October 31, 1979

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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| In the Matter of | ) | |
| | ) | |
| METROPOLITAN EDISON COMPANY | ) | Docket No. 50-289 |
| | ) | (Restart) |
| (Three Mile Island Nuclear Station, Unit 1) | ) | |

## LICENSEE'S BRIEF OPPOSING ADMISSION OF PSYCHOLOGICAL DISTRESS CONTENTIONS

The Nuclear Regulatory Commission (Commission) in its August 9, 1979 Order and Notice of Hearing stated that "[w]hile real and substantial concern attaches to issues such as psychological distress and others arising from the continuing impact of aspects of the Three Mile Island accident unrelated directly to exposure to radiation on the part of citizens living near the plant, the Commission has not determined whether such issues can legally be relevant to this proceeding." 44 Fed. Reg. 47821, 47824 (August 15, 1979). Accordingly, the Commission requested that parties wishing to raise such subjects as contentions brief the Atomic Energy Act (AEA or Act) and National Environmental Policy Act (NEPA) issues believed appropriate as part of the contention acceptance process. Implementing this Commission directive, the Atomic Safety and Licensing Board (Licensing Board), in its September 21, 1979 Memorandum and Order Ruling on Petitions and

Setting Special Prehearing Conference, directed that the briefs requested in the Commission's Order accompany the supplemental petitions and final contentions called for by October 22, 1979. Licensing Board Memorandum and Order, at p. 24.

Although a number of petitioners have sought to raise contentions dealing with psychological distress issues, only three briefs responsive to the Commission's Order have been filed. Petitioners People Against Nuclear Energy (PANE) maintain that the Commission is required to consider psychological distress contentions pursuant to both the Atomic Energy Act and NEPA. Petitioners Newberry Township T.M.I. Steering Committee et al. (Newberry petitioners) and the Commonwealth of Pennsylvania, while not addressing the AEA issue, argue that psychological distress contentions must be considered under NEPA.

In this responsive brief, Licensee submits that "psychological distress"[1] is not cognizable by this Commission under either the Atomic Energy Act or the National Environmental Policy Act.

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1 It should be emphasized at the outset that the "psychological distress" question at issue here is not whether the TMI-2 accident had psychological impacts on the surrounding populace, but whether additional psychological distress will result from the restart of operations at TMI-1, and whether such alleged additional distress (and its consequences) is a cognizable factor in this proceeding.

I. Psychological Distress Is Not Cognizable Under the Atomic Energy Act.

The first issue is whether psychological distress is cognizable under the Commission's public health and safety responsibilities pursuant to the Atomic Energy Act of 1954. This issue is purely one of statutory construction of that Act. The question is not the meaning of "health" in an abortion statute, or in a statute governing zoning of mental health facilities, or in common law developments allowing a mother to recover damages on seeing her child killed in an automobile accident. Compare PANE Brief at pp. 3-4, 7-13. Rather, the focus is properly on the intent of the Congress which assigned public health and safety responsibilities to the Atomic Energy Commission, which responsibilities were subsequently assumed by the Nuclear Regulatory Commission. The standards for assessing Congressional intent are familiar,[2] and they have been applied in considered fashion to precisely the question now before the Commission: the proper scope of the Commission's public health and safety responsibilities under the Atomic Energy Act. State of New Hampshire v. Atomic Energy Commission, 406 F.2d 170 (1st Cir.), cert. denied, 395 U.S. 962 (1969). In that case, decided prior to the enactment of NEPA, the First Circuit considered whether the Commission erred in refusing to

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2 See, e.g., Power Reactor Development Co. v. International Union of Electrical Workers, 367 U.S. 396, 408 (1961); Udall v. Tallman, 380 U.S. 1, 16 (1965).

consider, as outside its regulatory jurisdiction, evidence of thermal pollution resulting from discharge of cooling water by applicant's nuclear facility. The court, while plainly concerned by "the unnecessary dilemma of choosing between harming natural environment, with harmful effects on even the health and well being of humans, and frustrating the needed production of power," id. at 173 (emphasis added), and while finding "considerable appeal" to plaintiff's plea that the statutory reference to "health and safety of the public" be accorded its "present day plain meaning," id., nevertheless concluded that it could not responsibly construe the statutory language as urged by plaintiff. Rather, considering itself bound by compelling contrary evidence of Congressional purpose and intent, the court validated the Commission determination that the scope of its public health and safety responsibilities under the Act was limited to radiological health and safety. The analysis and conclusions of the State of New Hampshire court require a similar result here -- that psychological distress is outside the scope of the Act and that the Commission may not accept contentions relating to psychological distress pursuant to the Act.

Because State of New Hampshire is so closely on point, and because no other case speaks so directly to the issue presented here, more detailed discussion of the First Circuit's reasoning in that case can usefully illustrate both the proper framework

for analysis and the weaknesses of PANE's argument under the Act.

