UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-03098-ML
	)	
Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

NRC STAFF'S REPLY BRIEF ON TERRORISM-BASED CONTENTION

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March 12, 2002

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INTRODUCTION

In accordance with the Commission's Memorandum and Order of February 6, 2002,[1] the NRC Staff (Staff) replies to the February 27 briefs submitted by Georgians Against Nuclear Energy (GANE) and the Blue Ridge Environmental Defense League (BREDL).[2] *See* "Georgians Against Nuclear Energy Brief in Response to CLI-02-04 Regarding NEPA Requirement to Analyze Insider Sabotage and Malevolent Acts for Plutonium Fuel (MOX) Factory at Savannah River Site" (GANE's Brief); and "Blue Ridge Environmental Defense League (BREDL) response to NRC Memorandum and Order CLI-02-4" (BREDL's Brief), respectively. For the reasons set forth below, the Staff

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[1] CLI-02-04, 55 NRC ___ (Feb. 6, 2002) (partially granting a Duke Cogema Stone & Webster (DCS) petition to review the Board's admission of an environmental contention based on the terrorist attacks of September 11, 2001).

[2] Additionally, on February 27, 2002, the Nuclear Energy Institute (NEI) requested leave to file an amicus brief, and submitted its amicus brief, regarding NEI's views on the NEPA issues involved in the CAR and other proceedings pending before the Commission. In the Staff's view, NEI establishes that the NEPA issue at bar is of concern to NEI's members and to the nuclear energy industry, in general. Moreover, it is apparent that the Commission's resolution of the NEPA issue may affect NEI's members' interests, in that the issue appears to have generic applicability to NRC licensees and license applicants other than those involved in this proceeding, and the resolution of this issue could affect other licensing proceedings in the future. Accordingly, the Staff has no objection to NEI's request to file an amicus brief in the CAR proceeding.

submits that GANE and BREDL have not provided any persuasive arguments in their briefs in favor of (1) finding that federal agencies are required by the National Environmental Policy Act of 1969 (42 U.S.C. § 4321, *et seq.*) (NEPA) to consider intentional malevolent acts; (2) affirming the Atomic Safety and Licensing Board's decision in LBP-01-35, in which the Board admitted GANE contention 12; and (3) holding that 10 C.F.R. § 50.13 considerations do not apply in this proceeding.

BACKGROUND

On February 28, 2001, DCS submitted a construction authorization request (CAR) to build a mixed oxide fuel fabrication facility (MOX Facility). In August, 2001, GANE submitted several contentions, including contention 12, which asserted that the December 2000 environmental report submitted by DCS in support of the CAR improperly failed to analyze potential impacts of malevolent acts of terrorism and insider sabotage at the proposed MOX Facility; that such acts are reasonably foreseeable and could result in a beyond design basis accident; and that since NEPA requires the analysis of foreseeable environmental impacts, DCS improperly failed to analyze the environmental impacts of foreseeable terrorist acts. *See Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), LBP-01-35, 54 NRC __ (Dec. 6, 2001) (December 6 Ruling), slip op. at 50-51 (summarizing GANE contention 12), *reconsideration denied*, unpublished Memorandum and Order (Jan. 16, 2002), *petition for Commission review granted in part*, CLI-02-04, *supra*. Therein, the Commission requested the parties to address whether a federal agency, under NEPA, must consider intentional malevolent acts as part of its NEPA analysis. *See* CLI-02-04, slip op. at 3. The parties were also directed to address whether the Board erred in basing its admission of GANE contention 12 on the September 11, 2001 terrorist attacks (*see* CLI-02-04, slip op. at 1-2, *citing* December 6 Ruling, slip op. at 53-54); and whether the Board correctly found that the rationale supporting 10 C.F.R. § 50.13 does not apply to the proposed MOX Facility. *See* CLI-02-04, slip op. at 2 and n.2, *citing* December 6 Ruling,

slip op. at 52. Accordingly, DCS and the Staff filed their briefs addressing these questions. *See* "Brief of [DCS] in Response to the Commission's Memorandum and Order Regarding an Agency's Responsibility Under NEPA to Consider Terrorism," and "NRC Staff's Brief Responding to CLI-02-04" (Staff's Brief), respectively.

