NO. 07-71868 and NO. 07-72555

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PUBLIC CITIZEN, INC. and SAN LUIS OBISPO MOTHERS FOR PEACE,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and THE UNITED STATES OF AMERICA,
Respondents.

and

NUCLEAR ENERGY INSTITUTE,
Intervenor-Respondent.

THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and THE UNITED STATES OF AMERICA,
Respondents.

BRIEF OF AMICI CURIAE EDMUND G. BROWN JR., ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, IN SUPPORT OF PETITIONER STATE OF NEW YORK

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INTRODUCTION

This Court and the Congress have given the Nuclear Regulatory Commission (NRC) specific direction as to how that agency must treat the threat of terrorist attacks on nuclear power plants — namely, by dealing seriously and responsibly with what our nation's tragic experience has shown is a realistic threat with potentially catastrophic consequences. The NRC has ignored this Court's direction in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1031 (9th Cir. 2006), *cert. denied* 127 S.Ct. 1124 (2007), that it disclose to the public the possible harm to the environment from a terrorist attack on a nuclear plant, and has also ignored Congress' direction in the Energy Policy Act of 2005 that it thoroughly examine the threat of airborne attacks on such plants in revising the Design Basis Threat (DBT).[1] The DBT, as revised, does not require nuclear plant operators to provide passive protection for the nuclear reactors and for spent fuel pools (which lack the containment buildings that house reactors) against airborne terrorist attacks, relying *not* on factual studies about the ability of reactors and

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[1]The Design Basis Threat is the rule which requires operators of certain nuclear facilities, particularly nuclear power plants, to provide for protection of nuclear material against certain kinds of threats and specifies the level and type of threat that a nuclear plant must be able to withstand or repel. For instance, the Design Basis Threat has provisions for addressing attacks by land vehicle bombs, a cyber invasion, or a waterborne attack.

spent fuel pools to resist air strikes, nor on studies about the benefits of passive protection, but on the NRC's unsubstantiated judgement that it is "unreasonable" to require a private plant to protect against such threats.[2]

The petitioners are not asking that the DBT require nuclear plant owners to adopt so-called active protections, such as anti-aircraft guns. Instead, the NRC should have at least analyzed the merits and benefits of passive measures in a fair and well-reasoned response to the petition, as the Administrative Procedure Act requires, and discussed the environmental impacts of a terrorist attack, as the National Environmental Policy Act requires.

This case also raises fundamental issues concerning the right of the public to full information and rational action from its government. The Administrative Procedure Act, 5 U.S.C. § 553(c) (APA), guarantees the people the right to petition any government agency for rule-making and get, if not what they want, at least a straight answer as to why they are not getting it, supported by a brief statement of reasons that must be rational and must address the actual request and reasoning of the petition. In addition, the National Environmental Policy Act,

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[2]We note, as the NRC itself acknowledges, that the NRC is forbidden from considering the costs of measures in the DBT. 72 Fed. Reg. at 12,714; *see, also*, *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 824 F.2d 108, 114 (D.C. Cir. 1987.)

42 U.S.C. § 4321, *et seq.* (NEPA), requires any federal agency taking an action that may have a significant effect on the environment to straightforwardly tell the public, insofar as the science allows, what the environmental effects of that action will be.

Here, the NRC has failed in the duties assigned to it by the APA and by NEPA and has ignored this Court's opinion in *San Luis Obispo Mothers for Peace*. The NRC has denied a petition to require nuclear power plants to install protection against terrorist attacks from the air, but it has failed to give rational reasons, supported by facts in the record and fully and directly addressing the request the petitioner made, for the denial. In addition, NRC has refused to do what this Court has already told it that it must do under NEPA – provide full and honest information to the public about the catastrophic harm that a successful airborne attack on a nuclear power plant would do to the environment.

