MOTHERS for PEACE

COMMENTS BY SAN LUIS OBISPO MOTHERS FOR PEACE ON NRC PROPOSED RULE REGARDING DESIGN BASIS THREAT FOR PROTECTION OF NUCLEAR FACILITIES AGAINST SABOTAGE AND THREAT OF STRATEGIC SPECIAL NUCLEAR MATERIAL

January 23, 2006

CORRECTED March 1, 2006

I. INTRODUCTION AND SUMMARY OF COMMENTS

The San Luis Obispo Mothers for Peace ("SLOMFP") hereby submits its comments regarding the U.S. Nuclear Regulatory Commission's ("NRC's") proposed rule entitled "Design Basis Threat." The proposed rule was published in the Federal Register on November 7, 2005, at 70 Fed. Reg. 67,380.

The proposed rule, which constitutes the first NRC security-related rulemaking since the terrorist attacks of September 11, 2001, and comes a belated four-plus years after the Commission promised the public a complete re-evaluation of its security regulations, can only be described as a travesty. At best it is unclear and incomplete, and at worst it is downright dishonest about the extent to which the NRC has not only failed to meet the challenges of the post-9/11 environment, but has actually *weakened* the pre-9/11 standard. For example, while claiming to have "enhanced" the "adversary characteristics" of the pre-9/11 Design Basis Threat ("DBT") [*see* 70 Fed. Reg. at 67,381], the proposed rule actually reduces the vigor of the hypothetical threat for theft of formula quantities of strategic special nuclear material ("SSNM").

The NRC is similarly disingenuous in claiming to have "partially granted" a petition for rulemaking which sought conformance of the DBT to the characteristics of the 9/11 attack force. The revised DBT does not even come close to including the crucial adversary characteristics of the 9/11 attackers, such as the ability to operate as more than two teams or the capacity to carry out an airborne attack.

The NRC's rationale for limiting the scope of the DBT, *i.e.*, that a licensee should only have to defend against a DBT "which a private security force could reasonably be expected to defend," reeks of unlawful cost considerations. The DBT should be based on an objective standard that is related to the expected characteristics of the adversary, not to the size of the licensee's budget.

If the NRC has relied on some considerations other than costs to licensees in determining what measures could reasonably be expected of a licensee, it has given the public no hint of what those considerations might be. The NRC's failure to explain the technical

rationale for determining what security measures are reasonably required of a licensee constitutes a gross violation of the Administrative Procedure Act ("APA"). Likewise in violation of the APA, it appears that the NRC's limitations on the scope of the DBT are based on secret comments from the nuclear industry, which the NRC has not even bothered to summarize for the general public.

The proposed rule is also grossly deficient with respect to its complete failure to explain the difference between an "adversary force," against which licensees must be prepared to defend under 10 C.F.R. § 73.1, and "an enemy of the United States," from which nuclear power plant licensees are excused from defending their facilities under 10 C.F.R. § 50.13. Organizations like Al Qaeda, which are not associated with any national government, operate within the United States, and use weapons readily obtainable in the United States, meet the NRC's previously-stated criteria for an "adversary force" that must be defended against under 10 C.F.R. § 73.1. *See* Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889, 38,891 (August 1, 1994) (hereinafter "Vehicle Bomb Rule"). Nevertheless, the revised DBT does not come close to including Al Qaeda capabilities. Is this because the NRC has silently decided that Al Qaeda meets the criteria for an "enemy of the state?" If so, it is incumbent on the NRC to so state, and to also explain why Al Qaeda does not satisfy the criteria for an "adversary force" that were laid out in the Vehicle Bomb Rule.

The proposed rule falls so dismally short of providing an adequate, intelligibly defined, technically supported or procedurally fair regulation that it must be revised and re-published for public comment.

II. FACTUAL BACKGROUND

A. About the San Luis Obispo Mothers for Peace

SLOMFP is a non-profit organization concerned with the dangers posed by the Diablo Canyon Nuclear Power Plant on the local community, as well as the national and global risks posed by nuclear power, nuclear waste disposal, and nuclear weapons. SLOMFP also concerns itself with issues of peace, social justice, and a safe environment. SLOMFP has intervened in numerous NRC licensing proceedings in opposition to the unsafe operation of the Diablo Canyon nuclear plant, including the construction permit proceeding, the operating license proceeding, the construction period recovery proceeding, and the licensing proceeding for an Independent Spent Fuel Storage Installation ("ISFSI") on the Diablo Canyon site.

