

**Detailed explanation of NEI Comment # 23 on the Draft “Background and Preliminary Assumptions for an Environmental Impact Statement – Long-Term Waste Confidence Update” (U. S. Nuclear Regulatory Commission, December 2011)**

*1. Assumption (9) in Section 8.1 unnecessarily departs from Commission Precedent*

Assumption (9) in the draft report states that a waste confidence EIS for long-term storage of spent fuel will consider the impacts of terrorism on storage facilities and the environment. NEI believes that the assumption reflects a departure from Commission precedent, will create practical difficulties, and is unnecessary.

The Commission’s policy on the consideration of terrorism in NEPA evaluations was established in the matter of *Private Fuel Storage* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002). The NRC concluded that NEPA, under a rule of reason, does not require an assessment of terrorist attacks. *Id.* at 348-50. Moreover, the NRC found that the risk of a terrorist attack cannot be determined meaningfully—making an evaluation of the issue of terrorism risks to the environment not useful for decision-making. *Id.* at 350-51. The NRC also pointed to the security-sensitive nature of the issue as a basis to conclude that a NEPA evaluation is not an appropriate vehicle to analyze terrorism. *Id.* at 355-56.

Notwithstanding an adverse decision in the Ninth Circuit Court of Appeals,<sup>1</sup> the Commission reaffirmed its position on NEPA and terrorism in *Amergen Energy Co.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 129-30 (2007). The Commission cited precedent establishing that an NRC licensing action is not the proximate cause of any environmental impacts of a terrorist attack, and, therefore, those impacts are beyond the scope of a NEPA evaluation. The position was upheld by the Third Circuit Court of Appeals in *NJDEP v. NRC*, 561 F.3d 132 (3<sup>rd</sup> Cir. 2009). The NRC’s position in subsequent cases—in various licensing contexts, including new plant licensing and license renewal—has been that NEPA evaluations do not include terrorism issues except for facilities in the Ninth Circuit.

The draft report acknowledges (at 13) the split between the Circuit Courts, and states that the “EIS will include a discussion of terrorism that the NRC believes satisfies the Ninth Circuit’s holding in [*SLOMFP*],” and that “staff plans to consider the environmental impacts of terrorism related to storage and transportation at a generic level.” NEI understands the intent to maximize the scope of the generic assessment and thereby maximize the scope of facilities potentially covered in a generic EIS. However, this assumption regarding the scope of the intended EIS will clearly create an unnecessary inconsistency in the agency’s position on NEPA and terrorism.

The intent to include this issue also directly raises the concerns cited by the NRC in *Private Fuel Storage* and subsequent cases. In particular, the probability and consequences (*i.e.*, the risk) of terrorist attacks are difficult to meaningfully assess. The range of potential terrorist scenarios is open-ended, limited only by the imagination of an evaluator. Determining which scenarios are “credible” is subjective and subject to constant reassessment. And, even if that issue were solved, the probability (and thus the risk) of the scenario cannot be determined

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<sup>1</sup> *SLOMFP v. NRC*, 449 F.3d 1016 (9<sup>th</sup> Cir. 2006)

meaningfully—particularly when the issue is considered over the extended times involved for long-term storage of spent fuel. A tendency to conservative assumption (*e.g.*, assigning a probability of one to certain scenarios) will only skew the results of the evaluation, distorting public perceptions and decision-making.

At bottom, in issuing the updated waste confidence findings, the NRC reiterated its position on the legal issue of NEPA and terrorism. *75 Fed. Reg.* at 81,052. The Commission did include a discussion of terrorism in the discussion of the revision to Finding 4 (*see 75 Fed. Reg.* at 81,073 – 81,075) that the Commission “believes satisfies the Ninth Circuit’s holding in [*SLOMFP*].” *Id.* at 81,052. However, contrary to this belief, and the discussion of Assumption (9), it is not clear what evaluation of terrorism attack scenarios would satisfy the Ninth Circuit. Although the Ninth Circuit upheld the NRC’s evaluation of the issue on remand in the *SLOMFP* matter, the issue remains subject to case-by-case considerations, and any legal outcome is less than certain. While the issue should not and cannot be ignored under the NRC’s Atomic Energy Act responsibilities, NEI believes that the best place to assess terrorism as it relates to storage of spent fuel over an extended period is outside the NEPA context.