This case could hardly deal with more important issues. A nuclear reactor whose containment has been breached, or a spent nuclear fuel pool whose liquid has been vaporized or displaced by impact from a plane, is the ultimate "dirty bomb." Its radioactive legacy could last for centuries, making people sick, devaluing property, and leaving entire communities uninhabitable. Add to this the fact that California's working and decommissioned nuclear power plants (which

still have spent fuel stored onsite) are located in areas of dense population, or along its fragile and irreplaceable coastline – often both – and the potential for unthinkable damage to the public health and welfare, and to the environment, is obvious. Federal statutes prohibit California from protecting its people and environment from radiological releases from Diablo Canyon, San Onofre, Rancho Seco, and other nuclear plants or their spent fuel pools. *See,* 42 U.S.C. § 2021(k); *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212 (1983). Since the federal government has completely preempted the States from regulating radioactive dangers from nuclear plants, only the DBT can provide protection against the unlikely but completely devastating possibility of the release of deadly radiation from a successful airborne attack on a nuclear plant or its spent fuel pool.

In this case, the petition asked the NRC to provide this protection by amending the DBT to include airborne terrorist attacks, and the NRC refused, on grounds that it would be "unreasonable" to ask the nuclear industry to take on this task. 72 Fed. Reg. at 12,710. The job of regulating the nuclear industry and protecting the public – not the industry – was given by Congress to the NRC. 42 U.S.C. § 2232(a). California believes that the DBT is not reasonable; it should

give greater weight to the public's welfare, rather than the industry's, by at least evaluating passive protection strategies.

The NRC also argues that no nuclear plant needs to be able to withstand an airborne terrorist attack because federal intelligence, defense, and aviation regulatory agencies will detect and prevent any airborne terrorist attack. 72 Fed. Reg. at 12,710. California believes that it is unreasonable, given the nation's experiences in this century, for the NRC to base such a serious regulatory decision on the belief that federal agencies, their best efforts notwithstanding, will be able in every instance to detect and prevent each and every potential terrorist attack from the air on specific -- in this case, nuclear -- facilities and sites. Given the undeniable, demonstrated risk of an attack, and the enormous potential consequences, it is unreasonable for the NRC to refuse even to consider passive protection strategies for nuclear plants.

California asks this Court to reiterate what it held in *San Luis Obispo Mothers for Peace*, that the DBT must deal in a realistic and responsible way with what past horrific events have proved can and may occur, and that the petition to revise the DBT to include airborne attacks on nuclear facilities be remanded to the NRC for full consideration of passive measures.

INTEREST OF AMICI CURIAE

The State of California has a strong interest in the NRC's regulation of commercial nuclear power plants and the management of the threats posed to them by acts of terrorism. California has two sets of operating nuclear plants, Diablo Canyon Units 1 and 2, and San Onofre Units 2 and 3. In addition, the State also receives power from the Palo Verde nuclear plant in Arizona, which consists of three units and is partially owned by California utilities. There are also three decommissioned nuclear plants in California that currently store nuclear waste, namely Humboldt, Rancho Seco, and San Onofre Unit 1. California is concerned about the threat of terrorist attacks from the air. A successful terrorist attack on a California nuclear facility, depending on its severity, could kill or injure thousands of people, permanently contaminate valuable California natural resources, and devastate the economies of both the state and the nation. Such an attack, moreover, would require California state and local government agencies to spend substantial sums -- potentially in the tens of millions of dollars or more -- responding to the attack, conducting decontamination activities, providing health services for the injured, and repairing damaged infrastructure. California thus has an obvious interest in insuring that DBT regulations address the risks from terrorism.

The Attorney General of California has independent powers under the California Constitution, state common law, and the California Government Code to protect the environment and the natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov. Code § 12511; *D'Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). The California Legislature has given the Attorney General a unique role to participate in actions concerning pollution and adverse environmental effects which could affect the public or the natural resources of the State. Cal. Gov. Code §§ 12600-12612. California Government Code section 12600 specifically provides that "[i]t is in the public interest to provide the people of the State of California *through the Attorney General* with adequate remedy to protect the natural resources of the State of California from pollution, impairment, or destruction." (Emphasis added.) This brief is submitted as an exercise of those powers and responsibilities, and as a matter of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

California respectfully submits that the NRC has acted arbitrarily and capriciously in violation of the APA, has not fulfilled its responsibilities under the Atomic Energy Act to protect the public from radiologic harm, and has not followed the direction provided by Congress in the Energy Policy Act of 2005.

