

# Nuclear Terrorism Under NEPA: A Meta-Legal Analysis of the Split Between the Third and Ninth Circuits

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The U.S. Nuclear Regulatory Commission (“NRC”) has imposed on its licensees several stringent anti-terrorism requirements,<sup>1</sup> yet it continues to resist considering the environmental impacts of such terrorism in the parts of its licensing process conducted pursuant to the National Environmental Policy Act (“NEPA”).<sup>2</sup>

NRC’s approach has been challenged and subjected to judicial scrutiny. The Court of Appeals for the Ninth Circuit has disagreed with the Commission, and directed the NRC to consider such terrorism among environmental impacts in the licensing of a new Independent Spent Fuel Storage Installation (“ISFSI”) at the Diablo Canyon Nuclear Power Plant.<sup>3</sup> The NRC, however, has persisted in asserting its position outside the Ninth Circuit.<sup>4</sup> And it has found support in the Court of Appeals for the Third Circuit, which held that the NRC was not required to consider

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1. These anti-terrorism requirements include guard forces, physical barriers, access controls, detection alarms, alarm stations, response strategies, security exercises, clearance requirements, and background investigations. *See generally* 10 C.F.R. pt. 73 (2009) (stating security requirements for the physical protection of nuclear plants and materials).

2. *See In re Private Fuel Storage, L.L.C.*, 56 N.R.C. 340 (2002) (articulating the Commission’s position on the consideration of terrorism under NEPA review).

3. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n (Mothers for Peace)*, 449 F.3d 1016 (9th Cir. 2006).

4. The NRC continues to maintain that NEPA does not require such consideration because terrorism is a security issue, not an environmental issue, and thus limits application of the Ninth Circuit’s decision to its licensing of facilities within that circuit’s geographical boundaries. *See In re Nuclear Mgmt. Co., L.L.C.*, 65 N.R.C. 139 (2007) (denying request to address environmental impacts of a terrorist attack in the matter of the relicensing of a nuclear facility in New Jersey).

environmental impacts from terrorism in proceedings to extend the operating life of the Oyster Creek Nuclear Power Plant (“Oyster Creek”) by twenty years.<sup>5</sup>

Several commentators have already discussed these divergent views in terms of the legal analyses conducted by the deciding courts.<sup>6</sup> This Field Report takes a different approach, in the form of a meta-legal analysis,<sup>7</sup> which explores possible reasons (beyond the rather obvious observation that the courts disagreed regarding the applicable law) why the Third Circuit believed it to be appropriate to split with the Ninth Circuit and exclude the public from participating in the NRC’s consideration of an issue vital to public security. Among the possible meta-legal reasons identified here to explain the Third Circuit’s decision are: (1) a desire to avoid interfering with the application of risky technology (i.e., nuclear energy); (2) fear of reversal by the Supreme Court; and (3) a perception that the appellants were misusing the environmental review process required under NEPA to obtain other ends, namely, the shutdown of Oyster Creek.<sup>8</sup>

This meta-legal analysis proceeds as follows. Part I provides the context in which the circuit courts’ decisions were made—in particular, the historical deference to the NRC and its implementation of NEPA—to identify some of the factors possibly influencing the courts’ reviews of the NRC’s NEPA decisions. Part II is a detailed review and critical analysis of the Supreme Court’s decision in *Metropolitan Edison Co. v. People Against Nuclear Energy* (“*PANE*”),<sup>9</sup> a 1983 case that played a pivotal role in the Third Circuit’s decision. Part III describes factors that were not explicitly

5. N.J. Dep’t of Envtl. Prot. v. U.S. Nuclear Regulatory Comm’n, 561 F.3d 132 (3d Cir. 2009).

6. For brief summaries and comments on these commentaries, see *infra* Appendix.

7. By a meta-legal analysis, this author means an attempt to derive from the courts’ opinions the unstated underlying reasons for their choices of the operative facts, rules of law, or interpretations of those rules, to explain the bases for their opinions.

8. On December 8, 2010, Exelon announced that it would retire its Oyster Creek nuclear plant in 2019—a decade ahead of schedule and thirty years short of the extended date it was seeking in the relicensing. The company’s Chief Operating Officer and President explained, “[t]he plant faces a unique set of economic conditions and changing environmental regulations that make ending operations in 2019 the best option for the company, employees and shareholders.” Naureen S. Malik, *Exelon to Retire Oyster Creek Generating Station in 2019*, Dow Jones, Dec. 9, 2010, available at <http://online.wsj.com/article/BT-CO-20101208-716869.html>. It is interesting to consider whether the Third Circuit would have decided differently had it known that Exelon was considering shutting down the plant for environmental reasons.

9. 460 U.S. 766 (1983).

addressed in either circuit's opinion, but seem relevant to a reasoned decision on the issues of the cases. Finally, Part IV addresses other meta-legal factors that may have influenced the Third Circuit's decision.

