

## **Ninth Circuit Rules Navy Satisfied NEPA in Considering Potential Terrorist Threat to San Diego Facility**

The Ninth Circuit has rejected a claim, under the National Environmental Policy Act, that the Navy did not adequately consider the environmental consequences of a potential terrorist threat to the redevelopment of a military complex near downtown San Diego. The opinion upheld the Navy's Environmental Assessment for the complex, which concluded that the project would not create the potential for a significant impact from a terrorist attack. [San Diego Navy Broadway Complex Coalition v. United States Department of Defense](#), No. 12-57234 (9th Cir. March 30, 2016).



**Background** The Navy first approved the redevelopment of the complex in 1991. The project included both military functions and private commercial uses to generate revenue. However, adverse real estate conditions in San Diego delayed the project until the mid-2000s. In 2006, the Navy prepared an EA for the project to supplement its prior NEPA analysis from the early 1990s, and it executed a lease with a private development partner. But a citizens group filed a NEPA lawsuit, and the district court ruled that the Navy had failed to provide adequate public notice for the EA. In response, the Navy prepared a new EA and reapproved the project in 2009. The new EA included a discussion of a potential terrorist attack, due to the Ninth Circuit's ruling in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016 (9th Cir. 2006), which had held that a categorical dismissal of the potential impacts from a terrorist attack at an installation built to store spent nuclear fuel rods was unreasonable under NEPA. The Navy's new EA concluded that a terrorist attack at the complex in San Diego was too speculative and remote to require NEPA analysis, since there was no known

specific threat targeting the complex or its location. The EA also explained that anti-terrorism building specifications would be followed to reduce the risks posed by a potential terrorist attack. The EA thus concluded that the project would not place military or civilian personnel in jeopardy and would not result in a significant impact under NEPA. **The Court's Ruling** The court upheld the discussion in the EA, although it rejected the Navy's threshold claim that no analysis of a terrorist threat should be required under NEPA. The Navy argued that the new complex would consist merely of "everyday facilities," in contrast to the nuclear fuel storage facility at issue in the *Mothers for Peace* case. But the court emphasized that the complex would house military command personnel and would be located in a heavily populated urban area. The court thus concluded that the Navy was required to consider the potential for a terrorist attack, given the general risk of terrorism, the project's location, and its military functions. The court also faulted the Navy for its reasoning that "no known specific threat of a terrorist attack" existed. As the court explained: "The risks associated with terrorism are constantly in flux, and whether or not the intelligence community is aware of a *specific* threat to a facility at the time a NEPA analysis is conducted should have no bearing on whether to consider the impacts of an attack." (Court's emphasis.) Nevertheless, the court found it was sufficient that the EA referred to its anti-terrorism building specifications, which are designed to address a range of terrorist attack scenarios, including explosives, fire and chemical, biological and radiological weapons. One of the judges dissented, opining that the EA did not go far enough, as it did not consider the environmental consequences "of at least a few attack scenarios at the Complex." The dissent reasoned that the Navy's anti-terrorism building specifications only strengthened the defenses against a potential attack and did not "assess the likely environmental impact of such an attack." **Implications of the Ruling** The court's opinion emphasizes the requirement under the *Mothers for Peace* case that federal agencies must consider the impacts from a potential terrorist attack, at least when reviewing projects such as military installations and nuclear facilities. But the opinion also reflects a relatively deferential view of what constitutes an adequate analysis to fulfill this requirement. In light of recent events worldwide, this issue may continue to garner attention under NEPA from claimants, commentators and the courts.

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