It is apparent from the First Circuit's opinion that petitioner's argument in State of New Hampshire bears striking resemblances to the arguments presented by PANE in this case. This is most notable with respect to PANE's emphasis on the purported "plain meaning" of the AEA's public health and safety rubric, as illustrated by dictionary definitions and court decisions considering the meaning of "health" in different, unrelated statutory and common law contexts. The First Circuit in State of New Hampshire noted the appeal of a similar plea in that case, particularly in light of the absence of any statutory definition of "health" or "safety" in the Act itself. Yet, despite this temptation, the court concluded, properly, that "we do not * * * fulfill our function responsibly by simply referring to the dictionary." 406 F.2d at 173. Rather, invoking time-honored cautions voiced by Justices Holmes and Cardozo, the court concluded that it was constrained from succumbing to the temptation of an otherwise appealing but unsupported reading of the Act by

> a very palpable restriction in the history surrounding the problem addressed by the Congress, the subsequent Congressional confirmation of the limited approach taken by the Commission, the contemporary efforts in the Congress to broaden that approach, and a recognition of the complexity of administrative arrangements which would attend a literal definition of public

> health and safety as these terms are used in the Atomic Energy Act. [Id. at 173-74.]

Most significantly, the court determined that "[t]he history of the 1954 legislation reveals that the Congress, in thinking of the public's health and safety, had in mind only the special hazards of radioactivity." See id. at 174 (emphasis added)(footnote omitted). The court also remarked on the "very special relationship" between the Commission and the Joint Committee on Atomic Energy, a relationship given special credence by the Supreme Court in the interpretation of the meaning of the Atomic Energy Act. Power Reactor Development Co. v. International Union of Electrical Workers, 367 U. S. 396, 401 (1961). In the words of the First Circuit, the Joint Committee "made its focus clear when it said,

> The special problem of safety in the atomic field is the consequence of the hazards, created by potentially harmful radiations attendant upon atomic energy operations."

406 F.2d at 174, quoting Joint Committee Print, A Study of Atomic Energy Commission Procedures and Organization in the Licensing of Reactor Facilities, 85th Cong., 1st Sess., p. 4 (1957). Moreover, the Commission itself, as the Court recognized, "has been consistent in confining itself to these [radiological] hazards," specifying in its regulations and adjudications that the objective under the Atomic Energy Act is "eliminating radiological danger." 406 F.2d at 174.[3]

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3 Indeed, the Commission's regulations implementing its

The final factor considered by the First Circuit as shedding additional light on the scope of the Commission's public health and safety responsibilities under the Act was the history of subsequent amendments to the Act. Here again, the court found convincing evidence that Congress intended that the Commission's regulatory control under its AEA public health and safety responsibilities be limited to radiation hazards. See 406 F.2d at 175; 42 U.S.C. §§ 2021(b), (k). See also Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem. 405 U. S. 1035 (1972)(finding federal preemption under the Act with respect to radiation hazards).

In view of these indicia of Congressional intent,[4] and despite the admitted temptation to accord a broader

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NEPA obligations evidence a continued determination by the Commission that its public health and safety responsibilities under the AEA, as distinct from NEPA, are confined to radiological matters. See 10 C.F.R. §§ 51.20(c), 51.23(c) (providing that "satisfaction of Commission standards and criteria pertaining to radiological effects will be necessary to meet the licensing requirements of the Atomic Energy Act," whereas the "radiological effects of the facility and its alternatives," as well as other factors, will be incorporated in the NEPA cost-benefit analysis).

4 PANE's sole discussion seeking to conform its position to the legislative history of the AEA and governing principles of statutory construction consists of a quotation from the Senate Report accompanying the Atomic Energy Act of 1946 to the effect that the Commission was to "establish safety and health regulations for the possession and use of fissionable and byproduct materials to minimize the danger from explosion, radioactivity and other harmful or toxic effects incident to the presence of such materials." From this unexceptionable statement accompanying the predecessor legislation to the Atomic Energy Act of 1954, PANE concludes that "[t]his language arguably requires specific consideration of

significance to the Act's public health and safety terminology, the First Circuit rejected petitioner's plea for such an expansive reading of the statutory language on the basis of its conclusion

> that, in enacting the Atomic Energy Acts of 1946 and 1954, in overseeing its administration, and in considering amendments, the Congress has viewed the responsibility of the Commission as being confined to scrutiny of and protection against hazards from radiation. [406 F.2d at 175; emphasis added.]

As already noted, neither the Commonwealth of Pennsylvania nor Newberry petitioners, both of whom urge the Commission to consider psychological distress contentions in this proceeding, has seen fit to argue that such contentions are cognizable under the AEA. Only PANE has sought to make such an argument, relying primarily on dictionary definitions and on a host of cases having nothing to do with the Atomic Energy Act.[5] See PANE Brief, pp. 3-4, 7-13. Indeed, PANE's attempt to

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psychological hazards." See PANE Brief at p. 5. That "argument" simply falls of its own weight; there is not the slightest indication in the quoted statement, or elsewhere in the legislative history of the 1946 or 1954 Acts, that Congress intended psychological impacts to be considered by the Commission.

