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

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

BRIEF AND APPENDIX ON BEHALF OF PETITIONER,
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
Appendix Volume 1, Pages Pa1 - Pa 49

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JURISDICTIONAL STATEMENT

This matter is an appeal by the New Jersey Department of Environmental Protection ("New Jersey")[1] from a final order issued by the U.S. Nuclear Regulatory Commission ("NRC"). The Order affirmed a decision of the Atomic Safety and Licensing Board ("Board"), which denied New Jersey's request for a hearing and petition to intervene in relicensing proceedings concerning the Oyster Creek Nuclear Generating Station ("Oyster Creek"). This Court has jurisdiction pursuant to Section § 2342 (4) of the Hobbs Act, 28 U.S.C. § 2342(4), which provides Courts of Appeal with exclusive jurisdiction to review those final orders of the Atomic Energy Commission identified by 42 U.S.C. § 2339. Pursuant to 42 U.S.C. § 5841(f), those Hobbs Act provisions now apply to the NRC. Section § 2239(a) and (b) of the Atomic Energy Act (AEA), 42 U.S.C. § 2239 (a) and (b), read together, make final orders of the NRC concerning licenses subject to judicial review.

New Jersey sought such review by petition for review, pursuant to Rule 15(a) (1) of the Federal Rules of Appellate Procedure. It is permitted to file its petition in this Court, since its principal office is located within this Circuit. 28 U.S.C. § 2343. The appeal was timely filed pursuant to 28 U.S.C.

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[1]The New Jersey Department of Environmental Protection is designated by the Legislature to be the primary Department to oversee the health and safety of the State's citizens in regard to potential radiation damage. N.J.S.A. 26:2D-2 et seq. and N.J.S.A. 13:1D-9(i).

§ 2344 because it was docketed on April 25, 2007, within 60 days of the date of the NRC's Order, February 26, 2007.

STATEMENT OF THE ISSUE PRESENTED

Whether the National Environmental Policy Act of 1969, ("NEPA"), 42 U.S.C. § 4321 et seq., requires the Nuclear Regulatory Commission to prepare an Environmental Impact Statement, ("EIS"), which contains a site-specific analysis of the potential human environmental impacts of an air attack on a nuclear power plant as part of its review of an application to relicense that facility.

STANDARD OF REVIEW

This case involves a decision by the NRC rejecting New Jersey's contention that the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 et seq., requires the preparation of an EIS to consider the environmental impacts of an air attack on the Oyster Creek facility. The NRC rejected this contention because it found that "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on unlicensed facilities." (NRC Decision at 4, Pa 5). Because the NRC's determination was that NEPA does not require an EIS as a matter of law, the standard of review is whether the agency's action was reasonable. This was the standard of review applied by the Ninth Circuit to review a nearly identical decision of the NRC in San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006), cert. den. sub nom., PG&E v. San Luis Obispo Mothers for Peace, - U.S. -, 127 S.Ct. 1124 (2007).

Even if the NRC's action is properly judged under the standard of review which provides that an agency action will be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law(,)" 5 U.S.C. § 706(2)(A), under neither standard is the agency entitled to "unbridled discretion." South Trenton Residents Against 29 v. Federal Highway Administration, 176 F.3d 658, 663, n. 2 (3d Cir. 1999). The determination of the NRC in this case fails under both standards of

review.

STATEMENT OF RELATED CASES

This case is before this Court for the first time. Another contention was raised in the Oyster Creek relicensing proceeding by a group which included the Nuclear Information and Resource Service ("NIRS"), New Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (referred to collectively by the Board's decision as "NIRS" or "Citizens"). This contention, which relates to corrosion in the drywell liner at Oyster Creek was accepted by the NRC and is currently pending before that agency. NRC Docket No. 50-0219-LR.

STATEMENT OF THE CASE

New Jersey appeals from the February 26, 2007 decision of the NRC denying its request for an EIS to assess the potential environmental impact of an air attack on the Oyster Creek facility. The primary reason advanced by the NRC for its denial was its conclusion that the possibility of such harm is, as a matter of law, too remote and speculative to trigger the requirements of NEPA. The NRC also found that consideration of these environmental impacts in an EIS would be beyond the scope of its relicensing proceedings, as delineated by regulation. Finally, the NRC determined that the preparation of an EIS in conformity with the requirements of NEPA would be superfluous, because the NRC had already reviewed these questions on a generic basis, applicable to all nuclear power plants, in its Generic Environmental Impact Statement, ("GEIS"), and had undertaken rulemaking and enforcement efforts addressing terrorism pursuant to its authority under the Atomic Energy Act ("AEA"). 42 U.S.C. § 2011 et seq. The NRC concluded that these rulemaking procedures provide the best vehicle for addressing terrorism concerns.

