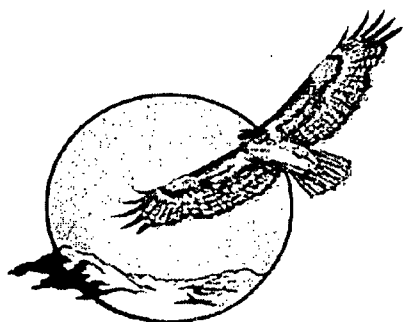


DOCKETED
USNRC

September 7, 2007 (7:48am)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Docket No. 70-3098-MLA



Tri-Valley CAREs


nuclear watch new mexico

MOX Limited Appearance Statement

September 6, 2007

Judges Michael C. Farrar (Chairman), Lawrence G. McDade, and Nicholas G. Trikouros
Atomic Safety & Licensing Board
MOX Limited Appearance Box
Atomic Safety and Licensing Board Panel
Mail Stop T-3F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Atomic Safety & Licensing Board Judges:

Nuclear Watch South, the Blue Ridge Environmental Defense League, and the Nuclear Information & Resource Service have filed a contention requesting a hearing concerning the lack of environmental analysis on the potential consequences of terrorism or sabotage at the MOX plutonium fuel factory proposed for the Savannah River Site. Thank you for this opportunity to add our comments to the MOX record on this urgent matter.

In Contention Five "Failure to Address Impact of Terrorist Attacks on Plutonium Fuel Facility and Transport" the citizens' petition refers to the recent 9th Circuit Decision (*Mothers for Peace vs. NRC*). We bring to your attention a subsequent 9th Circuit decision that required the Department of Energy (DOE) to consider the potential consequences of terrorist threats to a BioSafety Level-3 facility at the Lawrence Livermore National Laboratory.

The relevant part of this 9th Circuit decision was

Concerning the DOE's conclusion that consideration of the effects of a terrorist attack is not required in its Environmental Assessment, we recently held to the contrary in San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016 (9th Cir. 2006). In Mothers for Peace, we held that an Environmental Assessment that does not consider the possibility of a terrorist attack is inadequate. Id. at 1035. Similarly here, we remand for the DOE to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement. As in Mothers for Peace, we caution that there "remain open to the agency a wide variety of actions it may take on remand [and]... [w]e do not prejudge those alternatives." Id. *Memorandum, Tri-Valley CAREs et al v. Department of Energy, October 16, 2006, No.04-17232, D.C. No. CV-03-03926-SBA*, all punctuation in the original.

Following the 9th Circuit's Memorandum, on December 1, 2006, the Office of NEPA Policy and Compliance for DOE issued its own memorandum, with the subject line "Need to Consider Intentional Destructive Acts in NEPA Documents" (attached herein for the record and available at http://www.eh.doe.gov/nepa/tools/terrorism--interim_Nepa_guidance.pdf). That DOE memorandum directed that all of its future environmental impact statements and environmental assessments "explicitly address potential environmental consequences of intentional destructive acts (i.e., acts of sabotage or terrorism)." Parenthesis in the original. It further stated that this new policy "applies to all DOE proposed actions, including both nuclear and non-nuclear proposals."

As you no doubt know, the NRC appealed the Mothers for Peace decision to the U.S. Supreme Court. However, the highest court denied certiorari in January 2007, and therefore the Ninth Circuit decision became binding law within that Circuit. We recognize that it is not binding law in any other circuit, but can be considered as highly persuasive precedent, particularly since there is currently no contrary case law that we are aware of in any circuit.

On its web site, the NRC itself says that the National Environmental Policy Act is one of the key pieces of legislation that govern NRC operations. Related, DOE has already

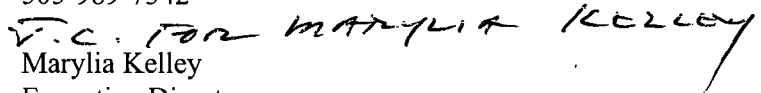
conceded its obligation to analyze Intentional Destructive Acts in environmental impact statements and environmental assessments under NEPA. The NRC also describes its commitment to protecting public health and safety as one of its core organizational values. To sum up, given the U.S. Supreme Court's refusal to hear the NRC's appeal, DOE's concession that it must analyze Intentional Destructive Acts, and NRC's publicly stated commitment to protect the public, we believe it follows that this Board should grant a hearing on a subject of paramount public interest and concern.

NRC licensing of a major DOE manufacturing facility establishes important precedents, not the least of which should be to provide solid analysis of the risk borne by the general population in case of terrorism or insider sabotage at a facility that could have "Materials at Risk" of between 34 to 78 tons of weapons grade plutonium. Such analysis is vital to emergency planning for the affected public. We strongly hope that this Atomic Safety & Licensing Board will choose to exercise its power to force this minimal standard, which is that Intentional Destructive Acts should be analyzed in the EIS for the MOX plutonium fuel factory.

