

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
No. 07-2271

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,)	
)	
Petitioner,)	PETITION FOR REVIEW OF AN
)	ORDER BY THE UNITED STATES
v.)	NUCLEAR REGULATORY
)	COMMISSION
)	
UNITED STATES NUCLEAR REGULATORY COMMISSION,)	
UNITED STATES OF AMERICA & AMERGEN ENERGY COMPANY, L.L.C.,)	
)	
Respondents.)	

REPLY BRIEF ON BEHALF OF PETITIONER,
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY
R.J. Hughes Justice Complex
P.O. Box 093
Trenton, New Jersey 08625
Attorney for Petitioner
(609)984-5612

NANCY KAPLEN
Assistant Attorney General
of Counsel

EILEEN P. KELLY
Deputy Attorney General
On the Brief

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POINT I

THE NRC AND AMERGEN MISAPPLY PRINCIPLES OF PROXIMATE CAUSATION IN ORDER TO CONCLUDE THAT NEPA DOES NOT REQUIRE THE DEVELOPMENT OF AN EIS TO EVALUATE THE RISK OF AN AIR ATTACK ON THE OYSTER CREEK NUCLEAR GENERATING PLANT.

Respondent Nuclear Regulatory Commission, ("NRC"), argues in Point I.A of its brief that the National Environmental Policy Act, ("NEPA"), 42 U.S.C. § 4231 et seq., does not require it to assess the potential environmental effects of a terrorist air attack on the Oyster Creek facility, because a "terrorist attack on Oyster Creek would be entirely the terrorists' legal responsibility, not NRC's." (NRCbf 35).¹ Both the NRC and respondent AmerGen Energy Company, ("AmerGen"), thus conclude that an air attack would constitute a "superseding event" causing the harm. Based on this purported break in the "chain of causation," both respondents argue that the causal link between the relicensing and any environmental harm that results is insufficient to trigger the review requirements of NEPA.

This argument misapplies principles of proximate causation, which clearly recognize the link between the creation of a risk and its foreseeable results, even if those results involve

¹Citations are as follows:

Pa: Appendix of Petitioner New Jersey Department of Environmental Protection

NRCbf: Brief of Respondent Nuclear Regulatory Commission

NRCa: Appendix of Respondent Nuclear Regulatory Commission

Ambf: Brief of Respondent AmerGen Energy Company

the actions of a third party. See Lillie v. Thompson, 332 U.S. 459, 462 (1947). Moreover, the NRC's own statements and actions in contexts other than NEPA reveal that the potential harm which the NRC declined to review here is a reasonably foreseeable consequence of the NRC's decision to approve the continued operation of Oyster Creek as it currently exists. Consequently, a sufficiently close causal connection exists between the NRC's relicensing and the potential environmental harm raised by New Jersey's contentions to trigger NEPA.

A. Mothers for Peace Properly Analyzed the Application of NEPA, and Should Be Followed Here.

Both NRC and AmerGen argue that San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1030 (9th Cir), erred by framing its inquiry regarding whether NEPA requires review as requiring it to determine whether an environmental harm would be such a "remote and highly speculative" consequence of the NRC's licensing decision "as to be beyond NEPA's requirements." NRCBf at 39; Ambf at 33. The respondents argue that the question to be examined is whether there exists a "reasonably close causal relationship" between the licensing action and the potential harm. See NRC Brief, Point I.C (NRCBf 38), and AmerGen Brief Point II, citing Department of Transportation v. Public Citizen, 541 U.S. 572 (2004). This argument reflects an artificial distinction which, if accepted, would be at odds with the NRC's own prior decisions, and other cases on which the NRC relies here.

Mothers for Peace states the NEPA inquiry precisely as it was framed by the NRC itself in the decision that the Ninth Circuit reviewed there. See Id. at 1030, citing Private Fuel Storage, 56 N.R.C. 340, 349 (2002) (decision of the NRC rejecting the request for NEPA review made by the San Luis Obispo Mothers for Peace, on the basis that the risk of terrorist attack was too "speculative and simply too far removed from the natural and expected consequences of agency action to require a study under NEPA."). Other decisions interpreting NEPA on which the NRC relies here similarly focus on the "remoteness" of harm from the agency's action. See Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 739 (3d Cir. 1989) (upholding the NRC's decision not to perform an EIS on the basis that the risk presented was "remote and speculative"). Indeed, in the decision now on review before this Court the NRC's stated reasons for denying New Jersey's request for a hearing included the NRC's finding that "'(t)he environmental effect' caused by third-party miscreants...is simply too far removed from the natural or expected consequences of agency action to require a study under NEPA." In the Matter of Amergen Energy Company, February 26, 2007 NRC Decision (emphasis supplied) (Pa 7), quoting Private Fuel Storage, supra, 56 N.R.C. at 349.

