IN THE UNITED STATES COURT OF APPEALS
FOR THE 9TH CIRCUIT

SAN LUIS OBISPO MOTHERS FOR PEACE,
SIERRA CLUB, and PEG PINARD,
Petitioners,

v.

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

PACIFIC GAS & ELECTRIC COMPANY,
Intervenor-Respondent

NO. 03-74628

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

BRIEF FOR PETITIONERS

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March 15, 2004

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FOR THE NINTH CIRCUIT

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v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	
PACIFIC GAS & ELECTRIC CO. Intervenor-Respondent	)	

PETITIONERS' CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners certify that Petitioners San Luis Obispo Mothers for Peace ("SLOMFP") and the Sierra Club are non-profit corporations. Neither SLOMFP nor the Sierra Club has any parent company and/or subsidiary or affiliate that has issued shares to the public.

Respectfully submitted,

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I. JURISDICTIONAL STATEMENT

This case involves an appeal of orders by the U.S. Nuclear Regulatory Commission ("NRC") or ("Commission"). The Court has jurisdiction pursuant to the Hobbs Act, 28 U.S.C. § 2342(4); the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(b); 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, 2003, within 60 days of October 15, 2003, the date of the Commission's final order in the proceeding. *Pacific Gas & Electric Company* (Diablo Canyon ISFSI), CLI-03-12, 58 NRC 185 (2003), EOR 38.

II. STATUTES AND REGULATIONS

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

III. ISSUES PRESENTED FOR REVIEW

1. Did the NRC violate the AEA's public hearing requirement, 42 U.SC. § 2239(a), and its own implementing regulations in 10 C.F.R. § 2.714(b)(2) when it refused to grant Petitioners a hearing on whether the National Environmental Policy Act ("NEPA") [42 U.S.C. § 4332] requires consideration of the environmental impacts of terrorist attacks or other acts of malice or insanity during storage of spent reactor fuel at a proposed Independent Spent Fuel Storage Installation ("ISFSI"), and during transportation away from the ISFSI?

2. Did the NRC violate the APA by basing its denial of Petitioners' hearing

request on a fact-based policy that it had not published for notice and comment under 5 U.S.C. § 553?

3. Did the NRC violate NEPA by categorically refusing to prepare an EIS on the environmental impacts of terrorist attacks and other acts of malice or insanity on the Diablo Canyon ISFSI, where it had failed to demonstrate that it had taken a hard look at the environmental impacts of such attacks?

4. Was the NRC's refusal to prepare an EIS on the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI arbitrary and capricious, where the NRC's decision was refuted by the record and inconsistent with the NRC's own actions, including its regulations?

5. Did the NRC violate NEPA by refusing to prepare an EIS on the environmental impacts of terrorist attacks on the Diablo Canyon ISFSI, where no statute or other law excused the NRC from complying with NEPA?

6. Did the NRC violate the hearing requirements of the AEA by refusing to grant Petitioners a hearing on what post-9/11 security measures for the entire Diablo Canyon nuclear complex are needed in order to ensure that licensing of the proposed ISFSI would not be inimical to the common defense and security or pose an unreasonable threat to public health and safety?

IV. STATEMENT OF THE CASE

In this case, Petitioners seek reversal of two NRC decisions regarding Pacific Gas & Electric Company's ("PG&E's") application to build and operate an ISFSI on the site of the Diablo Canyon nuclear power plant in coastal California. The ISFSI would store "spent" (*i.e.*, used) nuclear fuel in air-cooled casks that are to be placed outdoors on concrete pads.

In the first decision, the NRC refused to grant Petitioners a hearing on whether, in light of the terrorist attacks of September 11, 2001, and other terrorist events of recent years, the Commission should prepare an Environmental Impact Statement ("EIS") to consider the environmental impacts of a terrorist attack or other act of malice or insanity against the ISFSI. *Pacific Gas & Electric Company* (Diablo Canyon ISFSI), CLI-03-01, 57 NRC 1 (2003) (hereinafter "CLI-03-01"), Excerpts of Record ("EOR") 33.

In the second decision, the Commission refused to grant Petitioners a hearing on what additional security measures for the ISFSI and the associated nuclear power plant, in addition to compliance with the NRC's pre-9/11 security regulations, should be required to ensure that the proposed licensing of the ISFSI did not pose an undue security threat. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-02-23, 56 NRC 230 (2002) (hereinafter "CLI-02-23"), EOR 27. CLI-03-01 and CLI-02-23 were made

final in CLI-03-12, 58 NRC 185 (2003), EOR 38.

Petitioners have appealed both NRC decisions on the grounds that they violate (10 the AEA's hearing requirements and NRC implementing regulations, (2) the APA's notice-and-comment requirements, and (3) NEPA's requirement to rigorously evaluate the environmental impacts of proposed NRC actions. Petitioners also contend that the NRC's refusal to prepare an EIS was arbitrary and capricious.

V. STATUTORY FRAMEWORK

The two statutes that govern this case are the AEA and NEPA. The AEA sets a minimum standard for safe and secure operation of nuclear facilities, while NEPA requires NRC to consider and attempt to avoid or mitigate significant adverse environmental impacts of licensing those facilities. While the statutes have some overlapping concerns, they establish independent requirements. *Limerick Ecology Action v. NRC,* 869 F.2d 719,729-30 (3rd Cir. 1989) (holding that the AEA does not preclude NEPA).

A. Atomic Energy Act

1. AEA requirements for safety and security

a. Statutory requirements

The AEA authorizes and requires the NRC to protect the public against two types of hazards caused by operation of nuclear facilities: accidental releases of

radioactivity, and threats to the common defense and security. These requirements also apply to the storage and handling of spent reactor fuel. Sections 57(c) and 69 of the Act, for example, expressly prohibit the Commission from issuing a license to handle special nuclear materials or source materials, two of the radiological constituents of spent nuclear reactor fuel, if the issuance of such a license would be "inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public." 42 U.S.C. §§ 2077, 2099. Section 81 prohibits the Commission from, *inter alia,* permitting the distribution of any byproduct material to any licensee "who is not equipped to observe or who fails to observe such safety standards to protect health as may be established by the Commission." 42 U.S.C. § 2111.

b. Implementing regulations

NRC security regulation 10 C.F.R. § 73.1 requires that ISFSIs and other nuclear facilities must be protected against "design basis threats" of sabotage and theft of special nuclear material. The design basis threat is a "hypothetical threat" that serves three purposes:

> (1) It provides a standard with which to measure changes in the real threat environment,
> (2) It is used to develop regulatory requirements, and
> (3) It provides a standard for evaluation of implemented safeguards programs.

Proposed Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power

Plants, 58 Fed. Reg. 58,804 (November 4, 1993), Exhs. at 10.[1] In order to assure the adequacy of the design basis threat, "the NRC continually monitors and evaluates the threat environment worldwide." *Id.* ISFSI license applicants are required to demonstrate to the NRC that the ISFSI provides protection against the design basis threat through security plans and design measures. 10 C.F.R. § 72.24(o); 10 C.F.R. Part 72, Subpart H; 10 C.F.R. § 73.51.

2. Atomic Energy Act public hearing requirements and implementing regulations

Section 189a of the Atomic Energy Act 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 be admitted as an intervenor to an NRC adjudicatory licensing proceeding, a petitioner must file "contentions" that set forth, with "basis and specificity," the concerns the petitioner seeks to litigate. 10 C.F.R. § 2.714(b)[2]. Contentions must be supported by "sufficient information . . . to show that a genuine dispute exists

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[1] For the convenience of the Court, Petitioners have provided a volume of exhibits containing relevant documents issued by the NRC, the Department of Homeland Security, and the Department of Energy that are not a part of the official record of the proceeding below. References to exhibits are designated as "Exhs."

[2] In recent amendments to NRC's procedural regulations for adjudications, NRC renumbered § 2.714 and made minor revisions. Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2,182 (January 14, 2004). The Commission also renumbered and slightly revised other procedural regulations referred to in this brief, *i.e.*, 10 C.F.R. §§ 2.744(e) and 2.758. The revisions do not materially affect any of the procedural regulations relied on by Petitioners.

with the applicant on a material issue of law or fact." *Id.* The scope of the hearing is restricted to the contentions that have been admitted for litigation. 10 C.F.R. § 2.714(b)(1). If a petitioner is found to have demonstrated standing and pleaded at least one admissible contention, an Atomic Safety and Licensing Board ("ASLB") is convened and a public adjudicatory hearing is held.

