No. 07-2271

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Petitioner,
v.
U.S. NUCLEAR REGULATORY COMMISSION,
UNITED STATES OF AMERICA, and
AMERGEN ENERGY COMPANY
Respondents.

On Petition For Review Of An Order Of
The U.S. Nuclear Regulatory Commission

FEDERAL RESPONDENTS' ANSWERING BRIEF

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STATEMENT OF JURISDICTION

New Jersey challenges an Order of the U.S. Nuclear Regulatory Commission ("NRC"). Both NRC and the United States agree that this Court has jurisdiction under the Hobbs Act, 28 U.S.C. § 2341, *et seq*. Venue is proper, 28 U.S.C. § 2343, and the case timely filed. 28 U.S.C. § 2344.

Because NRC's Order denied New Jersey's petition to intervene and terminated its participation in a license renewal proceeding, the Order is appealable now, prior to NRC's final decision in the proceeding. *See, e.g.*, *Environmental Law and Policy Center v. NRC*, 470 F.3d 676, 681 (7th Cir. 2006); *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 525 (D.C. Cir. 1970).

ISSUES PRESENTED

1. Whether the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq*., requires NRC, when renewing a nuclear power plant's operating license, to examine the environmental impacts of a hypothetical terrorist attack on the facility.

2. Assuming *arguendo* that, for purposes of license renewal, NEPA obligated NRC to analyze the environmental impacts of a hypothetical terrorist attack:

(a) whether NRC's Generic Environmental Impact Statement supporting NRC's license renewal regulations – which analyzed the impacts of terrorist

attacks – complemented by a site-specific Supplemental Environmental Impact Statement, satisfies NRC's NEPA responsibilities, and

(b) whether NRC's dismissal of New Jersey's NEPA-terrorism contention was reasonable because, contrary to NRC's rules, the contention (1) amounted to an impermissible collateral attack on NRC's environmental regulations governing license renewal, and (2) failed to provide a method or theory of how NRC could meaningfully analyze the risk of a hypothetical terrorist attack.

3. Whether NRC properly refused to consider newly-presented, particularized claims that New Jersey failed to raise before NRC's Licensing Board but raised for the first time in its administrative appeal to the Commission.

STATEMENT OF THE CASE

I. Nature of the Case.

This case challenges an Order dismissing New Jersey from an NRC adjudicatory proceeding reviewing AmerGen Energy Company's ("AmerGen") application for a 20-year extension of the operating license its Oyster Creek nuclear power plant. New Jersey sought to intervene in the proceeding and submitted three contentions (or claims) challenging the application. NRC's

Licensing Board ruled New Jersey's contentions inadmissible, and the Commission affirmed.[1]

In this Court New Jersey raises only portions of one of its three contentions: that the National Environmental Policy Act ("NEPA") required NRC to perform an environmental evaluation of a potential terrorist air attack on Oyster Creek. The Commission held that NEPA did not require NRC to perform the requested review and that, in any event, NRC had already performed such an evaluation in the Generic Environmental Impact Statement ("GEIS") supporting NRC's license renewal regulations, and in a site-specific Supplemental Environmental Impact Statement prepared for Oyster Creek. The Commission also found New Jersey's contention inadmissible as a collateral attack on generic NRC regulations and for failure to specify a methodology for analyzing the risks of terrorism. Finally, the Commission rejected New Jersey's attempt to raise new issues during its administrative appeal.

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[1]The Licensing Board admitted a contention filed by a second group of intervenors, and litigation of that contention remains ongoing. NRC has not yet issued a final decision on AmerGen's license renewal application.

II. Statutory And Regulatory Framework.

NRC regulates non-defense related use of radioactive materials, including nuclear power plants, under provisions of the Atomic Energy Act ("AEA") of 1954, 42 U.S.C. § 2201, *et seq.*, and the Energy Reorganization Act of 1974, 42 U.S.C. § 5801, *et seq.*

A. *Nuclear Power Plant License Renewal.*

Sections 103 and 104(b) of the AEA authorize NRC to issue licenses to operate commercial power reactors. 42 U.S.C. §§ 2133 and 2134(b). Section 103 limits licenses to terms of 40 years but provides for issuing renewed licenses. 42 U.S.C. § 2133. NRC has promulgated regulations allowing renewal for up to 20 years. *See* 10 C.F.R. § 54.31.

Two sets of regulatory requirements govern NRC's review of license renewal applications. Under 10 C.F.R. Part 54, NRC conducts an AEA-based technical review, focusing on "the detrimental effects of aging" to assure that public health and safety requirements are satisfied. See Nuclear Power Plant License Renewal: Revisions, 60 Fed. Reg. 22,461, 22464 (1995). Under 10 C.F.R. Part 51, NRC completes a NEPA-based environmental review, focusing on potential impacts of 20 additional years of operation.

B. *The National Environmental Policy Act.*

NEPA was enacted to ensure that when a federal action is proposed, the federal agency fully considers the environmental consequences of its action. 42 U.S.C. § 4332(2)(C). NEPA is a procedural statute that does not mandate substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). Instead, it is designed "to insure a fully informed and well-considered decision" in the examination of potential environmental consequences and impacts of a proposed agency action. *Vermont Yankee Nuclear Power Corp. v. NRDC* , 435 U.S. 519, 558 (1978). Here, the proposed agency action was the renewal of AmerGen's operating license.

The regulations implementing NEPA provide that if the agency determines that the proposed action constitutes a major Federal action significantly affecting the quality of the human environment, the agency must prepare an environmental impact statement ("EIS"). *See* 40 C.F.R. Part 1502; 42 U.S.C. § 4332(C). The purpose of the EIS is to examine the environmental effects of the agency action that is under consideration. *Id.* NRC has promulgated its own regulations implementing NEPA. *See* 10 C.F.R. Part 51.[2]

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[2]NRC, as an independent agency, is not bound by Council of Environmental Quality's NEPA regulations but "takes account" of them "voluntarily." 10 C.F.R. § 51.10(a).

C. *License Renewal Environmental Review.*

In 1996, with the first wave of licensed reactors nearing expiration of their initial 40-year licenses, the Commission amended its existing environmental review requirements in 10 C.F.R. Part 51 to address the scope of environmental review for license renewal applications. *See* Final Rule, *Environmental Review for Renewal of Nuclear Power Plant Operating Licenses*, 61 Fed. Reg. 28,467 (1996). The regulations divide the license renewal environmental review into generic and plant-specific issues. NRC addressed the impacts of operating a plant for an additional 20 years that are common to all plants, or to a specific subgroup of plants, in a Generic Environmental Impact Statement. *See* NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, Vol 1 ("GEIS") (May 1996).[3]

Generic impacts analyzed in the GEIS are designated "Category 1" impacts. GEIS at 1-5 to 1-6. Respondents' Supplemental Appendix ("RA") at 8-9. Category 1 impacts are those that: (1) are common to all plants, or to a specific subgroup of plants; (2) can be assigned (with certain exceptions) a single

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[3]The GEIS can be found on the NRC's electronic database (available at the agency's website: http://www.nrc.gov/reading-rm/Adams.html). Its identifying "ADAMS" number is ML040690705. Portions were designated for inclusion in Petitioner's Appendix but were inadvertently omitted. We have submitted them in Respondents' Supplemental Appendix.

significance level (*i.e.*, small, moderate, or large); and (3) are unlikely to warrant plant-specific mitigation measures. *Id.* NRC rules codify these Category 1 generic findings in Table B-1, Appendix B, Subpart A, 10 C.F.R. Part 51.

By regulation, license renewal applicants are generally excused from discussing Category 1 issues in their environmental reports.[4] *See* 10 C.F.R. § 51.53(c)(3)(i). The applicant instead may rely on the generic environmental impact findings codified in Table B-1. All other environmental impacts associated with license renewal are designated "Category 2" issues, and must be addressed in the applicant's environmental report. 10 C.F.R. § 51.53(c)(3)(ii).

An applicant's environmental report must contain "new and significant information on environmental impacts of license renewal of which the applicant is aware." 10 C.F.R. § 51.53(c)(3)(iv). This includes information about generic "Category 1" impacts. *Id.*

Ultimately, NRC staff prepares a draft and final site-specific Supplemental Environmental Impact Statement ("SEIS") for each plant. 10 C.F.R. § 51.95(c). The SEIS includes evaluations of site-specific Category 2 impacts and "new and significant information" regarding generic Category 1 impacts. If "new

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[4]NRC regulations in 10 C.F.R. Parts 51 and 54 require a license renewal application to include an environmental report describing the environmental impacts of the proposed action and alternatives. *See* 10 C.F.R. §§ 51.53(c), 54.23.

information" emerges through a public comment or rulemaking petition and "is relevant to the plant and is also relevant to other plants (*i.e.*, generic information) and that information demonstrates that the analysis of an impact codified in the final rule is incorrect, the NRC staff will seek Commission approval to either suspend the application of the rule on a generic basis . . . or delay granting the renewal application (and possibly other renewal applications) until the analysis in the GEIS is updated and the rule amended." *See* 61 Fed. Reg. at 28,470.

D. *Generic Environmental Impact Statement for License Renewal*

In the license renewal GEIS, NRC made three findings relevant to this case. First, the GEIS reviewed the risk of sabotage – *i.e.*, a terrorist act – at a nuclear plant during the license extension period. The GEIS provided:

> With regard to sabotage, quantitative estimates of risk from sabotage are not made in external event analyses because such estimates are beyond the current state of the art for performing risk assessments. . . . The regulatory requirements under 10 CFR Part 73 [*i.e.*, the physical security regulations] provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the commission believes that acts of sabotage are not reasonably expected. *Nonetheless, 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.*

GEIS at 5-18 (emphasis added) (RA27). Second, the GEIS made a specific finding about the risk of – and impacts from – terrorist acts.

