No. 06-___

In the Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the National Environmental Policy Act ("NEPA") requires a federal agency to consider, as part of its NEPA review of an agency action, the environmental impact of potential sabotage whenever the possibility of sabotage is anything more than "remote and highly speculative," regardless of whether the agency action lacks a close, "proximate-cause" relationship to the potential sabotage and its impacts.

2. Whether an agency is required to consider the risk of sabotage in its NEPA review even if the agency reasonably concludes that the risk is not sufficiently quantifiable to be meaningful or to assist agency decision making under NEPA.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

1. Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioner here and an intervenor-respondent below is Pacific Gas and Electric Company ("PG&E").

The respondents below and respondents here are the Nuclear Regulatory Commission and the United States of America.

The petitioners below and respondents here are San Luis Obispo Mothers for Peace, the Sierra Club (Santa Lucia Chapter), and Peg Pinard.

2. Pursuant to Rule 29.6, petitioner states as follows:

PG&E is a corporation organized under the laws of California, with its principal place of business in San Francisco, California. PG&E is a public utility operating throughout most of northern and central California. PG&E is engaged primarily in the businesses of electricity generation; electricity and natural gas distribution; electricity transmission; and natural gas procurement, transportation, and storage. PG&E serves approximately 4.9 million electricity distribution customers and approximately 4.1 million natural gas distribution customers. PG&E is a subsidiary of PG&E Corporation, an energy-based holding company organized under the laws of the State of California, with its principal executive offices in San Francisco, California. PG&E Corporation is the only publicly held corporation owning ten percent (10%) or more of PG&E's stock.

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INTRODUCTION

In the decision below, the Ninth Circuit has overruled the Nuclear Regulatory Commission ("NRC" or "Commission") on two issues of great importance to the administration of the National Environmental Policy Act ("NEPA")—a statute that all too often is used by opponents of nuclear power to delay and make more costly the construction of all types of nuclear facilities. In so ruling, the Ninth Circuit has spurned controlling decisions of this Court and has placed itself in conflict with decisions in at least three other circuits, even while threatening the NRC's efforts to make more efficient the approval process for all nuclear facilities.

The NRC decision reviewed by the Ninth Circuit concerns a storage installation for spent nuclear fuel at the Diablo Canyon Power Plant ("Diablo Canyon"), a nuclear power plant located in San Luis Obispo County, California and owned and operated by petitioner Pacific Gas and Electric Company ("PG&E"). The private respondent here, San Luis Obispo Mothers for Peace, argued that the agency was required to review and address terrorism risks, not only in its ongoing security review (which for security reasons has only limited public participation), but also as part of the public proceeding that the agency conducts under NEPA. The NRC disagreed, in part because of the security risks posed by a public vetting of terrorism issues.

The first issue on which the Ninth Circuit ruled against the NRC concerns the legal threshold for determining the scope of an agency's NEPA review. The issue was addressed by this Court in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and then again in *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004). Those decisions unanimously held that whether a possible environmental effect must be assessed depends upon whether there exists "'a *reasonably close* causal relationship' between the environmental effect and the

alleged cause." *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774) (emphasis added). Both decisions made clear that this standard is similar "to the 'familiar doctrine of proximate cause from tort law'" (*ibid.*), and that the Court intended it to set "'a manageable line between those causal changes that may make an actor [*i.e.*, an agency] responsible for an effect and those that do not.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774 & n. 7). Here, the NRC relied upon this standard in holding that it was not required to address a potential terrorist attack in its NEPA analysis in addition to its ongoing security review.

The Ninth Circuit, however, held that the NRC erred in applying the *Metropolitan Edison* standard rather than the stricter standard applied by the Ninth Circuit in *No GWEN Alliance* v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988). Pet. App. 19a-21a. As a result of its analysis of these decisions, the Ninth Circuit held that an agency must conduct a NEPA analysis of any possible environmental effect—including effects that could result from intervening criminal conduct by third parties—*unless* the court can be convinced that the cause and effect are "remote and highly speculative." *Id.* at 21a. In so holding, the Ninth Circuit placed itself in conflict with decisions of the D.C. and Second Circuits, both of which have applied the *Metropolitan Edison* standard in determining that the causal relationship between agency decisions and potential acts of sabotage was *not* sufficiently close to warrant inclusion in a NEPA analysis.

The Ninth Circuit also rejected the NRC's independent conclusion that "the likelihood of [a criminal] attack cannot be ascertained with confidence by any state-of-the-art methodology" and, therefore, that the NRC had "no means to assess, usefully, the risks of terrorism" in any way that would be helpful to its NEPA analysis. Pet. App. 56a. The Ninth Circuit held that an agency's inability to quantify the risk of sabotage does not allow the agency "to eliminate a possible environmental consequence from analysis" (*id.* at

25a) and that, even if it did, the *NRC* "has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a. The only authority the Ninth Circuit cited for this proposition was the *dissent* in *Limerick Ecology Action, Inc.* v. *NRC,* 869 F.2d 719, 754 (3rd Cir. 1989). *Id.* at 25a. Not surprisingly, the Ninth Circuit's decision conflicts with the majority opinion in that case. And the Ninth Circuit's decision improperly shifts the burden of proof on the quantifiability issue from the petitioner to the agency.

Given the conflicts that the decision below creates with decisions of sister circuits and of this Court, and given the immense practical importance of the issue to PG&E, to the entire nuclear industry, and indeed to all industries regulated by federal agencies subject to NEPA, the decision below merits this Court's review.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-31a) is reported at 449 F.3d 1016. The order of the Nuclear Regulatory Commission reviewed by the court of appeals (Pet. App. 32a-41a) and a related Commission opinion (Pet. App. 42a-67a) are reported at 57 N.R.C. 1 and 56 N.R.C. 340.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 2006. Pet. App. 1a. No party to the proceeding filed a petition for panel rehearing or rehearing *en banc*. By order dated August 28, 2006, Justice Kennedy extended the time within which to file a petition for writ of certiorari to and including September 29, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4437, Council on Environmental Quality regulations, 40 C.F.R. §§ 1500.1-

1518.4, and Nuclear Regulatory Commission regulations, 10 C.F.R. §§ 51.1-.125 are reprinted at Pet. App. 75a-85a.

