

Respectfully submitted,

/s/
Diane Curran
Harmon, Curran, Spielberg & Eisenberg, L.L.P.
1726 M Street N.W., Suite 600
Washington, D.C. 20036
202/ 328-3500
April 22, 2009

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
I. INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
II. ARGUMENT	3
A. The NRC Misstates the Standard of Review	3
B. In Arguing That it is Legally Precluded From Disclosing Classified Information in a Closed Hearing, the NRC Misconstrues NEPA and the AEA	4
1. The NRC and PG&E confuse NEPA’s requirement to maximize environmental considerations in NRC decisions with its public disclosure requirements	4
2. In order to satisfy NEPA’s requirement to consider environmental values to the fullest extent possible, the NRC was required to grant SLOMFP a closed hearing under Sections 181 and 189a of the AEA.	6
3. The NRC’s argument that admission of SLOMFP’s contentions would require it to conduct many meritless hearings involving classified information is belied by NRC’s own regulatory scheme, and in any event SLOMFP has more than adequately satisfied the NRC’s admissibility standard	9
C. The NRC Fails to Demonstrate that it Considered the Reasonably Foreseeable and Significant Environmental Impacts of an Attack on the Diablo Canyon ISFSI, or That it Had a Valid Legal Reason Not to Consider Them	12

1.	The record is devoid of evidence that the NRC considered the plausible attack scenarios posed by SLOMFP in its comments on the EA Supplement.....	13
2.	The NRC fails to refute record evidence that it categorically and unlawfully applied unreasonable legal criteria to exclude consideration of reasonably foreseeable attack scenarios	16
III.	CONCLUSION	20

TABLE OF AUTHORITIES

Judicial Decisions

<i>Blue Mountains Biodiversity Project v. Blackwood</i> , 161 F.3d 1208 (9th Cir. 1998).....	3, 4, 13, 19
<i>British Airways Bd. v. Boeing Co.</i> , 585 F.2d 946 (9th Cir. 1978).....	13
<i>Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm’n</i> , 449 F.2d 1109 (D.C. Cir. 1971).....	2, 3, 8, 9
<i>Home Box Office, Inc. v. F.C.C.</i> , 567 F.2d 9 (D.C. Cir. 1977).....	14
<i>Idaho Sporting Congress v. Thomas</i> , 137 F.3d 1146 (9th Cir. 1998).....	3
<i>Limerick Ecology Action, Inc. v. NRC</i> , 869 F.2d 719 (3rd Cir. 1989).....	2, 8, 9
<i>Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1</i> , 128 S. Ct. 2733, 171 L. Ed. 2d 607 (2008).....	17
<i>Portland Audubon Soc’y v. Endangered Species Comm.</i> , 984 F.2d 1534 (9th Cir. 1993).....	14
<i>Public Service Co. of New Hampshire v. NRC</i> , 582 F.2d 77 (1st Cir. 1978).....	8
<i>San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n</i> , 449 F.3d 1016 (9th Cir. 2006), <i>cert. denied</i> , 549 U.S. 1166 (2007).....	2, 3, 5, 8, 17
<i>Save the Yaak Comm. v. Block</i> , 840 F.2d 714 (9th Cir. 1988).....	4
<i>SEC v. Chenery Corp.</i> , 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943).....	17
<i>Weinberger v. Catholic Action of Hawaii</i> , 454 U.S. 139 (1981).....	4, 5

Administrative Decisions

<i>Commonwealth Edison Co.</i> ((Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19 (1983)).....	13
<i>Louisiana Energy Services, L.P.</i> , (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996), <i>rev'd on other grounds</i> , CLI-97-15, 46 NRC 294 (1997).....	13

Statutes

Administrative Procedure Act

Generally.....	6
5 U.S.C § 556(e).....	14

Atomic Energy Act

42 U.S.C. § 2231.....	1, 2, 5, 6, 7, 8, 9
42 U.S.C. § 2239(a).....	5, 6, 9

Freedom of Information Act

5 U.S.C. § 552, et. seq.....	4
------------------------------	---

National Environmental Policy Act

42 U.S.C. § 4332(C).....	<i>passim</i>
--------------------------	---------------

Regulations

10 C.F.R. § 2.714(b).....	9, 11
10 C.F.R. § 2.905(a).....	10, 11
10 C.F.R. § 2.905(b)(1).....	10
10 C.F.R. Part 2, Subpart I.....	6, 7, 10