> Based on the above, the commission concludes that the risk from sabotage . . . is small and additionally, that the risks form [sic] other external events, are adequately addressed by a generic consideration of internally initiated severe accidents.

Id.

Third, the GEIS determined the environmental impact of on-site storage of spent nuclear fuel during an additional 20 years of operation was a Category 1 generic issue and determined the impact to be "not significant," or "small." *See* GEIS at 6-72, 6-75, 6-85, 6-86 (RA112, 115, 125, 126). NRC regulations expressly incorporated this generic finding. *See* 10 C.F.R. Part 51 Subpt. A, App. B, Table B-1.

E. *The NRC Hearing Process.*

NRC regulations permit anyone with an "interest" in a licensing proceeding to obtain a hearing on admissible safety and environmental "contentions." *See generally* 10 C.F.R. § 2.309(a); *Envirocare of Utah v. NRC*, 194 F.3d 72 (D.C. Cir. 1999). Contentions must include sufficient detail "to show that a genuine dispute exists . . . . on a material issue of law or fact." *See* 10 C.F.R. § 2.309(f). The petitioner must also "demonstrate that the issue raised is within the scope of the proceeding." 10 C.F.R. § 2.309(f)(1)(iii). Unless a party obtains a waiver from the Commission, NRC regulations are not "subject to attack" in NRC

adjudications. 10 C.F.R. § 2.335(a). Three-judge NRC licensing boards generally preside in NRC adjudicatory proceedings. Litigants may appeal Board rulings to the Commission. *See* 10 C.F.R. §§ 2.311, 2.341.

III. Factual Background.

A. *The License Renewal Application and New Jersey's Contention.*

In 2005, AmerGen submitted a License Renewal Application for Oyster Creek. The Application sought renewal of the Oyster Creek operating license for a period of 20 years beyond the current expiration date of April 9, 2009. Oyster Creek is located in Lacey Township, Ocean County, New Jersey. *See generally* PA208.[5]

NRC Staff published a Notice of Opportunity for a Hearing on the Application, *see* 70 Fed. Reg. 54,585 (2005), and New Jersey filed a Request for Hearing and Petition to Intervene. PA135. New Jersey submitted three contentions, but has raised only portions of Contention 1 in this Court. In Contention 1, New Jersey claimed the Application should contain a discussion of Severe Accident Mitigation Alternatives ("SAMAs") for certain issues related to Oyster Creek's Design Basis Threat ("DBT") including a potential aircraft attack on the reactor, the only issue New Jersey raises in this Court. PA138-39.

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[5]"PA" refers to the Petitioner's Appendix.

Part 1 of New Jersey's Contention 1, "Aircraft attack scenario," claimed:

> The NRC has conducted a generic analysis of the potential threat from aircraft attacks on nuclear power plants, but not a specific analysis of the expected performance of the Oyster Creek design. Generic studies may confirm that the likelihood of such a scenario damaging the reactor core and releasing radioactivity that could affect public health as low, but the need for a bounding calculation to effectively assess and implement an emergency response plan is essential for public protection. Studies have shown NRC's emergency planning basis remains valid, yet the current DBT information is not available to conclude that Oyster Creek is operating within its design basis. Therefore the DBT analysis and SAMA mitigation considerations for core melt sequences need to be included in the SAMA before license renewal.

PA138. As submitted, Part 1 of the Contention does not raise issues with regard to the Oyster Creek spent fuel pool.

In Part 2, "Spent Fuel Pool scenario," Contention 1 claimed:

> The Oyster Creek SAMA submittal for license renewal does not include any accidents regarding the spent fuel pool. While traditional analysis for SAMA includes accidents that lead to a core melt, it does not look at design basis accidents for spent fuel pools."

PA138-39. Part 2 did not, at least explicitly, contain any reference to an airplane crash scenario or a terrorist attack on the spent fuel pool.

New Jersey claimed that Contention 1 was "material" to the license renewal proceeding because it was directed at the SAMA process which involved "characterizing the overall plant risk" and "evaluating potential reduction in plant

risk . . .." Petition to Intervene at 4 (PA138). The NRC Staff and AmerGen filed Answers arguing that both parts of Contention 1 were inadmissible on a variety of grounds, including that the Commission had found in prior decisions that terrorism and terrorist actions were excluded from the scope of its NEPA analysis. PA153-55; PA179-81.

B. *The Licensing Board Decision.*

New Jersey's Petition and the responsive Answers were referred to an NRC Licensing Board, an independent 3-member hearing tribunal. After review, the Board issued a decision holding that New Jersey had standing to intervene in the proceeding, but had failed to submit an admissible contention. *AmerGen Energy Company*, LLC (Oyster Creek Nuclear Generating Station), LBP-06-07, 63 NRC 188 (2006) (PA50).

First, the Licensing Board found that the scope of the NRC's environmental review in a license renewal proceeding was limited by 10 C.F.R. Part 51 and NRC's license renewal GEIS.

> [t]he Commission has determined that a number of environmental issues that might otherwise be relevant to license renewal shall be resolved generically for all plants, and such issues – which are classified in 10 C.F.R. Part 51, Subpart A, Appendix B as "Category 1" issues – are normally "beyond the scope of a license renewal hearing[.]" . . . The remaining issues in

> Appendix B, which are designated as "Category 2" issues, are issues for which (1) the applicant must make a plant-specific analysis of environmental impacts . . . and (2) the NRC Staff must prepare a supplemental Environmental Impact Statement . . .. Contentions implicating Category 2 issues ordinarily are deemed to be within the scope of license renewal proceedings.

Slip Op. at 8-9 (citations omitted) (PA57-58).

The Board then found New Jersey's claim that, in accordance with NEPA, the SAMA should include an analysis of an aircraft attack on Oyster Creek outside the scope of the proceeding and not material to the proceeding under prior Commission rulings. "The Commission has repeatedly and unequivocally ruled that the effects of a terrorist attack need not be considered under NEPA." PA59.

The Board also found that NRC's GEIS had performed a "discretionary" analysis of terrorist attacks in conjunction with license renewal. The discretionary analysis concluded that the core damage and radiological release from such events would be no worse than the damage and release from internally initiated events. PA60, citing GEIS at 5-18.

Next, the Board held that, to the extent that New Jersey challenged the Oyster Creek SAMA analysis for failing to consider a terrorist attack on the spent fuel pool, that challenge was beyond the scope of the proceeding for the reasons stated in rejecting the aircraft attack scenario. PA61. In the alternative, the Board

held New Jersey's claim that Oyster Creek's SAMA analysis should address design basis accidents for spent fuel pools inadmissible because the agency had addressed environmental issues related to spent fuel pools on a generic basis. PA61. "The regulations designate '[o]n-site spent fuel' as a Category 1 issue, stating that the 'expected increase in the volume of spent fuel from an additional 20 years of operation can be safely accommodated on site with small environmental effects . . ..'" PA61, citing 10 C.F.R. Part 51, Subpart A, Appendix B.[6] Because New Jersey had failed to submit an admissible contention, the Board denied its Request for Hearing and Petition to Intervene. PA73-74.

C. *The Commission Decision.*

New Jersey appealed the Board decision to the Commission, which denied the appeal. *AmerGen Energy Company*, LLC (Oyster Creek Nuclear Generating Station), CLI-07-08, 65 NRC 124 (2007) (PA2).[7] First, the Commission reviewed a recent decision of the Ninth Circuit, *San Luis Obispo Mothers for Peace v. NRC*,

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[6]The Board also found that New Jersey's Contentions dealing with long-term compensatory measures, metal fatigue, and combustion turbine engines were inadmissible.

[7]The Commission had earlier denied New Jersey's appeal from the denial of its other two contentions. *AmerGen Energy Company, LLC* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111 (2006). PA24. New Jersey does not challenge that decision.

449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Electric Company v. San Luis Obispo Mothers for Peace*, 127 S. Ct. 1124 (2007), requiring NRC to perform a NEPA review of a potential terrorist attack on the proposed spent fuel storage installation at the Diablo Canyon Nuclear Power Plant. The Commission noted that it was not obligated to follow that decision in other Circuits, although it was required to apply the decision to cases in the Ninth Circuit. PA5-6.

Second, the Commission reaffirmed its view that NEPA does not require the NRC to consider the environmental consequences of a hypothetical terrorist attack on an NRC-licensed facility. PA6. "[A]s a general matter, NEPA 'imposes no duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial nuclear power reactor license renewal applications.'" *Id.* (Footnote omitted). "The 'environmental' effect caused by third-party miscreants 'is . . . simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'" PA6-7 (Footnote omitted). "[T]he claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact." *Id.* (Footnote omitted).

The Commission noted that its precedents were consistent with Supreme Court NEPA doctrine, which has held that a "'reasonably close causal

relationship' between federal agency action and environmental consequences is necessary to trigger NEPA[,]" analogous "to the tort law concept of 'proximate cause.'" PA7 (footnote omitted). The Commission found that, the Ninth Circuit's view notwithstanding, "there simply is no 'proximate cause' link between an NRC licensing action, such as (in this case) renewing an operating license, and any altered risk of a terrorist attack." *Id.* The Commission concluded that "[i]t is not sensible to hold an NRC licensing decision, rather than terrorists themselves, the 'proximate cause' of an attack on an NRC-licensed facility." PA8.

Next, the Commission concluded that "a NEPA-driven review of the risks of terrorism would be largely superfluous here, given that the NRC has undertaken extensive efforts to enhance security at nuclear facilities[.]" PA8 (footnote omitted). "These on-going post-9/11 enhancements provide the best vehicle for protecting the public." *Id.* (footnote omitted). The Commission also noted that "the problem of protecting sensitive security information in the quintessentially *public* NEPA and adjudicatory process presents additional obstacles." PA9 (emphasis in original).