## I. BACKGROUND

Court decisions are not constructed in a vacuum; instead, they are intended to be consistent with the existing body of law applicable to the issue under review. Thus, to appreciate the differences between the decisions of the Third and Ninth Circuits, it is necessary to be familiar with: (1) the NRC's resistance in implementing its NEPA responsibilities; (2) the NRC's thorough consideration of terrorist threats in other contexts; and (3) the federal courts' extraordinary deference to the NRC's technical expertise and technical decisions.<sup>10</sup>

### A. The NRC's Continuing Resistance to Meaningfully Implement NEPA

The NRC and its predecessor agency, the Atomic Energy Commission, have long resisted meaningful implementation of NEPA. Indeed, in one of the earliest judicial opinions to consider NEPA,<sup>11</sup> the court rejected the agency's interpretation that the use of "accompany" in the statute meant that the Environmental Impact Statement ("EIS") had to be physically included in the package of licensing documents, but under certain circumstances did not have to be considered or even read by the Commissioners before voting.<sup>12</sup> Although the courts have since sustained some challenges

10. The extent to which these differences can be attributed to the parties' briefings of the NRC's history of compliance with NEPA cannot be determined.

11. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971).

12. The *Calvert Cliffs'* court noted that "NEPA makes only one specific reference to consideration of environmental values in agency review processes. Section 102(2) (C) provides that copies of the staff's 'detailed statement'; and comments thereon 'shall accompany the proposal through the existing agency review processes.'" *Id.* at 1117. According to the Atomic Energy Commission rules then in force:

When no party to a proceeding . . . raises any [environmental] issue . . . such issues will not be considered by the atomic safety and licensing board. Under such circumstances, although the Applicant's Environmental Report, comments thereon, and the Detailed Statement will accompany the application through the Commission's review processes, they will not be received in evidence, and the Commission's responsibilities under the National Environmental Policy Act of 1969 will be carried out in toto outside the

to the NRC's implementation of NEPA,<sup>13</sup> the NRC continues to restrict public participation in its licensing process by limiting the issues that can be considered under NEPA.<sup>14</sup>

#### B. The NRC's Serious Consideration of Terrorist Threats

The NRC takes the threat of terrorist attacks very seriously. Initially, the NRC was most concerned about an insider threat: the ability of a trusted individual to use his or her unescorted access to a plant to sabotage its operation and cause an event that would force the plant to shutdown or release radioactive materials.<sup>15</sup> Subsequently, as domestic and foreign terrorist attacks proliferated in the 1980's and 1990's, the NRC focused more intently on external threats to nuclear plants, such as truck bombs.<sup>16</sup>

Today, licensed nuclear facilities are more tightly guarded by security forces that carry heavier weapons than they did in the past. Nuclear plant security force-on-force exercises<sup>17</sup> assume a greater design basis threat ("DBT") by more heavily armed and greater numbers of assailants.<sup>18</sup> Nuclear plants use scenario planning to develop and train on potential attack scenarios just as they develop and train on potential accident scenarios. Accordingly, the NRC believes that consideration of the environmental impacts of terrorism under NEPA would not add to protection against terrorism because the public has nothing new to contribute to the identification and evaluation of protective measures. Moreover, the NRC is concerned that any public discussion of the measures to protect against terrorism would inform terrorists on those measures

hearing process.

*Id.* (citation omitted).

13. *See* Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Comm'n, 869 F.2d 719 (3d Cir. 1989).

14. *See, e.g.*, 10 C.F.R. pts. 2 and 51 (2011).

15. 10 C.F.R. § 73.55(b)(9).

16. Amendments to the NRC's physical protection regulations for operating nuclear power reactors, to include the potential for use of a land vehicle by adversaries, were adopted ten years after the bombing of U.S. Marine barracks in Lebanon and soon after the first bombing of the World Trade Center in New York. Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 (Aug. 1, 1994) (codified at 10 C.F.R. pt. 73).

17. *See* OFFICE OF PUB. AFFAIRS, U.S. NUCLEAR REGULATORY COMM'N, FACT SHEET, FORCE-ON-FORCE SECURITY EXERCISES (2007), available at <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/force-on-force.pdf>.

18. *See* 72 Fed. Reg. 12,705 (Mar. 19, 2007) (codified at 10 C.F.R. pt. 73).

and how to defeat them.<sup>19</sup> Thus, the issue in the circuit cases was not whether the NRC was taking terrorism threats seriously, but whether the NRC should allow the public to view and suggest additional strategies for coping with those threats. The Ninth Circuit correctly pointed out that even if security concerns require prohibiting public access to information on the effects of terrorism that is submitted during the NEPA process, this does not explain why the public should be prevented from contributing information for the NRC to review privately.<sup>20</sup> For reasons discussed below, the Third Circuit did not reach this issue.

### C. The Federal Courts' Extraordinary Deference to the NRC

Unlike the way in which they approach other federal agencies, even highly technical agencies, the federal courts have been extraordinarily hesitant to overturn any technical decisions of the NRC.<sup>21</sup> Therefore, if a reviewing court determines the need to consider environmental impacts of a terrorist attack on a nuclear facility to be a technical issue within the scope of the NRC's statutory expertise, then that court is likely to defer to the NRC's reasons for not considering the environmental impacts of terrorism under NEPA. The Third Circuit continued the history of deference to the NRC by accepting, for example, the NRC's claims that it was unable to address airborne threats<sup>22</sup> and that it had already considered the environmental impacts of terrorism.<sup>23</sup> By contrast, the Ninth Circuit avoided this history of deference by focusing on the NRC's legal analyses, as opposed to its technical decisions.<sup>24</sup>

Another important aspect of the background of these two decisions is the extent to which the Courts felt bound by the Supreme Court's holding in *PANE*.<sup>25</sup> As this difference is critical to the divergent outcomes in the two decisions, *PANE* is discussed and

19. Although the NRC could limit the public exposure of sensitive information, see *In re Pacific Gas & Electric Co.*, 11 N.R.C. 775, 777 (1980), it has not addressed the extent to which it could exercise that authority to avoid disclosing counter-terrorism strategies to the public.

