07-0324-ag(L)

07-1276-ag(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDREW J. SPANO, as County Executive for the County of Westchester, COUNTY OF WESTCHESTER, NEW JERSEY ENVIRONMENTAL FEDERATION and NEW JERSEY CHAPTER OF THE SIERRA CLUB,
Petitioners,

v.

U.S. NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR REVIEW OF AN ORDER OF THE U.S. NUCLEAR REGULATORY COMMISSION

BRIEF FOR THE FEDERAL RESPONDENTS

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JURISDICTIONAL STATEMENT

The petitions for review challenge a decision of the Nuclear Regulatory Commission ("NRC" or "Commission") denying petitions for rulemaking. One of the petitions (07-1276-ag) was originally filed in the Third Circuit but transferred to this Court pursuant to 28 U.S.C. § 2112. We agree with petitioners that under the Hobbs Act this Court has subject matter jurisdiction to consider the petitions for review. *See* 28 U.S.C. § 2341 *et seq.*

STATEMENT OF THE ISSUE

Whether the NRC acted reasonably in denying petitions for rulemaking requesting that the agency revise its license renewal process for nuclear power plants to treat license renewal as the equivalent of initial licensing.

STATEMENT OF THE CASE

A. *Nature of the Case*

In the 1990s, the NRC conducted two full-scale rulemakings on the scope of license renewal for nuclear power plants. The NRC's ultimate license renewal rule focused the agency's review on degradation of plant systems, structures and components due to

aging. In 2005, the NRC received two nearly identical petitions for rulemaking requesting that the NRC expand the scope of license renewal to "provide that a renewed license be issued only if the plant operator demonstrates that the plant meets all criteria and requirements that would be applicable if the plant was being proposed *de novo* for initial construction." (A-9; A-180). The NRC noticed the petitions for public comment and received comments both supporting and opposing the petitions. The NRC declined to revise the established license renewal rule, as requested, noting that the petitioners had given no reason for expanding the scope of license renewal that the NRC had not already considered (and rejected) during the initial rulemakings.

Claiming that the NRC ignored critical new information, petitioners and supporting amici curiae challenge the NRC's denial of the rulemaking petitions. Petitioners are comprised of the New Jersey Environmental Federation and New Jersey Chapter of Sierra Club ("New Jersey Sierra Club"), and the County of Westchester, New York (together with Westchester County Executive Andrew J.

Spano) ("Westchester County"). Amici curiae supporting petitioners are comprised of the States of New York and Connecticut (joint brief) and Rockland County, New York (a separate brief).

B. *Statutory and Regulatory Backgound*

1. *NRC Regulatory Licensing Scheme.* The Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 *et seq.*, establishes "a comprehensive regulatory framework for the ongoing review of nuclear power plants located in the United States." *County of Rockland v. NRC*, 709 F.2d 766, 769 (2nd Cir. 1983). The NRC is "charged under the AEA [ ] with primary responsibility to ensure, through its licensing and regulatory functions, that the generation and transmission of nuclear power does not unreasonably threaten the public welfare." *Id.* "Consistent with its administrative mandate, the NRC is empowered to promulgate rules and regulations governing the construction and operation of nuclear power plants." *Id.*

Section 182 of the AEA, 42 U.S.C. § 2232(a), "provides the primary statutory standard relating to the [NRC's] mandate to ensure the safe operation of nuclear power plants." *Union of*

Concerned Scientists v. NRC, 824 F.2d 108, 109 (D.C. Cir. 1987). That section requires the NRC to "find that the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public." AEA § 182(a), 42 U.S.C. § 2232(a).[1] "'Adequate protection" is "not absolute protection," *Union of Concerned Scientists*, 824 F.2d at 114, but "permits the acceptance of some level of risk." *Id.* at 118. Thus, "even when the adequate protection standard is satisfied, safety improvements will be possible." *Id* at 114.

Section 161 of the AEA, 42 U.S.C. § 2201, authorizes the NRC to take a variety of regulatory measures "[i]n the performance of its functions," *id.*, and is a "grant of authority to the [NRC] to provide a measure of safety above and beyond what is 'adequate.'" *Union of*

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[1]In addition, Section 103 of the AEA, 42 U.S.C. § 2133, prohibits the NRC from issuing a license for a nuclear power reactor if the NRC finds that issuance of the license "would be inimical to the common defense and security or to the health and safety of the public." The "inimicality" and "adequate protection" standards are interchangeable, two sides of the same coin. *See, e.g., North Anna Environmental Coalition v. NRC*, 533 F.2d 655, 659 (D.C. Cir. 1976).

Concerned Scientists, 824 F.2d at 118. The "exercise of this authority is entirely discretionary" and the NRC "may take economic costs into account" in deciding whether to require modification of existing nuclear plants above the level of adequate protection. *Id.* This statutory framework is reflected in the NRC's "backfit" rule, 10 C.F.R. § 50.109, which addresses the incorporation, or "backfitting," of new safety features into the "design, equipment, or operating procedures of nuclear power reactors previously licensed for construction or operation." *Id.* at 109.

2. *Current Licensing Basis.* At the time of initial licensing, the NRC makes a "comprehensive determination that the design, construction, and proposed operation of the facility satisfie[s] the Commission's requirements and provide[s] reasonable assurance of adequate protection to the public health and safety and common defense and security." *Final Rule: Nuclear Power Plant License Renewal*, 56 Fed. Reg. 64,943, 64,947 (Dec. 13, 1991) ("1991 rulemaking"). Each nuclear power plant has a "current licensing

basis," a term of art which encompasses the entire gamut of NRC requirements applicable to a specific nuclear plant over the life of the plant's license. The current licensing basis includes, *inter alia*, all license conditions, technical specifications, plant-specific design basis information, orders, exemptions, and licensee commitments that are part of the docket of the plant's license (*i.e.*, responses to NRC bulletins, generic letters, enforcement actions and other licensee commitments documented in NRC safety evaluations or licensee event reports), and all of the regulatory requirements in the NRC's regulations with which a licensee must comply.[2] *See* 10 CFR § 54.3.

The current licensing basis does not remain fixed but evolves over the term of the license, as new requirements are "backfitted" onto requirements imposed by a plant's existing licensing basis in light of the NRC's ongoing regulatory activities. Changes to a plant's licensing basis can be made, for example, through "new or

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[2]These requirements include those found in 10 C.F.R. Parts 2, 19, 20, 21, 30, 40, 50, 55, 72, 73, and 100.

revised NRC regulations, acceptance of licensee commitments for the modification to nuclear power plant designs and procedures, or the issuance of orders or confirmatory action letters." 1991 rulemaking, 56 Fed. Reg. at 64947.

3. *License Renewal Rule.* The AEA limits the duration of most operating licenses for nuclear power plants to a maximum of 40 years but permits their renewal. Specifically, Section 103 of the AEA, 42 U.S.C. § 2133, provides that a license for a nuclear plant may be issued "for a specified period, as determined by the Commission, . . . but not exceeding forty years from the authorization to commence operation and may be renewed upon the expiration of such period." The statutory 40-year license term rests on antitrust and financial considerations, not safety or security ones. *See American Public Power Ass'n v. NRC*, 990 F.2d 1309, 1313 (D.C. Cir. 1993).

The NRC's original regulation implementing its license renewal authority, 10 CFR § 50.51, permitted license renewal for terms of up to 20 years but did not specify standards, procedures, or criteria

for renewal applications. In the 1980s, in anticipation of potential license renewal applications, the NRC embarked on a multi-year research program on the degradation of nuclear power plant systems, structures, and components due to aging. 1991 rulemaking, 56 Fed. Reg. at 64943. In 1991, the NRC issued a comprehensive new rule (codified at 10 CFR Part 54) governing nuclear reactor license renewal. 1991 rulemaking, *supra.* As an adjunct to the 1991 rulemaking the NRC undertook an extensive study of the adequacy of its ongoing regulatory process and issued a 19-chapter study, NUREG-1412, *Foundation for the Adequacy of the Licensing Basis* (1991). Supplemental Joint Appendix ("SJA") (A-697). This study concluded that "[t]he NRC has an effective program in place for reviewing and analyzing operating experience and other new information, and for implementing any necessary modifications at operating reactors." (SJA A-809). In 1995 the NRC revised and clarified the license renewal rule.[3]

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[3]*Nuclear Power Plant License Renewal; Revisions*, 60 Fed. Reg. 22461 (May 8, 1995) ("1995 rulemaking").