The NRC's determination that NEPA does not require an EIS here was based on an improper application of standards used to judge the forseeability of environmental impacts, from which the NRC erroneously concluded that the risk of an air attack at the Oyster Creek facility was too remote and speculative to trigger

NEPA. In addition, the fact that the NRC has taken regulatory action to address terrorism under the AEA does not excuse it from its obligation to comply with NEPA. To the contrary, as the Ninth Circuit concluded in San Luis Obispo Mothers for Peace v. NRC, supra, 449 F.3d 1030, these actions reflect the NRC's own recognition that the issues raised by New Jersey identify a potential for harm that is sufficiently foreseeable to require review under NEPA. Finally, the NRC cannot obviate its NEPA obligation to prepare an EIS by adopting rules limiting the scope of review on a relicensing application, or by claiming that it has addressed the same issues in other contexts. NEPA creates a separate statutory obligation that cannot be limited by agency rule adoptions or actions taken under the agency's own statutory authority. Consequently, the NRC's denial of New Jersey's request for an EIS was improper and should be reversed.

STATEMENT OF FACTS

On July 22, 2005, Respondent AmerGen Energy Company, LLC ("AmerGen"), a subsidiary of Exelon Corp., filed an application with the NRC to renew its license to operate Oyster Creek, a nuclear power generating facility located in Lacey Township, New Jersey, and originally licensed by the NRC for 40 years of operation. 70 Fed.Reg. 44,940. Renewal would permit the facility to operate for an additional 20 years. Ibid. On September 15, 2005, the NRC published a notice of acceptance of the application and a notice of opportunity for hearing. 70 Fed.Reg. 54,585.

On November 14, 2005, New Jersey filed a request for hearing and petition for leave to intervene in the proceedings pursuant to 10 C.F.R. § 2.309, in which it raised three contentions (Pa 135-145). NRC's acceptance of any of New Jersey's contentions would have allowed New Jersey to become an intervener. See 10 C.F.R. § 2.309(a). The Board, however, rejected all three of New Jersey's contentions (Board Decision at 47, Pa 96).

This appeal concerns only one of New Jersey's contentions, which questioned the NRC's failure to prepare an Environmental Impact Statement ("EIS") to address the risk of environmental harm from a possible air attack on the Oyster Creek core reactor or spent fuel pool.[2]

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[2]New Jersey's other two contentions challenged the application of an incorrect cumulative usage factor to evaluations of metal fatigue for the reactor coolant pressure

A. The Oyster Creek Facility.

The Oyster Creek facility, which commenced operation in 1969, is the oldest commercial nuclear power plant in the nation still in operation (Amergen License Renewal Application, at 1-7). Oyster Creek is a single unit facility and utilizes a forced circulation boiling water reactor which produces steam for direct use in a steam turbine (GEIS § 2.0, 2-1, Pa 326). Barnegat Bay, the ultimate source of cooling water for the reactor, is accessed via Forked River (GEIS at § 2.1.1, at 2-1, Pa 326).

The Oyster Creek reactor building houses the reactor and its auxiliary systems. The primary containment system consists of the drywell, vent pipes, and a pool of water contained in the absorption chamber Generic Environmental Impact Statement, Supplement 28 for Oyster Creek ("GEIS"), § 2.1.2 at 2-5, Pa 330). The reactor vessel and the reactor recirculation system are contained inside the drywell. See Updated Final Safety Analysis Report for Oyster Creek Nuclear Generating Station, Vol. 1, at 1.2-3 (Pa 317-318). The reactor building encloses the primary containment system, thereby providing a secondary containment. Ibid. In addition, all refueling equipment is inside the building, including the spent fuel storage pool and the new fuel storage

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boundary and associated components, and the adequacy of the application's identification of secondary power sources during blackout, as required by 10 C.F.R. § 50.63. (First NRC decision at 6, Pa 7). The NRC denied these contentions as well.

vault. Ibid.

The primary containment system is a General Electric Mark I design used only in early boiling water reactor plants (GEIS § 2.1.2 at 2-5, Pa 330). Concerns that the Mark I containment design would respond inadequately in the event of a large loss-of-coolant accident were first raised as early as 1972. See IMO Boston Edison Co. (Pilgrim Nuclear Generating Station), 26 N.R.C. 87, 99-102 (1987).

The drywell is a steel pressure vessel with a spherical lower portion and a cylindrical upper portion. The drywell shape resembles that of a light bulb (Oyster Creek Updated Final Safety Report (12/92), at 1.2-4; GEIS § 2.1.2 at 2-6 to 2-7, Pa 331-332). The torus, or pressure absorption chamber, is a steel pressure vessel located below and encircling the drywell, and is approximately half filled with water. Ibid. The torus shape resembles that of a doughnut. Id. The vent system from the drywell terminates, via the vent pipes, below the water level in the torus, so that in the event of a pipe failure in the drywell, the released steam passes directly to the water where it is condensed (GEIS § 2.1.2, at 2-6, Pa 331).