The NRC has not provided a rational, evidence-based justification for its refusal to evaluate passive design measures that would protect nuclear plants from an airborne attack. Instead, it asserts that it is the responsibility of the Defense Department to defend airspace, the responsibility of the Department of Homeland Security, the Federal Aviation Administration, and other federal agencies to prevent the hijacking of commercial jets, that the rules it already has in place for mitigating the impacts of large fires and explosions are adequate to handle the aftermath of an attack, and that no further passive protective measures mandated by the DBT are necessary. While the federal government does and should bear the primary responsibility for preventing airborne attacks, the consequences of an attack on a nuclear power plant are potentially so devastating and so long-lasting that NRC should at least *consider* making nuclear plants incorporate passive design features. Nobody claims that the federal government can prevent *all* attacks. Indeed, the 9/11 hijackers flew very close to a nuclear power plant outside New York City on their way to the World Trade Center. Nat'l Comm'n on Terrorist Attacks Against the U.S, *The 9/11 Commission Report* (2004) at 32 (E300)[3]. The NRC's failure to consider and evaluate the benefits of passive design features is untenable.

[3]"E" refers to the Joint Excerpt of the Record.

Second, the NRC ignores the dictates of Congress in the Energy Policy Act of 2005. That Act requires that the NRC revise the DBT and take into consideration the attacks on the World Trade Center and the Pentagon. Specifically, the Act calls for consideration of the events of September 11, 2001, as well as airborne assaults, as two of the twelve factors to be considered by the NRC in constructing the DBT. 42 U.S.C. § 2210e(b). Instead of following this mandate, the NRC categorically excluded airborne assaults from the DBT. The failure of the NRC to analyze defensive measures against airborne assaults by the use of engineering or design solutions proposed by commenters is an arbitrary and capricious act and violates the APA, the more so because of the enormity of the potential consequences.

Finally, the NRC has decided that, for NEPA purposes, the possibility of environmental impacts from its action in approving the DBT is speculative, and, therefore, the NRC believes it need not analyze the environmental impacts resulting from a terrorist attack. 72 Fed. Reg. at 12,718. The Court should again reject that argument, as it did in *San Luis Obispo Mothers for Peace v. NRC*, *supra*, as the NRC's belief that the impacts from a terrorist attack are so speculative as to not require analysis is no more true here than it was in that NRC licensing process, and it flies in the face of recent historical events.

ARGUMENT

I. THE NRC'S RESPONSE TO THE PETITION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT BECAUSE THE REASONS IT GIVES FOR DENYING THE PETITION ARE NOT RATIONAL, BUT ARE ARBITRARY AND CAPRICIOUS AND NOT DIRECTED TO THE PETITION'S REQUEST.

A. The Design Basis Threat Rule Is Not Rational in That it Does Not Address NRC's Statutory Responsibilities.

The rationality of a government agency's actions under the Administrative Procedure Act (APA) may be measured against compliance with an underlying substantive statute. *See Oregon Natural Resources Council v. Thomas*, 92 F.3d 792, 798-99 (9th Cir. 1996). Here, the Atomic Energy Act requires the NRC to regulate to protect health and minimize the danger to life or property. *Riverkeeper, Inc. v. Collins,* 359 F.3d 156, 167 (9th Cir. 2004), citing to 42 U.S.C. § 2201(b). The fact that Congress has given the NRC complete responsibility for preventing radiological harm to the public, and for "provid[ing] adequate protection to the health and safety of the public" (42 U.S.C. § 2232(a)), while preempting the states from doing so, makes it doubly important that the NRC carry out its statutory responsibilities thoroughly and completely.

