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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of: : Docket No. 50-423-LA-~~1~~3
DOMINION NUCLEAR : ASLBP No. 00-771-01-LA
CONNECTICUT, INC. :
(Millstone Nuclear Power Station, :
Unit No. 3; Facility Operating :
License NPF-49) :

**CONNECTICUT COALITION AGAINST MILLSTONE AND
LONG ISLAND COALITION AGAINST MILLSTONE REPLY BRIEF
REGARDING NEPA REQUIREMENT TO ADMIT CONTENTION
REGARDING ENVIRONMENTAL IMPACTS OF
ACTS OF MALICE AND INSANITY**

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION**

In the Matter of:	:	Docket No. 50-423-LA-2
DOMINION NUCLEAR	:	ASLBP No. 00-771-01-LA
CONNECTICUT, INC.	:	
(Millstone Nuclear Power Station,	:	
Unit No. 3; Facility Operating	:	
License NPF-49)	:	March 12, 2002

**CONNECTICUT COALITION AGAINST MILLSTONE AND
LONG ISLAND COALITION REPLY BRIEF
REGARDING NEPA REQUIREMENT TO ADMIT CONTENTION
REGARDING ENVIRONMENTAL IMPACTS OF
DESTRUCTIVE ACTS OF MALICE AND INSANITY**

I. INTRODUCTION

Pursuant to Memorandum and Order CLI-02-05 (February 6, 2002), Connecticut Coalition Against Millstone ("CCAM") and the Long Island Coalition Against Millstone ("CAM") (collectively "CCAM/CAM" or "Intervenors") hereby reply to the briefs filed by Dominion Nuclear Connecticut, Inc. ("DNC") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff.¹ This brief also replies to the amicus brief filed by the Nuclear Energy Institute.²

¹ See Brief of Dominion Nuclear Connecticut Inc. in Response to Commission Memorandum and Order CLI-02-05 (February 27, 2002) ("DNC Brief"); NRC Staff Brief in Response to CLI-02-05 (February 27, 2002) ("NRC Staff Brief"). CCAM/CAM is replying to DNC and the NRC Staff in a single brief, rather than filing two separate briefs. Although this brief is over the 20-page limit specified in the Commission's Memorandum and Order, CCAM/CAM would have been within the 20-page per brief limit had it filed separate briefs in response to each party.

² See Amicus Brief of Nuclear Energy Institute in Response to the Commission's Memorandum and Orders Dated February 6, 2002, Regarding the Commission's

In resisting NEPA analysis of the risks of destructive acts of malice and insanity against Millstone and other nuclear facilities, DNC, the NRC Staff, and NEI take three principal tacks. First, they argue that 10 C.F.R. § 50.13 exempts the NRC from considering such impacts. But 10 C.F.R. § 50.13 does not conflict with NEPA, and DNC has not shown any statutory conflict between the Atomic Energy Act and NEPA that would prevent the full implementation of NEPA. Second, DNC and the Staff try to hide behind years of precedents in which the NRC repeatedly held that destructive acts of malice and insanity are not “foreseeable.” These precedents, always weak, have been overtaken by the events of the last ten years. Moreover, in the aftermath of September 11, reliance on these precedents no longer has the slightest shred of credibility. Finally, DNC and the Staff argue that it is not possible, as a practical matter, to make a qualitative analysis of the potential for destructive acts of malice or insanity. The NRC discarded this defense in the 1994 vehicle bomb rulemaking.

Thus, the opposing parties have advanced no plausible rationale for refusing to consider the environmental impacts of destructive acts of malice and insanity in the EIS for the Millstone 3 license amendment, or for any other NRC licensing action. It is long past time to shed the light of day on this significant contributor to the potential for severe accidents at nuclear facilities.

II. ARGUMENT

A. Consideration of CCAM/CAM's Contention Is Not Precluded By the Atomic Energy Act or Its Implementing Regulations.

Section 102 of NEPA requires that:

to the fullest extent possible: (1) the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter . . .

42 U.S.C. § 4332. As the Supreme Court observed in *Flint Ridge Development Corp. v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787 (1976), this language “is neither accidental nor hyperbolic.” Instead, the phrase “to the fullest extent possible” conveys “a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle.” *Id.*

DNC acknowledges that NEPA requires compliance with its procedural requirements “to the fullest extent possible.” DNC Brief at 12. However, DNC argues that this case raises an “irreconcilable and fundamental conflict” between NEPA and NRC regulations at 10 C.F.R. § 50.13, which exempts nuclear power plant licensees from any requirement to design their facilities against enemy attacks and destructive acts. According to DNC, “it would be illogical for the NRC to conclude that enemy attacks need not be addressed from a security perspective, but that environmental impacts must be evaluated under NEPA.” DNC Brief at 13-14. Under the circumstances, according to DNC, NEPA must “give way.” DNC Brief at 12, quoting *Flint Ridge*, 426 U.S. at 788.

DNC's argument is based on an impermissibly broad interpretation of the standard for determining the existence of a conflict that bars the application of NEPA. It also fails to demonstrate any actual conflict between NEPA and 10 C.F.R. § 50.13.