The spent fuel cooling pool at Oyster Creek is an elevated structure, extending approximately 100 feet above ground level, that consists solely of a stainless steel liner, supported by a concrete structure. (Updated Final Safety Analysis Report, §

3.8.4.1.1, at 3.8-69 to 3.8-70, Pa 330). It is separated from the environment only by steel framing, metal siding, and built-up roofing consisting of lightweight concrete on the metal roof decking of the reactor building superstructure (Final Safety Analysis Report Update, 9.1.2.2, at 2.1-3, Pa 396).

The Oyster Creek nuclear power plant is located approximately 60 miles south of New York City, New York, and Newark, New Jersey, and is 50 miles east of Philadelphia, Pennsylvania (GEIS § 2.1.1 at 2-2 and 2-3, Pa 327-328). It is near the Pinelands National Reserve in southern New Jersey, which includes parts of Lacey Township (GEIS § 2.1.1 at 2-3, Pa 328). Oyster Creek is bisected by Route 9, which runs parallel to the Garden State Parkway. Id.

NRC's GEIS for Oyster Creek states that "approximately 4.2 million people live within 50 miles of the site. The population density of 1132 persons per [square mile] is considered a high population..." (GEIS, § 2.2.8.5, at 2-84, Pa 392). Because there are a variety of activities and attractions in the area, peak visitation levels in the vicinity of Oyster Creek during the summer "reach almost 500,000." Id.

B. New Jersey's Contentions.

New Jersey's petition contested the NRC's failure to prepare an EIS to study the environmental effects of an air attack on the Oyster Creek facility. (New Jersey Petition at 4-5, Pa 138-

139). New Jersey contended that such an EIS should have contained, within its examination of "Severe Accident Mitigation Alternatives" ("SAMA's") for Oyster Creek, a design basis threat ("DBT") analysis, and an analysis of mitigation alternatives for core melt sequences resulting from an aircraft attack on the facility. Id.; see also 10 C.F.R. § 51.53(c)(3)(ii)(L)(requiring an applicant to submit for consideration, on relicensing, an analysis of SAMA's that have not previously been considered). New Jersey's petition further contends that the license renewal submission should have included the same analysis for the spent fuel pool. Id. at 5.

C. NRC Staff Review of the Oyster Creek License Renewal, and the Statutory and Regulatory Process Within Which It Was Conducted.

As stated in New Jersey's contentions, the NRC "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." (New Jersey Petition at 4, Pa 140). New Jersey's contentions are best understood in light of a brief explanation of the NRC's relicensing review here, and of the statutory and regulatory framework in which the NRC's relicensing proceedings are conducted.

1) Statutory and Regulatory Framework.

The EIS which New Jersey has asked the NRC to perform is an analysis document required by NEPA when a federal agency undertakes a major action that will have an impact on the human

environment. 42 U.S.C. § 4321 et seq. The EIS is "an action forcing device" designed to ensure that the environmental "policies and goals" of NEPA are incorporated into federal programs. 40 C.F.R. § 1502.1. Its function is to provide "full and fair discussion of significant environmental impacts" and to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." Id.[3]

The NRC has adopted rules to guide its implementation of NEPA at 10 C.F.R. § 51.1(a) et seq. The environmental review conducted in accordance with these rules is separate from the NRC's "technical review of the license renewal application(,)" which determines compliance with public health and safety requirements. I/M/O Florida Power & Light Co. (Turkey Point) v. NRC, 54 N.R.C. 4, 5 (2001). Those technical requirements are set forth at 10 C.F.R. § 54.1(a) et seq.

The NRC's regulations identify the environmental

[3]When an action is subject to NEPA, an agency may first prepare an Environmental Assessment ("EA"), to determine whether the more detailed analysis provided by an EIS is required. 40 C.F.R. § 1508.9. If the agency finds that an EIS is not required, it may then issue a finding of no significant impact ("FONSI"). 40 C.F.R. §1508.13. If the EA shows that there will be some significant impacts, then the agency is required to draft an EIS. 42 U.S.C. §4223.

information that must be submitted on an application for relicensing at 10 C.F.R. § 51.53(c)(3)(i) and (ii). That rule divides environmental issues for review into Category 1 and Category 2 issues. The environmental report to be prepared and submitted by an applicant for plant relicensing "must contain analyses of the environmental impact of the federal action" for those impacts designated as Category 2 issues. 10 C.F.R. §51.53(c)(3)(ii); see also 10 C.F.R. Part 51, Appendix B, Subpart B (identifying Category 2 issues).