The NRC and Amergen rely heavily on the Supreme Court's decision in Department of Transportation v. Public Citizen, supra, 541 U.S. at 767, which discussed the need for a "reasonably close

causal relationship" between the government action and environmental harm to trigger NEPA, for the proposition that the Ninth Circuit was simply wrong when it premised its determination on whether the risk was too "remote and highly speculative" for NEPA consideration. NRC Brief, Point I.C (NRCBf 38); AmerGen Brief, Point IIA (Ambf at 28). The Supreme Court's decisions, however, have not limited the NEPA analysis in this way. To the contrary, the Court itself has alternatively discussed both the causal connection between the agency action and the potential harm, and the remoteness of potential environmental harm from the agency action. For example, in Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983), the Supreme Court concluded that NEPA did not apply because the environmental effect in question - which concerned psychological harm caused by the fear of harm to the environment, even where that harm is unrealized - was "simply too remote from the physical environment" to require an EIS (emphasis supplied).

For the foregoing reasons, it is clear that the Ninth Circuit's NEPA analysis in Mothers for Peace properly followed substantial precedent.

B. Proximate Cause Analysis Requires the Conclusion that NEPA Applies Here.

Contrary to respondents' contention, a proximate cause analysis like that applied by the Supreme Court in Department of Transportation v. Public Citizen, supra, supports the application

of NEPA here. As Public Citizen recognizes, "proximate cause analysis turns on policy considerations and considerations of the 'legal responsibility' of actors(.)" Id., 541 U.S. at 676, citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-74 (5th ed. 1984). This determination of legal responsibility in turn depends on questions of causation and foreseeability.

It is well established that an actor who creates a situation that leads to a risk will not be relieved from liability simply because the immediate cause of harm is the action of a third party, provided that the risk was reasonably foreseeable. Lillie v. Thompson, supra, 332 U.S. at 462. The Restatement (Second) of Torts § 302B (1995) sets forth these principles of liability as follows:

An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.
(emphasis supplied).

The analysis of "proximate cause" thus does not terminate simply because a third party action is interjected into the causal relationship, but must proceed to the question of whether that third party action was a reasonably foreseeable result of the risk created. Indeed, the regulations adopted by the Council for Environmental Quality, ("CEQ"), to implement NEPA recognize the

need to review such indirect but foreseeable effects. See 40 C.F.R. § 1508.8 (identifying as risks to be analyzed "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.").

Any review of whether a causal connection between agency action and environmental harm is sufficient to trigger NEPA, moreover, must take into account the purposes of that statute. For that reason, the Supreme Court has determined that the analogy between the NEPA analysis and proximate cause principles is not perfect. See Metropolitan Edison Co. v. People Against Nuclear Energy, supra, 460 U.S. at 773. One of these goals is to cause agencies to take a hard look at the environmental effects of its major decisions. With this goal in mind, potential impacts requiring review have been deemed to exclude "'highly speculative harms'" because they may "distort[] the decisionmaking process' by emphasizing consequences beyond those of "greatest concern to the public and of greatest relevance to the agency's decision." City of Shoreacres v. Waterworth, 420 F.3d 440, 453 (5th Cir. 2005), citing Robertson v. Methow Valley Citizens Council, 498 U.S. 332, 374 (1989) (internal quotation marks and citations omitted and other citations omitted). For purposes of NEPA review, then, an impact is "'reasonably foreseeable' if it is 'sufficiently likely to occur that a person of ordinary prudence would take it into account in

reaching a decision.'" City of Shoreacres v. Waterworth, supra, citing Sierra Club v. Marsh, 976 F.2d 763, 767 (1st Cir. 1992).

Contrary to respondents' suggestion, Department of Transportation v. Public Citizen, supra, does not change the NEPA analysis to exclude foreseeability, but rather focuses on the causal connection because the facts of that case concerned a break in causation unlike the one here. Public Citizen turned on the fact that the contemplated agency action could not cause the feared environmental harm, because the agency "simply lack[ed] the power to act on whatever information might be contained in the EIS." Id. at 768. Consequently, the Court did not need to reach the question of whether the result was foreseeable. Here, in contrast, NRC is the agency entrusted with determining whether the Oyster Creek facility will continue to operate.

The question of whether a third party criminal act makes an environmental effect too far removed from the agency action to preclude the application of NEPA therefore depends on whether the NRC should have realized this risk, see Lillie v. Thompson, supra, 332 U.S. at 662, and whether it was reasonable to allow this risk to proceed without the analysis that NEPA requires prior to taking action. See Sierra Club v. Marsh, supra, 976 F.2d at 767. Regardless of whether this court applies a "reasonably close causal relationship" test, or examines whether the environmental harm is a "remote and highly speculative" result of agency action, it is

clearly unreasonable for the NRC to authorize the continued operation of Oyster Creek without analyzing the vulnerability of its design and location to such a terrorist air attack.

