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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 0-70-03098-ML
(Savannah River Mixed Oxide Fuel Fabrication Facility)	)	ASLBP No. 01-790-01-ML

GEORGIANS AGAINST NUCLEAR ENERGY REPLY BRIEF REGARDING NEPA REQUIREMENT TO ANALYZE INSIDER SABOTAGE AND MALEVOLENT ACTS FOR PLUTONIUM FUEL (MOX) FACTORY AT SAVANNAH RIVER SITE

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Dated March 12, 2002
in Decatur, Georgia

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I. INTRODUCTION

Pursuant to Memorandum and Order CLI-02-04 (February 6, 2002), Georgians Against Nuclear Energy ("GANE") hereby replies to the briefs filed by Duke Cogema Stone & Webster ("DCS") and the Nuclear Regulatory Commission ("NRC" or "Commission") Staff.[1]

DCS and the NRC Staff point to numerous legal precedents in which the NRC decided that malevolent acts of terrorism and sabotage are not foreseeable under the NEPA rule of reason, and cases in which the federal courts have upheld those decisions. According to DCS and the Staff, these decisions bar the consideration of the issue in this case. The trouble with this argument is that it pretends that history froze when these cases were decided. In fact, a great deal of new information has come to light, and new

[1] *See* Brief of Duke Cogema Stone & Webster in Response to the Commission's Memorandum and Order Regarding an Agency's Responsibility Under NEPA to Consider Terrorism (February 27, 2002) ("DCS Brief"); NRC Staff Brief in Response to CLI-02-04 (February 27, 2002) ("NRC Staff Brief").

circumstances have arisen, which shows that these decisions are outdated and no longer applicable. In 1994, with its vehicle bomb rule, the Commission began to face the current reality, which is that highly sophisticated acts of terrorism and sabotage against nuclear facilities are credible. In addition, an accumulation of malicious and destructive attacks on U.S. facilities, culminating in the September 11 terrorist attacks on the World Trade Center and the Pentagon, have forced the NRC to put all nuclear licensees on a state of high alert, and have prompted a top-to-bottom review of NRC security requirements. Under the circumstances, it is no longer possible for the NRC to claim that malevolent acts of terrorism and sabotage against nuclear facilities are not foreseeable.

DCS's and the NRC Staff's briefs attempt to keep the NRC in the past, tethered to legal precedents that have become outmoded. NEPA will not allow this result. NEPA is an action-forcing statute that requires vigilant updating of new information by the NRC, so that each licensing decision is based on the best possible information regarding the environmental impacts of NRC decisions. The Commission must reject the arguments made by DCS and the Staff, and reckon with the environmental impacts of terrorism and sabotage.[2]

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[2] Many of the legal arguments raised by DCS and the NRC Staff in this case, regarding the requirements of NEPA with respect to the consideration of malevolent acts of terrorism and sabotage, were also raised by the applicant and the NRC Staff in the Millstone 3 spent fuel expansion case. Connecticut Coalition Against Millstone and Long Island Coalition Against Millstone ("CCAM/CAM") have filed a reply brief in that case, which sets forth detailed responses to these legal arguments. *See* 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 (March 12, 2002) ("CCAM/CAM Reply Brief"). In several instances, GANE's brief refers to the CCAM/CAM Reply Brief for additional support for GANE's position.

II. ARGUMENT

A. Under the Rule of Reason, the NRC Must Consider the Environmental Impacts of Malevolent Acts of Terrorism and Insider Sabotage.

The National Environmental Policy Act ("NEPA") is a broad charter for the protection of the environment. Neither the statute nor its legislative history contains a list of environmental impacts that are deemed significant for purposes of requiring an Environmental Impact Statement. Instead, in each decision involving a proposed major federal action significantly affecting the quality of the human environment, the responsible federal agency is required to apply a "rule of reason" to circumstances of that case in order to identify all of the environmental impacts of the proposed action that are "reasonably foreseeable." *See Potomac Alliance v. NRC,* 682 F.2d 1030, 1036 (D.C. Cir. 1982), cited in DCS Brief at 6.[3]

DCS and the NRC Staff present several arguments that the impacts of malevolent acts of terrorism and insider sabotage are not "foreseeable" under the rule of reason. First, they argue that such acts are not "caused" by the licensing of the proposed MOX plant, and therefore do not constitute environmental impacts. Second, DCS and the Staff argue that terrorist attacks are not foreseeable at any particular facility, and thus are not closely enough related to the proposed action. Third, DCS and the Staff argue that the impacts of malevolent acts of terrorism and insider sabotage are not foreseeable because they are not probable. As discussed below, none of these arguments has merit.