20. *Mothers for Peace*, 449 F.3d at 1034.

21. See, e.g., *Siegel v. Atomic Energy Comm'n*, 400 F.2d 778 (D.C. Cir. 1980).

22. *N.J. Dep't of Env'tl. Prot.*, 561 F. 3d at 139.

23. *Id.* at 143.

24. *Mothers for Peace*, 449 F.3d at 1027. The Ninth Circuit's decision was not unusual because the NRC has been reversed several times on NEPA legal issues.

25. 460 U.S. 766 (1983).

analyzed in detail below. Part II will argue that although neither circuit court properly analyzed the applicability of *PANE*, the Ninth Circuit correctly concluded that *PANE* was inapplicable.

## II. THE SUPREME COURT'S *PANE* DECISION AND ITS RELATION TO THE CIRCUIT SPLIT

### A. The *PANE* Analysis is Inapplicable to the Consideration of Terrorism under NEPA

In *PANE*, the Supreme Court addressed the scope of environmental issues required to be considered under NEPA. The Court determined that NEPA did not require an EIS to include the psychological impacts arising from the fear of a possible accident after the sister nuclear power plant ("TMI-1") to Three Mile Island Unit 2 ("TMI-2"), would be restarted.<sup>26</sup> Both the Third and Ninth Circuits needed to address this decision because the NRC relied on it in its responses to the petitions for review. For reasons briefly reviewed below, the Ninth Circuit found *PANE* inapplicable but the Third Circuit found that it supported the NRC's decision not to consider the environmental impacts of a terrorist attack. Several commentators have criticized the reasoning in each of the circuit court's decisions. The following analysis shows that the *PANE* decision was not applicable to either case because the policy matters that controlled the Supreme Court's decision in *PANE* were not involved in the cases that led to the Third and Ninth Circuit decisions.

To reach its conclusion in *PANE*, the Supreme Court first interpreted NEPA without much support from statutory text or legislative history, simply stating:

Our *understanding* of the congressional concerns that led to the enactment of NEPA *suggests* that the terms "environmental effect"

26. The March 1979 accident at TMI-2 is considered the worst nuclear power reactor accident in the United States. For NRC's description of the accident, see OFFICE OF PUB. AFFAIRS, U.S. NUCLEAR REGULATORY COMM'N, BACKGROUND, THREE MILE ISLAND ACCIDENT (2009), *available at* <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.pdf>. Because the accident resulted from a combination of personnel error, design deficiencies, and component failures, residents in the vicinity of the plant were concerned that the sister plant ("TMI-1") of the same design, with the same components, and operated by personnel with the same training as was given to the operators for TMI-2, could experience a similar accident if allowed to restart.

and “environmental impact” in section 102 be *read to include* a requirement of reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law.<sup>27</sup>

Having adopted this unsupported and limiting interpretation, the Court found: first, that the “*risk* of an accident is not an effect on the physical environment,” because, by definition, it is “unrealized in the physical world”; and second, that the “causal chain from renewed operation of TMI-1 to psychological health damage” necessarily included the middle links of “risk and its perception.”<sup>28</sup> The Court then stated its *belief* that the “element of risk lengthens the causal chain beyond the reach of NEPA.”<sup>29</sup>

The Court focused on the physical environment (which is more limited than the statutory scope of the “human environment”<sup>30</sup>) and invented a distinction between direct and indirect environmental effects because it was concerned that including pervasive impacts of modern technology (in this case, risk) in NEPA analyses would: (1) impede technological progress; (2) cause federal agencies to devote too many resources to NEPA analyses; and (3) allow NEPA to serve as a pretext for opposing federal policies.<sup>31</sup> Because these policy considerations clearly motivated the decision, the analytic framework set forth in *PANE* is applicable to other situations only if those same policy considerations are present.

In *PANE*, the Court clearly articulated its non-legal, policy reasons for limiting NEPA’s scope to alterations of the physical environment and thus rejecting inchoate feelings, such as the fear of risk, as cognizable impacts. The Court saw consideration of the fear of risk as potentially impeding technological progress by opening the floodgates to issues required to be included in EISs:

Risk is a pervasive element of modern life . . . . Many of the risks we face are generated by modern technology . . . . [T]he question whether the gains from any technological advances are worth its attendant risks may be an important public policy issue. Nonetheless, it is quite different from the question whether the same gains are worth a given level of alteration of our physical environment . . . .

27. *PANE*, 460 U.S. at 774 (emphasis added).

28. *Id.* at 775.

29. *Id.*

30. 42 U.S.C. § 4332(C) (2010).

31. *PANE*, 460 U.S. at 775–77.

Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. . . .

If contentions of psychological health damage caused by risk were cognizable under NEPA, agencies would, at the very least, be obliged to expend considerable resources developing psychiatric expertise that is not otherwise relevant to their congressionally assigned functions. The available resources would be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources.<sup>32</sup>

The Court also looked to the subjective nature of the fear of risk and the difficulty in determining whether that fear is real or merely a pretext for opposing a federal policy decision.

We do not believe that this line [between questions of fear or policy disagreements] is so easily drawn. . . .