1. The standard for determining a conflict with NEPA is extremely narrow.

The standard for exempting an agency from compliance with NEPA is extremely narrow. In passing the legislation, Congress intended to require full compliance with NEPA "unless the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." *Flint Ridge*, 426 U.S. at 788, citing 115 Cong. Rec. 39,703 (1989) (House conferees). As the conferees further explained:

[I]t is the intent of the conferees that the provision 'to the fullest extent possible' shall not be used by any Federal agency as a means of avoiding compliance with the directives set out in section 102. Rather, the language in section 102 is intended to assure that all agencies of the Federal Government shall comply with the directives set out in said section 'to the fullest extent possible' under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance.

Id. As the Court noted in *Calvert Cliffs Coordinating Committee v. U.S. AEC*, this language shows that:

The section 102 duties are not inherently flexible. They must be complied with to the fullest extent, unless there is a clear conflict of *statutory* authority. [footnote omitted] Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance.

449 F.2d 1109, 1115 (D.C. Cir. 1971) (emphasis in original). Thus, in order to establish an irreconcilable conflict with NEPA, a party must show a clash between NEPA and an agency's governing statutory authority.

In order to justify an exemption from NEPA, most courts have interpreted Section 102 to require a demonstration of a conflict between NEPA and a provision of an agency's organic statute. *See, e.g., Baker v. United States Department of Agriculture*, 928 F. Supp. 1513, 1520 (D. Id. 1996) (holding that conflict between NEPA and a regulation did not constitute sufficient grounds for an exemption, where there was no conflicting statutory provision). *See also Flint*, 462 U.S. at 788, quoting *United States v. SCRAP*, 412 U.S. 669, 694 (1973) ("NEPA was not intended to repeal by implication any other statute"); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989) (finding no language in the Atomic Energy Act that would preclude the full application of NEPA). In fact, with only one inapposite exception, all of the cases cited by DNC in support of its argument examine the potential for conflicts in *statutory provisions*, not conflicts between NEPA and agency regulations.³

Moreover, the statutory conflict exception is applied "sparingly," and in very limited circumstances. *Texas Commission on Natural Resources v. Bergland*, 573 F.2d at 206. These circumstances generally involve conflicts between procedural requirements of an agency's organic statute, and the procedural requirements of NEPA. As the Court observed in *Texas Commission on Natural Resources*:

³ *See* DNC Brief at 7, 12-13, citing *Texas Commission on Natural Resources v. Bergland*, 573 F.2d 201, 206 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978); *United States v. SCRAP*, 412 U.S. at 694; *Flint Ridge*, 426 U.S. at 788; *Atlanta Gas Light Co. v. Federal Power Commission*, 476 F.2d 142, 150 (5th Cir. 1973); *Lakeland, Tallahassee & Gainesville Regional Utilities v. Federal Energy Regulatory Commission*, 702 F.2d 1302, 1314 (11th Cir. 1983); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3rd Cir. 1989). The only exception is *Public Service Company of New Hampshire*, 582 F.2d 77, 81 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978), in which the Court upheld the NRC's decision to *include* an issue in the scope of its NEPA review, based on an interpretation of its organic statute.

In a limited number of cases statutorily mandated deadlines, *Gulf Oil Corp. v. Simon*, 373 F.Supp. 1102 (D.D.C), *aff'd*, 502 F.2d 1154 (Em.App. 1974), or an indispensable need for haste, *Atlanta Gas Light Co. v. Federal Power Commission*, 476 F.2d 142, 150 (5th Cir. 1973), have rendered compliance with NEPA impossible. In a small number of cases NEPA compliance has not been required when the agency's organic legislation mandated specific procedures for considering the environment that were 'functional equivalents' of the impact statement process. *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 160 U.S. App. D.C. 123, 489 F.2d 1247 (1973); *Portland Cement Association v. Ruckelshaus*, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973).

Id., 573 F.2d at 206-07.

CCAM/CAM is aware of only two cases in which the courts have examined whether a conflict existed between NEPA and an agency's regulations. *See Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986); *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 81 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978). However, these decisions imposed two caveats. First, the agency regulations must be interpreted as liberally as possible "to accommodate the application of NEPA." *Jones*, 792 F.2d at 826 (refusing to exempt an agency from NEPA where the regulation provided enough flexibility to permit compliance with NEPA). Second, the regulation must have a "reasonable relation to the language and purpose of the statute." *Public Service Co. of New Hampshire*, 582 F.2d at 81 (finding that no exemption from NEPA was justified where the NRC had reasonably interpreted its governing statute to include transmission lines within NEPA's scope).

2. **There is no conflict between NEPA and the Atomic Energy Act.**

No exemption from NEPA is warranted here, because DNC has demonstrated no conflict between NEPA and any statutory provision of the Atomic Energy Act. In fact, DNC's argument flies in the face of the U.S. Court of Appeals' holding in *Limerick Ecology Action v. NRC* that the Atomic Energy Act does not preclude NEPA's procedural requirements. As the Court explained:

The language of NEPA indicates that Congress did not intend that it be precluded by the AEA. Section 102 of NEPA requires agencies to comply 'to the fullest extent possible.' 42 U.S.C. § 4332. Although NEPA imposes responsibilities that are purely procedural, *Vermont Yankee*, 435 U.S. at 558, 98 S.Ct. at 1219, there is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA. Moreover, there is no language in the AEA that would indicate AEA precludes NEPA.

869 F.2d at 729. DNC can point to no provision of the Atomic Energy Act that undermines the Third Circuit's holding. The Atomic Energy Act contains no provision that would prevent the NRC from considering the risks of acts of malice or insanity against nuclear plants in an Environmental Impact Statement ("EIS").