B. History of NRC Resistance to SLOMFP's Requests for Action on Its Security Concerns

Since the terrorist attacks of September 11, 2001, SLOMFP has been greatly concerned about the lack of adequate security for the Diablo Canyon site, whose exposed location on the Pacific coastline makes it particularly vulnerable to attack. SLOMFP is also concerned about the NRC's failure to address the environmental impacts of terrorist

attacks or other acts of malice or insanity against the new ISFSI proposed for the Diablo Canyon site.

SLOMFP's attempts to raise its concerns through the NRC licensing process have been met with refusal or evasion. In the spring of 2002, for example, SLOMFP and other civic and environmental groups requested the NRC to prepare an Environmental Impact Statement ("EIS") regarding the environmental impacts of the ISFSI proposed by Pacific Gas & Electric Company ("PG&E") for the Diablo Canyon site. The NRC refused to entertain SLOMFP's contention that an EIS was required by the National Environmental Policy Act ("NEPA"). *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), LBP-02-23, 56 NRC 413 (2002), affirmed, CLI-03-11, 51 NRC 1 (2003). SLOMFP has sued the NRC to force it to comply with its procedural obligations under NEPA. The case, *SLOMFP et al. v. NRC,* No. 03-74628, is pending in the 9th Circuit of the U.S. Court of Appeals.

In the fall of 2002, the Commissioners also rejected a petition by SLOMFP and other organizations to impose post-9/11 security upgrades on the entire Diablo Canyon nuclear complex, including the nuclear plant and the proposed ISFSI. CLI-03-23, 56 NRC 230 (2002). The Commission asserted that it had undertaken "a comprehensive review of our security rules and policies," and invited SLOMFP to "make its positions known" during "any rulemakings that emerge from our comprehensive security review." *Id.* at 236 and note 10.

But no such rulemaking was forthcoming. Instead, the NRC revised the DBT and imposed other new security measures by secret enforcement orders, on which members of the public were given no opportunity to comment. *See, e.g.,* EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,150 (October 23, 2002); EA-02-104, Order Modifying License (Effective Immediately), 67 Fed. Reg. 65,152 (October 23, 2002). Only after SLOMFP and Public Citizen sued the NRC in the U.S. Court of Appeals, *Public Citizen and SLOMFP v. NRC,* No. 03-1181, did the agency offer the public any opportunity to comment on the Commission's post-9/11 security upgrades, in the instant rulemaking.

SLOMFP is pleased that at long last, the NRC has published a revised DBT for public comment. Unfortunately, however, it is clear that during the NRC's period of extreme secrecy, at least one aspect of nuclear facility security, protection against theft of SSNM, has been allowed to backslide to a level that is more lax than the pre-9/11 standard. In other respects, the proposed rule shows a disturbing failure to grapple with the characteristics of the post-9/11 security threat, to keep costs from tainting the scope of the DBT, or to articulate a clear concept of how the NRC determines the type of threat that should be included in the DBT.

III. COMMENTS ON PROPOSED RULE

A. The Proposed Rule Weakens the DBT for Protection of Strategic Special Nuclear Material Against Theft.

1. The proposed rule would reduce the number of teams against which a licensee must be prepared to defend.

As the Commission explained in proposing the current pre-9/11 DBT for theft of formula quantities of SSNM, the DBT for theft is intended to be more severe than the DBT for sabotage:

> The difference in the design basis for required levels of protection at power reactors and fuel cycle facilities reflects the relative differences in the potential consequences of successful sabotage at a reactor and theft of strategic special nuclear material and subsequent detonation of a nuclear explosive device. The consequences of reactor sabotage are generally less severe than detonation of a nuclear explosive device. While these considerations are not amenable to precise quantification they have been reflected in the general performance requirements associated with § 73.55 and the proposed amendments [to the DBT].

Proposed Rule: "Physical Protection of Plants and Materials," 42 Fed. Reg. 34,310, 34,311 (July 5, 1977). *See also Duke Energy Corporation* (Catawba Nuclear Station, Units 1 and 2), LBP-05-10, 61 NRC 241, 302 (2005) (hereinafter "*Catawba*"), *reversed on other grounds,* CLI-05-14, 61 NRC 359 (2005) (observing that "the DBT for theft of SSNM was obviously intended to be more challenging than that for radiological sabotage").

