

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**No. 07-2271**

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**NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**Petitioner,**

**v.**

**UNITED STATES NUCLEAR REGULATORY COMMISSION, UNITED  
STATES OF AMERICA & AMERGEN ENERGY COMPANY, L.L.C.,**

**RESPONDENTS.**

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**PETITION FOR REVIEW OF AN ORDER BY THE UNITED STATES  
NUCLEAR REGULATORY COMMISSION**

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**BRIEF OF PRIVATE RESPONDENT  
AMERGEN ENERGY COMPANY, L.L.C.**

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**CORPORATE DISCLOSURE AND  
STATEMENT OF FINANCIAL INTEREST**

**No. 07-2271**

**New Jersey Department of Environmental Protection**

**v.**

**NRC; AmerGen Energy Company, LLC**

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Private Respondent AmerGen Energy Company, LLC makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

Exelon Corporation

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

Exelon Corporation

3. If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4. In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

Not Applicable.

s/ Brad Fagg

Brad Fagg, Esq. (DC433645)

January 17, 2008

Date

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## **JURISDICTIONAL STATEMENT**

The New Jersey Department of Environmental Protection (“New Jersey”) challenges a decision by the United States Nuclear Regulatory Commission (“NRC” or “Commission”), denying its petition for intervention and request for a hearing in a pending NRC license renewal proceeding. This Court has subject matter jurisdiction under the Administrative Orders Review Act, 28 U.S.C. § 2341 *et seq.*, also known as the Hobbs Act. An agency denial of an intervention petition terminates the petitioner’s rights in a proceeding and is “final” agency action. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737-44 (1985); *see also Envtl. Law & Policy Ctr. v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006).

The NRC issued the order denying New Jersey’s hearing request on February 26, 2007. New Jersey filed its petition for review in this case on April 25, 2007, within 60 days of the NRC’s order, as required under the Hobbs Act. *See* 28 U.S.C. § 2344. Venue is proper in this Court. 28 U.S.C. § 2343.

## **STATEMENT OF THE ISSUES**

1. Whether the NRC acted arbitrarily and capriciously when it determined that the consequences of a hypothetical terrorist attack on an existing nuclear power plant did not have a reasonably close causal relationship to an application for an extension of the current operating license for that facility, so as

to require a specific and separate terrorism review under the National Environmental Policy Act (“NEPA”).

2. Whether the NRC acted arbitrarily and capriciously when it determined that, even if NEPA could in some circumstances require a terrorism review, the petitioner in this case was not entitled to litigate terrorism contentions in an adjudicatory proceeding regarding renewal of the license for the existing nuclear power plant, where: (a) the petitioner failed to discharge its burden to show some method or theory by which the NRC could have meaningfully assessed the risk of terrorists acts, and (b) the NRC had in any event addressed the petitioner’s issues generically and through rule-making.

### **STATEMENT OF THE CASE**

This case involves New Jersey’s petition for review of a final NRC order, *AmerGen Energy Co., LLC*, (Oyster Creek Nuclear Generating Station) CLI-07-08, 65 NRC 124 (2007) (PA2). That NRC order upheld the decision of an NRC Atomic Safety and Licensing Board (“ASLB”),<sup>1</sup> denying New Jersey’s request for intervention, under the applicable NRC rules, in a license renewal proceeding for the Oyster Creek Nuclear Generating Station (“Oyster Creek”). To be permitted to intervene under NRC rules, a party with standing must set forth an admissible

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<sup>1</sup> *AmerGen Energy Co., LLC* (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188 (2006) (PA50).

“contention.” The NRC denied New Jersey’s hearing request, rejecting three proposed contentions by New Jersey as inadmissible.

New Jersey here challenges the NRC’s rejection of one of those contentions. According to New Jersey’s petition for review, that contention is that NEPA requires the Commission to consider the environmental consequences of a hypothetical attack by air on Oyster Creek, as part of the NRC’s license renewal review for that facility. The contention as initially filed challenged three aspects of the adequacy of AmerGen’s severe accident mitigation alternatives (“SAMA”) analysis, required under applicable NRC license renewal regulations. In particular, New Jersey alleged that the SAMA analysis should, specifically and separately, consider (1) the consequences of a potential aircraft attack on Oyster Creek, (2) the vulnerability of the spent fuel pools, and (3) the sufficiency of interim compensatory measures regarding security then in place at the plant.

The NRC rejected New Jersey’s contention on a number of grounds, including the fact that it sought to adjudicate issues outside the scope of NEPA generally, and license renewal in particular. Following its own consistent precedent, the NRC held that there is not a sufficient causal connection between the agency’s relicensing decision and a hypothetical terrorist attack on Oyster Creek. *AmerGen Energy Co., LLC, CLI-07-08, 65 NRC at 128-30 (PA6-8)*. In doing so, the NRC underscored its disagreement with a recent Ninth Circuit

decision that reached a contrary conclusion. *Id.* The NRC further held, in the alternative, that even if NEPA could in some circumstances require an assessment of postulated terrorist attacks, New Jersey's contention in this case impermissibly sought to challenge generic agency findings that have been codified by rule. *Id.* at 131-34 (PA9-13.) Furthermore, relying in part on a decision of this Court, the NRC noted that New Jersey had failed to meet its burden to adduce some method by which the NRC could meaningfully assess the risk of terrorism at Oyster Creek for purposes of its NEPA review. *Id.* at 131 n.29, citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989), *reh'g denied* (Apr. 25, 1989). (PA9).

## **STATEMENT OF FACTS**

### **I. STATUTORY AND REGULATORY BACKGROUND**

A. *The Atomic Energy Act.* The Atomic Energy Act of 1954 ("AEA"), as amended, 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." *Rockland County v. NRC*, 709 F.2d 766, 769 (2d Cir. 1983). Sections 103 and 104(b) of the AEA authorize the Commission to issue licenses to operate commercial power reactors. *See* 42 U.S.C. §§ 2133 and 2134(b). The AEA does not elaborate on the standards or procedures to be applied by the NRC in issuing renewed operating licenses. The AEA, however, does give the Commission

considerable discretion to determine how to achieve its statutory mandates. *See Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

B. *The NRC's Part 54 License Renewal Regulations.* The NRC has promulgated standards and procedures for the renewal of reactor operating licenses. *See* 10 C.F.R. Part 54 (2007). As the Commission explained in its seminal Turkey Point license renewal decision, "Part 54 centers the license renewal reviews on the most significant overall safety concern posed by extended reactor operation – the detrimental effects of aging." *Fla. Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7 (2007) (PA265, 269). The NRC's license renewal framework is premised upon the notion that (with the exception of aging management issues) the NRC's ongoing regulatory process is adequate to ensure that the current licensing basis of operating plants provides and maintains an acceptable level of safety. "Nuclear Power Plant License Renewal," 56 Fed. Reg. 64,943, 64,946 (December 13, 1991). In implementing Part 54, the Commission made clear that "it would be unnecessary to include in [the agency's] review all those issues already monitored, reviewed, and commonly resolved as needed by ongoing regulatory oversight." *Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 8 (PA270).

C. *The NRC Hearing and Contentions Process.* Section 189(a) of the AEA requires the NRC to hold a hearing "upon the request of any person whose

interest may be affected,” before granting a new license, license amendment, or license renewal. 42 U.S.C. § 2239(a). The Commission generally establishes a three-member Atomic Safety and Licensing Board (“ASLB”) to rule on hearing requests and conduct necessary evidentiary hearings. 10 C.F.R. § 2.321.

Petitioners and parties may appeal ASLB rulings to the five-member Commission. 10 C.F.R. §§ 2.311, 2.341.

Any person seeking to obtain a hearing on a license renewal application must file a petition to intervene. 10 C.F.R. § 2.309(a). The petitioner must demonstrate standing and proffer at least one admissible “contention.” 10 C.F.R. § 2.309(a), (d). A contention is a specific issue of law or fact that the petitioner seeks to have adjudicated. It must be substantiated by an explanation of its bases, a statement of supporting facts or expert opinion, appropriate references and citations, and sufficient information to establish that a genuine dispute exists between the petitioner and the applicant. 10 C.F.R. § 2.309(f)(1). The disputed issue must be within the scope of the proceeding and “material” to the findings the NRC must make to support the licensing action. *Id.* Unless a party obtains a “waiver” from the Commission, NRC regulations and generic determinations are not subject to adjudication. 10 C.F.R. § 2.335.

D. *The National Environmental Policy Act.* The National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*, requires federal agencies to “include

in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action.” 42 U.S.C. § 4332(2)(C)(i). NEPA is a procedural statute that does not mandate substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989). Its principal purpose is “to insure a fully informed and well-considered decision.” *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

E. *The NRC’s Part 51 Environmental Review Regulations and License Renewal.*

1. *The Basic Framework.* The NRC has promulgated regulations to implement NEPA. *See generally* 10 C.F.R. Part 51 (2007). In 1996, the Commission amended Part 51 to address the scope of its environmental review for license renewal applications. *See* “Environmental Review for Renewal of Nuclear Power Plant Operating Licenses,” 61 Fed. Reg. 28,467 (June 5, 1996), as amended by 61 Fed. Reg. 66,537 (Dec. 18, 1996). To make Part 51 more efficient and focused, the NRC divided the environmental requirements for license renewal into generic and plant-specific components. The NRC prepared a Generic

Environmental Impact Statement (“GEIS”)<sup>2</sup> to evaluate and document those generic impacts that are well understood based on experience gained from the operation of existing U.S. nuclear power plants.

Generic issues are identified in the GEIS as “Category 1” impacts. GEIS, Vol. 1 at 1-5 to 1-6. These are issues on which the Commission found that it could draw “generic conclusions applicable to all existing nuclear power plants, or to a specific subgroup of plants.” *Fla. Power & Light Co*, CLI-01-17, 54 NRC at 11 (PA273). The Commission concluded that such issues involve “environmental effects that are essentially similar for all plants,” and thus they “need not be assessed repeatedly on a site-specific basis.” *Id.* The NRC has codified its generic findings in 10 C.F.R. Part 51, Subpart A, Appendix B, Table B-1 (“Table B-1”).