In fact, a comparison of NEPA and the Atomic Energy Act provisions cited by DNC at page 8 of its brief shows that these statutes are essentially harmonious. The purposes of NEPA are, *inter alia*, to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." See 42 U.S.C. § 4321. Similarly, the Atomic Energy Act authorizes the NRC to establish regulations to "promote the common defense and security" and to "protect health or to minimize danger to life or property." See 42

U.S.C. § 2201(b). While NEPA's scope may be "broader" than the Atomic Energy Act's, the two statutes share "many" of the same concerns. *See Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975).

The Atomic Energy Act simply does not contain a limit on the NRC's authority to consider measures for the protection of the human environment. The limitation found in 10 C.F.R. § 50.13 constitutes the Commission's own interpretation of where this obligation ends, not a directive from Congress. Thus, there is no irreconcilable conflict between NEPA and the NRC's organic statute that would justify an exemption from NEPA.

3. **There is no conflict between NEPA and 10 C.F.R. § 50.13 because § 50.13 is irrelevant to the issues raised by CCAM/CAM's contention.**

Even assuming for purposes of argument that a conflicting regulation would be sufficient to justify an exemption from NEPA, no such conflict exists here. As the Commission has previously stated, the purpose of 10 C.F.R. § 50.13 is quite narrow, *i.e.*, to exempt nuclear plant licensees from designing their plants against an attack by a foreign state, from outside the United States, using military weapons. *See* CCAM/CAM's Brief at 15-16, citing Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (August 1, 1994). Thus, 10 C.F.R. § 50.13 is "irrelevant" to situations involving a domestic threat of terrorism. *Id.*

Moreover, in the 1994 rulemaking, the Commission did exactly what DNC argues is impermissible under 10 C.F.R. § 50.13 in this case: it required licensees to take measures to protect against terrorist attacks. In addition, in the wake of the September 11 terrorist attacks, the Commission has imposed additional requirements on nuclear power

plant licensees. *See* EA-02-06, Order Modifying Licenses (February 25, 2002). Although the details of the order have not been disclosed, Homeland Security Director Tom Ridge has stated that design changes may be necessary. Gregory Twachman, *Structural Changes at Nuclear Plants May be Necessary, Says Ridge*, Inside NRC (February 11, 2002). Thus, the Commission itself already has rejected DNC's contention (at page 11 of its brief) that "[n]otwithstanding the events of September 11, 2001, there can be no doubt that terrorist acts ('intentional malevolent acts') against the United States fall within the scope of 10 C.F.R. § 50.13, at least to the extent that such acts exceed the current design basis external security threat defined in 10 C.F.R. § 73.1(a)(1)."

As the Court observed in *Jones v. Gordon*, the courts must give agency regulations "as liberal an interpretation as we can to accommodate the application of NEPA." 792 F.2d at 826. Although DNC tries to give 10 C.F.R. § 50.13 an air of rigidity by characterizing it as part of a "robust framework" for the protection of nuclear power plant security, *see* DNC Brief at 8, the Commission's statements in the 1994 vehicle bomb rule show that in fact, it can be interpreted in a way that permits the full implementation of NEPA. Indeed, as DNC acknowledges elsewhere in its brief, Congress deliberately wrote the Atomic Energy Act in a manner intended to give the NRC great "flexibility" to define security requirements, noting that "it would be unwise to try to anticipate by law all of the many problems that are certain to arise." *See* DNC Brief at 10, note 23, quoting H.R. Doc. No. 328, 83d Cong., 2d Sess. 7 (1954). Clearly, the Commission has discretion, under its organic statute, to re-interpret these requirements in light of current circumstances.

There can be no argument that circumstances have changed since 1967, when the Atomic Energy Commission promulgated 10 C.F.R. § 50.13. At that time, the United States was at the height of the Cold War with the Union of Soviet Socialist Republics and its allies, and the country's obsession was the threat of a missile attack from Cuba. Today, the Cold War is over, and a new threat has emerged that is completely unlike the Cold War threat. Given the flexibility inherent in the NRC's organic statute, it would be nothing short of nonsensical to read 10 C.F.R. § 50.13 to constitute a bar to full compliance with NEPA.

4. Even assuming for purposes of argument that 10 C.F.R. § 50.13 is relevant to CCAM/CAM's contention, no exemption from NEPA is justified.

As discussed above, there is no conflict between 10 C.F.R. § 50.13 and NEPA, for the simple reason that the Commission has declared 10 C.F.R. § 50.13 to be irrelevant to the question of whether nuclear power plant licensees should be required to design against destructive acts of malice or insanity. Even assuming for purposes of argument that 10 C.F.R. § 50.13 is somehow relevant to CCAM/CAM's contention, however, the regulation does not bar consideration of CCAM/s contention under NEPA. As the Court ruled in *Limerick Ecology Action v. NRC*, 869 F.2d at 729-30, the exclusion of an issue under the Atomic Energy Act does not result in the automatic exclusion of the same issue under NEPA.⁴

⁴ DNC cites *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 696 n. 10 (1985), for the proposition that "NEPA cannot logically impose requirements more stringent than those contained in the safety provisions of the AEA," without noting that ALAB-819 was reversed in relevant part by *Limerick Ecology Action v. NRC*. See DNC Brief at 15 note 30.