5 For example, PANE makes a considerable point of the claim that its members "would have a cause of action in tort for mental distress damages ***." PANE Brief at p. 12. Surely PANE does not contend that this proceeding is the appropriate forum for litigating such a supposed cause of action. Nor is it apparent what relevance the existence of such a cause of action would have to a determination of the issues to be considered in this proceeding.

distinguish the First Circuit's comprehensive analysis of the scope of the Commission's public health and safety responsibilities is relegated to a footnote, characterizing the only reasonably on-point judicial decision as "somewhat narrow" and arguing that the case "has been superceded [sic] * * * since NEPA now requires the Commission to condition nuclear plant licenses so as to minimize or avoid environmental effects such as thermal pollution * * *." PANE Brief at p. 5, n. 1. To be sure, NEPA has expanded the Commission's statutory mandate; the Commission is now "under a dual obligation: to pursue the objectives of the Atomic Energy Act and those of the National Environmental Policy Act." Public Service Company of New Hampshire v. N.R.C., 582 F.2d 77, 86 (1st Cir. 1978). In particular, "NEPA provides the congressional mandate to force 'timely and comprehensive consideration of non-radiological pollution effects in the planning of installations' * * * which was previously missing." 582 F.2d at 81, n.6. Thus, to the extent non-radiological environmental effects are cognizable by the Commission under NEPA, such effects may now be examined by the Commission -- under NEPA. There is, however, no suggestion in the Public Service case, or elsewhere, that NEPA's passage, while clearly expanding the Commission's overall mandate, expands the reach of the Atomic Energy Act per se. Thus, there is no reason to believe that the First Circuit's analysis of the scope of the Commission's responsibilities under the Atomic

Energy Act in the State of New Hampshire case is any less valid today than when it was handed down.[6] That analysis compels the conclusion that non-radiological impacts, including alleged psychological distress, are outside the scope of the Commission's authority under the Atomic Energy Act. Psychological distress contentions are thus not cognizable under the AEA, and must be rejected in this proceeding unless cognizable under NEPA. As the next section of this brief demonstrates, judicial precedent establishes that psychological distress is also not cognizable under NEPA.

## II. Psychological Distress is Not Cognizable Under NEPA.[7]

Neither the National Environmental Policy Act nor the implementing regulations promulgated by the Council on

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6 Apparently recognizing the weakness of its attempt to downplay the continuing vitality of the First Circuit's analysis in State of New Hampshire, PANE seeks to erect a second line of defense against the import of that decision: that "the health effect here [identified as "the colorless, odorless threat of radiation"] is not of the sort that could accompany a coal fired generating plant or similar major industrial activity other than nuclear power." PANE Brief at p. 6, n.1. We find the relevance of that observation somewhat obscure. Certainly individuals subjected to a broad range of industrial accidents or accident-scares -- not to speak of natural disasters -- may consider that they have suffered psychological distress, and may fear a recurrence. Correspondingly, neighbors of coal-fired generating plants may consider themselves threatened by possible health effects of low-level radiation emanating from coal piles -- as well as by other, more colorful and odiforous pollutants. In any case, we perceive no legal or logical basis for the assertion that psychological distress is a "radiation hazard" within the contemplation of the Act.

7 This discussion relates solely to the Commission's NEPA obligations with respect to psychological distress contentions. The more general question of whether NEPA otherwise requires preparation of a supplemental final environmental

Environmental Quality, 43 Fed. Reg. 55978 (November 29, 1978), or by this Commission, see 10 CFR Part 51, explicitly address the cognizability of alleged "psychological distress" under NEPA. However, a number of federal courts have considered precisely this issue. Their conclusion is that psychological distress is outside the scope of NEPA, however broad that scope might be. The courts have predicated this conclusion on two factors, which may be referred to in shorthand fashion as measurability and basis. Several courts have indicated quite clearly that speculative or immeasurable factors -- specifically including psychological distress -- are not cognizable under NEPA. Despite the contrary suggestion by PANE, see PANE Brief at p. 18, n.3, these cases do not hold that psychological distress, if measurable, would be cognizable as such. Rather, the judicial precedents indicate that where substantial community fears are present with respect to a proposed federal action, it may be incumbent on the federal agency to examine the underlying bases for those fears. For example, where the community is apprehensive about the threat of increased crime associated with the construction of a detention facility, the agency should in fact examine whether the proposed action will result in increased crime and take steps to mitigate such

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statement prior to restart is addressed in a separate filing, "Licensee's Brief on the Issue of Preparing an FES Prior to TMI-1 Restart."

consequences. Similarly, where a community is apprehensive about the radiological hazards posed by operation of a nuclear facility, the agency is required to take a "hard look" at the safety of the facility and whether there is reasonable assurance that the plant will pose no hazard to the health and safety of the public. That has been done with respect to TMI-1, and such new issues as have been raised by the TMI-2 accident will be examined in the context of this proceeding. TMI-1 will not be permitted to resume operation unless and until this Commission, in its expert judgment, has determined that the bases for suspension have been rectified. NEPA neither requires nor permits unfounded community fears or psychological distress alleged to result from plant operation to affect this determination.