. . . It would be extraordinarily difficult for agencies to differentiate between “genuine” claims of psychological health damage and claims that are grounded solely in disagreement with a democratically adopted policy.<sup>33</sup>

Because similar cases should be decided in the same fashion, the non-legal, policy reasons articulated in *PANE* are critical to determining the cases to which *PANE*'s holding should be applied. In the broad view, this holding is applicable to risks that: (1) are pervasive in society, especially if they are generated by modern technology that brings the possibility of major accidents; (2) when considered, threaten to dilute an agency's resources devoted to its mission; and (3) may be used as a pretext for raising policy disputes that should be addressed in the legislative process. When these criteria are applied to the risks of terrorism as a consequence of NRC licensing actions, the following conclusions can be drawn: (1) the risks are limited in scope to specific aspects of the uses of radioactive materials and thus are not pervasive aspects of society's broader reliance on modern technology; (2) considerations of terrorism do not dilute the NRC's resources devoted to its mission, because the NRC has considered terrorism as part of its regulation of security; and (3) the NRC's security requirements for any particular licensed facility establish objective criteria for

32. *PANE*, 460 U.S. at 775–76 (emphasis added) (citations omitted).

33. *Id.* at 777–78.

determining when concerns about terrorism are raised as a pretext for addressing policy issues better left to Congress.<sup>34</sup> For these reasons, *PANE*'s NEPA analysis does not apply to terrorism consequences from NRC licensing actions.

## B. Circuit Court Decisions<sup>35</sup>

### 1. The Ninth Circuit's Rejection of *PANE* in Favor of its Own Precedent

The Ninth Circuit determined that the *PANE* decision was not applicable in the San Luis Obispo case because the licensing of an ISFSI did not involve the chain of causality associated with fear of the risk of an environmentally harmful event.<sup>36</sup> Although, for the reasons discussed above, the Ninth Circuit reached the right conclusion, its convoluted logic based on a three-link chain missed a key point in *PANE*.

The Supreme Court's decision was based on a four-link chain in which "the element of risk and its perception by *PANE*'s members are necessary middle links" that caused the entire causal chain to be too attenuated.<sup>37</sup> The three event chain that the Ninth Circuit found in the *PANE* decision was: (1) major federal action (restart of TMI-1 permitted by NRC), (2) change in physical environment (increased risk of accident because reactor operating),<sup>38</sup> and (3) effect (decline in psychological health of the human population.)<sup>39</sup> The four event chain actually constructed by the Supreme Court in *PANE* was: (1) major federal action (TMI-1 restart permitted by NRC), (2) change in physical environment (increased risk of accident because reactor operating), (3) perception of risk by residents in vicinity of TMI-1, and (4) effect (decline in psychological health of those residents).<sup>40</sup> Only a three element chain applies to the environmental impacts resulting from

34. An investigation into pretext does not consider a petitioner's motive for bringing a NEPA suit, but instead, looks to see if there are substantive NEPA issues raised by the claim, i.e. that there are environmental threats from potential terrorism.

35. Because the circuit cases have already been the subject of much discussion, only a brief synopsis of each decision is provided below.

36. *Mothers for Peace*, 449 F.3d at 1029–30.

37. *PANE*, 460 U.S. at 775.

38. This link in the chain should have been environmental consequences of accidents considered by the NRC in its licensing process.

39. *Mothers for Peace*, 449 F.3d at 1029.

40. *PANE*, 460 U.S. at 775.

terrorism: (1) major federal action (operation permitted by NRC), (2) change in physical environment (terrorist attack results in release of radioactive materials), and (3) effect (population receives radiation dose). Thus, the circuit court improperly applied the attenuated causal chain in *PANE* to the NRC's decisions.

## 2. The Third Circuit's Extension of *PANE*'s Analysis

The Third Circuit's determination that the *PANE* analysis was apposite in the Oyster Creek case did not consider the underlying circumstances relied on by the Supreme Court in *PANE*. Although the Third Circuit properly stated that the "Court has directed that we draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not,"<sup>41</sup> it did not consider the policy factors that the Court had identified as essential to what would be considered manageable. Rather, the Third Circuit seized on the Court's reference to proximate cause in tort law—a reference which the Court specifically subordinated to the "underlying policies or legislative intent"<sup>42</sup>—to conduct an evaluation that did not adequately address the federal policy and administrative issues related to considering the effects of terrorism in an EIS.<sup>43</sup>

In response to the petitioner's concern about terror attacks from the air, the Third Circuit relied on case law holding that an agency need not consider environmental effects over which it has no control—in this case, the airspace over an NRC-licensed facility.<sup>44</sup> Other commentators have noted that the correct frame of reference is not the NRC's lack of control over airspace, but the NRC's clear control over the actions that licensees could be required to take to deal with terrorist attacks.<sup>45</sup>

Moreover, attack by air is not the only available avenue of terrorist attack. The NRC has issued orders and guidance regarding actions required to be taken to protect facilities from truck bombs, which would travel on roads not controlled by the NRC.<sup>46</sup> The Coast Guard has limited boat traffic on the publicly

41. *N.J. Dep't of Env'tl. Prot.*, 561 F.3d at 139.

42. *PANE*, 460 U.S. at 774 n.7.

43. *N.J. Dep't of Env'tl. Prot.*, 561 F.3d at 140.

