

**Circuit-Splitting the Atom:
How the Nuclear Regulatory Commission and the Department of Energy
Reached Different Conclusions on the Need to Consider
Hypothetical Terrorist Attacks under NEPA**

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ABSTRACT

This Paper examines possible explanations for the differing policies of the Nuclear Regulatory Commission (NRC), which adopted a "Ninth Circuit only" approach, and the Department of Energy (DOE), which adopted a single nationwide policy, in response to similar adverse appellate court rulings from the Ninth Circuit imposing the requirement to consider the possible environmental impacts of terrorist acts under the National Environmental Policy Act of 1969 (NEPA). The discussion begins with a general overview of NEPA and the need to examine "reasonably foreseeable" effects of proposed Federal actions. The Paper then provides a brief overview of Federal courts and the effect of adverse circuit court rulings on Federal agencies. The examination then turns to the relevant "proximate cause" case law on intervening criminal and terrorist acts, reviews the Ninth Circuit rulings imposing the NEPA terrorism requirements, and explains how the NRC's rejection of the Ninth Circuit approach led to a circuit split. Finally, the analysis explores the various legal and pragmatic considerations that likely led NRC and DOE, despite being similarly situated, to adopt different responses to similar adverse rulings. The author concludes that, notwithstanding the possibility of a future Supreme Court decision or Congressional action to clarify the requirements of NEPA, both approaches are workable and serve the unique interests of the respective agencies.

Introduction

Following the terrorist attacks of September 11, 2001, the United States Nuclear Regulatory Commission (NRC) implemented new regulations aimed at increasing the security of the nation's civilian nuclear facilities.¹ However, NRC did not examine the potential effects of a hypothetical terrorist attack in its National Environmental Policy Act (NEPA) Environmental Assessment (EA) for a proposed spent fuel storage facility at the Diablo Canyon power reactor.² In *San Luis Obispo Mothers for Peace v. NRC* (SLOMP),³ the Ninth Circuit found this approach violated NEPA.

The Department of Energy (DOE) had similarly concluded that consideration of the effects of a hypothetical terrorist attack was not required in its EA for the construction and operation of a Biosafety Level-3 Facility at Lawrence Livermore National Laboratory.⁴ The Ninth Circuit rejected that position in *Tri-Valley CAREs v. Department of Energy* (Tri-Valley),⁵ citing its decision in *SLOMP*.

Following the *Tri-Valley* decision, DOE chose to consider intentional destructive acts in all of its NEPA documents nationwide.⁶ But NRC adopted a policy of only examining terrorism impacts in major Federal actions within the jurisdiction of the Ninth Circuit.⁷ Subsequently, on appeal from a license renewal action for the Oyster Creek power reactor, the Third Circuit

¹ NRC implemented a new Design Basis Threat (DBT) in 2007. Design Basis Threat, 72 Fed. Reg. 12,705 (Mar. 19, 2007) (codified at 10 C.F.R. pt. 73). The DBT describes "general adversary characteristics that designated licensees must defend against with high assurance. These NRC requirements include protection against radiological sabotage . . . and theft or diversion of NRC-licensed [nuclear material]." *Id.* NRC also promulgated new prescriptive physical protection requirements in 2009. Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009) (codified at 10 C.F.R. pt. 73). And the Energy Policy Act of 2005 amended the Atomic Energy Act of 1954 (AEA) to require NRC to conduct force-on-force inspection exercises at least once every three years for designated licensees. AEA § 170D, as amended by P.L. 109-58 § 651(a)(1), 119 Stat. 799 (2005).

² NRC, ENVIRONMENTAL ASSESSMENT RELATED TO THE CONSTRUCTION AND OPERATION OF THE DIABLO CANYON INDEPENDENT SPENT FUEL STORAGE INSTALLATION (Oct. 24, 2003), *available at* <http://pbadupws.nrc.gov/docs/ML0329/ML032970370.pdf>.

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

⁴ DOE, NATIONAL NUCLEAR SECURITY ADMINISTRATION, OAKLAND OPERATIONS OFFICE, ENVIRONMENTAL ASSESSMENT FOR THE PROPOSED CONSTRUCTION AND OPERATION OF A BIOSAFETY LEVEL 3 FACILITY AT LAWRENCE LIVERMORE NATIONAL LABORATORY, LIVERMORE, CALIFORNIA, DOE/EA-1442 (Dec. 2002), *available at* http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/EA-1442-FEA-2002.pdf.

⁵ *Tri-Valley CAREs v. Dep't of Energy*, 203 F. App'x 105, 107 (9th Cir. 2006).

⁶ Memorandum from Carol S. Borgstrom, Director, DOE Office of NEPA Policy and Compliance, to DOE NEPA Community, "Need to Consider Intentional Destructive Acts in NEPA Documents" (Dec. 1, 2006), *available at* http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-intentdestructacts.pdf.