NRC rules require license renewal applicants to include an environmental report in their applications. 10 C.F.R. § 51.53(c). The report need not discuss Category 1 issues, insofar as an applicant may rely on the generic environmental impact findings codified in Table B-1. 10 C.F.R. § 51.53(c)(3)(i). The report, however, must address Category 2 impacts. 10 C.F.R. § 51.53(c)(3)(ii).

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<sup>2</sup> See NUREG-1437, “Generic Environmental Impact Statement for License Renewal of Nuclear Plants,” Final Report, Vols. 1 & 2 (May 1996), available at <http://www.nrc.gov/reading-rm/adams.html> at “ADAMS” accession numbers ML040690705 and ML040690738.

Furthermore, the environmental report must provide any “new and significant information” regarding the environmental impacts of license renewal of which the applicant is aware, 10 C.F.R. § 51.53(c)(3)(iv), which includes any new and significant information related to Category 1 impacts.

The NRC prepares a draft and a final site-specific supplemental environmental impact statement (“SEIS”) for each plant, using the applicant’s environmental report and other independent sources of information.<sup>3</sup> 10 C.F.R. § 51.95(c). The final SEIS adopts any applicable Category 1 environmental impact findings from the GEIS. 10 C.F.R. §§ 51.71(d); 51.95(c). It also includes evaluations of Category 2 impacts and any “new and significant information” concerning generic Category 1 impacts. 10 C.F.R. § 51.95(c)(4).

2. *NRC Generic Findings on On-Site Storage of Spent Fuel.*

Table B-1 identifies the on-site management and storage of spent nuclear fuel as a Category 1 issue. This generic determination encompasses the environmental impacts of potential accidents. *See* GEIS, Vol. 1 at xlviii, 6-72 to 6-76; 6-86, 6-92. The Commission has concluded that, “[b]ecause the GEIS analysis of onsite spent

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<sup>3</sup> The SEIS for Oyster Creek is Supplement 28 to the GEIS. *See* NUREG-1427, Supp. 28, “Generic Environmental Impact for License Renewal Regarding Oyster Creek Nuclear Generating Station, Vols. 1 & 2” (Jan. 2007), *available* at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1437/supplement28/index.html>. Petitioner’s Appendix contains excerpts from the SEIS. *See* PA289-392.

fuel storage encompasses the risk of accidents, [a contention that raises spent fuel accidents] falls beyond the scope of individual license renewal proceedings.” *Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 21 (PA283).

3. *NRC Generic Findings Concerning Severe Accidents.* The NRC evaluated two classes of accidents – design basis accidents and severe accidents – as part of its license renewal rulemaking. *See* Table B-1. Severe accidents “are those that are more severe than [design basis accidents] because they could result in substantial damage to the reactor core, regardless of offsite consequences.” SEIS, Vol. 1 at 5-3 (PA345). The NRC evaluated the impacts of severe accidents initiated by external phenomena such as tornadoes, floods, earthquakes, and fires. GEIS, Vol. 1. at 5-17. It also opted to consider sabotage as a potential initiating event. The GEIS states that while “the threat of sabotage events cannot be accurately quantified” (*id.* at 5-18), NRC physical protection requirements in 10 C.F.R. Part 73 (2007) “provide reasonable assurance that the risk from sabotage is small.” *Id.* The GEIS further states that while “acts of sabotage are not reasonably expected . . . if such events were to occur, the Commission would expect that resultant core damage and radiological releases would be no worse than those expected from internally initiated events.” *Id.*

F. *Severe Accident Mitigation Alternative Analysis.* Although the NRC found the “probability-weighted” consequences of impacts resulting from severe

accidents to be small, it has classified severe accidents as a Category 2 issue. *See* Table B-1. Recognizing that both NEPA and its Part 51 regulations require consideration of mitigation alternatives, the NRC concluded that “a site-specific consideration of severe accident mitigation alternatives is required at license renewal for those plants for which this consideration has not been performed.” 61 Fed. Reg. at 28,481 (1996).

The required SAMA analysis makes use of probabilistic risk assessment and cost-benefit analysis techniques to review and evaluate plant design alternatives (e.g., changes in hardware, procedures, and training) that could significantly reduce the radiological risk from a severe accident by preventing substantial core damage (i.e., a severe accident) or by limiting releases from containment in the event that substantial core damage occurs (i.e., mitigating the impacts of a severe accident). *See* 61 Fed. Reg. at 28,480-82 (1996); *AmerGen Energy Co., LLC*, LBP-06-07, 63 NRC at 199 n.6 (PA59).

## **II. THE PROCEEDINGS BELOW**

A. *AmerGen’s Application for Renewal of the Oyster Creek License.* On July 22, 2005, AmerGen filed an application with the NRC to renew Operating License No. DPR-16 for Oyster Creek. Oyster Creek is located adjacent to Barnegat Bay in Lacey and Ocean Townships, Ocean County, New Jersey. PA326-27. AmerGen’s application seeks to renew the Oyster Creek operating

license, which will otherwise expire in April 2009, for an additional 20 years. On September 15, 2005, the NRC published a notice of opportunity for hearing in the *Federal Register*. See 70 Fed. Reg. 54,585 (Sept. 15, 2005).

B. *New Jersey's Petition*. On November 14, 2005, New Jersey filed a Request for Hearing and Petition for Leave to Intervene (“Hearing Request”).

PA135. In its petition, New Jersey proffered three contentions challenging AmerGen’s license renewal application: (1) analysis of SAMAs under 10 CFR § 51.53(c); (2) compliance with the American Society of Mechanical Engineers Code with respect to metal fatigue; and (3) reliance on the Forked River Combustion Turbines as a standby source of electrical power pursuant to an interconnection agreement with another electric utility. Hearing Request at 3-11 (PA135-145).

New Jersey’s SAMA contention – the only contention the denial of which is challenged by New Jersey and therefore the only matter before this Court – purports to challenge AmerGen’s SAMA analysis under NEPA and 10 C.F.R. Part 51. As originally filed by New Jersey, the proposed contention was threefold, and alleged: (1) that the SAMA analysis in AmerGen’s license renewal application should contain “a specific analysis of the expected performance of the Oyster Creek design” in the event of an “aircraft attack” on Oyster Creek; (2) that the SAMA analysis should address “design basis accidents for spent fuel pools; and

(3) that “Interim Compensatory Measures” imposed by the Commission since the events of September 11, 2001, are not adequate for the renewed license term, and that “long-term measures” must be put in place. Hearing Request at 4-5 (PA138-39).

C. *The ASLB Proceedings and Ruling.* The NRC established an ASLB to rule on the various hearing requests the agency had received and to conduct any necessary hearings. The NRC Staff and AmerGen filed answers opposing the admission of New Jersey’s contentions on the ground that they failed to meet the NRC’s contention admissibility requirements in 10 C.F.R. § 2.309(f). PA146, 168. New Jersey failed to file a reply to either answer, despite being permitted to do so under 10 C.F.R. § 2.309(h)(2). *AmerGen Energy Co., LLC*, LBP-06-07, 63 NRC at 200 n.7 (PA59).

On February 27, 2006, the ASLB ruled that none of New Jersey’s proposed contentions was admissible, and accordingly denied New Jersey’s hearing request. *Id.* at 211 (PA74). In refusing to admit New Jersey’s SAMA-related contention, the ASLB rejected each of New Jersey’s three arguments. First, the ASLB held that New Jersey’s contention that Oyster Creek’s SAMA analysis must address the impacts of aircraft attacks was beyond the scope of, and not material to, the license renewal proceeding. *Id.* at 201 (PA60). The ASLB based its ruling, in part, on NRC adjudicatory precedent, emphasizing that “[t]he Commission repeatedly and

unequivocally has ruled that the effects of terrorist attacks need not be considered under NEPA.” *Id.* at 200 (citations omitted) (PA59). Additionally, the ASLB found that the NRC had previously performed a “discretionary analysis” of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release expected to result from internally initiated events. *Id.* at 201 n.8), citing *Duke Energy Corp.*, CLI-02-26, 56 NRC 358, 365 n.24; GEIS, Vol. 1 at 5-18 (PA60 ).

With respect to New Jersey’s second argument regarding the spent fuel pool, the ASLB similarly ruled that Commission precedent regarding terrorism contentions and NEPA precluded admission of the contention. *AmerGen Energy Co., LLC*, LBP-06-07, 63 NRC at 201 (PA61). In the alternative, the ASLB found that, because New Jersey’s contention raised concerns related to the on-site storage of spent fuel – a Category 1 issue that has been “resolved generically for all plants” through rulemaking – it improperly raised issues beyond the scope of the proceeding.<sup>4</sup> *Id.*

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<sup>4</sup> In response to New Jersey’s assertion that “spent fuel pool accidents are part of the licensee’s and state emergency preparedness programs” (PA139), the ASLB correctly noted that licensee emergency preparedness programs are evaluated by the NRC on an ongoing basis, and therefore are beyond the scope of license renewal. PA61. The Commission made this clear when it implemented 10 C.F.R. Part 54 and in subsequent individual adjudications. *Fla. Power & Light Co.*, CLI-01-17, 54 NRC 3, 9-10, citing 56 Fed. Reg. at 64,966 (1991) (PA271-272 ).