Contentions that seek compliance with NEPA must be based on the applicant's Environmental Report ("ER"). 10 C.F.R. § 2.714(b)(2)(iii).[3] The petitioner can amend those contentions or file new contentions if the NRC draft or final EIS or environmental assessment contains data or conclusions that differ significantly from the ER. *Id.*

B. National Environmental Policy Act

NEPA, 42 U.S.C. § 4332 et seq., is the "basic charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its fundamental purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take decisions that protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). Prior to taking actions that may have a significant impact on the human environment, NEPA requires federal agencies to

[3] *See also* 10 C.F.R. § 51.61, which requires that an ISFSI applicant must evaluate environmental issues in the first instance, in the ER. The NRC then uses the ER to prepare an EIS or Environmental Assessment, although it has an independent obligation to "evaluate and be responsible for the reliability" of the information. 10 C.F.R. § 51.70.

take a "hard look" at the environmental consequences of those actions. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1211 (9th Cir. 1998) *cert. denied sub nom. MalheurLumber Co. v. Blue Mountains Biodiversity Project,* 527 U.S. 1003 (1999); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

1. Environmental Impact Statement

The primary method by which NEPA ensures that its mandate is met is the "action-forcing" requirement for preparation of an EIS. *Robertson v. Methow Valley,* 490 U.S. at 348-49. Preparation of an EIS ensures that the agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts" and that "the relevant information will be made available to the larger audience that may also play a role in the decisionmaking process and implementation of that decision." *Id.* An EIS also provides decisionmakers with a reasonable array of alternatives for avoiding or mitigating the consequences of the proposed action. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1519-20 (9th Cir. 1992).

2. Environmental impacts that must be considered

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)(1). 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 may not be easily quantifiable is not an excuse for failing to address it in an EIS. 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.

C. Nuclear Waste Policy Act

In 1982, Congress passed the Nuclear Waste Policy Act ("NWPA"), 42 U.S.C. § 10101, *et seq.* The principal purpose of the NWPA was to establish a scheme for siting and licensing a permanent repository for spent reactor fuel and other high-level radioactive waste. For interim storage of high-level radioactive waste, the NWPA authorized the Commission to take necessary actions to "encourage and expedite the effective use of available storage, and necessary additional storage, at the site of each civilian nuclear power reactor," to the extent these activities are consistent with "the protection of the public health and safety, and the environment," *inter alia.* 42 U.S.C. § 10152.

VI. STATEMENT OF FACTS

A. Application for ISFSI at Diablo Canyon Nuclear Power Plant

The Diablo Canyon nuclear plant, located on the California coast near San Luis Obispo, consists of two 1,100-megawatt pressurized water reactors. Unit 1 began operating in 1985, and Unit 2 began operating in 1986. The license for Unit 1 is due to expire in 2021, and the license for Unit 2 is due to expire in 2025. Declaration of 7 September 2002 by Dr. Gordon Thompson in Support of a Petition by Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, Peg Pinard, et al, par. III-1 (September 7, 2002) (hereinafter "Thompson Declaration of September 7, 2002"), EOR 162-63.

As at many other nuclear plants, disposal of spent nuclear reactor fuel has become a major problem for PG&E as it waits for the siting and licensing of a permanent spent fuel repository. According to PG&E, by 2006 it will have completely filled existing spent fuel storage capacity with spent fuel stored in high-density racks. Environmental Report, Diablo Canyon ISFSI at 1.1-1 (December 21, 2001) (hereinafter "Diablo Canyon ER"). Therefore, at the close of 2001, PG&E applied to construct and operate an ISFSI on the site of the Diablo Canyon plant, where it would store additional spent fuel in air-cooled casks that sit on concrete pads. LBP-02-23, 56 NRC at 420, EOR 5.

B. September 11, 2001 Terrorist Attacks and NRC Response

The September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon had a profound impact on the NRC's perception of, and response to, the threat of terrorist attacks on nuclear facilities. As summarized by the Chairman of the NRC:

> awareness, resources, and vigilance were there [before September 11], but all went to a higher level when 9/11 showed the determination of enemies of the United States to attack our people and our way of life.

Remarks by NRC Chairman Nils J. Diaz to the Joint NRC/DHS State Security Outreach Workshop (June 17, 2003), Exhs. at 110. In cooperation with the Department of Homeland Security ("DHS"), the NRC established a series of graded threat levels and associated protective measures. NRC Regulatory Issue Summary 2002-12A, Power Reactors, NRC Threat Advisory and Protective Measures System (August 19, 2002), Exhs. at 97. The purpose of the new threat advisory system was to keep the government in a state of readiness to respond to a threat that was now perceived as persistent. As the Department of Homeland Security stated in publishing the new advisory system:

> The world has changed since September 11, 2001. We remain a nation at risk for the foreseeable future. At all Threat conditions, we must remain vigilant, prepared, and ready to deter terrorist attacks.

Homeland Security Presidential Directive at 3 (March 11, 2002). Exhs. at 85. Thus, after September 11, the NRC began to treat terrorist attacks as an inevitable

and constant threat requiring perpetual vigilance and preparedness.

D. Petitioners' Concerns Regarding the Vulnerability and Attractiveness of Diablo Canyon Nuclear Power Plant and Proposed ISFSI to Terrorist Attack

The Petitioners are environmental and civic membership organizations and one individual, whose members reside near the Diablo Canyon nuclear power plant and proposed ISFSI, and who therefore have an interest in protecting their health and environment against the hazards posed by those facilities.[4]

The September 11 terrorist attacks gave Petitioners grave concern that the siting and design of the Diablo Canyon nuclear power plant makes it a vulnerable and attractive target for terrorism and other acts of malice or insanity. The plant lies adjacent to the Pacific Ocean, in full view of the air and sea. Thus, it is vulnerable to attack by plane or boat. The plant is also surrounded on the north, east, and south by 12,000 acres of open land that is difficult to police. Petition by Avila Valley Advisory Council, San Luis Obispo Mothers for Peace, et al., for Suspension of ISFSI Licensing Proceeding Pending Comprehensive Review of Adequacy of Design and Operation Measures to Protect Against Terrorist Attack and Other Acts of Malice or Insanity at 21 (September 9, 2002) (hereinafter "Petition"), EOR 115.

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[4] Both SLOMFP and the Sierra Club have members who live within 17 miles of the Diablo Canyon nuclear plant, and Peg Pinard also lives within 17 miles of the plant. LBP-02-23, 56 NRC at 429-430, EOR 9-10. In LBP-02-23, the ASLB ruled that residence within a distance of 17 miles was sufficient to show harm for purposes of establishing standing. *Id.* at 428-29, EOR 8-9.

The Diablo Canyon containment, like most other nuclear reactor containments, cannot ensure protection of the reactor core against an aircraft crash. *Id.* at 21, EOR 140. Moreover, PG&E stores a very large inventory of spent reactor fuel at the Diablo Canyon site in pools that have no containment at all. If the pools were attacked and partially drained, the ensuing fire could result in a radiological release with consequences far worse than the Chernobyl reactor accident of 1986. *Id.* at 23, EOR 142; Thompson Declaration of September 7, 2002, par. III-12 and Section VII, EOR 166, 182-186.

The addition of the proposed ISFSI to the Diablo Canyon site would add to the vulnerability and attractiveness of Diablo Canyon as a terrorist target. Petition at 22, EOR 141. At a licensed ISFSI, PG&E could significantly increase the inventory of radioactive material on the Diablo Canyon site, thus posing an additional attractive target for sabotage. Thompson Declaration of September 7, 2002, par. III-11, EOR 166. Moreover, the design of the ISFSI provides poor protection against a terrorist attack. Design parameters for the facility encompass only comparatively minor threats to cask integrity, such as the impact of a tornado-driven automobile at 33 miles per hour, or the explosion of a vehicle fuel tank at a distance of 50 feet. Supplemental Request For Hearing And Petition To Intervene by San Luis Obispo Mothers For Peace, Avila Valley Advisory Council, Peg Pinard, Cambria Legal Defense Fund, Central Coast Peace And Environmental

Council, Environmental Center Of San Luis Obispo, Nuclear Age Peace Foundation, San Luis Obispo Chapter of Grandmothers For Peace International, San Luis Obispo Cancer Action Now, Santa Margarita Area Residents Together, Santa Lucia Chapter Of the Sierra Club, and Ventura County Chapter Of the Surfrider Foundation at 28 (July 19, 2002) (hereinafter "Petitioners' Contentions"), EOR 71.

Terrorist attacks or other destructive acts of malice or insanity against the ISFSI could employ much more powerful instruments, such as anti-tank ordnance or an impacting aircraft. A successful attack could cause a significant release of radioactive material, contaminating a large area of land and leading to substantial impacts to public health, the natural environment, and the regional economy. *Id.*

D. Petitioners' Intervention in ISFSI Licensing Proceeding

On April 22, 2002, the NRC published a Federal Register notice providing an opportunity to request a hearing on PG&E's application for a license for its proposed ISFSI. Pacific Gas and Electric Co.; Notice of Docketing, Notice of Proposed Action, and Notice of Opportunity for Hearing for a Materials License for the Diablo Canyon Spent Fuel Storage Installation, 67 Fed. Reg. 19,600. Petitioners filed hearing requests and petitions to intervene. LBP-02-23, 56 NRC at 421, EOR 5. A three-member panel of the ASLB was appointed to hear the case.