In *Limerick Ecology Action*, the NRC sought to avoid considering measures for the avoidance or mitigation of severe accidents at the Limerick nuclear power plant, on the ground that consideration of such alternatives was not required by the NRC's safety regulations. The court found that alternatives and mitigative measures must be considered under NEPA, even though they were excluded under the Atomic Energy Act safety regulations. *Id.*

This case presents similar circumstances: DNC seeks to exclude consideration under NEPA of the impacts of destructive acts of malice or insanity, as well as measures that would avoid or mitigate those impacts, on the ground that design measures to avoid or mitigate such impacts are excluded under the NRC's safety regulations at 10 C.F.R. § 50.13. Just as the Court in *Limerick Ecology Action* required the NRC to comply with NEPA despite the exclusion of issues under the NRC's safety regulations, so the Commission must comply with NEPA's procedural requirements here.

Moreover, even in the unlikely event that DNC is correct in arguing that some alternatives or mitigative measures may be beyond NRC's regulatory authority to impose on licensees, this does not prevent the NRC from identifying them or discussing other means by which they may be provided. An EIS would serve the important function of informing the NRC, state and local officials, and the public, regarding the environmental impacts of such acts, and available alternatives for avoiding or mitigating their impacts. CCAM/CAM believe that such a comparison would show that dry storage is marginally more expensive, but would virtually eliminate the potential for a large-scale radioactive

release from spent fuel stored on the site.⁵ While NEPA cannot force the NRC to choose dry storage over high-density storage, it has the "action-forcing" function of requiring the agency to compare the environmental impacts and relative costs of the two technologies, thereby educating decisionmakers and the public about appropriate policy choices for protecting the environment.

In addition, even if the NRC has handed off some of its responsibility for the common defense and security to the military, this does not excuse the NRC from describing the extent to which it has delegated its responsibility for protecting the common defense and security to the military, and the extent to which it retains that responsibility. At the moment, it remains unclear to what extent the NRC is taking responsibility for safeguarding the common defense and security against destructive acts of malice or insanity. An EIS would provide a public service by clarifying exactly what responsibilities the NRC has delegated to other agencies. This is equally applicable to the delegation of responsibility to state and local governments.

5. The precedents cited by DNC do not justify an exemption from NEPA.

Moreover, the NRC decisions cited by DNC in its brief at page 11 do not establish the existence of an irreconcilable conflict between NEPA and the Atomic Energy Act or its implementing regulations. *Carolina Power and Light Co.* (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2098 (1982) and *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-653, 16

⁵ Contrary to the suggestion in the NRC Staff's brief at 7, there is nothing "speculative" about the alternatives to high-density wet storage. Alternatives, including dry storage, can be readily ascertained.

NRC 55, 73-74 (1981) both concerned challenges to the adequacy of safety design requirements, and did not involve NEPA. In both cases, the ASLB rejected the contentions because they constituted challenges to the NRC's safety regulations at 10 C.F.R. § 50.13. In contrast, CCAM/CAM have not challenged the adequacy of 10 C.F.R. § 50.13 as a safety design requirement.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842, 843-45 (1981) and *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-16, 15 NRC 566 (1982) are also inapposite. Each decision rejected a contention challenging the failure of the license applicant to consider the effects of an electromagnetic pulse, such as would be caused in a nuclear war, on the operation of the facility. In each case, the ASLB reasoned that the contention was barred by 10 C.F.R. § 50.13 and its underlying rationale. It is not clear whether those contentions were raised under the NRC's safety regulations or under NEPA. If they were safety contentions, then the decisions are completely irrelevant here. If they were NEPA contentions, then the ASLB's application of the rule of reason in those cases is distinguishable from CCAM/CAM's contention because they posit acts of war by foreign governments, not the kind of domestic threat that is of concern here.

Similarly, *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973), does not support DNC. That decision did not identify any conflict between NEPA and the Atomic Energy Act. Instead, the Appeal Board concluded that under the NEPA "rule of reason," the Commission's reasons for exempting nuclear power plant licensees from the requirement to design against sabotage under its safety regulations logically applied to the question of whether the NRC should

be required to consider the environmental impacts of sabotage under NEPA. As discussed below, however, the *Shoreham* decision no longer holds up under the rule of reason.

6. Continuing application of the *Shoreham* decision is unreasonable and illogical.

DNC's and the NRC Staff's unquestioning reliance on the *Shoreham* decision is misplaced. *Shoreham* did not apply 10 C.F.R. § 50.13 as a rule of law; instead, it applied the *rationale* for 10 C.F.R. § 50.13 under the NEPA "rule of reason." 6 AEC at 851. This application of the rule of reason required a factual analysis regarding whether the considerations that prompted the NRC to promulgate 10 C.F.R. § 50.13 also constituted a reasonable basis for excluding a sabotage-related NEPA contention from an NRC licensing proceeding.

Factually based NEPA decisions like *Shoreham* are not set in stone, to be blindly imposed on environmental decisionmakers in perpetuity. To the contrary, one of NEPA's most vital features is that it continually forces agencies to "gather and evaluate new information relevant to the environmental impact of its actions." *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023-24 (9th Cir. 1980). Thus, for instance, in *Limerick Ecology Action v. NRC*, the Third Circuit refused to follow an earlier decision by the D.C. Circuit in *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1301 (D.D. Cir. 1984), *vacated on other grounds*, 760 F.2d 3120 (en banc), *aff'd*, 789 F.2d 26 (1986), which affirmed the NRC's refusal to consider the environmental impacts of severe accidents in EIS's, on the ground that the decision had become outdated. *See* 869 F.2d at 740 ("[I]t would seem that the extensive research projects undertaken by the

Commission concerning nuclear accidents indicates that it no longer considers such risks remote and speculative.”)