C. Review of Cases Cited by NRC and AmerGen.

The cases on which the NRC relies in Point I.B, (NRCBf 35 to NRCBf 37), to support its position that terrorist air attacks on a nuclear reactor are not foreseeable risks of licensing simply do not address the present day circumstances that the NRC must take into account in determining whether NEPA requires it to prepare an EIS. All but one of these cases were decided prior to the tragic events of September 11, 2001. In addition, the factual basis for decision in each of these cases can be distinguished in critical respects from the issues presented here.

Port Authority of New York and New Jersey v. Arcadian Corp., 189 F.3d 305 (3d Cir. 1999), and Gaines-Tabb v. ICI Explosives, 160 F.3d 613, 620-21 (10th Cir. 1998), involved the refusal to expand manufacturers' liability to include damage claims for negligent design and marketing, arising from the misuse of their products by third parties to make explosives used in terrorist bombings. These cases are of limited value for their analysis of foreseeability, because they analyzed events that occurred in 1994 and 1995, long before the response to the attacks of September 11, 2001 expanded the perception of this risk. Moreover, these decisions turned in large part on the question of

whether a manufacturer should have a duty to foresee and prevent extreme misuses of products that were otherwise not inherently dangerous. Port Authority in particular found that the imposition of such a duty on a manufacturer would be "grossly unfair." Id. at 313. In contrast, the request for NEPA review here must be viewed in light of the purposes of NEPA, which affirmatively charges federal agencies with the duty to implement a considered review, unless those harms are so remote as to make their consideration without value. See City of Shoreacres v. Waterworth, supra, 420 F.3d at 440.

The NRC and AmerGen also rely on two decisions where NEPA was deemed not to require analysis of environmental risks. See NRC Brief, Point I.E (NRCBf 48 to NRCBf 49); AmerGen Brief (Amb 36 to Amb 39). These cases are also distinguishable. Glass Packaging Institute v. Regan, 737 F.2d 1038, 1091 (D.C. Cir. 1984), concluded that the adoption of a regulation approving the use of plastic bottles did not require an EIS review of the risk of tampering because "[n]o cognizable environmental effect is implicated...." (emphasis in original). In reaching its decision, the court noted that the regulations promulgated by the Council on Environmental Quality to implement NEPA recognize that "social side effects of agency action, standing alone, do not require development of an environmental impact statement." Id. at 1092. The decision of the Eighth Circuit in Mid States Coalition for Progress v. Surface

Transportation Board, 345 F.3d 520 (8th Cir. 2003), upon which both respondents also rely, involved that Board's approval of an additional 280 miles of railroad tracks without preparing an EIS to examine the risk of derailment. Id. at 544. The court reasoned that an EIS was unnecessary, since any threat of derailment was "general in nature" to all railways, and did not bear specifically on the project in question. Id.²

The NRC argues that if New Jersey's position is accepted, federal agencies would have to look at every building, road and bridge and perform an EIS to evaluate the risk of terrorist air attack (NRCBf 44). Clearly, however, the particular target presented by a nuclear generating facility, and the potentially devastating effects of an attack, can be distinguished from an ordinary building, an additional 280 miles of railroad tracks out of thousands that exist, or even a bridge, based on the potential of a single act to cause great harm. These other examples differ both in the nature of the harm and, in the case of railroad tracks, in the scope of the unfocused nature of the inquiry that must be made. See Limerick Ecology Action v. NRC, supra, 869 F.2d at 738 (observing that "the risk will vary with the potential consequences."). Therefore, these rulings fail to support the NRC's decision.

D. The NRC and AmerGen Misapply Principles of Proximate

²That challenge was also brought out of time, and the Court concluded that there was no reason to reopen the inquiry.

Causation In an Attempt to Limit the Applicability of
NEPA to Quantifiable Risks.

As discussed above, the fact that the actions of a third party or other outside force are the most immediate cause of the harm does not relieve the actor from tort liability if the actor knew or should have known of the risk of such third party action, and if the harm was within the scope of the risk. The NRC attempts to narrow this responsibility, citing the Restatement (Second) of Torts, § 448, Comment b, for the proposition that, where an outside force breaks the "causal link," liability will attach only where "the actor creates a situation where 'a recognizable percentage of humanity is likely' to commit a crime or where 'persons of a particularly vicious nature are likely to be[.]'" NRC Brief Point I.B (NRCBf 31 to NRCBf 37); AmerGen Brief, Point II.b (Amb 30 to Amb 32). The NRC thus concludes that it is not required to perform an EIS here, because "it cannot be said...that a 'recognizable percentage' of the population would take advantage of the existence of Oyster Creek to attack it." NRCBf 36.³

The NRC's proximate cause analysis improperly attempts to interject a quantifiability requirement into the process of identifying risks cognizable under NEPA. There is no basis for such a requirement, either under tort liability principles or the law interpreting NEPA. Principles underlying the concept of

³Amergen similarly characterizes criminal activities as a "middle link" that lengthens the chain of causation beyond the reach of NEPA. Amb at 30.

proximate cause call for a response to reasonably foreseeable risks, which is not contingent on numerically identifying a particular number or percentage of possible actors. Restatement Second of Torts, § 332B; Lillie v. Thompson, supra, 332 U.S. at 462. Similarly, NEPA itself requires an agency to take a "hard look" at the impacts of its action where there is a significant risk of environmental harm, regardless of whether that risk may be quantified by identifying the number of probable actors. Mothers for Peace, supra, 449 F.3d at 1032, citing Limerick Ecology Action, Inc. v. NRC, supra, 869 F.2d at 754 (dissent of Judge Sirica, rejecting the NRC's conclusion that it could not assess the risk of terrorism because it could not quantify that risk).