In the NRC licensing proceeding, Petitioners attempted to redress their

concerns about the vulnerability and the attractiveness of the ISFSI and associated nuclear plant in the NRC licensing proceeding in two ways. First, Petitioners filed contentions demanding the preparation of an EIS regarding the environmental impacts of terrorist attacks and other acts of malice or insanity on the proposed ISFSI. Petitioners' Contentions at 24-40, EOR 67-83.[5] Second, Petitioners requested the NRC Commissioners to impose emergency security upgrades on the power plant and ISFSI, and to give Petitioners a hearing on those measures. Petition, EOR 115.

1. Petitioners' Environmental Contentions

Petitioners filed three contentions challenging PG&E's failure to evaluate the environmental impacts of a terrorist attack or other acts of malice or insanity in its ER. The lead contention, EC-1, asserted that:

> The Environmental Report's discussion of environmental impacts is inadequate because it does not include the consequences of destructive acts of malice or insanity against the proposed ISFSI.

Petitioners' Contentions at 24, EOR 67. Contention EC-3 challenged the ER's failure to evaluate the environmental impacts of transporting spent fuel away from the ISFSI to a final repository, including the impacts of a terrorist attack or other

[5] In addition to their environmental contentions, Petitioners also submitted safety contentions challenging PG&E's financial qualifications to build and operate the proposed ISFSI, and the inadequacy of the seismic design for the facility. Petitioners' Contentions at 2-23, EOR 45-66. Those contentions are not at issue in this appeal.

acts of malice or insanity against the fuel shipments. *Id.* at 39, EOR 82.[6]

At the outset, Contention EC-1 acknowledged the NRC's policy of refusing to consider the environmental impacts of intentional destructive acts in EISs on the ground that it could not make a meaningful evaluation of the risks. Petitioners' Contentions at 24 [EOR 67], citing *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697-701 (1985) (hereinafter "*Limerick*"), *aff'd on this ground and rev'd on other grounds, Limerick Ecology Action v. NRC,* 869 F.2d at 743-44. Noting that in the aftermath of the terrorist attacks of September 11, 2001, the NRC had declared that it would reconsider this policy, Petitioners set forth new factual information supporting a reversal of the policy. Petitioners supported their factual assertions with documentation and an expert declaration by Dr. Gordon Thompson of the Institute for Resource and Security Studies. Declaration of Dr. Gordon Thompson in Support of Intervenors' Environmental Contentions (July 18, 2002) (hereinafter "Thompson Declaration of July 18, 2002"). EOR 86.

In the "basis" statement of Contention EC-1, Petitioners discussed in detail a number of events and NRC pronouncements demonstrating that the Commission's factual determination in *Limerick* was no longer valid. First, the terrorist attacks of September 11, 2001, made it clear that "terrorists are both capable of and intent

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[6] Contention EC-2, which sought a revision of the ER's statement of purpose, is not on appeal here.

upon causing major damage to life and property in the United States." Petitioners' Contentions at 25, EOR 68. Significantly, although terrorists "have openly admitted that nuclear power stations are near the top of their lists as targets for attacks on civilians in the United States," nuclear facilities are not designed to protect against such assaults. *Id.*

Second, Petitioners pointed to numerous terrorist attacks of recent years, previously discounted by the NRC, which highlight the vulnerability of U.S. facilities and institutions, the sophistication of the attackers, and the persistence of efforts to damage major U.S. facilities. *Id.* at 26, EOR 69.[7]

Third, Petitioners cited the Commission's own regulatory actions, which reflected a change in the Commission's perception of the foreseeability of destructive acts of malice or insanity against nuclear facilities. Petitioners showed that in a 1994 rulemaking, the Commission had abandoned its previous position that the difficulty of quantifying the probability of sabotage and terrorist attacks means that they can be ignored. This change cleared the way for imposition of a

[7] In addition to September 11, these events include: the 1983 bombing of the Marine barracks in Beirut; the 1993 bombing of the World Trade Center; the February 1993 intrusion into the Three Mile Island site, in which the intruder crashed his station wagon through the security gate and rammed it under a partly opened door in the turbine building; the 1995 bombing of a federal building in Oklahoma City; the 1993 plot to bomb the United Nations Building, FBI offices in New York City, the Lincoln Tunnel, the Holland Tunnel, and the George Washington Bridge; the 1998 bombing of the U.S. embassies in Tanzania and Kenya; and the 2000 bombing of the U.S.S. Cole. *Id.*

new requirement that nuclear power plant licensees erect barriers against vehicle bombs. Petitioners' Contentions at 26 [EOR 69], citing Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (August 1, 1994) (hereinafter "Vehicle Bomb Rule"), Exhs. at 14.

Only two years earlier, the NRC had *refused* to require vehicle barriers in response to a petition for rulemaking, on the ground that the likelihood of a truck bomb was so low as to be "remote." Nuclear Control Institute et al., Denial of Petition for Rulemaking, 56 Fed. Reg. 26,782, 26,788 (June 11, 1991). Exhs. at 26. Two events in 1993, however, caused the Commission to reconsider and reverse this decision: the terrorist bombing of the World Trade Center and the intrusion of the Three Mile Island security area and turbine building. In the Vehicle Bomb Rule, the Commission found for the first time that it was not necessary to be able to quantify the probability of a vehicle bomb attack, and instead turned to qualitative factors and questions of conditional probability, stating in pertinent part that:

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

Petitioners' Contentions at 27, EOR 70, quoting 59 Fed. Reg. at 38,891, Exhs. at 14. Petitioners asserted that these same considerations continue to apply in the post-September 11 environment, and that "motive, capacity, and the pattern of past incidents are relevant to a qualitative analysis." *Id.* at 28, EOR 71.

Petitioners demonstrated, moreover, that the Diablo Canyon ISFSI design is vulnerable to terrorist attack. The ISFSI is designed to withstand "comparatively minor threats to cask integrity, such as the impact of a tornado-driven automobile at 33 miles per hour, or the explosion of a vehicle fuel tank at a distance of 50 feet. *Id.*

Given these facts, Petitioners demanded that the ER provide: (a) a complete discussion of "the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI;" and (b) an evaluation of a "range of reasonable alternatives to the proposed action," including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks than PG&E intended to use. *Id.*

2. Petitioners' request for comprehensive review of design measures to protect against terrorist attacks

In addition to raising environmental contentions, on September 9, 2002, petitioners SLOMFP and Peg Pinard, *inter alia* (hereinafter "SLOMFP") filed a petition seeking the imposition of emergency post-9/11 security upgrades on the

entire the Diablo Canyon nuclear complex, including the nuclear plant and the proposed ISFSI. Petition, EOR 115. In support of the Petition, Petitioners submitted a detailed expert declaration by Dr. Gordon Thompson. Thompson Declaration of September 7, 2002, EOR 156.[8]

SLOMFP's Petition charged that the NRC's current safety and security requirements are grossly inadequate to provide reasonable protection to the public from the effects of terrorist attack or other acts of malice or insanity on the Diablo Canyon complex, because they focus on perimeter security and neglect "defense-in-depth." *Id.* at 13-23, EOR .[9]

SLOMFP also contended that in the absence of substantially improved protective measures for the Diablo Canyon nuclear complex, construction and operation of the proposed ISFSI would compound the attractiveness and vulnerability of the nuclear complex to such attacks and destructive acts. Thus, any NRC decision to license the proposed ISFSI would violate the Atomic Energy Act's prohibition against licensing actions that would be inimical to the common

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[8] The Sierra Club did not join in the Petition, and therefore does not participate in this portion of the appeal.

[9] For instance, facilities that house radioactive material should be fortified to reduce their vulnerability if perimeter security is breached. If facilities housing radioactive material are successfully damaged, measures should be provided to mitigate the effects of such damage. Finally, rigorous emergency planning measures should be in place, in order to protect the public if an offsite radiological release should occur. *Id.* at 2, EOR 121. *See also* Thompson Declaration of September 7, 2002, at 32, 39; EOR 187, 194.

defense and security and would constitute an unreasonable risk to public health and safety. *Id.* at 7, 11-23 [EOR 126, 130-142], citing 42 U.S.C. §§ 2077, 2099, 2111.

SLOMFP asked the Commission to suspend the ISFSI licensing proceeding and consider additional measures to protect the Diablo Canyon complex from terrorist attack. In the event that the Commission refused to suspend the proceeding, SLOMFP requested that the Commissioners expand the scope of the pending licensing proceeding to permit consideration of interim measures to protect public health and safety and the common defense and security while evaluation of longer-term measures is underway.

SLOMFP proposed that the interim measures encompass four categories that would provide a defense-in-depth strategy against a range of threats: (1) site security, such as a mandatory aircraft exclusion boundary; (2) increased facility robustness, such as automated shutdown of the reactors upon initiation of a high-alert status at the plant; (3) damage control measures, such as patching and restoring water to a breached spent fuel pool; and (4) emergency response measures, such as criteria for long-term protective actions. *Id.* at 30-32 [EOR 150-51], citing Thompson Declaration of September 7, 2002, Sections VIII and XI, EOR 186-87, 192-95.