Thus, while the current, pre-9/11 DBT for sabotage requires consideration of a group of "several persons," the current DBT for theft requires consideration of a more severe threat, *i.e.,* a "small group" that has "the ability to operate as two or more teams." *Compare* 10 C.F.R. § 73.1(a)(1) and § 73.1(a)(2)(F). As recently interpreted by the Atomic Safety and Licensing Board ("ASLB"), the phrase "two or more teams" must be interpreted to require licensees to defend against a minimum of three teams of at least two people. *Catawba,* 61 NRC at 298-302 and note 263.

The proposed rule "adds new capabilities" to the DBT for sabotage, including "operation as one or more teams." Proposed 10 C.F.R. § 73.1(a), 70 Fed. Reg. at 67,383. In contrast, however, the proposed rule *decreases* the capabilities of hypothetical thieves from the current rule, by reducing the number of teams from "two or more" to "one or more." Proposed 10 C.F.R. § 73.1(a)(2), 70 Fed. Reg. at 67,384. As a result, the minimum number of teams in the theft DBT has decreased from three to two. This change reduces the ability of the attacking force to "divide and conquer" by mounting several simultaneous attacks. The change in the minimum number of teams also implicitly reduces the size of the attacking group, given that a "team" must be interpreted to include at least two people. *Catawba,* 61 NRC at 302 n. 263.

Most disturbingly, the NRC's "Section-By-Section Analysis" contains patently false information about the change in 10 C.F.R § 73.1(a)(2). Under the header "New," the Analysis accurately represents that subsection 73.1(a)(2)(i)(F) has been "[d]eleted." Under the heading "Change," however, the Analysis falsely states that "[t]his requirement would be included in § 73.1(a)(2)(i)." 70 Fed. Reg. at 67,384. Obviously, the requirement of § 73.1(a)(2)(i)(F) is *not* included in proposed § 73.1(a)(2)(i). Instead, it has been substantially modified.

The Commission's failure to candidly identify or explain the reduction in the theft DBT with respect to the number of adversary teams is especially egregious in light of the Congressional directive, cited at 70 Fed. Reg. 67,381, the "potential for attack on facilities by multiple coordinated teams of a large number of individuals." The primary definition of the word "multiple," as given in *Random House Webster's College Dictionary* (2nd Edition 1997), is: "consisting of, having, or involving several or many individuals, parts, elements, relations, etc.; manifold." The same dictionary defines the word "several" as more than two, and "many" as involving a large number. Clearly, Congress wanted the NRC to consider adversary forces of more than two teams. To reduce the number of teams *below* the pre-9/11 DBT, without explaining how that reduction is consistent with Congress' concerns or the Commission's previous statement that the DBT for theft must be more rigorous than the DBT for sabotage, epitomizes arbitrary and capricious decision-making.

By misleading the public into thinking that the requirement of § 73.1(a)(2)(i)(F) to consider two or more teams has been carried forward into the proposed rule, the NRC has turned the process of notice and comment rulemaking into an unacceptable "bureaucratic game of hide and seek." *MCI Telecommunicatons Corp. v. FCC,* 57 F.3d 1136, 1142 (D.C. Cir. 1995). The NRC must cure the obfuscation of this major change to the theft DBT by revising and re-publishing the proposed rule in a form that provides straightforward and well-explained notice of the change to the DBT. *Id.* at 1143.

2. The proposed rule retains ambiguous language from the current rule which invites misinterpretation and lax implementation by licensees.

The proposed rule is also deficient because it retains ambiguous wording from the current rule, without changing it or clarifying its meaning. As the Commission must be aware, the NRC Staff and at least one licensee interpret the phrase "two or more teams" to give the licensee the option of choosing whether to show that it is prepared to defend against two adversary teams or some other number of adversary teams greater than two. *Catawba,* 61 NRC at 297. In the *Catawba* proceeding, which concerned the use of plutonium-based fuel, the Staff and Duke Power Corporation ("Duke") argued that Duke could show it was prepared to meet the DBT for theft of formula quantities of SSNM by showing preparedness to defend against only two adversary teams. *Id.* at 297. In opposition, the intervenor, Blue Ridge Environmental Defense League, argued that the phrase must be interpreted to mean that the adversary has the ability to break into two or

more teams, and therefore the licensee must "be prepared to defend against an attack by two teams of adversaries, as well as an attack by more than two teams of adversaries." *Id.,* 61 NRC at 297. In other words, the licensee must be prepared to defend against at least three teams of adversaries. *Id.* at 299.