This analysis is amplified in the following discussion, whose purpose is to assist the Commission in understanding the reasoning evolved by the courts in a series of major NEPA decisions concerning psychological impacts and in evaluating the applicability of that reasoning to the facts of the instant case. Contrary to the suggestion of the Commonwealth of Pennsylvania, it is submitted that petitioners in this proceeding cannot "distinguish easily" the psychological harms allegedly attributable to renewed operation of TMI-1 from the pyschological harms alleged and found not to be cognizable in the decided cases. The briefs submitted to the Commission have

certainly articulated no such persuasive distinction. Indeed, careful study of existing judicial precedent compels the conclusion that petitioners' psychological distress contentions are not cognizable under NEPA and must be rejected.

A. Existing NEPA Cases Reject the Cognizability of Psychological Distress.

The leading set of cases involving fear or psychological effects arose from a decision by the General Services Administration and the Federal Bureau of Prisons to construct a federal detention facility, the Metropolitan Correction Center (MCC), in lower Manhattan. The case had three separate incarnations before the Second Circuit, Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972) ("Hanly I"); Hanly v. Kleindienst, 471 F.2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973) ("Hanly II"); and Hanly v. Kleindienst, 484 F.2d 448 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) ("Hanly III"). The court each time held that a full EIS was not required, but twice returned the case to the agency for progressively more detailed environmental assessments.

In the first round before the Second Circuit, plaintiffs claimed

> that the living environment of all the families in this area will be adversely affected by the presence of the jail and by the fears of "riots and disturbances" so generated.

460 F.2d at 646 (emphasis added). The court noted that the GSA "environmental statement" contained "no hint that such possible disturbances were considered" or that other, more routine considerations, such as traffic or parking problems, received thoughtful discussion," id., and held that NEPA "must be construed to include protection of the quality of life for city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs all affect the urban environment" and "should not be ignored." Id. While recognizing that "some of plaintiffs' fears are vague and speculative", the court concluded "clearly all of them are not and the 'responsible official' of GSA has apparently never considered any of them." Id. Accordingly, the court remanded the case and required GSA to make "a proper determination under section 102(2)(C), taking account of all relevant factors, of whether the proposed jail significantly affects the quality of the human environment." Id. at 648.

Hanly I certainly provides precedent for the view that certain factors affecting the well-being of urban dwellers are cognizable under NEPA. That is not to say, however, that community "fears" are cognizable as such. Rather, read in context, the court's reference to those of plaintiffs' fears which were not "vague and speculative" was plainly meant not to refer to the fears themselves but to those social realities which are feared, and which provide a real basis for fear: such

things as "noise, traffic * * * crime, congestion, and even availability of drugs * * *." Hanly I neither holds that unsubstantiated psychological fears are themselves, independent of any basis, cognizable under NEPA, nor suggests that such fears should be viewed as health effects in themselves.

These conclusions are reinforced by Hanly II. Following the Hanly I remand, the GSA prepared a more detailed environmental assessment, once again concluding that the MCC was not a facility "significantly affecting the quality of the human environment." This determination was again challenged, and the case worked its way back to the Second Circuit. That court summarized its earlier holding as requiring the agency

> to give attention to other factors that might affect human environment in the area, including the possibility of riots and disturbances in the jail which might expose neighbors to additional noise, the dangers of crime to which neighbors might be exposed as the consequence of housing an out-patient treatment center in the building, possible traffic and parking problems * * * and the need for parking space * * *.

Id. at 827. The court then observed that GSA's 25-page environmental assessment

> reflects a detailed consideration of numerous relevant factors. Among other things, it analyzes the size, exact location, and proposed use of the MCC; its design features, construction, and aesthetic relationship to its surroundings; the extent to which its occupants and activities conducted in it will be visible by the community; the estimated effects of its operation upon traffic, public transit and parking facilities; its approximate population, including detainees and employees; its effect on the level of noise, smoke, dirt, obnoxious odors, sewage and solid

> waste removal; and its energy demands. It also sets forth possible alternatives, concluding that there is none that is satisfactory. Id.

The court then undertook a detailed review of the substance of the GSA assessment, noting, inter alia, the assessment's description of "efforts that will be made to minimize any contact between detainees and members of the community," id. at 832, including darkened windows "designed to insulate the community from visual contact with the detainees," id., as well as from noise, id. at 833, and prisoner access routes and recreational areas also designed to minimize visibility. The court further noted that there had only been two small inside disturbances and three non-violent outside disturbances during the past five year period at the existing detention facilities. With respect to these factors, the court found that the GSA assessment "[o]n its face * * * indicates that GSA has redetermined the environmental impact of the MCC with care and thoroughness." Id.

The court then stated that plaintiffs offered little or no evidence to contradict these detailed facts, observing that "for the most part their opposition is based upon a psychological distaste for having a jail located so close to residential apartments, which is understandable enough." Id. The court clearly indicated its view of the non-cognizability of such "psychological distaste" under NEPA:

> It is doubtful whether psychological and sociological effects upon neighbors

> constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement. 10/
>
> 10/ Unlike factors such as noise, which can be related to decibels and units which measure duration, or crime, in which crime statistics are available, psychological factors are not readily translatable into concrete measuring rods.