Finally, SLOMFP demanded that, for whatever measures the NRC chose to consider, it grant the public an opportunity to participate in the decisionmaking

process pursuant to the hearing requirements of the AEA and the rulemaking requirements of the APA. *Id.* at 32-33, EOR 151-52. SLOMFP also suggested procedures for identifying sensitive information that could not be widely disseminated, and for restricting access to the information. *Id.*

E. Decisions Below

1. Decisions on Environmental Contentions

a. LBP-02-23

On December 2, 2002, the ASLB issued a ruling granting Petitioners standing, but denying admission of their environmental contentions. LBP-02-23, 56 NRC 413 (2002), EOR 1. The ASLB ruled that the environmental contentions posed an impermissible challenge to NRC regulations that exempt NRC licensees from having to design their nuclear facilities against malevolent attacks by land-based or airborne vehicles. *Id.*, 56 NRC at 447, citing 10 C.F.R. §§ 73.51, 50.13. EOR 18. In light of the Commission's ongoing "top to bottom" review of the agency's safeguards and security programs, however, the ASLB referred its ruling on Petitioners three environmental contentions to the Commission for its consideration. *Id.*, 56 NRC at 448, EOR 19.

b. *Private Fuel Storage* decision

At the time that the ASLB issued LBP-02-23, the Commission had before it four other cases in which citizen groups and the State of Utah had requested

hearings on the environmental impacts of terrorist attacks on proposed nuclear facilities. In light of the events of September 11, 2001, the Commission declared that it would consider the question of: "[w]hat is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001?"[10]

On December 18, 2002, the Commission issued orders in each of the four cases, flatly refusing to prepare an EIS addressing the environmental impacts of terrorist attacks.[11] In the lead case, *Private Fuel Storage,* the Commission rejected a contention by the State of Utah that the EIS for the facility should consider the environmental impacts of a suicidal crash of a jumbo jetliner into a proposed ISFSI. In that decision, the Commission provided the most detailed explanation of its four-fold grounds for refusing to address the environmental impacts of terrorist attacks and other "malevolent acts" in an EIS: (a) terrorist attacks are not

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[10] *See* CLI-03-01 at 5 note 13 [EOR 35], citing *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-03, 55 NRC 155 (2002); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-05, 55 NRC 161 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-04, 55 NRC 158 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2, Catawba Nuclear Station, Units 1 and 2), CLI-02-06, 55 NRC 164 (2002).

[11] *Private Fuel Storage, L.L.C.* (Independent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) (hereinafter "*Private Fuel Storage*") (Exhs. at 1); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 1), CLI-02-27, 56 NRC 367 (2002); *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2), Catawba Nuclear Station, Units 1 and 2), CLI-02-26, 56 NRC 358 (2002).

reasonably foreseeable because they are not predictable; (b) terrorist attacks are not a natural or inevitable byproduct of licensing nuclear facilities, and therefore do not fall within the scope of impacts that must be considered; (c) terrorist attacks are "worst-case" events that need not be considered in an EIS; and (d) NEPA's open public participation processes are not suitable for discussing sensitive information regarding terrorist threats. *Private Fuel Storage,* 56 NRC at 347, Exhs. at 4.

At the same time that it refused to consider environmental impacts of terrorist attacks in an EIS, the Commission "stress[ed]" its determination, in the "wake of the horrific September 11 terrorist attacks, to "strengthen security at the facilities we regulate." *Id.*, 56 NRC at 343, Exhs. at 2. As the Commission explained:

> We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect 'public health and safety' and the 'common defense and security.' We are reexamining, and in many cases have already improved, security and safeguards matters such as guard force size, physical barriers, access control, detection systems, alarm stations, response strategies, security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and the design basis threat. We also are reviewing our own infrastructure, resources, and communications.

Id., 56 NRC at 343, Exhs. at 2. The Commission also stated that its comprehensive review may "yield permanent rule or policy changes." *Id.* Finally, the Commission cited enforcement orders in which it had ordered all nuclear power plant licensees to implement interim compensatory security upgrades. *Id.* at 344,

Exhs. at 3.[12]

c. CLI-03-01

On January 23, 2003, the Commission issued CLI-03-01, affirming the ASLB's refusal to admit Petitioners' environmental contentions for a hearing. 57 NRC 1, EOR 33. The Commission announced that it was rejecting the contentions "for the same reasons" stated in the *Private Fuel Storage* case. *Id.* Citing the Nuclear Waste Policy Act, the decision also stated that:

> our conclusion comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository. Storage of spent fuel at commercial reactor sites offers no unusual technological challenges. Indeed, it has been occurring at Diablo Canyon for many years and will continue whether or not we license the propose ISFSI.

Id. 57 NRC at 7 (footnotes omitted), EOR 36. Finally, in a footnote, the Commission suggested that it would be better to focus on preventing a terrorist attack in the "near term" at the Diablo Canyon nuclear power plant, rather than focusing on future spent fuel storage at the ISFSI. *Id.*, 57 NRC at 7 note 24.

The Commission did not rest on, and declined to address, the ASLB's rationale for deciding that Petitioners were not entitled to a hearing. *Id.* at 7, note 22, EOR 36.

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[12] *See* EA-02-026, All Operating Power Reactor Licensees; Order Modifying Licenses Effective Immediately), 67 Fed. Reg. 9,792 (March 4, 2002), Exhs. at 44.

2. Commission decision on Petition

On November 21, 2002, the Commission issued CLI-02-23, denying SLOMFP's Petition for comprehensive review of design measures to protect against acts of terrorism. 56 NRC 230, EOR 27. The Commission did not dispute SLOMFP's claim that it could not lawfully license the proposed ISFSI if the existing Diablo Canyon nuclear power plant posed an unacceptable threat to the common defense and security in violation of the Atomic Energy Act, 42 U.S.C. §§ 2077, 2099, and 2111. Instead, it found that it had already given SLOMFP some of the relief it sought, by undertaking "a comprehensive review of our security rules and policies," and imposing new "interim security measures for ISFSIs." *Id.* at 236, EOR 30, citing EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,150 (October 23, 2002) (Exhs. at 49); EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,152 (October 23, 2002) (Exhs. at 51).

The NRC declared that "SLOMFP is free to make its positions known during this adjudication (as they relate to this proceeding) and in any rulemakings that emerge from our comprehensive security review." *Id.* at 236 and note 10, EOR 30. The Commission also refused to suspend the ISFSI licensing proceeding, on the ground that the ISFSI licensing proceeding could go forward "in parallel with our security review and the interim compensatory measures we have

ordered." *Id.* (footnote omitted).

3. Conclusion of the proceeding below

Following an oral argument on Petitioners' financial qualifications contention, the ASLB ruled against Petitioners in LBP-03-11, 58 NRC 47 (2003). On October 15, 2003, the Commission issued CLI-03-12, denying Petitioners' request that it take review of the ASLB's decision. EOR 38.

On October 24, 2003, after the conclusion of the adjudicatory proceeding, the NRC Staff issued an Environmental Assessment and Finding of No Significant Impact regarding the proposed ISFSI. Environmental Assessment Related to the Construction and Operation of the Diablo Canyon Independent Spent Fuel Storage Installation at 24 (hereinafter "Environmental Assessment"), EOR 211. The Environmental Assessment reiterated the Commission's determination "that an NRC environmental review is not the appropriate forum for consideration of terrorist attacks." *Id.* at 23, EOR 236.

F. NRC Enforcement Orders

In the spring of 2003, the NRC issued permanent orders, making upgrades to the design basis threat, security force work hours, and training requirements on all operating nuclear power plants, including Diablo Canyon.[13] While the general

[13] EA-03-038, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,510 (May 7, 2003) (Exhs. at

contents of these orders were made public, the details were withheld from public disclosure.[14] Moreover, although the orders changed the regulatory requirements for security measures at each operating nuclear power plant, the Commission did not treat them as license amendments, which would have triggered public hearing requirements under the Atomic Energy Act, 42 U.S.C. § 2239(a). Neither did the Commission treat the regulatory revisions as rulemakings, which would have required notice and opportunity for comment under the APA, 5 U.S.C. § 553.[15]

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54); EA-03-039, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,514 (May 7, 2003) (Exhs. at 58); EA-03-086, All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,517 (May 7, 2003), Exhs. at 62.

It should be noted that these orders affected the Diablo Canyon nuclear power plant, but not the ISFSI.

[14] The details of the orders were contained in Attachment 2 to each order. The Commission did not include the contents of Attachment 2 in the Federal Register notices for the enforcement orders. *See* orders cited in note 13, *supra*.

[15] In a case now pending before the District of Columbia Circuit, SLOMFP has challenged the NRC's issuance of the orders cited above in note 13, on the ground that the NRC unlawfully used the orders to revise its security regulations, without complying with APA and AEA notice-and-comment requirements. *Public Citizen and San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Commission*, No. 03-1181. The briefing in that case is proceeding approximately in parallel with this proceeding.