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[3] Thus, it is neither surprising nor legally significant that there is no express language, in either the National Environmental Policy Act ("NEPA") or its legislative history, which requires the consideration of the environmental impacts of malevolent acts of terrorism or insider sabotage in an Environmental Impact Statement ("EIS"). *See* DCS Brief at 4-5.

1. The potential for acts of malevolence and insider sabotage against the proposed MOX Facility bears a direct causal relationship to the proposed license amendment.

DCS and the NRC Staff contend that the effects of malevolent acts of terrorism or insider sabotage are not foreseeable impacts because they have no "causal" connection to the proposed licensing of the MOX Facility. Thus, according to DCS and the Staff, they are neither direct nor indirect impacts.[4] DCS Brief at 7-10, NRC Staff Brief at 12-13. In support of their argument, they rely principally on *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 775 (1983), where the Supreme 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.

The argument that an EIS may not examine the impacts of terrorism and sabotage, because they are not directly caused by the licensing of the facility, is not supported by either the case law or by logic. First, the Supreme Court's holding in *Metropolitan Edison* in no way supports DCS'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. *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, GANE's contention is concerned with physical contributors to the risk and consequences

[4] CEQ regulations define direct impacts as effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

of physical accidents at the proposed MOX facility. Thus, it is completely unlike the contention at issue in *Metropolitan Edison.*[5]

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, GANE's environmental contention raises concerns about direct impacts on the physical environment, caused by accidents at the MOX plant that result from intentional malevolent acts or insider sabotage. Such acts constitute one set of events in a wide array of factors that could cause a licensee to lose control of its nuclear facility, thus leading to an accident. As contributors to the risk of a nuclear facility accident, destructive acts of terrorism or insider sabotage 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.

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[5] GANE'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* DCS Brief at 8-9. 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 that the NRC does not consider the threat of terrorist attacks on U.S. nuclear facilities to be the least bit speculative.

A nuclear 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 tornado 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.*

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 malevolent acts and insider sabotage present ongoing risks, and have the effect of exacerbating both the likelihood and effects of accidents. *See also* CCAM/CAM Reply Brief at 16-21. GANE refers the Commission to the discussion in that brief.

2. If terrorist attacks against nuclear facilities in general are foreseeable, then they are foreseeable against any individual facility, including the proposed MOX Facility.

As discussed in GANE's Brief at 20-25, it is clear that the NRC foresees additional terrorist attacks against U.S. nuclear facilities. To protect against such attacks, the NRC has undertaken a comprehensive review of its security regulations, and all nuclear power plant licensees have been ordered to make changes to their facilities. *Id.* at 25.

DCS and the Staff now argue that GANE's contention is inadmissible because such attacks are not foreseeable at any "particular" facility. *See* DCS Brief at 10-11, NRC Staff Brief at 12. This assertion is patently illogical. If, as the recent actions of the

NRC demonstrate, any nuclear facility is considered to be a reasonably foreseeable target of a terrorist attack, it follows that the proposed MOX plant is a reasonably foreseeable target of a terrorist attack.[6]

DCS makes two other arguments that are equally unpersuasive. First, DCS contends that the NRC should ignore the environmental impacts of terrorism and insider sabotage because the potential for such events has been reduced by the "dramatic increase" in the level of attention and resources devoted to their prevention in the aftermath of September 11. DCS Brief at 12. If, in fact, the environmental impacts of terrorism and sabotage against the proposed MOX Facility have been avoided or mitigated by some measures, then it is the NRC's responsibility to identify and discuss those measures in an EIS.

DCS also argues that the MOX Facility is particularly immune to a terrorist attack, because it is located "well within the boundaries of a secure government reservation." DCS Brief at 12. This unsupported factual claim should be tested in a hearing, not accepted uncritically in an appellate brief. Moreover, the evidence adduced to date by the Atomic Safety & Licensing Board (ASLB) suggests that the Savannah River Site is far more porous than suggested by DCS, given that it "includes a major state highway, CSX railroad tracks, and a public trash dump." *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC ___, slip op. at 38. (Dec. 6, 2001)

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[6] DCS's argument is also internally inconsistent with the argument it makes later in its Brief, that the Commission should not allow case-by-case evaluations of terrorism, given the Commission's ongoing "top-to-bottom evaluation of its security requirements." DCS Brief at 27. If the threat is so general that it requires a generic evaluation, then it applies to all nuclear facilities, including the proposed MOX Facility.