44. *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 161 (2d Cir. 2004).

45. Ben Schiffman, Note, *The Limits of NEPA: Consideration of the Impacts of Terrorism in the Environmental Impact Statement for Nuclear Facilities*, 35 COLUM. J. ENVTL. L. 373, 398–99 (2010).

46. OFFICE OF NUCLEAR REGULATORY RESEARCH, U.S. NUCLEAR REGULATORY COMM'N,

navigable water bodies that supply cooling water to licensed nuclear facilities, including Oyster Creek.<sup>47</sup> Although the Coast Guard independently imposed this limit, the NRC could require a licensee to obtain such a limit from the Coast Guard as a condition of license.

Regarding the NRC's supposed previous consideration of the environmental effects of terrorism, it makes little sense to rely, as did the Third Circuit, on finding that such effects would be no different from the effects of accidents already considered. That the effects of terrorism could be more severe than those of any accident contemplated was starkly demonstrated by the collapse of the World Trade Center's twin towers in 2001. More importantly, a failure to consider terrorism and, so, to consider whether to take actions to mitigate the environmental consequences of terrorism, also could increase the likelihood that the environmental effects already considered for an accident would be realized. Thus, the Third Circuit did not take into account Judge Learned Hand's formula that relates the burden of avoiding an accident to the likelihood of its occurrence and the injuries resulting from it.<sup>48</sup> As the likelihood of an injury increases, the threshold of the burden for not taking precautions to avoid the injury also increases.

Finally, nothing in the Third Circuit's opinion indicates a concern that if its decision was wrong, it might result in the NRC's failure to preclude serious environmental impacts from a terrorist attack by not forcing the NRC to consider alternative licensing conditions that could limit such impacts. One would expect that the potential consequences of a wrong decision would cause a court to issue a self-protecting, conservative opinion, unless it viewed the consequences of such a decision to be too onerous. Any such concern should have been allayed by the NRC's facile response to the Ninth Circuit's decision. The NRC added a very short analysis of terrorist-induced environmental impacts to the Diablo Canyon ISFSI Environmental Assessment and proceeded to issue the license, consistent with the procedural nature of NEPA.<sup>49</sup>

REGULATORY GUIDE 5.68: PROTECTION AGAINST MALEVOLENT USE OF VEHICLES AT NUCLEAR POWER PLANTS (1994), available at <http://www.nrc.gov/reading-rm/doc-collections/reg-guides/protection/rg/division-5/division-5-61.html> (follow "Publish Date" hyperlink at Guide Number 5.68).

47. 68 Fed. Reg. 32,643 (June 2, 2003) (codified at 33 C.F.R. pt. 165).

48. *United States v. Carroll Towing*, 159 F.2d 169, 173 (2d Cir. 1947).

49. *Diablo Canyon Independent Spent Fuel Storage Installation (ISFSI) License Application*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/waste/spent-fuel-storage/diablo>

### III. FACTORS THE CIRCUIT COURTS SHOULD HAVE ADDRESSED

The Circuit Courts' decisions are legalistic arguments focused on NEPA precedents. The Third Circuit, having found that NEPA did not apply, did not need to consider more practical considerations such as: (1) the roles and expert knowledge of the local emergency agencies that would respond to the environmental effects of a terrorist attack; and (2) the demonstrated ability to publicly consider, without damaging public security, alternative proposals that could result in different mitigations of the environmental effects of a terrorist attack on a nuclear facility. The Ninth Circuit did address and dismiss the NRC's concerns about security by noting that the NRC had not explained its "unwillingness to hear and consider the information that Petitioners seek to contribute to the process, which would fulfill both the information-gathering and the public participation functions of NEPA."<sup>50</sup> But the Ninth Circuit gave no indication of whether it believed that such input could be valuable to the NRC.

#### A. The Roles of Local Emergency Response Agencies

The NRC, with the cooperation of the Federal Emergency Management Agency ("FEMA"), has established emergency response requirements for nuclear facility licensees.<sup>51</sup> Those requirements include entering into agreements with state and local emergency response organizations that participate in implementing the emergency response plans.<sup>52</sup> Thus, these response organizations have substantial responsibilities and have developed substantial experience in dealing with the environmental effects of a terrorist attack, whether or not the environmental impacts of terrorism are discussed in a NEPA analysis prepared by the NRC. Indeed, this was the reason the

canyon-isfsi.html (last visited Feb. 13, 2011).

50. *Mothers for Peace*, 449 F.3d at 1034.

51. The NRC and FEMA have jointly provided emergency planning guidance for over thirty years. See U.S. NUCLEAR REGULATORY COMM'N & FED. EMERGENCY MGMT. AGENCY, CRITERIA FOR PREPARATION AND EVALUATION OF RADIOLOGICAL EMERGENCY RESPONSE PLANS AND PREPAREDNESS IN SUPPORT OF NUCLEAR POWER PLANTS (1980), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0654> (follow hyperlinks to "Revision 1" as well as various supplements).