STATEMENT OF THE CASE

A proper understanding of the issues presented and why they merit this Court's review requires some familiarity with: (a) NEPA and its purposes; (b) the administrative proceedings before the NRC; and (c) the Ninth Circuit's decision.

A. NEPA And Its Purposes

Congress enacted NEPA to ensure that agencies consider the environmental consequences of proposed major federal actions. 42 U.S.C. § 4321; 40 C.F.R. § 1500.1(c). NEPA is a procedural statute; it does not mandate particular substantive results. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam). It requires an agency to prepare a detailed environmental impact statement ("EIS") only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Regulations promulgated by the NRC and by the Council on Environmental Quality ("CEQ"), moreover, provide that an agency may prepare an environmental assessment ("EA") to determine whether a proposed action is likely to have a significant impact on the environment. See 10 C.F.R. §§ 51.25, 51.30-.31; 40 C.F.R. §§ 1501.3, 1501.4. If the agency determines through an EA that the proposed action will not have a significant effect on the quality of the human environment, the agency issues a "finding of no significant impact," and it does not need to prepare an EIS. See 10 C.F.R. §§ 51.30-.35; 40 C.F.R. §§ 1501.4(e), 1508.13.

B. Administrative Proceedings

On December 21, 2001, PG&E filed an application with the NRC for a license that would authorize PG&E to place

spent fuel and related radioactive materials from the Diablo Canyon power plant into "dry" storage in a separately-licensed, independent spent fuel storage installation ("ISFSI") at the Diablo Canyon site. The ISFSI is intended to provide interim storage of spent fuel in accordance with Congress' direction in the Nuclear Waste Policy Act of 1982, as amended ("NWPA"). See 42 U.S.C. § 10151(a)(1). [1]

On April 22, 2002, the NRC published in the *Federal Register* a notice of opportunity for a hearing on the PG&E application. 67 Fed. Reg. 19,600 (Apr. 22, 2002). Respondent San Luis Obispo Mothers for Peace and several others (collectively "Mothers for Peace") jointly submitted a petition to intervene and a request for a hearing. On July 18, 2002, these parties filed an amended petition setting forth proposed contentions for hearing. Pet App. 68a-74a. Among other things, they argued that PG&E's Environmental Report ("ER") was inadequate because it did not include an assessment of the environmental consequences of deliberate acts of sabotage. *Ibid.*

On December 2, 2002, the NRC's Atomic Safety and Licensing Board ("Licensing Board") ruled that, under the Commission's hearing rules, the terrorism-related contentions constituted impermissible challenges to the Commission's security regulations. Pet App. 34a-36a. The Licensing Board also concluded that license applicants are not required to design facilities against destructive acts by "enemies of the United States." *Id.* at 35a. The Licensing

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[1] As at other nuclear power plants, spent fuel at Diablo Canyon is initially (and still) stored in a "wet" spent fuel pool. Dry storage allows spent fuel that has already been cooled for a time in a spent fuel pool to be removed from the pool and stored in a leak-tight steel cylinder bound within a robust concrete cask. An ISFSI is a facility for maintaining a number of storage casks, up to a licensed maximum. ISFSIs must meet NRC safety and security requirements. See, *e.g.*, 10 C.F.R. Part 72, Subpart H.

Board referred its ruling on these contentions to the Commission, inasmuch as identical issues had been raised in several other NRC proceedings and were pending before the Commission at the time. *Id.* at 36a. None of those other proceedings has generated a court decision.

The Commission accepted the Licensing Board's referral of the terrorism issues and, on January 23, 2003, affirmed the result reached by the Licensing Board. Pet App. 32a-41a. (Order CLI-03-1) In fact, in the interim between the Licensing Board's referral and the Commission's decision in this case, the Commission had already considered, in the *Private Fuel Storage* proceeding, the issue of whether NEPA requires evaluation of impacts caused by terrorist acts. Pet. App. 42a-67a. (Order CLI-02-25)

In the decision at issue here, the Commission applied the *Private Fuel Storage* precedent to hold as a matter of law that NEPA does not require a review of the likelihood or environmental impacts of a terrorist attack on the proposed facility. Pet. App. 38a-41a. For one thing, applying the "proximate cause" standard articulated by this court in *Metropolitan Edison,* the NRC held that the possibility of a terrorist attack at any one facility is speculative and too far removed from the natural or expected consequences of the agency's action to require further study under NEPA. *Id.* at 38a-39a, 51a-55a. For another, the NRC concluded that the risk of a terrorist attack at a nuclear facility cannot be adequately quantified or determined, and that the agency thus had "no means to assess, meaningfully, the risks of terrorism" at any particular facility. *Id.* at 39a, 55a-57a. The NRC also emphasized that the public NEPA process is an inappropriate forum for considering sensitive threat assessment issues, and that public NEPA reviews "may well have the perverse effect of assisting terrorists seeking effective means to cause a release of radioactivity." *Id.* at 39a, 62a-65a.

In October 2003 the NRC issued an EA for the proposed action. In that 26-page document, the NRC considered the impacts of the proposed action, including the non-radiological and radiological impacts of ISFSI construction, as well as the potential impacts of operating the facility and decommissioning it at the end of its useful life. The NRC concluded that an EIS was not warranted and issued a finding of no significant impact. Pet. App. 10a. The NRC then issued a license to PG&E on March 22, 2004.

C. The Decision Below

On December 11, 2003, Mothers for Peace filed a petition in the Ninth Circuit seeking review of the NRC's decision. They argued, among other things, that the NRC erroneously declined to hold a hearing on whether the environmental impacts of terrorist attacks and other "acts of malice or insanity" against the ISFSI should be addressed in an EIS.

In its decision, issued June 2, 2006, the court of appeals held that "the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy a reasonableness review." Pet. App. 31a. In so holding, the court rejected each of the independent reasons the NRC had given in *Private Fuel Storage* for declining to consider the environmental impact of terrorist attacks under NEPA. *Id.* at 17a-30a.