3. An event need not be probable to be foreseeable.

DCS offers an even weaker argument that the consequences of intentional malevolent acts are not reasonably foreseeable under NEPA because they are not "probable." DCS Brief at 13. This argument flatly ignores applicable case law and Commission policy.

To GANE's knowledge, the Commission has never concluded that an accident at a nuclear facility is "probable." If it were to make such a finding, it doubtless would have to shut the facility down. Instead, under both the Atomic Energy Act and NEPA, the NRC is concerned with the *potential* for accidents. As the Second Circuit of the U.S. Court of Appeals explained in *City of New York v. U.S. Department of Transportation,* 715 F.2d 732, 746 (2nd Cir. 1983), analysis of accident risks posed by a nuclear facility is qualitatively different than the analysis of the inevitable impacts of other types of projects:

> If the proposed agency action is the construction of a highway or the dredging of a harbor, some adverse environmental effects are certain to occur, such as destruction of park land or disturbance of animal or fish feeding grounds. Actions of this sort may also pose risks of other consequences that can only be estimated, but normally the seriousness of the certain consequences provides an adequate basis for determining that the effect on the environment will be sufficiently significant to require an EIS. In this case, however, the certain consequences are not at all significant. It is the risk of accident that might render the proposed action environmentally significant. That circumstance obliges the agency to undertake risk assessment: an estimate of both the consequences that might occur and the probability of their occurrence.

Id., 715 F.2d at 746. Thus, the fact that a nuclear accident is not considered "probable" does not exempt it from NEPA review.

DCS also contends that the "line of cases discussing Class 9 accidents at nuclear power plants also supports the proposition that the NRC is not required to analyze, under NEPA, improbable or unlikely environmental impacts." DCS Brief at 14. In support of this proposition, DCS cites two cases decided by the D.C. Circuit U.S. Court of Appeals: *Carolina Environmental Study Group v. U.S.,* 510 F.2d 796, 799 (D.C. Cir. 1975); and

San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1301 (D.C. Cir. 1984), *vacated on other grounds,* 760 F.2d 3120 (en banc), *aff'd,* 789 F.2d 26 (1986). In each of these cases, the Court affirmed a finding by the NRC that the potential for Class 9 (*i.e,* severe, beyond design basis) accidents was "remote and speculative."

Misleadingly, DCS fails to mention a subsequent decision by the Third Circuit in *Limerick Ecology Action v. NRC,* 869 F.2d 719 (3rd Cir. 1989), which pointedly refused to follow the D.C. Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC,* 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.") As the Court recognized in *Limerick Ecology Action v. NRC,* fact-based NEPA decisions, made years ago under different circumstances, may not apply to current circumstances. NEPA requires that environmental analyses must constantly be updated to account for new information. *See* GANE Brief at 13.

In fact, as DCS acknowledges, the Commission no longer rules out the potential for a severe accidents as a matter of course. *See, e.g., Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), CLI-90-7, 32 NRC 129, (1990).[7] DCS's claim that this is purely gratuitous on the part of the Commission is disingenuous. DCS Brief at 15. As the Third Circuit recognized in *Limerick Ecology Action v. NRC,* such a position would no longer hold up under any reasonable degree of scrutiny.

[7] In *Vermont Yankee,* the Commission also held that low probability is the "key to applying NEPA's rule of reason" test to contentions alleging adverse environmental impacts from a severe accident scenario. 32 NRC at 131. Nevertheless, GANE disagrees with the Commission's view in that case that quantitative probability calculations constitute the only legally acceptable means for evaluating the likelihood of severe accidents. *See* GANE Brief at 12.

B. The Potential for and Consequences of Malevolent Acts of Terrorism and Insider Sabotage Are Capable of Meaningful Analysis.

DCS also argues that analysis of the impacts of a terrorist attack is not required because no meaningful analysis can be made. DCS Brief at 17. *See also* NRC Staff Brief at 9-12. First, as DCS presents at page 19 of its Brief, it considers that only a quantitative analysis of probability can be considered "meaningful." However, if a quantitative analysis cannot be performed, NRC regulations require a qualitative analysis. *See* GANE Brief at 12-13.

