

memorandum

DATE:

December 1, 2006

REPLY TO
ATTN OF:

Office of NEPA Policy and Compliance

SUBJECT:

Need to Consider Intentional Destructive Acts in NEPA Documents

TO:

DOE NEPA Community (list attached)

In light of two recent decisions by the United States Court of Appeals for the Ninth Circuit, DOE National Environmental Policy Act (NEPA) documents, including environmental impact statements (EISs) and environmental assessments (EAs), should explicitly address potential environmental consequences of intentional destructive acts (i.e., acts of sabotage or terrorism). This interim guidance has been developed by the Office of NEPA Policy and Compliance, in consultation with the Assistant General Counsel for Environment and the Deputy General Counsel of the National Nuclear Security Administration. More detailed guidance on this matter is in preparation.

The more recent of the court's two decisions involved DOE's EA for *Construction and Operation of a Biosafety Level-3 Facility at Lawrence Livermore National Laboratory* (DOE/EA-1442, 2002). In that October 16, 2006, decision, *Tri-Valley CAREs v. Department of Energy*, the court wrote:

Concerning the DOE's conclusion that consideration of the effects of a terrorist attack is not required in its Environmental Assessment, we recently held to the contrary in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006). In *Mothers for Peace*, we held that an Environmental Assessment that does not consider the possibility of a terrorist attack is inadequate. *Id.* at 1035. Similarly here, we remand for the DOE to consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement. As in *Mothers for Peace*, we caution that there "remain open to the agency a wide variety of actions it may take on remand [and]. . . [w]e do not prejudge those alternatives." *Id.*

A summary of the court's decision in *Mothers for Peace* is contained in DOE's NEPA *Lessons Learned Quarterly Report*, September 2006, page 19 (available on the DOE NEPA website at www.eh.doe.gov/nepa under Lessons Learned Quarterly Reports).

Each DOE EIS and EA should explicitly consider intentional destructive acts. This applies to all DOE proposed actions, including both nuclear and non-nuclear proposals.

Partial guidance on analyzing intentional destructive acts in NEPA documents is contained in *Recommendations for Analyzing Accidents under NEPA* (July 2002);

available on the DOE NEPA website under Selected Guidance Tools). This guidance includes example language and a discussion of ways to apply an analysis of accidents to an analysis of the potential consequences of acts of sabotage or terrorism. This approach may be appropriate for many, if not most, situations where the potential sabotage or terrorist scenarios and the accident scenarios involve similar physical initiating events or forces (e.g., fires, explosions, drops, punctures, aircraft crashes). This approach may not be adequate for all situations, however, because accident scenarios may not fully encompass potential threats posed by intentional destructive acts. For example, this approach may not adequately reflect the threat assessments for facilities with inventories of special nuclear materials. Each EIS and EA should explicitly consider whether the accident scenarios are truly bounding of intentional destructive acts. Regardless of whether additional analysis is necessary, each EIS and EA should contain a section demonstrating explicit consideration of sabotage and terrorism.

The Department is developing new guidance on considering intentional destructive acts in NEPA documents, and expects that the guidance will address such topics as:

- Determining the appropriate level of detail for analysis, consistent with the "sliding-scale" principle (e.g., a more detailed threat analysis is appropriate for a special nuclear material management facility, or for a non-nuclear facility with a significant amount of material at risk; a less detailed analysis may be adequate for a proposed office complex).
- Determining when a finding of no significant impact for an EA is appropriate in view of potential large impacts from terrorist acts.
- Determining what information regarding analyses of these threats can be released to the public.
- Considering intentional destructive acts even when some or all of the analyses may be classified; protecting classified security information through the use of classified appendices and unclassified summaries.
- Timing considerations for cases where threat analyses are needed.

While this further guidance is in preparation, DOE NEPA practitioners should immediately implement the guidance in this notice to explicitly consider the potential impacts of intentional destructive acts in NEPA documents, and should consult with the Office of NEPA Policy and Compliance and, depending on the organization that is preparing the NEPA document, either the DOE or NNSA Office of the General Counsel.

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