Federal Register Notices

Final Rule, “Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process,”
54 Fed. Reg. 33,169 (August 11, 1989).....9-10

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

In the case below, the U.S. Nuclear Regulatory Commission (“NRC”) refused to prepare an environmental impact statement (“EIS”) regarding the environmental impacts of an attack on the Diablo Canyon Independent Spent Fuel Storage Installation (“ISFSI”), on the ground that no plausible attack scenario would cause environmental impacts of any significance. The NRC also rebuffed all attempts by San Luis Obispo Mothers for Peace (“SLOMFP”) to challenge the basis for the finding of no significant environmental impact reported in the environmental assessment (“EA”) Supplement, refusing to grant SLOMFP a closed hearing or to address the environmental impacts of the plausible and environmentally devastating attack scenarios presented by SLOMFP and its expert witness, Dr. Gordon Thompson, in comments on the draft EA Supplement.

In its brief on appeal, the NRC makes three basic arguments: (a) that to admit SLOMFP’s contentions would have required it to reveal classified information to SLOMFP, which was not required by the National Environmental Policy Act (“NEPA”); (b) that it was not possible to litigate the reasonable foreseeability of attack scenarios; and (c) that in any event, the NRC *did* consider the attack scenarios posed by SLOMFP.

The NRC’s first rationale ignores the requirement of Section 181 of the Atomic Energy Act (“AEA”) that the NRC must provide procedures for

consideration of classified information in its hearing process. 42 U.S.C. § 2231. NEPA requires that the NRC must fulfill Section 181's requirements, in order to consider environmental values to the "fullest extent" possible throughout its decision-making process, unless compliance would conflict with another statute. *Calvert Cliffs Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971). The NRC fails to point to any statute that conflicts with NEPA's mandate to fully consider attack impacts by holding a closed hearing. *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989).

The NRC's second rationale amounts to a restatement of an argument that was soundly rejected by this Court in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 549 U.S. 1166 (2007): that attacks on nuclear facilities are remote and speculative as a matter of law and therefore need not be considered under NEPA. That argument remains legally invalid today.

Finally, the NRC completely fails to support its third claim, that the record below shows it did consider the attack scenarios postulated by SLOMFP and found them to be incredible. In fact, not a shred of record evidence exists to support the NRC's assertion. And the NRC fails to satisfy its burden of proving that it did not apply unreasonable legal criteria designed to screen out consideration of attacks that would cause significant adverse environmental impacts.

II. ARGUMENT

A. The NRC Misstates the Standard of Review.

The NRC drastically overstates the level of deference that the Court should afford it in this case. NRC Br. 32-34. Most of the issues raised in this appeal concern legal interpretations of NEPA, for which the Court does not owe deference to the NRC. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1028 (“Because the issue whether NEPA requires consideration of the environmental impacts of a terrorist attack is primarily a legal one, we review the NRC's determination that it does not for reasonableness”). *See also Calvert Cliffs Coordinating Comm.*, 449 F.2d at 1115 (An agency’s NEPA duties are “not inherently flexible.”)

With regard to an agency’s factual decision not to prepare an EIS, the Court applies an “arbitrary and capricious” standard, requiring that agency decisions must be “based on consideration of the relevant factors.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998) (quoting *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). In short, NEPA obligates a reviewing court to determine whether the agency took a “hard look” at the environmental consequences of its decision. *Id.* *See also San Luis Obispo Mothers for Peace*, 449 F.3d at 1032. The decision will be considered unreasonable if the agency fails to supply a “convincing statement of reasons why

potential effects are insignificant.” *Blue Mountains*, 161 F.3d at 1211 (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988)).