Here, the NRC was asked to change the DBT to include airborne attacks, and was specifically asked to require nuclear plants to install *passive*

protections, including a kind of large protective steel cage around the reactor building and spent fuel pools (colloquially called a "beamhenge"); in case of airborne attack, the beamhenge -- not the plant or the spent fuel pool -- would absorb much of the force of impact. Petition for Rulemaking, *In the Matter of the Proposed Amendments to 10 C.F.R. Part 73 (Upgrading the Design Basis Threat Regulations for Protection Against Terrorist Attacks on Nuclear Reactors* NRC Proceeding No. PRM 73-12 (July 23, 2004)(CBG Petition) (E 70-96) at 25-26 (E 94-95). This is a form of passive, rather than active, protection. The NRC already requires many kinds of passive protection of plants against attack from the ground, including fencing, barriers, building materials that are difficult to breach, and the like. *See, e.g.*, 10 C.F.R. Part 73, sections 73.2 (definition of "physical barrier"), 73.46(c) (physical barriers required). The petition at issue here asks for additional passive physical barriers, a technique that the NRC already views as a legitimate option for protection of nuclear plants.

In denying the petition, the NRC largely refused even to discuss passive barriers, which would defend against the threat to the public health and safety of aircraft attack by terrorists by increasing the ability of a nuclear facility to withstand the moment of attack. However, in its denial of the petition, the NRC ignores passive methods to protect the facility against a plane's impact and instead

looks only to the time before the attack comes and the time after the attack occurs. Looking to the time before the attack, the NRC relies on the federal armed forces to deter or defeat such an attack, on intelligence agencies to predict the attack, and on airport screening to prevent airline hijacking. Looking to the time after the attack, NRC relies on mitigation measures it requires for other kinds of large fires and explosions, and on emergency evacuation plans to remove surrounding populations, should radiation escape the facility. 72 Fed. Reg. at 12,710.

California believes that this rationale is not rational. With respect to events before the attack takes place, the NRC's reliance on other federal agencies to prevent plane attacks is akin to a bank refusing to install vaults because it is the responsibility of the police department to prevent crime. It is not reasonable or rational to refuse to consider a potentially viable category of protection strategies on the premise that the federal government can detect *each and every* individual terrorist threat to a nuclear plant that may come by air, and can then prevent or foil each and every such attack before it occurs. We know from documents cited in the *9/11 Commission Report* that terrorists have definitely and specifically considered targeting nuclear facilities. *9/11 Commission Report* at 245 (E308). We also know that airport screening is not yet so perfect that it can detect *each and every* weapon carried by a potential passenger, or prevent *each and every* potential

hijacking of an aircraft. *See, e.g.,* the United States General Accounting Office (GAO) report "Transportation Security -- Efforts to Strengthen Aviation and Surface Transportation Security Are Underway, but Challenges Remain" GAO-08-140T. As the Los Angeles *Times* has reported, a recent test by the Transportation Security Administration indicated the screeners failed to detect about 60% of simulated bombs at Los Angeles International Airport; this demonstrates the fallacy of relying on airport screening as a major component in protecting nuclear reactors from commercial airplane assaults. Bloomekatz and Hennesey-Fiske, *LAX Screeners Sweat the Small Stuff, Miss the 'Bombs'*, Los Angeles Times, October 19, 2007, available at http://www.latimes.com/news/local/ma-me-lax190ct19,1,4048172.story. It is not rational or responsive to the NRC's statutory responsibilities under the AEA to rely solely on other government agencies to prevent damage from an airborne terrorist attack.

Neither is it a rational response to a petition to strengthen the DBT in order to *prevent* the destruction of a nuclear plant to rely on mitigation measures that address only what a plant is to do *after* the destruction occurs. In its response to comments on fires, the NRC itself recognizes that dealing with the results of an attack on a nuclear facility (e.g., fires) is not the same as changing the DBT (the "adversary characteristics") — and thus, presumably, increasing the ability of the

facility to resist the attack in the first place. 72 Fed. Reg. at 12,711. However, the NRC fails to explain why adopting regulations that look at what happens after the DBT has failed and a terrorist attack has occurred is an adequate answer to a request to amend the DBT itself. This approach is analogous to not taking measures to protect Hoover Dam from destruction because one has made plans for how to get people to higher ground after the resultant flood. One would still be left with a ruined dam and destruction to nearby residences, businesses and infrastructure or, in the present case, a compromised nuclear facility and a severely contaminated landscape.