Indeed, although Mothers for Peace relies on the Limerick dissent to support its rejection of the NRC's argument, the Limerick majority agreed with the dissent on this point, and declined to hold "that the mere assertion of unquantifiability immunizes the NRC from consideration of the issue under NEPA." Limerick, supra, 869 F.2d at 744, n. 31. The majority rather pointed out that "the failure to address the unquantifiable risk of sabotage raises serious concerns[.]" Id. at 744. Regardless of whether the risk of terrorism involves a numerically quantifiable group of actors, clearly those plotting airborne attacks have been recognized as a cognizable threat by a number of federal agencies, including the NRC, as a class of individuals creating serious

safety concerns for nuclear reactors. Thus, the NRC's purported inability to quantify potential actors should not control the NEPA analysis.

POINT II

NEW JERSEY HAS MET ANY BURDEN REGARDING THE ESTABLISHMENT OF RISK ASSESSMENT METHODOLOGY THAT NRC CAN USE IN AN EIS EVALUATING THE RISKS POSED BY AN AIRBORNE ATTACK.

The NRC argues in Point II.A.2 of its brief that it was not required to provide a hearing on New Jersey's airborne attack contention because New Jersey failed to identify a methodology for assessment of this risk. More specifically, the NRC argues that New Jersey's contention is flawed because it fails to refute the conclusion of the NRC's GEIS that the evaluation of air attacks is "beyond the current state of the art for performing risk assessments." NRCBf 59, citing the NRC's decision in this case (Pa 9 at n. 29), which in turn cited Limerick Ecology Action, Inc. v. NRC, supra, 869 F.2d at 744; see also AmerGen Brief, Point IV (Amb 43 to Amb 37). Because these assertions regarding the lack of available risk assessment methodology are based on the conclusions of the GEIS regarding the unquantifiability of the risk, they are insufficient to support the NRC's dismissal of New Jersey's contentions. See Mothers for Peace, supra, 449 F.3d at 1031; Limerick Ecology Action, Inc. v. NRC, supra, 869 F.2d at 744, n. 31 (concluding that the lack of a methodology to quantify an environmental risk does not, standing alone, put that risk beyond

the requirements of NEPA). Moreover, the NRC's reliance on the asserted lack of available methodology here is misplaced, because it is patently obvious from the NRC's own statements and actions that it has already used available techniques to develop what it has characterized as a meaningful analysis of this risk. The NRC's argument that it cannot perform a meaningful analysis of the risks posed by an air attack therefore should be rejected.

A. The NRC's GEIS Is Insufficient To Support Its Assertions Regarding the Lack of Available Risk Assessment Methodology, Since It Rests on the Inability to Quantify the Risk.

The NRC relies on its GEIS for its assertion that there is no available methodology to analyze the risk of airborne terrorist attacks NRC Brief Point II.A.2 (NRCBf 53). The portion of that document on which the NRC relies, however, does not support this broad contention, but rather reaches the more limited conclusion that "quantitative estimates of risk from sabotage are not made in external event analyses because such estimates are beyond the current state of the art for performing risk assessments." NRCBf 59, citing GEIS at 5-18 (NRCa 27) (emphasis supplied). The inability to quantify a risk, however, is insufficient to preclude the applicability of NEPA.

Mothers for Peace reversed an NRC determination that it did not have to evaluate the risk of air attack under NEPA because it lacked methodology to quantify that risk. Id. at 1031. Respondents now ask this Court to reject the Ninth Circuit's

analysis, claiming that the issue was properly disposed of by this Court's decision in Limerick Ecology Action, Inc. v. NRC, supra, 869 F.2d at 744, n. 31. Mothers for Peace, however, is not inconsistent with this Court's earlier decision on that issue. Although Limerick upheld the NRC's rejection of a sabotage-related contention because the intervenors there failed to "'cast any serious doubt'" on the NRC's conclusion that sabotage was beyond risk assessment techniques available in 1983, at the same time it expressly declined to hold that "the mere assertion of unquantifiability immunizes the NRC from consideration of the issue under NEPA." Limerick Ecology Action, supra, 869 F.2d at 744. Limerick rather concluded that dismissal might not be appropriate where, as here, it is clear from the NRC's own actions or statements that it was aware of ways to evaluate the risk. See Id. at 744, n. 31 (distinguishing the dismissal of the sabotage contention in Limerick from an earlier case involving Three Mile Island; in which the Court rejected an NRC contention that no risk assessment methodology was available based on the NRC's "concession ... that others are engaging in quantification of the phenomenon."). Thus, Limerick expressly declined to establish an across-the-board requirement that would allow the NRC to reject any NEPA contention for failing to identify a risk assessment methodology.