In its briefing schedule, the Commission set March 12, 2002, as the date for the parties to submit reply briefs. *See* CLI-02-04, slip op. at 3. The NRC Staff accordingly submits this Reply Brief, which chiefly addresses arguments made in GANE's Brief.[3] To the extent that BREDL's Brief argues points relevant to the admissibility of GANE's contention 12, the Staff also addresses those points.[4]

ARGUMENT

A. GANE Fails To Show That The Impacts Of Intentional Malevolent Acts Are Reasonably Foreseeable Events Which Must Be Evaluated Under NEPA

As indicated above, the Commission directed the parties in this proceeding to file briefs addressing the following question:

> What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11, 2001? The parties should cite all relevant cases, legislative history or regulatory analysis.

CLI-02-04, slip op. at 3. In responding to this question, the Staff concluded that: (1) where a federal agency prepares an environmental impact statement (EIS), NEPA requires that the agency

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[3] As the paper copy of GANE's Brief is not yet available because of mail delays, all page citations are keyed to the reformatted electronic version of the document transmitted by Glenn Carroll on the morning of February 28, 2002. Likewise, page citations to BREDL's Brief are to the electronic version transmitted by Louis Zeller shortly after midnight on February 28, 2002.

[4] To a large extent, BREDL argues other points not relevant here, such as whether the Commission should urge the United States Congress to repeal certain provisions of the Atomic Energy Act. *See, e.g.*, BREDL's Brief, at 2, and 12-15. Similarly, the Staff does not address certain safety issues referenced by GANE which are not relevant to the question of whether GANE's contention 12 should have been admitted. *See* GANE's Brief, at 33-34 (*e.g.*, whether material control and accounting modifications which exceed the applicable requirements of 10 C.F.R. Part 74 should be required at the proposed MOX Facility).

consider those impacts that are reasonably foreseeable as a consequence of the agency's action, subject to a rule of reason; and (2) intentional malevolent acts (such as the September 11, 2001, terrorist attacks) do not constitute "reasonably foreseeable" impacts resulting from any NRC licensing actions, and are not amenable to the type of "meaningful analysis" and evaluation that were contemplated by Congress under NEPA -- in that there is no quantitative, qualitative, or otherwise rational means by which the NRC could reasonably predict that such attacks will be targeted against a facility, or that they will involve any particular mode of execution, magnitude, or consequences. Accordingly, the Staff found that NEPA does not require the evaluation of intentional malevolent acts or related events in an EIS or other form of environmental analysis. *See* Staff's Brief, at 3[5] (summarizing the Staff's argument therein at 4-19). As shown below, GANE's Brief does not call into question the validity of the above conclusions and findings made by the Staff.

Throughout GANE's Brief, GANE argues that if a threat is credible, it must be fully evaluated in an EIS pursuant to NEPA. *See, e.g.,* GANE's Brief, at 2, 4, 27, 28, and 32. But reasonable foreseeability is the long-established standard for whether impacts must be evaluated under NEPA,[6] and, as previously argued (*see* Staff's Brief, at 9-10), GANE has not established that

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[5] The Staff does not assert that a best estimate of the consequences of a postulated attack could not be hypothesized -- based, for example, upon an analytical model of the attack. However, any such "consequence" analysis would not meaningfully contribute to the agency's consideration of its licensing action under NEPA without some rational means to estimate the probability that the postulated event will occur at a specific facility, in that a probability estimate is needed to allow an agency to determine whether that attack (or its likely consequences) are "reasonably foreseeable." To the extent that any statement in the Staff's Brief may not have expressed this position clearly (*see, e.g.*, Staff's Brief, at 3, "in the absence of any means to reasonably predict or evaluate the occurrence, magnitude, or consequences of such intentional, malevolent acts . . . . "), such statements should be read in the above-described context.

[6] *See, e.g., Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission,* 481 F.2d 1079, 1092 (D.C. Cir. 1973) (only impacts which are "reasonably foreseeable" to result from the agency's action must be evaluated; remote and speculative impacts need not be evaluated); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772 (1983) (continued...)

intentional, malevolent acts of terrorists such as those which occurred on September 11, 2001, constitute the type of "reasonably foreseeable" impacts that must be evaluated in an EIS. Further, there does not appear to be any valid scientific information or analysis that would support a determination that terrorist attacks (or any particular consequence thereof) are "reasonably foreseeable" consequences of NRC licensing actions.[7] Accordingly, as discussed further below, GANE's proposed credibility standard for performing NEPA evaluations should be rejected.

