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## Client Alert

### ***San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission: Risk of Terrorist Attack Is Not Too Speculative for Consideration Under NEPA***

by Jay E. Silberg, Norman F. Carlin, Mathew J. Swain

The Ninth Circuit recently held in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, No. 03-74628, 2006 WL 1511889 (9th Cir. June 2, 2006) (“Mothers for Peace”) that, as a matter of law, the Nuclear Regulatory Commission (“NRC”) erred in determining that the National Environmental Policy Act (“NEPA”) does not require the agency to consider the potential environmental impacts of terrorist attacks at nuclear facilities. This decision departs from precedent in major respects. If the Ninth Circuit’s reasoning is adopted by other agencies and courts, environmental review under NEPA and equivalent state laws could be affected for a wide range of industrial and public projects that may be seen as terrorist targets. Project developers, licensees and license applicants, and investors should be aware of this decision and consider appropriate steps to address any new licensing risks.

#### **Background**

In 2001, Pacific Gas and Electric Co. (“PG&E”) applied to the NRC for a license to construct and operate an Interim Spent Fuel Storage Installation at its Diablo Canyon nuclear power plant in San Luis Obispo, California. The facility would be used for the aboveground, temporary on-site storage of spent nuclear fuel.

In 2002, San Luis Obispo Mothers for Peace and others (“Petitioners”) petitioned the NRC to intervene in the licensing proceeding, seeking to raise a number of issues including the need to consider the environmental impacts of a terrorist attack on the facility. The NRC denied their attempts to introduce terrorism as a concern under NEPA, on four grounds: (1) the possibility of a terrorist attack is too removed from the natural or

expected consequences of agency action; (2) the risk of a terrorist attack cannot be determined, rendering any analysis meaningless; (3) NEPA does not require a “worst-case” analysis; and (4) NEPA’s public process is not an appropriate forum for sensitive security issues. In 2003, the NRC issued an Environmental Assessment (“EA”) for the proposed facility. Noting that the NRC considers security issues as part of its safety review and has taken additional measures to protect the security of spent fuel storage facilities, the EA concluded that “an NRC environmental review is not the appropriate forum for consideration of terrorist acts.” Petitioners challenged the NRC’s denial of their attempt to raise the risk of terrorist attack as a NEPA issue. The Court denied Petitioners’ other claims under the Atomic Energy Act and Administrative Procedure Act, but agreed with their NEPA claim.

### The Ninth Circuit’s Decision

NEPA has the twin aims of obligating a federal agency to consider environmental impacts before undertaking or approving a proposed action, and ensuring that the public is informed. The Ninth Circuit found that the question whether NEPA requires consideration of the environmental impacts of terrorist attacks is primarily a question of law, which should be reviewed for “reasonableness,” rather applying than the more deferential standard of review for an agency’s factual findings. The Court then addressed the NRC’s four grounds as follows.

First, the Court determined that the possibility of terrorist attacks is not so “remote and highly speculative” that their environmental impacts can be excluded from consideration under NEPA. The NRC failed to address factual contentions that the new facility would increase the risk of an attack. Moreover, the Court concluded, the NRC’s position was “inconsistent with the government’s efforts and expenditures to combat this type of terrorist attack at nuclear facilities” (*id.* at \*11), in particular the agency’s “top to bottom” security review against terrorist threats.

Second, the Court held that the numeric probability of a terrorist attack need not be precisely quantifiable in order for its potential environmental impacts to be considered. Rather, the Court found, the proper inquiry is whether the risk of an attack is significant. If so, then NEPA requires taking a “hard look” at the environmental consequences of a terrorist attack. Moreover, the NRC failed to show that the risk of an attack is actually unquantifiable, given that the agency claimed to have undertaken meaningful assessments of such risk in other contexts.

Third, the Court determined that the NRC erred by characterizing Petitioners’ request as a demand for a “worst-case” analysis. As the NRC correctly pointed out, former Council on Environmental Quality (“CEQ”) regulations requiring a worst-case analysis are no longer in effect. However, the current CEQ regulations do require an analysis of events with potentially catastrophic consequences, “even if their probability of occurrence is low, provided that the analysis of impacts is supported by credible evidence, is not based on pure conjecture, and is within the rule of reason.” (*id.* at \*13, quoting 40 C.F.R. § 1502.22(b)(4).) According to the Court, Petitioners did not ask the NRC to engage in conjecture on the worst-case outcome, but instead sought an analysis of the likely range of environmental impacts if an attack occurred.