⁷ *Amergen Energy Co. LLC* (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 N.R.C. 124, 128-31 (2007).

affirmed NRC's decision to exclude the potential effects of a hypothetical terrorist attack in its NEPA documents in *New Jersey Department of Environmental Protection v. NRC* (NJDEP).⁸

Part I of this Paper examines NEPA's requirement to consider "reasonably foreseeable" effects and the relationship of this requirement to the legal concept of "proximate cause." Part II discusses the effects of adverse circuit court rulings on Federal agencies. Part III recites relevant case law on "proximate cause" and intervening criminal and terrorist acts. Part IV turns to the specific rulings in *SLOMP* and *Tri-Valley*, as well as the respective agency responses to these rulings and the eventual circuit split created by *NJDEP*. Part V parses the various legal and pragmatic considerations that may have led NRC and DOE to adopt different responses to the *SLOMP* and *Tri-Valley* decisions, despite their circumstantial similarity. The author concludes that, notwithstanding the possibility of a future Supreme Court ruling or legislative intervention, both approaches are workable and serve the unique interests of the respective agencies.

Part I – The National Environmental Policy Act of 1969

NEPA, enacted by the 91st United States Congress and signed into law by President Richard Nixon on January 1, 1970, established a national policy designed to

encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.⁹

NEPA has been called an environmental "Magna Carta" because of its ambitious goals and its emulation around the world.¹⁰

In general terms, NEPA requires Federal agencies to "consider every significant aspect of the environmental impact of a proposed action," and to take a "hard look" at environmental consequences.¹¹ However, NEPA does not demand any specific outcome; agencies have the latitude to decide that "other values outweigh the environmental costs."¹² NEPA "merely

⁸ N.J. Dep't of Env'tl. Prot. v. U.S. Nuclear Regulatory Comm'n, 561 F.3d 132 (3d Cir. 2009).

⁹ 42 U.S.C. §§ 4321-4370 (2011).

¹⁰ See, e.g., Todd S. Aagaard, *A Functional Approach to Risks and Uncertainties under NEPA*, 1 MICH. J. ENVTL. & ADMIN. L. 87 (2012), available at http://students.law.umich.edu/mjeal/index/wp-content/uploads/Aagaard_1MJEL87_2012.pdf.

¹¹ Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 553 (1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

¹² *Robertson*, 490 U.S. at 350.

prohibits uninformed—rather than unwise—agency action.”¹³ The Supreme Court has noted that NEPA’s “twin aims” are (1) to force agencies to consider environmental impact as part of its decision making, and (2) to make information available to the public so that it can play a role in the decision making process.¹⁴

Specifically, NEPA requires “all agencies of the Federal government” to prepare a “detailed statement” for all proposed “major Federal actions significantly affecting the quality of the human environment.”¹⁵ This “detailed statement” is commonly referred to as an Environmental Impact Statement (EIS).¹⁶ Alternatively, if an agency determines that its proposed major Federal action will not have a significant impact on the human environment, it may make a “Finding of No Significant Impact” (FONSI).¹⁷ In this situation, an agency need only prepare a more limited Environmental Assessment (EA).¹⁸ If an EIS is required, it must describe, among other things, the “environmental impact of the proposed action,” and “any adverse environmental effects which cannot be avoided should the proposal be implemented.”¹⁹

In the NEPA vernacular, “effects” and “impacts” are synonymous.²⁰ Regulations from the Council on Environmental Quality (CEQ)²¹ note that effects include both “[d]irect effects, which are caused by the action and occur at the same time and place,” as well as “[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²²

A. “Reasonably Foreseeable” Effects

So what, exactly, does “reasonably foreseeable” mean? What degree of causal relationship between an environmental effect and the proposed Federal action is necessary to

¹³ *Id.* at 351.

¹⁴ *Baltimore Gas & Elec. Co. v. Natural Res. Def. Counsel, Inc.*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee*, 535 U.S. at 553 and *Weinberg v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981)).

¹⁵ 42 U.S.C. § 4322(2)(C) (2011).

¹⁶ 40 C.F.R. § 1501.11 (2013).

¹⁷ 40 C.F.R. §§ 1501.4(e), 1508.13 (2013).

¹⁸ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757-58 (2004); 40 C.F.R. § 1508.9 (2013).

¹⁹ 42 U.S.C. § 4322(2)(C) (2011).

²⁰ 40 C.F.R. § 1501.8 (2013).

²¹ NEPA established the CEQ. NEPA § 202 (codified at 42 U.S.C. § 4342). The President issued an executive order instructing CEQ to “[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA].” E.O. 11514, “Protection and enhancement of environmental quality” § 3(h), 35 Fed. Reg. 4247 (Mar. 5, 1970). As an independent agency, NRC is not bound by these regulations but “takes account” of them “voluntarily, subject to certain conditions” in conjunction with its own NEPA regulations. 10 C.F.R. § 51.10(a).

²² 40 C.F.R. § 1501.8 (2013).

trigger NEPA obligations? The contours of causation have been at the core of many NEPA cases litigated in the Federal courts.