In declining to admit the SAMA contention on the basis of New Jersey's third argument regarding "interim" compensatory measures, the ASLB concluded that the contention was neither within the scope of, nor material to, the proceeding. *Id.* at 203 (PA63). The ASLB explained that, in 2005, the Commission initiated a rulemaking to codify the revised DBT security requirements that it had previously imposed, by order, on licensees as interim compensatory measures. *Id.*, citing "Design Basis Threat," 70 Fed. Reg. 67,380 (Nov. 7, 2005) (proposed rule). Given the Commission's discretion to proceed by rulemaking or adjudication, the ASLB concluded that, to the extent New Jersey "wishes to challenge particular aspects of the proposed [DBT] rule, its remedy lies in the rulemaking process, not in this adjudication." *Id.* at 204 n. 10 (PA64) (internal quotes omitted).

D. *New Jersey's Appeal to the Commission.* On March 28, 2006, New Jersey appealed the ASLB's ruling to the Commission. In its brief, New Jersey argued – for the first time – that the effects of a terrorist attack are, for purposes of NEPA, "reasonably foreseeable," and must therefore be considered in AmerGen's SAMA analysis.<sup>5</sup> New Jersey also posited – again for the first time – that the "design," "location," and "specific threat of attack" at Oyster Creek make it "uniquely vulnerable to terrorist attack." *Id.* at 16-22 (PA400-406).

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<sup>5</sup> Brief on Behalf of Petitioner New Jersey Department of Environmental Protection on Appeal from Order LBP-06-07 of the Atomic Safety and Licensing Board Denying Request for Hearing and Petition to Intervene (Mar. 28, 2006) ("New Jersey Appeal") at 8-10.

E. *The Ruling By the Commission.* On September 6, 2006, the Commission affirmed the ASLB's rejection of the two contentions regarding metal fatigue and standby power by New Jersey not challenged here, but deferred ruling on the first SAMA contention. *AmerGen Energy Co., LLC*, CLI-06-24, 64 NRC 111(2006) (PA24). On February 26, 2007, the Commission affirmed, in every material respect, the ASLB's decision denying admission of New Jersey's SAMA contention. *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC 124 (PA2).

Recognizing that the ASLB had relied, in part, on prior Commission adjudicatory decisions, the Commission stated:

We find that the Board properly applied our settled precedents on the NEPA-terrorism issue. "Terrorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to 'the detrimental effects of aging.' Consequently, they are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding." Moreover, as a general matter, NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor license renewal applications."

*Id.* at 129 (internal citations omitted) (PA6-7). In so ruling, the Commission reaffirmed its conclusion that the Supreme Court's "reasonably close causal relationship" standard constitutes the obligatory and dispositive test for determining whether a particular environmental "effect" requires assessment under NEPA. *Id.* at 129-30 (PA7). The Commission reaffirmed its conclusion that,

under that standard, the impact of a terrorist attack “is . . . simply too far removed from the natural or expected consequences of agency action to require study under NEPA.” *Id.* at 129, quoting *Private Fuel Storage, LLC*, CLI-02-25, 56 NRC 340, 349 (2002) (PA340). The Commission underscored its disagreement with 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), stating that the NRC is not obliged to adhere to the Ninth Circuit’s decision in proceedings involving facilities located outside of the territorial jurisdiction of the Ninth Circuit. *Id.* at 128-29 & n.14 (PA5-6).

The Commission, however, also based its ruling on alternative grounds. In particular, the Commission made clear that, “*even if* as a general matter we were to accede to the Ninth Circuit’s view and decide to consider terrorism under NEPA, *there is no basis* for admitting New Jersey’s NEPA-terrorism contention in this license renewal proceeding.” *AmerGen Energy Co., LLC.*, CLI-07-08, 65 NRC at 131 (PA9) (emphasis supplied).

Accordingly, the Commission affirmed each of the ASLB’s alternative and independent grounds for dismissal of the contention. The Commission concurred in the ASLB’s findings that: (1) the GEIS documents the results of the NRC Staff’s “discretionary analysis” of radiological sabotage in connection with license renewal; (2) the GEIS concludes that the core damage and radiological release

potentially resulting from such acts would be no worse than the damage and release predicted to result from internally initiated events; (3) the NRC performed a site-specific analysis of alternatives to mitigate severe accidents (i.e., SAMAs); (4) no site-specific NEPA review of design basis accidents involving the Oyster Creek spent fuel pool is required given the generic findings contained in the GEIS; and (5) the DBT is the subject of an ongoing (now final) NRC rulemaking and is not litigable in an adjudication. *Id.* at 131-34 (PA9-13). Finally, citing this court's holding in *Limerick*, the Commission stated that New Jersey had failed to make clear how the NRC could "assess[], meaningfully, the risk of terrorism at the particular site in question (Oyster Creek)." *Id.* at 131 n.29 (PA9).

New Jersey timely petitioned this Court for review.

### **STANDARD OF REVIEW**

This Court may review agency decisions that result in a "final agency action." Such decisions must be upheld unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983). A reviewing court must consider whether "the agency examined the relevant data and articulated a satisfactory explanation for its action," or whether "the agency has made a clear error in judgment." *Prometheus Radio*

*Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005). Moreover, “[t]he scope of review of NRC actions is extremely limited” because the AEA is “hallmarked by the amount of discretion granted the Commission in working to achieve the statute’s ends.” *Massachusetts v. NRC*, 878 F.2d 1516, 1523 (D.C. Cir. 1989). Finally, where, as here, the issues turn upon scientific, technical, and predictive judgments by the agency, “a reviewing court must generally be at its most deferential.” *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Limerick*, 869 F.2d at 744.

### **SUMMARY OF ARGUMENT**

In this appeal, New Jersey seeks, under NEPA, to compel the NRC to consider the effect of a hypothetical terrorist aircraft attack on the Oyster Creek nuclear power plant, in connection with an extension of the operating license for that plant. But New Jersey’s terrorism contention plainly concerns the safety of the existing Oyster Creek facility as it is operating today – its contention does not involve any new construction and has no connection to license renewal, much less to any NEPA review that might be required in connection with such renewal. Accordingly, the NRC’s rejection of New Jersey’s contention on the grounds that it fell outside of NEPA generally and license renewal in particular was correct, and

was certainly not arbitrary and capricious. That fact is among the several independent and alternative reasons that New Jersey's petition should be denied.

Another reason for denial is the application of the required causation standard under NEPA. The Supreme Court has prescribed the applicable causation principles that limit inquiries under NEPA, and those principles do not permit New Jersey's contention here. In *Metropolitan Edison Company v. People Against Nuclear Energy*, 460 U.S. 766 (1983), and again more than 20 years later in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), the Supreme Court held unambiguously that there must be a "reasonably close causal relationship" between the environmental effect and the alleged cause in order for NEPA review to be required. The Court expressly looked to common law principles of proximate causation in connection with that standard. There is no plausible interpretation of such principles under which the environmental effect of a deliberate, intentional, third-party criminal act – i.e., the terrorist act postulated by New Jersey – could be said to be proximately caused by an extension of the operating license for an existing nuclear power plant.

In response, New Jersey relies almost exclusively on one case from the Ninth Circuit, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007). *Mothers for Peace*, however, involved construction of a new spent nuclear fuel storage facility, and therefore a change to

the existing environment that is not present here. More fundamentally, however, the Ninth Circuit in *Mothers for Peace* did not apply the above-noted controlling causation standard for NEPA claims as dictated by the Supreme Court. Rather, the Ninth Circuit held that a NEPA-terrorism contention must be considered if the postulated event is merely “foreseeable,” unless the government can overcome a burden of showing that the effect is “remote and highly speculative.” 449 F.3d at 1030.

*Mothers for Peace* is, quite simply, wrong, and should not be followed by this Court. The fact that the NRC undertakes comprehensive anti-terrorism activities under its statutory mandates does not alter this conclusion: federal agencies do all sorts of things every day that do not result in the necessity for full-blown review and analysis under NEPA. NEPA is, to state it plainly, not an anti-terrorism statute. New Jersey’s effort to transform it into one should be rejected.

Finally, even if NEPA could be said to require a terrorism review in some circumstances, the NRC did not err (or act arbitrarily and capriciously) in determining that such a review was not required here. First, New Jersey failed to discharge its burden to show some method or theory by which the NRC could have meaningfully assessed the risks of terrorist acts. In this Circuit, under *Limerick*, that is what is required in order for a petitioner such as New Jersey to prevail. Second, the NRC correctly rejected New Jersey’s contention on the grounds that

what New Jersey was actually challenging were generic determinations by the NRC, established through rule-making. The NRC's authority to proceed by way of such generic and rulemaking procedures is axiomatic, *e.g.*, *Baltimore Gas*, 462 at 101, and New Jersey did not avail itself of any of the permissible routes by which such determinations might be contested. The NRC's rejection of New Jersey's request for an adjudicatory determination was not arbitrary or capricious, and should be affirmed for that additional reason as well.

### **ARGUMENT**

#### **I. NEW JERSEY'S TERRORISM CONTENTION CONCERNS THE ONGOING, CURRENT OPERATION OF THE OYSTER CREEK FACILITY AS IT NOW EXISTS, AND THEREFORE DOES NOT IMPLICATE FUTURE LICENSE RENEWAL, NOR NEPA REVIEW IN CONNECTION WITH SUCH RENEWAL**

New Jersey's position here suffers from a fundamental and threshold flaw, which is this: All of New Jersey's arguments regarding a postulated terrorist attack implicate the safety of the existing Oyster Creek facility *as it is operating today*. New Jersey does not, as the petitioner did in *Mothers for Peace*, challenge new construction at the site, or some other physical change or alteration of the current environment. Accordingly, there is a fatal lack of any connection between New Jersey's terrorism contention here and the extension of the current operating license for Oyster Creek – the approval of which is, after all, the relevant agency action. Accordingly, the NRC did not act arbitrarily or capriciously when it

rejected New Jersey's contention upon the ground that the contention raised issues that "lie outside the scope of NEPA in general and license renewal in particular," and upon the basis that "there is no change to the physical plant and thus no creation of a new 'terrorist target.'" *AmerGen Energy Company, LLC*, CLI-07-08, 65 NRC at 128, 130 n.25 (PA5, 8).