Two basic regulatory principles lay at the heart of the NRC's license renewal approach. The first was that, with the exception of issues unique to the period of extended operation, the NRC's ongoing regulatory process is adequate to ensure that the "current licensing basis" of currently operating plants provides and maintains an acceptable level of safety. 1991 rulemaking, 56 Fed. Reg. at 64946. The second principle was that the plant-specific licensing basis must be carried forward into the renewal term and maintained in the same manner and to the same extent as during the original licensing term. *Id.*

4. *License Renewal Process.* In its 1991 and 1995 rulemakings, the NRC sought to develop a license renewal process that would be both efficient, avoiding duplicative assessments where possible, and effective, allowing the NRC staff to focus its resources on the most significant safety concerns at issue during the renewal term. The NRC's basic "objective was to supplement the regulatory process . . . to provide sufficient assurance that adequate safety will be assured during the extended period of

operation." 1995 rulemaking, 60 Fed. Reg. at 22464. The NRC explained that "[a]s part of this rulemaking, the Commission has carefully considered the desirability of renewal reviews that would duplicate the Commission's ongoing review of operating reactors." 1991 rulemaking, 56 Fed. Reg. at 64946. The NRC concluded that, "[w]hile in theory the Commission could undertake duplicative reviews of issues that are relevant to both ongoing operation during the current license term and extended operation beyond the current term, this would be wasteful of the Commission's resources." *Id.*

Accordingly, in establishing the license renewal process, the NRC decided that it would not be necessary or desirable to throw open the full range of provisions in a plant's current licensing basis to re-analysis during the license renewal review. Instead, the NRC concluded that "issues concerning operation during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review." 1995 rulemaking, 60 Fed. Reg. at 22481.

The current licensing basis, the NRC explained, "represents the evolving set of requirements and commitments for a specific plant that are modified as necessary over the life of a plant to ensure continuation of an adequate level of safety." *Id.* at 22473. The NRC emphasized that it "continuously analyzes conditions, acts, and practices that could affect safe operation of plants" through the ongoing regulatory process, which includes research, inspections, audits, investigations, evaluations of operating experience and regulatory actions to resolve identified issues. *See* 1991 rulemaking, 56 Fed. Reg. at 64947; 1995 rulemaking, 60 Fed. Reg. at 22485.

The NRC acknowledged that its ongoing regulation of operating reactors remains open to improvement:

> The Commission cannot conclude that its regulation of operating reactors is 'perfect' and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all NRC requirements.

1991 rulemaking, 56 Fed. Reg. at 64945. The NRC concluded,

however, that its ongoing regulatory process is "sufficiently broad and rigorous," *id.*, to "provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and safety and common defense and security are 'backfitted' onto the plants." 1991 rulemaking, 60 Fed. Reg. at 64956.

The NRC determined that the only area where the current regulatory process may need supplementing "concerns the detrimental effects of aging on the functionality of certain systems, structures, and components in the period of extended operation." 1995 rulemaking, 60 Fed. Reg. at 22464. The NRC found that the particular systems, structures, and components that must be subjected to an aging management review during license renewal are primarily "passive, long-lived" ones such as the reactor pressure vessel. Reviewing "active" and "passive" systems requires different methods:

> Performance and condition monitoring for systems, structures, and components typically involve functional verification, either directly or indirectly. Direct

> verification is practical for active functions such as pump flow, valve stroke time, or relay actuation where the parameter of concern (required function), including any design margins, can be directly measured or observed. For passive functions, the relationship between the measurable parameters and the required function is less directly verified. Passive functions, such as pressure boundary and structural integrity are generally verified indirectly, by confirmation of physical dimensions or component physical condition (e.g., piping structural integrity can be predicted based on measured wall thickness and condition of structural supports, but its seismic resistance capability cannot be verified by inspection alone).

1995 rulemaking, 60 Fed. Reg. at 22471.

In sum, the NRC concluded that "functional degradation of [passive, long-lived] components is not as readily revealable [as that for active components] so that the regulatory process and existing licensee programs may not adequately manage the detrimental effects of aging in the period of extended operation." 1995 rulemaking, 60 Fed. Reg. at 22487.

During the license renewal rulemakings, the NRC responded to comments critical of the NRC's approach. Commenters argued, *inter alia*, that the current licensing basis of a number of plants was

inadequate. These commenters cited multiple examples of operational concerns and incidents at specific plants. 1995 rulemaking, 60 Fed. Reg. at 22473. The NRC responded that the "identification of [the cited issues] through the regulatory process demonstrates that the NRC's programs are effective in identifying and resolving new technical and safety issues and areas of noncompliance in a timely fashion," and that "[i]n each example provided by the commenters, appropriate corrective action was taken or is being taken on a plant-specific or on an industry-wide basis to either modify the [current licensing basis] to resolve the concern or to ensure the continued compliance with the present [current licensing basis]." *Id.*

Commenters also argued that it was unreasonable for the NRC to assume that all reactor licensees are in full compliance with their current licensing bases. In response, the NRC explained that its regulatory process is designed to uncover and address non-compliance:

> The Commission does not contend that all reactors are in full compliance with their respective [current licensing bases] on a continuous basis. Rather, . . .the regulatory process provides reasonable assurance that there is compliance with the [current licensing basis]. The NRC conducts its inspection and enforcement activities under the presumption that noncompliances will occur.

1995 rulemaking, 60 Fed. Reg. at 22474.

The NRC also responded to concerns regarding the exclusion of emergency planning from the scope of license renewal. The NRC explained that through "its standards and required [periodic] exercises," including "continuing update requirements for emergency planning," the agency "ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics and other site-related factors." 1991 rulemaking, 56 Fed. Reg. at 64966-67.

Other commenters criticized excluding plant physical security issues from the scope of license renewal. The NRC explained that the "level of [physical security] protection will be maintained during the renewal term in the same manner as during the original license term, since these requirements remain in effect during the renewal

term . . . , [and] will continue to be reviewed and changed to incorporate new information, as necessary." 1991 rulemaking, 56 Fed. Reg. at 64967.

One commenter suggested a particular need to review plant physical security plans during license renewal to enhance the level of physical security in the event that additional high-level waste will be temporarily stored on the plant site during the renewal term. The NRC responded that regulations already on the books provide the needed protection:

> [T]he Commission's existing regulations in 10 CFR parts 72 and 73 specify the security requirements for sites where application is made to construct additional high-level-waste storage facilities. These regulations require the staff review of additional physical security measures to ensure that the new waste storage facilities would be adequately protected. These regulations and requirements must be satisfied at any time when a licensee would seek to construct such a facility, whether during the initial term or during a renewal term, and the review of the physical security measures necessary for licensing any type of monitored retrievable storage facility will occur independently of any license renewal application review.

Id.

5. *Environmental Review of License Renewal Applications.* In 1996, the NRC amended its regulations under 10 C.F.R Part 51 to implement environmental protection requirements under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, for license renewal. *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467 (June 5, 1996). Underlying the 1996 rule was an extensive, systematic study of the potential environmental consequences of operating nuclear power plants for an additional 20 years. *See generally Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 11-12 (2001).

On many issues -- so called "Category 1" issues -- the NRC found that it could draw generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants. *See* 10 C.F.R. Part 51, Subpart A, Appendix B. The NRC determined that "Category 1 issues involve environmental effects that are essentially similar for all plants [undergoing license renewal], [so that] they need not be assessed repeatedly on a site-

specific basis, plant-by-plant." *Turkey Point*, 54 NRC at 11. For Category 1 issues, a license renewal applicant must still provide additional analysis as part of its application if new and significant information bears on the applicability of the Category 1 finding at its particular plant. *Id.*

The environmental impact of storage of spent nuclear fuel during the term of a 20-year license renewal period is a Category 1 issue. *Id.* at 21. The NRC determined generically that "[t]he expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects through dry or pool storage at all plants if a permanent repository is not available." *See* 10 C.F.R. Part 51, Table B-1, Subpart A, Appendix B .