The Supreme Court has examined these questions in two important cases addressing causation under NEPA: *Metropolitan Edison v. People Against Nuclear Energy*,²³ and *Department of Transportation v. Public Citizen*.²⁴ In these cases, the high court declared that a mere “‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA.”²⁵ According to the Supreme Court, the appropriate test for determining whether NEPA requires a Federal agency to analyze the postulated environmental impacts of a proposed action is whether there is a “‘reasonably close causal relationship’” between the two. The Court “‘analogized that test to the ‘familiar doctrine of proximate cause from tort law.’”²⁶

B. Proximate Cause

Black’s Law Dictionary defines “proximate cause” as:

the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would ‘set society on edge and fill the courts with endless litigation.’ As a practical matter, legal responsibility must be limited to those causes which are *so closely connected with the result* and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.²⁷

According to traditional tort law, these ideas of justice and policy generally recognize a break in the chain of causation when there is intervening criminal conduct.²⁸ For example, imagine that a suicide bomber detonates an explosive device in a coffee shop. The mere act of constructing or operating a coffee shop would generally not be considered a “proximate cause” of the resulting harm because of the intervening criminal act. One does not “proximately cause” criminal activity simply by providing an object for a criminal act.

This begs the question: can a major Federal action ever be considered the “proximate cause” of the environmental effects that could result from a successful terrorist attack? The

²³ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

²⁴ *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 757-58 (2004).

²⁵ *Id.* at 767.

²⁶ *Id.* (quoting *Metro. Edison*, 460 U.S. at 774).

²⁷ BLACK’S LAW DICTIONARY, “cause” (9th ed. 2009) (internal citations omitted).

²⁸ *See generally* Restatement (Second) of Torts § 442, 448.

Supreme Court has not addressed this specific question. And Federal appellate courts have reached different conclusions, creating a “circuit split” on this point of law.

Part II – Adverse Circuit Decisions and Federal Agencies

Before moving on to the specific court rulings at issue in this Paper, a general discussion of Federal appellate courts, and the effects of their decisions on Federal agencies, will provide some relevant context.

A. Federal Court Structure

There are ninety-four Federal district courts which are organized into twelve regional circuits, each having a United States court of appeals. These “circuit courts” hear appeals from the district courts located within that circuit, as well as appeals from decisions of Federal administrative agencies.²⁹ Eleven of the regional circuits are numbered (e.g., the “First Circuit” through the “Eleventh Circuit”), and the District of Columbia has its own circuit (i.e., the “D.C. Circuit”).³⁰ Figure 1, below, is a map of the district and circuit boundaries.

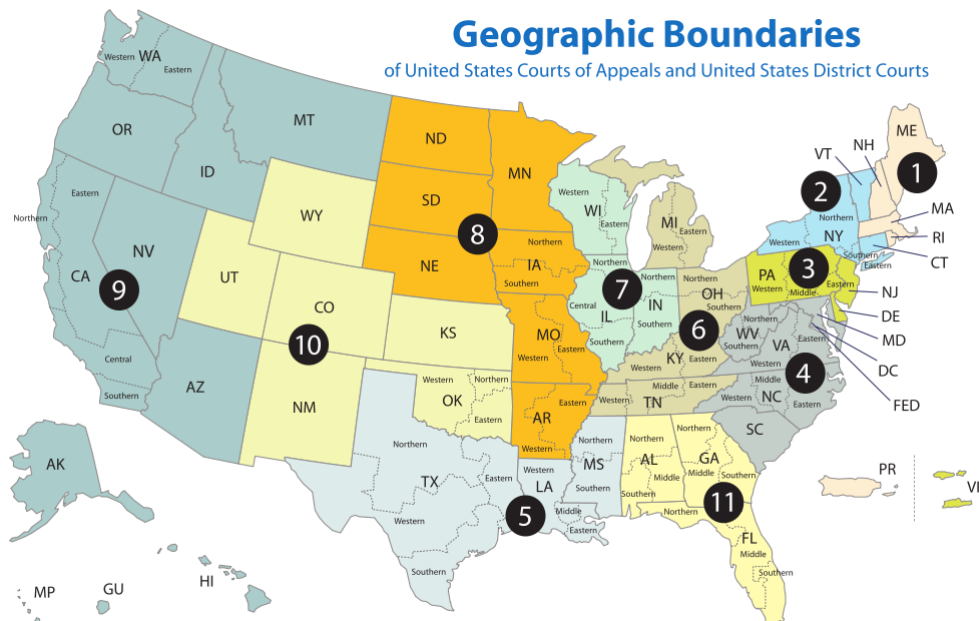


Figure 1³¹

²⁹ Courts of Appeals, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx> (last visited Apr. 12, 2014).

³⁰ “In addition, the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims.” *Id.*

³¹ Geographic Boundaries of the United States Courts of Appeals and United States District Courts, UNITED STATES COURTS, <http://www.uscourts.gov/uscourts/images/CircuitMap.pdf> (last visited Apr. 12, 2014).