VII. SUMMARY OF THE ARGUMENT

The terrorist attacks of September 11, 2001, combined with other terrorist attacks on U.S. facilities in the 1990's, transformed the NRC's regulatory response to the threat of destructive and malicious acts against nuclear facilities in the United States. In order to prevent and protect against the potentially devastating effects of terrorist attacks, the NRC has developed a system to maintain a constant state of alert, undertaken a comprehensive review of the adequacy of its safety and security regulations, and upgraded its security requirements for all operating nuclear facilities in the United States.

Despite the tremendous attention that the NRC has focused on the risks of terrorist attacks and means to prevent them, the NRC has completely foreclosed the public from participating in its decisionmaking process for addressing the risks of terrorist attacks. Thus, at the critical juncture of licensing a new ISFSI at the Diablo Canyon nuclear power plant, the Commission deprived Petitioners of any legal forum for addressing the extraordinary implications of the September 11 attacks for the NRC's licensing decision. In CLI-03-01, the NRC categorically refused Petitioners' request for a hearing on its environmental contentions that NEPA requires consideration of the environmental impacts of terrorist attacks and other acts of malice or insanity on the Diablo Canyon ISFSI and during related transportation of spent fuel. In CLI-02-23, the Commission refused to grant

SLOMFP a hearing on what emergency security upgrades for the entire Diablo Canyon nuclear complex should be imposed to ensure that licensing of the proposed ISFSI would not compound the existing security threat posed by the nuclear power plant, and thereby pose an unacceptable risk to the common defense and security and public health and safety.

By refusing to allow Petitioners to be heard regarding the implications of the September 11 attacks on its licensing decision for the Diablo Canyon ISFSI, the Commission violated the AEA, the APA, and NEPA. In CLI-03-01, the Commission violated the AEA's public hearing requirement, 42 U.S.C. § 2239(a), by unlawfully denying Petitioners a hearing on their environmental contentions. In rejecting Petitioners' contentions, the Commission unlawfully failed to apply its own regulations for evaluating the admissibility of contentions at the threshold stage of a hearing, and instead improperly decided the merits of the contention without affording Petitioners an opportunity to be heard. Moreover, in violation of the APA, 5 U.S.C. § 553, the Commission unlawfully relied for its decision on a fact-based statement of policy that was never subjected to the rigors of public comment or an evidentiary hearing.

The Commission's decision to deny Petitioners a hearing also violated NEPA, because it was based on an arbitrary and capricious determination that an EIS is never required to address the environmental impacts of terrorist attacks

because those impacts are not foreseeable or capable of meaningful analysis. In making these factual determinations, the Commission completely ignored contradictory evidence presented by Petitioners, including the Commission's own rules, regulatory actions, and practices. By failing to provide a "convincing explanation" for its conclusion, the Commission failed to satisfy NEPA's requirement for a "hard look" at environmental issues raised by its decisions. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d at 1211.

The Commission also violated Section 189a of the AEA by refusing to hold a hearing on appropriate post-9/11 measures for upgrading security at the entire Diablo Canyon nuclear complex, including the nuclear plant and the proposed ISFSI. The Commission did not deny that Petitioners had a right to be heard on these measures, but instead directed Petitioners to participate in illusory rulemaking proceedings that did not exist, and which the agency had no apparent intention of conducting. While the NRC had the right to choose between offering Petitioners a hearing or an opportunity to participate in a rulemaking, it did not have the right to completely deny Petitioners any forum for participating in the decisionmaking process regarding appropriate upgrades to the security measures for the Diablo Canyon nuclear complex.

Accordingly, the Commission’s decisions in CLI-03-01 and CLI-02-23 should be overturned, and Petitioners should be granted the hearings to which they

are legally entitled.

VIII. ARGUMENT

A. Reviewability and Standard of Review

1. Reviewability

The Commission's decisions in this proceeding are reviewable by the Court under the Atomic Energy Act, 42 U.S.C. § 2239(b); and the Hobbs Act, 28 U.S.C. § 2342(4). *See also Sierra Club v. NRC,* 862 F.2d 222, 224-25 (9th Cir. 1988).

2. Standard of Review

The standard of review in this case is established by the APA, 5 U.S.C. § 706. Purely legal questions are reviewed de novo. *Akiak Native Community v. U.S. Postal Service,* 213 F.3d 1140, 1144 (9th Cir. 2000). Predominantly legal decisions must be overturned if they are unreasonable. *Alaska Wilderness Recreation and Tourism v. Morrison,* 67 F.3d 723, 727 (9th Cir. 1995).

Factual decisions under NEPA must be reviewed under the arbitrary and capricious standard. *California v. Norton,* 311 F.3d 1162, 1170 (9th Cir. 2002); *Akiak Native Community v. U.S. Postal Service,* 213 F.3d at 1144. An agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

B. The Commission Improperly Denied Petitioners a Hearing on Their Environmental Contentions, in Violation of Section 189a of the AEA.

1. The Commission failed to follow its own admissibility regulations, thereby depriving Petitioners of their rightful hearing.

Section 189a of the Atomic Energy Act, 42 U.S.C. § 2239(a), affords interested members of the public a right to request a hearing on the lawfulness of proposed licensing actions by the NRC, including the NRC's compliance with NEPA. The scope of the hearing is governed by the "contentions" that are successfully raised by a petitioner. 10 C.F.R. § 2.714(b)(1).

In order to gain admission of a contention for litigation, a petitioner to the NRC must present "[s]ufficient information . . . to show that a genuine dispute exists with the applicant on a material issue of law or fact." 10 C.F.R. § 2.714(b)(2)(iii).[16]

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[16] The information must consist of:

> references to the specific portions of the application (including 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 petitioners' belief.

Id. In addition, the petition must provide a "brief explanation of the contention," and:

> [a] concise statement of the alleged facts or expert opinion which support the

Petitioners satisfied the NRC's admissibility standard with respect to their contentions that the Diablo Canyon ER's discussion of environmental impacts of licensing the proposed ISFSI, including storage and transportation of spent fuel, is inadequate because it does not include the consequences of destructive acts of malice or insanity. Contentions at 24-28, EOR 67-71. Noting that the Commission had recently made a commitment to reconsider its previous position that such impacts are not cognizable under NEPA, Petitioners presented new and relevant evidence undermining the NRC's underlying factual conclusion, as set forth in the 1985 *Limerick* case, that the environmental impacts of terrorist attacks are not foreseeable or capable of meaningful analysis. Contentions at 24-28, EOR 67-71. This evidence consisted of:

- the targeting of nuclear facilities as terrorist targets after September 11, 2001;
- the vulnerability of nuclear facility structures to terrorist attack;
- the pattern of terrorist attacks in recent years, highlighting the vulnerability of U.S. facilities and institutions, the sophistication of the attackers, and the persistence of efforts to damage major U.S. facilities; and
- the NRC's own recognition, in the 1994 Vehicle Bomb Rule, that it is both possible and necessary to make a meaningful evaluation of the potential for

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> 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.

10 C.F.R. §§ 2.714(b)(2)(i) and (ii).

terrorist attacks.

See discussion, *supra*, in Section VI.D.1.

In rejecting Petitioners' environmental contentions, the Commission completely failed to address the question of whether the information submitted by Petitioners was sufficient to meet the NRC's admissibility standard, *i.e.*, whether it demonstrated a genuine factual dispute regarding the NRC's ability to evaluate the risk of terrorist attacks in a meaningful way. Nowhere in the decision is it possible to find a discussion of whether Petitioners satisfied 10 C.F.R. § 2.714(b)(2).

By failing to follow its own regulations, the NRC committed reversible error. *Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984) ("Agencies are generally bound by the regulations they promulgate"); *Cherokee Nation of Oklahoma v. Babbitt*, 117 F.3d 1484, 1499 (D.C. Cir. 1997), citing *Service v. Dulles*, 354 U.S. 363 (1957).

2. The Commission improperly judged the merits of Petitioners' environmental contentions, thereby depriving them of their rightful hearing.

The Commission has consistently ruled that in deciding whether the NRC's admissibility standard is satisfied, the substantive merits of a contention may not be reached. *Sierra Club v. NRC*, 862 F.2d at 228, citing *Texas Utilities Electric Co.* (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912, 931 (1987); *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant),

ALAB-837, 23 NRC 525, 541 (1986); *Limerick*, 22 NRC at 694. The purpose of this limitation is to "ensure that the parties are not required to prove their contentions before they are admitted in the proceedings." *Sierra Club v. NRC*, 862 F.2d at 228 (reversing a decision in which the NRC's Appeal Board reached the merits of a contention in judging its admissibility).

Contrary to this requirement, the Commission went straight to the merits of Petitioners' environmental contentions, holding that (a) the possibility of a terrorist attack is "speculative" and "too far removed from the natural or expected consequences of agency action to require study under NEPA"; and (b) it is not possible to evaluate the risk of terrorist attacks in a "meaningful" way, either quantitatively or qualitatively. 57 NRC at 7, EOR 36.

By judging the merits of Petitioners' environmental contentions, the Commission short-circuited the hearing process and violated its own well-established precedents of declining to reach the merits of a contention at the admissibility stage of the proceeding. *Sierra Club v. NRC*, 862 F.2d at 228. The Commission thereby unlawfully deprived Petitioners of their statutory right to a hearing under Section 189a of the Atomic Energy Act. As this Court held in *Sierra Club v. NRC*, because "[t]he disputed contention has never been appropriately considered," a hearing is required now. 862 F.2d at 228.