B. The NRC's Own Actions and Statements Recognize the Availability of Risk Assessment Methodology.

Even assuming that New Jersey is required to affirmatively rebut the finding of the NRC's GEIS that the risk of air attack is unquantifiable, this Court should, based on Mothers for Peace and the dicta in its own Limerick decision, examine the NRC's own actions and statements with regard to its efforts to evaluate and address the risk. Such an analysis requires the conclusion that the NRC's activities and statements reflect its recognition that a meaningful analysis of air attack risks can be undertaken.

Mothers for Peace, supra 449 F.3d at 1032, rejected the NRC's claim that it was impossible to have "a meaningful, i.e. quantifiable, assessment of terrorist attacks, while claiming to have undertaken precisely such an assessment in other contexts." Among other things, the Ninth Circuit noted that the NRC's assertion that such estimates could not be performed for potential terrorist activities was "belied by the very existence of the Homeland Security Advisory System, which provides a general assessment of the risk of terrorist attacks." Id., n. 9. Thus, Mothers for Peace concluded that "[t]he numeric probability of a specific attack is not required in order to assess likely modes of attack, weapons, and vulnerabilities of a facility, and the possible impact of each of these on the physical environment, including the assessment of various release scenarios." Id. at 1031.

In the period following the NRC actions reviewed in Mothers for Peace, the NRC has continued to engage in an analysis of the terrorist risk. Describing amendments to its Design Basis Threat ("DBT") rule, as required by the Energy Policy Act of 2005, codified at 42 U.S.C. § 2210e, the NRC expounded upon the approach it has used to analyze and address this threat, as follows:

After the terrorist attacks on September 11, 2001, the NRC promptly assessed the potential for and consequences of terrorists targeting a nuclear power plant, including its spent fuel storage facilities, for an aircraft attack, the physical effects of such a strike, and how compounding factors (e.g., fires, meteorology, etc.) would affect the impact of potential radioactive releases. As part of a comprehensive assessment, the NRC conducted detailed site-specific engineering studies of a limited number of nuclear power plants to assess potential vulnerabilities of deliberate attacks involving a large commercial aircraft. 72 F.R. 12706 (March 19, 2007) (emphasis supplied).

The Energy Policy Act itself also provided the NRC with a template made up of twelve factors to consider in amending its DBT rule to address terrorism, set forth below:

- b) Factors. When conducting its rulemaking, the Commission shall consider the following, but not be limited to--
- (1) the events of September 11, 2001;
 - (2) an assessment of physical, cyber, biochemical, and other terrorist threats;
 - (3) the potential for attack on facilities by multiple coordinated teams of a large number of individuals;
 - (4) the potential for assistance in an attack from several persons employed at the facility;
 - (5) the potential for suicide attacks;
 - (6) the potential for water-based and air-based

threats;

(7) the potential use of explosive devices of considerable size and other modern weaponry;

(8) the potential for attacks by persons with a sophisticated knowledge of facility operations;

(9) the potential for fires, especially fires of long duration;

(10) the potential for attacks on spent fuel shipments by multiple coordinated teams of a large number of individuals;

(11) the adequacy of planning to protect the public health and safety at and around nuclear facilities, as appropriate, in the event of a terrorist attack against a nuclear facility; and

(12) the potential for theft and diversion of nuclear materials from such facilities. [42 U.S.C. § 2210e].

Although the Energy Policy Act of 2005 identifies the above factors for consideration in the development of security enhancements, rather than for the development of an EIS, they illustrate that evaluation of this risk is not beyond current methodology.

Where, as here, it is obvious that a viable approach exists to review an environmental risk, the NRC should not be permitted simply to rest on the fact that New Jersey did not expressly articulate what approach the NRC should use. Viewed in light of the body of knowledge of NRC as a whole, and of its approach to the question of severe accidents and terrorism in other contexts, its assertion that the risk of terrorist air attacks cannot be assessed is simply untenable, and contrary to its affirmative duty to identify technologies in order to comply with NEPA. . See Department of Transportation v. Public Citizen, supra, 541 U.S. at 764, citing Vermont Yankee Nuclear Power Corp. v.

Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978).

C. New Jersey Is not Barred from Responding to NRC's Methodology Arguments.

The NRC argues that New Jersey is barred from responding to NRC's argument regarding risk assessment methodologies because "New Jersey's brief in this Court fails even to address the Commission's Limerick-based alternative holding." NRCBf 62. However, New Jersey's arguments in Points II(1) and (2), above, do not introduce new factual material or affirmative arguments, but properly respond to the arguments raised by the NRC in its responding brief. Beck v. University of Wisconsin, 75 F.3d 1130, 1133 (7th Cir. 1996) (holding that reply papers may respond to matters placed in issue by a responding brief). In its merits brief, as here, New Jersey relied extensively on the NRC's own actions and statements to address terrorism to show that the NRC's refusal to address the vulnerability of the Oyster Creek facility an EIS was unreasonable.