Furthermore, the Commission found that Contention 1 did not explain "how the NRC Staff, or the Licensing Board, is to go about assessing, meaningfully, the risk of terrorism at the particular site in question." PA9 at n.29. The Commission

noted that this Court has upheld an NRC refusal to admit for hearing a NEPA-terrorism contention where the petitioner did not explain how the NRC could quantify the risk of terrorism. *Id.* (citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989))

In the alternative, the Commission indicated that even if NEPA required consideration of a hypothetical terrorist attack, New Jersey's contention was inadmissible because NRC's GEIS had "'performed a discretionary analysis of terrorist acts in conjunction with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release from internally initiated events.'" PA9 (footnote omitted). Furthermore, the Commission said, NRC Staff had performed a site-specific analysis of alternatives to mitigate severe accidents to supplement the general findings in the GEIS. PA9-10 and n.32, citing GEIS, Supplement 28, at pp. 5-3 to 5-11 and Appendix G.

In addition, the Commission reviewed New Jersey's claim that the Licensing Board should have reviewed plant-specific issues that were part of Oyster Creek's current licensing basis. PA10. The Commission noted New Jersey's claim that specific distinguishing characteristics of Oyster Creek made it particularly vulnerable to terrorist threats. PA10-11. Those characteristics

included, *inter alia*, (1) Oyster Creek's allegedly obsolete Mark 1 containment design and elevated spent fuel pool; and (2) the proximity of the reactor to population centers such as Philadelphia, Pennsylvania, and Newark, New Jersey. PA11. The Commission held that because New Jersey had not raised these issues in its contentions, but instead for the first time in its appellate brief, they were not properly before the Commission. *Id.*

Finally, the Commission reviewed New Jersey's request for a review of the vulnerability of the Oyster Creek spent fuel pool to "design basis" accidents. PA11-12.[8] The Commission held that this issue was covered by existing regulations and the GEIS. *Id.* The Commission stated that if New Jersey

> believes that there is reason to depart from the . . . GEIS and related regulations, its remedy is a petition for rulemaking to modify our rules or a petition for a waiver of our rules based on "special circumstances", not an adjudicatory contention.

Id. (footnote omitted).

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[8]The "design basis" is, generally speaking, licensee information identifying "the specific functions to be performed by a structure, system, or component." *See* 10 C.F.R. § 50.2.

SUMMARY OF ARGUMENT

Applying Supreme Court precedent, the Commission reasonably found that NEPA does not require review of the potential effects of a hypothetical terrorist attack on Oyster Creek because the proposed federal action here, renewal of the Oyster Creek license, would not be the "proximate cause" of those effects. Alternatively, assuming *arguendo* that NEPA does require an analysis of those effects, NRC performed that analysis when it issued the Generic Environmental Impact Statement ("GEIS") supporting the license renewal rule, as complemented by Supplement 28. And even if NRC's GEIS and Supplement 28 were not sufficient, New Jersey's contention at issue here was not admissible as a threshold matter because it impermissibly challenged an NRC regulation and generic evaluation. Finally, the Commission properly refused to consider arguments New Jersey raised for the first time in its administrative appeal.

1. The proposed Federal action under review is an Order renewing the license for the Oyster Creek nuclear power plant for another 20 years. The Supreme Court has held that the appropriate test for determining whether NEPA requires a Federal agency to analyze the impacts of the proposed action is whether there is a "reasonably close causal relationship" between the action and the claimed effect. *Department of Transportation v. Public Citizen*, 541 U.S. 752

(2004); *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). The Court "analogized that test to the 'familiar doctrine of proximate cause from tort law.'" *Public Citizen*, 541 U.S. at 767, quoting *Metropolitan Edison*, 460 U.S. at 774. A mere "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Id.* The Commission reasonably found that there was no "reasonably close causal relationship" between the Order and any environmental effects of a hypothetical terrorist attack; thus, the Order would not be the "proximate cause" of those effects.

Under traditional tort law, intervening criminal activity generally breaks the chain of causation. Instead, an intervening force (such a terrorist or criminal act) is the "superseding cause" of harm to a third party. Restatement (Second) of Torts § 448. Section 442 of the Restatement (Second) of Torts provides six elements that must be balanced in determining whether an event is a superseding cause. Under the Restatement factors, the NRC license would not be the "proximate cause" of the effects of an attack on Oyster Creek; instead, the attack itself would be the superseding cause of the effects of that attack.

New Jersey relies heavily on a recent decision by the Ninth Circuit, *San Luis Obispo Mothers for Peace v. NRC*, requiring NRC to perform an analysis of a

hypothetical terrorist attack on a new facility before construction. But that court did not perform the "reasonably close causal connection" (*i.e.*, proximate cause), analysis required by the Supreme Court. Instead, that court reviewed the issue under a "remote and speculative" standard. And NRC's regulatory effort to protect against terrorist attacks does not, in an of itself, mean that NRC is required to analyze impacts of an attack under NEPA.

Furthermore, the policies underlying NEPA do not support requiring the analysis of terrorist attacks, which are a threat to the entire nation. Taken to its logical conclusion, this would require the Federal government to perform this analysis of every licensing action it might approve: every bridge in the Interstate Highway System, for example. Requiring such reviews would require significant resources that could be better used in actually protecting the public health and safety and the environment. In addition, NEPA's main purpose is to ensure "informed" agency actions. But there is no need to use NEPA to get NRC to consider the effects of a terrorist attack; NRC is already heavily focused on preventing those attacks. Finally, every court of appeals to consider this issue – except the Ninth Circuit – has found that NEPA does not require a review of the potential effects of a hypothetical terrorist or criminal act.

2. Assuming *arguendo* that NEPA requires NRC to analyze the potential effects of a hypothetical terrorist attack, the Commission reasonably found that NRC performed an analysis that satisfies that requirement when it issued the license renewal, and Supplement 28, a review of site-specific environmental matters at Oyster Creek. The GEIS concluded that the consequences of sabotage, a terrorist act, would be comparable to the consequences of a "severe accident," which is analyzed generically in the GEIS, and on a site-specific basis in Supplement 28. New Jersey never directly attacks this alternative basis of decision and does not explain how an attack on Oyster Creek would produce consequences different from those analyzed in the GEIS and Supplement 28.

Regardless of whether NRC is required to analyze the potential effects of a hypothetical terrorist attack, New Jersey's contention was inadmissible as a threshold matter under NRC's procedural requirements. First, the contention impermissibly challenged an NRC regulation. Part 2 of the Contention sought an analysis of design-basis accidents in the spent fuel pool. But NRC resolved that issue by generic rulemaking and any attempt to challenge that action should be by petition for rulemaking or by request for waiver of the rules. The record supports the same argument for Part 1 of the contention.

New Jersey complains that these administrative remedies are uncertain and futile. But neither argument excuses New Jersey's failure to follow regular administrative procedures. Petitions for similar relief are currently pending before NRC and decisions denying a petition are reviewable in the court of appeals.

Second, New Jersey's contention, in essence, asked NRC to perform a risk assessment of a terrorist attack on Oyster Creek. But NRC's GEIS found that there was no meaningful way to analyze the risk of sabotage (*i.e.*, terrorism) at any facility, and the Commission found that New Jersey's contention did not explain how NRC could evaluate the risk of terrorism at Oyster Creek. In a similar case, this Court held that a similar assessment constituted the necessary "hard look" required by NEPA and that a petitioner, like New Jersey, had the burden of proposing a contention that would rebut NRC's view that it had no meaningful way to assess the terrorism risk at particular plants. *Limerick Ecology Action v. NRC*, 869 F.2d at 743-44. New Jersey's opening brief did not address this alternative ground for rejecting its contention, so it is barred from raising it in its reply brief.

3. New Jersey attempted to expand its contention in its administrative appellate brief when it introduced new claims not presented to the Licensing Board. New Jersey argued that various aspects of Oyster Creek made it "uniquely

vulnerable to attack," including the "design," and "location" of the plant. But those issues are not presented in the original contention submitted to the Licensing Board. The Commission properly denied New Jersey's attempt to expand its contention during the administrative appeal and New Jersey may not revive its expanded claims in this Court.

STANDARD OF REVIEW

Review of NRC Orders in licensing cases and in agency decisions under NEPA is "deferential" in that the NRC decision on a NEPA issue "may not be overturned unless it is found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Limerick Ecology Action v. NRC*, 869 F.2d at 728. *See also Concerned Citizens Alliance, Inc. v. Slater*, 176 F.3d 686, 705 (3d Cir. 1999); 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 Vehicles Mfs. Ass'n v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). A reviewing court must consider whether "the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *See also Prometheus Radio Project v. FCC*, 373 F.3d 372, 389-90 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

Where, as here, 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. NRDC*, 462 U.S. 87, 103 (1983); *Limerick Ecology Action v. NRC*, 869 F.2d at 744.

To the extent that agency regulations are at issue, courts give "controlling weight" to an agency's interpretation of its own regulations, "unless it is plainly erroneous or inconsistent with the regulation." *United States v. Larionoff*, 431 U.S. 864, 872 (1977). *Accord Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Rodriguez v. Reading Housing Authority*, 8 F.3d 961, 965 (3d Cir. 1993).

It is well-settled that "[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 v. NRDC*, 435 U.S. at 543 (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940)). This tenet is especially applicable to NRC because its enabling legislation, the Atomic Energy Act, is "virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968); *see also*

Massachusetts v. U.S. Nuclear Regulatory Commission, 878 F.2d 1516, 1522 (1st Cir. 1989).