C. The Commission Violated the APA By Establishing a Binding Substantive Norm Without Providing Notice or Opportunity to Comment or Subjecting it to a Public Hearing.

In CLI-03-01 and *Private Fuel Storage*, the NRC announced a general policy of refusing to consider the environmental impacts of terrorist attacks in EISs. The NRC has applied this policy in all of the post-9/11 cases in which citizen groups and state governments have sought hearings regarding the question of whether NEPA requires consideration of the impacts of terrorist attacks in EISs for NRC licensing decisions. *See* cases cited in note 11, *supra.*

By precluding Petitioners from challenging the adequacy of NRC's consideration of measures to protect the human environment from the environmental impacts of terrorist attacks on nuclear facilities, the NRC's policy sets a "binding substantive norm" *Mad-Luna v. Fitzpatrick*, 813 F.2d 1006, 1014 (9th Cir. 1987). Thus, it is subject to the public participation requirements of the APA, as set forth in 5 U.S.C. § 553. *Id. See also Mt. Diablo Hospital District v. Bowen*, 860 F.2d 951, 956 (9th Cir. 1988); *Citizens Awareness Network v. NRC*, 59 F.3d 284, 290-91 (1st Cir. 1995). Because the NRC established its policy without first seeking public comment, it must be overturned as invalid. *Id.*

Moreover, when applying a policy in a particular situation, an agency "must be prepared to support the policy just as if the policy statement had never been issued." *Limerick Ecology Action v. NRC*, 869 F.2d at 733, quoting *Pacific Gas &*

Electric Co. v. Federal Power Commission, 506 F.2d 33, 37 (D.C. Cir. 1974). Here, the NRC has conducted no evidentiary proceeding that would support the factual determinations on which its policy rests. Therefore, the NRC cannot rely on the policy to deny Petitioners a hearing.

D. The NRC violated NEPA by failing to take a hard look at the environmental impacts of a terrorist attack on the Diablo Canyon ISFSI.

As discussed in *Sierra Club v. NRC,* by unlawfully deciding, at the threshold stage, the merits of Petitioners' contention that NEPA requires consideration of the environmental impacts of terrorist attacks and other acts of malice or insanity, the Commission deprived the Court of "any basis to hold that the agency decision was correct on the merits." 862 F.2d at 229. Even if the Court finds that it can reach the merits of the Commission's decision, however, CLI-03-01 must be reversed because it fails to demonstrate that the Commission took a "hard look" at the environmental issues raised by the Petitioners. *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d at 1211.

In order to demonstrate that its refusal to prepare an EIS on the environmental impacts of terrorist attacks and other acts of malice or insanity on the proposed ISFSI resulted from a "hard look" at the environmental issues, the NRC must provide a "convincing statement of reasons" for its decision. *Id.* Here, the NRC's asserted reasons for refusing to prepare an EIS are far from convincing.

Rather, they demonstrate that the NRC "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 v. U.S. Forest Service,* 100 F.3d 1443, 1448 (9th Cir. 1996), quoting *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). As demonstrated below, the NRC's stated reasons for refusing to consider Petitioners' environmental contentions either improperly ignore record evidence, including the Commission's own regulations, or claim an unfounded exception to NEPA's statutory requirements. Accordingly, CLI-03-01 must be reversed.

1. The NRC unlawfully ignored record evidence, including its own rule, establishing that it is capable of making a meaningful evaluation of the potential for terrorist attacks.

NRC regulations at 10 C.F.R. § 51.71 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." In CLI-03-01, the Commission argued that it lacks the capacity to perform any meaningful analysis of the potential for terrorist attacks, whether quantitative or qualitative. *Id.*, 57 NRC at 7, EOR 36. This argument, must be rejected because it "runs counter to the evidence before the agency." *Southwest Center v. U.S. Forest Service,*100 F.3d at 1448.

In CLI-03-01, the NRC completely ignored Petitioners' evidence that the Commission has "the capacity and information necessary to perform a qualitative analysis of the potential for acts of malice or insanity." Petitioners' Contentions at 26, EOR 69. Significantly, Petitioners' principal evidence consisted of the Commission's own Vehicle Bomb Rule, wherein the Commission had fundamentally changed its previous position that the threat of terrorists attacks must be quantifiable in order to be capable of a meaningful evaluation, and now concluded that "the threat, although not quantified, is likely in a range that warrants protection against a violent external assault as a matter of prudence." Contentions at 27, EOR 70, quoting 59 Fed. Reg. at 38,890-91, Exhs. at 15. *See also* discussion in Section VI.D.1, *supra*. The Vehicle Bomb Rule also identified factors that could be used in such a qualitative analysis, such as the motive and capacity of potential attackers, and the pattern of past incidents. Contentions at 28, EOR 71. Moreover, the Commission explained how conditional probabilistic analysis could be used to evaluate the vulnerability of a facility. *Id.* at 26, EOR 69.

The Commission's own Vehicle Bomb Rule unequivocally demonstrates that the Commission has means of making a meaningful evaluation of the potential for terrorist attacks. Failing to address Petitioners' critical evidence on this point, CLI-03-01 does not provide a "convincing rationale" for its conclusion that the risks of terrorist attacks are not capable of meaningful evaluation. *Blue Mountains*

Biodiversity Project v. Blackwood, 161 F.3d. at 1214 (rejecting environmental assessment that failed to address the record, either "in support of or in opposition to its conclusions").

In fact, the *Private Fuel Storage* decision demonstrates the irrationality of the Commission's claim that it cannot make a meaningful assessment of the potential for terrorist attacks. That decision effectively concedes that the Commission has been conducting *exactly* the type of analysis of which it claims to be incapable:

> [w]orking closely with the Office of Homeland Security and with other agencies, the NRC after September 11 has shifted substantial resources and personnel to a study of the terrorism threat. We already have upgraded security requirements, with more improvements in the pipeline. Our agency is engaged in intensive research on facility vulnerabilities; it is considering additional or alternate means of protection; and it is looking in particular at the effects of suicidal crashes of large commercial airplanes, the focus of Utah's contention here.

Id., 56 NRC at 356, Exhs. at 9. Thus, the Commission's own actions in the aftermath of the September 11 terrorist attacks further demonstrate the implausibility of the Commission's rationale for refusing to prepare an EIS in this case. *Southwest Center v. U.S. Forest Service*, 100 F.3d at 1448. Accordingly, the Commission's refusal, in CLI-03-01, to prepare an EIS violates NEPA because it is arbitrary and capricious.

2. In denying the existence of a direct causal relationship between licensing of the ISFSI and the risk of terrorist attacks, the Commission improperly ignored record evidence and contradicts its own findings and policies.

The Commission also argued that the possibility of a terrorist attack is "too far removed from the natural or expected consequences of agency action to require a study under NEPA." CLI-03-01, 57 NRC at 6-7 [EOR 36], quoting *Private Fuel Storage,* 56 NRC at 349, Exhs. at 5. Once again, this argument must be rejected because it "runs counter to the evidence before the agency." *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448.

The Commission simply ignored the evidence presented by Petitioners that the September 11 attacks show that nuclear facilities are highly attractive targets to terrorists, who are both capable of, and intent upon, causing major damage to life and property in the United States, and who have made persistent attempts to do so. Petitioners' Contentions at 25-26, EOR 68-69. Indeed, as held by the ASLB in another NRC licensing case, this is the inescapable lesson of September 11:

> Regardless of how foreseeable terrorist attacks that could cause a beyond-design-basis accident were prior to the terrorist attacks of September 11, 2001, involving the deliberate crash of hijacked jumbo jets into the twin towers of the World Trade Center in New York City and the Pentagon in the Nation's capital, killing thousands of people, it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact that these terrorist attacks occurred demonstrates that massive and

> destructive terrorist acts can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.

Duke Cogema Stone and Webster (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC 403, 446 (2001), *reversed in relevant part*, CLI-02-24, 56 NRC 335 (2002).

Moreover, as discussed above in Section VI.B, *supra,* the NRC's actions in the aftermath of September 11 demonstrate that it considers the threat of terrorist attacks to be inevitable and constant threat. In light of its own efforts to maintain a constant state of vigilance against the terrorist threat and to review the adequacy of its entire regulatory program to protect against that threat, the NRC's claim that the threat of terrorist attacks is too far removed from the licensing of the Diablo Canyon ISFSI is so implausible that it could not be attributed to NRC's expertise or a difference of opinion with Petitioners. *Southwest Center v. U.S. Forest Service,* 100 F.3d at 1448.