471 F.2d at 833 & n.10. That this comment amounted to a considered statement by the court on the subject of psychological effects is made clear by the presence in Chief Judge Friendly's dissenting opinion of an extended passage on precisely this question. 471 F.2d at 839-40.[8]

The majority's ultimate remand in Hanly II was based in part on certain factual issues which the court held to require further consideration and findings by GSA: the "possibility that the MCC will substantially increase the risk of crime in the immediate area" and the possibility that community treatment and outpatient programs would "endanger the health and safety of the immediate area by exposing neighbors and passersby to drug addicts visiting the MCC for drug maintenance

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8 At least one district court has cited Hanly II flatly for the proposition that "NEPA does not require an evaluation of the psychological and sociological effects of a prison on people who live nearby." Monarch Chemical Works, Inc. v. Exon, 466 F. Supp. 639, 657 (D. Neb. 1979)(rejecting the claim that socio-economic consequences of the construction of a prison upon industrial and commercial growth need be considered where the correctional facility would have no significant direct effect on the environment. Id. at 655, 656.)

and to drug pushers and hangers-on who would inevitably frequent the vicinity * * *." Id. at 834. The court observed that "if the MCC were to be used as a drug treatment center, the potential increase in crime might tip the scales in favor of a mandatory detailed impact statement." Id.

Two useful strands may be drawn from this analysis of Hanly I and Hanly II. Effects on the quality of the urban environment, including such factors as crime and riots or disturbances which give rise to community fears and "psychological distaste," are cognizable under NEPA and must be considered by a federal agency in determining whether to prepare an EIS. However, the Hanly decisions read together indicate that it is the underlying bases giving rise to community fears, rather than those fears themselves (independent of the substantiality of their causes) which must be examined by agency and court. The proffered rationale for this distinction is the difficulty of measuring fear or psychological distaste.[9] However, the cases are also consistent with an additional rationale, that fears or psychological effects

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9 Judge Leventhal has cited this reasoning with approval in Maryland - National Capital Park and Planning Commission v. United States Postal Service, 487 F.2d 1029 (D.C. Cir. 1973), noting "Some questions of esthetics do not seem to lend themselves to the detailed analysis required under NEPA for a § 102(c) impact statement. Like psychological factors they 'are not readily translatable into concrete measuring rods'." 487 F.2d at 1038.

lacking any substantiated basis do not independently require consideration under NEPA.

Following the court's remand in Hanly II, GSA prepared supplementary findings to its earlier environmental assessments, including determinations that the MCC would not provide a drug maintenance program, immediately or in the future; that no appreciable increase in crime would result from the operation of the MCC (based on a study of crime statistics in precincts housing detention facilities and in precincts not housing such facilities, and on before-and-after studies); and that there would be little chance for contact between detainees, their visitors, and children attending school in the area. The GSA concluded, for the third time, that construction of the MCC was not an action which would significantly affect the quality of the human environment. The district court accepted this determination and, noting that "[i]t appears to this Court, as it apparently has to the Court of Appeals, * * * that plaintiffs' objections to the MCC are primarily psychological," denied plaintiffs' motion for injunctive relief. Hanly v. Kleindienst, 72 Civ. 716 (S.D.N.Y. June 15, 1973).[10] On the

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10 Judge Tenney held generally that the GSA's findings of no adverse environmental impacts with regard to the factors outlined above were not arbitrary or capricious. With respect to the statistical case relating to a rise in crime, the court stated

> While it is true that these statistics do not guarantee that crime will

third appeal, the Second Circuit affirmed per curiam. Hanly III.

This denouement to the Hanly series of cases confirms the lessons already drawn. The courts required and carefully reviewed agency discussion of a range of urban environmental concerns, some of which could potentially provide a basis for justifiable community fears. The courts ultimately accepted less than a "guarantee" of safety, so long as there was foundation in fact for agency determinations. At no point did the courts require, nor did the agency perform, an evaluation of community fears or "psychological distaste" as such.

Roughly contemporaneous with the Hanly litigation in New York was an analogous court battle concerning construction of a federal detention center in downtown Chicago. First National Bank of Chicago v. Richardson, 484 F.2d 1369 (7th Cir. 1973). For present purposes the judicial setting can be summarized as follows:

> the essential contentions of the plaintiffs were that a "jail" and an 850-car parking

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> not increase in the area of the MCC, they do serve as a foundation in fact for such a finding and plaintiffs' unsupported allegations to the contrary do not convince this Court that the findings are arbitrary or capricious.

Slip op. at 7-8 (emphasis added). The Court reached a similar conclusion with respect to possible contacts between detainees and school children. Id. at 8.

> facility have a significant environmental impact; plaintiffs' witnesses were reluctant to state flatly that in their opinions the proposed facility would have a deleterious environmental impact; the impact upon the quality of life of a structure designated as a jail is none the less real because psychological; and a concern for public safety was expressed by some but not all of plaintiffs' witnesses.

Id. at 1375 (emphasis added).