Moreover, the 1994 vehicle bomb rulemaking shows that the NRC is perfectly capable of making a qualitative analysis of the potential for malevolent acts of terrorism and insider sabotage. *See* GANE Brief at 20-22. In fact, as discussed in GANE's Brief at 23, the NRC was prepared to do an analysis of the environmental impacts of terrorist attacks in the GESMO GEIS, and would have done so had the project not been abandoned. In addition, other Commission pronouncements following September 11 have demonstrated that the NRC considers terrorist attacks at nuclear facilities to be foreseeable and is imposing design and operational changes to protect against them or mitigate them. *See* GANE Brief at 25. The cases cited by DCS and the NRC Staff have been overtaken by these events.[8]

DCS also argues that an evaluation of environmental impacts of malevolent acts of terrorism or sabotage is not meaningful because knowledge of the catastrophic nature of the consequences would not add anything useful to the analysis. DCS Brief at 20, *citing Warm Springs Dam Task Force v. Gribble,* 621 F.2d 1017, 1026 (9th Cir. 1980); *No*

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[8] See DCS Brief at 18-19, citing *Limerick Ecology Action v. NRC*, 869 F.2d at 741-44, *New York v. U.S. Department of Transportation*, 715 F.2d at 741-2; NRC Staff Brief at 15, citing *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-875, 26 NRC 251, 269 (1987); *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-10, 47 NRC 288, 296 (1998), *PFS*, LBP-98-7, 47 NRC 142, 179, 186, 199, 201 (1998).

GWEN Alliance of Lane County v. Aldridge, 855 F.2d 1380, 1386 (9th Cir. 1988). This argument is incorrect, for two reasons. First, at the present writing, there is no evaluation of the effects of a severe accident at the MOX Facility on the human environment.[9] DCS has prepared an analysis of design basis accidents, but not severe accidents. Thus, as the ASLB ruled in LBP-01-35, this argument is "unpersuasive." LBP-01-35, slip op. at 54.

Second, there is a whole range of severe accidents short of a worst case accident. Thus, the discussion of impacts of terrorism and sabotage would amount to much more than just a statement that the effects of a successful malevolent attack would be catastrophic. The EIS would evaluate the particular vulnerabilities of the plant to terrorist attack or sabotage, and the range of consequences that could occur if those vulnerabilities were exploited. The analysis would look at how the facility responds to various threats. This would allow a more informed analysis of the benefits of alternatives for avoiding or mitigating those vulnerabilities. The analysis of alternatives and mitigative measures would also be part of the EIS.[10]

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[9] As the ASLB noted in LBP-01-35:

All of DCS's accident scenarios assume filtration efficiency for each HEPA filter of at least 99%. *See* ER, App. F at F5-F6; CAR § 11.4.9.2. Stated otherwise, in all of DCS's accident scenarios, both HEPA filters continue to function and DCS has not analyzed the impact of any accident in which one or both HEPA filters are incapacitated.

LBP-01-35, slip op. at 54.

[10] DCS correctly states that "to determine potential consequences, one must consider such factors as the impact of the attack on important structures, systems and components, the source term, and dispersion." DCS Brief at 26. DCS also correctly states that "the range of postulated damage to the facility to the public could run the gamut from *de minimis* to catastrophic, depending upon the assumptions used to determine the mode and success of the attack." *Id.* But DCS then adds incorrectly that "there are no criteria for selecting any of these factors." Plenty is known about the history of terrorist and sabotage events, the capabilities of terrorists and saboteurs, and their access to weapons and tools. It is also possible to evaluate the vulnerability of facilities to such attacks. There is nothing to preclude the NRC from developing and evaluating scenarios for such events. The fact that it may not be possible to know every last detail about how these scenarios may unfold does not preclude the NRC from making

C. It Would Neither Be Impractical Nor Inconsistent With National Policy for the NRC to Consider the Environmental Impacts of Malevolent Acts of Terrorism or Insider Sabotage in an EIS.

DCS argues that under the rule of reason, the policy underlying 10 C.F.R. § 50.13, which applies only to commercial reactors, has been "properly extended to the consideration of terrorist attacks under NEPA and to facilities licensed by the NRC other than commercial reactors." DCS Brief at 22. As discussed in GANE's Brief at 14-18, the policy considerations that support 10 C.F.R. § 50.13 are not applicable to the question of whether nuclear licensees should be required to design against criminal terrorism and sabotage. The reasoning of 10 C.F.R. § 50.13 is even less applicable to a MOX processing facility than to a nuclear power plant, given that the focus of the regulation was whether a nuclear plant must be designed to protect against military weapons such as nuclear missiles.

Moreover, to the extent that DCS is invoking some kind of vague general conflict between NEPA and the policies underlying the Atomic Energy Act, that argument must be rejected. As discussed in the CCAM/CAM Reply Brief at 3-8, NEPA must be applied to the "fullest extent possible," and compliance cannot be avoided unless there is an express conflict between NEPA and a statutory provision of an agency's organic statute.