B. In Arguing That it is Legally Precluded From Disclosing Classified Information in a Closed Hearing, the NRC Misconstrues NEPA and the AEA.

1. The NRC and PG&E confuse NEPA’s requirement to maximize environmental considerations in NRC decisions with its public disclosure requirements.

The NRC and PG&E repeatedly insist that the NRC has fully satisfied NEPA by complying with the Freedom of Information Act’s (“FOIA’s”) requirements for public disclosure of non-exempt information. For example, the NRC claims that it reasonably relied on *Weinberger’s* “core holding” that disclosure of classified information under NEPA is “expressly governed by FOIA.” NRC Br. 49 (citing *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981), 42 U.S.C. § 4332(C)). *See also* NRC Br. 30 and 50, PG&E Br. 34, 42, 43. In focusing on NEPA’s requirements for public disclosure of information, however, the NRC and PG&E ignore NEPA’s *separate* requirement to maximize environmental considerations in agency decisions. As NEPA plainly provides:

Copies of [an EIS] 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 [the FOIA], *and* shall accompany the proposal through the existing agency review processes.

42 U.S.C. § 4332(C) (emphasis added). These “twin aims” of public disclosure and informed agency decision-making are independent of each other. *San Luis Obispo Mothers for Peace*, 449 F.3d at 1020; *Weinberger*, 454 U.S. at 143. Thus, in *Weinberger*, the Navy was required to prepare an EIS as part of its decision-making process under the second prong of § 4332(C), even though the EIS could not be disclosed to the public under the first prong. Similarly, in this case, even if the NRC is not required to publicly disclose all of the information it relied on in preparing the EA Supplement, it nevertheless was required to maximize consideration of environmental values in its decision-making process by granting SLOMFP a closed hearing.

Both the NRC and PG&E argue that the NRC discharged its duties under NEPA by following the same type of decision-making process used by the Navy in *Weinberger*. NRC Br. 20, PG&E Br. 22. But the Navy’s decision-making process is completely different from the NRC’s. The Navy is governed by no equivalent of Section 181 or Section 189a of the AEA [42 U.S.C. §§ 2231, 2239(a)] that would require it to include interested members of the public in hearings that are part of its decision-making processes. While the Navy may have applied its own procedures to the maximum extent possible to take environmental considerations into account, the NRC’s compliance with NEPA must be judged separately against the terms of its own statutorily-mandated decision-making procedures.

2. In order to satisfy NEPA’s requirement to consider environmental values to the fullest extent possible, the NRC was required to grant SLOMFP a closed hearing under Sections 181 and 189a of the AEA.

The Commission concedes that its procedural regulations in Subpart I of 10 C.F.R. Part 2, and Section 181 of the AEA from which they derive [42 U.S.C. § 2231], allow for the consideration of classified information in NRC licensing hearings. NRC Br. 52-53. But the NRC asks the Court to defer to its interpretation that Section 181 and its implementing regulations were intended to apply only to security issues raised under the AEA and not to NEPA issues. *Id.* However, the NRC’s interpretation must be rejected as flatly contradicted by the NRC’s statutory obligation.

Section 181 of the AEA generally applies the procedural requirements of the Administrative Procedure Act (“APA”) to NRC hearings conducted under Section 189a of the Act. It also requires the Commission to promulgate regulations for “parallel procedures as will effectively safeguard disclosure of Restricted Data” (*i.e.*, classified information) with “minimum impairment of the procedural rights which would be available if Restricted Data . . . were not involved.” 42 U.S.C. § 2231.¹ Nothing in Section 181 restricts its applicability, or the applicability of

¹ The full text of Section 181 provides that:

The provisions of subchapter II of chapter 5, and chapter 7, of Title 5 shall apply to all agency action taken under this chapter, and the term “agency”

regulations promulgated under Section 181, to security-related issues arising under the AEA. Thus, in order to comply with NEPA to the “fullest extent,” the NRC must offer closed hearings, conducted under Subsection I procedures, regarding environmental issues that involve consideration of classified information or safeguards information if those issues are raised in compliance with the NRC’s admissibility standards.²