The court reviewed plaintiffs' objections to the adequacy of the GSA environmental assessment, comparing the GSA's treatment of such issues as drug maintenance programs, increased rate of crime, and traffic and parking problems to the treatment of corresponding matters in the New York case. The Seventh Circuit followed Hanly in holding that "NEPA must be construed to include protection of the quality of life for city residents," id. at 1377; it also recognized the difficulties in identifying the environmental problems of the inner-city. With respect to the role of "neighborhood sensibilities" in such decisions, the Seventh Circuit followed Hanly II and indeed took a step beyond it:

> In the Hanly litigation and in this case, the "sensibilities" of the neighborhood have been a factor which the plaintiffs have asserted relates to the environmental impact of the project. As the court in Hanly II observed, "[i]t is doubtful whether psychological and sociological effects upon neighbors constitute the type of factors that may be considered in making such a determination since they do not lend themselves to measurement." 471 F.2d at 833. As regards public "sensibilities" aroused by criminal defendants, we question whether such factors,

> even if amenable to quantification, are properly cognizable in the absence of clear and convincing evidence that the safety of the neighborhood is in fact jeopardized.

Id. at 1380, n.13 (emphasis added).

Thus, presented with the contention that "the impact upon the quality of life of a structure designated as a jail is none the less real because psychological," id. at 1375, the Seventh Circuit questioned whether psychological and sociological effects, even if amenable to quantification, are properly cognizable under NEPA in the absence of convincing evidence "that the safety of the neighborhood is in fact jeopardized." Id. at 1380 n.13. First National Bank thus provides explicit support for the proposition that unsubstantiated fears or psychological effects are not cognizable under NEPA.

Contrary to the suggestion in PANE's Brief (at pp. 18-19), this conclusion is not vitiated by the Second Circuit's decision in Chelsea Neighborhood Associations v. United States Postal Service, 516 F.2d 378 (2d Cir. 1975); indeed, that case provides further support for the proposition that a NEPA analysis looks to the bases for fear rather than to fear per se. The case concerned construction of a large post office vehicle maintenance facility, whose walls were to rise from the sidewalk approximately 80 feet, on top of which would be a flat platform with housing extending upward from there. The court found certain "serious questions" inadequately considered in the EIS:

> What effect will living at the top of an 80-foot plateau have on the residents of the air-rights housing? Will there be an emotional as well as physical isolation from the community? Will that isolation exacerbate the predicted rise in crime due to the increase in population density?

Id. at 388. The court held, citing Hanly I, that an EIS must consider "these human factors." That is appropriate in these circumstances, for the anticipated emotional isolation might have a very real basis in the objective reality of housing alongside an 80 foot precipice, segregated from the remainder of the community. The court noted that the concededly required EIS gave "scant attention" to these issues, and required the agency to develop a fuller record.[11] Thus, in no sense does the Chelsea decision hold that unfounded emotional or psychological impacts are cognizable under NEPA; rather, the case is fully consistent with the approach of the Second Circuit in Hanly and with other courts in requiring examination of the objective factors giving rise to alleged emotional impacts.

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11 In evaluating the significance of the Chelsea decision, it should be noted that the postal service conceded that the project was a major federal action significantly affecting the quality of the human environment, id. at 382, and sought to take credit for the positive aspects of the housing component of the project without considering any potential adverse consequences. This imbalance in approach undoubtedly influenced the court's determination that the EIS was inadequate. See id. at 387.

The role of community fears and psychological effects is examined further in a set of cases considering NEPA obligations in the context of low income housing projects. Once again, there are twin New York and Chicago cases. In the Chicago litigation, Nucleus of Chicago Homeowners Association v. Lynn, 524 F.2d 225 (7th Cir. 1975), cert. denied, 424 U.S. 967 (1976), an organization of residents sought to enjoin construction of low-income, scattered-site housing units in their neighborhood, on the ground that HUD officials failed to file an environmental impact statement. Plaintiffs charged that the proposed construction "will have a direct adverse impact upon the physical safety of those plaintiffs residing in close proximity to the sites, as well as a direct adverse effect upon the aesthetic and economic quality of their lives" so as to "significantly affect the quality of the human environment." 524 F.2d at 228. Both the district court and the court of appeals rejected plaintiffs' claims that "HUD had breached its duty under NEPA to weigh the potential environmental traumas associated with the construction of low-income public housing." Id. at 229. As the Seventh Circuit stated, "to the extent that this claim can be construed to mean that HUD must consider the fears of the neighbors of prospective public housing tenants, we seriously question whether such an impact is cognizable under NEPA," id. at 231 (emphasis added), citing First National Bank of Chicago v. Richardson, supra.

Significantly, both HUD, in conducting its analysis, and the court, in approving the adequacy of HUD's analysis and finding an EIS unnecessary, relied on objective factors, including design and tenant selection and eviction policies, to "diminish the possibility that prospective * * * tenants will pose a danger to the health, safety, or morals of their neighbors." 524 F.2d at 231. Thus, once again, the courts looked to the objective reality underlying community fears, and not to the existence of fear per se, as the touchstone of its NEPA analysis.