52. The NRC requires each reactor operator to enter into agreements with state, county, and local communities. The agreements require these entities to participate in emergency preparedness programs, activities, drills, and real responses. The reactor operators provide these entities, especially the local communities, with equipment and technical support.

supervisors of the County of San Luis Obispo, the county in which the ISFSI for Diablo Canyon would be located, filed an *amicus curiae* brief in the Ninth Circuit case in support of the petitioner, the San Luis Obispo Mothers for Peace (“SLOMFP”).<sup>53</sup>

#### B. NRC Ability to Consider Environmental Effects in Public

The circuit courts focused almost entirely on legalistic arguments rather than the practical consequences of ordering the analyses. But the practical consequences of a decision often are important to a court. In these cases, the NRC’s reluctance to consider, under NEPA, the environmental impacts of a terrorist attack may have been justifiable had the NRC shown that such consideration would be rendered nugatory by the limitations on public disclosure necessarily imposed to address concerns about security breaches. The supervisors of San Luis Obispo recognized this and, so, focused their brief on the Diablo Canyon ISFSI Final Environmental Impact Report (“EIR”), prepared by outside consultants for the county’s Department of Planning and Building. This EIR had been prepared for proceedings held on the coastal development permit application submitted by Pacific Gas & Electric (“PG&E”) to the California Coastal Zone Management Commission. Terrorist threats and alternative sites for the ISFSI were meaningfully addressed in the EIR as part of the evaluation of the ISFSI location and structure that would result in the least likely environmental impacts from a terrorist attack. No compromises to security resulted from this public discussion. The supervisors did not suggest that the NRC should copy this process; instead, they cited it as evidence that the NRC could conduct a meaningful public dialogue on the environmental impacts of a terrorist attack on a nuclear facility, so that a court decision ordering the NRC to do so would not be a hollow victory for the petitioner.

53. This was an unusual move for the county, because unlike SLOMFP, it did not oppose the Diablo Canyon facility, but it was left no choice under the court’s rules for participating as *amicus curiae*. The county supervisors determined that they needed to be heard in favor of requiring the NRC to give the public an opportunity to interact with the NRC on what would be done to mitigate the environmental effects of a possible terrorist attack on the ISFSI.

#### IV. ADDITIONAL SPECULATION ON WHY THE THIRD CIRCUIT CREATED A CIRCUIT SPLIT

The Third Circuit clearly was not impressed by the Ninth Circuit's legal analysis<sup>54</sup> and surely was aware of the Ninth Circuit's distinct record of reversals by the Supreme Court. This may partially explain the Third Circuit's heavy reliance on proximate cause as an attempt to protect its decision from reversal by relying on an analysis apparently legitimized by the Supreme Court in *PANE*. Notwithstanding its requirement of proximate cause, the Third Circuit ostensibly did not believe the NRC's licensing action would satisfy even a lesser standard of casual connection because the court was not convinced that the licensing would precipitate a terrorist attack.<sup>55</sup>

Similarly, the Third Circuit relied heavily on the Supreme Court's admonition that "a manageable line" must be drawn by the courts in resolving NEPA disputes.<sup>56</sup> The Third Circuit appears to have concluded that the NRC had properly allocated its limited resources to its adoption of security rules for NRC licensees and had already considered the environmental effects of a terrorist attack.<sup>57</sup>

More disturbing is the Third Circuit's apparent failure to fully appreciate security analyses for nuclear facilities. This is demonstrated, in part, by its statement that "security decisions must be centralized rather than made on a site-specific basis since those in charge of each site may have differing ideas over how to spread limited resources."<sup>58</sup> To the contrary, security decisions are quintessentially site-specific decisions for implementing general security requirements. For example, in the case of the Oyster Creek facility, the Third Circuit focused only on attacks from the

54. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 143 n.10.

55. *Id.* at 136. The Third Circuit wrote: "the NRC correctly concluded that the relicensing of Oyster Creek does not have a 'reasonably close causal relationship' with the environmental effects that would be caused in the event of a terrorist attack." *Id.* at 143. This finding is consistent with the facts that: (1) the Oyster Creek plant had operated for many years already without a terrorist attack, and (2) other plants have already had their operating licenses renewed without subsequently experiencing a terrorist attack. Similarly, the NRC has licensed several ISFSIs and none of them has experienced a terrorist attack. Thus, as a factual matter, the NRC's licensing or relicensing of a facility has not been the kind of action to precipitate a terrorist attack.

56. *Id.* at 139 (citing *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004)).

57. *Id.* at 142 n.9.

58. *Id.* at 141.

air, comparable to those on the World Trade Center in 2001, despite the potential for a terrorist attack from the river, which provides cooling water for the facility. Had the Third Circuit read the NRC's license renewal decision<sup>59</sup> more carefully, it might have learned that attacks from the air are not the only concern for a nuclear power plant, because each plant site may have a multitude of vulnerabilities to terrorist attack. A comprehensive consideration of alternatives under NEPA ought to take these vulnerabilities into account, in order to determine how best to mitigate them.

Had the Third Circuit focused on the important role of such site specific factors for a complete NEPA analysis of alternatives, it might not have deferred to the NRC's reliance on the Generic Environmental Impact Statement for License Renewal of Nuclear Plants ("GEIS").<sup>60</sup> By its general nature, the GEIS does not include site-specific vulnerabilities to terrorist attacks and therefore does not evaluate alternatives designed to mitigate the possible environmental impacts that could result from such terrorist attacks.<sup>61</sup>

59. *In re AmerGen Energy Co.*, 65 N.R.C. 124, 133 (2007).

60. OFFICE OF NUCLEAR REGULATORY RESEARCH, U.S. NUCLEAR REGULATORY COMM'N, GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR LICENSE RENEWAL OF NUCLEAR PLANTS (1996), available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437> (hereinafter GEIS).