The DBT arbitrarily fails to consider passive measures to defend against airborne attacks from the design requirements, despite the fact that it was this very kind of attack that initiated the greater scrutiny of all sensitive infrastructure in this country. Indeed, plant operators have new standards requiring them to be prepared to defend against water-borne threats, which arguably could also be deterred by armed forces, but the NRC has refused to consider similar measures for airborne attacks. Instead of relying on the military, or mitigating the effects after the strike has occurred, the DBT should constitute a "defense in depth" for the nuclear power plants of the country by applying an additional layer of security if an analysis demonstrates that passive design features

are feasible. Power plants need not be equipped with antiaircraft batteries run by power companies, as dismissed by the NRC in the Federal Register discussion of the DBT. Rather, what should be considered is passive, engineering solutions that would better protect the nuclear reactors at the plant, and therefore prevent the release of radioactivity from the plant. The NRC stated that such measures are unreasonable, without providing evidence to support this conclusion. California believes that the obvious benefits to public safety from passive measures should have been explicitly weighed in reaching this conclusion. The failure of the NRC even to analyze the benefits of measures to protect against airborne assault on nuclear power plants violates the Atomic Energy Act's mandate to the NRC to protect public health and safety, is arbitrary and capricious, and thereby violates the APA as well. *See* 5 U.S.C. § 706(2)(A).

B. The NRC Has Violated the Administrative Procedure Act by Failing to Directly Address the Relief Requested in the Petition.

The APA recognizes that many administrative agencies have considerable discretion in interpreting how to fulfill their statutory responsibilities, and sets up only procedural and substantive minimum requirements that agencies must meet in various areas, including responding to citizen petitions. The bedrock minimum requirement for agency rule making is rationality and support in the

record for the agency's analysis and actions. *Motor Vehicle Manufacturers Association of the U.S., Inc. et al. v. State Farm Mutual Automobile Insurance Co., et al*, 463 U.S. 29, 34 (1983) (*MVMA.*) In *MVMA*, the Court held that an agency's rule making would be held to be arbitrary and capricious if the agency "relied on factors which Congress has not intended it to consider." *MVMA*, 463 U.S. at 43.

When an agency responds to a petition, the APA demands, at the very least, a reasoned response. *American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). A court reviewing an agency decision denying a petition must consider whether the agency's decision making was reasoned and must examine the agency's explanation of its decision to reject the petition. *Id.* at 5. Reviewing courts have paid special attention when a petition asked an agency to change a regulation in response to a significant change in the facts underlying the regulation. *Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

Here, the response of the NRC to the petition fails the test. First, the factual predicate for the DBT has undeniably changed. As is set out fully in petitioner New York's brief, this nation's tragic real-world experience on September 11, 2001 showed that terrorists will strike targets by air and that they have discussed and contemplated striking nuclear facilities. *9/11 Commission*

Report at 245 (E308). This new state of facts has been echoed by President Bush. In his State of the Union Address on January 9, 2002, President Bush noted that U.S. intelligence agencies had uncovered plans of U.S. nuclear power plants at Al-Qaeda bases in Afghanistan, indicating that attacks at those facilities may have been planned. President Bush pointed to information about nuclear plants as targets: "We have found diagrams of American nuclear power plants and public water facilities, detailed instructions for making chemical weapons, surveillance maps of American cities, and thorough descriptions of landmarks in America and throughout the world." *The President's State of the Union Address* (January 29, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html.

The NRC itself issued an alert to the nation's nuclear power plants on January 23, 2002 that warned of the potential for an attack by terrorists who planned to crash a hijacked airliner into a nuclear facility. While the NRC alert stressed that the threat of a suicide plane attack was not corroborated, the alert said that "the attack was already planned" by three suspected Al-Qaeda operatives "already on the ground," who were trying to recruit non-Arabs for the terrorist mission. Bazinet and Sisk, *Plant Attacks Feared*, The New York Daily News,

February 1, 2002, *available at* WL 3165383. Other examples of such statements by various government officials are described, *infra*, at p. 20.