First, declining to apply this Court's *Metropolitan Edison* standard of causation, the court ruled that the exclusive standard for determining whether a potential effect must be considered under NEPA is whether the hypothetical effect in question is something more than "remote and highly speculative." Pet. App. 21a. If it is, the agency must include that effect in its NEPA review. Having thus found that the NRC had erred in applying the "proximate cause" standard articulated by this Court in *Metropolitan Edison*, the court directed the NRC to conduct a new assessment applying the

Ninth Circuit's own "remote and highly speculative" standard instead. *Id.* at 22a-24a, 31a.

Second, the court rejected the NRC's conclusion that it need not conduct a full-scale NEPA analysis of a risk that cannot be quantified in a manner sufficient to permit a meaningful NEPA analysis. Pet. App. 26a. Accordingly, the court held the agency's EA inadequate, and remanded to the agency for further proceedings on that issue. *Id.* at 31a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision countermands the NRC on two issues of great importance to the administration of NEPA: the "causation" standard that must be met before the NRC or any other agency is obligated to include a potential environmental effect as part of its NEPA analysis; and whether a NEPA review is required where the risks associated with that potential effect are not sufficiently quantifiable to allow a meaningful NEPA analysis. As we show below, on the first issue the Ninth Circuit's decision squarely conflicts with decisions of this Court as well as decisions in other circuits. And on the second issue, the decision below conflicts with CEQ regulations that this Court has previously endorsed, as well as a decision of the Third Circuit.

In addition, the decision has widespread adverse consequences. It threatens to impose a substantial burden on PG&E and other private parties participating in future NRC licensing proceedings for existing and new nuclear power plants. It also will impose unnecessary burdens on applicants for permits from other federal agencies subject to the requirements of NEPA and on those agencies. The decision also creates a cloud of uncertainty over PG&E's plans for spent fuel storage at Diablo Canyon, which is the most significant electrical generating facility in California. And finally, as the NRC stressed, NEPA reviews of terrorist threat scenarios would themselves create a risk that

classified information could be released, to the detriment of public health and safety. For all of these reasons, this Court's review is warranted.

I. The Ninth Circuit's Holding Regarding NEPA's "Causation" Standard Conflicts With Decisions Of This Court As Well As Decisions In At Least Two Other Circuits

As this Court recognized in *Metropolitan Edison,* an agency's decision about the proper scope of its NEPA analysis can have a major impact on the burdens that analysis will impose on private applicants and on the agency. See 460 U.S. at 776. On that issue, the decision below is a clear departure from controlling decisions of this Court adopting a NEPA "causation" requirement, and from decisions in other circuits faithfully applying that requirement.

A. The Decision Below Expressly Rejects This Court's Causation Standard, And Does So On Implausible Grounds

In *Metropolitan Edison*, and then again in *Public Citizen*, this Court unanimously held that whether a particular environmental "effect" must be assessed under NEPA depends at the threshold upon whether there exists "'a reasonably close causal relationship' between the environmental effect and the alleged cause"—*i.e.*, the agency action under consideration. *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). The Court made clear that the standard for determining whether a "reasonably close causal relationship" exists is a "proximate cause" standard akin to that typically applied in tort law. *Id.* As in tort law, where the concept of "proximate cause" is applied to define a point where an initial actor is no longer responsible for a chain of ensuing events, the Court intended to set "'a manageable line between those causal changes that may make an actor [*i.e.*, an agency] responsible

for an effect and those that do not.'" *Id.* (quoting *Metropolitan Edison*, 460 U.S. at 774 & n. 7). Yet the decision below expressly rejected this standard in favor of the Ninth Circuit's own, alternative standard.

1. *Metropolitan Edison* arose after a well-known accident damaged one of two reactors at Three Mile Island, and after the NRC authorized the restart of the undamaged reactor. An association of local residents who opposed further operation of the facility intervened in the restart proceedings, alleging that NEPA required the NRC to analyze in its supplemental EIS the potential effects of the agency's action on psychological health and community well-being. 460 U.S. at 768-69.

This Court began by observing that "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." 460 U.S. at 772 (emphasis in original). The Court further reasoned that the term "environmental effect" must be read to require "a reasonably close causal relationship between a change in the physical environment and the effect at issue." *Id.* at 774. The Court emphasized that "but for" causation is not sufficient to make an asserted effect cognizable under NEPA. *Ibid*. Rather, the Court held that the statute requires a "reasonably close causal relationship," similar to the tort law doctrine of proximate cause. *Ibid*. The Court reasoned that "[t]ime and resources are simply too limited" to further extend the statute and that spreading agency resources too thin would inhibit, rather than promote, protection of the environment. *Id.* at 776.

Applying this "proximate cause" test, the Court next considered whether there was a proximate relationship between resumed operation of the reactor (the change in the physical environment permitted by the agency's action) and psychological distress and other health effects from the perceived risk of a post-restart accident (the alleged effects at issue). 460 U.S. at 774-75. The Court found the "causal

chain" to be "too attenuated" (*id.* at 774), inasmuch as "the element of risk and its perception by [the concerned residents] are necessary middle links." *Id.* at 775. The Court concluded that the alleged effect was "simply too remote from the physical environment" to require an EIS under NEPA. *Id.* at 774. And the Court observed that "[u]ntil Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry." *Id.* at 778.

2. *Public Citizen* reaffirmed the *Metropolitan Edison* proximate causation test and clarified that it extends to the link between an *agency action* and a future effect. *Pub. Citizen*, 541 U.S. at 759-60. The case arose after the President announced his intent to lift a moratorium prohibiting Mexican motor carriers from obtaining operating authority within the United States. The Federal Motor Carrier Safety Administration ("FMCSA") subsequently proposed rules establishing certain financial and safety requirements for Mexican motor carriers. *Id.* at 759-60. The FMCSA also issued an EA for the proposed rules, but the EA did not consider the environmental impact of the Mexican carriers' increased cross-border operations. *Id.* at 761. The agency reasoned that any such impact would be the effect of the *President's* modification of the moratorium, not the *agency's* implementation of the regulations. *Ibid*. The court of appeals disagreed, and found the agency's EA deficient because it failed to consider the "reasonably foreseeable" effect of increased emissions caused by the entry of Mexican trucks. *Id.* at 762-63.