Both the NRC and PG&E claim repeatedly that the NRC has broad discretion to choose whether to offer SLOMFP a closed hearing. *See, e.g.,* NRC

and “agency action” shall have the meaning specified in Section 551 of Title 5: *Provided, however,* That in the case of agency proceedings or actions which involve Restricted Data, defense information, safeguards information protected from disclosure under the authority of section 2167 of this title or information protected from dissemination under the authority of section 2168 of this title, the Commission shall provide by regulation for such parallel procedures as will effectively safeguard and prevent disclosure of Restricted Data, defense information, such safeguards information, or information protected from dissemination under the authority of section 2168 of this title to unauthorized persons with minimum impairment of the procedural rights which would be available if Restricted Data, defense information, such safeguards information, or information protected from dissemination under the authority of section 2168 of this title were not involved.

42 U.S.C. § 2231 (emphasis in original).

² With respect to the degree of its obligation to share sensitive security information with SLOMFP, the NRC attempts to make a distinction between classified and safeguards information, arguing that disclosure of classified information is completely forbidden. NRC Br. 31-32, 62 n.16. Section 181, however, makes no such distinction, requiring the NRC to provide hearing procedures that will allow fair hearings on both types of information.

Br. 31, PG&E Br. 35. But NEPA deprives the NRC of any discretion to refuse to exercise its decision-making process in a way that maximizes environmental considerations. As the U.S. Court of Appeals for the Third Circuit has recognized, “compliance with NEPA is required unless specifically excluded by statute or existing law makes compliance impossible.” *Limerick Ecology Action*, 869 F.2d at 729 (citing *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 81 (1st Cir. 1978)). *See also Calvert Cliffs Coordinating Comm.*, 449 F.2d at 1115 (holding that the NRC’s duties under Section 102 of NEPA, 42 U.S.C. § 4332(C), “are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority.”) (emphasis in original).³

Here, there is no conflict of statutory authority because Section 181 has no language restricting its applicability to AEA-related safety and security issues. Nor does Section 181 contain any provision that would prohibit the disclosure of classified information to parties who comply with NRC procedures for the protection of the information. To the contrary, Section 181 is designed to facilitate the holding of closed hearings on material licensing issues. Moreover, there is no other legal factor that renders compliance with Section 181 “impossible.”

³ Nor does the “wide latitude” granted the NRC by this Court extend to disregarding the procedural requirements of the AEA. NRC Br. 35, citing *San Luis Obispo Mothers for Peace*, 449 F.3d at 1035. While the Court suggested that a “Weinberger-style” proceeding “might” be appropriate on remand, it did not rule that such a proceeding *would* be appropriate for the NRC. 449 F.3d at 1034.

Limerick Ecology Action, 869 F.2d at 729. The closest NRC has come to arguing that is to claim that compliance would be “impracticable.” NRC Br. 49-50. But impracticability is not the equivalent of a legal impediment.⁴

3. The NRC’s argument that admission of SLOMFP’s contentions would require it to conduct many meritless hearings involving classified information is belied by NRC’s own regulatory scheme, and in any event SLOMFP has more than adequately satisfied the NRC’s admissibility standard.

The NRC also contends that to admit SLOMFP’s contentions would open the floodgates to the “loath[some]” potential that “[a]ny petitioner” could obtain a security clearance and then ask for a hearing in which classified information could be obtained. NRC Br. 49. But the NRC’s own regulations for the admissibility of contentions ensure that only well-founded contentions are admitted for adjudication. 10 C.F.R. § 2.714(b).⁵ And even after contentions are admitted, in

⁴ The NRC argues that the AEA and NEPA have “fundamentally different purposes,” and that the Subpart I regulations which implement Section 181 were “not intended for use in NEPA proceedings.” NRC Br. 51-52. But it must be presumed that Congress was aware of Section 181 when it passed NEPA, and yet it made no modification to Section 181 to clarify that it could not be applied to environmental issues. Just as the *Calvert Cliffs* Court found that NEPA was fully applicable to hearings held under Section 189a of the AEA, the same reasoning should apply to Section 181.