Here, the reasonableness of the Appeal Boards decision in *Shoreham* does not hold up 29 years later under the light of current understanding regarding the nature of the threat of destructive and malicious actions against U.S. facilities. See CCAM/CAM Brief at 18-20. This information shows that the military is largely ineffective in defending against surprise attacks from inside the United States, using unconventional weapons like fertilizer bombs and jet planes. The *Shoreham* rationale does not survive scrutiny under the NEPA “rule of reason.”

Moreover, DNC’s suggestion of a new underpinning for *Shoreham* is illogical and inconsistent with the purposes of NEPA. See DNC Brief at 23-26. DNC argues that under the “rule of reason,” the Commission should recognize a “division of responsibility” between the private sector and the federal government in responding to the threat of malevolent attacks against U.S. nuclear facilities, and refrain from requiring any NEPA analysis of the issue. However, DNC’s own argument demonstrates that there is no clear division of responsibility between the private sector and the military. As DNC concedes, the response to the events of September 11 has been “global in scope.” DNC Brief at 23. The range of responses includes both increased military preparedness and a review of the adequacy of the design basis of nuclear facilities. *Id.* at 23-24. Thus, there is no rational basis for the division that DNC suggests.⁶

⁶ DNC cites the preamble to 10 C.F.R. § 50.13 for an example of the manner in which the NRC “underscored” the alleged division of responsibility between the private sector and the military. The quoted language includes a statement that one of the factors underlying the Commission’s practice of assigning some responsibility to the military has

B. The Potential for Acts of Malevolence and Insanity Against Millstone Bears a Direct Causal Relationship to the Proposed License Amendment.

DNC argues that by their very nature, “intentional malevolent acts of terrorists” cannot be construed to be either “direct effects” or “indirect effects” of an NRC licensing action.” See DNC Brief at 18. The NRC Staff shares this view. See NRC Staff Brief at 12-13. According to DNC, this is because there is no “close causal” relationship between the licensing of spent fuel pool expansion at Millstone 3 and malevolent attacks on the plant, given that “[t]he effects of a terrorist attack would not be a consequence of the NRC’s licensing action to allow increased spent fuel storage at Millstone 3. DNC Brief at 20. In support of their argument, DNC and the Staff rely principally on the Supreme Court’s decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). There, the Court held that psychological distress caused by the restart of the Three Mile Island nuclear power plant is not a cognizable impact on the human environment under NEPA.

This argument is neither supported by case law or by logic. First, the Supreme Court’s holding in *Metropolitan Edison* in no way supports DNC’s and the Staff’s position. In that case, the alleged impact was psychological distress caused by the risk of an accident, rather than physical impacts that would occur if an accident were to happen.

been “a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable.” See DNC Brief at 9, citing 32 Fed. Reg. 13,445 (September 26, 1967). Once again, this rationale does not hold up under the rule of reason. In fact, as demonstrated in Dr. Thompson’s Declaration, it is possible to design a nuclear facility against the full range of modern weaponry. See Declaration of 31 October 2001 by Dr. Gordon Thompson in Support of a Motion by CCAM/CAM, paragraphs V-2 and VIII-3 A decision has been made, however, that this is

See 460 U.S. at 775-76. The Court concluded that the psychological impact caused by the potential for an accident to occur was "too remote from the physical environment" to warrant consideration under NEPA. 460 U.S. at 774. However, the Court never questioned that environmental impacts of accidents were a legitimate subject for an EIS. See 460 U.S. at 775 (citing with approval the TMI EIS's discussion of the "risk of a nuclear accident"). Here, CCAM/CAM's contention is concerned with physical contributors to the risk and consequences of physical accidents at the Millstone 3 plant. Thus, it is completely unlike the contention at issue in *Metropolitan Edison*.⁷

There can be no question that the potential for a severe accident at a nuclear power plant is a legitimate subject of analysis in an EIS. See *Limerick Ecology Action v. NRC*, 869 F.2d at 740-1. It is also unquestionably legitimate for an EIS to examine the manner in which such an accident can occur, for purposes of both evaluating the impacts of the accident and identifying appropriate alternatives or mitigative measures. *Id.* Here, CCAM/CAM's environmental contention raises concerns about direct impacts on the physical environment, caused by accidents at the Millstone plant that result from intentional acts of malice or insanity. Such acts constitute one set of events in a wide

too expensive. This is exactly the type of policy decision that should be subject to public scrutiny and debate in the course of NEPA analysis.