61. *In re AmerGen*, 65 N.R.C. at 131–32. The NRC's evaluation of terrorism in the GEIS is as follows:

"With regard to sabotage, quantitative estimates of risk from sabotage are not made in external event analyses because such estimates are beyond the current state of the art for performing risk assessments . . . the Commission amended 10 CFR Part 73 to provide malevolent use of vehicles, including land bombs. The regulatory requirements under 10 CFR [P]art 73 provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the [C]ommission believes that acts of sabotage are not reasonably expected. . . Based on the above, the [C]ommission concludes that the risk from sabotage . . . at existing nuclear power plants is small and . . . are adequately addressed by a generic consideration of internally initiated severe accidents."

GEIS at § 5.3.3.1. The age and language of this analysis show that the NRC relied on outmoded thinking (as indicated by its use of the word sabotage instead of terrorism) when it relied on this GEIS after the 9/11 attacks on the Twin Towers. This language also shows that the NRC did not consider site-specific vulnerabilities to terrorism.

The Third Circuit decision also relied on the NRC's preparation of a Supplemental Environmental Impact Statement ("SEIS") in which the NRC analyzed alternatives at Oyster Creek to mitigate severe accidents. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 143. The NRC's site specific analysis in the SEIS simply repeated its generic analysis in the GEIS, to wit: "Additionally, compliance with the NRC regulatory requirements under 10 CFR Part 73

The Third Circuit's lack of understanding is also demonstrated by its statement that "if NEPA required the NRC to analyze the potential consequences of an airborne attack, the NRC would spend time and resources assessing security risks over which it has little control . . . ."<sup>62</sup> Yet the NRC stated that it *has* considered the consequences of such an attack. Thus, the Third Circuit's concern about agency resource allocation seems misplaced.

Finally, the Third Circuit seems to have viewed the petition as a collateral attack on the NRC's renewal of an operating license for the oldest operating nuclear power plant in the United States.<sup>63</sup> Even if this were correct, the petitioners' motives for bringing a NEPA lawsuit are irrelevant if the suit itself raises substantive NEPA issues, as did the Third Circuit case. Many lawsuits are brought for strategic purposes.

## V. CONCLUSION

This Field Report has argued that the Third Circuit created a split with the Ninth Circuit for reasons other than a disagreement over what the law requires. Several possible meta-legal reasons for this split have been offered. First, the Third Circuit likely concluded it was safer to follow the NRC's reliance on the Supreme Court's analysis in *PANE* than to follow the Ninth Circuit, the circuit court most often reversed by the Supreme Court. Second, the Third Circuit may have been concerned about the waste of limited federal resources, especially where the NRC claimed to have already conducted a NEPA analysis. Third, the Third Circuit did not fully appreciate the limited nature of that analysis and its failure to address any site-specific vulnerabilities to a terrorist attack. Fourth, the Third Circuit did not fully appreciate the role of NEPA in providing a forum for public input and education, as

provides reasonable assurance that the risk from sabotage is SMALL. . . . Based on the above, the Commission concludes that the risk from sabotage . . . at existing nuclear power plants is SMALL." OFFICE OF NUCLEAR REACTOR REGULATION, U.S. NUCLEAR REGULATORY COMM'N, GENERIC ENVIRONMENTAL IMPACT STATEMENT FOR LICENSE RENEWAL OF NUCLEAR PLANTS: SUPPLEMENT 28, at 5-3 to -4 (2007), *available at* <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement28/index.html> (follow "Volume 1" hyperlink; then follow "NUREG-1437, Supplement 28, Volume 1" hyperlink). Thus, the NRC's SEIS also did not consider specific vulnerabilities to a terrorist attack and, *a fortiori*, could not consider alternatives which could mitigate the environmental consequences of such an attack.

62. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 141.

63. *Id.* at 143 n.11.

did the Ninth Circuit. Finally, the Third Circuit seems to have suspected that the petitioners' NEPA suit was a pretext for challenging the NRC's extension of the license for the Oyster Creek nuclear facility. Unfortunately, none of these reasons justifies the outcome that the court reached.

## APPENDIX: OVERVIEW OF PRIOR COMMENTS

Several commenters have expressed their opinions regarding the two appellate court decisions. A few of the commentaries are summarized here to show that they do not address the Third Circuit's motives in creating a circuit split.

*Columbia Journal of Environmental Law Note*

A recent student Note in the *Columbia Journal of Environmental Law* presents a traditional legal analysis arguing that the Oyster Creek case was wrongly decided by the Third Circuit.<sup>64</sup> The Note concludes that the Third Circuit's reliance on *PANE* was inapposite because that case dealt with the environmental impacts arising from the *risk* of an accident, not impacts from an *actual* accident.<sup>65</sup> Instead, the Note characterizes the Ninth Circuit's "remote and highly speculative" test as preferable because, among other things, it is believed to implement NEPA's mandate to broadly consider environmental impacts.<sup>66</sup>

However, this Note does not adequately address the Third Circuit's conclusion that there is no "reasonably close causal relationship" between relicensing and a terrorist attack by airplane.<sup>67</sup> Nor does it discuss the conclusion that the NRC had already considered the environmental effects of such an attack under NEPA, so that no purpose would be served by considering them again.<sup>68</sup> In particular, the Note does not explain why the protective actions that the NRC requires of its licensees did not—as claimed by the NRC and accepted by the court—cause the environmental effects of a terrorist attack to be remote and highly speculative;<sup>69</sup> why the court's reliance on the NRC's claim that it already had considered those impacts and found them no different from those associated with accidents was unwarranted; or why the re-licensing of a facility that has operated for many years without a terrorist attack would be "too far removed from the natural or

64. Schiffman, *supra* note 45.

65. *Id.* at 394.