The Commission's ruling is inconsistent with the agency's own long-established policy and practice of addressing the environmental impacts of external events in accident analyses conducted under NEPA. *See Sierra Club v. NRC*, 862 F.2d at 228 (reversing a decision that was "contrary to the NRC's own policy (and one that accords with common sense)"). Under its own NEPA guidance, NRC considers accidents caused or exacerbated by a range of initiating events, including

internal events (such as equipment failure) and external events (such as tornados, floods, earthquakes, and explosions at adjacent facilities). NUREG-1555, Environmental Standard Review Plan for Environmental Review for Nuclear Power Plants at 7.2-3 (October 1999). Exhs. at 37.[17]

None of these external events would constitute "natural" consequences of operation of the ISFSI. If they were to occur while the ISFSI is operating, however, they could cause an accidental release of radioactivity to the environment, which would not have occurred had the nuclear facility not been licensed.

In a footnote to *Private Fuel Storage*, the Commission attempted to distinguish "natural" events from terrorist attacks on the ground that natural events are "closely linked to the natural environment of the area within which a facility will be located, and are reasonably predictable by examining weather patterns and geological data for that region." 56 NRC at 347, note 18. This distinction is irrational. Terrorists attacks on nuclear facilities, are also "closely linked" to those facilities, in the sense that they are desirable targets. Furthermore, the

[17] Thus, for example, the Diablo Canyon ER, on which the NRC based its Finding of No Significant Impact, evaluates four classes of "design events." *Id.* at 5.1-1 (December 21, 2001). Exhs. at 37. Design Events III and IV "include such events as earthquakes; tornados and missiles generated by natural phenomena; floods, fire and explosions; canister leakage under hypothetical accident conditions; . . . 100 percent blockage of air inlet ducts; . . . and transmission collapse." *Id.* at 5.1-3. *See also* Environmental Assessment at 19 (approving the accident analysis in the ER). Exhs. at 232.

Commission's argument that natural events are "reasonably predictable" amounts to a reprise of the claim that environmental impacts must be quantifiable in order to be cognizable. *See Limerick,* 22 NRC at 701. As discussed above in Section VI.D.1, the Commission itself disavowed this position in the Vehicle Bomb Rule. The Commission's position is also inconsistent with 10 C.F.R. § 51.71, which requires a discussion of qualitative factors that cannot be quantified.

3. The NRC ignored its own rule by concluding that evaluation of environmental impacts of terrorist attacks is not "manageable."

The Commission argued that inquiries into the environmental impacts of terrorist attacks are not "manageable." CLI-03-01, 57 NRC at 6-7, quoting *Private Fuel Storage,* 56 NRC at 349 and note 33, quoting *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 776 (1983).[18] According to the NRC, those who seek a NEPA evaluation of the environmental impacts of terrorist attacks effectively seek an open-ended, "worst-case" analysis that has "no stopping

[18] The Commission's citation to *Metropolitan Edison Co. v. People Against Nuclear Energy* is completely inapposite. In that case, the Supreme Court ruled that psychological effects posed by the risk of an accident at the Three Mile Island nuclear power plant were "too remote from the physical environment" to warrant preparation of an EIS. 460 U.S. at 774. The Supreme Court "emphasize[d]" that in that case, it was considering "the effects caused by the *risk* of an accident." *Id.* (emphasis added). Here, in contrast, Petitioners are concerned about actual physical environmental effects in the event that a terrorist attack occurs at the Diablo Canyon ISFSI. As the Court recognized in *Metropolitan Edison,* "[t]he situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs at TMI-1, is an entirely different case," where its holding would not apply. *Id.* at 775.

point." *Private Fuel Storage*, 56 NRC at 354, Exhs. at 8.

The Commission's argument is directly contradicted by the agency's own pragmatic approach to evaluating the potential for specific types of terrorist attacks, as outlined in the 1994 Vehicle Bomb Rule. The Vehicle Bomb Rule demonstrates that it is possible to evaluate the potential for and credibility of attack scenarios, and to identify a range of reasonable alternatives for avoiding or mitigating the impacts of such attacks. Here, Petitioners seek a hearing on whether just such an analysis is required for the Diablo Canyon ISFSI.

As discussed in Contention EC-1, Petitioners seek "a full discussion of the potential consequences of a range of credible events involving destructive acts of malice or insanity against the proposed ISFSI." Contentions at 28, EOR 71. They also seek an evaluation of a "range of reasonable alternatives to the proposed action, including dispersal of casks, protection of casks by berms or bunkers, and use of more robust storage casks" than the casks proposed by PG&E. *Id.* It is only common sense that the analysis requested by Petitioners is no more open-ended than the analysis the NRC performed in promulgating the Vehicle Bomb Rule.

4. The NRC cannot excuse itself from the requirements of NEPA without a statutory basis.

Compliance with NEPA is required "unless specifically excluded by statute or existing law makes compliance impossible." *Limerick Ecology Action v. NRC,* 869 F.2d at 729, citing *Public Service Co. of New Hampshire v. NRC,* 582 F.2d 77, 81 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978). While the Commission asserts that it is excused from compliance with NEPA by various factors, it cites no statute or existing law that makes compliance impossible. Accordingly, the Commission's excuses are without basis in law. *Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma,* 426 U.S. 776, 787-88 (1976).

a. Sensitivity of information does not preclude NEPA analysis.

The Commission attempted to justify its exclusion of Petitioners' environmental contentions on the ground that "NEPA's public process is not an appropriate forum for considering sensitive security issues." CLI-03-01, 57 NRC at 7, EOR 36. The Commission has not cited any law that would excuse it from compliance with NEPA. Without a specific and conflicting statutory basis, the mere sensitivity of information does not provide an excuse for noncompliance with NEPA. *Limerick Ecology Action v. NRC,* 869 F.2d at 729.

To the extent that the Commission is bound by legal requirements to protect sensitive information, the Commission has failed to demonstrate that those

requirements render it "impossible" to consider the environmental impacts of terrorist attacks and acts of malice or insanity against the proposed ISFSI.

In fact, the Commission's position is inconsistent with its own practice under another public participation statute, Section 189a of the Atomic Energy Act. 42 U.S.C. § 2239. The NRC has never denied a licensing hearing simply because sensitive, proprietary, or safeguards information may be discussed in the hearing. Instead, it implements procedures that limit access to sensitive information to parties who have signed confidentiality agreements.[19] The NRC can also use these procedures to limit access to sensitive information regarding the vulnerability of the Diablo Canyon ISFSI to the parties and interested government participants.[20]

The NRC also failed to recognize that it can *solicit* public comment, even if it does not disclose all the details of its environmental analysis. SLOMFP, for example, has proposed a defense-in-depth concept for protection against acts of malice or insanity, including measures ranging from perimeter protection to hardening of facility structures and strengthened emergency planning measures.

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[19] *See, e.g*, 10 C.F.R. §§ 2.744(e) (procedures for handling safeguards information in NRC hearings), 10 C.F.R. Part 2 Subpart I (procedures for handling classified information in NRC hearings); *Pacific Gas & Electric Company* (Diablo Canyon Nuclear Power Plant), ALAB-410, 5 NRC 1398, 1405 (1977) (granting intervenor's security expert access to confidential security plans during the operating license proceeding for Diablo Canyon).

[20] SLOMFP's Petition also recommended a process for ensuring that sensitive information is appropriately identified and protected during the adjudication regarding the Diablo Canyon ISFSI. Petition at 32-33 [EOR 151-52], Thompson Declaration of September 7, 2002, Section X, EOR 189-92.

See Petition at 24, 30-32 [EOR 143, 149-151]; Declaration of Dr. Gordon Thompson of September 7, 2002, Sections VIII, XI; EOR 186-87, 192-95. This proposal is far more comprehensive than the NRC's apparent focus on perimeter protection, as described in *Private Fuel Storage*, 56 NRC at 344, Exhs. at 3. State and local governments, which have expertise in and responsibility for implementing back-up security and emergency response measures, also have valuable contributions to make to the decisionmaking process.

The NRC conveniently ignored the fact that in numerous instances, other agencies such as the U.S. Department of Energy ("DOE") have prepared EISs containing information that was not accessible to the general public. For instance, the DOE has restricted circulation of some sensitive information, and withheld other information under the classification of "Official Use Only."[21] The DOE has

[21] For example, Appendix H of the DOE's recently published EIS for the proposed Yucca Mountain high-level radioactive waste repository, which discusses consequences of accidents at the repository, is not in the hard copy of the EIS that was circulated to the public, nor is it on the internet. DOE/EIS-0250F, Final Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada at H-1 (February 2002). Exhs. at 80. Instead, it was placed in Volume 4 of the Final EIS, which must be specially ordered from the DOE. *Id.*, Readers Guide at 3. Exhs. at 81.

Another EIS prepared by the DOE contains an air transportation accident analysis that is not published in the publicly available version of the EIS, but is contained in an "Official Use Only document." DOE/EIS-236-S2, Draft Supplemental Programmatic Environmental Impact Statement on Stockpile Stewardship and Management for a Modern Pit Facility, Vol. II at C-15 and Tables

also prepared EISs containing highly sensitive classified information.[22] In none of these instances did the DOE refuse to prepare an EIS because it would involve the discussion of sensitive information. Instead, the publicly available version of the EIS redacted sensitive information. By following appropriate procedures and/or obtaining appropriate clearances, interested citizens and state and local governments may gain access to the information.

b. The NWPA does not preclude NEPA compliance.