On review, this Court first inquired whether the Mexican carriers' increased cross-border operations, with the correlative release of emissions by Mexican trucks, was an "effect" of FMCSA's issuance of the proposed rules. 541 U.S. at 764. The Court characterized the respondents' argument as "a particularly unyielding variation of 'but for' causation, where an agency's action is considered a cause of

an environmental effect even when the agency has no authority to prevent the effect." *Id.* at 767 (citing *Metropolitan Edison*, 460 U.S. at 774).

Instead of applying a "but-for" causation test, the Court, reiterating *Metropolitan Edison,* held that whether a particular environmental "effect" must be considered under NEPA depends upon whether there exists "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Pub. Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). Moreover, as in *Metropolitan Edison*, the Court reiterated that this standard is analogous "to the 'familiar doctrine of proximate cause from tort law,'" and therefore provides "'a manageable line between those causal changes that may make an actor [*i.e.*, an agency] responsible for an effect and those that do not.'" *Ibid.* (quoting *Metropolitan Edison*, 460 U.S. at 774 n. 7).

Applying this test, the Court found that the agency had no authority to refuse admission of the Mexican motor carriers if the carriers met certain requirements contained in FMCSA regulations. 541 U.S. at 766-68. Accordingly, any pollution from Mexican motor carriers, *even if foreseeable*, was not an "effect" that the agency needed to consider because no "action" by the agency would "cause" Mexican motor carriers to enter the United States. As in the past, the Court also emphasized that inherent in NEPA is a "rule of reason" that requires consideration of the *usefulness* of any new potential information to the decision-making process. *Id.* at 767-68.

3. Here, in applying a NEPA "rule of reason" to determine whether it needed to analyze the environmental impacts of terrorist attacks, the NRC expressly applied the *Metropolitan Edison* causation standard. Relying upon that standard, the NRC noted that "where the link between the agency action and the claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of the impact," NEPA requires no discussion of that impact.

Pet. App. 53a (citing *Metropolitan Edison*, 460 U.S. at 772-75) (other citations omitted).

The NRC then correctly concluded that its licensing of the ISFSI could not reasonably be viewed as the "proximate cause" of the effects of a terrorist attack. Pet. App. 53a-54a. As the agency put it, "the causal relationship between approving the [] facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility." *Id.* at 55a. In other words, any effects of terrorist attacks would be proximately caused by terrorists, not the NRC.[2]

4. The Ninth Circuit held that the NRC erred in applying the *Metropolitan Edison* standard and flatly declared that "*Metropolitan Edison* and its proximate cause analogy are inapplicable here." Pet. App. 20a. Instead, the Ninth Circuit held that the appropriate analytical approach is the one the Ninth Circuit had used in *No GWEN Alliance*

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[2] As in tort law, a proximate cause analysis incorporates elements of certainty, foreseeability, and probability. It also considers any public policy considerations germane to the issue of legal responsibility. See, *e.g.*, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) ("[T]he notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'"). See also W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-275 (5th ed. 1984). In effect, in imposing security requirements under the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011-2297g, the NRC has already made an expert determination on the extent of its licensees' responsibility for the security of nuclear facilities. Although the Ninth Circuit found it "difficult to reconcile" the Commission's position on NEPA with its ongoing AEA-based security reviews (Pet. App. 23a), it is those very AEA-based reviews that make it unnecessary to stretch NEPA into threat assessment and that provide an additional policy basis for the NRC's "proximate cause" determination in the present case.

v. *Aldridge*, 855 F.2d 1380 (9th Cir. 1988), which expressly rejected the *Metropolitan Edison* standard in favor of a "remote and highly speculative" probability standard. *No GWEN*, 855 F.2d at 1385-86 (quoting *Warm Springs Dam Task Force* v. *Gribble*, 621 F.2d 1017, 1026-27) (9th Cir. 1980)). Under that standard, an alleged effect must be included in the agency's NEPA analysis *unless* that effect is "remote and highly speculative."

The court attributed its refusal to apply *Metropolitan Edison* in this case to a footnote in that decision, which the court read as limiting this Court's holding to situations involving "effects caused by the *risk* of accident." Pet. App. 20a (quoting 460 U.S. at 775 n. 9) (emphasis added). But the court of appeals failed even to acknowledge this Court's holding in *Public Citizen*, which makes clear that the *Metropolitan Edison* standard applies across the board. See 541 U.S. at 767.[3]

In sum, the decision below squarely rejected the legal causation standard that this Court has twice held to govern the determination whether a particular environmental effect must receive plenary review under NEPA.

B. The Decision Below Conflicts With Decisions In Two Other Circuits, And Is In Substantial Tension With A Decision Of Yet Another Circuit

In rejecting this Court's "proximate cause" standard, the decision below also placed the Ninth Circuit in square conflict with the D.C. and Second Circuits, and in substantial tension with the Eighth Circuit.

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[3] The passages from *Metropolitan Edison* cited by the Ninth Circuit related to this Court's specific application of the proximate cause standard; they did not purport to limit the *applicability* of the standard. Compare Pet. App. 20a-21a with *Metropolitan Edison*, 460 U.S. at 773-77.

1. The Ninth Circuit's decision conflicts with the D.C. Circuit's opinion in *Glass Packaging Institute* v. *Regan,* 737 F.2d 1083 (D.C. Cir. 1984). There the D. C. Circuit rejected a challenge to a decision of the Bureau of Alcohol, Tobacco, and Firearms ("BATF") to allow the packaging of liquor in plastic bottles. In permitting the use of plastic bottles, the BATF had prepared an environmental assessment that the petitioners criticized for failing to consider the potential injury or death that could result from sabotage of the bottles by "deranged" criminals. 737 F.2d at 1091.

As one of two alternative holdings,[4] the D.C. Circuit rejected as "specious" the claim that potential harm resulting from such sabotage must be evaluated under NEPA where it is caused by "reasonably foreseeable criminal acts of third parties." 737 F.2d at 1091-92. Relying upon *Metropolitan Edison's* "proximate cause" analysis, the D.C. Circuit held that "mere foreseeability does not trigger a duty to consider an alleged environmental effect" (*id.* at 1091), and that "[t]he limits to which NEPA's causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA." *Id.* at 1091-92. The court concluded that, under a proximate cause analysis, the causal link between possible sabotage of plastic bottles and BATF's approval of those bottles was simply too attenuated to "tip the scale" in favor of mandatory NEPA review. *Id.* at 1093 (citations omitted).

