



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

October 6, 2005

OFFICE OF THE
GENERAL COUNSEL

Cathy A. Catterson, Clerk
United States Court of Appeals for
the Ninth Circuit
95 Seventh Street
San Francisco, California 94103-1526

RE: *San Luis Obispo Mothers for Peace, et al. v. U.S. Nuclear Regulatory
Commission*, No. 03-74628

Dear Ms. Catterson:

Pursuant to FRAP 28(j), this letter responds to Petitioners' October 3 Letter.

1. Petitioners cite *Ranchers Cattleman Action Fund v. USDA*, 415 F.3d 1078, 1103 (9th Cir. 2005), for the proposition that *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766 (1983), is "inapplicable to the instant case because it did not involve changes to the environment."

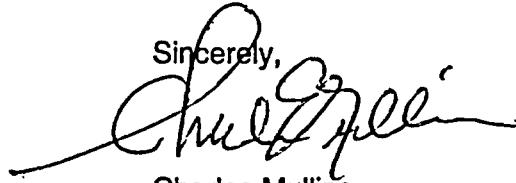
But *Metropolitan Edison* did involve a change to the environment: the renewed operation of a nuclear power plant. *Ranchers* does not suggest otherwise. All parties in *Metropolitan Edison* agreed that renewed operation would cause psychological problems in the "but for" sense. However, the Supreme Court held that showing "but for" causation was insufficient to trigger NEPA obligations, 460 U.S. at 774, and analogized the required showing to "the familiar doctrine of proximate cause[.]" *Id.* That ruling applies whenever a proposed Federal action creates an "environmental impact" under NEPA. Our Brief demonstrates that licensing the Diablo Canyon facility would not be the "proximate cause" of the impacts of any hypothetical "act of malice or insanity," although it might be the cause in a "but for" sense.

2. We cited *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004), as additional authority that "proximate cause," not mere "but for" causation, is required to trigger NEPA obligations. See Federal Respondents' Letter (July 19, 2004).

Petitioners cite two cases, arguing that *Public Citizen* does not support our position because of the "involvement of causal factors independent of the federal action." But in both *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1122 (9th Cir. 2005), and *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 868 (9th Cir. 2005), this Court simply held that a specified environmental impact (a housing development and an increased risk of oil spills) was the reasonably foreseeable result of the issuance of a Corps of Engineers permit. Neither case discussed the application of "proximate cause" and neither case involved an intervening outside force.

3. Enclosed is the latest filing and Court Order in *Public Citizen v. NRC*, No. 03-1181 (D.C. Cir.).

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Mullins", written over the word "Sincerely,".

Charles Mullins
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

Enclosure: Court Order

cc: Diane Curran
Kathryn E. Kovacs
David A. Repka
Jay E. Silberg
Kevin James
Robert K. Temples



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

August 31, 2005

Mark J. Langer, Clerk
U. S. Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: *Public Citizen, Inc., and San Luis Obispo Mothers For Peace v. NRC,*
No. 03-1181

Dear Mr. Langer,

Enclosed you will find an original and four copies of "Joint Motion to Continue Holding Case in Abeyance." Please date stamp the enclosed copy of this letter to indicate date of receipt, and return it to me in the enclosed envelope, postage pre-paid, at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Heck", is written over a horizontal line.

Jared K. Heck
Attorney
Office of the General Counsel

Enclosures: As stated

cc: service list

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN, INC., and
SAN LUIS OBISPO MOTHERS
FOR PEACE,

Petitioners,

v.

U.S. NUCLEAR REGULATORY
COMMISSION and the UNITED
STATES OF AMERICA,

Respondents.

No. 03-1181

JOINT MOTION TO CONTINUE HOLDING CASE IN ABEYANCE

On July 20, 2005, the Court ordered this case held in abeyance pending the commencement of a rulemaking proceeding by the Nuclear Regulatory Commission dealing with its design basis threat regulations. The Court further directed the parties to file motions to govern future proceedings within 30 days after a rulemaking proceeding had commenced, but no later than September 1, 2005. Pursuant to the Court's order, the parties now submit this joint motion to continue holding the case in abeyance.

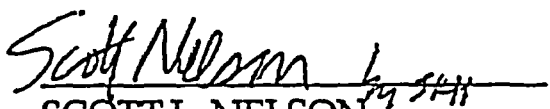
All Commissioners have voted to approve publication of a proposed design basis threat rule. The Commissioners' votes are being reconciled and their comments incorporated into the proposed rule package, which will then be published in the *Federal Register* for public comment. Under section 651(a) of the recently-enacted Energy Policy Act of 2005, the Commission must publish the proposed rule no later than November 7, 2005, and complete its rulemaking proceeding within 18 months of that date.

In the Commission's view, these administrative and legislative developments render this case moot. Public Citizen's position is that until the challenged design basis threat order has been replaced by a lawfully promulgated rule, there will remain a live controversy. However, rather than consume time and resources arguing mootness, the parties have agreed to ask the Court to continue to hold this case in abeyance until the NRC publishes its final design basis threat rule. The NRC expects the final rule would be published no later than May 7, 2007, in accordance with the statutory deadlines described above.

Accordingly, the parties move the Court to continue holding this case

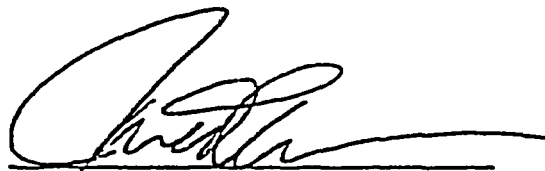
in abeyance until the completion of the NRC's design basis threat rulemaking or until May 7, 2007, whichever is sooner.

Respectfully submitted,



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Counsel for Petitioners



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KATHRYN E. KOVACS
U.S. Department of Justice
Environment and Natural
Resources Division
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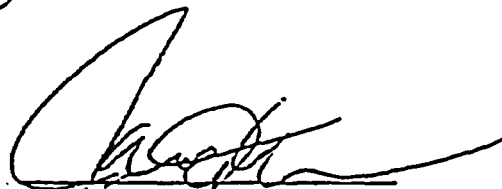
Counsel for Respondents

August 31, 2005

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2005, copies of the foregoing motion to continue holding the case in abeyance were served by mail, postage prepaid, upon the following:

Scott L. Nelson
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington, D.C. 20009

A handwritten signature in black ink, appearing to read 'Jared K. Heck', is written over a horizontal line.

Jared K. Heck
Counsel for Respondents

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1181

September Term, 2005

Filed On: September 19, 2005

[919152]

Public Citizen, Inc. and San Luis Obispo Mothers for
Peace,

Petitioners

v.

Nuclear Regulatory Commission and United States of
America,

Respondents

BEFORE: Ginsburg, *Chief Judge*, and Randolph and Rogers, *Circuit Judges*

ORDER

Upon consideration of the joint motion to continue holding case in abeyance, it is

ORDERED that the motion be granted. This case shall remain in abeyance pending further order of the court. It is

FURTHER ORDERED that the parties are directed to file status reports or motions to govern future proceedings within 90 days from the date of this order and at 90-day intervals thereafter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Cheri Carter
Deputy Clerk