The NRC incorporated into its 1996 rule a prior generic finding (commonly referred to as the "Waste Confidence Rule") regarding the environmental impacts of storage and disposal of spent nuclear fuel beyond the license renewal period. *See* 10 C.F.R. § 51.53(c)(2); 10 C.F.R. § 51.23. In the Waste Confidence

Rule, the NRC generically determined that "spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent spent fuel storage installations," and that "sufficient repository capacity will be available within 30 years beyond the licensed life for operation of any reactor to dispose of the commercial high-level waste and spent fuel originating in such reactor and generated up to that time." 10 C.F.R. § 51.23.

C. *Statement of the Facts*

1. *The Rulemaking Petitions*

In 2005, the NRC received two nearly identical petitions for rulemaking requesting that the license renewal rule in 10 C.F.R. Part 54 be amended to make license renewal equivalent to *de novo* initial licensing. (A-9; A-180). One petition, from the County Executive of Westchester County, New York (Andrew J. Spano), stemmed from concerns relating to license renewal of the Indian

Point Energy Facility ("Indian Point"), located in Westchester County. (A-9). The other petition, from the mayor of Brick Township, New Jersey (Joseph C. Scarpelli), stemmed from concerns relating to the Oyster Creek Nuclear Generating Station, located within 18 miles of Brick Township. (A-180).

As discussed further below, the rulemaking petitions cited, *inter alia*, changed demographics and population growth in the vicinity of the Oyster Creek and Indian Point plants, the September 11, 2001 terrorist attacks, a report critical of security at spent nuclear fuel facilities, and the highly-publicized reactor vessel head corrosion incident at the Davis-Besse plant in Ohio as reasons why the NRC should treat license renewal as the equivalent of a *de novo* review for an initial construction permit and operating license. The petitions asked that license renewal include, among other subjects, emergency planning, physical security, spent fuel storage safety, and active systems, structures, and components within the scope of license renewal.

The NRC docketed the petitions and solicited public comment.

A-149. The NRC received a combined total of twenty-five comment letters on the two rulemaking petitions, sixteen supporting and nine opposing the petitions. (A-154). As relevant to this litigation, two public interest groups, Riverkeeper and Nuclear Information and Resource Service, filed comments elaborating on reports critical of nuclear spent fuel storage security and emergency planning at Indian Point (A-24) and reports critical of the NRC with respect the degraded reactor vessel head at the Davis-Besse plant. (A-82).

The NRC evaluated the two rulemaking petitions together because they raised nearly identical issues. The NRC denied the petitions in a Federal Register notice published in December 2006. (A-147).

2. *The NRC's Denial of the Rulemaking Petitions*

The NRC prefaced its denial with a detailed description of the content of each petition, including *verbatim* quotations of what each petition listed as "key renewal issues" (A151- A154); a detailed description of the public comments in support of granting and

denying the petitions (A154 - A-156); and a review of the NRC's license renewal process and underlying philosophy, as articulated in the NRC's 1991 and 1995 rulemakings. (A157 - A158).

Turning to the reasons for denying the petitions, the NRC said at the outset that "the petitions raise issues that the Commission already considered at length in developing the license renewal rule." (A156-A157). The NRC indicated that particular issues raised by the rulemaking petitions, "includ[ing] emergency planning and nuclear plant security," are more effectively "managed by the current regulatory processes" rather than postponed until or duplicated in a license renewal proceeding. (A-158). The NRC reiterated its fundamental license renewal philosophy that agency resources are best devoted to operational issues as they arise rather than spent on later, duplicative license renewal reviews:

> The Commission has decided to limit the scope of the license renewal process because other issues would, by definition, be relevant to the safety and security of current plant operation. Given the Commission's responsibility to oversee the safety and security of operating reactors, issues that are relevant to both current plant operation and operation during the

> extended period must be addressed as they arise within the present license term rather than at the time of renewal. In some cases. safety or security might be endangered if resolution of a safety or security matter were postponed until the final renewal decision. Thus, duplicating the Commission's responsibilities in both oversight of current plant operations as well as license renewal would not only be unnecessary, but would waste Commission resources.

Id.

The NRC thus found no reason to depart from its well-established approach:

> Neither the petitions nor the comments raise new issues, nor provide any tangible reason why the careful formulation of the scope of license renewal should be addressed once again. Other procedural mechanisms are available to the public to raise concerns related to the current operations . . . for nuclear power plants.

Id.

The NRC then proceeded to a point-by-point analysis of the matters raised by the petitions.[4]

a. *Treatment of License Renewal Application as Initial License.*

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[4]Our description focuses on aspects of the NRC's decision that are most pertinent to the arguments raised in the briefs of petitioners/amici curiae.

Both rulemaking petitions requested the same relief -- that the NRC amend its regulations "to provide that a renewed license will be issued only if the plant operator demonstrates that the plant meets all criteria and requirements that would be applicable if the plant was being proposed *de novo* for initial construction." (A-159). The NRC responded that the petitioners had suggested a license renewal approach that would be "essentially the same as what the Commission rejected in formulating the license renewal rule." (A-160). Quoting from the 1991 rulemaking, the NRC reiterated that *de novo,* initial license-type, reviews are unnecessary at license renewal because of ongoing NRC inspections, enforcement, and upgrades:

> 'It is not necessary for the Commission to review each renewal application against standards and criteria that apply to newer plants or future plants in order to ensure that operation during the period of extended operation is not inimical to the public health and safety. Since initial licensing, each operating plant has continually been inspected and reviewed as a result of new information gained from operating experience. Ongoing regulatory processes provide reasonable assurance that, as new issues and concerns arise, measures needed to ensure that operation is not inimical to the public health and

> safety and common defense and security are 'backfitted' onto the plants.'

Id. (quoting from 56 Fed. Reg at 64945).

The NRC further explained that in developing the rule it had emphasized that "'aging management of certain important systems, structures, and components during [the] period of extended operation should be the focus of a renewal proceeding and that issues concerning operation during the currently authorized term of operation should be addressed as part of the current license rather than deferred until a renewal review.'" (A-160) (quoting from 60 Fed. Reg. at 22481).

b. *Emergency Planning*

The petitions requested that emergency planning be included in the license renewal process because of concerns that, "in light of the change in demographics, local infrastructures and governments would be unable to support large-scale evacuations." (A-161). Quoting from its 1991 rulemaking, the NRC responded that "'[t]hrough its standards and required exercises, the Commission

ensures that existing plans are adequate throughout the life of any plant even in the face of changing demographics and other site-related factors . . . that may occur during the term of the existing operating license.'" (A-161) (quoting from 56 Fed. Reg. at 64966).

The NRC pointed out that its emergency planning regulations in 10 C.F.R. §§ 50.47, 50.54(q), 50.54(s)-(u), and 10 C.F.R. Part 50, Appendix E, are "independent of the renewal of the operating license, and continue to apply during the license renewal term"; that "the NRC's regulatory oversight program . . . monitors the continued adequacy of a licensee's EP program"; and that "licensees must review the facility's EP program periodically, including working with State and local governments, and . . . biennial exercises with offsite authorities." (A-162). The NRC further explained that "'[e]mergency planning is, by its very nature, neither germane to age-related degradation nor unique to the period covered by the [] license renewal application.'" *Id.* (citation omitted).