As noted above, by contrast, the Ninth Circuit expressly rejected this Court's proximate cause test and applied the "remote and highly speculative" standard previously articulated by the Ninth Circuit in *No GWEN*. Although the Ninth Circuit did not explicitly state that "mere

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[4] The court also held, in the alternative, that criminal tampering with plastic beverage bottles "is definitely not an *environmental* consequence under any reasonable interpretation of [NEPA]." 737 F.2d at 1094 (emphasis added).

foreseeability"—as opposed to the "reasonable foreseeability" normally required in the tort-law context—is enough for purposes of NEPA, that is the necessary implication of its holding. Thus, in the D.C. Circuit, "reasonable foreseeability" is required, whereas in the Ninth Circuit it is not.

This difference, moreover, would clearly be outcome-determinative in future cases. For example, if the D.C. Circuit had applied the Ninth Circuit's test in *Glass Packaging*, it undoubtedly would have held that the BATF *was* required to consider the possibility of sabotage as part of its NEPA review. The risk of tampering with plastic bottles was concededly foreseeable (in the "mere foreseeability" sense) and, therefore, at least somewhat greater than "remote and highly speculative." By contrast, if the Ninth Circuit had applied the stricter "proximate cause" analysis from *Metropolitan Edison*, as the D.C. Circuit did in *Glass Packaging*, it would have been constrained to affirm the NRC's finding that approving a spent fuel storage facility is *not* the "proximate cause" of any sabotage that might subsequently occur at that facility. Allowing for the fact that these two decisions arose in the context of different agency actions and different forms of sabotage, the conflict between them could hardly be more stark.

2. The Ninth's Circuit decision also conflicts with the Second Circuit's decision in *City of New York* v. *U.S. Department of Transportation*, 715 F.2d 732 (2d Cir. 1983). The court there rejected a challenge to a Department of Transportation ("DOT") rule designed to reduce the risk of transporting large quantities of radioactive materials by highway where, among other things, the agency had determined that an EIS was not necessary. The Second Circuit reversed a finding by the district court that DOT was "obligated" to address the risk of sabotage in its NEPA analysis. 715 F.2d at 750. The court stated that "[w]ith respect to environmental consequences that are only remote

possibilities, an agency must be given some latitude to decide what sorts of risks it will assess." *Ibid.* (citations omitted). The court found that DOT had correctly concluded that "the risks of sabotage were *too far afield* for consideration" under NEPA. *Ibid.* (emphasis added).

The Second Circuit's use of the phrase "too far afield" indicates that it applied a proximate cause analysis—*i.e.*, it believed there was no "reasonably close causal relationship" between the environmental impacts of a terrorist attack and the agency action at issue. In short, it followed an analysis like that applied by this Court in *Metropolitan Edison*. And, unlike the Ninth Circuit, the Second Circuit did *not* require the agency to demonstrate that the risk of terrorist activity was "remote" and "highly speculative" to avoid considering the issue as part of its NEPA analysis.

Here again, the Second Circuit, if it followed its precedent, would have decided this case differently than the Ninth Circuit did. Conversely, if the Ninth Circuit followed its reasoning in this case, it would almost certainly decide a case like *City of New York* against the federal agency. The risk that the highway transportation of large quantities of radioactive materials *could* lead to sabotage may be low, but that risk is no more "remote" or "speculative" than the risk that a terrorist would attack one particular spent fuel storage site. In short, there is a clear conflict between the Ninth and Second Circuits.

3. The Ninth Circuit's decision is also in substantial tension with the Eighth Circuit's decision in *Mid States Coalition for Progress* v. *Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), which involved a proposal to construct and upgrade rail lines. There the Eighth Circuit rejected a claim that the Surface Transportation Board ("Board") violated NEPA when it declined to reopen the record and supplement its EIS to consider concerns arising from the terrorist attacks of September 11, 2001. 345 F.3d at 544. The Eighth Circuit held that such requests were subject to the

"rule of reason," and that the agency should be accorded deference as long as its decision is not arbitrary and capricious. *Ibid.* (citing *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)). In regard to the issue of terrorism, the court acknowledged that "the events of September 11, 2001, have certainly raised awareness of the potential threats to our nation's transportation systems." *Ibid.* The court nonetheless held that "the Board exercised its permissible discretion when it determined that any increased threat was general in nature and did not bear specifically on [petitioners] or the proposed * * * project." *Ibid.*

Although the Eighth Circuit's analysis focused on the distinction between "general" and "specific" threats, it clearly requires something more than the Ninth Circuit has now held sufficient to trigger NEPA's requirement—*i.e.*, anything that is not "remote and highly speculative." If the Ninth Circuit had applied the Eighth Circuit's test here, it would have been forced to concede as a matter of law that the "increased threat" of terrorism was a "general" threat that does "not bear specifically on the [PG&E] project." And, therefore, the Ninth Circuit would have had to conclude that NEPA's requirements were *not* triggered.[5]

II. The Ninth Circuit's Decision On The NRC's Ability To Exclude Unquantifiable Risks Conflicts With Decisions Of This Court, With CEQ Regulations, And With Decisions In Other Circuits

The Ninth Circuit also encroached on the NRC's broad discretion in rejecting the agency's conclusion that "the likelihood of attack cannot be ascertained with confidence

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[5] See also *City of Shoreacres* v. *Waterworth*, 420 F.3d 440, 451-53 (5th Cir. 2005) (discussing *Public Citizen* in dictum and stating that "a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a 'proximate cause,' in the sense meant by tort law, of the proposed agency action").

by any state-of-the-art methodology" and, therefore, that NRC had "no means to assess, usefully, the risks of terrorism * * * " for purposes of its NEPA review. Pet. App. 55a. The Ninth Circuit rejected that reasoning, holding that an agency's inability to quantify the risk of sabotage, in a way that is meaningful under NEPA, does not allow the agency "to eliminate a possible environmental consequence from analysis" under NEPA. Pet. App. 25a-26a. The Ninth Circuit's holding warrants review because it is inconsistent with NEPA, as implemented by the NRC and CEQ and as construed by this Court, and because it conflicts with the law of the Third Circuit.