⁵ Promulgated in 1989, the admissibility standard applied to SLOMFP’s contentions “raise[d] the threshold” of a previous, more lenient standard, by requiring the proponent of a contention “to supply information showing the existence of a genuine dispute with the applicant on an issue of law or fact.” Final Rule, “Rules of Practice for Domestic Licensing Proceedings – Procedural

order to gain access to classified information the parties must have representatives who have qualified for and obtained security clearances. 10 C.F.R. § 2.905(a). In addition, if the classified information is not introduced into the proceeding by the NRC but is instead requested by a party, the requesting party must show that the information “may be required for the preparation of the party’s case.” 10 C.F.R. § 2.905(b)(1).⁶

Changes in the Hearing Process,” 54 Fed. Reg. 33,169 (August 11, 1989). As summarized by the Commission:

The required showing must include references to the specific portions of the application which are disputed. The contention must also be supported by a concise statement of the alleged facts or expert opinion, together with specific sources and documents of which the petitioner is aware, which will be relied on to establish the facts or expert opinion. Absent this showing, the contention will not be admitted. Under the proposed amendments, admission of a contention may also be refused if it appears unlikely that the petitioner can prove a set of facts or in support of the contention or if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief. Finally, the proposed amendments would provide that a contention raising only an issue of law will not be admitted for resolution in an evidentiary hearing but shall be decided on the basis of briefs and any oral argument that may be held.

Id.

⁶ PG&E contends that “based on the particular circumstances of this case,” the NRC actually applied the criteria in Subpart I of 10 C.F.R. Part 2 for disclosure of classified information (*i.e.*, 10 C.F.R. §§ 2.900-2.913), and concluded that disclosure was not justified. PG&E Br. 45-46. The record of the case provides no indication of any such factual determination, however. PG&E can point to no part of any NRC decision below that applies any specific provision of Subpart I to SLOMFP’s request for access to classified information.

In any event, it is important to note that the NRC did not rule below, nor does it argue in its brief, that SLOMFP's contentions fail to satisfy the admissibility requirements detailed in 10 C.F.R. § 2.714(b) with respect to the clarity with which they raise a legal dispute under NEPA or the adequacy of the expert and documentary support provided in the contentions and in Dr. Thompson's supporting expert declaration and report. In fact, SLOMFP supported its contentions with a high level of specificity and documentary support, describing in significant detail the means by which an attack causing significant environmental harm could be successfully carried out. ER 382-86. The only grounds on which the NRC refused to admit the contentions are purely legal, *i.e.*, that the NRC was not required to disclose classified information to SLOMFP, and that it was impossible, as a general matter, to litigate the reasonable foreseeability of attacks on nuclear facilities. *See* CLI-08-01, 67 NRC at 11-13 (ER 42-43) (rejecting Contention 1(a)); 67 NRC at 18 (ER 46) (rejecting Contention 2); 67

In addition, under 10 C.F.R. § 2.905(a), the NRC does not have discretion to deny SLOMFP access to classified information that the NRC introduces in a hearing, if SLOMFP's representatives had the necessary security clearances. Therefore, to the extent that the Commission considers the introduction of classified evidence to be necessary for a hearing on SLOMFP's contentions (ER 47), Section 2.905(a) would deprive the Commission of discretion to deny SLOMFP access to that information.

NRC at 20-21 (ER 47) (rejecting Contention 3); CLI-08-08, 67 NRC at 200-02 (ER 32-33) (rejecting Contention 6).⁷

C. The NRC Fails to Demonstrate that it Considered the Reasonably Foreseeable and Significant Environmental Impacts of an Attack on the Diablo Canyon ISFSI, or That it Had a Valid Legal Reason Not to Consider Them.