Only the Supreme Court has the authority to issue legally-binding precedent for all lower Federal courts.³² Rulings from the regional circuits are only binding jurisprudence within the geographic area of that particular circuit.³³ Thus, it is possible to have divergent interpretations and applications of Federal law based solely on geography. When two or more circuits reach different conclusions on questions of law, it is known as a "circuit split." While the Supreme Court is not required to resolve circuit splits, these differences in interpretation are generally an important consideration in the Court's case selection (known as "*certiorari*").³⁴

B. Effect on Federal Agencies

What effect do adverse circuit rulings have on Federal agencies that have nationwide programs across multiple circuits? Federal courts have explicitly noted that, "[i]t is clear, of course, that an agency of the United States is not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States."³⁵ Agencies are "free to litigate the same issue in the future with other litigants."³⁶ In fact, the Supreme Court values a concept known as "percolation," and has noted that forcing nationwide agency compliance with a single circuit court ruling

would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeal to explore a difficult question before this Court grants *certiorari*.³⁷

However, the courts have also noted that there is "some point when the Government should stop trying to treat citizens differently in different circuits In cases involving statutory interpretation, principles of fairness, consistency and judicial and governmental efficiency militate against repetitious litigation."³⁸

Federal agencies may choose to accept an adverse circuit court ruling and pursue a single, nationwide approach. Alternatively, agencies may elect to implement a regional approach for their various activities. For example, the Fourth Circuit issued a decision adverse to the

³² "The judicial Power of the United States, shall be vested in one supreme Court." U.S. CONST. art. III, § 1.

³³ *Generali v. D'Amico*, 766 F.2d 485, 489 (11th Cir. 1985); *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir. 1986), *cert. denied*, 479 U.S. 914 (1986).

³⁴ *See* SUP. CT. R. 10.

³⁵ *Georgia Dep't of Med. Assistance v. Bowen*, 846 F.2d 708, 710 (11th Cir. 1988) (citing *Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959, 964 (9th Cir. 1986)).

³⁶ *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 173 (1984).

³⁷ *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

³⁸ *Bowen*, F.2d at 711 (citing *Thomas v. Fla. Power and Light Co.*, 764 F.2d 768, 770 (11th Cir. 1985)).

Environmental Protection Agency (EPA) and the Army Corps of Engineers (ACOE).³⁹ The agencies responded by issuing guidance claiming that the decision was “incorrect” in light of “longstanding interpretation of the regulations,” and noting that the government “reserve[d] the right to litigate the[] issues in other circuits.”⁴⁰ The guidance made clear that, “[t]he Fourth Circuit’s decision is not binding outside the Fourth Circuit, and therefore will not be implemented outside the Fourth Circuit.”

Similarly, when the Federal Circuit⁴¹ and the Sixth Circuit⁴² reached different conclusions regarding the question of whether severance payments were “wages” subject to FICA tax, the Internal Revenue Service (IRS) took a regional approach in addressing the adverse ruling.⁴³ The IRS, which preferred the Federal Circuit ruling, suspended review of certain claims in the Sixth Circuit (pending an appeal to the Supreme Court) and applied the Federal Circuit ruling to all other taxpayers.⁴⁴

Agencies may consider a wide range of legal and pragmatic factors in deciding how to address an adverse circuit court decision. Possible considerations specific to NRC and DOE in the NEPA-terrorism context are discussed in detail, below. But, first, we turn to the circuit court opinions relevant to the topic of this Paper.

Part III – Can Federal Actions ‘Proximately Cause’ Terrorist Attacks under NEPA?

In the wake of the horrific terrorist attacks of September 11, 2001, the United States became more focused than ever before on the possibility of future attacks.⁴⁵ Environmental groups began lodging challenges to major Federal actions, claiming that the environmental effects of hypothetical terrorist attacks must be considered under NEPA. The Supreme Court has

³⁹ *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997).

⁴⁰ EPA & ACOE, Guidance for Corps and EPA Field Offices Regarding Clean Water Act Section 404 Jurisdiction Over Isolated Waters in Light of *United States v. James J. Wilson* (May 29, 1998), available at <http://1.usa.gov/liGnwtt>.

⁴¹ *CSX Corp. v. United States*, 518 F.3d 1328 (Fed. Cir. 2008).

⁴² *In re Quality Stores, Inc.*, 693 F.3d 605 (6th Cir. 2012).

⁴³ IRS, Office of Federal, State and Local Governments, FSLG Newsletter (July 2013), available at http://www.irs.gov/pub/irs-tege/p4090_0713.pdf. http://www.irs.gov/irm/part21/irm_21-007-002r-cont03.html. See also, IRS, Internal Revenue Manual § 21.7.2.5.16 (Oct. 1, 2013), available at http://www.irs.gov/irm/part21/irm_21-007-002r-cont03.html.

⁴⁴ The IRS ultimately prevailed on appeal. *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395 (2014).

⁴⁵ See generally James B. Steinberg & Miriam R. Estrin, *Harmonizing Policy and Principle: A Hybrid Model for Counterterrorism*, 7 J. NAT’L SECURITY L. & POL’Y 161, 165 (2014) (discussing the shift “to prevent attacks instead of simply prosecuting those who try to carry them out.”).

yet to consider this issue, precisely, but several Federal appellate courts have ruled on this and other highly-relevant questions of law.