A. The Ninth Circuit's Decision Is Erroneous Under The Controlling Authorities

CEQ regulations speak directly to this issue.[6] Indeed, the CEQ amended 40 C.F.R. § 1502.22 in 1986 (in light of *Metropolitan Edison)* to require consideration of "reasonably foreseeable" impacts in lieu of the "worst case" analysis that the regulation had previously required. See 51 Fed. Reg. 15,618, 15,621-25 (Apr. 25, 1986). That regulation now provides that where there is "incomplete or unavailable information," an EIS must still be "based upon theoretical approaches or research methods generally accepted in the scientific community, * * * provided that the analysis of the

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[6] The Commission has complied with NEPA by issuing its own regulations governing its consideration of the environmental impact of licensing actions. See 10 C.F.R. §§ 51.1-.125. The NRC's regulations are based on the CEQ regulations. Section 51.10(a) refers to "the Commission's announced policy to take account of the regulations of the [CEQ] published November 29, 1978 (43 Fed. Reg. 55,978-56,007) voluntarily, subject to certain conditions." In the *Private Fuel Storage* case, the Commission noted that it gives CEQ regulations "substantial deference." Pet. App. 51a. See also *Andrus* v. *Sierra Club*, 442 U.S. 347, 358 (1979) (holding that CEQ regulations are entitled to "substantial deference").

impacts is supported by *credible scientific evidence, is not based on pure conjecture, and is within the rule of reason* * * * ." 40 C.F.R. § 1502.22(b)(4) (emphasis added).[7]

The CEQ's standard was explicitly approved by this Court in *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989). As the Court observed, the amended regulation does not necessarily foreclose an agency's duty to consider remote but potentially severe impacts. 490 U.S. at 354. But it "grounds the duty in evaluation of scientific opinion rather than in the framework of a conjectural 'worst case analysis.'" *Id.* at 354-55 (citation omitted). The Court further explained that, by requiring an EIS to "focus on reasonably foreseeable impacts," (*id.* at 356), the amended rule "'will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision * * * rather than distorting the decisionmaking process by overemphasizing highly speculative harms.'" *Ibid.* (citations omitted).

Here, acting within the "rule of reason" and permissible discretion under NEPA, the NRC determined that "attempts to evaluate th[e] risk" of a terrorist attack, "even in qualitative terms are likely to be meaningless and consequently of no use in the agency's decisionmaking" under NEPA. Pet. App. 39a. (Indeed, Mothers for Peace had conceded that any such analysis would be "qualitative." Pet. App. 72a-74a.) The agency observed that it has no way to calculate the probability of an attack on a specific facility and declined merely to *assume* that the facility is at risk. Pet.

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[7] Although these CEQ regulations expressly govern an EIS rather than an EA, the same principles apply *a fortiori* to an EA. If, as the regulation shows, an agency cannot be required to consider in an EIS an alleged risk that is based on "pure conjecture" and that is not "supported by credible scientific evidence," it cannot be required to consider such a risk in an EA. The standard for an EA cannot be broader than for an EIS.

App. 57a. Such an assumption, the NRC stated, "would transform the NEPA analysis into a form of guesswork and distort NEPA's cost-benefit calculus." *Ibid.* Such an approach would contravene the CEQ regulations, as well as this Court's decisions approving those regulations, insofar as the regulations clearly reject any need for conjectural and "worst case" analysis. See 51 Fed. Reg. at 15,621-24.

But the Ninth Circuit refused to accord the NRC's determination the deference it deserves. See, *e.g.*, *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983). Instead, substituting its judgment for that of the NRC, the Ninth Circuit held that the NRC's inability to quantify the risk of sabotage does not allow it "to eliminate a possible environmental consequence from analysis" under NEPA. Pet. App. 25a.[8] Even worse, rather than requiring those challenging the NRC's conclusions to demonstrate, through reliable evidence, that a terrorist attack on the specific proposed facility is "reasonably foreseeable," the Ninth Circuit improperly reallocated the burden of proof to the NRC in holding that *the NRC* "has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a.

B. The Decision Below Placed The Ninth Circuit In Conflict With The Third Circuit On This Important Issue

The Ninth Circuit's decision is directly contrary to the majority opinion of the Third Circuit in *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719 (3rd Cir. 1989). On the

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[8] The Ninth Circuit erred for an additional reason. Consistent with NRC regulations that direct qualitative analysis of factors that cannot be quantified (see, *e.g.*, 10 C.F.R. § 51.71(d)), the NRC specifically noted that "stochastic" criminal terrorist acts are not within the "range of likely impacts" which, even if not subject to precise measurement or quantification, the agency "can say with some degree of certainty * * * will take place." Pet. App. 49a-50a, 59a. The Ninth Circuit ignored this assessment.

NRC's argument regarding its ability to quantify risk and perform a meaningful analysis, the court cited as its only authority the *dissent* in *Limerick*. Pet. App. 25a. The Ninth Circuit's decision, however, squarely conflicts with the majority opinion in *Limerick*, and in two separate respects.

First, the majority opinion is flatly inconsistent with the Ninth Circuit's holding that an inability to quantify the risk of sabotage cannot justify exclusion of that risk from the agency's NEPA analysis. In *Limerick*, the majority held that the NRC had *not* acted arbitrarily and capriciously in deciding not to evaluate the risk of sabotage in an EIS, based on the agency's conclusion that "sabotage risk analysis is beyond current probabilistic risk assessment methods and that there is no current basis by which to measure such risk." 869 F.2d at 743. The Third Circuit found that this agency conclusion satisfied NEPA's "hard look" requirement and emphasized that this was a determination in an area where courts are to "be at [our] most deferential." *Ibid.* (quoting *Baltimore Gas*, 462 U.S. at 103). The Ninth Circuit failed even to mention this holding, although its citation of the *Limerick* dissent strongly suggests an awareness of the majority's opinion.