Respectfully submitted,



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United States Government

Department of Energy

memorandum

DATE: December 1, 2006

REPLY TO
ATTN OF: Office of NEPA Policy and Compliance (ECohen: 202-586-7684)

SUBJECT: Need to Consider Intentional Destructive Acts in NEPA Documents

TO: DOE NEPA Community
(list attached)

In light of two recent decisions by the United States Court of Appeals for the Ninth Circuit, DOE National Environmental Policy Act (NEPA) documents, including environmental impact statements (EISs) and environmental assessments (EAs), should explicitly address potential environmental consequences of intentional destructive acts (i.e., acts of sabotage or terrorism). This interim guidance has been developed by the Office of NEPA Policy and Compliance, in consultation with the Assistant General Counsel for Environment and the Deputy General Counsel of the National Nuclear Security Administration. More detailed guidance on this matter is in preparation.

The more recent of the court's two decisions involved DOE's EA for *Construction and Operation of a Biosafety Level-3 Facility at Lawrence Livermore National Laboratory* (DOE/EA-1442, 2002). In that October 16, 2006, decision, *Tri-Valley CAREs v. Department of Energy*, the court wrote:

Concerning the DOE's conclusion that consideration of the effects of a terrorist attack is not required in its Environmental Assessment, we recently held to the contrary in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006). In *Mothers for Peace*, we held that an Environmental Assessment that does not consider the possibility of a terrorist attack is inadequate. *Id.* at 1035. Similarly here, we remand for the DOE to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement. As in *Mothers for Peace*, we caution that there "remain open to the agency a wide variety of actions it may take on remand [and]. . . [w]e do not prejudge those alternatives." *Id.*

A summary of the court's decision in *Mothers for Peace* is contained in DOE's NEPA *Lessons Learned Quarterly Report*, September 2006, page 19 (available on the DOE NEPA website at www.eh.doe.gov/nepa under Lessons Learned Quarterly Reports).

Each DOE EIS and EA should explicitly consider intentional destructive acts. This applies to all DOE proposed actions, including both nuclear and non-nuclear proposals.

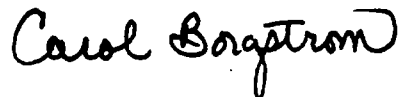
Partial guidance on analyzing intentional destructive acts in NEPA documents is contained in *Recommendations for Analyzing Accidents under NEPA* (July 2002;

available on the DOE NEPA website under Selected Guidance Tools). This guidance includes example language and a discussion of ways to apply an analysis of accidents to an analysis of the potential consequences of acts of sabotage or terrorism. This approach may be appropriate for many, if not most, situations where the potential sabotage or terrorist scenarios and the accident scenarios involve similar physical initiating events or forces (e.g., fires, explosions, drops, punctures, aircraft crashes). This approach may not be adequate for all situations, however, because accident scenarios may not fully encompass potential threats posed by intentional destructive acts. For example, this approach may not adequately reflect the threat assessments for facilities with inventories of special nuclear materials. Each EIS and EA should explicitly consider whether the accident scenarios are truly bounding of intentional destructive acts. Regardless of whether additional analysis is necessary, each EIS and EA should contain a section demonstrating explicit consideration of sabotage and terrorism.

The Department is developing new guidance on considering intentional destructive acts in NEPA documents, and expects that the guidance will address such topics as:

- Determining the appropriate level of detail for analysis, consistent with the “sliding-scale” principle (e.g., a more detailed threat analysis is appropriate for a special nuclear material management facility, or for a non-nuclear facility with a significant amount of material at risk; a less detailed analysis may be adequate for a proposed office complex).
- Determining when a finding of no significant impact for an EA is appropriate in view of potential large impacts from terrorist acts.
- Determining what information regarding analyses of these threats can be released to the public.
- Considering intentional destructive acts even when some or all of the analyses may be classified; protecting classified security information through the use of classified appendices and unclassified summaries.
- Timing considerations for cases where threat analyses are needed.

While this further guidance is in preparation, DOE NEPA practitioners should immediately implement the guidance in this notice to explicitly consider the potential impacts of intentional destructive acts in NEPA documents, and should consult with the Office of NEPA Policy and Compliance and, depending on the organization that is preparing the NEPA document, either the DOE or NNSA Office of the General Counsel.



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Director
Office of NEPA Policy and Compliance

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Michael C. Farrar, Chairman
Nicholas G. Trikouros
Dr. William M. Murray

In the Matter of)

Shaw Areva MOX Services)

(Mixed Oxide Fuel Fabrication Facility)
Possession and Use License))

Docket No. 70-3098-MLA

ASLBP No. 07-856-02-MLA-BD01

September 6, 2007

CERTIFICATE OF SERVICE

I hereby certify that copies of Tri-Valley Cares and Nuclear Watch of New Mexico's MOX Limited Appearance Statement were e-mailed to the following with hard copies served by First Class U.S. Mail.

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September 6, 2007
in Santa Fe, NM