GANE discusses the Commission's "1994 vehicle bomb rule" as an example of an NRC action supporting GANE's argument that a credible threat must be fully evaluated pursuant to NEPA. *See* GANE's Brief, at 26-29.[8] GANE fails to mention that this 1994 action pertained only to the amendment of the design-basis threat (DBT) of radiological sabotage -- set forth in 10 C.F.R. § 73.1(a)(1)(i) -- by including therein the threat of an explosive-laden vehicle. The acts of terrorism upon which GANE's contention 12 was admitted cannot reasonably be equated with the acts of

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[6](...continued)
(*PANE*); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354-55 (1989) (*Methow Valley)*; *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 745 (3d Cir. 1989). Moreover, in abolishing its requirement that a worst case analysis be prepared, the CEQ explained that its amended requirement (40 C.F.R. § 1502.22) will help ensure that "more accurate and relevant information about reasonably foreseeable significant adverse impacts" will be provided. 51 Fed. Reg. 15618, 15624 (April 25, 1986).

[7] As further argued in the Staff's Brief, based on presently available information and analytical techniques, the probability that a terrorist attack or act of sabotage may be directed against a particular nuclear facility cannot reasonably be determined through scientific analysis, and is not amenable to meaningful prediction or forecasting. Rather, such events may at best be described as random and unpredictable, in that they result not from the licensing or construction of a particular facility but, instead, from the independent decision of a wrongdoer to perform that malevolent act. Further, there is no existing data base to which a decision-maker may turn, to estimate either (a) the probability that a terrorist attack or act of sabotage will occur, (b) that the attack or sabotage would be directed against a particular facility, (c) the nature and magnitude of such an act, and (d) the "success" or consequences of the act. *See* Staff's Brief, at 11-12, and 17 n.17.

[8] As part of its argument, GANE states that DCS had a duty in its environmental report to analyze "credible 'beyond-design-basis' sabotage scenarios." GANE's Brief, at 28. But, as indicated in the Staff's Brief, at 20, and n. 5, *supra*, absent any NEPA duty on the NRC's part to evaluate such scenarios, DCS would have no legal duty to do so in its environmental report.

domestic terrorism covered by the Commission's 1994 revision to 10 C.F.R. Part 73. Thus, the fact that the NRC amended the radiological sabotage DBT described in 10 C.F.R. § 73.1(a)(1)(i) does not support GANE's argument regarding whether credible terrorist threats must be evaluated under NEPA.

GANE makes a related argument that various actions recently taken by the federal government (in reaction to the terrorist attacks of September 11) show there exists "the potential for additional acts of terrorism," and that attacks against nuclear facilities in general are now considered "to be credible." GANE's Brief, at 32. But GANE, beyond its sweeping rhetoric, has provided no substantive basis for departing from the Commission's longstanding position with respect to consideration of such acts of terrorism.

Accordingly, for the reasons discussed above, GANE's proposed credibility standard for performing NEPA evaluations should be rejected.

B. GANE Fails To Show That ALAB-819 Should No Longer Be Followed

GANE argues that based on the "Commission's own [unspecified] pronouncements in the 1994 truck bomb rulemaking" (GANE's Brief, at 25), an Appeal Board's finding -- that a Staff environmental evaluation (regarding operation of the Limerick nuclear facility) was not required to consider the effects of sabotage -- is no longer viable. *See Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 701 (1985) (ALAB-819), *review declined*, CLI-86-5, 23 NRC 125 (1986), *affirmed sub nom. Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989) (*Limerick*).[9] The Appeal Board in ALAB-819 found that a risk analysis of sabotage is "beyond the state of the art of probabilistic risk assessment." ALAB-819, 22 NRC at 697. Contrary to GANE's argument, the Commission's statements in the 1994

[9] BREDL similarly argues that *Limerick* is outdated, based on unspecified advances in how probabilistic risk assessments are performed. *See* BREDL's Brief, at 20 (item 2). As previously noted, it is still not possible to meaningfully analyze the probability that any particular nuclear facility will be subjected to a terrorist attack. *See* Staff's Brief, at 17 n.17, and 20.

rulemaking implicitly affirmed ALAB-819's findings regarding probabilistic risk assessment, as follows:

> The Commission notes that the use of probabilistic risk assessment (PRA) as a tool for estimating risk is sound when based on results from demonstrable, repeatable events and test data ... The NRC has examined the use of PRA to predict sabotage as an initiating event and concluded that to do so would not be credible or valid because terrorist attacks, by their very nature, may not be quantified. Past attempts to apply PRA techniques to acts of sabotage have resulted in similar findings.