These facts demanded a fuller response to the petition's request for a passive beamhenge-type physical barrier around nuclear reactors and spent fuel pools than the NRC provided. In its response to the request for beamhenge-type passive protections at nuclear facility, the NRC did not directly address the need for passive protection. Instead, it stated only that "active protection against the airborne threat rests with other organizations of the Federal government, such as NORTHCOM and NORAD, TSA, and FAA," and that "licensees [i.e., licensed nuclear plants] have been directed to implement certain mitigation measures to limit the effects of an aircraft strike." 72 Fed. Reg. at 12,711. In other words, when petitioned to adopt passive barriers that would lessen the impact of the actual strike, the NRC responded that it is someone else's job to prevent all such strikes *before* they happen[4], and that existing regulations would mitigate what happens *after* such strikes. In no way did this response address what happens *during* the strikes, which was the focus of the petition's request for passive protection.

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[4]We note that the NRC did not offer any evidence, or even a well reasoned argument, to the effect that these other agencies actually can and will prevent each and every potential airborne terrorist attack.

The APA surely demands that a straightforward request be met with a straightforward answer that addresses the question; such a requirement is impliedly encompassed in the requirement that an agency give a reasoned, adequate explanation for its denial of a petition. *American Horse Protection Assn.*, 812 F.2d at 4. Here, the NRC has effectively dodged the question, and has certainly failed to give a reasoned and rational explanation of its denial of the petition. This failure violates the APA.

II. THE NRC HAS ACTED ARBITRARILY AND CAPRICIOUSLY IN NOT COMPLYING WITH THE DIRECTION OF CONGRESS IN THE ENERGY POLICY ACT OF 2005. IN SO DOING, IT HAS ALSO VIOLATED THE APA.

The Energy Policy Act of 2005 directed the NRC to revise the DBT and, specifically, to consider at least twelve factors in doing so. The first factor was the events of September 11, 2001. (The sixth factor also includes considering airborne threats.) 42 U.S.C. § 2210e(b). The action challenged in this case is the only regulatory action the NRC has taken to carry out Congress' wishes since the Energy Policy Act passed. As already discussed, the NRC declined to mandate design requirements to defend against a September 11-style airborne attack, based on its own judgement that such a requirement would be "unreasonable." This does not constitute compliance with the congressional mandate.

The NRC's refusal to amend the DBT to address the very real possibility of a September 11-style attack upon a nuclear plant ignores strong factual evidence that such an attack is reasonably foreseeable and not speculative. The National Academy of Sciences (NAS) recently released a report that pointed out the potential dangers of a civilian aircraft attack on spent nuclear fuel stored at nuclear power plants. Nat'l Acad. of Scis., *Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report* (2006) (E 725-846) at 30 (E 760). As discussed, *supra*, President Bush and the NRC itself have both recognized the possibility of such attacks.

In addition, on May 14, 2002, Gordon Johndroe, a spokesman for the Office of Homeland Security, noted that "[W]e know that Al-Qaeda has been gathering information and looking at nuclear facilities and other critical infrastructure as potential targets." *Security Boosted at Nuke Facilities*, The Washington Times, May 14, 2002, *available at* http://www.ohiocitizen.org/campaigns/electric/pre2003/boosted.htm.

On September 4, 2003, the United States General Accounting Office (GAO) issued a report, noting that the nation's commercial nuclear power plants are possible terrorist targets and criticizing the NRC's oversight and regulation of

nuclear power plant security. GAO, *Nuclear Regulatory Commission: Oversight of Security*, GAO-03-752 (September 4, 2003).

Yet, despite this well-publicized and authoritative information, and despite Congress' explicit direction in the Energy Policy Act to analyze defensive measures against airborne attacks and the September 11, 2001-style attacks, the NRC refused to seriously consider adding passive physical barriers to the DBTs, in the face of a specific and well supported petition.

This failure to consider what Congress deemed an important problem violates not only the Energy Policy Act, but the APA as well. *MVMA* 463 U.S. at 43. In light of these concerns raised by sister federal agencies such as the GAO and the NAS, as well as the President himself, it is arbitrary and capricious for the NRC to summarily decide that it need not consider passive defensive measures against airborne attacks and to depend exclusively on the active defense that it presumes the armed forces and other security agencies will provide for the safety of nuclear power plants.