A. Proximate Cause and Intervening Terrorist Acts in Tort

As noted above, the Supreme Court looks to the paradigm of proximate cause when examining NEPA obligations, and intervening criminal conduct generally breaks a chain of causation. Two Federal appellate courts have specifically ruled, in basic tort cases, that terrorist acts are “superseding events” that sever the causal chain in a proximate cause analysis.

In the wake of the 1993 World Trade Center bombing, fertilizer manufacturers were sued under theories of negligence. The Third Circuit held “as a matter of law the World Trade Center bombing was not a natural or probable consequence of any design defect in defendants’ products. In addition, the terrorists’ actions were superseding and intervening events breaking the chain of causation.”⁴⁶ The Tenth Circuit reached the same result following the Oklahoma City bombing and held that fertilizer manufacturers were not responsible for the criminal conduct of the bomber.⁴⁷

B. Proximate Cause and Intervening Criminal or Terrorist Acts under NEPA

In applying the proximate cause analysis to NEPA, specifically, the Supreme Court instructed courts to “look to [NEPA’s] underlying policies” to draw a “manageable line” for proximate causation.⁴⁸ Four of the five Federal circuit courts of appeals that have considered the question of causation in the context of NEPA have drawn that “manageable line” to exclude intervening criminal or terrorist activity, finding that such acts are too far removed from Federal action to require NEPA analysis.

The D.C. Circuit rejected a claim that agencies must review criminal acts in NEPA analyses. The court held that the acts of “deranged criminals” far exceed “[t]he limits to which NEPA’s causal chain may be stretched before breaking.”⁴⁹ The Second Circuit upheld the Department of Transportation’s conclusion that the risks of terrorism or sabotage “were too far afield for consideration” in the NEPA analysis of a regulation governing the shipment of radioactive material.⁵⁰ Similarly, the Third Circuit upheld a decision by NRC declining to

⁴⁶ Port Auth. of N.Y. & N.J. v. Arcadian Corp., 189 F.3d 305, 319 (3d Cir. 1999).

⁴⁷ Gaines-Tabb v. ICI Explosives, USA, Inc., 160 F.3d 613, 618 (10th Cir. 1998).

⁴⁸ Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004).

⁴⁹ Glass Packaging Inst. v. Regan, 737 F.2d 1083, 1091-92 (D.C. Cir. 1984).

⁵⁰ City of N.Y. v. Dep’t of Transp., 715 F.2d 732 (2d Cir. 1983), *cert. denied*, 465 U.S. 1055 (1984).

analyze the risks of sabotage under NEPA because the analysis would not be meaningful.⁵¹ And, in 2003, the Eighth Circuit determined that it was legally permissible for the Surface Transportation Board to decline to consider “generalized” risks of terrorism in NEPA analyses.⁵²

The lone Federal appellate court to express a contrary view is the Ninth Circuit, which held, in two separate cases, that NEPA requires analysis of the potential impacts of a hypothetical terrorist attack. In *SLOMP*, the Ninth Circuit ruled against the NRC in a spent fuel storage facility licensing action.⁵³ The court then applied the *SLOMP* decision to DOE in *Tri-Valley*, remanding DOE’s action to construct and operate a facility at a national lab.⁵⁴

The Ninth Circuit likely reached a different conclusion than each of the other circuits because it declined to apply the Supreme Court’s “reasonably close causal relationship” standard, finding it “inapplicable.” The opinion claimed to distinguish the *Metropolitan Edison* decision as involving a change in the physical environment and an effect, whereas *SLOMP* involved the relationship between a Federal action and a change in the environment.⁵⁵ Instead, the Ninth Circuit applied its own test, noting that “[t]he appropriate inquiry is . . . whether [terrorist] attacks are so ‘remote and highly speculative’ that NEPA’s mandate does not include consideration of their potential environmental effects.”⁵⁶ The court applied this unique test and found that, in both *SLOMP* and *Tri-Valley*, NEPA required consideration of terrorist attacks.

Part IV – Agency Responses to the Ninth Circuit Ruling and Eventual Circuit Split

In the aftermath of the adverse Ninth Circuit rulings, with no Supreme Court review in sight,⁵⁷ NRC and DOE were left with difficult policy choices about how to move forward with NEPA reviews. Ultimately, the agencies implemented different approaches to the adverse decisions.

⁵¹ *Limerick Ecology Action v. Nuclear Regulatory Comm’n*, 869 F.2d 719, 743-44 (3d Cir. 1989).

⁵² *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 543-44 (8th Cir. 2003).

⁵³ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n (SLOMP)*, 449 F.3d 1016, 1035 (9th Cir. 2006).

⁵⁴ *Tri-Valley CAREs v. Dep’t of Energy*, 203 F. App’x 105, 107 (9th Cir. 2006).