A. New Jersey's own arguments and assertions confirm that its real complaints have nothing to do with license renewal, much less any NEPA review that might be required in connection with such renewal. Though nominally cast in terms of a NEPA-driven SAMA analysis, New Jersey fundamentally raises concerns about the safe *ongoing* operation of Oyster Creek. For example, in its original contention, New Jersey criticized emergency response plans, alleged a lack of current design basis threat information sufficient to conclude that Oyster Creek is operating within its design basis, and urged that "long-term" measures rather than interim compensatory measures are necessary to address potentially damaging fires and explosions caused by acts of terrorism, including design-basis attacks. Hearing Request at 4-6 (PA138-39).

None of this, however, has anything to do with the detrimental effects of aging nor the NRC's license renewal review scheme, including the NEPA component of that review. Further, New Jersey suggests in these circumstances that the NRC can (and should) actually compel a licensee to implement particular

“mitigation measures.” *See, e.g.*, Pet. Br. 48. This is simply not the case given NEPA’s purely procedural nature. *See, e.g., Robertson*, 490 U.S. at 350-351. More to the point for present purposes, however, the allegations confirm that New Jersey’s real concern is with the fact that the Oyster Creek power plant is operating at all. The sorts of actions that New Jersey clearly desires the NRC to take would flow necessarily from the NRC’s AEA authority and involve Oyster Creek’s current operation – they bear no relation to aging management, license renewal, or NEPA. The present circumstances stand in stark contrast to bona fide, legitimate environmental analyses under NEPA, which typically involve discussion of the proposed federal action (e.g., construction, permitting), its environmental impacts, reasonable alternatives to the action, mitigation measures, and any irreversible commitments of resources. *See, e.g., South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658 (3d Cir. 1999) (discussing the environmental analyses performed for a federal highway construction project).

B. The NRC’s license renewal regulations intentionally and sensibly reflect this distinction between aging-related issues, on the one hand, and the ongoing regulatory process (including, in particular, security and emergency planning issues) on the other. The NRC chose to “focus[] the renewal process on [passive] plant systems, structures, and components for which current [regulatory] activities and requirements *may not* be sufficient to manage the effects of aging in

the period of extended operation.” “Nuclear Power Plant License Renewal; Revisions,” 60 Fed. Reg. 22,461, 22,469 (May 8, 1995); *see also Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 9 (PA271).<sup>6</sup>

C. Given the above, the NRC was eminently correct (and certainly not arbitrary and capricious) when it held that “[t]errorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to the “detrimental effects of aging.” *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC at 129 (citation omitted) (PA6). The Commission correctly discerned that New Jersey’s site-specific claims “go to the safe *ongoing* operation of Oyster Creek,” rather than to “matters peculiar to plant aging or to the license extension period.” *Id.* at 133 (emphasis in original) (PA11). As the NRC observed, because renewal applications are typically processed years before the expiration of the initial license, a plant may continue to operate under the terms of its original license for some time after the renewal decision. *Id.* at 130 n.25 (PA8).

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<sup>6</sup> Of particular significance given New Jersey’s contention here, the NRC explicitly considered emergency planning and security in promulgating its license renewal regulations. The NRC stated that, through various ongoing measures, “the Commission ensures that existing [emergency] plans are adequate throughout the life of any plant even in the face of changing demographics and other site-related factors.” 56 Fed. Reg. at 64,966 (1991). It also singled out security as another aspect of the current licensing basis that is *not* impacted by the adverse effects of aging. 60 Fed. Reg. at 22,475 (1995). The NRC has noted that “security issues at nuclear power reactors, while vital, are not among the aging-related questions at stake in a license renewal proceeding.” *Dominion Nuclear Conn., Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 638 (2004).

Seeking to remedy alleged deficiencies in emergency planning or security through the license renewal process, as New Jersey does here, is inappropriate and runs counter to the considered policy judgments of the NRC. The NRC properly concluded that New Jersey's contention fell outside the scope of the agency's license renewal review. That conclusion was not arbitrary and capricious.

**II. THERE IS NO "REASONABLY CLOSE CAUSAL RELATIONSHIP," AS REQUIRED BY CONTROLLING PRECEDENT, BETWEEN THE ALLEGED ENVIRONMENTAL IMPACT OF A HYPOTHETICAL TERRORIST AIR ATTACK AND RENEWAL OF THE LICENSE FOR THE OYSTER CREEK FACILITY**

A. The Controlling Supreme Court Precedent. The Supreme Court has clearly stated the test for whether a postulated "effect" triggers review under NEPA. In *Metropolitan Edison*, and again in *Public Citizen*, the Supreme Court unanimously held that a particular environmental "effect" requires evaluation under NEPA only if there exists "'a reasonably close causal relationship' between the environmental effect and the alleged cause" thereof, i.e., the agency action under consideration. *Pub. Citizen*, 541 U.S. at 767, quoting *Metropolitan Edison*, 460 U.S. at 774. The NRC in this case correctly applied that test, and concluded that NEPA does not require the agency to consider the environmental consequences of a hypothetical terrorist attack on an NRC-licensed facility.

1. *Metropolitan Edison* stemmed from the 1979 accident that damaged Unit 2 of the Three Mile Island nuclear power plant near Harrisburg,

Pennsylvania. Unit 1 had been shut down for refueling and was not damaged. When the NRC authorized restart of the undamaged Unit 1, it provided an opportunity for a hearing on certain safety issues related to plant restart. Local residents opposed to further operation intervened in the restart proceedings, contending that NEPA required the NRC to analyze the potential effects of the agency's action on psychological health and community well-being. The NRC declined to admit the petitioner's contentions. 460 U.S. at 768-69. After the Court of Appeals reversed the NRC, the Supreme Court granted certiorari.

The Court agreed with the NRC. After carefully parsing the language of NEPA and probing the congressional concerns that led to its enactment, the Court concluded that "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." 460 U.S. at 772 (emphasis in original). The Court concluded that the term "environmental effect" must be read to require "a *reasonably close causal relationship* between a change in the physical environment and the effect at issue." *Id.* at 774 (emphasis supplied). The Court expressly likened this causation "requirement" to the "familiar doctrine of proximate cause" from tort law. *Id.*

Applying the causation requirement, the Court considered whether there was a proximate relationship between resumed operation of the reactor (i.e., the change in the physical environment permitted by the NRC's action) and psychological

distress and other health effects from the perceived risk of a post-restart accident (the alleged effects at issue). 460 U.S. at 774-75. The Court found the “causal chain” to be “too attenuated” (*id.* at 774), insofar as “the element of risk and its perception by [the concerned residents] are necessary middle links.” *Id.* at 775.

Like the Ninth Circuit in the erroneous *Mothers for Peace* decision, New Jersey attempts to distinguish *Metropolitan Edison* by urging that that case concerned only effects associated with the “risk” of an accident. Pet. Br. 31. New Jersey argues that, by contrast, it seeks an assessment of “the actual environmental harm that would result from an air attack” on Oyster Creek. Such an argument, however, simply dispenses with the Supreme Court’s “reasonably close causal relationship” requirement. It asks this Court to accept the premise that the “actual environmental harm” of a postulated terrorist attack on Oyster Creek is the natural, direct, and immediate consequence of the NRC’s decision to renew that facility’s operating license, rather than the natural, direct and immediate consequence of the *intervening* postulated terrorist attack itself. That, plainly, is wrong. The causational limits upon NEPA mandated by the Supreme Court cannot be stretched to accommodate New Jersey’s contentions here.

2. In *Public Citizen*, the Court reaffirmed that the “reasonably close causal relationship” requirement dictates whether an asserted “environmental effect” requires evaluation under NEPA. *Public Citizen*, 541 U.S. at 759-60. The

case arose after the President announced his intent to lift a moratorium prohibiting Mexican motor carriers from obtaining operating authority within the United States. In response, the Federal Motor Carrier Safety Administration (“FMCSA”) proposed rules establishing financial and safety requirements for Mexican motor carriers. *Id.* at 759-60. The FMCSA issued an environmental assessment for the proposed rules, but excluded consideration of the potential impact of increased cross-border operations by the Mexican carriers. *Id.* at 761. The agency reasoned that any such impact would result from the President’s modification of the moratorium, *not* the agency’s implementation of the regulations. *Id.* On review, the Ninth Circuit disagreed, holding that the agency should have considered the “reasonably foreseeable” effect of increased emissions caused by entry of Mexican trucks. *Id.* at 762-63.

The Supreme Court reversed. The Court relied on its prior ruling in *Metropolitan Edison*. It reiterated that whether a particular environmental “effect” must be considered under NEPA depends upon whether there exists “‘a reasonably close causal relationship’ between the environmental effect and the alleged cause.” *Public Citizen*, 541 U.S. at 767, quoting *Metropolitan Edison*, 460 U.S. at 774. The Court again analogized the standard to the tort law doctrine of proximate cause. *Id.* It rejected the respondents’ argument as “a particularly unyielding variation of ‘but for’ causation, where an agency’s action is considered a cause of

an environmental effect even when the agency has no authority to prevent the effect.” *Id.*, citing *Metropolitan Edison*, 460 U.S. at 774.

In an attempt to distinguish *Public Citizen*, New Jersey purports to contrast the role of the FMCSA there and the NRC here, Pet. Br. at 33, and argues that FMSCA’s rulemaking could not be considered the “legally relevant cause” of the increased truck traffic, which was attributable solely to the actions of Congress and the President. *Id.* The unavoidable and necessary implication of New Jersey’s argument, however, is that the relicensing of Oyster Creek *should* be considered the “legally relevant cause” of the impact of a terrorist attack on the facility. A terrorist attack, however, obviously would be an “intervening cause” or “necessary middle link” that “lengthens the causal chain beyond the reach of NEPA.”