ARGUMENT

I. NEPA DOES NOT REQUIRE ANALYSIS OF THE IMPACTS OF A POTENTIAL TERRORIST ATTACK ON AN NRC-LICENSED FACILITY.

A. NEPA Requires Consideration Of An Environmental Effect Of A Federal Agency Action Only If That Action Is The "Proximate Cause" Of The Effect.

In this case, the proposed federal action is NRC's renewal of Oyster Creek's operating license. Under NEPA, NRC is required to consider the environmental consequences and effects of the proposed *federal action*. New Jersey's challenge to NRC's NEPA analysis, however, is not based on the environmental consequences of the proposed agency action but, rather, on the environmental consequences of a potential terrorist attack. NRC's license renewal would be a "but for" cause of such an attack. If Oyster Creek were denied license renewal and compelled to shut down when its license expires, the shut-down plant might be a less attractive terrorist objective. But it is "proximate cause," not mere "but for" cause, that triggers NEPA obligations.

1. The Supreme Court has held that NEPA "requires" an agency to consider an environmental effect of a proposed federal action only if there is "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen*, 541 U.S. at 767, quoting *Metropolitan Edison Co.*, 460 U.S. at

774. "[A] 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." *Public Citizen*, 541 U.S. at 767. The Court "analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" *Id.*, quoting *Metropolitan Edison*, 460 U.S. at 774.[9]

Under the traditional understanding of the proximate cause doctrine, intervening criminal activity generally breaks the chain of causation. A terrorist attack damaging a nuclear facility is a criminal action, one that is conceivable, but not likely. There has never been such an attack. Thus, NRC's licensing decisions cannot meaningfully be construed as the legal cause of a potential terrorist attack or its environmental impact. *See, e.g.*, Restatement (Second) of Torts §§ 442, 442B cmt. c, 448 (1965). One does not "proximately cause" criminal activity simply by providing an object for a criminal act.

With NEPA, as with tort law, proximate cause is necessary "to hold the defendant's liability within some reasonable" – and objectively justifiable –

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[9]New Jersey misstates the case to this Court. New Jersey claims that "[t]he primary reason advanced by the NRC for the denial [of New Jersey's contention] was its conclusion that the possibility of such harm is . . . too *remote and speculative* to trigger the requirements of NEPA." Petitioner's Brief ("Pet. Br.") at 7 (emphasis added). But the Commission made no such statement in the decision under review here. *See* PA2-14. Instead, as we detail in the text, the Commission analyzed the issue under the "reasonably close causal relationship" (or proximate cause) test established by the Supreme Court.

"bounds." W. Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 44 at 302 (5th ed. 1984). The inquiry focuses on a single question: whether the complained-of action is "so closely connected with the result and of such significance that the law is justified in imposing liability." *Id.* § 41 at 264.

2. The proximate cause requirement in *Metropolitan Edison* (an NRC case) and *Public Citizen* strongly implies that an NRC decision to renew the Oyster Creek license would not make NRC legally responsible for a subsequent terrorist attack. Indeed, the case for excluding terrorist impacts from NEPA is conceptually similar to – and, indeed, arguably stronger than – the case for excluding psychological stress solely from exposure to risk, which was the holding in *Metropolitan Edison*.

Metropolitan Edison involved an NRC decision to allow restart of the undamaged Three Mile Island Unit 1 nuclear reactor. The issue in dispute was whether NEPA required the NRC to analyze potential psychological health effects on persons living near the reactor who were frightened by the possibility of another accident. The opponents of re-starting TMI-1 contended, not implausibly, that this change in the physical environment would have cognizable impacts on human health, namely psychological stress experienced by persons sensitized to the risk of a nuclear accident by the TMI-2 accident that had occurred at the same

site. No one disputed that a clear "but for" causal chain, neither remote nor speculative, linked the NRC's licensing action to psychological stress: license allows plant operation; plant operation causes risk of an accident; risk causes fear; and this fear causes psychological stress. *See* 460 U.S. at 771, 774.

Nevertheless, the Supreme Court held that NEPA did not require the NRC to consider those impacts.

> But a risk of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world. In a causal chain from renewed operation of TMI-1 to psychological health damage, the element of risk and its perception by PANE's members are necessary middle links.

Id. at 775. Observing that "psychiatric expertise" would be needed to address risk-caused psychological health damage, the Court concluded that "the element of risk lengthens the causal chain beyond the reach of NEPA." *Id.* Here, as we show below, the element of criminality of a potential terrorist attack on Oyster Creek similarly breaks the causal chain.

B. A Terrorist Attack On Oyster Creek Would Be The Superseding Cause Of Any Environmental Impacts Of That Attack.

In tort law, an intentional act (such as a criminal attack) generally breaks the chain of causation and relieves the original actor of responsibility for the resulting harm.

> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Restatement (Second) of Torts § 442B (1965) (emphasis added). The Restatement explains the parameters of the doctrine by labeling such an intervening force a "superseding cause." "The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom . . .." Restatement (Second) of Torts § 448 (1965) (emphasis added). *See generally*, *Hundley v. District of Columbia*, 494 F.3d 1097, 1104-05 (D.C. Cir. 2007).

Section 442 of the Restatement (Second) of Torts sets out six considerations relevant to determining whether an intervening force is a superseding cause. Those considerations are:

> (1) the intervening force brings about harm that is "different in kind from that which would otherwise have resulted from the actor's negligence;" (2) the force "or the consequences thereof appear after the event to be extraordinary rather than normal in view of the

> circumstances existing at the time of its operation;" (3) the force operates "independently of any situation created by the actor's negligence;" (4) "the operation of the intervening forces is due to a third person's act;" (5) the "force is due to the act of the third person which is wrongful;" and (6) the "degree of culpability of a wrongful act . . . which sets the intervening force in motion."

Restatement (Second) of Torts, § 442 (a)-(f) (1965).

2. Applying these tort law concepts here, as the Supreme Court did in *Metropolitan Edison* and *Public Citizen*, one readily concludes that a terrorist attack on Oyster Creek would be a "superseding cause" of any damage caused by that attack. The last four Restatement factors unquestionably support that conclusion. For example, the intervening force (the attack) would operate "independently" from the actor (in this case, the NRC) and would be the result of "a third person's act." Furthermore, the actions of the third person (*i.e.*, the attackers) would be "wrongful" and they would bear complete "culpability" for the attack.

As to the first two factors, while the consequences of a successful terrorist attack would be similar to the possible consequences of normal operation (*i.e.*, a severe accident as described in the GEIS, *see* Argument II, *infra*), the "chain of circumstances" surrounding a successful airplane (or other) attack would be "extraordinary," to say the least. The 9/11 attacks on office buildings were

horrific, but so far unique. They are unlikely to be repeated successfully, as such, because of the enhancements in airline security.

Under these principles an attack by a terrorist group on Oyster Creek would be the "superseding cause" of environmental impacts resulting the attack. Thus, the tort law analogy strongly suggests that NRC's renewal of the Oyster Creek license cannot be deemed the "proximate cause" of the effects of an attack.

Section 448 of the Restatement does recognize that in unusual settings the original action may still be the "legal" or "proximate cause" of harm, even when there is a third-party crime or "superseding act," but only where the original actor had good reason to believe that a crime would take place. New Jersey correctly observes that "the criminal acts of third parties cannot be dismissed as being unforseeable as a matter of law. Pet. Br. at 34. New Jersey points, as an example, to *Lillie v. Thompson*, 332 U.S. 459, 462 (1947). *Lillie* stated that a tort defendant who was "aware of conditions which created a likelihood" of criminal activity has a duty to "make reasonable provision" against the activity. *Id.* at 461-62. The essential point here, however, is the Supreme Court said "likelihood," not mere possibility.

The Restatement is in accord:

> [if] the actor's [] conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, [and]

> the actor at the time . . . realized or should have realized the *likelihood* that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Restatement, § 448 (emphasis added).

But this exception does not apply to an NRC licensing action. The comments to the Restatement provide additional guidance. Comment b to Section 448 indicates that liability for third party crimes is appropriate only where the actor creates a situation where "a recognizable percentage of humanity is likely" to commit a crime or where "persons of a particularly vicious nature are likely to be[.]":

> There are certain situations which are commonly recognized as affording temptations to which a recognizable percentage of humanity is likely to yield. So too, there are situations which create temptations to which no considerable percentage of ordinary mankind is likely to yield but which, if they are created at a place where persons of peculiarly vicious type are likely to be, should be recognized as likely to lead to the commission of fairly definite types of crime. If the situation which the actor should realize that his negligent conduct might create is of either of these two sorts, an intentionally criminal or tortious act of the third person is not a superseding cause which relieves the actor from liability.

Restatement, § 448, comment b.

The only two court of appeals decisions interpreting these Restatement provisions in the context of terrorism – both involved attacks on office buildings and one is from this Court – found the terrorist attacks superseding acts, relieving

the original actor of liability (*i.e.*, the original action was not the "proximate cause" of the harm). *See Port Authority of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305, 317-19 (3d Cir. 1999); *Gaines-Tabb v. ICI Explosives*, 160 F.3d 613, 620-21 (10th Cir. 1998). In both cases the plaintiffs sought damages from the manufacturers of fertilizer used in the bombs. The third-party bombers, both courts held, were legally or "proximately" responsible for the damages, not the fertilizer manufacturers. *Port Authority*, 189 F.3d at 318-19 (citing *Gaines-Tabb*). *See also Camden County Board of Chosen Freeholders v. Beretta, U.S.A., Corp.*, 273 F.3d 536, 541 (3d Cir. 2001) ("a defendant has no duty to control the misconduct of third parties.") (citation omitted). We are not aware of any suggestion that the officials who approved the necessary zoning permits to build the buildings were in any way legally responsible for the consequences of the attack.