Finally, DCS argues that the potential likelihood and consequences of malevolent acts of terrorism and sabotage "could involve information 'singularly sensitive' from a national security perspective." DCS Brief at 25, *quoting Florida Power & Light Co.* (Turkey Point Nuclear Generating Units, Nos. 3 and 4), 4 AEC 9, 14 (1967). According to DCS, this is particularly the case with respect to the proposed MOX Facility, "which involves weapons-grade plutonium and access to restricted data and national security information." DCS Brief at 25. Thus, DCS contends that "NEPA's goal of informing the

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reasonable assumptions about how they may happen, and proceeding with an evaluation. In fact, the NRC used just such a prudent approach in the 1994 vehicle bomb rule.

public would not be served by an EIS that could not contain within its publicly-available portions, any such classified information." *Id.*

GANE agrees that one of NEPA's primary goals is to inform the public. GANE also believes that keeping government secrets about the risks of nuclear facilities can be a dangerous and destructive policy. Nevertheless, GANE also believes that on a temporary emergency basis, it may be necessary to limit public access to some information.

In this regard, there are several things that need to be kept in mind. First, as a general matter, sensitive EIS information would not be "classified" military secrets, or necessarily even safeguards information. A separate category of sensitive information that could enable people with malicious, psychotic, or otherwise criminal motives to exploit an inherently dangerous nuclear facility for purposes of terrorism or sabotage must be created. The NRC must come up with a reasonable definition for sensitive information, and it must also develop procedural measures for determining whether the information should be withheld. In addition, the NRC must develop guidelines for nondisclosure agreements to be entered by parties to the litigation.

GANE believes that while some pertinent information may meet the standard for limiting disclosure, significant portions of the analysis would be suitable for full public discussion and debate, including information on the consequences of malevolent acts of terrorism and sabotage, and the potential for such acts. Information related to the specific ways in which the proposed MOX Facility is vulnerable to such attacks would not necessarily be suitable for public disclosure, and specific design alternatives for avoiding or mitigating such acts may also constitute sensitive information. It should be borne in mind that the federal government has prepared EIS's that address sensitive information before, with appropriate protection of information relating to safeguards. Thus, the fact that not all information may be appropriate for widespread release is not an excuse for failing to prepare an EIS. Most important of all, an EIS on security risks will serve the

vital function of informing the NRC, state and local officials, and the public, regarding the environmental impacts of malevolent acts, available alternatives for avoiding or mitigating their impacts, and facilitate emergency planning.

D. The NRC Has Not Performed a Generic EIS Regarding the Environmental Impacts of Malevolent Acts of Terrorism or Insider Sabotage That Satisfies the Requirement for an EIS in This Licensing Case.

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.*

DCS argues that in the context of its ongoing "top-to-bottom" evaluation of security requirements for nuclear facilities, the Commission is attempting to strike a balance between which "hostile acts" should be protected against by nuclear facility regulation, and which ones are the responsibility of federal, state and local governments. DCS Brief at 27. According to DCS, this militates against the preparation of an individual EIS in the instant case.

DCS's argument amounts to an attempt to bury the issues raised by GANE's Contention 12 in the "bureaucratic shuffle." *See Flint,* 426 U.S. at 787. To do so would be completely unlawful. An ongoing and open-ended regulatory review cannot substitute for fulfillment of NEPA's requirement that environmental impacts must be fully evaluated and alternatives examined *before* a licensing action is taken. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 348 (1989). Moreover, even if the NRC intended to rely on a generic EIS regarding the environmental impacts of malevolent acts

of terrorism and insider sabotage, that generic EIS must be prepared *before* the MOX Facility can be licensed. Consideration of environmental impacts in a later generic EIS, prepared *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). NEPA is an "action-forcing" statute that requires the NRC to prepare a complete EIS for this particular licensing action. *Robertson,* 490 U.S. at 348.

III. CONCLUSION

Neither DCS nor the NRC has presented any plausible justification for avoiding the admission of GANE's Contention 12, or for refusing to consider the environmental impacts of malevolent acts of terrorism or insider sabotage in an EIS for the proposed MOX Facility. Accordingly, the ASLB decision admitting the contention should be upheld.

Respectfully submitted,

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(Docket # 70-3098, ASLBP # 01-790-01-ML)

I hereby certify that copies of GANE's Reply Brief Regarding NEPA Requirement to Analyze Insider Sabotage and Malevolent Acts for Plutonium Fuel (MOX) Factory at Savannah River Site were sent to the following by e-mail with paper copies served via first class mail.

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