The NRC observed that to support one aspect of their

emergency planning claim -- the siting of nuclear plants -- petitioners "ask rhetorically whether the local societal and infrastructure factors that influenced the original plant licensing changed in a manner that would make the plant less apt to be licensed today." *Id.* The NRC noted that such "broad, conclusory statements without a factual or technical basis" do not satisfy minimum filing standards for a rulemaking petition under 10 C.F.R. § 2.802(c)(3),[5] *id.*, but responded that "[s]etting the sufficiency of the petition aside, it is not evident that demographics and siting would necessarily preclude the issuance of an initial operating license at either [Oyster Creek or Indian Point]." (A-163). The NRC explained that in another rulemaking pertaining to reactor site criteria for initial licensing, it had determined that "'population density is but one factor that must be balanced against the other advantages and disadvantages of a particular site in determining the site's acceptablity,'" *id.* (quoting 61 Fed. Reg. 65157, 65162

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[5]Section 2.802(c)(3) requires rulemaking petitions to include "relevant technical, scientific or other data involved which is reasonably available to the petitioner."

(Dec. 11, 1996)), and that "'higher population density sites are not unacceptable, per se.'" *Id.* (quoting 61 Fed. Reg. at 65163).

c. *Security*

The petitions requested that physical security be examined within the scope of license renewal. The NRC responded that it had "specifically addressed physical security considerations" in its 1991 rulemaking and had emphasized at that time that it will "'continue to ensure compliance of all licensees, whether operating under an original license or a renewed one, through ongoing inspections and reviews.'" (A-164) (quoting from 56 Fed. Reg. at 64967). The NRC also noted that "[a]fter the terrorist attacks of September 11, 2001, U.S. commercial nuclear facilities escalated to the highest level of security," and that since that time, the NRC "has issued more than 35 Advisories, Orders, and Regulatory Issue Summaries" addressing security issues at U.S. power reactors; "required by order [in April 2003] that power reactors revise their physical security plans, guard training and qualification plans, and contingency plans"; "will soon issue a final rule revising the Design

Basis Threat . . . regulations"; and "will soon publish a proposed rule for comment amending most of its security regulations for power reactors." (A-165). The NRC concluded that the "cited Commission decisions and agency activities support denial of this section of the petition because security issues are monitored through an on-going regulatory process." *Id.*

In addition, the NRC responded to a comment urging the NRC to amend its regulations "to require that the security of spent fuel pools and dry cask storage be comprehensively assessed during the relicensing process" on the basis of a report to Congress by the National Academy of Sciences ("NAS") entitled "*Safety and Security of Commercial Spent Nuclear Fuel Storage.*" (A-178). The NRC noted that the referenced NAS report "is a classified report on spent fuel transportation security" that was delivered to House and Senate committees in July 2004, and that the NRC "sent a report to Congress on March 14, 2005, describing the specific actions the NRC took to respond to the Academy's recommendations." *Id.* The NRC observed that the "Academy's study is one of many

instruments that supplements NRC's understanding of the safety of the interim storage of spent fuel." *Id.*

d. *Storage of Spent Nuclear Fuel*

The petitions requested the NRC to consider the impacts of long-term storage of spent nuclear fuel during license renewal. (A-165). The NRC responded that the safety and environmental impacts of spent fuel storage for the license renewal term and the period beyond the license renewal term are assessed generically under 10 C.F.R. Part 51. *Id.* Regarding in particular the impacts of long-term storage beyond the license renewal term, the NRC explained that its "Waste Confidence Rule" constitutes a generic finding that long-term storage of spent fuel can be accomplished "safely and without significant environmental impacts" for at least 30 years beyond the licensed life for operation, including the license renewal period. (A165 - A166). The NRC also responded to comments critical of the NRC's reliance on its Waste Confidence Rule, explaining that its established criteria for reevaluating the Waste Confidence findings have not occurred. (A177 - A178).

e. *Exclusion of Active Systems, Structures, and Components*

The NRC responded to a commenter's assertion that "moving parts" – *i.e.*, active structures and components – should be included within the scope of license renewal. (A-169). The NRC explained that it had explicitly considered whether to include active structures and components within the scope of a license renewal review, but concluded that "functional degradation resulting from the effects of aging on active functions" -- as opposed to "passive" functions considered during license renewal -- is "more readily determinable" by "existing programs and requirements." (A-169). The NRC reviewed in detail the technical bases given in its 1991 and 1995 rulemakings for distinguishing between active and passive systems, structures, and components for the purposes of license renewal. (A-170).

f. Advances in Scientific and Technical Knowledge and Plant Design

The NRC responded to comments about the design of older plants (A-175) and requesting that license renewal be based on the

"best scientific and technical knowledge and data available." *Id.* The NRC explained that the ongoing regulatory process "does consider new scientific and technical knowledge and data available since plants were initially licensed, and imposes new requirements on licensees as justified. " *Id.* The NRC explained that its "continuous regulatory oversight process" requires licensees to "correct design deficiencies that could impact continued safe operation," including the installation of "new, modern systems to replace or supplement original systems that are obsolete or no longer considered adequate." *Id.* The NRC emphasized that older plants must abide by applicable new requirements:

> [T]he NRC does not 'grandfather' plants as part of the license renewal . . . .[T]he review conducted within the scope of renewing an operating license does not relieve a licensee from compliance with its current licensing basis, which mandates compliance with the Commission's current regulations. If changes in technology or scientific knowledge occur resulting in new NRC requirements, each licensee must evaluate the new requirements and comply based on the design and licensing basis of their plant.

(A-171).

SUMMARY OF ARGUMENT

As a result of two full-scale rulemakings in the 1990s, the NRC adopted a license renewal approach that focuses primarily on the detrimental effects of aging on "passive" systems, structures, and components. The NRC decided that all other safety-related matters are essential to current operation, will be addressed as they arise, and need not be re-addressed at the time of license renewal.

The NRC reasonably denied the rulemaking petitions at issue here, which requested that it enlarge the scope of the license renewal rule to treat license renewal as though a "plant was being proposed *de novo* for initial construction." The NRC concluded that petitioners' requested changes to the rule were unnecessary and counterproductive and that the petitions did not raise any issues that the NRC had not already anticipated.

On appeal, petitioners and their supporting amici curiae argue that the NRC's denial of their petitions arbitrarily failed to take into account safety and security issues and reports critical of the NRC's

regulatory process that appeared after the license renewal rule was promulgated.

The NRC's refusal to enlarge the scope of license renewal as requested was a reasonable exercise of its broad discretion to leave in place a well-established rule.

1. The reports and incidents cited by petitioners and their supporting amici curiae indicate at most a need to sharpen the NRC's ongoing current licensing basis review. They do not undermine the premises for the NRC's current license renewal approach. In its prior rulemakings, the NRC specifically anticipated -- indeed, assumed -- that safety issues and shortcomings would inevitably emerge during current operation and that the NRC's ongoing regulatory process must evolve as necessary to deal with such issues as they arise.

2. The NRC's license renewal approach -- carrying forward, or "renewing," a plant's current licensing basis into the renewal term, with the addition of age-related degradation requirements -- is consistent with the AEA's statutory language and framework. The

petitioners' approach, treating license renewal as the equivalent of initial licensing, would be incompatible with the AEA's "two-tier structure," which permits variations between new and existing plants.

3. Contrary to the position of petitioners/amici curiae, the NRC did not need to discuss specific safety and security issues that have arisen during the course of ongoing regulation in order to explain its denial of the rulemaking petitions. The burden for justifying agency denials of rulemaking petitions is very limited, and the NRC's response easily met this standard.

4. The NRC reasonably refused to reallocate its regulatory priorities. The rule change requested by the petitions would require the NRC to take agency personnel away from their ongoing "current licensing basis" duties in order to perform more extensive license renewal reviews. The NRC's decision not to expend limited agency resources on a new and expanded one-time license renewal review was well within its broad discretion.

5. Petitioners claim that the NRC unreasonably based its

denial on statements in its decision regarding filing deficiency, the existence of procedural mechanisms for public involvement, and nuclear plant cooling water systems. But these statements neither were central to the NRC's response to the matters discussed, nor undercut the NRC's rationale for refusing to treat license renewal as the equivalent of initial licensing.

6. The relief the rulemaking petitions sought before the NRC would essentially convert license renewal into initial licensing, severely limiting the practical possibility of license renewal. The NRC reasonably decided against that course, first when it promulgated its license renewal rule and again in denying the rulemaking petitions.