Similarly, a hypothetical terrorist attack on Oyster Creek would be entirely the terrorists' legal responsibility, not NRC's. In that event, the terrorist attack reasonably should be considered a "superseding event" under Section 442 of the Restatement. Section 448's exception for cases when an action creates a situation likely to lead to a crime is inapplicable. It cannot be said, to use Section 448, comment b's terms, that a "recognizable percentage" of the population would take

advantage of the existence of Oyster Creek to attack it.[10] As the Tenth Circuit pointed out in language that appropriately applies to terrorism in the United States, "[a recognizable percentage] is not satisfied by pointing to the existence of a small fringe group or the occasional irrational individual, even though it is foreseeable generally that such groups and individuals will exist." *Gaines-Tabb*, 160 F.3d at 621.

But that is exactly what New Jersey alleges in this case. New Jersey's argument amounts to a claim that renewing Oyster Creek's license would be the "proximate cause" of the environmental consequences in the unlikely event that members of a "small fringe group" manage to mount an attack damaging Oyster Creek. That claim is at odds with the Supreme Court's "proximate cause" requirement, as explained in *Metropolitan Edison* and *Public Citizen*, and with recent cases, including decisions by this Court, applying traditional tort law to cases involving superseding criminal or terrorist actions.

New Jersey argues that NRC found "that intentional acts of 'third party miscreants' are too remote and unforeseeable to require study under NEPA (NRC decision at 5-6, Pa6-7)" Pet. Br. at 34. New Jersey argues that NEPA requires

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[10]Oyster Creek is not "at a place where persons of a peculiarly vicious type are likely to be[.]" Restatement (Second) of Torts, § 448, comment b. *See also Gaines-Tabb*, 160 F.3d at 621.

NRC to analyze the risk of environmental harm from a terrorist attack because such an attack and resulting harm is "foreseeable." *E.g.*, Pet. Br. at 34, 35, 37, 40. But again New Jersey misstates the Commission's decision as well as the applicable law. The Commission decision under review here never terms a potential terrorist attack "unforeseeable" as a general matter. In fact, NRC is taking measures to prevent such attacks. But as we have explained, under tort principles holding an original action the "proximate cause" of criminal behavior requires a showing that the criminal behavior is reasonably likely, not just generally foreseeable. *See, e.g.*, *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984); *cf. Public Citizen*, 541 U.S. at 762-63.

C. New Jersey's Reliance On A Recent Ninth Circuit Decision Is Misplaced.

New Jersey relies heavily on *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1028-31, a Ninth Circuit decision requiring NRC to prepare a NEPA analysis of the effects of a terrorist attack on a proposed spent fuel storage facility. *See, e.g.*, Pet. Br. at 25-36. The Ninth Circuit's decision failed to address adequately the "reasonably close causal relationship" standard (*i.e.*, "proximate cause") mandated by *Metropolitan Edison* and *Public Citizen*. This Court should not follow it.

1. The Ninth Circuit's erroneous decision conflicts with the Supreme Court's decisions in *Metropolitan Edison* and *Public Citizen* because it refused to apply the "reasonably close causal relationship" standard those decisions mandated. The Ninth Circuit found *Metropolitan Edison* "inapplicable" because it involved the relationship between a change in the physical environment and an effect, whereas *Mothers for Peace* involved the relationship between a federal action and a change in the environment. 449 F.3d at 1029. But that is no distinction at all. In every NEPA case, the question is whether a federal action will cause a significant effect on the environment. Moreover, the Ninth Circuit did not even address *Public Citizen*, which reiterates, unconditionally, that "NEPA *requires* 'a reasonably close causal relationship' between the environmental effect

and the alleged cause." 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774) (emphasis added).

It is true that neither *Metropolitan Edison* nor *Public Citizen* involved the environmental effects of a potential terrorist attack, so neither decision had occasion actually to apply the "reasonably close causal relationship" test to those effects. *See Metropolitan Edison*, 460 U.S. at 775, n.9 (noting that the Court did not consider "effects that will occur if . . . an accident occurs.").[11] But the Ninth Circuit's failure even to apply the "reasonably close causal relationship" test was clear error. And under that standard, it is clear that a NEPA analysis of the consequences of terrorist acts is not required as discussed above.

Rather than apply *Public Citizen* and *Metropolitan Edison* and their required "reasonably close causal relationship" test, the Ninth Circuit constructed (from whole cloth) an elaborate 3-event analysis, relied on by New Jersey here (Pet. Br. at 31-32), and used the newly-created test to distinguish *Metropolitan Edison*. Ultimately, the Ninth Circuit concluded that "[t]he appropriate inquiry is . . . whether [terrorist] attacks are so 'remote and speculative' that NEPA's mandate does not include consideration of their potential environmental effects."

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[11]No one would dispute that licensing a facility would be the "proximate cause" of an accident arising out of normal plant operation.

449 F.3d at 1030. The Ninth Circuit gave no further attention to the Supreme Court's "reasonably close causal relationship" test. But as explained below, the Ninth Circuit's 3-event test analysis misapprehends NEPA; the issue in *Metropolitan Edison* was not whether the asserted environmental effects (psychological stress) were "remote and speculative," but whether they were proximately caused by NRC licensing.

As a preliminary matter, to the extent there are three "events" to be analyzed under NEPA, they are: (1) the proposed federal action, (2) the change in the physical environment caused by the proposed action, and (3) the environmental effect of the change from the proposed action. NEPA does not require an analysis of changes in the environment caused by non-environmental effects.

> To paraphrase [NEPA § 102],where an agency action significantly affects the quality of the human environment, the agency must evaluate the "environmental impact" and any unavoidable adverse environmental effects of its proposal. The theme of [NEPA] § 102 is sounded by the adjective "environmental": 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.

Metropolitan Edison, 460 U.S. at 772 (emphasis in original).

Moreover, the Ninth Circuit's application of its 3-event analysis to distinguish *Metropolitan Edison* does not make sense in its own terms. The Ninth Circuit was correct that in *Metropolitan Edison* there was no dispute about the

relationship between events 1 and 2: a major federal action (NRC's authorizing re-start of TMI-1) caused a change in the physical environment by introducing an operating reactor into the environment. And *Metropolitan Edison* found that there was a break in the causal chain between the change in the physical environment (which the Ninth Circuit termed "event 2") and the psychological stress of the risk of an accident (which the Ninth Circuit termed "event 3). But likewise in *Mothers for Peace*, there was no dispute about the relationship between events 1 and 2 – a major federal action (NRC's licensing decision, event 1) changed the physical environment by allowing construction of a spent fuel storage facility (event 2). This change created the possibility that terrorists might attack that facility, thereby causing further environmental effects (event 3).

Consequently, for the Ninth Circuit to use its "events" analysis to determine whether this change caused the environmental effects complained of, the Ninth Circuit should have focused on the relationship between the proposed agency action (the Ninth Circuit's event 1) and the environmental effects of a terrorist attack (the Ninth Circuit's event 3) and performed a proximate cause analysis. By misapplying its own 3-event analysis, as well as ignoring the Supreme Court's required test, the Ninth Circuit reached the wrong result.

The Supreme Court, in any event, has not cabined its "proximate cause" approach inside a complex 3-event analysis. The Court has made clear that NEPA "requires" a proximate cause connection between the agency action and the alleged environmental effects (a "reasonably close causal relationship") in every case. *Public Citizen*, 541 U.S. at 761. As we demonstrated above, what really matters here is that human malice (a terrorist attack) breaks the chain of "proximate cause" between an NRC license renewal decision and potential environmental effects from an attack – just as in *Metropolitan Edison* human fear and perception of risk broke the causal chain between NRC's approving reactor restart and potential psychological stress. The Ninth Circuit failed even to consider that question, and thus its decision is, in our view, unpersuasive.

2. The Ninth Circuit also suggested that NRC's extensive efforts to prevent terrorist attacks are somehow "inconsistent" with its view that NEPA is not implicated. *See, e.g.*, 449 F.3d at 1030-31. New Jersey makes the same claim in its brief. *See* Pet. Br. at 35-36. But that claim focuses on the wrong question. The question is not whether an attack is worth trying to prevent, but whether NRC's licensing decision would be the *proximate cause* of an attack's consequences. An agency's precautionary choice to protect against a highly improbable criminal event does not change the nature of the causal connection.

The Ninth Circuit itself has recognized that precautionary actions do not trigger a duty to perform NEPA analyses. *See, e.g., Ground Zero Center for Non-Violent Action v. United States Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004). There, petitioners claimed the Navy had to prepare a NEPA analysis of a potential Trident missile accident because the Navy had taken that risk, however slight, into account when planning its base layout. *Id.* at 1090. The Ninth Circuit rejected that argument, holding that just because the Navy's compliance with Department of Defense regulations mandating "maximum possible protection" of the base did not mean, in and of itself, that the Navy had to prepare a NEPA review of the risk of that accident. *Id.*

In essence, the Ninth Circuit's *Ground Zero* decision held that an unlikely event did not require a NEPA analysis merely because the Navy took precautions to reduce its consequences. Likewise, NRC should not be required to prepare a NEPA analysis of a potential terrorist attack merely because the agency takes precautions against it under its responsibility to protect the public health and safety and the common defense. *See, e.g.*, 42 U.S.C. § 2201(b).[12]

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[12]As the Commission decision pointed out (PA8, n.25), there is also a significant distinction between *Mothers for Peace* and this case. *Mothers for Peace* dealt with a new structure, while the present case merely extends the life of an existing facility.

D. Policies Underlying NEPA Support The NRC's Decision Not To Perform An Environmental Review of Impacts Of A Potential Terrorist Attack.