The ASLB devoted a significant portion of its decision to an analysis of the regulation in light of the parties' arguments. *See* 61 NRC at 297-302. Applying "well-established principles of statutory construction," the ASLB concluded that the interpretation of 10 C.F.R. § 73.1(a)(2)(i)(F) offered by the licensee and the Staff would "counter the stated purpose of the rule." 61 NRC at 302. Without addressing the ASLB's reasoning on this particular issue, however, the Commission later reversed the ASLB's decision on the generally stated ground that certain license conditions imposed by the ASLB were "unnecessary to ensure compliance with the exemption standard." CLI-05-14, 61 NRC at 362.

Given that the Commission has reversed the ASLB's *Catawba* decision, the status of the Board's thorough and well-reasoned ruling on the meaning of 10 C.F.R. § 73.1(a)(2)(i)(F) is now unclear. In setting the minimum number of teams that must be considered, the Commission should have revised the regulation to avoid use of language that it knew to be ambiguous and subject to abuse.

B. The Proposed DBT Fails to Include Appropriate Post-9/11 Threat Characteristics

Although the NRC claims to have "partially granted" a petition for rulemaking which sought conformance of the DBT to the characteristics of the 9/11 attack force, the revised DBT does not even come close to including the crucial adversary characteristics of the 9/11 attackers, such as the ability to operate as more than two teams or the capacity to carry out an airborne attack. As discussed below in Sections C and D, although the Commission provides virtually no discussion of its basis for defining the scope of the DBT so narrowly, it appears that the proposed rule may be tainted by invalid cost considerations as well as a secret interpretation of 10 C.F.R. § 50.13 to which only the NRC and perhaps the nuclear industry may be privy. As such, these limitations are not supported by a valid rulemaking.

As a practical matter, SLOMFP believes that the revised DBT is utterly inadequate to protect the public against today's terrorist attack. SLOMFP incorporates by reference the comments submitted by the Union of Concerned Scientists on this subject, which were submitted on January 23, 2006, by David A. Lochbaum.

SLOMFP also wishes to emphasize its especially deep concern over the NRC's failure to address the threat of airborne attack in this rulemaking, or to include the threat of waterborne attack on ISFSIs. The Diablo Canyon nuclear complex sits on a hillside overlooking the Pacific Ocean, and is thereby vulnerable to both airborne and waterborne attacks. Al Qaeda has shown that such attacks can be carried out, using domestically available equipment. Diablo Canyon has no defense whatsoever, against such attacks.

In December 2005, for example, SLOMFP received a report that in May 2005, a small plane flew directly over the Diablo Canyon plant, "dive-bombing" within 500 feet of the dome. There was no response from plant security. SLOMFP has reported the allegation to the NRC. *See* letter from Jane Swanson, SLOMFP, to Harry A. Freeman, NRC Allegations Coordinator (December 15, 2005).

C. The NRC's Rationale for Limiting the Characteristics of the DBT Appears to be Based on Invalid Cost Considerations.

As stated in the preamble to the proposed rule:

> . . . the DBT is based upon review and analysis of actual demonstrated adversary characteristics in a range of terrorist attacks, *and a determination as to the attacks against which a private security force could reasonably be expected to defend.*

70 Fed. Reg. at 67,385 (emphasis added). Nowhere in the proposed rule does the Commission explain what it means by "attacks against which a private security force could reasonably be expected to defend." Absent any other explanation, the use of the phrase implies that the scope of the DBT has been limited by considerations of cost to the licensee, which is not permitted for measures that are necessary for protection of public safety. *Union of Concerned Scientists v. NRC,* 824 F.2d 103 (D.C. Cir. 1987).