ARGUMENT

STANDARD OF REVIEW

Agency denials of petitions for rulemaking are reviewed under the "arbitrary and capricious" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The "scope of judicial review under this standard is narrow and deferential" and a "reviewing

court cannot 'substitute its judgment for that of the agency,' particularly when that determination is propelled by the agency's scientific expertise." *Henley v. FDA*, 77 F.3d 616, 620 (2d Cir. 1996) (citation omitted). Under "familiar and well-established principles," an agency decision is not arbitrary and capricious if the agency "'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Milk Industry Foundation v. Glickman*, 132 F.3d 1467, 1476 (D.C. Cir. 1998) (citations and internal quotation marks omitted).

The "parameters of the 'arbitrary and capricious' standard of review will vary with the context of the case." *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981). "Agency decisions not to conduct rulemaking . . . are tested under a 'very narrow' reading of the arbitrary and capricious test." *State Farm Mut. Auto. Ins. Co. v. DOT*, 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated on other grounds*, 463 U.S. 29 (1983). Review of denials of a rulemaking petition is "particularly deferential." *Midwest Independent Transmission*

System Operator, Inc. v. FERC, 388 F.3d 903, 910 (D.C. Cir. 2004). *See also Massachusetts v. EPA*, 127 S.Ct. 1438, 1459 (2007). An agency has a "limited burden of justification" of refusals to engage in rulemaking. *Midwest Independent Transmission System Operator, Inc.*, 388 F.3d at 913.

In short, "an agency's decision not to initiate a rulemaking" may be overturned "'only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency.'" *Id.* at 910 (citation omitted). "This standard is at the high end of the range of deference." *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (internal quotation and citation omitted). The review is "extremely limited." *Massachusetts*, 127 S.Ct. at 1459.

The NRC's Denial of Rulemaking Petitions Requesting That License Renewal be Expanded to Include Matters Already Encompassed by the Ongoing Regulatory Process was Not Arbitrary and Capricious

Nearly a quarter of a century ago, in *County of Rockland v. NRC*, 709 F.2d at 768, this Court, noting the "unique nature of nuclear safety," recognized that nuclear power was a persistently

controversial topic:

> One of the most emotional issues confronting our society today is the adequacy of safety measures at nuclear power facilities. Fueled by the Three Mile Island incident, the debate over nuclear safety persists as public interest groups charge that serious problems remain and operator-utilities seek to assure the public that all reasonable measures have been taken to protect surrounding populations in the event of a major nuclear accident.

See also Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 557-58 (1978).

As evidenced by the briefs of petitioners (and their supporting amici curiae), this Court's observation in *County of Rockland* is as true of political reality today as it was in 1983. The rulemaking petitions before the NRC argued that a major expansion of the NRC's license renewal rule -- to make it equivalent to initial licensing -- is necessary to assure the continued adequacy of nuclear plant safety measures.[6] The NRC concluded that the

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[6]In their briefs petitioners and supporting amici curiae appear to have backed away somewhat from this extreme position, or at least to have obscured the point. Suffice it to say, the reasonableness of the agency's response must be judged against the actual content of the rulemaking petitions then before it, not by

requested changes were unnecessary and counterproductive.

The question before this Court is whether the NRC's denial of the petitions for rulemaking was arbitrary and capricious under the highly deferential standard of review applicable to an agency's refusal to engage in rulemaking. Judicial review of the NRC's decision here is not an occasion to engage in political debate over "fundamental policy questions" about nuclear safety, *id.* at 557-58; *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983), but to determine the reasonableness of the agency's "decision to refrain from amending the [] established regulatory scheme." *Professional Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983). Hence, our rebuttal to the briefs of petitioners/amici curiae remains appropriately focused on showing why the NRC's refusal to greatly enlarge the scope of license renewal, as petitioners requested, was the product of reasoned decisionmaking satisfying legal standards.

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revisionist positions advanced by counsel on appeal. *Cf. Vermont Yankee Nuclear Power Corp.*, 435 U.S. at 554.

A. The NRC's License Renewal Rule Reasonably Focuses on Aging Issues Rather than Ongoing Operational Issues.

As we explained in the *Statement of the Case*, during two rulemakings in the 1990s the NRC exhaustively considered the scope and format of license renewal. The agency examined in detail the very proposal advanced in the rulemaking petitions here – to treat license renewal as if it were new licensing – and rejected it. *See, e.g.*, 1991 rulemaking, 56 Fed. Reg. at 64945-46. One problem with that approach, the NRC concluded, is that it would "duplicate" or "postpone" inspections and reviews the NRC already performs as part of its effort to make sure that nuclear power plants' "current licensing basis" remains up-to-date and protective of public health and safety. *Id.* at 64946; 1995 rulemaking, 60 Fed. Reg. at 22481; A-158. A *de novo*, "new licensing" approach to license renewal would divert scarce agency resources from vital ongoing regulatory activity to one-time-only license renewal reviews. (A-158).

During the license renewal rulemakings, the NRC made a full-

scale study of the agency's ongoing "current licensing basis" reviews and found them effective means for assuring operational safety and security into the license renewal period, "with the possible exception of the detrimental effects of aging on the functionality of certain plant systems, structures, and components" ("passive" ones). 1995 rulemaking, 60 Fed. Reg. at 22464. *See* NUREG-1412, at pp. 1-6, 19-3 - 19-4 (SJA A-710; A-809). Hence, the NRC focused its license renewal inquiry on the aging of passive systems, for which deterioration might not be apparent in everyday operational reviews. Such passive systems include vital systems like the reactor pressure vessel.

The NRC's approach is sensible. Nuclear safety and security requires the NRC to maintain comprehensive and effective "current licensing basis" programs. If, as petitioners and their supporting amici curiae maintain in this lawsuit, the NRC's ongoing programs are deficient in some areas, the answer is to fix those deficiencies, not to establish a new and expanded one-time license renewal review. The link between alleged deficiencies in NRC safety and

security oversight of operating nuclear plants and an expanded license renewal rule is less than self-evident.

The NRC's philosophy is that regulatory problems are best identified and solved when they occur. The NRC thus limited its license renewal inquiry to difficult-to-identify "aging" issues and to otherwise target agency resources at addressing problems when they arise. The NRC reasonably chose not to undertake license renewal reviews of operational and other issues that the agency already can and should consider on an everyday basis.

Petitioners and their supporting amici may disagree with the NRC's philosophy and underlying technical and scientific conclusions, but these are decisions that Congress has assigned to the NRC within its area of expertise, according it "considerable latitude to decide the difficult questions that arise with respect to nuclear safety." *County of Rockland*, 709 F.2d at 776. Courts overturn agency denials of rulemaking petitions only in the "'rarest and most compelling of circumstances,'" *EMR Network*, 391 F.3d at 273 -- only where the agency action can be characterized as

"irrational" or "implausible." *Henley*, 77 F.3d at 620. Petitioners' arguments for changing the NRC's license renewal rule do not come close to placing this case in that category.

B. Regulatory Incidents and Changes in the Regulatory Environment Since the Promulgation of the License Renewal Rule do not Undermine the Fundamental Premises of the Rule

One basic argument pervades the briefs of petitioners and their supporting amici: the NRC's denial of the rulemaking petitions was arbitrary and capricious because the NRC (allegedly) failed to take into account critical "new" information brought to the NRC's attention that has emerged since the time the license renewal rule was promulgated. But petitioners' "new" information bears on continuing safety and security review during licensed operation, not on one-time license renewal reviews.