59 Fed. Reg., 38889, 38890, col. 2 (Aug. 1, 1994). The Commission further found that this conclusion regarding the usefulness of PRA to estimate risk was not altered by fact that the vehicle bomb attack took place:

> The Commission continues to believe that arbitrary selection of numbers to "quantify" threat probability without demonstrable, actual, supporting event data would yield misleading results at best. Knowledgeable terrorism analysts recognize the danger and are unwilling to quantify the risk. Over the past several years, a number of National Intelligence Estimates have been produced addressing the likelihood of nuclear terrorism. The analyses and conclusions are not presented in terms of quantified probability but recognize the unpredictable nature of terrorist activity in terms of likelihood. The NRC continues to believe that, although in many cases considerations of probabilities can provide insights into the relative risk of an event, in some cases it is not possible, with current knowledge and methods, to usefully quantify the probability of a specific vulnerability threat.

59 Fed. Reg., at 38890, col. 3.

Significantly, although the Commission in 1994 adopted vehicle protection requirements for nuclear power plants, for the reasons described fully in connection with that rulemaking, the Commission did not find a vehicle bomb attack to be reasonably foreseeable. This same conclusion applies today in that, despite the occurrence of the September 11 attacks,[10] no reason has been shown to exist that would allow the Commission to reliably predict the probability that a terrorist attack of any particular nature or magnitude will be directed against a specific facility or type of facility, or the extent to which such an attack would succeed in the face of existing plant

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[10] In discussing these events, the Staff notes there is no basis to conclude that the events of September 11 are in any way comparable to those which gave rise to the 1994 rulemaking.

security, safeguards, and defense establishment protection. Moreover, while GANE cites the language of 10 C.F.R. § 51.71(d) for the proposition that if the likelihood of an impact cannot be easily quantified, that is "not an excuse for failing to address it in an EIS" (GANE's Brief, at 16), there is nothing in 10 C.F.R. § 51.71 that vitiates NEPA's "rule of reason," or the related case law that only "reasonably foreseeable" impacts need be evaluated in an EIS. *See, e.g., PANE, supra*, 460 U.S. at 772, and *Methow Valley, supra*, 490 U.S. 354-55.

Thus, the Appeal Board's finding in ALAB-819 regarding the inability of PRA to estimate sabotage risks remains a viable NRC precedent, and GANE's argument that ALAB-819 is no longer viable should be rejected.

C. NUREG-0414 and the GESMO Proceeding Provide No Legal Basis for Evaluating The Impacts Of Intentional Malevolent Acts Under NEPA

GANE argues that a 1978 Staff technical report, "Safeguarding a Domestic Mixed-Oxide Industry Against a Hypothetical Subnational Threat" (NUREG-0414)[11], reflects a decision made in a November 1975 Commission policy statement (*see* 40 Fed. Reg., at 53056 *et seq.)* pertaining to how the use of MOX fuel should be evaluated under NEPA, and that a decision now not to analyze the impacts of intentional malevolent acts at the proposed MOX Facility would constitute the reversal of the Commission's 1975 policy. *See* Section III. D. 2 of GANE's Brief, at 30-31.

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[11] NUREG-0414 grew out of a draft "Generic Environmental Statement on the Use of Recycle Plutonium in Mixed-Oxide Fuel in Light Water Cooled Reactors" (GESMO), which the Atomic Energy Commission issued in 1974 (*see* 39 Fed. Reg. 30186 (Aug. 21, 1974)) as part of the agency's analysis of a proposal for the wide-scale use of MOX fuel -- made from reactor-grade plutonium -- then being evaluated. After considering comments on the draft GESMO made by the Council on Environmental Quality (CEQ), the NRC in 1975 found that a full assessment of safeguards issues was required before it made a final decision on whether to allow the wide-scale use of MOX fuel in the light water power reactor fuel cycle. *See* 40 Fed. Reg. 53056, 53058 (Nov. 14, 1975). The Commission accordingly directed the Staff to prepare a draft cost-benefit analysis of alternative safeguards programs as a supplement to the draft GESMO. *See* 40 Fed. Reg. at 53063 (Projected Schedule of Events Leading to Commission Decision on Wide-Scale Use of MOX Fuel, attached to the Notice as an appendix). In 1978, after the GESMO proceeding had been terminated, the safeguards supplement drafted by the Staff was issued as NUREG-0414, a Staff technical report.