As the D.C. Ciruit of the U.S. Court of Appeals has ruled, the NRC has two categories of safety regulations: those that are "necessary" for the protection of public health and safety, and those that are merely "desirable." *Id.* With respect to regulations that are necessary for protection of public health and safety, the statute precludes any consideration of the costs of those measures. *Id.* Only with respect to measures that are considered merely "desirable" may the NRC consider their costs. *Id.*

The Atomic Energy Act treats security in the same manner as safety: cost considerations are precluded for "necessary" security measures, and permitted only for "desirable" measures. For example, Section 103(d) prohibits the NRC from issuing a nuclear power plant license "if, in the opinion of the Commission, the issuance of a license . . . would be inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d). Similarly, Sections 57(c)(2) prohibits the Commission from issuing a license to handle special nuclear material if the issuance of such a license would be "inimical to the common defense and security or would constitute an unreasonable risk to the health and safety of the public." 42 U.S.C. §§ 2077(c)(2). The lack of discretion or any reference to cost considerations shows Congress' intent that costs could not be taken into account in meeting these minimal standards. *Union of Concerned Scientists v. NRC,* 824 at 114-15. On the other hand, Section 161(b) allows the NRC to promulgate standards that are "necessary *or desirable* to promote the common defense and security or to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b) (emphasis added). Thus, in setting security standards that are merely "desirable" as opposed to "necessary," the Commission may consider costs. *Union of Concerned Scientists v. NRC,* 824 F.2d at 114.

The notice of proposed rulemaking makes it clear that the NRC's proposed revisions to the DBT fall into the non-discretionary category of measures considered "necessary" for protection of public safety and security:

> The principal objectives of the proposed rule, are among other things, to make generally applicable the security requirements previously imposed by the Commission's April 29, 2003 DBT orders, and to define in NRC regulations *the level of security necessary to ensure adequate protection of the public health and safety and common defense and security.*

70 Fed. Reg. at 67,381 (emphasis added). As such, the DBT revisions must be based on safety and security considerations, without regard to their costs.

Yet, the preamble to the proposed rule suggests that, in violation of this prohibition, the NRC has taken the costs of security measures into account in determining the severity of the DBT against which licensees should be required to protect. As discussed in the preamble to the proposed rule, the DBT is based in part on "a determination as to the attacks against which a private security force could reasonably be expected to defend." 70 Fed. Reg. at 67,385 (emphasis added). This language suggests that the DBT excludes some types of terrorist attacks that are reasonable to anticipate, but which the NRC considers too costly to defend against. To exclude certain hypothetical attacks from the DBT, based on the cost to the licensee of defending against them, would blatantly violate the Atomic Energy Act's prohibition against cost consideration in establishing minimum safety and security standards. The DBT should be based on an objective standard that is related to the expected characteristics of the adversary, not to the size of the licensee's budget.

D. To the Extent That the NRC Relies on Factors Other Than Cost Considerations to Limit the Scope of the Revised DBT, Its Rationale Is Unacceptably Vague, Subjective, and Unsupported.

If the NRC has relied on some considerations rather than costs in determining what measures could reasonably be expected of a licensee, it has given the public no hint of what those considerations might be. The NRC's failure to explain the technical rationale for determining what security measures are reasonably required of a licensee constitutes a gross violation of the APA. "If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals." *Connecticut Light & Power v. NRC,* 673 F.2d 525, 530 (D.C. Cir. 1982); *Engine Manufacturers Association v. EPA,* 20 F.3d 1177, 1181 (D. C. Cir. 1994).

E. The Proposed Rule Is Inadequate Because It Fails to Explain the Type of Adversary Force That Would Be Exempted From 10 C.F.R. § 73.1 Coverage As an Enemy of the State.

The proposed rule is also grossly deficient with respect to its complete failure to explain the difference between an "adversary force," against which licensees must be prepared to defend under 10 C.F.R. § 73.1, and "an enemy of the United States," from which nuclear power plant licensees are excused from defending their facilities under 10 C.F.R. § 50.13.

The NRC addressed this issue in 1994, when it promulgated a new rule for defense of nuclear power plants against vehicle bombs. *See* Vehicle bomb Rule, 59 Fed. Reg. 38,889. In the preamble to the new regulations, the Commission addressed arguments from the nuclear industry that vehicle bombers constituted "enemies of the state" against which they should not be required to protect:

> The issue raised in a contested application for a power reactor construction permit, which led to the promulgation of 10 CFR 50.13, was whether the reactor should be constructed to withstand a missile attack from Cuba. There is a significant difference in the practicality of defending against a missile attack and constructing a vehicle barrier at a safe standoff distance from vital areas.
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> The statement of considerations for 10 CFR 50.13 makes it clear that the scope of that regulation is to relieve applicants of the need to provide protective measures that are the assigned responsibility of the nation's defense establishment. The Atomic Energy Commission recognized that it was not practical for the licensees of civilian nuclear power reactors to provide design features that could protect against the full range of the modern arsenal of weapons. The statement concluded with the observation that assessing whether another nation would use force against a nuclear power plant was speculative in the extreme and, in any case, would involve the use of sensitive information regarding both the capabilities of the United States' defense establishment and diplomatic relations.
>
> The new rule, with its addition to the design basis threat and added performance requirements, is in response to a clearly demonstrated domestic capability for acts of extreme violence directed at civilian structures. The participation or sponsorship of a foreign state in the use of an explosives-laden vehicle is not necessary. The vehicle, explosives, and know-how are all readily available in a purely domestic context. It is simply not the case that a vehicle bomb attack on a nuclear power plant would almost certainly represent an attack by an enemy of the United States, within the meaning of the phrase in 10 CFR 50.13.

59 Fed. Reg. at 38,893. Elsewhere in the rulemaking notice, the Commission stated:

> The vehicle bomb attack on the World Trade Center represented a significant change to the domestic threat environment that ... eroded [our prior] basis for concluding that vehicle bombs could be excluded from any consideration of the

> domestic threat environment. For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan and successfully conduct a major vehicle bomb attack. Regardless of the motivations or connections of the conspirators, it is significant that the bombing was organized within the United States and implemented with materials obtained on the open market in the United States. Accordingly, the Commission believes that the threat characterized in the final rule is appropriate.

Id., 59 Fed. Reg. at 38891. These statements suggest the following set of criteria for distinguishing between § 73.1 "adversaries" and § 50.13 "enemies of the state:"

1. Whether defense against the attacker is "practicable," *i.e.*, whether it depends on the use of modern weaponry ordinarily reserved for military defense;
2. Whether the attacker is a foreign government;
3. Whether defending against the attack requires the use of information about the U.S. defense establishment;
4. Whether the attack can be carried out entirely within the United States;
5. Whether the weapons needed for the attack are readily available within the United States, without the need for assistance from a foreign government;
6. Whether a similar attack has been carried out on U.S. soil in the past.

Nowhere in the proposed rule does the Commission explain whether or how it has applied these criteria to the adversary threats that were considered in formulating the proposed rule. The only criteria which appears to have been applied is represented by the cryptic statement that the revised DBT "represents the largest threats against which private sector facilities must be able to defend with high assurance." As discussed above, this criterion smacks of pure cost considerations. Yet, the proposed rule gives no indication that any other criteria were applied.

The proposed rule excludes a number of adversary characteristics that would meet the criteria used in the Vehicle Bomb Rule, *i.e.*, characteristics of the Al Qaeda as it carried out the September 11 attacks. For instance, the rule excuses licensees from defending against more than two teams, although the Al Qaeda attackers were divided into four teams. The rule also excludes airborne attacks, although the September 11 attacks were carried out from the air. The NRC has also excluded waterborne attacks on ISFSIs, even though facilities like the Diablo Canyon ISFSI, located on the exposed California coastline, clearly are vulnerable to an Al Qaeda-style attack by water. The NRC has not seen fit to explain to the public the basis for excluding these types of attacks from the adversary characteristics in the DBT. If the NRC has silently decided that Al Qaeda-like terrorist organizations meet the criteria for an "enemy of the state" and therefore need not be protected against by nuclear facility licensees, it is legally obligated to inform the public. The NRC may not hide or obscure its technical justification for a rulemaking. *MCI Telecommunicatons v. FCC,* 57 F.3d at 1141-42.

In addition to violating the notice and comment requirements of the APA, the Commission's failure to explain the applicability of 10 C.F.R. § 50.13 to its rule, or to otherwise explain the basis for its criteria for determining the DBT adversary renders the rulemaking deficient in two other respects. First, the lack of clarity regarding the types of attackers that are considered to fall under 10 C.F.R. § 73.1 creates a significant opportunity for abuse in the creation and revision of guidance for implementation of the DBT. For instance, the number of attackers in an adversary force is not specified in the rule, and instead is stated in the guidance documents. Thus, the NRC may change the number as threat assessments change over time. 70 Fed. Reg. at 67,382. If the NRC has made a secret determination that Al Qaeda-style terrorist organizations constitute "enemies of the United States" that are not subject to 10 C.F.R. § 73.1, the size of those organizations will never be a relevant consideration in establishing or determining whether to increase the number of attackers assumed in the guidance document. Such a failure could leave the public grossly unprotected from a very real threat.