III. THE NRC'S FAILURE TO CONSIDER THE ENVIRONMENTAL EFFECTS OF A TERRORIST ATTACK ON A NUCLEAR PLANT VIOLATES NEPA AND DISREGARDS THIS COURT'S RULING IN *SAN LUIS OBISPO MOTHERS FOR PEACE.*

While the NRC did prepare an Environmental Assessment (EA) for the DBT rule, it has refused to consider the environmental effects of terrorist attacks against a nuclear plant because the effects are not "reasonably foreseeable" and are remote, speculative or embody a worst case scenario. 72 Fed. Reg. at 12,718. Yet an attack along the lines of September 11, 2001 is exactly the kind of scenario Congress instructed the NRC to consider in the Energy Policy Act of 2005. Further, its failure to analyze the environmental effects that would flow from a terrorist attack violates the informational premises of NEPA.

NEPA is the basic national charter for protection of the environment and is implicated whenever a federal action has the potential for "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1(a). It is a procedural statute that requires the Federal agencies to assess the environmental consequences of their actions before those actions are undertaken. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004). NEPA is to be applied liberally to carry out the Act's purposes. *La Flamme v. F.E.R.C.,* 852 F.2d 389, 398 (9th Cir. 1988).

NEPA "ensures that the agency ... will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir. 1998), *cert. denied sub nom. Malheur Lumber Co. v. Blue Mountains Biodiversity Project*, 527 U.S. 1003 (1999) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989)). "NEPA requires that a federal agency consider every significant aspect of the environmental impact of the proposed action ... [and] inform the public that it has indeed considered environmental concerns in its decision making process." *Lands Council v. Powell,* 395 F.3d 1019, 1026-27 (9th Cir. 2005) (quoting *Earth Island Inst. v. United States Forest Serv.,* 351 F.3d 1291, 1300 (9th Cir. 2003).) There is no exemption for activities taken under the Atomic Energy Act from NEPA. *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 729 (1989).

A consideration under NEPA in determining whether a proposed action will significantly affect the quality of the human environment is "(t)he degree to which the effects on the quality of human environment are likely to be

highly controversial." 40 C.F.R. § 1508.27(b)(4).[5] A proposal is highly controversial when there is "a substantial dispute [about] the size, nature, or effect of the major Federal action," or where "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor." *Anderson v. Evans,* 371 F.3d 475, 489 (9th Cir. 2004). *See also Blue Mountains Biodiversity Project,* 161 F.3d at 1212, *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), *cert. denied. sub nom. Holland Am. Line-Westours, Inc. v. Nat'l Parks & Conservation Ass'n,* 534 U.S. 1104 (2002). The approval of a rule that is meant to provide security for nuclear reactors and spent fuel pools is just such a project, and a successful airborne assault would cause a significant degradation of a human environmental factor, thereby triggering the need to analyze the environmental impacts in a NEPA review.

Here, the NRC argues that it need not analyze the effects of such attack under NEPA because such a review would be "speculative". 72 Fed. Reg. at 12,718-12,719. The Ninth Circuit recently rejected a similar failure of analysis in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (*supra*), where the

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[5]We note that the NRC has, in large part, adopted the regulations interpreting NEPA published by the Council on Environmental Quality, found at 40 C.F.R., section 1500, *et seq.* *Limerick Ecology Action*, 869 F.2d at 727.