⁵⁵ *SLOMP*, 449 F.3d at 1029. The court did not, however, explain how it was able to depart from *Pub. Citizen*, which says that “NEPA *requires* a reasonably close causal relationship.” 541 U.S. at 767 (emphasis added).

⁵⁶ *SLOMP*, 449 F.3d at 1030 (citing *No GWEN Alliance of Lane Cnty., Inc. v. Aldridge*, 855 F.2d 1380, 1386 (9th Cir. 1988)).

⁵⁷ The Supreme Court rejected the petition for a writ of *certiorari* without comment. *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm’n*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom.* *Pac. Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, 549 U.S. 1166 (2007).

A. DOE Response to *Tri-Valley*

The Ninth Circuit issued its decision in *Tri-Valley* (adverse to DOE) on October 16, 2006. Within a matter of weeks, on December 1, 2006, the Director of DOE's Office of NEPA Policy and Compliance issued interim guidance implementing the Ninth Circuit ruling on a nationwide basis:

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 applies to *all* DOE proposed actions, including both nuclear and non-nuclear proposals.⁵⁸

This document pointed to pre-existing guidance on intentional destructive acts that DOE had previously developed.⁵⁹ Indeed, DOE had been considering "sabotage and terrorism . . . in NEPA documents for many years [on a discretionary basis]" prior to the Ninth Circuit ruling.⁶⁰

B. NRC Response to *SLOMP*

The Ninth Circuit issued its decision in *SLOMP* (adverse to NRC) on June 2, 2006. Several months later, on February 26, 2007, the Commission, acting in its appellate adjudicatory capacity, issued four decisions reaffirming its previous NEPA policy. The Commission noted that "the Ninth Circuit decision does not control" in matters outside that circuit,⁶¹ and stated that the Commission "continue[s] to believe that the [NEPA] does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities,"⁶² notwithstanding the dissent of Commissioner Jaczko.⁶³

The Commission explained its decision in *Oyster Creek*:

Respectfully . . . we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the *Diablo Canyon* proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question. Such an obligation would defeat any possibility of a conflict between the Circuits on important issues. . . . The Ninth Circuit brushed aside the Supreme Court's "proximate cause" test as somehow "inapplicable" to

⁵⁸ Memorandum from Carol M. Borgstrom, *supra* note 6 (emphasis added).

⁵⁹ DOE, RECOMMENDATIONS FOR ANALYZING ACCIDENTS UNDER NEPA (July 2002), available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-DOE-AccidentAnalysis.pdf.

⁶⁰ See DOE, "NEPA Hot Topics: Sabotage and Terrorism; Global Climate Change," 57 NEPA Lessons Learned Quarterly Report 6 (Dec. 1, 2008), available at <http://energy.gov/sites/prod/files/LLQR-2008-Q4.pdf>.

⁶¹ Sys. Energy Res., Inc. (Early Site Permit for Grand Gulf ESP Site), CLI-07-10, 65 N.R.C. 144, 146 (2007).

⁶² Nuclear Mgmt. Co., LLC (Palisades Nuclear Plant), CLI-07-09, 65 N.R.C. 139, 141 (2007).

⁶³ Pac. Gas & Elec. Co. (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-07-11, 65 N.R.C. 148, 149 n.5 (2007).

NRC licensing decisions. But the Supreme Court has held, unconditionally, that the test is “required.” . . . [A] NEPA-driven review of the risks of terrorism would be largely superfluous here, given that the NRC has undertaken extensive efforts to enhance security at nuclear facilities And, as the NRC has pointed out in other cases, substantial practical difficulties impede meaningful NEPA-terrorism review, while the problem of protecting sensitive security information in the quintessentially *public* NEPA and adjudicatory process presents additional obstacles.⁶⁴

This Commission decision was appealed to the Third Circuit and affirmed in *NJDEP*. The Third Circuit applied the Supreme Court precedents of *Metropolitan Edison* and *Public Citizen* and held that NRC licensing actions cannot reasonably be viewed as the “proximate cause” of terrorist attacks. The court reasoned that a terrorist attack “requires at least two intervening events: (1) the act of a third-party criminal and (2) the failure of all government agencies specifically charged with preventing terrorist attacks,” and that “this causation chain is too attenuated to require NEPA review.”⁶⁵ This ruling created a true circuit split with the Ninth Circuit’s *SLOMP* decision.

Part V – Similar Circumstances, Different Approaches

As a matter of law, no agency is required to follow the favored approach of other agencies in complying with NEPA.⁶⁶ But, why did NRC choose the regional approach? Why did DOE elect a national approach? Both agencies have significant dealings with similar nuclear subject matters; both suffered the same adverse ruling from the Ninth Circuit; and both likely performed the decisional calculus using similar legal and pragmatic considerations. So how could they end up on such different paths? The answer is likely because, despite their similarities, the agencies are fundamentally different animals.

A. Popularity and Political Expediency

Obviously, NRC’s decision to limit the application of *SLOMP* to only the Ninth Circuit was not universally embraced. The non-profit advocacy group, Public Citizen, wrote a caustic letter to NRC, stating that “[b]ifurcating NRC [p]olicy [i]s a [t]errible [w]ay to [r]egulate,” and

⁶⁴ Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 N.R.C. 124, 128-31 (2007) (internal citations omitted).