66. *Id.* at 396.

67. *N.J. Dep't of Env'tl. Prot.*, 561 F.3d at 136.

68. *Id.* at 143.

69. Holly Doremus, *NEPA and Terrorism*, ENVTL. L. AND POL'Y BLOG (Apr. 12, 2009), <http://legalplanet.wordpress.com/2009/04/12/nepa-and-terrorism/>.

expected consequences of agency action”<sup>70</sup> to now provoke such an attack, as claimed by the NRC and accepted by the court.

Moreover, the Note does not address a concern that appears to have motivated the Third Circuit’s decision: the court’s perception that the petitioners were really using NEPA as the only available vehicle to challenge the NRC’s renewal of the old Oyster Creek plant with an obsolete design. Although not stated by the Third Circuit, this perception implies that the Third Circuit believed that had it followed the Ninth Circuit, the Third Circuit would have condoned a misuse of NEPA that could have broad impacts beyond this case. In particular, it feared that such a decision would force the NRC to waste limited resources to consider remote and speculative environmental impacts that were not of concern to participants in the NEPA process. As discussed above, such perceptions should be irrelevant if the NEPA issues presented by the parties are substantive.

#### *Ecology Law Quarterly*

A student Note in the *Ecology Law Quarterly* provides a similar traditional legal analysis that takes detailed issue with the Third Circuit’s decision and concludes it was wrong.<sup>71</sup> It attributes the circuit split to a “difference of opinion on whether the precautionary principle should be extended to terrorism.”<sup>72</sup> This is incorrect, as there is nothing in the Ninth Circuit’s decision indicating reliance on the precautionary principle<sup>73</sup> and, as the Third Circuit explicitly noted, the Ninth Circuit had not invoked that principle to require NEPA analyses in other cases.<sup>74</sup>

Moreover, because NEPA is a procedural statute that does not mandate substantive results, it is not an appropriate vehicle for imposing safety requirements. That role is played by the Atomic Energy Act of 1954, as amended, which requires the NRC to apply the weak precautionary principle. It does this by establishing that a

70. *In re AmerGen Energy Co.*, 65 N.R.C. 124, 129 (2007) (quoting *In re Private Fuel Storage, L.L.C.*, 56 N.R.C. 340, 349 (2002)).

71. Amanda Lopez, Note, *NEPA in the Post-9/11 World*, 37 *ECOLOGY L.Q.* 423 (2010).

72. *Id.* at 448.

73. According to the precautionary principle, “[w]hen human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm.” WORLD COMM’N ON THE ETHICS OF SCIENTIFIC KNOWLEDGE AND TECH., THE PRECAUTIONARY PRINCIPLE 14 (2005), available at <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf>.

74. *N.J. Dep’t of Envtl. Prot.*, 561 F.3d at 143.

nuclear facility can be licensed only if the NRC determines that it has been designed, constructed, and operated consistent with protecting public health, safety, and security. The NRC applies the weak precautionary principle to concerns over terrorist attacks on nuclear facilities through its regulations and licensing procedures, which ensure that the facilities it licenses are designed and operated in ways that reduce the likelihood and consequences of terrorist attacks.

As this Note states, NEPA's procedures are intended to be informational for both the public and the federal agencies involved in decision making on major federal actions that significantly affect the quality of the human environment.<sup>75</sup> Thus, the appropriate analysis for understanding the Third Circuit's decision should focus on why the court accepted the NRC's reasoning that it had nothing to learn from the public and nothing to inform the public regarding the potential environmental impacts associated with a terrorist attack on a nuclear facility.

*Lewis & Clark: Environmental Law Online*

This case summary summarized the Ninth Circuit's decision without analyzing its reasoning.<sup>76</sup>

*Missouri Environmental Law and Policy Review*

This is one of the few Notes that supports the Third Circuit's decision.<sup>77</sup> The conclusion is based in part on the view that the possibility of a terrorist attack and the need to plan for it does not trigger a responsibility to base a final decision on this possibility.<sup>78</sup> This view is inconsistent with the character of NEPA as a procedural statute that does not force an agency to choose a particular alternative. In other words, NEPA dictates that an agency must consider the possibility of environmental impacts from terrorism, regardless of whether it bases its final decision on that possibility.

75. Lopez, *supra* note 71, at 425.

76. LEWIS & CLARK LAW SCHOOL'S ENVIRONMENTAL LAW ONLINE, *Case Summary*, [http://www.elawreview.org/summaries/environmental\\_quality/nepa/san\\_luis\\_obispo\\_mothers\\_for\\_pe.html](http://www.elawreview.org/summaries/environmental_quality/nepa/san_luis_obispo_mothers_for_pe.html).

77. Thomas C. Smith, Note, *Terrorist Attacks & NEPA: The Third Circuit Creates a Split in Authority*, 17 Mo. Envtl. L. & Pol'y Rev. 415, 430 (2010).

78. *Id.* at 431.