As demonstrated in SLOMFP's Opening Brief, in concluding that an attack on the Diablo Canyon ISFSI would have insignificant environmental impacts, the NRC ignored detailed and documented evidence presented by SLOMFP and its expert, Dr. Gordon Thompson, of a whole range of credible attack scenarios with potentially devastating consequences. SLOMFP Opening Br. at 44-46. The NRC claims to have considered the attack scenarios posed by Dr. Thompson and found them to be implausible (NRC Br. 37, 65), but the record is devoid of any evidence to support that claim. The NRC has also failed to refute record evidence that it applied unreasonable legal criteria designed to screen out consideration of attacks that would cause significant adverse environmental impacts.

⁷ Because the NRC relied on only those two rationales to deny admission of SLOMFP's Contentions 1(a), 3 and 6 and part of Contention 2, it was not necessary for SLOMFP to separately address the NRC's reasons for rejecting each of those contentions in making the arguments in its brief. Therefore, there is no merit to the NRC's claim that SLOMFP waived aspects of its appeal by failing to separately address each contention. NRC Br. 38 and 46.

1. The record is devoid of evidence that the NRC considered the plausible attack scenarios posed by SLOMFP in its comments on the EA Supplement.

The NRC claims that the “record demonstrates that NRC did review Dr. Thompson’s scenario.” NRC Br. 65. The NRC bears the burden of proving this claim, *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); and it must also satisfy NEPA by providing support for its assertion. *Blue Mountains Biodiversity Project*, 161 F.3d at 1214. But the only citations offered by the NRC for this proposition consist of (a) undocumented statements by NRC Staff counsel during an oral argument (NRC Br. 66) (citing SER 149, 213); and (b) an undocumented representation by a subgroup of the Commissioners that “outside of this adjudication,” they reviewed unidentified “non-public documents” that assertedly “provide[d] the basis for the Staff’s selection of the attack scenarios evaluated.” ER 18.

Unsupported statements by counsel cannot substitute for a documented adjudicatory record. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978) (“[L]egal memoranda and oral argument are not evidence.”); *Commonwealth Edison Co.* (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 18 NRC 19, 23-24 (1983) (Questions of fact are “not susceptible of resolution in the staff’s favor on the basis of nothing more than the generalized

representations of counsel who are unequipped to attest on the basis of their own personal knowledge as to the accuracy of the representations.”).

Undocumented references by decision-makers to sources outside of an evidentiary record are also insufficient to satisfy the APA. The record of a decision must be disclosed to the parties to a proceeding in order to allow them to respond. 5 U.S.C § 556(e). (“The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision . . . and . . . shall be made available to the parties. When an agency decision rests on . . . a material fact not appearing in the evidence in the record, a party is entitled . . . to an opportunity to show the contrary.”). *See also Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993) (“[an] incomplete record must be viewed as a ‘fictional account of the actual decisionmaking process.’”) (quoting *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 54 (D.C. Cir. 1977)). Although the documents at issue are classified, NEPA, the APA, and the FOIA nonetheless require the Commission to at least identify them, and also to disclose the portions that are not classified. CLI-08-01, 67 NRC at 14 (ER 44).

The NRC attempts to defend the legality of the majority’s reliance on an *ad hoc* document review by arguing that there is no legal requirement for NRC Commissioners to “gather at the same table to review material as a group.” NRC

Br. 64. According to the Commission, it followed an acceptable process by circulating draft copies of its decision “to all offices for review and comment – a process not unlike issuing a judicial decision.” *Id.* at 65. But the Commission confuses the process for agreeing on the text of an adjudicatory decision with the process for making a defensible record of its decision as the self-appointed “hearing tribunal” in the case. NRC Br. 37. The Commission’s additional review of the attack scenarios that had been considered by the NRC in the proceeding was intended to provide factual support for the Commission’s ultimate decision, by providing a “check upon the NRC Staff’s approach” to identifying plausible attack scenarios. CLI-08-01, 67 NRC at 21 n.98 (ER 47). Thus, the NRC is attempting to use the Commission’s *ad hoc* review as a part of the evidentiary record on which the NRC relied for its decision. Basic principles of fairness in administrative decision-making cannot be deemed satisfied when not only are the parties and the reviewing court unaware of what documents were relied on to support a decision, but not even all of the decision-makers *themselves* are aware of them.⁸

⁸ As discussed in Commissioner’s dissent from CLI-08-06 the Commission majority put in place “no process” to collectively undertake the review and conducted no discussion of its results. Commissioner Jaczko dissent (ER 27).