The NRC's arguments in Point II.A of its brief expand and recast an inconclusive comparison to Limerick, which appears in a footnote,⁴ into what it now characterizes as a separate "Limerick-

⁴In its decision, the NRC concluded that NEPA-driven review would be "superfluous" given the NRC's "extensive efforts to enhance security at nuclear facilities,..." In the course of discussing this conclusion, the NRC notes that "(a)nd, as the NRC has pointed out in other cases, substantial practical difficulties impede meaningful NEPA-terrorism review...." Decision at 7-8. In a footnote to this statement, the NRC makes a comparison between this case and Limerick Ecology Action,

based" holding on which it based its dismissal. New Jersey's arguments here merely respond to this expansion and recasting of the NRC's passing reference to Limerick into a primary basis for its decision. Especially given the minor nature of the unexplained reference which the NRC has now expanded into an independent holding, the NRC should not be permitted to preclude New Jersey's response.

POINT III

NEW JERSEY'S CONTENTIONS AND ARGUMENTS PROPERLY IDENTIFIED THE INADEQUACY OF THE GEIS TO ADDRESS ISSUES UNIQUE TO THE OYSTER CREEK FACILITY.

The NRC argues in Point II A of its Brief that, assuming NEPA requires it to analyze the environmental risks posed by a potential air attack, it has already adequately performed such an analysis in its GEIS. NRCa 50.⁵ The NRC alleges that New Jersey

supra, without characterizing it as a separate basis for dismissal. Id. at 8, n. 29 (stating that, "(a)s in Limerick Ecology Action, where the Court of Appeals upheld an NRC refusal to admit for hearing a NEPA-terrorism contention, it's not clear from New Jersey's contention how the NRC Staff, or the Licensing Board, is to go about assessing, meaningfully, the risk of terrorism at the particular site in question (Oyster Creek)."). The NRC's merits brief virtually ignores the holding of its decision that NEPA review would be superfluous, and shifts its attention to its argument that it could not perform a review because New Jersey failed to identify a methodology.

⁵Although the NRC's decision also cites its actions to review and upgrade security at nuclear plants as part of the reasons for which it believes an EIS analyzing airborne terrorism risks to be unnecessary, it fails to refer to those same actions here.

has never challenged the adequacy of the GEIS or explained how an air attack on Oyster Creek might produce impacts different from the severe accident scenario analyzed by the GEIS. In that same vein, the NRC argues in Point III that New Jersey failed to timely raise its arguments as to the "uniqueness" of the Oyster Creek facility, based on its design, location, and its particular vulnerability to attack (NRCBf 64-66). Therefore, the NRC argues that it properly rejected New Jersey's demand for a site specific EIS to supplement the GEIS.

The NRC's argument incorrectly characterizes New Jersey's contentions, which expressly called for a site specific review that would take into account the facility's design and its particular vulnerability to air attack (Pa 135 to Pa 136). New Jersey pointed out in its first contention that "(t)he NRC has conducted a generic analysis of the potential threat from aircraft attacks on nuclear power plants, but not a specific analysis of the expected performance of the Oyster Creek design." (Pa 138). New Jersey also raised the NRC's failure to analyze "the plant's vulnerability to aircraft attacks, and in particular the spent fuel pool vulnerability:..." (Pa 136). Finally, New Jersey identified the inconsistency between the NRC's recognition of terrorism for purposes of NEPA, and its actions and statements in other contexts. See New Jersey's Contention 1 (pointing out that although the NRC had undertaken "a comprehensive re-evaluation of safeguards and

security programs, regulations, and procedures to determine potential DBT,"... "the site specific review for Oyster Creek has not taken place.") (Pa 138).

New Jersey's request for a site specific review is clearly sufficient to place in issue the risks posed by an airborne attack given Oyster Creek's design and location. Not only did New Jersey raise the issue of any particular vulnerabilities in Oyster Creek's design, but these issues are, further, inherent elements of a request for a site specific risk assessment. See Limerick, supra at 738 (noting that "the impact of SAMDAs⁶ on the environment will differ with the particular plant's design, construction and location."). These are issues that are "so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." Department of Transportation v. Public Citizen, supra, 541 U.S. at 765, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., supra, 435 U.S. at 553. Consequently, the NRC erred in concluding that New Jersey's contentions were not adequate to require site specific review in an EIS.

POINT IV

NEW JERSEY'S AIRBORNE TERRORISM CONTENTIONS DO
NOT PRESENT AN IMPROPER COLLATERAL ATTACK ON
THE NRC'S RULES.

⁶New Jersey's contention asked for an analysis of Severe Accident Mitigation Design Alternatives ("SAMDAs") (Pa 138), which consider possible plant design alternatives that could lessen the severity of the impacts should an incident occur.