Second, if indeed the Commission intends to treat sub-national groups like Al Qaeda as enemies of the state against which nuclear licensees are not required to defend, this decision puts a great deal more responsibility on the Department of Defense ("DOD"), which is poorly prepared to respond to terrorist threats on U.S. soil The NRC should be clear about its determination so that the armed forces are clearly warned about the nature and extent of terrorist attacks on U.S. nuclear facilities for which they will be responsible, and so that members of the public who live near nuclear facilities understand the degree to which they are unprotected.

F. The Proposed Rule Violates the Administrative Procedure Act Because it is Based on the Contents of Ex Parte Communications.

While the Commission has failed to disclose to the public the technical basis for its proposed limited definition of the adversary characteristics of the DBT, it appears to have shared the content of the proposed DBT with an exclusive group of parties, including the nuclear industry:

> After soliciting and receiving comments from Federal, State, local agencies and industry stakeholders, the NRC imposed by order supplemental DBT requirements that contained additional detailed adversary characteristics. The Commission deliberated on the responsibilities of the local, State, and Federal governments to protect the nation, and the responsibility of the licensees to protect individual nuclear facilities, before reaching consensus on a reasonable approach to security in the April 23, 2003 DBT orders. After gaining experience under these orders over the past two years, the Commission believes that the attributes of the orders should be generically imposed on certain classes of licensees.

70 Fed. Reg. at 67,381. Thus, it appears that in violation of the APA, the NRC conducted a sort of private rulemaking on the scope of 10 C.F.R. § 50.13 as it relates to 10 C.F.R. § 73.1.

Clearly, question of how responsibility for protecting nuclear facilities is apportioned among State authorities, Federal agencies, and nuclear licensees is a matter of gravest importance to the neighbors of nuclear facilities. While SLOMFP does not seek the publication of sensitive or safeguards information about this issue, we believe it should be possible for the NRC to disclose and take comment on the general legal and technical principles that were discussed, just as these issues were discussed in the Vehicle Bomb Rule. *Home Box Office, Inc. v. FCC,* 576 F.2d 9, 57 (D.C. Cir. 1977), *cert. denied, American Broadcasting Companies, Inc. v. Home Box Office, Inc.,* 433 U.S. 829.

III. CONCLUSION

The NRC's proposed rule falls dismally short of what the Atomic Energy Act and the Administrative Procedure Act require for adequate protection of public health and security and accountability to the public. The only viable remedy for the many and significant deficiencies in the proposed rule is to revise and re-publish it for another round of comment.

Respectfully submitted,

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January 23, 2006

ERRATA TO COMMENTS BY SAN LUIS OBISPO MOTHERS FOR PEACE ON NRC PROPOSED RULE REGARDING DESIGN BASIS THREAT FOR PROTECTION OF NUCLEAR FACILITIES AGAINST SABOTAGE AND THREAT OF STRATEGIC SPECIAL NUCLEAR MATERIAL

San Luis Obispo Mothers for Peace hereby submits the following errata to the comments that it filed on January 23, 2006, regarding the proposed rule entitled "Design Basis Threat," 70 Fed. Reg. 67,380 (November 7, 2005). A corrected copy of the comments is attached.

Page	Line	Change
2	18	Delete "an" before "providing"
4	4	Change "reduces" to "reduce"
6	32	Change "UCS" to "SLOMFP"
7	1	Change "Recently" to "In December 2005"
7	1	Change "early December" to "May 2005"
9	1	Change "F." to "E."
11	23	Change "G." to "F."

Respectfully submitted,

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March 1, 2006

From: Diane Curran <dcurran@harmoncurran.com>
To: SECY <SECY@nrc.gov>
Date: Wed, Mar 1, 2006 4:22 PM
Subject: Corrected comments on proposed DBT rule

Dear SECY,

On behalf of the San Luis Obispo Mothers for Peace, I am attaching an errata sheet and a corrected copy of SLOMFP's comments on the proposed Design Basis Threat Rule. These comments were filed January 23, 2006.

Separately, I am mailing hard copies of the corrected comments and SLOMFP's revised comments, which were filed on February 22, 2006.

Sincerely,

Diane Curran

CC: Jill ZamEk <Jzk@charter.net>, Morgan Rafferty <mrafferty805@charter.net>, Glenn Tracy <GMT@nrc.gov>

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Subject: Corrected comments on proposed DBT rule
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