The short answer to this argument is that in its later decision to terminate the GESMO proceeding, the Commission stated it was withdrawing its November 1975 policy statement. *See* "Mixed Oxide Fuel Order," 42 Fed. Reg. 65,334, 65,335 (item 5) (Dec. 30, 1977).[12] Thus, any decisions reflected in the November 1975 policy statement would no longer have of any force or effect. Moreover, to the extent that GANE's argument may be read as relying on the contents of NUREG-0414 (*see* GANE's Brief, at 30-31 and nn. 11-14) -- rather than on anything the Commission said in its policy statement -- such reliance is misplaced. The Foreword to NUREG-0414 makes clear that it constituted only the Staff's analysis of technical safeguards information which the Commission decided should be made available to the public, and did not reflect any policy decisions or conclusions made by the Commission:

> This document is a staff technical report. The Commission has not specifically addressed many of the policy issues in the specific context of this report, and has, therefore, not approved its conclusions. The Commission has authorized publication because it believes that the information should be available to the public.

NUREG-0414, at xiv.

Moreover, GANE's argument fails to articulate how any 1975 policies or decisions would apply to consideration of the currently proposed MOX Facility.[13] The only wording from the

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[12] GANE noted that the GESMO proceeding was terminated after President Carter's April 1977 decision to defer any recycling of plutonium (*see* GANE's Brief, at 30), but GANE failed to cite the Commission's December 30, 1977 Order. Moreover, in its background discussion (*see* GANE's Brief, at 5), GANE also failed to note that in 1981, President Reagan lifted what he termed President Carter's "indefinite ban" on reprocessing spent fuel from nuclear power reactors. October 8, 1981 White House press release ("Statement by the President").

[13] GANE's argument references "the Commission's decisions" on NUREG-0414, without specifying what "decisions" are being relied on, and GANE is similarly vague in concluding this argument by *referring* to a "policy decision that led to NRC's 1975 directive." GANE's Brief, at 31. In further examining the November 1975 policy statement, it is apparent that the only Commission policies being discussed related to properly structuring the NRC's decisional process -- taking both NEPA and Atomic Energy Act considerations into account -- for evaluating the proposed wide-scale use of MOX fuel. *See* 40 Fed. Reg., *supra*, at 53059, col. 3. The Commission sought to establish a decisional process assuring "thorough consideration of all salient factors," and resulting in "determinations that are sufficiently definitive and well-founded to allow firm planning by the nuclear

(continued...)

Commission's November 1975 policy statement cited by GANE is that "a full assessment of safeguards issues" was needed prior to making a final decision on whether to allow the wide-scale use of MOX fuel. GANE's Brief, at 30, *quoting* 40 Fed. Reg., *supra*, at 53056. This Commission statement was preceded by CEQ's January 1975 comments on the draft GESMO, which expressed CEQ's view that the draft failed to properly analyze the impacts of the "potential diversion of special nuclear materials," and the threat to the public posed by such potential diversions. 40 Fed. Reg., *supra*, at 53058, col. 1. GANE apparently reads the CEQ's January 1975 comments together with the Commission's "full assessment of safeguards issues" statement as establishing a policy that "consideration of nuclear theft and sabotage [would be required] for the generic MOX fuel program EIS" (an apparent reference to the final GESMO). GANE's Brief, at 31. As discussed above and in n. 15, CEQ's comments were a small piece of much larger Commission deliberations, and GANE fails to show how these comments are relevant to the present NEPA evaluation of the proposed MOX Facility. As GANE concedes, the scope of the current MOX fuel program is much narrower than the generic program at issue in the GESMO proceeding. *See* GANE's Brief, at 31.