*Metropolitan Edison*, 460 U.S. at 775. The factual differences between *Public Citizen* and this case are not material, and the controlling principles reaffirmed by the Supreme Court in *Public Citizen* compel affirmance of the NRC’s determination here.

B. *The “Reasonably Close Causal Connection” – Proximate Cause.* The Supreme Court’s analogy to “proximate cause” is inherently sensible and rooted in bedrock principles of common law and statutory construction. As the Supreme Court has recognized, proximate cause has long been the traditional common-law rule of causation. *See, e.g., Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*,

245 U.S. 531, 533-34 (1918); *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531-33 (1983). Moreover, proximate cause remains the rule at common law. *See Public Citizen*, 541 U.S. 767, citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 264, 274-75 (5th Ed. 1984); *see also* Restatement (Second) of Torts §§ 281(c), 430-462 (1965); Restatement (Third) of Torts: Apportionment of Liability § 3 (2000).

The proximate cause of a harm is “that cause which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred.” 57A AM JUR 2D *Negligence* § 411 (2004 and 2007 Supp.). Proximate causation is necessary “to hold [an actor’s] liability within some reasonable bounds,” *Prosser & Keeton* § 44, at 302, and to prevent liability from being imposed for “remote consequences.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Oregon*, 515 U.S. 685, 713 (1995) (O’Connor, J., concurring). It thus serves as a “tool[] to limit a person’s responsibility for the consequences of that person’s own acts.” *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). Taking into account “ideas of what justice demands” and “of what is administratively possible and convenient,” (*id.*, quoting *Prosser & Keeton* § 41, at 264), proximate causation

seeks to define the “appropriate scope of responsibility,” Dan D. Dobbs, *The Law of Torts* § 180, at 443 (2001).

Absent a causation requirement, an agency is left with an unbounded array of conceivable causes and hypothetical, future events, with no obvious stopping point. The Supreme Court addressed this problem in *Metropolitan Edison* and *Public Citizen* when it identified the need for “reasonably close causal relationship” rather than a “but for” causal relationship, and explicitly invoked principles of “proximate cause.”

In this case, the NRC’s approval of a license renewal request clearly cannot be considered the primary, moving or predominating cause of a postulated terrorist attack on Oyster Creek, or the effects that any such attack might have on the environment. The perpetrator of the attack would be an “intervening cause” that “produces the injury” to the environment. *Metropolitan Edison*, 460 U.S. at 775. Any conclusion to the contrary yields one of the extreme results of “unyielding but-for causation” that the Supreme Court rejected. *Public Citizen*, 541 U.S. at 767.

C. *The NRC’s Consistent Precedent.* The Commission similarly recognized this problem five years ago when it first ruled on the NEPA-terrorism issue in the *Private Fuel Storage* proceeding. Relying on *Metropolitan Edison*, the Commission reasoned that:

It is sensible to draw a distinction between the likely impacts of the [] facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process becomes truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse effect, no matter how indirect its connection to agency action. In our view, the causal relationship between approving the [] facility and a third party deliberately flying a plane into it is too attenuated to require a NEPA review, particularly where the terrorist threat is entirely independent of the facility.

*Private Fuel Storage, LLC*, CLI-02-25, 56 NRC 340, 350 (2002) (PA257). In rejecting New Jersey's contention in this case, the NRC again applied the *Metropolitan Edison* causation standard, noting "a 'reasonably close causal relationship' between federal agency action and environmental consequences is necessary to trigger NEPA." *AmerGen Energy Company, LLC*, CLI-07-08, 65 NRC at 129 (PA7).<sup>7</sup>

D. *The Mothers for Peace Decision*. New Jersey relies heavily (if not entirely) on the Ninth Circuit's *Mothers for Peace* decision from 2006. In *Mothers*

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<sup>7</sup> New Jersey argues that the "criminal acts of third parties cannot be dismissed as being unforeseeable as a matter of law." Pet. Br. 34. The applicable test, however, is not mere "foreseeability." Moreover, the authorities upon which New Jersey relies are inapposite. *Harrison* and *Lillie* involved negligence suits brought by railroad employees who were assaulted by third parties while on the job. At issue was whether the plaintiffs' employers had satisfied their duties to take reasonable precautions to protect them against foreseeable dangers, irrespective of whether those dangers involved third-party criminal acts. The cases did not involve the sort of causation inquiry mandated by the Supreme Court in the NEPA context.

*for Peace*, the Ninth Circuit held that the NRC erred in applying the *Metropolitan Edison* standard, and simply declared that “*Metropolitan Edison* and its proximate cause analogy are inapplicable here.” 449 F.3d at 1029. The Ninth Circuit did not cite *Public Citizen* at all, even though that decision had reversed a prior Ninth Circuit NEPA ruling. Rather than follow the test dictated by the Supreme Court, the Ninth Circuit in *Mothers for Peace* erroneously rejected the *Metropolitan Edison* causation requirement in favor of a “remote and highly speculative” probability standard. *Id.* Under the Ninth Circuit’s surrogate standard, an alleged “effect” must be assessed under NEPA *unless* that effect can be shown, by the government, to be “remote and highly speculative.” 449 F.3d at 1030-31.

The Ninth Circuit’s reasoning –which New Jersey adopts wholesale – is simply wrong.<sup>8</sup> In essence, the Ninth Circuit construed a footnote in *Metropolitan Edison* as limiting the Court’s holding to situations involving “effects caused by the *risk* of accident.” 449 F.3d at 1029, quoting 460 U.S. at 775 n. 9 (emphasis

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<sup>8</sup> The Supreme Court did not grant certiorari in *Mothers for Peace*. See 127 S.Ct. 1124 (2007). In the Federal Government’s brief regarding the certiorari petition, the Solicitor General made clear the government’s view that the Ninth Circuit’s decision was “unprecedented” and “wrong.” See Brief for the Federal Respondents, *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Supreme Court, filed December 15, 2006) at 6, 20. The Solicitor General, however, believed that there was an absence of a “square circuit split,” and the corresponding opportunity for further developments in other circuits militated against certiorari at that juncture. *Id.* at 6, 12, 16-19. Accordingly, and also because the burden imposed by the Ninth Circuit’s ruling was not yet clear, the Solicitor General did not urge that certiorari be granted in that case.

supplied). In doing so, the Ninth Circuit ignored the Supreme Court's clear holding in *Public Citizen* that "NEPA requires a 'reasonably close causal relationship' between *the environmental effect and the alleged cause.*" 541 U.S. at 767 (emphasis supplied).

The Ninth Circuit's proposition that *Metropolitan Edison* involved "a different type of causation," 449 F.3d at 1029, is untenable and incorrect. The Ninth Circuit characterized the causal chain as consisting of three events: (1) a major federal action, (2) a change in the physical environment, and (3) an effect. *Id.* According to the court, *Metropolitan Edison* involved the relationship between events 2 and 3, whereas *Mothers for Peace* was concerned with the "disputed relationship" between events 1 and 2. *Id.* This purported distinction and characterization of the causal chain, however, cannot withstand scrutiny nor be correctly applied to the circumstances of this case. Among other flaws, it necessarily rests on the premise that a "terrorist attack" – as opposed to NRC-authorized construction or operation of a nuclear facility – constitutes the relevant "change in the physical environment." 460 U.S. at 774. That is clearly incorrect. The construct just does not hold up.

Contrary to the Supreme Court's real admonition, the Ninth Circuit, with its tortured causation contortions, in reality jettisoned any recognizable notion of "proximate cause." The Supreme Court's confirmation of that proximate cause

analogy in two unanimous decisions issued some 20 years apart, however, plainly was intended to guide the courts in their application of NEPA's causation requirement. The Supreme Court emphasized that "courts *must* look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that make an actor *responsible for an effect* and those that do not." *Public Citizen*, 541 U.S. at 767, quoting 460 U.S. at 774 & n.7 (emphasis supplied). The Ninth Circuit impermissibly disregarded that admonition. Respectfully, this Court should not make that same error.

E. *Mothers for Peace Is at Odds with the Holdings of Other Circuit Courts.* The Ninth Circuit's decision in *Mothers for Peace* is an aberration: "[m]ost cases have held that the risk of terrorist attacks need not be considered" under NEPA. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION § 8.47.1 (1984 & 2007 Supp.) For example, in *City of New York v. U.S. Department of Transportation*, 715 F.2d 732 (2d Cir. 1983), the Second Circuit rejected a challenge to a Department of Transportation ("DOT") rule designed to reduce the risk of transporting large quantities of radioactive materials by highway. DOT declined to include sabotage in its discussion of high-consequence accidents, in part because the NRC, which was the agency responsible for physical security, had concluded that sabotage added nothing to the risk of such accidents. The Second Circuit affirmed. The court found that "[w]ith respect to environmental

consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess.”<sup>9</sup> 715 F.2d at 750 (citations omitted). The court found that DOT had not abused its discretion in concluding that “the risks of sabotage were too far afield for consideration” under NEPA. *Id.* The court, at least implicitly, applied a proximate cause analysis.

Similarly, in *Glass Packaging Institute v. Regan*, 737 F.2d 1083 (D.C. Cir. 1984), the D.C. Circuit rejected a challenge to a decision of the Bureau of Alcohol, Tobacco, and Firearms (“BATF”) to allow the packaging of liquor in plastic bottles. The petitioners criticized the BATF for failing to consider, in its environmental assessment, the potential injury or death that could result from sabotage of the bottles by “deranged” criminals. 737 F.2d at 1091.