The NRC and AmerGen argue that the NRC correctly rejected New Jersey's contention seeking a site-specific EIS to consider its airborne attack contention because it amounts to a collateral challenge to the NRC's regulations. NRC Brief Point II.B.1 (NRCBf 54 to NRCBf 58); Amergen Brief Point V (Amb 48 to Amb 57). Challenges to existing rules, respondents argue, must be accomplished through a petition for new rulemaking, or a petition for rule waiver pursuant to 10 C.F.R. § 2.335 (NRCBf 54 to 44). New Jersey's contentions, however, do not ask the NRC to take actions inconsistent with its rules, and therefore do not require New Jersey to file either a request for regulatory amendment or for a waiver of the rules. To the contrary, the action sought by New Jersey here is contemplated by the NRC's existing rules, which not only reserve to that agency the authority to consider new and significant information to supplement the GEIS, but direct it to do so. See 10 C.F.R. § 51.53(c)(3)(iv); 10 C.F.R. § 51.95(c)(4).

The NRC's rules do treat certain issues, including those relating to spent fuel storage, as issues that normally can be generically resolved by its GEIS. See 10 C.F.R. § 51.53(c)(3)(i); NRCBf 56; see also 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1 (identifying those issues classified as Category 1 impacts). The NRC's rules also recognize, however, that there may be a need to supplement existing information, including that provided by the GEIS, by requiring an applicant to submit "new and significant

information on environmental impacts of license renewal of which the applicant is aware(.)" 10 C.F.R. § 51.53(c)(3)(iv). Further, 10 C.F.R. § 51.95(c)(4) directs the NRC staff to consider "any significant new information" in the supplemental EIS which NRC staff is to prepare, which staff uses to "determine whether or not the adverse environmental impacts of license renewal are so great that preserving the option of license renewal for energy planning decisionmakers would be unreasonable." 10 C.F.R. § 51.95(c)(4).

The NRC conceded in its own brief that 10 C.F.R. § 51.95(c)(4) applies not only to Category 2 impacts, which ordinarily require site specific analysis to supplement the GEIS, but also calls for NRC staff to consider new and significant information about generic Category 1 impacts. NRCBf 7. Similarly, the NRC's own decisions have recognized the obligation to analyze new information that may bear on the applicability of the GEIS. See In the Matter of Florida Power & Light Company (Turkey Point), 54 N.R.C. 3, 11 (July 2001) (stating that "even where the GEIS has found that a particular impact applies generically (Category 1), the applicant must still provide additional analysis in its Environmental Report if new and significant information may bear on the applicability of the Category 1 finding at its particular plant.") (Pa 273). Thus, the NRC's rules already provide for, and indeed require, the submission of new and significant information not only where it affects the reactor, but also where it pertains

to the spent fuel pool, which is a Category 1 issue otherwise resolved by the GEIS.

AmerGen cites Fla. Power & Light Co. (Turkey Point), supra, 54 N.R.C. at 12, for the proposition that a petitioner may seek a waiver of licensing rules or petition for rulemaking in order to challenge a finding in the NRC's GEIS (Amb 55). While this may be one avenue available to a petitioner, 10 C.F.R. § 51.53(c)(3)(iv) does not make its requirement for the submission of new and significant information in an applicant's environmental report contingent on a change to GEIS through new rulemaking. Similarly, nothing in the NRC's rules makes the submission and consideration of new information pursuant to 10 C.F.R. § 51.95(c)(4) contingent on the waiver of NRC regulations permitting reliance on the GEIS to address certain issues. In short, because the NRC retains the authority under its existing rules to require and consider new information, New Jersey's challenge to the NRC's failure to exercise this authority does not constitute a collateral attack on these rules, nor does it require rulemaking or a rule waiver. Indeed, 10 C.F.R. § 51.53(c)(3)(iv) and 10 C.F.R. § 51.95(c)(4) would be rendered meaningless if no new information could be considered without a rule change. Such an interpretation would render those rules ineffective to supplement the GEIS with information necessary to comply with NEPA, which imposes a statutory obligation to consider significant information

independent of the NRC's authority and obligations under the Atomic Energy Act. Limerick Ecology Action, supra, 869 F.2d at 729-30.

New Jersey's request for a review of the airborne attack threat calls for the NRC to review and consider significant new information affecting the reasonableness of relicensing on the basis of its GEIS, adopted in 1996 (NRCa2; Amerbf 51). The heightened concern with air attacks following September 11, 2001, however, has been recognized by a number of NRC actions, and by indeed Congress, which adopted the Energy Policy Act of 2005. The development of this information changes the factual basis on which the NRC developed its GEIS, and constitutes "significant new information" bearing on the NRC's decision. Thus, 10 C.F.R. § 51.53(c)(3)(iv) and 10 C.F.R. § 51.95(c)(4) require the NRC to supplement its GEIS with a site specific EIS to consider this information, and its refusal to do so is an abuse of its discretion.