NRC argued that the possibility of a terrorist attack on a nuclear plant was so speculative as to not require analysis. In that case, petitioners sued the NRC for refusing to analyze environmental impacts of terrorist attacks in its review of an application for interim spent fuel storage installations at the Diablo Canyon nuclear facility. The NRC argued that it did not have to analyze the impacts of a possible terrorist attack as part of NEPA compliance in its review of the application because the possibility of such an attack was a worst case scenario and "pure conjecture". *Id.* at 1033. This Court held that the NRC's categorical refusal under NEPA to consider environmental effects of a terrorist attack on the basis that terrorist attacks were "remote and highly speculative," was not reasonable, since refusal was inconsistent with the government's efforts and expenditures to combat that type of attack against nuclear facilities. In fact, as this Court noted, "The NRC's actions in other contexts reveal that the agency does not view the risk of terrorist attacks to be insignificant." *Id.* at 1032. As this Court held in that decision, while the NRC is not required to consider consequences that are speculative, the possibility of a terrorist attack is not a worst case scenario and must be subjected to analysis. *Id.* at 1033-34. The decision noted that the NRC position seemed to clash with the position that the Department of Homeland

Security has urged upon all Americans, including noting that the country remains at an elevated risk for terrorist attack. *Id.* at 1033-34, fn. 10.

In its discussion of the DBT, the NRC has no convincing argument to distinguish the *San Luis Obispo Mothers for Peace* case, and indeed does not even try to do so; it dismisses the case in a footnote by proclaiming that the fact that such impacts should be considered in an NRC licensing decision regarding the storage of spent nuclear fuel at one specific nuclear power plant does not mean that it needs to consider similar environmental effects in a rule that affects the safety of *all* nuclear power plants in the United States. If anything, it would seem that the analysis of the impacts of a terrorist attack on the environment is even more important in a rule that applies to the safety and security of the all of the nuclear plants in the nation. The NRC's decision deprived the public of a full understanding of the dangers of an airborne terrorists attack upon nuclear facilities, and thereby deprived the public of a full opportunity to participate in the rule making at issue here. It is long settled that "[a]dministrators may not lightly sidestep procedures that involve the public in deciding important questions of public policy." *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, 735 F.2d 1437, 1446 (1984), *cert. denied sub nom, Arkansas Power & Light Co. v. Union of Concerned Scientists*, 469 U.S. 1132 (1985). It is hard to

imagine a question of greater public import than protection of facilities which, if seriously damaged, can contaminate thousands, perhaps hundreds of thousands, of people, and render the immediate area uninhabitable for decades, if not centuries. The NRC's failure to do a full environmental analysis and disclosure of the potential effects on the environment of the denial of this petition violates NEPA's full informational requirements.

CONCLUSION

California respectfully requests that this Court find that the NRC acted in an arbitrary and capricious manner when it failed to consider passive measures to protect nuclear facilities from terrorist attack by airborne assault in its Design Basis Threat regulations, and remand this matter to the NRC for further rulemaking consistent with this Court's findings.

DATED: October 31, 2007

Respectfully Submitted,

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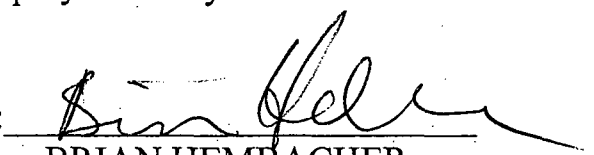
By: 
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, and Ninth Circuit Rule 32-1, the Attorney General's Office hereby certifies that this amicus curiae brief is proportionately spaced, has a typeface of 14 points or more and contains fewer than 7,000 words.

October 31, 2007

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DECLARATION OF SERVICE BY OVERNIGHT MAIL (FEDEX)

Case Name: *Public Citizen, Inc. and San Luis Obispo Mothers for Peace v. United States Nuclear Regulatory Commission, and the United States of America, and Nuclear Energy Institute; The State of New York, v. United States Nuclear Regulatory Commission, and the United States of America,*

Case Nos.: 07-71868 and 07-72555

I, Aimee Lopez, declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, California 90013.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with FedEx. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with FedEx that same day in the ordinary course of business.

On October 31, 2007, I served the attached **BRIEF OF AMICI CURIAE EDMUND G. BROWN JR., ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, IN SUPPORT OF PETITIONER STATE OF NEW YORK** which was placed for collection with FedEx at the Office of the Attorney General,

300 South Spring Street, Suite 1702, Los Angeles, California 90013, enclosed in a sealed envelope addressed to:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 31, 2007, at Los Angeles, California.

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Declarant	Signature