The Chicago housing case's New York twin has had an extensive litigative history and is not yet finally settled. Trinity Episcopal School Corporation v. Romney, 387 F. Supp. 1044 (S.D.N.Y. 1974), aff'd in part, rev'd in part, and remanded, 523 F.2d 88 (2d Cir. 1975), on remand, Trinity Episcopal School Corp. v. Harris, 445 F. Supp. 104 (S.D.N.Y. 1978), rev'd and remanded sub nom. Karlen v. Harris, 590 F.2d 39 (2d Cir. 1978). The action was commenced to enjoin conversion of a housing project planned for a site in New York's West Side Urban Renewal Area from a predominantly middle-income project into high-rise, exclusively low-income housing, and to prevent the use of federal funds therefor. One line of attack by plaintiffs was that HUD had failed to prepare a required EIS. In fact, pursuant to its own regulations, HUD had performed an intermediate-level "Special Environmental

Clearance", resulting in a "negative statement" determining that the housing project would not have a significant adverse impact on the environment. Plaintiffs contended "that psychological and social as well as physical factors" must be included in the range of environmental criteria, and that HUD was required to analyze issues "such as neighborhood stability and community attitudes and fears" and "whether the proposed project would cause the Area to 'tip.'" 387 F. Supp. at 1077-78. HUD responded that a NEPA study does not require an analysis of psychological and social factors, that HUD had in fact considered "those measurable factors which bear upon the project's social impact," and that issues such as "community fear of the presence or influx of low-income persons are not measurable factors and therefore not part of a tipping or social impact analysis." Id. at 1078.

The court characterized the legal issues as two-fold:

> (1) Whether NEPA requires consideration of those tangible factors such as the incidence of crime and the quality of schools which are the basis for social attitudes of residents; and (2) Whether such attitudes must also be weighed independently of the tangible factors upon which they may be based. Id.

With respect to the first question, the court easily concluded, following Hanly I, that certain tangible factors "are essential to a NEPA study." Id.[12] With respect to the

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12 The court itemized such issues as including "percentage of minority residents or proximity of public housing projects and the quality of community services such as the degree of crime,

second question, the court noted plaintiffs' argument that an increase in the number of low-income families would "tip" the area via an increase in the incidence of crime "such that middle income residents out of fear for the safety and stability of the Area will flee" and supporting expert testimony to the effect "that there is a rapidly growing fear in the Area of increasing crime and ghettoization, and that these attitudes are attributable to the increasing number of low income families * * *." Id. The court concluded, nevertheless, that

> community attitudes and fears, or the propensity of certain economic or racial groups to commit anti-social behavior, do not lend themselves to the same type of objective analysis and are not required in a NEPA study.

Id. at 1078-79 (emphasis added), citing Hanly II and the district court decision in Nucleus of Chicago Homeowners Association v. Lynn, 372 F. Supp. 147 (N.D. Ill. 1973), aff'd, 524 F.2d 225 (7th Cir. 1975). The court accordingly accepted as neither arbitrary nor capricious the HUD conclusion that conversion of the affected site to public housing would not significantly affect the environment. 387 F. Supp. at 1097.[13]

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(continued)
police protection, schools, hospitals, fire protection, recreation, transportation and commercial establishments." Id.

13 The district court also held that consideration of alternatives was not required. The Second Circuit, holding that "Federal agencies

Finally, in Como-Falcon Coalition v. United States Department of Labor, 465 F. Supp. 850 (D. Minn. 1978), discussed at length in the Commonwealth of Pennsylvania's submission, the court in a comprehensive and scholarly opinion considered NEPA's applicability to the establishment of a job corps center on a former college campus in an urban center. The decision affirmed the Department of Labor's negative determination that establishment of the proposed center would not significantly affect the human environment and that an EIS need not be prepared. While the Commonwealth of Pennsylvania's brief elaborates the general analytic framework suggested by the court, it is worth noting that the court also made certain specific observations and holdings of particular relevance to the psychological distress issue. The court explicitly recognized that "[t]he impact a Job Corps center might have on the security of an urban environment is an emotionally charged issue. Members of plaintiff understandably fear an influx of disadvantaged youth in their neighborhood when reports from other Job Corps centers portend increased criminal activity." Id. at 861-62. Nonetheless, the court concluded as follows:

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(continued)
must consider alternatives under § 102(2)(D) of NEPA without regard to the filing of an EIS," 523 F.2d 88, 93, reversed the contrary conclusion on that issue reached by the district court, but did not otherwise reject the district court's environmental analysis.

> The incidence of crime as an environmental impact cannot be determined by a comparison of emotional fervor. Because plaintiff's fears, while understandable, are not based on a significant likelihood of danger to the community, the Court concludes that the Department of Labor acted reasonably in determining that the proposed Job Corps center would not appreciably affect public safety in the neighborhood.

Id. at 861-62 (emphasis added)(note omitted). Thus, even in a case cited for its expansive view of matters cognizable under NEPA, the court upheld an agency decision that fears "not based on a significant likelihood of danger to the community" need not be evaluated.