POINT V

THE DUTY TO ANALYZE ENVIRONMENTAL RISKS POSED BY POTENTIAL AIRBORNE TERRORIST ATTACKS UNDER NEPA IS NOT NEGATED BY THE NRC'S ATTEMPTS TO LIMIT ITS REVIEW OF RELICENSING APPLICATIONS BY REGULATION, OR BY CONSIDERATIONS OF ADMINISTRATIVE CONVENIENCE.

Amergen argues that New Jersey's contentions do not establish a connection between the risk of terrorist air attack and the renewal of Oyster Creek's operating license, because they relate to the issues the NRC normally considers on relicensing review, which concern "matters peculiar to plant aging or to the license extension period(,)" Amb 25, citing NRC decision, 65 N.R.C. at 129 (Pa 6).⁷ As discussed in Point III of New Jersey's merits brief, however, the NRC cannot obviate the requirements of NEPA by narrowing the focus of its relicensing review under the rules it adopts pursuant to the Atomic Energy Act. CITE. The NRC's regulations, moreover, recognize that relicensing is a major action subject to NEPA. 10 C.F.R. § 51.5 et seq.

NRC has argued that there is little to be gained by conducting a NEPA review when its energies could be better used to develop security measures for licensed facilities, as it has done through its Design Basis Threat ("DBT") rules. However, the addition of security measures to an already licensed facility does not satisfy NEPA, because it does not enable the agency to make its

⁷The NRC's Brief virtually ignores this argument, which was advanced in the NRC's decision as a basis for its decision, and addressed in Point III of New Jersey's initial merits brief.

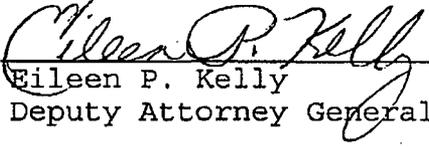
licensing decision based on a consideration of information analyzing the environmental risk. Rather, the DBT rule addresses facilities that have already been licensed for operation. Thus, the actions taken by the NRC to address security at existing facilities does not provide the "hard look" at the licensing decision required by NEPA, but deals with securing these facilities after the major agency action of licensing has already been taken. As New Jersey argued in Point IV of its Brief, administrative convenience is not a basis for failure to comply with NEPA. Therefore, the reasons cited by NRC and AmerGen to limit the scope of NEPA review to "relicensing" inquiries are unpersuasive.

CONCLUSION

For the reasons stated in this Reply brief and in its September 21, 2007 brief on the merits, Petitioner, New Jersey Department of Environmental Protection respectfully requests that the Court reverse the decision of Respondent U.S. Nuclear Regulatory Commission rejecting New Jersey's contention that the National Environmental Policy Act of 1969 requires an environmental impacts analysis of a terrorist attack by air on the Oyster Creek Nuclear Generating Station, located in Lacey Township, New Jersey, withing the proceedings on the application by Respondent AmerGen Energy Co., Inc., for relicensure of that facility.

Sincerely yours,

ANNE MILGRAM
ATTORNEY GENERAL OF NEW JERSEY

By: 
Eileen P. Kelly
Deputy Attorney General

Dated: March 4, 2008

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31.1(c)

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical.

I further certify that this brief complies with L.A.R. 31.1(c) in that prior to it being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

Company: Networks Associates Technologies, Inc.

Product: McAfee VirusScan Enterprise 8.0.0


Eileen P. Kelly
Deputy Attorney General

Dated: March 4, 2008
Trenton, New Jersey

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 32(A)(7)(B) AND LOCAL
RULE 32(A)(5) AND (A)(6)

I, Eileen P. Kelly, a member in good standing of the bar of the United States Court of Appeals for the Third Circuit, certify that this Brief complies with Fed. R. App. P. 32(a)(7)(B) in that the principal portions of the brief contain 6,688 words according to the software program employed by the office of the Attorney General of New Jersey. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a monospaced typeface using Word Perfect version 12 with 12 point Courier New font.


Eileen P. Kelly
Deputy Attorney General

Dated: March 4, 2008
Trenton, New Jersey

CERTIFICATE OF SERVICE

I, Eileen P. Kelly, a member in good standing of the bar of the United States Court of Appeals for the Third Circuit, certify that two (2) copies of this Brief and one (1) copy of the Appendix were served today by overnight mail on the following:

Charles E. Mullins
Sr. Attorney
Office of the General Counsel
U.S. Nuclear Regulatory
Commission
11555 Rockville Pike
Rockville, MD 20852-2738

Brad Fagg, Esq.
Morgan, Lewis & Bockius, LLP
1111 Pennsylvania Avenue
Washington, DC 20004

Michael A. Bauser
Nuclear Energy Institute, Inc.
1776 I Street, N.W., Suite 400
Washington, D.C. 20006-3708.


Eileen P. Kelly
Deputy Attorney General

Dated: March 4, 2008
Trenton, New Jersey

CERTIFICATE OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.


Eileen P. Kelly
Deputy Attorney General

Dated: March 4, 2008