

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS

Richard A. Meserve, Chairman  
Greta Joy Dicus  
Nils J. Diaz  
Edward McGaffigan, Jr.  
Jeffrey S. Merrifield

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In the Matter of )  
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DUKE COGEMA STONE & WEBSTER ) Docket No. 70-3098-ML  
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)  
(Savannah River Mixed Oxide Fuel )  
Fabrication Facility) )  
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CLI-02-24

**MEMORANDUM AND ORDER**

This proceeding arises out of a construction authorization request for a mixed oxide (“MOX”) fuel fabrication facility. The Licensing Board admitted five contentions.<sup>1</sup> It later denied a request by the license applicant, Duke Cogema Stone & Webster (“DCS”), to reconsider the admissibility ruling.<sup>2</sup> DCS petitioned for interlocutory review of the Board’s decision. We agreed to review the Board decision insofar as it admitted a contention based on the risk of terrorist attacks.<sup>3</sup> Intervenor, Georgians Against Nuclear Energy (“GANE”), filed the contested terrorism

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<sup>1</sup> See LBP-01-35, 54 NRC 403 (2001).

<sup>2</sup> See unpublished Memorandum and Order (Ruling on Motion to Reconsider) (Jan. 16, 2002).

<sup>3</sup> See CLI-02-04, 55 NRC 158 (2002). We subsequently declined to review the Board’s admission of the other four challenged contentions. See CLI-02-09, 55 NRC 245 (2002).

contention. The contention asserted that under the National Environmental Policy Act (“NEPA”), DCS and the NRC must evaluate the impacts of terrorism at the proposed MOX fuel facility.

For the reasons stated below, we reverse the Board’s admission of GANE’s terrorism contention.

## I. BACKGROUND

On February 28, 2001, the DCS consortium submitted an application for authorization to construct a MOX fuel fabrication facility at the U.S. Department of Energy’s Savannah River, South Carolina, site. The MOX facility, if approved and constructed, will convert surplus weapons-grade plutonium to MOX fuel, a blend of uranium and plutonium oxides, that commercial nuclear power stations can use to generate electricity. Upon a request for a hearing by several individuals and groups, the Licensing Board found that GANE and two other intervenors, Donald Moniak and the Blue Ridge Environmental Defense League (BREDL), had standing, and had proffered admissible contentions.<sup>4</sup> Among them was GANE’s contention 12, demanding a NEPA review of terrorism’s impacts.<sup>5</sup>

DCS and the NRC staff had opposed admission of GANE’s terrorist contention on the ground that the terrorist risk is not “reasonably foreseeable;” *i.e.*, it is so “remote and speculative” that it need not be analyzed under NEPA.<sup>6</sup> The Board disagreed, holding that the September 11<sup>th</sup> terrorist attacks foreclosed finding the threat of terrorism “remote and speculative:”

GANE’s contention was filed on August 13, 2001. Regardless of how foreseeable terrorist acts that could cause a beyond-design-basis accident were prior to the terrorist attacks of September 11, 2001, involving the deliberate crash of hijacked jumbo jets into the twin towers of the World Trade Center in New York City

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<sup>4</sup> See LBP-01-35, 54 NRC at 472.

<sup>5</sup> See *id.* at 444-47.

<sup>6</sup> See *id.* at 446.

and the Pentagon in the Nation's capital, killing thousands of people, it can no longer be argued that terrorist attacks of heretofore unimagined scope and sophistication against previously unimaginable targets are not reasonably foreseeable. Indeed, the very fact that these terrorist attacks occurred demonstrates that massive and destructive terrorist attacks can and do occur and closes the door, at least for the immediate future, on qualitative arguments that such terrorist attacks are always remote and speculative and not reasonably foreseeable.<sup>7</sup>

The Board also rejected DCS's remaining argument -- that NEPA reviews are precluded by an agency rule, 10 C.F.R. § 50.13, that "obviates the need for design features in reactors to protect against attacks by foreign enemy governments and individuals."<sup>8</sup> The Board declined to extend section 50.13 beyond the power reactor context.<sup>9</sup>

The terrorism issue then moved to the Commission, where we turned down GANE's petition to suspend the hearing process pending completion of the NRC's ongoing comprehensive review of security and safeguards policies.<sup>10</sup> We later granted DCS's petition for interlocutory review of the NEPA-terrorism question.<sup>11</sup> We asked the parties to address all issues that they "determine are relevant" to admissibility of the terrorism contention and specifically to answer the question, "What is an agency's responsibility under NEPA to consider intentional malevolent acts, such as those directed at the United States on September 11,

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 445.