Second, even assuming that an inability to perform a meaningful analysis would not foreclose a NEPA review as a matter of law, the Ninth Circuit's decision conflicts with *Limerick* in holding that it is the *agency*, not the party challenging the decision, that bears the burden of proof on the issue of quantifiability. Pet. App. 26a. Throughout this portion of its opinion, the Ninth Circuit made clear that it was placing this burden on the NRC. For example, at one point the Ninth Circuit held that "the *agency* fails to adequately show that the risk of a terrorist act is unquantifiable." Pet. App. 25a (emphasis added). And then at the end of that discussion, the Ninth Circuit reiterated its holding that "*the NRC* has not established that the risk of a terrorist attack is unquantifiable." *Id.* at 26a (emphasis

added). Nowhere did the Ninth Circuit suggest that NRC critics and project opponents bear any burden on this issue.

This too flatly conflicts with the majority decision in *Limerick*. The majority there repeatedly made clear that, once the expert agency articulates its view that the risk is not quantifiable, the party challenging that conclusion bears the burden of proof on that issue. Early in its discussion, for example, the majority stated: "[W]e believe that LEA"—the petitioner there—"has mischaracterized this issue by casting it in terms of *the NRC's burden* to prove its asserted inability to quantify or predict sabotage risk." 869 F.2d at 743 (emphasis added). The majority continued that, "[t]o prevail here, LEA should have advanced some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks." *Id.* at 744. The majority concluded that, "[w]here LEA failed to meet *its burden* * * * we cannot conclude that the NRC acted arbitrarily and capriciously by refusing to litigate this issue." *Ibid.* (emphasis added); *accord id.* at 744 n. 31 (noting that "LEA has failed to carry its burden to rebut the NRC's claim that it cannot meaningfully consider the issue").

This difference in approach is dispositive on this point as well. Had the Ninth Circuit followed the Third Circuit's approach, it would have been forced to concede that a proper conclusion by the NRC that the risk of sabotage cannot be meaningfully quantified would be sufficient to exclude the sabotage issue from the agency's NEPA review. And the Ninth Circuit could not simply have granted the petition on the ground that the NRC had failed to carry its burden of establishing this point. To the contrary, if the Ninth Circuit felt that Mothers for Peace (notwithstanding the NRC's unimpeachable conclusion to the contrary) had legitimate evidence that the risk of a terrorist attack *is* quantifiable, the most the court could have done would have been to remand to the agency to determine, in the first

instance, whether the petitioner had carried *its* burden of establishing quantifiability.

III. The Decision Below Will Have Widespread Adverse Practical Consequences

Certiorari is also warranted because the Ninth Circuit's decision, if left to stand, will have far-reaching, adverse ramifications for PG&E and private applicants before the NRC and other federal agencies, for government resources, and for national security.

A. The Ninth Circuit's Decision Will Unduly Burden PG&E and Other Participants In The NRC Regulatory Process Without Advancing NEPA's Goals

The Ninth Circuit's decision threatens to increase substantially the burdens of the NEPA review in this and other NRC proceedings and thus flouts this Court's observation that "[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of 'ensur[ing] a fully informed and well considered decision' * * * is to be accomplished." *Metropolitan Edison*, 460 U.S. at 776 (citing *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 551, 558 (1978).

1. Nominally, the Ninth Circuit's decision requires the NRC to consider further the petitioners' "factual contentions" that the licensing of the Diablo ISFSI "would lead to or increase the risk of a terrorist attack because (1) the presence of the [ISFSI] would increase the probability of a terrorist attack on the Diablo Canyon nuclear facility, and (2) the Storage Installation itself would be a primary target for a terrorist attack." Pet. App. 21a. However, by its nature, an assessment of these issues would require a detailed terrorist threat assessment focusing on such issues as the current and future threat environment, the relative "attractiveness" of the ISFSI as a terrorist target, and the vulnerability (or relative "hardness") of the facility as a

terrorist target. Such assessments almost inevitably would lead to a further assessment of the capabilities of putative attackers, the consequences of postulated attacks, fanciful mitigation measures, and alternative design concepts. Such an extension of NEPA into the realm of threat assessment would place an unnecessary and duplicative burden on PG&E (and, indeed, other private parties) that are already addressing many of these issues through post-9/11 security reviews and inspections, security upgrades, security orders, and a rulemaking. It may also divert resources of the agency staff and other federal law enforcement agencies to participate in a potentially open-ended remand process.

2. The impact of the Ninth Circuit's decision, moreover, would not be limited to this NRC licensing proceeding. The logic of the Ninth Circuit's decision would compel the NRC to consider the risk of terrorism in all pending and future power reactor licensing actions—for PG&E and other applicants. Those proceedings would include waste storage licensing and amendment proceedings, power plant license renewal applications, new power plant license applications, and the Yucca Mountain high-level waste repository project. This would have a substantial impact on PG&E, the industry, and NRC resources as well as the predictability and efficiency of NRC licensing proceedings. The resultant transformation of NRC proceedings into "amorphous public extravaganzas" on the speculative effects of postulated terrorist attacks would impede the important national policy objective of streamlining NRC licensing processes. See *Bellotti* v. *NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983); see also *Citizens Awareness Network, Inc.* v. *United States*, 391 F.3d 338, 343 (1st Cir. 2004) (noting the "very lengthy" duration of past NRC hearings and NRC efforts to improve hearing efficiency).

3. On the other hand, the adjudication of speculative claims positing terrorist attacks on the Diablo Canyon ISFSI, or on any other nuclear facility, would yield no benefit to

the applicants, the NRC or the public, especially when considered in light of the additional burden imposed by such a review. As the *Limerick* majority recognized, without reasonable estimates of an event's probability, the "risk" cannot be properly characterized. 869 F.3d at 743-44. And, as the NRC recognized, any attempt to analyze such "risks" without meaningful data will tend to "exaggerate a project's risks and unduly alarm the public." Pet. App. 58a.

Moreover, as noted above, the NRC and the nuclear industry have enhanced substantially the already robust security measures required by the AEA and NRC regulations in response to the events of September 11, 2001. See, *e.g.*, 10 C.F.R. Part 73. The agency's review and enhancement of its security requirements is an ongoing process, intended to ensure that the risk of a terrorist attack remains remote. Because a process is already in place to address nuclear security, the assessment of hypothetical terrorist attacks under the rubric of NEPA would not add meaningfully, if at all, to NRC decision making. Cf. *Romer* v. *Carlucci*, 847 F.2d 445, 457 (8th Cir. 1988) (finding that NEPA review of nuclear missile basing decision would not be of "decisional significance" given the availability of "comprehensive information").