The Supreme Court has acknowledged that its NEPA analogy to tort law's proximate cause concept is not precise. *Public Citizen*, 541 U.S. at 767, citing *Metropolitan Edison*, 460 U.S. at 774 n.7. Courts must "look to the underlying policies or legislative intent in order to draw a manageable line." *Id.* NEPA's policies do not warrant the NEPA-terrorism analysis demanded by the Ninth Circuit in *Mothers for Peace* and by New Jersey here.

NEPA's underlying policies focus on environmental effects within a "rule of reason." *See Public Citizen*, 541 U.S. at 767. The statute's goals would not be furthered by requiring analysis of terrorism, which poses a threat to the Nation as a whole, but is unlikely to occur at any particular facility. New Jersey's argument, taken to its logical conclusion, would require a NEPA analysis of a potential terrorist attack with every regulatory approval (*i.e.*, a license) or construction project the Federal government approves that might conceivably attract a terrorist – every bridge in the Interstate Highway System, for example, every federal courthouse, every federally-funded mass transit project, every military installation, and so on. Resources can be better spent. Across-the-board terrorism reviews would fulfill the Supreme Court's fear that "'adverse environmental effects' might

embrace virtually any consequence of a government action that someone thought 'adverse.'" *Metropolitan Edison*, 460 U.S. at 772.

As the Supreme Court emphasized in *Metropolitan Edison*, NEPA's demands must "remain manageable" if its goals are to be met. 460 U.S. at 776. Otherwise, "available resources may be spread so thin that agencies are unable adequately to pursue protection of the physical environment and natural resources." *Id.* Requiring NRC to analyze the potential impacts of terrorist attacks under NEPA would consume significant agency resources without corresponding benefit. NRC already goes to great lengths to protect nuclear facilities. Following the terrorist attacks of September 11, 2001, NRC ordered licensees to add security measures beyond those already required by regulation. *See, e.g.*, 67 Fed. Reg. 9792 (2002). NRC has also recently strengthened its "design basis threat" regulations that require protection against sabotage of reactors and theft or diversion of nuclear material. 72 Fed. Reg. 12705 (2007). Adding NEPA analysis of potential terrorist attacks to NRC's already extensive regulatory efforts to address that threat would divert agency resources and make NEPA less manageable with little likelihood of producing useful new information

-- and would therefore fail to advance NEPA's goal of protecting the environment.[13]

NEPA's main purpose is to protect the environment by ensuring informed agency actions. "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Here, as we have noted, there is no need to use NEPA to make sure NRC considers terrorism.

Moreover, information on potential consequences of terrorist attacks at individual facilities, and on how NRC and licensees plan to prevent them, is sensitive security information. *See* 42 U.S.C. § 2167 (authorizing NRC to protect from disclosure "safeguards" information). Even if protecting sensitive information in NRC adjudicatory hearings on terrorism were manageable, and even assuming that the sensitivity of security information does not alone excuse

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[13]Contrary to New Jersey's claim, Pet. Br. at 45-49, NRC does not argue that compliance with the Atomic Energy Act relieved it from compliance with NEPA. NRC is aware that the AEA and NEPA are separate statutes. Instead, as the Commission pointed out in its decision below (PA8-9, n.28), its efforts to improve security is a more appropriate area in which to invest scarce resources "to pursue protection of the physical environment and natural resources." *See Metropolitan Edison*, 460 U.S. at 776.

compliance with NEPA's analysis requirements if the analysis can be withheld from the public, *cf. Weinberger v. Catholic Action*, 454 U.S. 139, 146 (1981), an NRC NEPA-terrorism analysis still creates a risk that sensitive information could be disclosed through negligence or widespread circulation of sensitive information. Any time an agency creates a document, it also creates a risk that the document could be disclosed – whether by design or accident – and the information in the document compromised. That risk reinforces the conclusion that NEPA's rule of reason does not require consideration of terrorist attacks on NRC-regulated facilities as part of the NEPA process.[14]

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[14]Contrary to New Jersey's claim, Pet. Br. at 50-52, the Commission did not rest its decision exclusively on the sensitivity of the information that would be involved in a NEPA review. Instead, the Commission found the sensitivity of the information "present[ed] additional obstacles" (PA9) to meaningful NEPA review.

E. Other Courts Addressing This Issue Have Held That Agencies Were Not Required To Perform A NEPA Review Of Potential Terrorist Attacks.

The Ninth Circuit appears to stand alone in requiring a NEPA analysis of the impacts of a potential terrorist attack. The only other courts of appeals to address the issue have upheld agency decisions not to consider terrorist attacks as part of their NEPA analyses. In fact, as we discuss more fully later, see Argument II, *infra*, this Court has upheld an NRC decision not to analyze the risks of sabotage (*i.e.*, a terrorist act) under NEPA where the petitioner did not propose a meaningful way to analyze that risk. *See Limerick Ecology Action v. NRC*, 869 F.2d 719, 743-44 (3d Cir. 1989).

In *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520 (8th Cir. 2003), the Eighth Circuit reviewed the Surface Transportation Board's decision to allow construction of new rail lines. In doing so, the court held that the agency did not err in declining to reopen the record in light of the terrorist attacks of September 11, 2001, because the agency had "exercised its permissible discretion when it determined that any increased threat was general in nature" and did not relate to the specific project at issue. *Id.* at 544.

In *City of New York v. Department of Transportation*, 715 F.2d 732 (1983), *appeal dismissed, cert. denied*, 465 U.S. 1055 (1984), the Second Circuit deferred

to the Department of Transportation's conclusion that the risks of terrorism or other sabotage "were too far afield for consideration" in the NEPA analysis of a regulation governing shipment of radioactive material by highway. *Id.* at 750.

Finally, in *Glass Packaging Inst. v. Regan*, 737 F.2d at 1091, the D.C. Circuit invoked proximate cause principles and cited *Metropolitan Edison* in refusing to require the Bureau of Alcohol, Tobacco, and Firearms to analyze under NEPA the possibility that a "deranged criminal" might tamper with bottles. The court held that "mere foreseeability does not trigger a duty to consider an environmental effect." *Id.* at 1091. Such a NEPA review of the "criminal acts of third parties," the court said, would exceed "[t]he limits to which NEPA's causal chain may be stretched before breaking." *Id.* at 1091-92. The same is true in our case.

This Court should follow its own and other Circuits' prior rejection of claims that NEPA requires examining terrorism.

II. ASSUMING *ARGUENDO* THAT NEPA GENERALLY REQUIRES A TERRORISM REVIEW, NRC ALREADY HAS DONE SO IN ITS GEIS AND NEW JERSEY'S CONTENTION IS INADMISSIBLE UNDER NRC RULES AND PRACTICE.

A. NRC Already Has Performed An Analysis Of The Environmental Impacts Of A Potential Terrorist Attack On A Nuclear Reactor.

Even if NEPA requires a terrorism review, NRC has already done so, as the Licensing Board and the Commission correctly found. *See* PA8-10. Specifically, in the license renewal GEIS, NRC conducted a "discretionary" NEPA analysis of terrorist attacks on nuclear reactors. PA60 (citing GEIS); PA9-10. The GEIS concluded that the impacts of a terrorist attack (sabotage) "would be no worse than" the impacts of a "severe accident." GEIS, Vol. 1, at 5-18 (RA27). NRC also prepared a Supplemental EIS ("Supplement 28"), a site-specific environmental analysis of alternatives at Oyster Creek to mitigate severe accidents. *See* GEIS, Supplement 28 (Oyster Creek Nuclear Generating Station), Final Report (January 2007), at 5-3 – 5-12 (PA345-54) and Appendix G (PA356-91).

The GEIS, together with the site-specific Supplement 28, addresses the impacts of a hypothetical terrorist attack. The GEIS noted that quantitative estimates of risk (*i.e.*, the probability of an event multiplied by the consequences of an event) of a terrorist act – such as sabotage – are beyond the current state of

the art to quantify or predict.[15] RA27. But the GEIS found in qualitative terms that, if there were a successful attack, the resulting reactor core damage and radiological releases (*i.e.*, the consequences or "impacts") would be at worst comparable to those expected from a severe reactor accident. *Id.*

This finding acknowledges the potential seriousness of terrorism at nuclear reactors. A "severe accident" is more than just a "routine" plant accident. "Severe core damage accidents are low probability events beyond the design basis established in 10 CFR part 50 that can lead to significant core damage and radioactive material release . . .." 57 Fed. Reg. 44513 (1992). *See also* 50 Fed. Reg. 32138 (1985). As the GEIS explains:

> Generally, the [NRC] categorizes accidents as "design-basis" (i.e., the plant is designed specifically to accommodate these) or "severe" (i.e., those involving multiple failures of equipment or function and, therefore, whose likelihood is generally lower than design-basis accidents but where consequences might be higher), for which plants are analyzed to determine their response. The predominant focus in environmental assessments is on events that can lead to releases substantially in excess of permissible limits for normal operation.

GEIS at 5-1 – 5-2 (RA10-11). *See also* GEIS at 5-11 – 5-12 (RA20-21) (types of accidents evaluated).

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[15]"Radiological sabotage" is a design basis threat defined in 10 C.F.R. § 73.1(a)(1).

The GEIS assesses the potential dose and adverse health effects from accidents: (1) atmospheric releases (GEIS at 5-19 – 5-49) (RA28-58); (2) fallout onto open bodies of water (GEIS at 5-49 – 5-65) (RA58-74); and (3) releases into groundwater (GEIS at 5-65 – 5-95) (RA78-104).[16] The GEIS also assesses the economic impacts of a severe accident with an off-site release (GEIS at 5-96 – 5-99) (RA105-08). Equating consequences of a successful attack on a nuclear plant (including Oyster Creek) to those expected from a severe accident, therefore, means that NRC has examined the offsite effects of such an attack.