<sup>9</sup> *Id.*

<sup>10</sup> *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-01-28, 54 NRC 393 (2001). The Commission later rejected GANE's request for reconsideration. See *Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-02, 55 NRC 5 (2002).

<sup>11</sup> See CLI-02-04, 55 NRC at 159.

2001?” The Commission simultaneously agreed to review terrorism contentions in three other cases.<sup>12</sup>

DNC and the NRC staff filed briefs maintaining that the NRC has no responsibility to consider intentional malevolent acts under NEPA. Both GANE and BREDL filed briefs taking the opposite view.<sup>13</sup>

## II. DISCUSSION AND CONCLUSION

We now turn to the substantive legal and practical issue of whether, pursuant to NEPA, the NRC Staff must evaluate the impacts of intentional malevolent acts against the proposed MOX fuel facility. For the reasons we stated today in detail in *Private Fuel Storage*, we hold that the NRC has no obligation under NEPA to consider intentional malevolent acts, such as those directed against the United States on September 11, 2001, in conjunction with licensing of the MOX fuel fabrication facility.<sup>14</sup>

In short, we recognize that we cannot rule out the possibility of a terrorist threat to nuclear facilities, but find that “the possibility of a terrorist attack ... is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under

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<sup>12</sup> See *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-06, 55 NRC 164 (2002) (accepting certified question); *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-05, 55 NRC 161 (2002) (accepting referred ruling); See *Private Fuel Storage, LLC* (Independent Spent Fuel Storage installation), CLI-02-03, 55 NRC 155 (2002) (accepting referred ruling).

<sup>13</sup> The Nuclear Energy Institute, stating that its interests were aligned with those of the applicant, filed a brief, along with a request that we consider it as an *amicus curiae*. We grant the request.

<sup>14</sup> See *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-\_\_\_, 56 NRC \_\_\_ (Dec. 18, 2002); accord *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-02-\_\_\_, 56 NRC \_\_\_ (Dec. 18, 2002); and *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-02-\_\_\_, 56 NRC \_\_\_ (Dec. 18, 2002).

NEPA.”<sup>15</sup> As a practical matter, attempts to evaluate that threat even in qualitative terms are likely to be meaningless and consequently of no use in the agency’s decision making.<sup>16</sup> Moreover, although one of the purposes of NEPA is to inform the public of the environmental impacts of a major federal action, the results of any attempted analysis of terrorism could not be made available to the public, for reasons associated with safeguards and physical security.<sup>17</sup>

The Commission is devoting substantial time and agency resources to combating the potential for terrorism involving nuclear facilities and materials. In response to the September 11<sup>th</sup> attacks, the NRC Staff is conducting a comprehensive review of our security and safeguards measures, and we have instituted interim upgrades in security requirements for our licensees. We are also working with numerous other government agencies to meet and minimize the threat of terrorism.<sup>18</sup> Thus, although we decline to consider terrorism in the context of NEPA, the Commission is devoting significant attention to terrorism-related matters.

Accordingly, we *reverse* the Board’s decision to admit GANE’s terrorism contention.

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<sup>15</sup> *Private Fuel Storage*, CLI-02-\_\_\_, 56 NRC at \_\_\_, slip op. at 11.

<sup>16</sup> *See id.* at \_\_\_, slip op. at 7-8, 13-14, 16-18, 21, 22.

<sup>17</sup> *See id.* at \_\_\_, slip op. at 8, 10, 18-22.

<sup>18</sup> *See id.* at \_\_\_, slip op. at 2-4. We note that the MOX fuel fabrication facility is unique among NRC-regulated facilities, for its purpose is to reduce the threat of nuclear proliferation through constructive disposition of the inventory of plutonium remaining from defense activities. Specifically, “the Applicant is seeking authorization to build a facility that would implement a significant objective of national security and policy” in accordance with an agreement between the United States and Russia. *See* CLI-01-28, 54 NRC 393, 401 (2001) (*quoting* CLI-01-13, 53 NRC 478, 484 (2001)).

IT IS SO ORDERED.

For the Commission<sup>19</sup>

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Annette L. Vietti-Cook  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 18<sup>th</sup> day of December, 2002.

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<sup>19</sup> Commissioner Dicus was not present for the affirmation of this Order. If she had been present, she would have approved it.