The D.C. Circuit rejected as “specious” the claim that potential harm resulting from such sabotage must be evaluated under NEPA, even if such harm is

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<sup>9</sup> The Second Circuit’s conclusion echoes this Court’s observation in *Limerick* that the consideration of some speculative risks, e.g., earthquake, but not others, e.g., sabotage, does not establish an arbitrary or capricious exercise of the Commission’s “broad discretion.” 869 F.2d at 744 n.32. As the NRC has observed, accidents precipitated by natural events like earthquakes or severe storms – unlike acts of terrorism – “are closely linked to the natural environment of the area within which a facility will be located and are reasonably predictable by examining weather patterns and geological data for that region.” *Private Fuel Storage, LLC*, CLI-02-25, 56 NRC at 347 n.18 (PA254). In contrast, “[t]errorism is a global issue, involving stochastic human behavior, independent of the planned facility.” *Id.* Moreover, the sheer “gravity of harm” potentially resulting from a terrorist attack does not negate the need for “a sufficiently close causal connection to the physical environment.” *Metropolitan Edison*, 460 U.S. at 778.

caused by “reasonably foreseeable criminal acts of third parties.” 737 F.2d at 1091-92. Applying *Metropolitan Edison’s* causation requirement, the D.C. Circuit held that “mere foreseeability does not trigger a duty to consider an alleged environmental effect” (*id.* at 1091), and that “[t]he limits to which NEPA’s causal chain may be stretched before breaking must be defined by the policies and legislative intent behind NEPA.” *Id.* at 1091-92. The court concluded that the causal link between possible sabotage of plastic bottles and BATF’s approval of those bottles was too attenuated to “tip the scale” in favor of mandatory NEPA review.<sup>10</sup> *Id.* at 1093 (citations omitted).

More recently, the Eighth Circuit rejected a “NEPA-terrorism” claim in a case involving the Surface Transportation Board’s review of a proposal to construct and upgrade rail lines. *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003). The petitioners argued that the agency violated NEPA when it declined to supplement its EIS to consider concerns arising from the terrorist attacks of September 11, 2001. 345 F.3d at 544. The court held that such requests were subject to the “rule of reason,” and that the agency should be accorded deference as long as its decision is not arbitrary and

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<sup>10</sup> See also *City of Shoreacres v. Waterworth*, 420 F.3d 440, 451-53 (5th Cir. 2005) (discussing *Public Citizen* in dictum and stating that “a plaintiff mounting a NEPA challenge must establish that an alleged effect will ensue as a ‘proximate cause,’ in the sense meant by tort law, of the proposed agency action”).

capricious. *Id.*, citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). The court acknowledged that “the events of September 11, 2001, have certainly raised awareness of the potential [terrorist] threats to our nation’s transportation systems.” *Id.* Nonetheless, the court held that “the Board exercised its permissible discretion when it determined that any increased threat was general in nature and did not bear specifically on [petitioners] or the proposed . . . project.” *Id.*

In sum, neither the Ninth Circuit’s *Mothers for Peace* decision nor New Jersey’s arguments regarding that case provides grounds upon which this Court could conclude that the NRC here exceeded its permissible discretion. The Ninth Circuit plainly erred in holding that NEPA requires the NRC to evaluate the environmental consequences of a hypothetical terrorist attack on an NRC-licensed facility. To adopt the Ninth Circuit’s “remote and highly speculative” standard would be to flout the causation requirement dictated by the Supreme Court in *Metropolitan Edison* and *Public Citizen*.

### III. THE FACT THAT THE NRC TAKES ACTIONS TO PROTECT NUCLEAR PLANTS AGAINST POTENTIAL TERRORIST ATTACKS DOES NOT COMPEL AN ANALYSIS OF TERRORISM UNDER NEPA

Parroting another argument advanced by the Ninth Circuit in *Mothers for Peace*, New Jersey makes much of the undisputed (and unremarkable) fact that the NRC has taken, and continues today to take, comprehensive steps to avoid terrorism and sabotage at nuclear power plants. *See* Pet. Br. at 35-37. That fact, however, simply does not support the unwarranted leap that New Jersey then tries to make, namely, that the NRC is somehow therefore *required* to allow review of New Jersey's terrorism contentions *under NEPA*, and that the NRC's failure to do so is "illogical."

New Jersey's arguments in this regard are flawed and misdirected in at least two respects. First, those arguments merely adopt the reasoning of the *Mothers for Peace* court, and therefore rest precariously on the notion that *any* effect that is foreseeable or not established by the government to be "remote and highly speculative" requires consideration under NEPA. That position lacks merit for the reasons set forth above – the proper inquiry is not whether a particular effect is simply foreseeable, it is whether that effect bears a "reasonably close causal relationship" to the *agency action* under consideration. There is nothing "illogical" about the long-standing, well-established causation-based constraint on the scope of an agency's NEPA review, as set forth in controlling Supreme Court precedent.

Second, virtually every day federal agencies do all sorts of things that do not require full-blown NEPA analyses, for example (as even the Ninth Circuit has recognized) pursuant to separate statutes and regulations that “have different aims and standards than NEPA.” *Ground Zero Center for Nonviolent Action v. United States Department of the Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004). And so it is here: there are a host of statutes and regulations that define the NRC’s security-related duties,<sup>11</sup> but those statutes and regulations do *not* include NEPA. Indeed, New Jersey acknowledges that “[t]he obligation imposed by NEPA is separate and independent from the NRC’s authority under the AEA.” Pet. Br. 41. To state the obvious: NEPA is not, of course, an anti-terrorism statute.

Under NEPA, the preparation of an EIS is required only for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C)(i). Agencies commonly undertake “major Federal actions” for which no EIS is required. *See, e.g.*, MANDELKER, *supra*, § 8.49 (particularly the cases cited in notes 1 and 6). Such actions have involved, for instance, the promulgation of rules, highway improvements, erection of telecommunications towers, airport improvements, dredge and fill permits, oil and gas leases and drilling permits,

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<sup>11</sup> *See, e.g.*, 42 U.S.C. § 2012 (identifying the Commission’s duty to “assure the common defense and security”); 42 U.S.C. § 5845 (identifying need to provide “safeguards against threats, thefts, and sabotage of licensed facilities, and materials”); 10 C.F.R. Part 73 (Commission’s physical protection regulations).

transmission line routing, wastewater treatment plants, and shipments of radioactive materials. *Id.* There are countless other examples. If the environmental concerns and prerequisites of NEPA are not implicated, that statute provides no basis for a challenge to the federal action.

This approach is consistent with NEPA's rule of reason, which "ensures that agencies determine whether and to what extent to prepare an EIS based on *the usefulness of any new potential information to the decisionmaking process.*" *Public Citizen*, 541 U.S. at 767, citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989) (emphasis supplied). Acting within its broad discretion, the NRC has reasonably decided not to "divert[] limited agency resources from [its] ongoing anti-terrorist efforts to undertake a special NEPA review of terrorism risks and consequences over the renewal period." *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC at 130 n.28 (PA8). The sort of review sought by New Jersey would not add value to the decision-making process. *Cf. Romer v. Carlucci*, 847 F.2d 445, 457 (8th Cir. 1988) (finding that NEPA review of a nuclear missile basing decision would not be of "decisional significance").

This important distinction between NEPA requirements on the one hand, and the NRC's separate and independent efforts to protect against terrorism and sabotage on the other, was not lost on the Commission, which correctly rejected

New Jersey's argument. *AmerGen Energy Company LLC*, CLI-07-08, 65 NRC at 131 n.31 (PA9). That determination was not arbitrary or capricious.

#### **IV. NEW JERSEY FAILED TO MEET ITS BURDEN UNDER NEPA AND THIS COURT'S *LIMERICK* DECISION**

Even assuming (contrary to all of the above) that a terrorism review in some circumstances might be required under NEPA, the NRC did not act arbitrarily or capriciously by rejecting New Jersey's contentions in this case. For New Jersey to have prevailed, it "should have advanced some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite [the NRC's] asserted inability to quantify the risks." *Limerick*, 869 F.2d at 744. New Jersey, however, advanced no such method or theory. New Jersey, like the petitioner in *Limerick*, seeks an impermissible remand for an effectively "standardless proceeding." *Id.* As in *Limerick*, that request should be denied.

A. The *Limerick* case involved the NRC's decision to grant an initial full power operating license for the Limerick Nuclear Generating Station. A petitioner alleged, *inter alia*, that the NRC had violated NEPA by failing to adequately consider the risk of sabotage in its EIS. This Court upheld the NRC's decision *not* to analyze the potential impacts of sabotage on a nuclear power plant under NEPA, where the NRC had concluded that such an analysis would not add meaningfully to its existing analysis of the potential impacts of severe accidents, such as those caused by earthquakes and fires. 869 F.2d at 743-44.

Even though *Limerick* involved issuance of an initial operating license instead of a renewed license (which, if anything, would suggest a higher standard), the material similarities between *Limerick* and this case are striking. The applicant had prepared a plant- and site-specific probabilistic risk assessment of severe accidents that included the effects of external events such as earthquakes. Based upon that assessment, the applicant identified and implemented, as part of plant construction, several risk reduction modifications (much like SAMAs, but at the plant design and construction stage). The applicant, however, did not “specifically and separately” consider the risk of reactor sabotage, and the petitioner challenged that determination. 869 F.2d at 723.

B. As the NRC explained in its EIS in the *Limerick* proceedings, “[n]either the applicant’s analysis nor the staff’s includes the potential effects of sabotage; such an analysis is considered to be beyond the state of the art of probabilistic risk assessment.” 869 F.2d at 742. An NRC Appeal Board refused to admit the petitioner’s contention, because the petitioner “had failed to cast any serious doubt on either the staff’s conclusion that a sabotage risk analysis is beyond the state of the art of probabilistic risk analysis or the Commission’s similar determination that there is no basis by which to measure that risk.” *Id.* This Court affirmed, holding that “the NRC did not act arbitrarily in adhering to

this conclusion where [petitioner] proposed no meaningful method by which the NRC could either assess or predict sabotage risks.” *Id.* at 743.