The GEIS's finding is reasonable. A successful attack at Oyster Creek damaging the reactor core might (although not necessarily would) result in a release of radiological contamination. That radiological release resulting from the attack would be comparable to a release resulting from a severe accident – which the GEIS analyzes.

NRC's environmental decision-making here included Supplement 28, an analysis of the risk of severe accidents specific to Oyster Creek. Supplement 28

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[16]The GEIS bases its analysis on several generic studies and on the plant-specific final environmental statements ("FES") published since 1981, which contained a severe accident analysis. GEIS at 5-19 (RA28). For those sites whose FES pre-dated 1981, such as Oyster Creek, the GEIS extrapolated from the existing data to obtain a reasonable estimate of the results of a severe accident at that site. GEIS at 5-19 – 5-28 (RA28-37).

reviews possible accident scenarios and the consequences of an off-site release. PA345-46; 358-60. Supplement 28 then discusses the Severe Accident Mitigation Alternatives ("SAMAs") considered by AmerGen. PA346-53; 360-89. Supplement 28, together with the GEIS, provide both site-specific and generic analysis of environmental impacts at Oyster Creek. Thus, assuming *arguendo* that NEPA requires it, the NRC has already analyzed the environmental impacts of a potential terrorist attack.

New Jersey's brief in this Court never directly attacks either the Licensing Board's or the Commission's conclusion about the applicability of the GEIS. The closest it comes is one conclusory sentence complaining that the GEIS does "not include an analysis of the environmental effects of an air attack on Oyster Creek, taking into account its particular design . . .." Pet. Br. at 47. But New Jersey has never explained, either before the Commission or in its opening Brief here, how an air attack on Oyster Creek might produce impacts or consequences that are different from the severe accidents analyzed in the GEIS and Supplement 28. And as we point out, *infra* at 64-66, New Jersey's Contention never raised the "particular design" issues before the Licensing Board; thus, it was barred from raising them on appeal to the Commission. Likewise, it should not be able to raise them here.

B. The Commission Reasonably Found New Jersey's Proposed Contention Was Not Admissible Under NRC Hearing Rules And Practice.

Regardless of whether NRC is required to perform a NEPA analysis of the impacts of a potential terrorist attack, the Commission reasonably found that, as a threshold matter, New Jersey had failed to submit a valid contention under the NRC's procedural requirements in the adjudicatory proceeding. First, New Jersey's contention amounted to an impermissible collateral attack on NRC's license renewal regulations. Second, New Jersey's NEPA-terrorism contention failed to explain how NRC could meaningfully assess the threat of terrorism at the Oyster Creek facility.

1. New Jersey's Contention Impermissibly Challenged an NRC Regulation.

Part 2 of New Jersey's Contention sought an analysis of design basis accidents in the Oyster Creek spent fuel pool. PA138-39. The Licensing Board dismissed this portion of the Contention 1 as an impermissible challenge to NRC regulations. PA61. The Commission affirmed that decision. PA12. "If New Jersey believes there is reason to depart from the license renewal GEIS and related regulations, its remedy is a petition for rulemaking to modify our rules or a petition for a waiver of our rules based on 'special circumstances,' not an adjudication contention." *Id.* (footnote omitted). The same analysis supports a

similar finding that Part 1 of the Contention – dealing with terrorist attacks on reactors – was likewise a challenge to the GEIS and impermissible under NRC's regulations. As explained *infra*, the Commission's conclusion was correct and this rationale provides yet another basis for rejecting New Jersey's challenge to the Commission's decision.

Exercising its discretion in the promulgation of regulations, NRC determined it could adequately evaluate some environmental impacts of nuclear power plant license renewal generically. *See* 10 C.F.R. Part 51 Subpt. A, App. B, Table B-1. *See also*, GEIS at 5-18. Generic analysis is "clearly an appropriate method" of meeting the agency's statutory obligations under NEPA. *Baltimore Gas and Electric Co. v. NRDC*, 462 U.S. at 101. Agencies need not "continually . . . relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). Agency authority to rely on rulemaking to determine generic environmental issues that do not require case-by-case consideration applies "even where an agency's enabling statute expressly requires it to hold a hearing." *Id.*

It is "hornbook administrative law that an agency need not – indeed should not – entertain" a challenge to a regulation in an individual adjudication. *Tribune Co. v. FCC*, 133 F.3d 61, 68 (D.C. Cir. 1998). *Accord San Luis Obispo Mothers*

for Peace v. NRC, 449 F.3d at 1026-27. In keeping with this principle, NRC's procedural rules expressly prohibit adjudicatory contentions that attack an NRC regulation. 10 C.F.R. § 2.335(a).

Yet that is exactly what New Jersey's Contention sought to do. Part 2 of the Contention demanded an updated analysis for the environmental impacts of spent fuel storage.[17] But this issue is a generic matter whose impacts an NRC regulation has already found "small." *See* 10 C.F.R. Part 51 Subpt. A, App. B, Table B-1.[18] NRC rules explicitly excuse license renewal applicants from analyzing such impacts in their environmental reports. 10 C.F.R. § 51.53(c)(3)(i). Thus, an adjudicatory contention (such as New Jersey's) arguing that an impact is

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[17]We assume, for purposes of argument, that New Jersey's "spent fuel pool" contention relates to airborne terrorism – the only issue New Jersey raises in this Court. *See* Pet. Br. at 3. The actual contention, though, does not mention terrorism in connection with spent fuel pools, just in connection with the reactor. PA138-39.

[18]NRC's "small" finding rests on the License Renewal GEIS. The GEIS's findings are reinforced by other studies. *See* 55 Fed. Reg. 38474, 38481 (1990). *See, e.g.*, NUREG-1738, "Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Plants" (February 2001) (Available on the NRC's website at ML010160522). These studies also review both the probability and consequences of an airplane crash into a spent fuel pool and conclude that the consequences would be comparable to the consequences of an earthquake-induced failure of a spent fuel pool. *E.g.*, NUREG-1738 at Appendix 4. NUREG-1738 reviewed earlier studies, including those of airplane crashes, and concluded that "the consequences of a [spent fuel pool] accident could be comparable to those for a severe reactor accident." *Id.* at 3-28.

something other than that which the NRC has codified in Appendix B amounts to a challenge to the regulation.

Both the Licensing Board (PA61) and the Commission (PA12) properly concluded that NRC procedural rules do not allow adjudicatory contentions challenging a regulation. The rules do, however, allow intervenors to seek a waiver of the regulation from the Commission if unusual circumstances are present. *See* 10 C.F.R. § 2.335(b); *see also Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 364 (2001). But New Jersey never sought such a waiver. And unless 10 C.F.R. § 51.53(c)(3)(i) or the impact finding in Appendix B is waived by the Commission for a particular proceeding pursuant to section 2.335(b), no party or potential party may challenge either of these regulations in a Commission adjudication. 10 C.F.R. § 2.335(a). New Jersey's spent fuel pool claim – Contention 1, Part 2 – was properly found inadmissible for adjudicatory hearing.

The administrative record supports a similar analysis for Part 1 of the Contention. Part 1 demanded an analysis of a terrorist attack on the Oyster Creek reactor. PA138. But this analysis was already provided by GEIS, which concluded that the results of a terrorist attack would be comparable to the results of a severe accident. Part 1 of New Jersey's Contention was an attempt by New

Jersey (in effect) to challenge the GEIS's finding. As such, Part 1 was also inadmissible as an attack on an NRC rule (*i.e.*, the GEIS, whose generic findings are incorporated in NRC regulations (10 C.F.R. Part 51, App. B)).

The Commission noted (PA12) that an NRC rule may be suspended or altered in response to a petition for rulemaking. *See* 10 C.F.R. § 2.802. But New Jersey also did not file a petition for rulemaking. New Jersey complains that the rulemaking process is "uncertain," Pet. Br. at 48, and that "even if ideas for mitigation measures are generated from public participation . . ., it is unlikely they will be implemented in time to affect [license renewal.]" *Id.* New Jersey also argues, essentially, that a petition for rulemaking would be "futile" because the NRC would deny it as it denied another petition for rulemaking that referenced Oyster Creek. Pet. Br. at 48-49.

But neither argument excuses New Jersey's failure to follow NRC's regular administrative procedures, which are entitled to a presumption of regularity and good faith. *Bridge v. U.S. Parole Commission*, 981 F.2d 97, 106 (3d Cir. 1992). *See also Ward v. Rock Against Racism*, 491 U.S. 781, 811 (1989); *Hoffman v. United States*, 894 F.2d 380, 385 (Fed. Cir. 1990). In fact, as New Jersey

acknowledges, another group has asked NRC to alter its license renewal rules.[19] *See* Pet. Br. at 48-49.

2. NRC Reasonably Rejected New Jersey's Contention Because It Failed To Explain How To Assess Meaningfully The Risk of Terrorism at Oyster Creek As Required By This Court's *Limerick Ecology Action* Decision.

"Risk" is a precise, quantifiable concept (*i.e.*, probability multiplied by consequences). NRC's GEIS on license renewal found that assessing the risk of terrorist events was "beyond the current state of the art for performing risk assessments." GEIS at 5-18. RA27. But New Jersey's contention did not explain how NRC could evaluate the risk of a terrorist attack on the Oyster Creek facility meaningfully. *See* PA9 at n.29 ("it's not clear from New Jersey's contention how the NRC Staff, or the Licensing Board, is to go about assessing, meaningfully, the risk of terrorism at . . . [Oyster Creek.]").