Additionally, the 1975 CEQ and Commission actions were taken prior to the Supreme Court's issuance of two significant NEPA opinions referenced in n. 6, *supra*. First, in *Methow Valley,* the Court explicitly approved the CEQ's amended regulation (40 C.F.R. § 1502.22), stating that while the new standard does not necessarily exclude an agency's duty to consider remote but potentially severe impacts, it "grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" *Methow Valley,* 490 U.S. at 354-55. This decision further establishes that the threshold determination as to whether an impact is "reasonably

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[13](...continued)
industry." *Id.* While noting that safeguards measures in general are designed to "prevent the theft or diversion of special nuclear materials and to prevent the sabotage of nuclear facilities" (*id.*, at 53057, col. 1), the Commission was then in the early stages of amending its regulations to "address safety, environmental, and safeguards matters associated with wide-scale use" of MOX fuel. *Id.*, at 53060, col. 2.

foreseeable" under NEPA must be supported by "credible scientific evidence" if it is to be "meaningfully" evaluated in an EIS. *Id.* The Court explained that CEQ's decision to eliminate the need for federal agencies to conduct a worst case analysis under 40 C.F.R. § 1502.22 was based upon a determination that, by requiring an EIS "to focus on reasonably foreseeable impacts," the amended rule "will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision . . . rather than distorting the decision making process by overemphasizing highly speculative harms." *Methow Valley*, 490 U.S. at 356 (citations omitted).

Second, in *PANE*, the Court stated that in determining whether an impact is "reasonably foreseeable" under NEPA, consideration must be given to "the closeness of the relationship between the change in the environment and the 'effect' at issue." *PANE*, 460 U.S. at 772. Under the Court's reasoning, a potential effect must be proximately related to the agency's action, and at some point the causal link between an agency's proposed action and the alleged effect of that action becomes too attenuated to permit reasonable or meaningful analysis, *i.e.*, the effects or impacts become too remote and speculative to permit reasonable evaluation. *Id.*, at 773-75. Under *PANE* then, the risk that an intentional malevolent act may be directed at the proposed MOX Facility (thereby causing adverse environmental consequences) is not proximately related to the NRC's licensing decisions regarding said facility, inasmuch as the necessary causal link is broken by the intervention of the person or entity which independently decides to carry out the intentional malevolent act. Because the risk that such an act would occur is dependent upon some individual's malevolent determination to perform that act, the wrongdoer's independent conduct would appear to constitute a "necessary middle link" that "lengthens the causal chain beyond the reach of NEPA." *PANE*, 460 U.S. at 775.

Accordingly, the Commission should reject GANE's argument that NUREG-0414 reflects a 1975 Commission policy decision pertaining to how the use of MOX fuel should be evaluated

under NEPA, and that a decision now not to analyze the impacts of intentional malevolent acts at the proposed MOX Facility would constitute the reversal of a Commission policy.

D. The Rationale Underlying 10 C.F.R. § 50.13 Applies to Whether, Under NEPA, the Impacts of a Suicide Plane Attack or Similar Terrorist Acts on the Proposed MOX Facility Must be Evaluated

Although not clearly articulated, GANE appears to argue that the Commission is obligated, pursuant to a Supreme Court opinion[14] and NEPA's "rule of reason," to reverse a prior Appeal Board decision[15] which found that 10 C.F.R. § 50.13's underlying policy was as applicable to the NRC's NEPA responsibilities as it is to the NRC's health and safety responsibilities under the AEA, and thus could be applied to exclude a NEPA contention seeking to litigate whether an EIS should have addressed potential impacts of sabotage on a nuclear facility. *See* GANE's Brief, at 17-18, and 22-24 (the latter portion arguing that to apply *Shoreham* here would violate NEPA's "rule of reason"). As discussed below, GANE's argument has no merit, and should be rejected.

GANE focuses on three factors the *Shoreham* Appeal Board had found significant in making the above-described finding,[16] but fails to show why those factors are not equally applicable in this proceeding. The first factor is the impracticality of requiring a civilian industry to design defenses against enemy attack. *See* GANE's Brief, at 22. GANE fails to show what purpose would be

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[14] GANE cites *Marsh v. Oregon Natural Resources Council*, 490 US 360, 374 (1989) (*Marsh*). *See* GANE's Brief, at 17-18. The Court in *Marsh* was considering whether water quality information developed after an EIS was completed required that a supplemental EIS be prepared before the action at issue (building a dam) could continue. *See Marsh,* 490 US at 363-65, and 378-79. Contrary to GANE's argument (*see* GANE's Brief, at 17-18), *Marsh* does not discuss any factors pertaining to whether previous NEPA case law should be upheld, and thus has no bearing on whether *Shoreham* is a valid precedent which should be followed here.