2. The NRC fails to refute record evidence that it categorically and unlawfully applied unreasonable legal criteria to exclude consideration of reasonably foreseeable attack scenarios.

In its Opening Brief, SLOMFP argued that at the threshold of this proceeding, the NRC made an unlawful legal determination that attacks on the Diablo Canyon ISFSI are not reasonably foreseeable under NEPA, by declaring that it is not possible to evaluate alternative attack scenarios in a meaningful way because they are “limitless, confined only by the limits of human ingenuity.” SLOMFP Opening Br. 46-47 (citing ER 47). The NRC argues that the determination was a factual one, not a legal rule, and that SLOMFP has presented no “concrete evidence” in support of its argument. NRC Br. 62-64.

The NRC’s determination clearly was a legal one. The Commission summarily applied the rationale to dismiss Contentions 1(a), 3, 6, and part of 2, without pausing for any evaluation of the detailed factual information that SLOMFP had provided in support of its contention, including SLOMFP’s discussion of the reasons why its proffered attack scenarios were plausible.⁹

⁹ On appeal, the NRC tries to retroactively insert a factual consideration into the NRC’s decision to reject the contentions, by arguing that it is “unclear how SLOMFP could meaningfully assist at a hearing,” because SLOMFP has allegedly failed to demonstrate the qualifications of Dr. Gordon Thompson, who provided expert support for SLOMFP’s contentions. NRC Br. 50. However, Dr. Thompson’s high level of qualifications to sponsor SLOMFP’s contentions – which were set forth in his declaration and curriculum vitae that were submitted in support of the contentions (ER 339-49) -- were never questioned by the NRC Staff,

Moreover, the NRC's legal determination is unreasonable. As this Court recognized in *San Luis Obispo Mothers for Peace*, it is not credible for the NRC to argue, in the context of refusing to prepare an EIS, that there is no reasonable means for evaluating the plausibility of an attack, while in other regulatory contexts it "insists on its preparedness" to meet the threat. 449 F.3d at 1031. Here, the legal position taken by the NRC in the context of refusing to admit SLOMFP's contentions -- *i.e.*, that it has no meaningful way to evaluate the reasonable foreseeability of attacks in a hearing -- undermines the credibility of its insistence, in the context of defending the EA Supplement, that it *has* judged the plausibility of a range of attacks. The credibility of the NRC's position that it has judged the plausibility of a range of attacks is fatally undermined by the fact that the EA Supplement completely ignored demonstrably plausible attack scenarios that could

PG&E, or the Commission in the case below. Thus, it is too late for the Commission to question them now. Since they were not included in any of its decisions in the proceeding below, they must be disregarded by the Court as impermissible *post hoc* rationalizations. *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1*, 128 S. Ct. 2733, 2745; 171 L. Ed. 2d 607 (2008) (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943)).

In any event, the argument has no merit, because the Commission overlooks the statement in SLOMFP's hearing request that in the adjudicatory proceeding on admitted contentions, SLOMFP intended to rely on the expert services of both Dr. Thompson and Dr. Edwin S. Lyman of the Union of Concerned Scientists. Dr. Lyman's expert qualifications to testify on nuclear facility security matters were previously approved by the Commission in another case, and he has received a Level L security clearance; therefore SLOMFP intended to rely on Dr. Lyman for the review and evaluation of relevant classified documents. ER 331-32.

cause significant offsite environmental effects and failed to articulate any criteria for doing so.

In addition, contrary to the NRC's claim, SLOMFP's argument is not "contradicted by the EA's explicit consideration of an attack scenario and its potential consequences." NRC Br. 62. The fact that the NRC analyzed a single scenario for its consequences does not say anything about the agency's view of its obligation or ability to analyze the plausibility of other scenarios. On that point, the record consists only of unsupported extra-record statements that the NRC considered the plausibility of the scenarios proposed by SLOMFP.