⁷ CCAM/CAM's contention is also completely unlike the issue raised in *No GWEN Alliance of Lane County v. Aldridge*, 855 F.2d 1380, 1385-86 (9th Cir. 1988). See DNC Brief at 20, note 33. The plaintiffs in that case sought consideration in an EIS of the environmental impacts of "a nuclear exchange which might be provoked, at least in part, by the installation or use of" a radio system to be constructed by the Air Force for use during a nuclear war. *Id.* at 1381. The Court found that the plaintiff's contention that the GWEN system would provoke or be a target of a nuclear war was "speculative." *Id.*, 855 F.2d at 1386. Here, in contrast, pronouncements by the NRC in the 1994 vehicle bomb rule, and announcements subsequent to September 11, demonstrate conclusively

array of factors that could cause a licensee to lose control of its nuclear plant, thus leading to an accident.⁸ As contributors to the risk of a nuclear facility accident, destructive acts of malice or insanity constitute "direct" environmental impacts under the definition set forth in 40 C.F.R. § 1508.8 (direct effects "are caused by the action and occur at the same time and place.") The risk that an accident will occur is caused by the operation of the facility. The risk also exists throughout the operating life of the facility, in the place where the facility is located.

A nuclear power plant accident can be described as an event in which, for any one of a variety of reasons, the licensee loses control of the radioactive material in the plant. The loss of control may be directly caused by the licensee or one of its agents, or it may be caused by an event that is not caused by the licensee or its agents, such as a loss of power or an earthquake. Such accident contributors are the proper subject of an EIS.

As the Commission directed in a 1980 interim policy statement:

Events or accident sequences that lead to a release shall include but not be limited to those that can reasonably expected to occur. In-plant accident sequences that can lead to a spectrum of releases shall be discussed and shall include sequences that can result in inadequate cooling of reactor fuel and to melting of the reactor core. *The extent to which events arising from causes external to the plant which are considered possible contributors to the risk associated with the particular plant shall also be discussed.*

that the NRC does not consider the threat of terrorist attacks on U.S. nuclear facilities to be the least bit speculative.

⁸ DNC suggests that the potential for deliberate airliner crashes into the Millstone 3 pool is the exclusive focus of CCAM/CAM's contention. DNC Brief at 4. This is incorrect. The contention suggests a range of means by which a pool fire could be caused at the Millstone 3 plant, including various acts of sabotage and terrorism such as intentional cask drop, siphoning of the pools, and deliberate airliner crashes. See Thompson Declaration, pars. IV-1 through IV-14.

Statement of Interim Policy, Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act, 45 Fed. Reg. 40101 (June 13, 1980) (emphasis added). Like other external accident contributors, destructive acts of malice and insanity present ongoing risks, and have the effect of exacerbating both the likelihood and effects of accidents.

In this respect, the risk of destructive acts of malice or insanity is no different from the risk of other events that the NRC examines for their effect on the potential for or consequences of a nuclear power plant accident. *See, e.g., Public Service Company of Oklahoma* (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433, 434 (1980) (recognizing that proximity to a "man-made or natural hazard" may "exacerbate" the risk of an accident at a nuclear facility and thereby require NEPA analysis); *Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 211 (1978) (approving NRC Staff decision to prepare EIS for severe accidents at floating nuclear power plant because of the potential that radioactive contamination could spread through water more easily than on land). Destructive acts of malice and insanity are but one set of potential causes of a loss of control of the operation of a nuclear facility that could lead to an accident.

Obviously, the licensing of a nuclear facility does not increase the chance of a terrorist attack, any more than it increases the chance of an earthquake or a flood. Nevertheless, these man-made and natural environmental factors can substantially increase the likelihood that the licensee will lose control of the reactor and cause a serious accident. Similarly, the ease by which tides and currents can carry radioactive contamination does not increase as a result of the licensing of a floating reactor; yet, the

consequences of an accident at that reactor could increase as a result of its location on the water. Because these factors would exacerbate the risk of an accident, they must be considered in an EIS.

Examples of factors that are not caused by the licensing action, but which nevertheless exacerbate the risks of the licensing action, can easily be found in EIS's prepared by the NRC. For example, the EIS for the Seabrook nuclear power plant addresses the design of the plant to withstand a 100-year flood (§ 5.3.2); and a review of "external hazards that might adversely affect the operation of the plant and cause an accident," such as nearby industrial, transportation, and military facilities (§ 5.9.4.4(2)). See NUREG-0895, Final Environmental Statement Related to the Operation of Seabrook Station, Units 1 and 2 (1982). Obviously, none of the risks posed by these external features would increase as a result of the operation of the Seabrook plant; but their existence could exacerbate the risk of operating the Seabrook plant.⁹

DNC incorrectly ignores the NRC's longstanding practice of examining the potential causes of nuclear accidents in its EIS's. Moreover, DNC ignores the fact that a license amendment that permits an increase in the inventory of radioactive material at a nuclear power plant may increase the attractiveness of the plant as a target for destructive acts of malice or insanity. Various federal officials have highlighted the attractiveness of nuclear facilities to terrorists, including a statement by President Bush in his State of the Union message that nuclear power plant blueprints were found in an Al Qaeda cave. The

⁹ Similar examples can be found in cases involving non-nuclear projects. See, e.g., *Laguna Greenbelt Inc. v. U.S. Department of Transportation*, 42 F.3d 517, 529-30 (9th Cir. 1994) (affirming Federal Highway Administration's conclusion that wildfires

size and accessibility of the radioactive inventory at a nuclear plant obviously would be a consideration to any person planning such an attack.