Fourth, the Court held that “[t]here is no support for the use of security concerns as an excuse from NEPA’s requirements.” (*id.* at \*15.) Though security considerations may permit or require modification of some of the NEPA procedures to limit the public disclosure of sensitive information, allowing a “security exemption” from NEPA would be inconsistent with one of NEPA’s purposes: to ensure that the public can contribute to the body of information being considered by the agency. The Court noted that the NRC did not articulate

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any explanation for its unwillingness to consider the information that Petitioners offered to contribute to the process.

Having failed to consider the potential environmental impacts of a terrorist attack, the EA was found to be inadequate. In remanding to the NRC, the Court stated that its decision “should not be construed as constraining the NRC’s consideration of the merits on remand, or circumscribing the procedures that the NRC must employ in conducting its analysis.” (*Id.* at \*16.)

### Effects of the Ninth Circuit’s Decision

The NRC and PG&E have not yet decided whether to seek rehearing, rehearing *en banc* or Supreme Court review. Should the *Mothers for Peace* decision become law, when considering proposed nuclear projects within the Ninth Circuit, the NRC must consider public comments regarding the potential environmental impacts of a terrorist attack. If the agency determines that the risk of attack is significant, it must then evaluate the potential environmental impacts.

The reasoning of *Mothers for Peace* could prove persuasive to other agencies and courts as well. However, there is reason to doubt that this is a sound decision. Among other issues, the U.S. Supreme Court has held that to require consideration of a particular effect under NEPA, there must be a “reasonably close causal relationship” between the effect and the proposed action. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). While the Ninth Circuit seeks to distinguish *Metropolitan Edison*, the relationship between the NRC’s decision to license the facility and the hypothetical terrorist attack nevertheless seems too attenuated to meet the standard of a “reasonably close causal relationship.”

In addition, *Mothers for Peace* conflicts with Second, Third and Eighth Circuit decisions upholding the exclusion of terrorism risks from consideration under NEPA. In *New York v. U.S. Department of Transportation*, 715 F.2d 732, 750 (2<sup>nd</sup> Cir. 1982), *cert. denied*, 465 U.S. 1055 (1984), the Second Circuit held that the “risks of sabotage were too far afield for consideration” in NEPA review of proposed transport routes for radioactive material. In *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3<sup>rd</sup> Cir. 1989), the Third Circuit found that existing risk assessment methods did not provide a meaningful basis to assess risks of sabotage to a proposed nuclear power plant. These cases preceded the attacks of September 11, 2001. However, in a more recent case, the Eighth Circuit found supplemental NEPA review unnecessary for railroad projects approved before September 11, because any increased terrorist threat to the nation’s transportation system was general in nature and not specific to these projects. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 544 (8<sup>th</sup> Cir. 2003).

### NEPA Practice Implications

Nuclear power plants are not the only facilities that may be seen as potential terrorist targets. If the Ninth Circuit’s reasoning is widely followed, it could affect the procedures and scope of environmental review under NEPA and similar state laws, such as the California Environmental Quality Act (“CEQA”). A wide range of industrial and public projects, including energy facilities, dams, urban infrastructure, transportation facilities and the like, could be affected. Many agencies will be ill-equipped to deal with terrorism issues substantively or procedurally. The knowledge and expertise of the project applicant will likely be increasingly important.

However, the Court left open the possibility that an agency faced with NEPA comments raising the terrorism issue could reject them on the merits. Presumably, an agency would be entitled to deal with such issues on a generic basis, as with other environmental issues. See, e.g., *Baltimore Gas & Electric Co. v. Natural*

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*Resources Defense Council*, 462 U.S. 17 (1983). In addition, the decision confirms an agency's ability to modify NEPA's public participation process as needed to prevent the disclosure of sensitive security information.

Pillsbury Winthrop Shaw Pittman's Energy and Environment, Land Use & Natural Resources practice teams monitor developments in nuclear regulation and environmental law. If you wish to obtain more details on the *Mothers for Peace* case and its implications, or to develop strategies for projects that require federal approval, please contact the Pillsbury lawyer with whom you work or one of the attorneys below.

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### For further information, please contact:

**Jay E. Silberg (bio)**

Washington, DC

+1.202.663.8063

[jay.silberg@pillsburylaw.com](mailto:jay.silberg@pillsburylaw.com)

**Matias Travieso-Diaz (bio)**

Washington, DC

+1.202.663.8142

[matias.travieso-diaz@pillsburylaw.com](mailto:matias.travieso-diaz@pillsburylaw.com)

**Jeffrey A. Knight (bio)**

Washington, DC

+1.202.663.9152

[jeffrey.knight@pillsburylaw.com](mailto:jeffrey.knight@pillsburylaw.com)

**Norman F. Carlin (bio)**

San Francisco

+1.415.983.1133

[norman.carlin@pillsburylaw.com](mailto:norman.carlin@pillsburylaw.com)

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