Petitioners/amici curiae focus on and discuss at length two reports regarding emergency planning procedures at Indian Point -- the "Witt Report" and the "KLD Report" (A-337; A-658).[7] Those

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[7]Sierra Club Br. at 22-25; Westchester Br. at 23-26; New York/Connecticut Br. at 21-22; Rockland Br. at 13.

reports conclude, *inter alia*, that evacuation capabilities at the plant have been seriously compromised by the increase in the surrounding population. Petitioners/amici also point to the 2004 NAS report (A-258),[8] which identifies security concerns at spent fuel pools, including the potential vulnerabilities of spent fuel pools to terrorist attacks. In addition, New Jersey Sierra Club, Br. at 28-35, cites the reactor pressure vessel head corrosion incident at the Davis Besse nuclear plant, including two government reports critical of the NRC's response to the incident -- a report prepared by the U.S. Government Accountability Office (A-559) and a report prepared by the NRC Office of the Inspector General (A-533). Finally, Westchester County cites post-license renewal rule enforcement issues at the Indian Point plants involving active or "moving" parts.[9]

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[8]Sierra Club Br. at 38-39; Westchester Br. at 30-32; New York/Connecticut Br. at 22-23; Rockland Br. at 15-16.

[9]Westchester Br. at 27-28. Amici curiae reference various other publications that are neither in the record nor mentioned by petitioners on appeal, but we do not address them here, *see Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n. 5 (2nd Cir. 2001), except

Petitioners/amici curiae contend, in essence, that the NRC's rulemaking denial is inadequate because it does not analyze these various reports and incidents. According to petitioners/amici curiae, these reports and incidents constitute significant new information demonstrating the failure of the NRC's ongoing regulatory process to provide adequate protection to the public with respect to emergency planning, spent fuel security, and active plant systems.[10] They argue that the asserted NRC failures in these areas undermine a fundamental premise of the license renewal rule, calling for *de novo* review of such matters as part of license renewal.[11]

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to note that the cited publications have the same relevance to ongoing regulation as the reports and incidents cited by petitioners. *See* n. 15, *infra*.

[10]*See, e.g.*, Sierra Club Br. at 12; Westchester Br. at 22, 38; New York/Connecticut Br. at 25; Rockland Br. at 12.

[11]*See, e.g.*, Sierra Club Br. at 27; Westchester Br. at 21; New York/Connecticut Br. at 23. New Jersey Sierra Club's argument, Br. at 28-35, that the NRC unreasonably ignored the Davis Besse incident in its denial is a red herring. The reactor pressure vessel head -- the subject of the Davis Besse incident -- is a "passive" structure expressly included within the scope of license renewal. *See* 10 C.F.R. § 54.21(a)(1)(i) (listing "reactor vessel" as a plant

As a preliminary matter, we observe an inherent illogic to the basic position of petitioners/amici curiae. At bottom, they appear to perceive a pervasive failure on the NRC's part to provide an adequate level of protection to the public health and safety and common defense and security; yet, they are calling on the same agency to address regulatory deficiencies during the course of a one-time license renewal proceeding, which may or may not take place. A *de novo* review of nuclear plants at renewal would not fix a (hypothetical) pervasive failure of the NRC's regulatory process because license renewal is a one-time-only event, and not all plants will even seek license renewal.

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component assessed during license renewal). Thus, no change in the rule is necessary to make such issues part of the license renewal inquiry. Additionally, with respect to Westchester and Rockland Counties' citations to the NAS study pertaining to the availability of on-site spent fuel storage *capacity* (Westchester Br. at 29-30; Rockland Br. at 20), we note that on-site storage capacity is an economic issue, not a safety issue. *Cf. Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 203, 207, 214-15 (1983). In plain terms, the continued licensed operation of a nuclear plant depends on the availability of adequate storage capacity for the spent fuel that the plant will produce.

Petitioners/amici curiae are correct that a fundamental premise of the NRC's license renewal approach, as the NRC explained in its denial, is that its "regulatory process provides ongoing assurance that the licensing basis of nuclear power plants provides an acceptable level of safety." (A-168). But that is only one part of the equation. As the NRC also explained in its denial, another equally important premise is that, "[g]iven the Commission's responsibility to oversee the safety and security of operating reactors, issues that are relevant to both current plant operation and operation during the extended period must be addressed as they arise within the present license term rather than at the time of renewal." (A-158).

The NRC's reliance on its ongoing regulatory process for matters excluded from the scope of license renewal was never premised on a conclusion that its "regulation of operating reactors is 'perfect' and cannot be improved, that all safety issues applicable to all plants have been resolved, or that all plants have been and at all times in the future will operate in perfect compliance with all

NRC requirements." 1991 rulemaking, 56 Fed. Reg. at 64945. Rather, the NRC's approach, "addressing issues as they arise within the present license term," by definition assumes that serious health and safety issues will inevitably arise, particularly in an area of regulation as complex and controversial as that of nuclear power, and that the NRC's regulation and the licensing bases of nuclear plants will evolve "as necessary over the life of a plant to ensure continuation of an adequate level of safety." 1995 rulemaking, 60 Fed. Reg. at 22473.

In short, the NRC's license renewal rule specifically *anticipated* that safety issues and shortcomings would emerge outside of license renewal and must be dealt with when they arise. Thus, the cited incidents of licensee noncompliance or reports critical of the NRC's regulatory activities, however serious, reveal no "fundamental change in the factual premises previously considered by the agency" in adopting its license renewal rule. *See Midwest Independent Transmission System Operator, Inc.*, 388 F.3d at 910. *See also Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v.*

United States, 883 F.2d 93, 103 (D.C. Cir. 1989) (finding no "fundamental change in [] circumstances" where petitioner's "contentions largely underscore[d] those previously advanced"). *Compare Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) (requiring agency to reexamine whether previously promulgated rule continued to serve public interest after predicate for rule ceased to exist).

C. The NRC's Decision is Consistent with the Statutory Framework

Nor does the NRC's denial of the rulemaking petitions have anything in common with the rare cases where courts have overturned an agency's denial of a rulemaking petition because of "'plain errors of law, suggesting that the agency has been blind to the source of its delegated power.'" *American Horse Protection Association v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (citation omitted). *See also, e.g., Massachusetts*, 127 S.Ct. at 1462 (agency "refused to comply with [its] clear statutory command"); *Bargmann v. Helms*, 715 F.2d 638 (1983) (agency mistaken in concluding it lacked statutory authority to institute requested rulemaking);

NAACP *v. FPC*, 520 F.2d 432 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976) (same).

The AEA's statutory language and framework supports the reasonableness of the NRC's approach to license renewal. The single statutory reference to license renewal, AEA § 103, 42 U.S.C. § 2133, refers to license "renewal" (a license "may be renewed upon . . . expiration"), not "relicensing," the phrase petitioners/amici curiae use repeatedly throughout their briefs (apparently to imply that license renewal equates to a new license). Rather than calling for a *de novo* review against standards for brand new plants, the term "renew" is consistent with the NRC's approach of carrying forward, or "renewing," a plant's current licensing basis into the renewal term, supplemented by regulatory requirements related to age-related degradation. As the NRC noted in its 1991 rulemaking, the AEA's legislative history shows that the initial 40-year license term was adopted not for safety reasons but because of economic and antitrust concerns. *See* 1991 rulemaking, 60 Fed. Reg. at 64962 (citing legislative history underlying adoption of 40-year

term).

Finally, as reflected in the NRC's "backfit" rule, it has long been established that the AEA's "two-tier structure relating to the protection of public health and safety" permits variations between new and existing operating reactors. *See Union of Concerned Scientists*, 824 F.2d at 118. Indeed, contrary to assertions that the NRC may be legally obligated to treat license renewal as initial licensing,[12] the AEA's two-tier framework strongly suggests that requiring pre-existing plants to go beyond "adequate protection" and meet all safety features required of brand new plants, whether or not cost justified, would not be reasonable or consistent with congressional intent. *Cf. Union of Concerned Scientists*, 824 F.2d at 121 (Williams, J., concurring) (viewing AEA as "homogeneously preclud[ing] consideration of cost" in backfitting of regulatory requirements onto existing plants "would lead to astonishing and

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[12]*See, e.g.*, Sierra Club Br. at 37-38 (NRC may unreasonably fail to impose safety requirements during the operating license term because of backfit requirements); Rockland Br. at 8 (NRC's "[c]ongressional mandate" is to treat license renewal "in the same way as [it] would an applica[tion] for an initial license").

perverse results," for example, "forc[ing] the decommissioning of [] plants" where the safety benefits are neither necessary for adequate protection nor cost justified). Neither the nuclear industry nor any other industry could survive if existing facilities had to adopt all new safety improvements, no matter how costly, marginal, or perhaps even impossible.