[15] *Long Island Lighting Co.* (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831, 851 (1973) (*Shoreham*).

[16] GANE fails to note that the three factors *Shoreham* discusses -- set forth by GANE in a block quote (*see* GANE's Brief, at bottom of 18) -- were ones first formulated by the United States Court of Appeals for the District of Columbia Circuit. *See Shoreham,* 6 AEC at 851, *quoting Siegel v. AEC,* 400 F.2d 778, 782 (D.C. Cir. 1968).

served by performing a NEPA analysis of impacts that would result if a suicide airplane or similar attack -- comparable to a foreign missile attack -- was carried out on the proposed MOX Facility. The second factor is the recognition that only the military could reasonably be expected to guard against attacks of such magnitude. *See* GANE's Brief, at 23. GANE states that based on the "element of surprise gained by suicide bombers," the military "is generally ineffective in preventing" attacks such as those which took place on September 11, since the military "does not stand in constant readiness to counter serious domestic threats." *Id.* Even assuming these statements are correct, GANE fails to show that the impacts of such attacks must be evaluated under NEPA, since these impacts would be caused by the independent acts of third parties unrelated to any NRC licensing action, and would thus fall outside NEPA's causal reach. *See PANE, supra*, 460 U.S. at 775. The third *Shoreham* factor is the unavailability of relevant information, due to its typically classified nature. *See* GANE's Brief, at 23-24. GANE references information "available in the news media" (*id.*, at 24), but such information -- absent a security breach -- is not classified.[17]

Accordingly, GANE fails to show why the finding in *Shoreham* -- *i.e.*, that 10 C.F.R. § 50.13's underlying policy is as applicable to the NRC's NEPA responsibilities as it is to the NRC's health and safety responsibilities under the AEA -- should not be adhered to in this proceeding. The policy considerations underlying the adoption of 10 C.F.R. § 50.13 are equally applicable to Part 70 facilities, and would thus be applicable to the proposed MOX Facility.

CONCLUSION

While the Board's December 6 Ruling admitting GANE's contention 12 may have been -- in GANE's words -- "historic" and without precedent (GANE's Brief, at 2), it finds no support in

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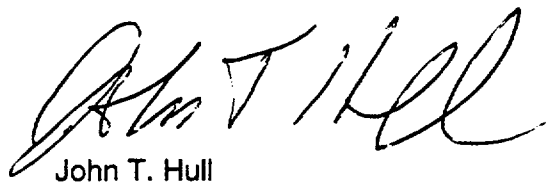
[17] On a related point, GANE states that an EIS for the proposed MOX Facility should "evaluate the vulnerability" of its design to acts of "terrorism and sabotage." GANE's Brief, at 33. In the Staff's view, including such information in the MOX Facility's EIS would be extremely foolhardy, amounting almost to an open invitation for terrorists to launch an attack against the facility (if it is later built and operated).

NEPA case law or in sound public policy. Based on this Staff Reply, and for the further reasons argued in the Staff's Brief, the Commission should (1) find that NEPA does not require that intentional malevolent acts -- such as the attacks of September 11, 2001 -- be considered in performing environmental evaluations of proposed federal actions; (2) reverse the Board's admission of GANE's contention 12 in the CAR proceeding; and (3) reject the Board's finding that 10 C.F.R. § 50.13 considerations do not apply in this proceeding.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 12th day of March, 2002

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NUCLEAR REGULATORY COMMISSION

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DUKE COGEMA STONE & WEBSTER	)	Docket No. 70-03098-ML
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Mixed Oxide Fuel Fabrication Facility (Construction Authorization Request)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF'S REPLY BRIEF ON TERRORISM-BASED CONTENTION" have been served upon the following persons this 12th day of March, 2002, by electronic mail, and by U.S. mail, first class (or as indicated by an asterisk (*) through the Nuclear Regulatory Commission's internal distribution system).

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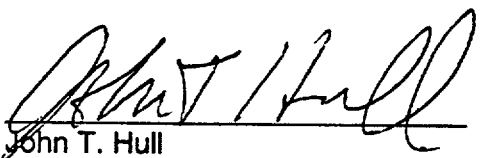

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