B. NEPA Precedents Govern the Instant Case; Psychological Distress Is Not Cognizable Here.

What emerges from this analysis of the case law is that psychological distress is not cognizable under NEPA for two distinct reasons.[14] The early NEPA cases placed primary emphasis on the speculative and immeasurable quality of community fears and psychological distress. Implicit in those cases, but becoming increasingly evident as the case law has

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14 This dual aspect of tbe NEPA case law is clearly recognized in the Commonwealth of Pennsylvania Brief, dated October 4, 1979. PANE, while aware of the relevant NEPA cases and of this interpretation of them, has apparently chosen to devote its full NEPA analysis to the measurability issue, abandoning any effort to confront or explain away this second aspect of the NEPA cases. Indeed, PANE appears to suggest that the courts have been concerned solely with "the measurability of the alleged impacts, not the applicability of NEPA to the impacts, if they are measurable." PANE Brief at p. 18, n.3. As the foregoing discussion amply demonstrates, that is clearly not the case.

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petitioners beyond the first NEPA hurdle of measurability as it applies to the proceeding. For the issue is not whether the TMI-2 accident had psychological impacts on the surrounding population, but whether the restart of TMI-1 will have additional psychological impacts which are neither speculative nor immeasurable. On this point, neither PANE nor the Commonwealth of Pennsylvania has even suggested, let alone demonstrated, how the initial measurability requirement established by Hanly II and Maryland-Capital National Park, supra, may be satisfied. Even assuming that the events at TMI-2 "have provided intervenors with identifiable victims of psychological distress [and] quantifiable manifestations of psychological distress," Commonwealth of Pennsylvania Brief at p. 6, there is simply no indication that the additional effects allegedly expected as a result of TMI-1 restart are more than speculative and remote or are susceptible to objective measurement. Thus, the psychological distress contentions fail to meet even the first requirement for cognizability under NEPA articulated by the courts.

More fundamentally, petitioners have offered no reason for the Commission to depart from the court-validated mandate to examine the objective bases for fear, but not the existence of fear or resulting psychological distress per se.[16] This

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16 A number of petitioners have contended that the Commission must also consider various secondary socio-

approach is well-supported by logic as well as by law. Were the rule otherwise, completely unfounded and irrational fears would be permitted to pervert the reasoned decision-making process envisioned by NEPA. Were unfounded psychological ills treated as cognizable, how would the agency be expected to assess costs and benefits in the exercise of its NEPA reaponsibilities? How much -- or how little -- demonstrated safety would be required to assuage how much unfounded fear? How would such an issue be litigated? Similar considerations have convinced a number of courts to conclude that psychological distress, independent of a well-founded basis in reality, is not and should not be cognizable under NEPA.

That conclusion is supported here by yet another potent factor: the political determination, by the elected representatives of all the people, that nuclear power, if found by this Commission to be acceptably safe, is to play a role among the nation's energy resources. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 98 S.Ct. 1197, 1219 (1978). There is a channel for the expression of apprehensions and fears

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economic impacts alleged to be associated with the psychological fears. If psychological fears not founded on objective, rational bases are not cognizable under NEPA, it necessarily follows that any consequences of unfounded fears are even further removed from any basis in objective reality, and cannot be considered as being caused by the challenged federal actions. Accordingly, secondary impacts which themselves result from unfounded fears are not cognizable under NEPA.

concerning the safety of nuclear power, whether or not those fears are well-founded. That channel is the democratic political process. This Commission should not permit the integrity of its technical judgments on nuclear safety to be compromised by considerations of unfounded fears or "psychological distress." NEPA does not require it to do so.

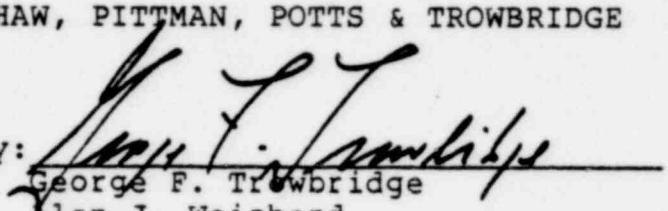
Conclusion

It is clear that the Commission in this proceeding will examine, on the basis of the best available scientific and technical expertise, the adequacy of actions recommended by the Director of Nuclear Reactor Regulation to rectify the bases for the Commission's suspension order. If reasonable assurances are not achieved, TMI-1 will not be permitted to resume operation. The question addressed here is whether the Commission is authorized to go beyond this task to consider alleged psychological distress which may result from resumption of operations at TMI-1. Such distress is speculative, not susceptible to measurement, and, most importantly, results from fears inconsistent (by definition) with the Commission's own expert assessment of the risks accompanying plant operation. Such speculative and unfounded effects are not cognizable by this Commission, under either the Atomic Energy Act or the National Environmental Policy Act. Sound policy dictates, and judicial precedents require, that the Commission reject all contentions predicated on psychological distress as not legally

relevant to this proceeding and beyond the Commission's authority.

Respectfully submitted,

SHAW, PITTMAN, POTTS & TROWBRIDGE

By: 
George F. Trowbridge
Alan J. Weisbard

Dated: October 31, 1979