⁶⁵ N.J. Dep’t of Env’tl. Prot. v. U.S. Nuclear Regulatory Comm’n, 561 F.3d 132, 140 (3d Cir. 2009).

⁶⁶ Natural Res. Def. Council, Inc. v. Fed. Aviation Admin., 564 F.3d 549, 560 (2d Cir. 2009).

that “[d]ividing NRC policy into a region of ‘the Ninth Circuit’ and ‘the rest of the country’ is a highly inappropriate response.”⁶⁷

However, NRC is an independent Federal agency,⁶⁸ whereas DOE is a cabinet-level agency.⁶⁹ Generally speaking, independent agency decision making is more removed from popular opinion than that of their executive counterparts. This design was intended to insulate, for example, important safety regulation functions from the occasional ill-considered whims of an electorate.⁷⁰ Considering the amount of public pressure on the Federal government to take action to prevent terrorist attacks, DOE may have given greater weight to the demands of the public, where NRC may have given greater weight to other legal and pragmatic considerations.

However, even independent agencies are not immune to political pressure. NRC Commissioner Jaczko entered a dissent in the *Oyster Creek* decision noting that the Commission’s decision “not to implement the Ninth Circuit’s mandate nationwide” was “unnecessary and risky” and would “not provide regulatory stability or national consistency.”⁷¹ However, Commissioner Merrifield fired-back in a scathing concurring opinion, countering that Commissioner Jaczko’s approach was to create “regulatory strangulation . . . not based on ensuring adequate protection of the public health and safety, but rather, based on political expediency.”⁷² At some level, popular opinion and political considerations likely entered the decision making process for both agencies, but perhaps to a lesser extent at the NRC.

B. Uniformity and Consistency

Both agencies likely considered the need for uniformity and consistency in their operations. While DOE could have concluded that uniformity would be best-achieved through a national approach, NRC may have legitimately reached a different conclusion on the same issue. For example, DOE prepares NEPA documents on both nuclear and non-nuclear actions, whereas NRC’s sole sphere of authority is regulation of civilian use of atomic energy. Perhaps DOE

⁶⁷ Letter from Michele Boyd, Legislative Director, Energy Program, Public Citizen, to the NRC Secretary (Mar. 12, 2006), available at <http://pbadupws.nrc.gov/docs/ML0707/ML070720562.pdf>.

⁶⁸ Energy Reorganization Act of 1974, Pub. L. 93-438, 88 Stat. 1233 (Oct. 11, 1974).

⁶⁹ Department of Energy Organizing Act of 1977, Pub. L. 95-91, 91 Stat. 565 (Aug. 4, 1977).

⁷⁰ See generally Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN L. REV. 1111 (2000).

⁷¹ Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 N.R.C. 124, 135 (2007).

⁷² *Id.* at 134.

found significant value in establishing uniformity between nuclear and non-nuclear programs; NRC would not experience a similar benefit from a national approach.

DOE may have also considered the need for geographic consistency. Twenty of seventy-three “Major DOE Laboratories and Field Facilities” (27%) are located in the Ninth Circuit.⁷³ However a significantly smaller number of major NRC-licensed facilities, just eight of one hundred fourteen (7%) are in the Ninth Circuit.⁷⁴ NRC could have reasonably concluded that consistency was best achieved by not disturbing the status quo for the 93% of stakeholders *outside* the Ninth Circuit.

C. Finality

Consistency also spills into the concept of finality. After all, finality is the only true consistency. As discussed above, circuit courts lack authority to settle an area of law uniformly throughout the United States. Only the Supreme Court can provide finality to an unsettled question of law. One of the most important precursors to Supreme Court review is a circuit split. Perhaps DOE, which was already implementing NEPA terrorism reviews prior to the *Tri-Valley* ruling, simply did not see a likely candidate for creating a circuit split in its NEPA pipeline. With these facts, perhaps DOE concluded that it had reached that point when it should “stop trying to treat citizens differently in different circuits.”

Meanwhile, at NRC, *Oyster Creek* was waiting in the wings. NRC could have concluded that *Oyster Creek* would create a circuit split and allow the question to proceed to the Supreme Court, achieving true finality. The reasonableness of NRC’s position is reinforced by the fact that the case did, indeed, create a circuit split. (Unfortunately, petitioner did not seek *certiorari*.)

D. Efficiency

In admonishing the lower courts to draw a “manageable line” for imposing NEPA responsibilities on agencies, the Supreme Court noted that NEPA’s demands must “remain manageable” if its goals are to be met.⁷⁵ Otherwise, “available resources may be spread so thin that agencies are unable to adequately pursue protection of the physical environment and natural

⁷³ See DOE, Facilities Information Management System, “Major DOE Laboratories and Field Facilities,” http://fims.info.doe.gov/does_at_a_glance.htm (last visited Apr. 12, 2014).