C. Destructive Acts of Malevolence and Insanity Are Foreseeable.

DNC argues that under the "rule of reason," consideration of intentional malevolent acts in connection with a license amendment must be rejected because "the risk of this type of externally-driven event is neither quantifiable nor predictable," and therefore defies any "meaningful analysis of the risk." DNC Brief at 20, 21. In support of its position, DNC relies on ALAB-819, the Appeal Board's *Limerick* decision rejecting a sabotage contention; and the Third Circuit's affirmance in *Limerick Ecology Action v. NRC*, 869 F.2d at 741-44. DNC, the NRC Staff and the Nuclear Energy Institute ("NEI") also cite a number of other previous NRC and court decisions holding that acts of terrorism and sabotage are not foreseeable.¹⁰ NEI argues that "[t]he policy and logic underlying these decisions apply as well today as when the decisions were issued." NEI Brief at 8. However, the opposing parties' reliance on these precedents is misplaced, for several reasons.

near California highway would not increase likelihood of soil erosion and runoff caused by highway construction).

¹⁰ See DNC Brief at 21, citing *Greenpeace v. Stone*, 748 F.Supp. 749, 762 (D. Hawaii 1990); *Garrett v. NRC*, 11 ERC 1684, 8 Env'tl. L. Rep. 20,510, 20,5012 (D. Ore. 1978); NRC Staff Brief at 15, citing *City of New York v. U.S. Department of Transportation*, 715 F.2d 732, 736 (2nd Cir. 1983); NEI Brief at 7, citing *Consolidated Edison Co. of New York, Inc.* (Indian Point Station Unit No. 2), ALAB-202, 7 AEC 825 (1974); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-81-42, 14 NRC 842 (1981); *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-27, 22 NRC 126 (1985).

First, the mere fact that the probability of destructive acts of malice or insanity cannot be quantified does not constitute an acceptable excuse for failing to address their likelihood. *See* CCAM/CAM Brief at 26-27, citing 10 C.F.R. § 51.71(d), 40 C.F.R. § 1502.22(b)(1).¹¹ Where quantitative means are not available, the impacts must be discussed in qualitative terms. As demonstrated by the 1994 vehicle bomb rulemaking, the NRC is fully capable of making such a qualitative analysis.¹²

Second, as discussed above at page 14, the NRC may not rely blindly on factual determinations made years ago regarding the difficulty of evaluating the potential for destructive acts of malice and insanity. All of the decisions cited by the opposing parties were made in the 1970s and 1980s. As discussed below, significant changes have occurred since then, which fatally undermine the factual basis for these decisions.¹³

(1) 1994 vehicle bomb rulemaking

In response to the truck bombing of the World Trade Center and the incursion into the Three Mile Island nuclear plant, the Commission has fundamentally changed its

¹¹ These NRC and CEQ regulations make it clear that qualitative analysis is a credible and legitimate scientific basis for evaluating the potential for environmental impacts. Thus, the NRC Staff has no legal or logical basis for its position that an evaluation of the potential for destructive acts of malice or insanity are without meaning or utility unless their probability can be estimated. *See* NRC Staff Brief at 12.

¹² It is also important to note that while it may be difficult to quantify the likelihood of destructive acts of malice or insanity, there is no comparable difficulty in quantifying their impacts. *See* Thompson Declaration, Section VII. Thus, the NRC Staff vastly overstates the case when it claims that any attempt to predict the consequences of such an event at a nuclear facility would amount to "pure speculation." *See* NRC Staff Brief at 12.

¹³ NEI makes the absurd argument that "no evidence has been introduced to suggest that the decisions discussed above are no longer applicable, or that the risk of a terrorist attack on or the sabotage of a nuclear power plant does not remain extraordinarily low." NEI Brief at 8. To the contrary, in support of its contention,

approach to the evaluation of the likelihood of acts of terrorism and sabotage. In the 1994 vehicle bomb rulemaking, the Commission abandoned its previous position that the difficulty of quantifying the probability of such events means that they can be ignored. Instead, the Commission qualitatively concluded that the threat of an attack with a vehicle bomb "is likely in a range that warrants protection against a violent external assault as a matter of prudence." *See* CCAM/CAM Brief at 28, citing 59 Fed. Reg. at 38,890-91. Although the Atomic Energy Act provided the legal framework for the 1994 vehicle bomb rule, the Commission's analytical approach to the likelihood of sabotage and terrorism is equally applicable in a NEPA context.

(2) Pattern of recent terrorist attacks

Moreover, the growing incidence and lethality of terrorist attacks against U.S. facilities over the past ten years have highlighted a number of significant factors that permit a qualitative analysis of the foreseeability of acts of malice and insanity: the vulnerability of U.S. facilities and institutions, the sophistication of the attackers, and the persistence of efforts to damage major U.S. government facilities and other institutions. *See* CCAM/CAM Brief at 30.

(3) Commission response to September 11

Finally, actions taken by the Commission in the wake of the September 11 terrorist attacks on the World Trade Center and the Pentagon show that the Commission treats the potential for terrorist attacks as foreseeable actions that may be responded to through changes in plant operation and design. For instance, the Commission has

CCAM/CAM submitted substantial evidence that additional terrorist attacks on U.S. facilities are considered foreseeable by the U.S. government.

declared an indefinite state of "high alert" against acts of terrorism. The NRC has also issued an order to all nuclear power plant licensees, requiring them to make changes to their plants to protect against such attacks. While the details of the order are not public information, Homeland Security Director Tom Ridge has stated that the measures include design changes. *See* Twachtman article, *supra*. In addition, the NRC has undertaken a comprehensive review of its security regulations.