The unfortunate events of September 11, 2001 have certainly heightened awareness of the possibility of sabotage or terrorism. Such acts, however, were not unheard of prior to 9/11. As this Court noted in *Limerick*, evidence of such acts from 1971 to 1981 was adduced in that case, yet that did not alter the fundamental fact that claims of sabotage risk were “nonlitigable.” 869 F.2d at 744. As the NRC has consistently and recently confirmed, that is still very much the case today. *See, e.g., Private Fuel Storage, LLC*, CLI-02-25, 56 NRC at 350 (PA257) (stating that “the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology,” as there is “no way to calculate the probability portion of the equation”).

The *Limerick* Court observed that the “mere assertion of unquantifiability” does not “immunize” the NRC from consideration of the risk of sabotage under NEPA. 869 F.2d at 744 n.31. Nevertheless, the failure of the petitioner there “to meet its burden” to establish a litigable claim against the NRC was, correctly, determined to be fatal to the contention. 869 F.2d at 744.

C. And, as *Limerick* held, the burden does indeed rest with the petitioner, *not* the NRC. 869 F.2d at 744. A leading treatise on NEPA law and litigation agrees, and explains the need to allocate the burden of proof in this manner:

Because a consensus is usually lacking on the state of the art in environmental methodology, the courts have usually accepted the methodology used by an agency in analyzing environmental impacts. They put the burden of proof on plaintiffs to prove that the methodology was unacceptable.

MANDELKER, *supra*, § 10.45. This approach is particularly appropriate in cases such as this, which involve scientific and technical determinations, and predictive judgments, of the NRC. The *Limerick* Court emphasized on multiple occasions the “highly deferential standard” applicable to such determinations – i.e., where “the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.” 869 F.2d at 744, citing *Baltimore Gas*, 462 U.S. at 103.

D. Here, New Jersey clearly and utterly failed to advance any method by which the NRC might “meaningfully” assess the risk of an air attack on Oyster Creek, and failed to “undermine or rebut” the NRC’s determination that such risks cannot be meaningfully litigated in the NEPA context. 869 F.2d at 744. In particular, New Jersey made no attempt to explain how a successful “aircraft attack” on Oyster Creek fits into the NRC’s SAMA analysis, or how the agency might analyze the probability of such an attack. Nor did New Jersey provide any information that would controvert the NRC’s determination that the consequences of any reactor accident caused by an act of sabotage would be no worse than those

expected from internally initiated events. Additionally, New Jersey did not explain why and how the asserted “unique design, location, and threat of attack to [the] facility” (New Jersey Appeal at 16, PA400) should be factored into the SAMA analysis.

Like the petitioner in *Limerick*, New Jersey “[did] not explain what separate consideration of sabotage as an initiator of such a severe accident would add, from a qualitative [or quantitative] standpoint.” 869 F.2d at 742. Instead, New Jersey merely declared that the EIS should contain “DBT analysis and SAMA mitigation considerations for the core melt sequences resulting from an aircraft attack on the facility.” Hearing Request at 4, PA138. It provided no “credible evidence” showing that such an evaluation is feasible or likely to enhance the NRC’s SAMA review. Nor did it “cast any serious doubt” on the conclusion that the risk of a terrorist attack is simply not yet amenable to the type of analysis that could be meaningfully used in NRC environmental decision making, particularly SAMA analysis, which relies heavily on *probabilistic* risk assessment methods.

**V. THE NRC DID NOT ACT ARBITRARILY OR CAPRICIOUSLY IN REJECTING NEW JERSEY'S REQUEST FOR AN ADJUDICATORY HEARING ON ISSUES THAT THE COMMISSION HAS ADDRESSED GENERICALLY AND THROUGH RULE-MAKING**

Even if a “terrorism review” is required under NEPA, the NRC did not act arbitrarily or capriciously in rejecting New Jersey’s SAMA contention in the circumstances of this case. The Commission concluded that all three parts of New Jersey’s SAMA contention – its assertions regarding aircraft attacks, spent fuel pool accidents, and the use of interim compensatory measures – constitute impermissible challenges to generic NRC determinations. Such determinations are not subject to challenge in an adjudicatory proceeding, absent a waiver or exception not present here.<sup>12</sup>

A. The NRC’s authority to resolve issues generically by rule rather than through individual licensing adjudication cannot be seriously questioned. That

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<sup>12</sup> Indeed, New Jersey’s contention and arguments in fact suggest that it did not fully apprehend the purpose of SAMA analysis, and that New Jersey simply disregarded the robust site-specific evaluation performed by AmerGen. As the ASLB noted, Appendix F to AmerGen’s Environmental Report contains a “280-page, site-specific analysis” that identifies accident-initiating sequences and considers nearly 140 mitigating alternatives. *AmerGen Energy Co., LLC*, LBP-06-07, 63 NRC at 199 (PA58). AmerGen identified 37 of those alternatives as candidates for detailed cost-benefit analysis. That analysis, in turn, resulted in the identification of multiple cost-beneficial SAMAs. The NRC reviewed AmerGen’s SAMA evaluation and concluded that “the methods used and the implementation of those methods were sound,” and that the overall analysis was “reasonable and sufficient.” SEIS at 5-10 (PA35).

authority is fully applicable to NEPA matters, as the Supreme Court has specifically upheld the Commission's authority to discharge its responsibilities under NEPA through generic rulemaking. *See Baltimore Gas*, 462 at 100-01; *Vermont Yankee*, 435 U.S. at 535 n.13. As the Court observed in *Baltimore Gas*, “[a]dministrative efficiency and consistency of decision are both furthered by a generic determination of [environmental impacts] without needless repetition of the litigation in individual proceedings.” 462 U.S. at 101. The Commission recognized the advantages of generic determinations when it promulgated its license renewal rules, noting that “the environmental impacts that can be generically evaluated will not have to be evaluated for each plant.” 61 Fed. Reg. at 28,647 (1996).

The judicial deference that should be afforded to such determinations is also axiomatic. As, again, confirmed by the Supreme Court, “[a]dministrative agencies ‘should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.’” *Vermont Yankee*, 435 U.S. at 543 (1978), quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). “The AEA has been consistently read – as it was written – to give the Commission broad regulatory latitude.” *Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169, 1177 (D.C. Cir. 1992). NRC procedures are entitled to “substantial deference.” *Kelly v. Selin*, 42 F.3d 1501, 1512 (6th Cir. 1995). “As

a general principle, agencies have broad authority to formulate their own procedures – and the NRC’s authority in this respect has been termed particularly great.” *Citizen’s Awareness Network v. United States*, 391 F.3d 338, 352 (1st Cir. 2004) (citations omitted).

B. The first of New Jersey’s three challenges to AmerGen’s SAMA analysis involved the assertion that impacts of an aircraft attack should be specifically and separately considered. The NRC, however, correctly rejected that assertion on the ground that it had already has “performed a discretionary analysis of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events.” *AmerGen Energy Co., LLC*, LBP-06-07, 63 NRC at 201 n.8 (PA60). When it published the GEIS, the NRC reasonably (and logically) concluded that the analysis of severe accident consequences bounds the potential consequences that might result from the core damage and radiological release associated with a beyond-design-basis event, irrespective of whether the initiating cause was some internal event or an external terrorist attack.<sup>13</sup> Therefore, under 10 C.F.R. § 51.53(c)(3)(iv), no

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<sup>13</sup> Agency use of “bounding” analyses or assumptions is not uncommon and has been upheld by multiple courts, including in cases involving nuclear materials. *See, e.g., Hirt v. Richardson*, 127 F. Supp. 2d 833, 844 n.7 (W.D. Mich. 1999); *South Carolina ex rel. Beasley v. O’Leary*, 953 F. Supp. 699, 708 (E.D.S.C. 1996); *Sierra Club v. Watkins*, 808 F. Supp. 852, 866-67 (D.D.C. 1991).

separate, site-specific NEPA analysis is required to evaluate the potential environmental impacts of sabotage events.

It is certainly true that the GEIS was published before the unfortunate events of September 11, 2001, and that the GEIS does not explicitly mention an “aircraft crash” as an initiating event of a severe accident. That, however, does not detract from the permissible and valid bounding analysis upon which the GEIS is based. That bounding analysis does not depend upon whether the initiating event is an earthquake, sabotage, aircraft attack, catastrophic equipment failure, or some other as-yet-unimagined cause. The fact remains that the GEIS conclusion regarding sabotage is a valid generic finding not subject to ad hoc litigation absent a waiver. In submitting a NEPA-based *contention* that the NRC must perform “a specific analysis of the expected performance of the Oyster Creek design” in the event of an aircraft attack on the plant, New Jersey disregarded this fact and effectively challenged a generic determination made by the Commission in the GEIS and codified in 10 C.F.R. Part 51. New Jersey’s position must therefore fail – “it is hornbook administrative law that an agency need not – indeed should not – entertain a challenge to a regulation, adopted pursuant to notice and comment, in an adjudication or licensing proceeding.” *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998) (citations omitted). The NRC has explicitly incorporated this

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principle into its adjudicatory rules. *See* 10 C.F.R. § 2.335(a) (stating that absent a waiver, “no rule or regulation of the Commission . . . is subject to attack in an adjudicatory proceeding”).

C. These same principles dispose of New Jersey’s second challenge to AmerGen’s SAMA analysis, namely its assertions regarding the spent fuel pools. The Commission also generically evaluated the environmental impacts from on-site spent fuel storage in the GEIS. The Commission concluded that spent fuel generated during the period of extended operation can be safely accommodated on site with small environmental impacts through dry or pool storage at all plants. 10 C.F.R. Part 51, Subpt. A, App. B, Table B-1. As the Commission has explained, this generic finding encompasses the environmental impacts of potential spent fuel accidents. *Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 21 (2001) (PA283) (“Because the GEIS analysis of onsite fuel storage encompasses the risk of accidents, [a contention that raises spent fuel accidents] falls beyond the scope of individual license renewal proceedings.”)