D. The NRC Provided a Reasoned Explanation for Denying the Rulemaking Petitions

Contrary to petitioners'/amici curiae's position,[13] the NRC did not need to specifically discuss plant incidents or reports critical of its regulatory processes to make the bases for its denial clear. On the matters relevant to the reports and enforcement incidents cited by petitioners and amici curiae, *i.e.*, emergency planning, security of spent fuel pools, and active systems and components, the NRC in its denial reviewed the technical and policy reasons for its approach, explaining why and how these matters are better

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[13] *See, e.g.*, Sierra Club Br. at 23, 35, 37; Westchester Br. at 26, 29, 31; New *York/Connecticut* Br. at 21, 23; Rockland Br. at 14.

addressed by the ongoing regulatory process rather than duplicated in or postponed to license renewal. *See Statement of the Facts*, pp. 25-28 (emergency planning); 28-30 (security); 31 (active systems).[14] The agency explained (A-158) that its resources are best served by focusing license renewal on matters related to age-related degradation, where the current licensing basis may need supplementing, and addressing all other matters, including emergency planning, spent fuel pool security, and active systems, within the ongoing regulatory process. The NRC's rationale can

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[14]New Jersey Sierra Club faults the NRC for not mentioning the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007), which concluded that the NRC erred in not considering the impacts of terrorism in its environmental analysis under NEPA. Br. at 41-42. But security *is* included within the scope of the NRC's ongoing regulation of spent nuclear fuel storage facilities. *See, e.g.*, 1991 rulemaking, 56 Fed. Reg. at 64967; 10 C.F.R. § 73.51. This case is about the scope of license renewal, not the scope of an agency's legal obligation to address the environmental impacts of terrorism under NEPA, an issue which remains the subject of current litigation. *Ohngo Gaudadeh Devia v. NRC*, D.C. Circuit Nos. 05-1419, 05-1420, and 06-1087; *State of New Jersey v. NRC*, 3rd Circuit Nos. 06-5140, 07-1559, 07-1756. As the NRC explained in its denial, its rules implementing NEPA under 10 C.F.R. Part 51 address the environmental impacts of license renewal. *See Statement of the Facts*, pp. 30-31.

quite "reasonably be discerned" from its denial decision and the record as a whole. *See Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974). *See also Schiller v. Tower Semiconductor Ldt.*, 449 F.3d 286, 303 (2d Cir. 2006). The NRC was not required to discuss particular reports and incidents.[15]

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[15]If anything, a discussion of the reports and incidents cited by petitioners/amici curiae would only have served to confirm that complex and often politically controversial issues can and do arise, and are addressed, in the course of the NRC's ongoing regulation, as the NRC's license renewal rulemaking already anticipated. *See, e.g.*, 1995 rulemaking, 60 Fed. Reg. at 22473-74. In point of fact, the NRC noted in its rulemaking denial that it had responded to the NAS's study regarding security risks at spent fuel pools in a March 2005 report to Congress, (A-178; SJA A-814), and Westchester County's own description of incidents at Indian Point illustrates that NRC took a number of enforcement actions, including a complete shutdown of Indian Point 3, upon discovery, *inter alia*, of problems with the plant's active parts. Westchester County Br. at 27-28. Moreover, responses to the Witt Report and the Davis Besse reactor head incident within the context of ongoing regulation are a matter of public record. *See, e.g.*, NRC Website, *Radiological Emergency Preparedness Program - Indian Point Energy Center Response* (Attachment B), http://www.nrc.gov/reading-rm/adams.html (web-based access, ADAMS Accession Number ML061150609); NRC Website, *Davis Besse Reactor Vessel Head Degradation*, http://www.nrc.gov/reactors/operating/ops-experience/vessel-head-degradation.html.

In short, despite petitioners/amici curiae's belief that the NRC should have elaborated on the bases for its denial, the NRC's "explanations easily satisfy [its] limited burden of justification under [the] 'highly deferential' standard of review" applicable here. *Midwest Independent Transmission System Operator, Inc.*, 388 F.3d at 913. The NRC "appropriately cited and adhered to its 'prior determination,'" and "the depth of the inquiry, under the circumstances presented, was within the domain of [agency] discretion." *Nat'l Customs Brokers*, 883 F.2d at 99, 103. *See also Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (agency's limited explanation sufficient where "nothing had been presented which required some explanation beyond that already contained within the rulemaking record").

E. The NRC Reasonably Refused to Reallocate Regulatory Priorities and Resources

Petitioners/amici curiae contend that the NRC's refusal to conduct a *de novo* review of a plant's current licensing basis at license renewal is unreasonable because such a review would not

necessarily be "redundant" of the ongoing regulatory process.[16] But the NRC has never denied that duplicative reviews could potentially provide some, albeit not "significant," value added. *See, e.g.*, 1991 rulemaking, 56 Fed. Reg. at 64945 ("the added discipline of a formal license renewal review against the full range of current safety requirements would not add *significantly* to safety") (emphasis added). Nonetheless, in its rulemaking denial as in the original rulemakings the NRC decided that such an approach would not be an efficient use of the agency's resources. *See id.*; A-158. Petitioners/amici may disagree with the NRC's regulatory priorities, but decisions involving "allocation of resources," *Bellotti v. NRC*, 725 F.2d 1380, 1382 (D.C. Cir. 1983), and "weigh[ing] the costs and benefits of alternative policies," *Center for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985), "epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency." *Id.* "An agency has broad discretion to choose how best to

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[16] *See, e.g.*, Sierra Club Br. at 26, 27; New York/Connecticut Br. at 23.

marshal its limited resources and personnel to carry out its delegated responsibilities." *Massachusetts*, 127 S.Ct. at 1459.

In sum, reviewing courts have long "defer[red] to an agency's view of its own regulatory priorities," *Midwest Independent Transmission System Operator, Inc.*, 388 F.3d at 906, and cases involving agency decisions not to initiate rulemaking, which have been overturned "'only in the rarest and most compelling of circumstances,'" *EMR Network*, 291 F.3d at 273 (citation omitted), are no exception.

F. The NRC's Denial of the Rulemaking Petitions was not Premised on its Statements Regarding Filing Deficiency, the Existence of Procedural Mechanisms Available to the Public, or Nuclear Plant Cooling Water Systems

Petitioners'/amici curiae's remaining attacks on the NRC's decision variously charge that the NRC's denial of the rulemaking petitions was based unreasonably on statements regarding filing deficiencies in the rulemaking petitions, the existence of procedural mechanisms for public involvement in the ongoing regulatory process, and regulations of other governmental authorities

pertaining to nuclear plant cooling water systems. All these arguments are misguided.

1. *Filing Deficiency.* Petitioners/amici curiae claim that the NRC's denial of the rulemaking petitions was "founded upon a determination that the Petitions were deficient" under 10 C.F.R. § 2.802(c)(3). Sierra Club Br. at 15; *see* Westchester Br. at 40-41; Rockland Br. at 10. They maintain that the NRC acted arbitrarily and violated its own regulations in 10 C.F.R. § 2.802(f) by denying the petitions without giving the rulemaking petitioners an opportunity to "cure" such deficiencies. Westchester Br. at 40-41; Sierra Club Br. at 12-16; Rockland Br. at 10-11. Section 2.802(f) says that rulemaking petitioners will be given 90 days to submit additional data to cure petitions rejected for noncompliance.

a. As we recounted in the *Statement of the Facts*, p. 27, the NRC in its denial (A162-63) noted that the rulemaking petitions did not contain the type of information specified for rulemaking petitions under 10 C.F.R. § 2.802(c)(3). But petitioners/amici make far too much of this statement. It is evident from the NRC's

decision as a whole that the rulemaking petitions were denied solely on the merits, not because they were deficient in "form." Indeed, the statement petitioners seize on appears only under the "Emergency Planning" subheading in the limited context of a discussion concerning nuclear plant siting criteria. (A-162). The NRC immediately made clear that it was "[s]etting the sufficiency of the petition aside" and addressing on the merits the points raised in the petitions regarding plant siting. (A-163).