All of these developments show a major change in the circumstances surrounding the potential for acts of malice and insanity against nuclear facilities, and a change in the NRC's approach toward preparing for them. In short, the NRC now considers such events to be foreseeable, and has developed criteria for evaluating their potential. Thus, the NRC no longer has any credible basis for claiming that such events are not foreseeable. The factual determinations in ALAB-819 and *Limerick Ecology Action v. NRC*, regarding the lack of a meaningful way to evaluate the potential for sabotage and terrorism, have been overtaken by subsequent events.¹⁴

D. The NRC Must Comply With NEPA In Connection With This Licensing Action, and May Not Defer Compliance to Subsequent Generic Action.

DNC argues that the Commission should resist any effort to force compliance with NEPA in the context of this individual licensing proceeding, and instead focus on "generic efforts to continually assess threats and ensure that licensees maintain an appropriate security level." DNC Brief at 26. Certainly, there is no legal bar to

¹⁴ NEI contends that "worldwide experience remains that terrorists seldom attack defended targets," constitutes an evidentiary claim appropriately raised in a hearing, not on this appeal. In any event, the reliability of the claim is suspect on its face, considering

addressing environmental issues on a generic basis. However, the NRC may not postpone reckoning with environmental issues raised by an individual licensing case on the ground that they will be dealt with later on a generic basis. NEPA is an action-forcing statute that requires agency decisionmakers to deal with environmental issues as they arise in the context of each decision. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). Consideration of environmental impacts in a later generic EIS after the NRC has already acted in a specific case "is insufficient to fulfill the mandate of NEPA." *Cf. Thomas v. Peterson*, 753 F.2d 754, 760 (9th Cir. 1985) (US Forest Service's plan to prepare series of EIS's for later actions, after basic enabling decision was already made, is contrary to NEPA). The Millstone 3 license amendment must be supported by an adequate environmental analysis integrated with the NRC's planning "at the earliest possible time." 40 C.F.R. § 1501.2 While the Commission may choose to perform that analysis in the context of a generic study, the analysis must be completed and subjected to public review and comment before the licensing action may go forward.

DNC also attempts to downplay the importance of an EIS, arguing that NEPA is merely "procedural." DNC Brief at 2. DNC also claims that from a "practical perspective, consideration of the environmental impacts of intentional malevolent acts at plant-specific locations under NEPA would provide NRC decision makers with little additional, substantive information relevant to the Federal actions at issue." DNC Brief at 25. According to DNC, "[w]hile the data resulting from a process-driven review of terrorist attack scenarios, such as a fully-fueled jet aircraft crash into either a reactor or

the fact that a number of defended facilities have been attacked by terrorists in the last few years, including the U.S.S. Cole and the Marine barracks in Beirut.

spent fuel pool, may reasonably be expected to identify significant environmental impacts, the more important questions of mitigation and defensive alternatives already are the focus of intense, ongoing NRC scrutiny." DNC Brief at 25-26.

DNC's effort to minimize the importance of an environmental analysis in this case is not persuasive. NEPA indisputably constitutes a procedural statute, but the procedures are vitally important tools to ensure that federal agency decisionmakers take into account environmental values in their decisions, and that the information is disclosed to the public. *See LaFlamme v. FERC*, 852 F.2d 389, 398 (9th Cir. 1988), *quoting Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1021 (9th Cir. 1980) (one of NEPA's principal purposes is to facilitate "widespread discussion and consideration of the environmental risks and remedies associated with the pending project' thereby augmenting an informed decisionmaking process.") Here, there is a dearth of information on the crucial environmental issues raised by the proposed Millstone 3 license amendment. For instance, the NRC has never before performed an environmental analysis of the vulnerability of the Millstone 3 plant to a terrorist or sabotage event, the consequences of such an event, or alternatives that would avoid or mitigate the consequences of such an event. In particular, there is no existing environmental impact statement that examines the environmental consequences of a pool fire at Millstone 3 or any other nuclear power plant; nor is there any analysis of the alternative of dry storage. Thus, an EIS would provide valuable information that has never been gathered or published before. Publishing the information for public comment would also provide an important public education benefit and insert a measure of accountability into the NRC's decisionmaking process. *See LaFlamme, supra*, 852 F.2d at 398. While it may be

necessary to shield some information from disclosure, much of it can be published for public comment. See Thompson Declaration, Section IX.

III. CONCLUSION

For the foregoing reasons, DNC, the NRC Staff, and NEI have failed to provide any lawful or logical reason that the Commission should continue to refuse to consider the environmental impacts of destructive acts of malice and insanity in its EIS's.

CCAM/CAM's contention should be admitted for litigation. The Commission should also order that the license amendment may not be implemented until completion of the hearing or an EIS, whichever comes later.

Respectfully submitted,



Diane Curran

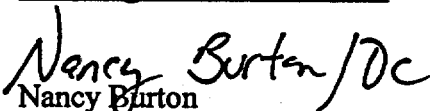
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March 12, 2002

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2002, copies of "CONNECTICUT COALITION AGAINST MILLSTONE AND LONG ISLAND COALITION AGAINST MILLSTONE REPLY BRIEF REGARDING NEPA REQUIREMENT TO ADMIT CONTENTION REGARDING ENVIRONMENTAL IMPACTS OF ACTS OF MALICE OR INSANITY" were served by E-Mail and first class mail on the individuals listed below:

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