The NRC also denies that as a matter of law, the EA Supplement relied on NRC guidance document SECY-04-0222 to eliminate consideration of a whole range of attacks with significant adverse environmental impacts by screening out any attacks that did not cause early fatalities. ER 325. The NRC claims that the EA shows the early-fatalities criterion was not applied in the EA, but instead was used in a separate analysis of what additional security measures might be needed in the aftermath of the September 11 attacks. NRC Br. 41.

But the language of the EA Supplement is far from clear on the question of whether the early fatalities criterion affected the range of attack scenarios considered in the EA. ER 63. Moreover, the early-fatalities criterion was the *only* direct indicator of an adverse outcome of an attack on an ISFSI that was provided

in the EA Supplement, and thus it was reasonable to infer that it was applied to the EA Supplement. *Id.* at 25, 47. And the NRC completely fails to refute, or even mention, the affidavit submitted by the NRC Staff in the proceeding below which contradicts the NRC’s argument by stating 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). *See also* SLOMFP Opening Br. 23. In failing to show that the Hall Affidavit was incorrect or irrelevant, the Staff failed to satisfy its burden of proof or to demonstrate that the NRC’s decision was “based on a consideration of the relevant factors.” *Blue Mountains Biodiversity Project*, 161 F.3d at 1211 (internal quotations omitted).

III. CONCLUSION

For the foregoing reasons, SLOMFP requests this Court to reverse CLI-08-26, CLI-08-08, CLI-08-05, and CLI-08-01, and remand this case to the NRC for further proceedings.¹⁰

Respectfully submitted,

/s/

Diane Curran

Anne Spielberg

Matthew Fraser

Harmon, Curran, Spielberg & Eisenberg, L.L.P.

1726 M St. NW, Suite 600

Washington, D.C. 20036

April 22, 2009

¹⁰ SLOMFP withdraws its previous request for revocation of PG&E's license for the ISFSI. *See* SLOMFP Opening Br. at 55.

STATUTORY ADDENDUM

Statutes

Atomic Energy Act

42 U.S.C. § 2231

Applicability of administrative procedure provisions; definitions

The provisions of subchapter II of chapter 5, and chapter 7, of title 5 shall apply to all agency action taken under this chapter, and the terms "agency" and "agency action" shall have the meaning specified in section 551 of title 5: Provided, however, That in the case of agency proceedings or actions which involve Restricted Data, defense information, safeguards information protected from disclosure under the authority of section 2167 of this title or information protected from dissemination under the authority of section 2168 of this title, the Commission shall provide by regulation for such parallel procedures as will effectively safeguard and prevent disclosure of Restricted Data, defense information, such safeguards information, or information protected from dissemination under the authority of section 2168 of this title to unauthorized persons with minimum impairment of the procedural rights which would be available if Restricted Data, defense information, such safeguards information, or information protected from dissemination under the authority of section 2168 of this title were not involved.

Regulations

NRC Regulations

10 C.F.R. § 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.

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 April 22, 2009, electronic copies of the foregoing errata to Petitioner's Reply Brief were served on the following by posting them on the website for the U.S. Court of Appeals for the Ninth Circuit:

Kathryn E. Kovacs, Esq.
Appellate Division
Environment and Natural Resources
U.S. Department of Justice
P.O. Box 23795
Washington, D.C. 20026

Charles E. Mullins, Esq.
Karen D Cyr, Esq.
John F. Cordes, Esq.
Office of General Counsel
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20852

David A. Repka, Esq.
Winston & Strawn, LLP
1700 K Street N.W.
Washington, D.C. 20006-3817
202-282-5726

Kathleen M. Sullivan, Esq.
Quinn Emanuel Urquhart Oliver &
Hedges, L.L.P
51 Madison Avenue, 22nd Floor
New York, NY 10010

/s/

Diane Curran

Harmon, Curran, Spielberg & Eisenberg, L.L.P.

1726 M Street N.W., Suite 600

Washington, D.C. 20036

tel.: 202/328-3500

fax: 202/328-6918

Attorney for Petitioners