The Commission asserted that its refusal to prepare an EIS on the environmental impacts of a terrorist attack "comports with the practical realities of spent fuel storage and the congressional policy to encourage utilities to provide for spent fuel storage at reactor sites pending construction of a permanent repository." CLI-03-01, 57 NRC at 7, EOR 36. Nothing in the NWPA, however, exempts spent fuel storage from the requirements of NEPA. In fact, the statute specifically requires that the Commission's actions must be consistent with NEPA. 42 U.S.C. § 10152.

C.4-1, C.4-2, C.4-3 (May 2003), Exhs. at 102.

[22] *See, e.g.*, DOE/EIS-0161, Final Programmatic Environmental Impact Statement for Tritium Supply and Recycling, Vol. I at 2-1 (October 1995) (evaluating environmental impacts of recycling and production of tritium for nuclear weapons), Exhs. at 67; DOE/EIS-0319, Final Environmental Impact Statement for the Proposed Relocation of Technical Area 18 Capabilities and Materials at the Los Alamos National Laboratory at iii, 5-1 (August 2002) (evaluating environmental impacts of sabotage on a DOE research facility), Exhs. at 91.

c. Compliance with NEPA is independent of AEA safety and security requirements.

In both CLI-03-01 and *Private Fuel Storage*, the Commission cited its determined and ongoing effort to combat the potential for terrorism and its comprehensive review of security measures as compensation for its failure to comply with NEPA. CLI-03-01, 57 NRC at 8 [EOR 37]; *Private Fuel Storage*,56 NRC at 343, 347, Exhs. at 2, 4. As stated in *Private Fuel Storage*,

> [w]e hasten to add that our decision against including terrorism within our NEPA reviews does not mean that we plan to rule out the possibility of a terrorist attack against NRC-regulated facilities. On the contrary, as we outlined above, the Commission and its Staff have taken steps to strengthen security and are in the midst of an intense study of the effects of postulated terrorist attacks and of our relevant security and safeguards rules and policies.

Id., 56 NRC at 347, Exhs. at 4. As the NRC also observed, however, the activities described above "are rooted in the NRC's ongoing responsibilities under the AEA to protect public health and safety and the common defense and security." *Id.*

As discussed above in Section V, *supra*, the requirements of the AEA are distinct from those of NEPA. While the AEA sets minimum standards for safe and secure operation of nuclear facilities, NEPA requires the NRC to consider and attempt to avoid or mitigate the environmental impacts which flow from the licensing of such facilities. Although the statutes overlap to some degree, compliance with the AEA does not excuse compliance with NEPA. *Limerick*

Ecology Action v. NRC, 869 F.2d at 729-30.

Moreover, the Commission's comment that "it is not obvious what additional information or insights a formal NEPA review might bring into play," 56 NRC at 356 [Exhs. at 9], only serves to highlight the insular and uninformed type of decisionmaking that NEPA's "action-forcing" requirement for an EIS is designed to correct. *Robertson v. Methow Valley,* 490 U.S. at 349. By refusing to grant Petitioners a hearing, the NRC has shielded itself from the "action-forcing" requirement to consider Petitioners' evidence of (a) the manner in which the Diablo Canyon ISFSI is, in fact, vulnerable to a terrorist attack; (b) the potential consequences of such an attack; and (c) design features, not apparently considered by the NRC, that can be implemented to avoid or mitigate those vulnerabilities. *See* Contentions at 27-28, EOR 70-71; discussion in Section VI.D.2, *supra*. None of Petitioners' insights have been taken into account in the licensing of the Diablo Canyon facility, because the NRC has completely ignored the relevance of the terrorist attacks of September 11.

E. The Commission's Decision to Deny SLOMFP's Request for a Hearing on New Security Measures for the Diablo Canyon Nuclear Complex Violates Section 189a of the AEA.

Pursuant to Section 189a, the Commission must offer Petitioners an opportunity to request a hearing on all issues that are material to the issuance of a license for the Diablo Canyon ISFSI. *Union of Concerned Scientists v. NRC,* 735

F.2d 1437, 1443 (D.C. Cir.1984), cert. denied, 469 U.S. 1132 (1985). Such material issues include the question of whether licensing of the proposed ISFSI would be inimical to public health and safety and the common defense and security under the statutory standard established in 42 U.S.C. §§ 2077(c), 2099, and 2111. *Id..*, 735 F.2d at 1445 (hearing must cover all issues of material fact, including basis for "ultimate finding" that adequate protective measures can and will be taken).

SLOMFP's Petition charged that this statutory standard could not be met if the NRC licensed a new nuclear facility on the Diablo Canyon site without first ensuring that the entire Diablo Canyon nuclear complex was adequately protected against terrorist attacks. SLOMFP thus sought to be heard on what security upgrades should be imposed on the entire Diablo Canyon nuclear complex, in the aftermath of the terrorist attacks of September 11, 2001, in order to ensure that licensing of the proposed ISFSI would not be inimical to common defense and security or pose an unreasonable risk to public health and safety. Therefore, the Commission's refusal to give SLOMFP a hearing on additional security measures required to protect the Diablo Canyon nuclear complex violates the hearing requirements of the Atomic Energy Act, 42 U.S.C. § 2239(a).

In CLI-02-23, the Commission did not deny that it was appropriate to upgrade security requirements for the entire Diablo Canyon nuclear complex; nor

did it deny that SLOMFP was entitled to be heard on the adequacy of those upgrades under Section 189a of the Atomic Energy Act. Instead, the Commission held that SLOMFP had come to the wrong forum, *i.e*, that it could participate instead "in any rulemakings that emerge from [the NRC's] comprehensive security review." *Id.*,56 NRC at 236, EOR 30. The Commission also asserted that SLOMFP could raise its concerns in the hearing that was then pending before the ASLB. *Id.*

Despite the Commission's claim that SLOMFP would have these two fora in which to be heard regarding the adequacy of security for the Diablo Canyon nuclear complex, in fact the Commission precluded SLOMFP from being heard at all. To date, the Commission has not instituted a single rulemaking to establish changes in the design basis threat and other security-related measures for the Diablo Canyon nuclear plant or the ISFSI.

SLOMFP was also foreclosed from raising this issue before the ASLB in the hearing that was then pending, because the premise of the Petition was that existing NRC security regulations are grossly inadequate to protect against terrorist attack, and therefore must be supplemented by additional requirements. *See* Petition at 2, EOR 121. As the Commission stated elsewhere in CLI-02-23, "hearing petitioners may not challenge NRC rules." 56 NRC at 236 note 10. Such challenges to NRC regulations during licensing proceedings are specifically

prohibited by 10 C.F.R. § 2.758. That is why, in fact, SLOMFP raised these issues before the Commission in the first instance, rather than before the ASLB. Petition at 8-10, EOR 127-29. Only the Commission has the authority to change the security rules for the facility. *Id.*

The only forum in which the Commission has addressed the matters raised in SLOMFP's Petition is a forum in which SLOMFP has no right to participate. For Diablo Canyon, as for all operating nuclear power plants and ISFSIs, security upgrades have been made solely through individual enforcement orders. S*ee* Section VI.F, *supra.* Members of the public, however, lack standing to obtain a hearing on the adequacy of the terms of enforcement orders. *Bellotti v. NRC,* 725 F.2d 1380, 1382 (D.C. Cir. 1983).[23]

As the U.S. Court of Appeals for the D.C. Circuit recognized in *Union of Concerned Scientists v. NRC,* 711 F.2d 370, 380 n. 24 (D.C. Cir. 1987), the Commission had the discretion to offer SLOMFP an opportunity to participate in a rulemaking instead of a hearing specific to the Diablo Canyon nuclear complex. The Commission lacks the discretion, however, to completely deny SLOMFP any opportunity to be heard on on its claims. *Id.* The Commission's refusal to grant

[23] Thus, for instance, although the enforcement orders upgrading security requirements offer any person who would be "adversely affected" an opportunity to request a hearing (*see, e.g.*,67 Fed. Reg. at 9,793 [Exhs. at 45], 67 Fed. Reg. at 65,151 [Exhs. at 50], 67 Fed. Reg. at 65,153 [Exhs. at 52], 68 Fed. Reg. at 24,511 [Exhs. at 55], 68 Fed. Reg. at 24,515 [Exhs. at 60]), only the licensee would be deemed "adversely affected" by such orders under *Bellotti.* 725 F.2d at 1382.

SLOMFP a hearing in this proceeding, without having offered a rulemaking in which SLOMFP could participate, violated SLOMFP's statutory right to a hearing under section 189a of the AEA, 42 U.S.C. § 2239(a). *Id.*

XII. CONCLUSION

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

Respectfully submitted,

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March 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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v.	)	No. 03-74628
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, Respondents	)	

CERTIFICATE OF SERVICE

I certify that on March 15, 2004, copies of the foregoing Petitioners' Brief were served on the following by Federal Express or by hand:

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