In affirming the ASLB’s ruling here, the Commission correctly noted that the GEIS and NRC regulations address the impacts of spent fuel storage and reactor design basis accidents issues for which no site-specific NEPA review is

required.<sup>14</sup> Specifically, 10 C.F.R. § 51.53(c)(3)(i) excuses license renewal applicants from having to analyze such impacts in their environmental reports. By alleging that additional analysis of on-site spent fuel storage impacts (including impacts of accidents) is required, New Jersey's contention is clearly an impermissible collateral attack on an NRC regulation. Accordingly, the NRC properly denied New Jersey's request for a hearing on its contention.

D. Similarly, the NRC properly rejected New Jersey's third argument regarding the SAMA analysis, namely that "[l]ong-term measures rather than interim compensatory measures must be in place" (PA139) to counter design basis threats, because that argument amounted to an impermissible challenge to a then-pending rulemaking. In affirming the ASLB, the Commission emphasized that: (1) design basis threats were the subject of an ongoing rulemaking; (2) agencies have discretion to proceed on a case-by-case basis or by rulemaking; and (3) rulemaking is an "appropriate vehicle for addressing the current terrorism risk," as that risk is faced by nuclear facilities in general. *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC at 133-34 (PA12-13). As noted above, the NRC's decision is consistent with its authority under the AEA and settled principles of administrative law. It is

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<sup>14</sup> See *Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 21-22 (PA283-84) ("[T]he GEIS deals with spent fuel storage risks (including accidents) generically, and concludes that 'regulatory requirements already in place provide adequate mitigation.'" (citing GEIS at xlvi, 6-72 to 6-76, 6-86, 6-92).

axiomatic that “the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.” *SEC v. Chenery*, 332 U.S. 194, 203 (1947); *see also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

One additional point warrants emphasis here. New Jersey’s argument that interim compensatory measures will not suffice has been rendered moot by subsequent events. On March 19, 2007, a few weeks after the Commission issued the order here appealed, the NRC published the final design basis threat rule. *See* “Design Basis Threat,” 72 Fed. Reg. 12,705 (Mar. 19, 2007). That rule made “generically applicable security requirements similar to those previously imposed by the Commission’s April 29, 2003 DBT Orders, based on experience and insights gained by the Commission during implementation” of the Orders. *Id.*

E. The NRC’s rules necessarily bar contentions seeking to challenge generic determinations adopted by notice-and-comment rulemaking; permitting such challenges in adjudications would contravene the most basic principles of administrative law. Nonetheless, the Commission has “recognize[d] that even generic findings sometimes need revisiting in particular contexts.” In the Turkey Point case, the Commission summarized the appropriate procedural vehicles for “revisiting” generic environmental determinations relevant to license renewal:

Our rules thus provide a number of opportunities for individuals to alert the Commission to new and

significant information that might render a generic finding invalid, either with respect to all nuclear power plants or for one plant in particular. In the hearing process, for example, petitioners with new information showing that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule. *See* 10 C.F.R. § [2.335] [internal citation to footnote omitted]. Petitioners with evidence that a generic finding is incorrect for all plants may petition the Commission to initiate a fresh rulemaking. *See* 10 C.F.R. § 2.802. Such petitioners may also use the SEIS notice-and-comment process to ask the NRC to forgo use of the suspect generic finding and to suspend license renewal proceedings, pending a rulemaking or updating of the GEIS. *See* 61 Fed. Reg. at 28,470; GEIS at 1-10 to 1-11.

*Fla. Power & Light Co.*, CLI-01-17, 54 NRC at 12 (2001) (PA274). Prospective intervenors with “new and significant” information demonstrating that a generic rule would not serve its purpose at a particular plant may seek a waiver of the rule pursuant to 10 C.F.R. § 2.335. Absent a waiver of 10 C.F.R. § 51.53(c)(3)(i) or the impact finding at issue (as codified in Table B-1), however, no party or potential party may challenge either provision in an NRC adjudication. 10 C.F.R. § 2.335(a).

Here, as the Commission correctly noted, New Jersey failed to utilize any of these vehicles or procedures. On appeal to the Commission, New Jersey for the first time sought to bolster its SAMA contention by presenting new information concerning Oyster Creek’s purported “unique characteristics,” namely “the unique design, location, and specific threat of attack” which New Jersey argued combined

to create extraordinary circumstances and justify site-specific SAMA review. New Jersey Appeal at 16-22 (PA400-06). The Commission's rejection of those arguments was correct, and was certainly not arbitrary and capricious. First, the arguments were not raised until New Jersey's appeal to the Commission, and could properly have been rejected on that ground alone. Second, and more fundamentally, however, the Commission correctly concluded that "New Jersey's site-specific claims go to the safe *ongoing* operation of Oyster Creek [and] are not matters peculiar to plant aging or to the license extension period." *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC at 133 (PA11) (emphasis in original). When the Commission amended its license renewal rules in 1995, it stated unequivocally that "[t]he scope of Commission review determines the scope of admissible contentions in a hearing absent a Commission finding [that a waiver is appropriate] under 10 CFR [2.335]." 60 Fed. Reg. at 22,482 n.2 (1995). Thus, in contending that "other protective measures" are necessary to ensure the safe operation of Oyster Creek, New Jersey raised issues beyond the limited scope of license renewal.<sup>15</sup>

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<sup>15</sup> As the Commission noted, another appropriate procedural step would be to petition the NRC for enforcement relief under 10 C.F.R. § 2.206. *AmerGen Energy Co., LLC*, CLI-07-08, 65 NRC at 133 (PA11). The courts have found the section 2.206 process to be an acceptable procedure for raising issues related to a plant's current licensing basis. *See, e.g., Kelly v. Selin*, 42 F.3d at 1515, citing *Bellotti v. NRC*, 725 F.2d 1380, 1383 (D.C. Cir. 1983) ("If petitioners wish to litigate these issues, which are beyond the scope of required proceedings, they may

The NRC was manifestly correct that a NEPA challenge in a license renewal proceeding is not the proper forum or procedure to address terrorism issues. Oyster Creek is operating today, and will continue to operate for years whether or not its license is extended. Terrorism is obviously a near-term, serious issue to which the NRC devotes substantial time and attention. For all of the reasons explained above, terrorism is not a NEPA issue, nor a license renewal issue. The NRC was not arbitrary and capricious when it refused to allow its resources to be diverted in the manner urged by New Jersey, particularly where the law does not so require.

F. Finally, the NRC correctly observed that the practical obstacles presented by protecting sensitive security information in the sort of adjudicatory proceeding sought by New Jersey – a “quintessentially public” process – militated against allowing the contention to be litigated. *AmerGen Energy Company, LLC*, CLI-07-08, 65 NRC at 131 (PA9), citing *Private Fuel Storage*, CLI-02-25, 56 NRC at 354-57. Perversely, the relief sought by New Jersey could actually hamper ongoing anti-terrorism efforts by the NRC, both due to the unintended effect of public release of security-based information in multiple adjudicatory license renewal proceedings, and due to diversion of agency resources and associated

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file a petition with the Commission pursuant to 10 C.F.R. § 2.206. The Commission may not deny such a petition arbitrarily.”).

interference with prevention of “a terrorist attack in the near term at the already licensed facilities.” *Id.* at 134 (PA13), quoting *Duke Energy*, CLI-02-26, 56 NRC at 365 (2002). The NRC was well within its permissible authority and reasonable expert judgment to consider such factors in exercising its discretion. That judgment was not arbitrary and capricious, and should be affirmed.

### **CONCLUSION**

For all of the foregoing reasons, this Court should deny New Jersey’s petition for review.

Respectfully submitted,

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Dated: January 17, 2008

### **STATEMENT OF RELATED CASES**

Private Respondent is aware of one related case within the meaning of Third Circuit Rule 28.1(a)(2). The administrative proceeding to review AmerGen's Application for renewal of the Oyster Creek license, in which New Jersey sought to participate, is still ongoing. The NRC's Licensing Board recently issued a decision, *AmerGen Energy Company, LLC (Oyster Creek Nuclear Generating Station)*, LBP-07-17, 66 NRC — (Dec. 18, 2007), rejecting the remaining challenge to AmerGen's Application. The intervenors in that case filed an appeal with the Commission on January 16, 2008.

### **CERTIFICATE OF BAR MEMBERSHIP**

Pursuant to L.A.R. 28.3(d) and 46.1(e), I, Brad Fagg, certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

DATED: January 17, 2008

s/ Brad Fagg  
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**CERTIFICATIONS OF COMPLIANCE  
WITH TYPE-VOLUME LIMITATION, TYPEFACE  
REQUIREMENTS, TYPE STYLE REQUIREMENTS,  
CONSISTENCY, AND VIRUS CHECK**

1. The foregoing Brief of Private Respondent AmerGen Energy Company, L.L.C. ("Brief") complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 12,412 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word processing system used to prepare the foregoing Brief: Microsoft Office Word 2003.

2. The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14 point Times New Roman font.

3. The text of the electronic brief and hard copies of same are identical, as required by L.A.R. 31.1.

4. The foregoing Brief was scanned for viruses by McAfee Virus Scan Enterprise Anti-Spy-ware, version 8.0.0, and no viruses have been detected.

DATED: January 17, 2008

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## CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury that I served, on behalf of Private Respondent AmerGen Energy Company, L.L.C., "Brief of Private Respondent AmerGen Energy Company, L.L.C." in Case No. 07-2271, this 17th day of January 2008, by placing the original and ten (10) copies in an overnight delivery service, postage prepaid, addressed to this Court, and on the following counsel by placing two (2) copies of the same in an overnight delivery service, posted prepaid, along with email service of an electronic copy:

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