As the Commission noted, *see id.*, in 1989 this Court affirmed an NRC decision to reject a similar contention for precisely the same reason. *Limerick Ecology Action v. NRC*, 869 F.2d at 744. This Court held that the petitioner in that

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[19] *See Spano v. NRC*, No. 07-0324-ag(L) (2d Cir.). Similarly, Massachusetts and California, concerned about fires in spent fuel pools, have filed petitions for NRC rulemakings to alter prior generic findings that such risks are low and need not be evaluated in license renewal proceedings. *See* 72 Fed. Reg. 2464 (2007) (Massachusetts petition); 72 Fed. Reg. 27068 (2007) (California petition). It is not clear why New Jersey could not have filed its own petition.

case "should have advanced some method or theory by which the NRC could have entered into a meaningful analysis of the risk of sabotage despite its asserted inability to quantify the risks." *Id.* (footnote omitted).

Limerick Ecology Action involved the issuance of a full power license to the Limerick facility. NRC issued an "FES" (*i.e.*, an environmental impact statement) that did not consider the risks of sabotage because "such an analysis is considered beyond the art of probabilistic risk assessment." *Philadelphia Electric Company* (Limerick Generating Station, Units 1 and 2), ALAB-819, 22 NRC 681, 697 (1985). A citizens group, Limerick Ecology Action ("LEA"), challenged the FES and argued that it should have considered the risk of sabotage, *i.e.*, a terrorist event. *Id.* at 697-98.

Initially, NRC's Appeal Board noted that the FES had undertaken a review of "a whole range of design-basis and severe accident scenarios." *Id.* at 698.[20] The Appeal Board found that LEA did "not explain what separate consideration of sabotage as an initiator of such a severe accident would add, from a qualitative standpoint, to this discretionary environmental review." *Id.* at 698-99. Next, the Appeal Board noted that "although the risk of sabotage cannot be quantified in a way that would permit its litigation per se, the [NRC's] regulations nonetheless

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[20]The Appeal Board decision was the "final" agency action in the case.

require each plant to have a detailed security plan . . . [which is] subject to litigation in licensing hearings." *Id.* at 699 (citations omitted). The Appeal Board concluded that "the risk of sabotage is simply not yet amenable to a degree of quantification that could be meaningfully used in the decisionmaking process[]" and excluded the contention. *Id.* at 701.

This Court upheld the Appeal Board's decision. The Court noted the FES's finding "that assessment of such risks was attended by a great deal of uncertainty[,]" *Limerick Ecology Action*, 869 F.2d at 743, and found that the Appeal Board's conclusion satisfied NEPA's requirement of a "hard look" because

> we are required to "be at [our] most deferential" when the Commission makes such a scientific determination . . . and because the challenging party has failed to undermine or rebut the NRC's conclusion that the risk of sabotage cannot be assessed.

Id. (citation omitted). Moreover, this Court held that the petitioner had the burden of rebutting NRC's claim that there was no meaningful way to assess the threat and did not meet it. *Id.* at 744 n.31 ("[We] find that [petitioner] has failed to carry its burden to rebut the NRC's claim that it cannot meaningfully consider the issue.").

Here, New Jersey's Contention, in essence, asked NRC to perform an assessment of the risk of a terrorist attack at Oyster Creek. But similar to the FES

at issue in *Limerick*, NRC's license renewal GEIS found that there is no meaningful method to assess the risk of a terrorist attack at a particular facility. *See* GEIS at 5-18 (RA27). And, as with the petitioner in *Limerick Ecology*, New Jersey's Contention (a) failed to rebut NRC's conclusion that it has no meaningful way to assess the risk, and (b) did not explain "how" NRC can assess that risk.

Moreover, as in *Limerick*, NRC has prepared an analysis of potential impacts, (*i.e.*, consequences) of "severe" or beyond design-basis accidents for license renewal in general (*see* GEIS, *supra*) and for Oyster Creek in particular (*see* Supplement 28, *supra*). And as in *Limerick*, New Jersey never explains how an Oyster Creek-specific consideration of a terrorist event, such as sabotage or an airplane attack, as the source of consequences similar to those of a severe reactor accident, would add to NRC's environmental review.

In short, the Commission reasonably refused to accept New Jersey's Contention on the same grounds that this Court upheld in *Limerick Ecology Action*. Indeed, New Jersey's brief in this Court fails even to address the Commission's *Limerick*-based alternative holding. New Jersey is barred from curing this defect in its Reply Brief. *See Gambino v. Morris,* 134 F.3d 156, 161 n. 10 (3d Cir.1998) (citation omitted); *Hoxworth v. Blinder, Robinson & Co., Inc.,* 903 F.2d 186, 204-05 n.29 (3d Cir. 1990).

In sum, Contention 1 amounted to an impermissible attack on NRC's regulations, and NRC reasonably denied New Jersey's request for an adjudicatory hearing on its contention.

III. THE COMMISSION PROPERLY REJECTED NEW JERSEY'S ATTEMPT TO EXPAND ITS CONTENTION ON ADMINISTRATIVE APPEAL.

When New Jersey appealed the Licensing Board's decision to the Commission, New Jersey expanded its claims to add additional claims not presented to the Licensing Board. In its administrative appeal brief, New Jersey argued that the "design," "location," and "specific threat of attack" at Oyster Creek make it "uniquely vulnerable to attack." *See* NJ Appeal at 16-22 (PA400-06). But Contention 1 – as presented to the Licensing Board – did not raise any issue regarding the "uniqueness" of the Oyster Creek design, location, or threat vulnerability. *See* PA137-39. Likewise, Contention 1 – as presented to the Licensing Board – did not raise any concerns about the Mark I containment, the elevated design of the spent fuel pool, or the location of the Oyster Creek facility and population density of the surrounding area. *Compare* RA400-06, with PA137-39. Instead, these claims were presented in the adjudicatory proceeding for the first time during the administrative appeal. New Jersey now raises these issues here. *See, e.g.*, Pet. Br. at 10-12, 17, 53-54.

The Commission properly rejected New Jersey's attempt to introduce new issues into the proceeding. As the Commission ruled, citing agency precedent, parties may not raise new issues on appeal. PA11-12, citing *USEC, Inc.*

(American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006). The agency practice is the same as this Court's. "This Court has consistently held that it will not consider issues raised for the first time on appeal." *Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994) (citations omitted). "This general rule 'applies with added force where the timely raising of the issue would have permitted the parties to develop a factual record.'" *Id.* (quoting *In re American Biomaterials Corp.*, 954 F.2d 919, 927-28 (3d Cir. 1992).

In its opening brief here, New Jersey claims that the newly introduced factors were "not obscure technical facts that the agency would be unable to identify unless they are specifically spelled out in a hearing request." Pet. Br. at 55.[21] But in NRC adjudicatory proceedings, like any judicial proceeding, the party initiating the proceeding, *i.e.*, an intervenor such as New Jersey, has the burden "to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contention." *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. at 552. *See also Hydro Resources, Inc.*, CLI-04-39, 60 NRC 657, 660 (2004). In an NRC proceeding, the petition to intervene must set out

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[21]New Jersey cites 10 C.F.R. § 2.760 to justify raising new issues on appeal. *See* Pet. Br. at 53. That regulation now appears 10 C.F.R. § 2.713. *See* 69 Fed. Reg. 2182 (2004). Nothing in it relieves New Jersey of its obligation to bring its contentions first to the Licensing Board rather than initially on administrative appeal to the Commission.

contentions and the framework for the proceeding. 10 C.F.R. § 2.309. A responding party is not required to address matters not in the petition.

In this case, New Jersey submitted proposed contentions to the Licensing Board, including Contention 1. The responding parties, the NRC Staff and AmerGen, responded to Contention 1 as drafted – as they were required to do. Had New Jersey included in its Contention the claims it later raised in its appellate brief, both the NRC Staff and AmerGen would have been required to respond to them, and the Licensing Board and the Commission presumably have addressed them. As it was, New Jersey did not raise these additional issues until filing its appellate brief with the Commission. As the Commission held (PA11), this was too late.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review.

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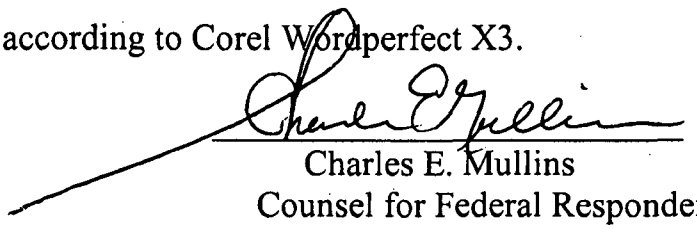
January 17, 2008

CERTIFICATE OF COMPLIANCE

Counsel for Federal Respondents hereby certifies that the foregoing Brief for the Federal Respondents satisfies the requirements of Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The Brief was prepared in proportional Times New Roman font of 14 characters per inch, and, excluding the parts of the brief exempted by Rule 32(a)(7)(iii) of the Federal Rules of Appellate Procedure, contains 13,968 words, according to Corel Wordperfect X3.



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STATEMENT OF RELATED CASES

The Federal Respondents are 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 SERVICE

I declare under penalty of perjury that I filed the "Federal Respondents' Brief" in Case No. 07-2271 by causing ten (10) paper copies to be sent to this Court by overnight delivery service, and an electronic copy in PDF format via electronic mail. I hereby certify that the electronic brief served on this Court has been scanned for viruses using Symantec AntiVirus Program 10.1.5.5010 and is virus-free, and that the text of the electronic brief and the paper briefs are identical. I also served two paper copies of the brief on the following counsel by overnight delivery service:

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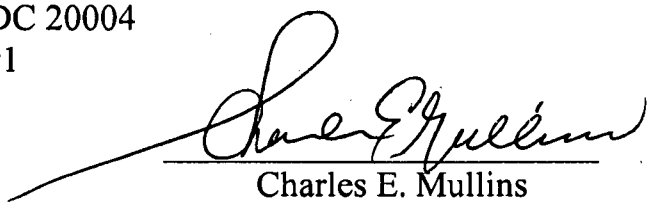

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