⁷⁴ See NRC, INFORMATION DIGEST (NUREG-1350) Vol. 25 (2013-2014), *available at* <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1350/v25/facts-at-a-glance.pdf>.

⁷⁵ *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 776 (1983).

resources.” Efficient use of scarce resources is a particularly important consideration in the austere, post-sequestration Federal budget environment in which agencies must operate.⁷⁶

Both agencies may have considered the need to take further action to adequately address the ongoing threat of terrorism in the post-9/11 world. DOE, which conducts NEPA reviews in nuclear, as well as non-nuclear, actions, may have perceived an internal deficiency related to proactive consideration of terrorist threats in non-nuclear space. DOE may have found that it would be *efficient* to implement reviews uniformly across the agency using NEPA as an appropriate vehicle. However, NRC, which *only* has nuclear actions, had already implemented robust security measures throughout its regulatory framework.⁷⁷ In fact, NRC’s statutory authority does not allow it to issue a license unless it can determine that a facility would not constitute an unreasonable risk to the health and safety of the public and would not be inimical to the common defense and security.⁷⁸ NRC found that analyzing potential impacts of terrorist attacks under NEPA would duplicate work and consume significant agency resources.⁷⁹

As noted earlier, the first of the “twin aims” of NEPA is to force agencies to consider environmental impacts as part of its decision making.⁸⁰ While DOE likely found that NEPA would be an efficient means of considering environmental impacts of terrorist attacks in its decision making process for non-nuclear actions, there is clearly no need to use NEPA to *force* NRC to consider terrorism.

Turning to the second of the “twin aims” of NEPA: to make information available to the public so that it can play a role in the decision making process.⁸¹ DOE and NRC both consider sensitive security information in evaluating proposed actions. But the sensitivity of security information, alone, does not excuse compliance with NEPA because those parts of the analysis can be withheld from the public.⁸² But what if it is necessary to withhold the *entire* analysis from the public? It is unclear whether DOE has ever had such a situation. However, NRC did

⁷⁶ See generally Scott Fulton, Dialogue: Key Legal Issues Facing the Administration in 2013: Environment, Energy and Natural Resources, 43 ENVTL. L. REP. NEWS & ANALYSIS 10395, 10397-98 (May 2013).

⁷⁷ See DBT Rule, Power Reactor Security Rule, and Energy Policy Act of 2005, *supra* note 1.

⁷⁸ See generally Atomic Energy Act of 1954, as amended (42 U.S.C. § 2201 *et seq.*)

⁷⁹ Amergen Energy Co., LLC (License Renewal for Oyster Creek Nuclear Generating Station), CLI-07-08, 65 N.R.C. 124, 128-31 (2007).

⁸⁰ N.J. Dep’t of Env’tl. Prot. v. U.S. Nuclear Regulatory Comm’n, 561 F.3d 132, 138 (3d Cir. 2009).

⁸¹ *Id.*

⁸² Weinberger v. Catholic Action of Haw., 454 U.S. 139, 146 (1981).

precisely that, and the Ninth Circuit upheld that decision, when *SLOMP* was remanded.⁸³ But when no information is provided to the public, the process does not further the aims of NEPA.

If the NEPA process could help an agency *gather* valuable information pertinent to terrorism impacts, it could still further the aims of NEPA. However, on the issue of terrorism, the NRC found it unlikely that a public input process would yield any useful new information. Various Federal agencies within the executive branch with intelligence, arms control, foreign policy, law enforcement, and homeland security responsibilities possess significant expertise on the international threat environment and have access to diplomatic and other channels to assess foreign nations, sub-national organizations, and other threats to national security, where the public does not.

If the NRC was unable to gather useful information *from* the public, unable to share sensitive information *with* the public, and found that the reviews merely encumbered scarce agency resources to duplicate work, it appears reasonable for the agency to conclude that voluntarily conducting NEPA terrorism reviews, outside the Ninth Circuit, would detract from the agency's ability to pursue the goals of NEPA in *actually* meaningful ways.

But DOE's opposite conclusion is also logically consistent. DOE would not be duplicating work in non-nuclear actions, and could legitimately discover efficiency gains with across-the-board NEPA terrorism reviews. Plus, the geographic diversity of DOE actions lends itself to a finding that a nationwide strategy is the best path to consistent application of the law.

Conclusion

Despite similar nuclear responsibilities, and similar adverse circuit court decisions, DOE and NRC arrived at differing NEPA strategies through reasoned logic. Both agencies appear to have a genuine concern for marshalling resources in the most efficient, effective manner that will allow them to achieve the aims of NEPA.

Ideally, a nationwide position would be articulated through clarification of the statute by Congress, or a binding precedential decision by the Supreme Court. But, given the challenges of the current political environment, and the current lack of a viable "case or controversy" on this precise issue coming up through the court system, neither seems likely. In the meantime, the

⁸³ *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 635 F.3d 1109 (9th Cir. 2011).

well-reasoned approaches of both agencies will allow the nation to continue moving toward a “productive and enjoyable harmony between man and his environment.”