Moreover, Section 2.802(c)(3)'s filing-sufficiency requirement does not concern the agency's merits review but only what is necessary for a rulemaking petition to be considered "complete" in order to be "formally docketed" for filing. "If it is determined that the petition includes the information required by [Section 2.802(c)(3)] and is complete, the Director, Division of Administrative Services, Office of Administration, will assign a docket number to the petition, will cause the petition to be formally docketed, and will make a copy of the docketed petition available at the NRC Web site." 10 C.F.R. § 2.802(e) Since the subject rulemaking petitions

were formally docketed and accepted for filing, any correction of deficiencies for formal docketing under Section 2.802(f) became a moot point. The NRC, in short, *accepted* the rulemaking petitions and did not penalize petitioners for any filing deficiency.

b. In any event, even assuming, *arguendo*, that the NRC erred in not giving rulemaking petitioners an opportunity to submit additional data on the limited subject of nuclear plant siting criteria, petitioners have not explained how this error was prejudicial to them. *See* 5 U.S.C. § 706; *Owner-Operator Independent Drivers Assn. v. Federal Motor Carrier Safety Administration*, D.C. Cir. No. 06-1035, 2007 WL 2089740, slip op. at 21 (July 24, 2007) (reviewing courts must take "due account . . . of the rule of prejudicial error"). *Accord Waldron v. INS*, 17 F.3d 511, 519 (2d Cir. 1994); *Economic Opportunity Comm'n of Nassau County, Inc. v. Weinberger*, 524 F.2d 393, 400 (2d Cir. 1975). To show that error was prejudicial, "'a [petitioner] must indicate with reasonable specificity . . . how it might have responded if given the opportunity.'" *Owner-Operator Independent Drivers* Assn., slip op. at

21 (citation and internal quotation marks omitted, brackets in original). In addition, "a petitioner must 'show that on remand [it] can mount a credible challenge . . . and [was] thus prejudiced by the absence of an opportunity to do so before' the agency." *Id.* (citation and internal quotation marks omitted, brackets in original).

In the absence of such showing by petitioners, any violation of Section 2.802(f) by the NRC was purely technical and not cause for remand. Indeed, nothing prevents petitioners from submitting a fresh rulemaking petition, backed by whatever new data they have, at any time.

2. *Procedural Rules for Public Participation.* Westchester County maintains that "one basis for denial [was] the NRC [statement] that the public had other administrative avenues by which to raise concerns regarding a particular licensee." Br. at 41. If we understand its position correctly, Westchester County believes that the NRC denied the rulemaking petitions because avenues other than petitioning for rulemaking provide substitutes for public

involvement. But on its face, the portion of the NRC's decision cited by Westchester County, Br. at 42, explains that the NRC was denying the rulemaking petitions because they neither "raise[d] new issues, nor provide[d] any tangible reason why the careful formulation of the scope of license renewal should be addressed once again." (A-158). The immediately following statement -- that "[o]ther procedural mechanisms are available to the public to raise concerns related to the current operations or the renewal of a license" -- obviously was not intended to constitute an independent rationale for denying the petitions but simply to point out the existence of mechanisms such as the citizen petition process (*see* 10 C.F.R. § 2.206) for public involvement in the ongoing regulatory process.

3. *Regulation of Plant Water Cooling Systems.*

Westchester County, Br. at 33-34, and amici curiae New York and Connecticut, Br. at 25-28, argue that the NRC's rulemaking denial was premised on misstatements of the role of the states in regulating nuclear plant water cooling systems, thus "infecting" the

decision "with legal errors" justifying a remand.

New York/Connecticut Br. at 25, 28. While the NRC's statements incorrectly minimized the role of the states in the regulation of water cooling systems,[17] they were not even remotely a basis for denying the rulemaking petitions. In fact, these statements, made in response to an obscure reference to plant water cooling systems by one of the petitioners,[18] were akin to *dicta* -- *i.e.*, not necessary

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[17]The NRC's rulemaking denial can be read as suggesting that federal law preempts the states' role in disputes over water cooling (A-167), whereas in actuality federal law preserves a role for the states. As evidenced in a court decision cited by New York/Connecticut, *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007), issued five weeks after the NRC's rulemaking denial, the interplay between federal and state law regarding water quality is very complex. The NRC may have mischaracterized that interplay on the particular subject of cooling water in its rulemaking denial, but a subsequent NRC decision reflects that it is well aware of the role of the states in the regulation of nuclear plant water cooling systems. *See Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc.* (Vermont Yankee Nuclear Power Station), CLI-07-16, 65 NRC 371, 389 (2007).

[18]The portion of the NRC's denial containing these statements, under the subheading "Changes to State and Local Law Affecting Continued Operation," addressed the following rhetorical argument, quoted here *verbatim* and in its entirety, in Westchester County's rulemaking petition:

for the NRC's decision -- and entirely irrelevant to whether the scope of license renewal should be expanded. The part of the NRC's response actually *relevant* to that question (which Westchester County and New York/Connecticut ignore) explained that recent changes in local and state regulations did not constitute a basis for expanding the scope of license renewal because licensees must "comply with applicable local and State regulations" not preempted by federal law as part and parcel of the ongoing regulatory process. (A-166).

G. Petitioners' Rulemaking Proposal Would Convert License Renewal Into Initial Licensing

The rulemaking petitions at issue here requested very specific agency action: that the NRC amend its license renewal rule to make license renewal entirely equivalent in scope and effect to initial licensing, as though "the plant was being proposed *de novo*

> Have local/state regulations changed that would affect the plant's continued operation? For example, Indian Point must convert from once-through cooling to a closed-cycle design using cooling towers.

(A-12; A-166).

for initial construction." (A-9; A-180).[19] Put briefly, the petitions asked the NRC to abandon the entire concept of license "renewal." A licensee wanting to operate 20 additional years would have to meet the same conditions and make the same showings that must be made by a new license applicant seeking authority to site, build, and operate an entirely new nuclear plant, a plant that would have to meet the latest state-of-the-art standards. This would be licensing *ab initio*, not license renewal. The NRC reasonably decided against that course.

In denying petitioners' somewhat draconian proposals[20] the NRC made no claim that its current license renewal procedures could not be improved or that its ongoing regulatory process has

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[19]*See* n. 6, *supra.*

[20]It is evident from petitioners' own arguments that many currently licensed nuclear plants more than a few years old but quite capable of continued safe operation might be unable to meet such a stringent test for renewal. The brief for Westchester County notes: "[d]uring the hearings, it was suggested that the technology could be obsolete in as little as five or ten years, well before the end of the 40-year term." Br. at 36. The petitions for rulemaking were in effect if perhaps not in intention petitions to eliminate the practical possibility of license renewal.

functioned flawlessly. In the decision now under review the NRC simply determined that the specific rulemaking requested by petitioners was unnecessary and undesirable. Many if not all the arguments in the briefs for petitioners and supporting amici curiae seem to miss this point. Those briefs describe at length what they see as serious shortcomings in the NRC's regulation of the nuclear power industry, but they do not explain how the specific rulemaking proposal the NRC rejected was a necessary remedy or would be effective in coping with the problems they perceive.

In sum, the petitioners fall far short of showing that the NRC acted unreasonably or unlawfully in denying their rulemaking request.

CONCLUSION

For the foregoing reasons the petitions for review should be denied.

Respectfully submitted,

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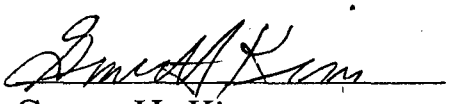
CERTIFICATE OF LENGTH OF BRIEF

I hereby certify that the foregoing final Brief for the Federal Respondents contains 12997 words, excluding the Table of Contents, Table of Authorities, and Certificates of Counsel, as counted by the Corel Wordperfect X3 program.

Respectfully submitted,



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August 31, 2007

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