4. Similarly, additional review would not serve NEPA's informational purpose. The sensitivity of the information pertinent to such a review would generally preclude its release to the public. Therefore, the development of an EIS that addresses terrorism impacts likely would not provide a useful "springboard for public comment," nor would it ensure that "the larger audience" can provide input as necessary to the NRC. *Pub. Citizen*, 541 U.S. at 768 (quoting *Baltimore Gas*, 462 U.S. at 97).

B. The Ninth Circuit's Decision Would Adversely Impact Other Private Applicants and Federal Agency Actions

The Ninth Circuit's decision also has implications for activities authorized or conducted by other federal agencies. The prospect of terrorist attacks is not confined to any one industry. Adoption of the court's logic would necessitate that any agency conducting a NEPA review for a proposed chemical plant, oil pipeline, liquefied natural gas pipeline, skyscraper, dam, bridge, or tunnel somehow establish that terrorist attacks on such a facility are highly speculative or else postulate a successful attack and evaluate its environmental consequences. This will place new burdens on many future private applicants.

For most private parties and many federal agencies, requiring terrorism reviews under NEPA would strain resources and erode the efficacy of permitting, licensing, and other approval processes. This would require applicants and agencies to expend "considerable resources" developing security expertise "not otherwise relevant to their congressionally assigned functions." *Metropolitan Edison*, 460 U.S. at 776. And ironically, the Ninth Circuit's extraordinary expansion of NEPA—the result of its failure to perform the requisite causation analysis—would do nothing to further protection of the environment.

C. The Ninth Circuit's Decision Creates Uncertainty And Potential Delay for PG&E at the Diablo Canyon Nuclear Power Plant

The Ninth Circuit's decision creates uncertainty for the timing of the operation of the Diablo Canyon spent fuel storage facility at issue here. Consistent with its obligations under the NWPA and to electricity consumers in California, PG&E must provide additional spent fuel storage capacity to support the continued, productive operation of the Diablo Canyon power plant. Accordingly, PG&E designed and

licensed the ISFSI to meet this need and plans to begin loading spent fuel from the wet pools into dry storage casks in November 2007. Presently, however, it is not known whether the NRC will foreclose operation of the ISFSI in 2007.[9] It is also not known how long the remand proceedings required by the decision below (or any related judicial review) will last. Clearly, PG&E's dry storage plans could be adversely impacted by the remand.[10] Review by this Court is needed to resolve the uncertainties and practical problems the Ninth Circuit decision poses for PG&E and its customers.

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[9] The Ninth Circuit decision did not invalidate, vacate or stay the license for the ISFSI, and therefore does not affect PG&E's authority to load fuel in that facility. See *Amoco Prod.* v. *Vill. of Gambell*, 480 U.S. 531, 542 (1987)) (*citing Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 311 (1982)) (injunctive relief is an "extraordinary" equitable remedy that "does not issue as of course"). However, the petitioners have requested from the NRC declaratory or equitable relief that would prevent PG&E from loading spent fuel. While the NRC has denied the immediate request for such relief, it has deferred the question of PG&E's authority to begin operation of the ISFSI. See *Pac. Gas & Elec. Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-23, 64 N.R.C. __ , slip op. (Sept. 6, 2006).

[10] As a contingency, PG&E has obtained NRC approval of a "wet storage" alternative that would provide storage to support continued plant operation until 2010-2011. The failure to resolve *fully* the remanded issue by the 2010-2011 timeframe could result in an interruption of service at Diablo Canyon. This alternative involves the installation and use of temporary spent fuel storage racks in the existing spent fuel pools at Diablo Canyon. These racks have yet to be installed. The wet storage option is decidedly *not* the preferred storage option from the operational, public safety, security, or economic perspectives.

D. The Ninth Circuit's Decision Raises Serious National Security Concerns

The Ninth Circuit's holding also raises significant national security concerns. The Ninth Circuit's decision requires some level of public participation in the remand process, and the NRC traditionally has addressed NEPA reviews through the formal adjudicatory process. As the NRC noted, "[a] full-scale NEPA process inevitably would require examination not only of how terrorists could cause maximum damage but also of how they might best be thwarted." Pet. App. 64a. Such an assessment would require access to highly sensitive national security information held by the licensees, the NRC, and other government agencies. Disclosure of such information to members of the public, though subject to rigorous (and cumbersome) procedural protections, would create a very real risk that classified or security information could be released, possibly to the detriment of nuclear safety and security.

As the NRC explained, such a result would be contrary to the NRC's statutory mandate under the AEA to withhold from the public domain any information that could jeopardize the common defense and security. Pet. App. 64a-65a. Section 147 of the AEA requires the NRC to prohibit unauthorized disclosures of security-related information. See 42 U.S.C. § 2167(a). NEPA does not override that statutory obligation. To the contrary, NEPA requires agencies to implement the statute's policies using "all practicable means, consistent with other essential considerations of national policy." 42 U.S.C. § 4331(b).

The NRC expressed deep concerns regarding any process with public participation on security issues. Pet. App. 39a, 62a-65a. The Ninth Circuit dismissed those concerns and suggested that they could be mitigated by procedural controls. Pet. App. 29a-30a. However, it is the NRC that Congress has charged with ensuring the safety

and integrity of nuclear facilities. And, it is the NRC that has conducted proceedings on nuclear security matters and accumulated experience on the risks and benefits of the process. Accordingly, the NRC's judgments about these issues are entitled to the highest respect and deference—deference that was completely absent from the decision below.

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Especially in the post-9/11 world, courts should be solicitous of the views of federal agencies charged with protecting the public from terrorist threats. The Ninth Circuit's decision not only flouts the views of the federal agency charged by Congress with regulating nuclear energy, it does so in a manner that flouts controlling decisions of this Court and creates needless conflicts with sister circuits. The decision needs to be reversed, either summarily or as a result of plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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