The analyses required for Category 2 issues include a consideration of "severe accident mitigation alternatives," ("SAMA's"), for those issues that have not previously been considered in either an EIS or an EA, as part of the original licensing. 10 C.F.R. § 51.53(c)(3)(ii)(L). The SAMA analysis considers possible plant design modifications in order to determine whether there are alternatives that could lessen the severity of the impacts should an incident occur. (GEIS at 5.2., at 5-4, Pa 346). The NRC's regulations do not require such an analysis for Category 1 issues. 10 C.F.R. § 51.53(c)(3)(i); see also 10 C.F.R. Part 51, Appendix B, Subpart A.

On an application for relicensing of an existing facility, the NRC addresses NEPA's requirement for an EIS by preparing a supplement to its Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants (GEIS),

NUREG-1438, Volumes 1 and 2 (NRC 1996, 1999). See 10 C.F.R. § 51.95(c). This GEIS does not analyze human environmental impacts specifically as to one facility, but looks at impacts that the agency thinks are common to all such facilities. [NUREG - 1437]. NRC Staff, however, is required to "integrate the conclusions" of the GEIS with, among other things, "any significant new information." 10 C.F.R. § 51.95(c)4. The purpose of the review is to develop a "recommendation regarding the environmental acceptability of the license renewal action." Id.

A design basis threat ("DBT") analysis is created by NRC Staff and is defined as "the adversary force composition and characteristics against which nuclear power facility owners must design their physical protection systems and response strategies. See 10 C.F.R. 73.1. A DBT analysis is used for regulatory purposes and should be considered in the SAMA report for plant designs to mitigate the threat..

2). Environmental Review Performed for Oyster Creek Renewal Application.

In performing its environmental review of the Oyster Creek facility, the NRC, applying 10 C.F.R. § 51.95(C), relied on its GEIS for License Renewal of Nuclear Power Plants, supra, NUREG-1438, Volumes 1 and 2. This GEIS concludes that, viewed on a generic basis, environmental risks from sabotage are small, and, further, that this risk is "adequately addressed by a generic consideration of internally initiated severe events." (NRC

Decision at 8, n. 32, Pa 9); GEIS § 5.1.2 at 5-3 to 5-4 (Pa 343-346). Consequently, the Oyster Creek GEIS does not consider, on a site specific basis, the particular vulnerability of the Oyster Creek facility to an air attack on the elevated spent fuel pool or any other portion of the Oyster Creek facility. (AmerGen Answer to New Jersey Petition, at 12, Pa 179).

D. The NRC's Decision.

On December 2, 2005, the Secretary of the NRC referred New Jersey's petition to the Chief Administrative Judge of the Atomic Safety and Licensing Board, ("Board"), and on December 9, 2005, a Board panel was assembled to review New Jersey's contentions and determine whether to grant it intervener status and a hearing. AmerGen (Pa 168) and the NRC Staff (Pa 146) each filed Answers to New Jersey's Petition.

On February 27, 2006, the Board issued a Memorandum and Order denying a hearing on all three of New Jersey's contentions (Board Decision at 47, Pa 96). See 42 U.S.C. § 2021(l) and 10 C.F.R. § 2.309(a). In this same decision, the Board accepted contentions relating to the integrity of the drywell liner, filed by a consortium of public interest groups which included the Nuclear Information and Resource Service ("NIRS").[4] On March 28,

[4]This group also included New Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (referred to collectively by the Board's decision as NIRS). NIRS filed a petition to

2006, New Jersey appealed the Board's denial of its contention to the NRC (Board Decision at 476, Pa 96).

On September 6, 2006, the NRC affirmed the Board's rejection of two of New Jersey's contentions (NRC Decision at 18, Pa 41). New Jersey does not appeal that ruling here. However, the NRC reserved decision on the NEPA question, pending the Supreme Court's ruling on a petition for certiorari in San Luis Obispo Mothers for Peace v. NRC, supra, 449 F.3d 1016, which the Ninth Circuit had decided on June 2, 2006 (NRC Decision at 2, 18; Pa 25, 41). That decision, like the one here, addressed the question of whether NEPA requires an EIS to assess the environmental impact of an airborne attack. The Ninth Circuit concluded that an EIS was in fact required. Ibid. at 1035.

On January 16, 2007, the Supreme Court denied certiorari. Mothers for Peace, supra, cert. den. sub nom. PG & E v. San Luis Obispo Mothers for Peace, -- U.S. --, 127 S.Ct. 1124 (2007). Thereafter, on February 26, 2007, the NRC issued its decision denying New Jersey's petition for hearing on its NEPA-terrorism

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intervene and request for hearing on November 14, 2005. NIRS contended that AmerGen's renewal application does not adequately assure the continued integrity of the drywell liner during the relicensure period, which had been affected by corrosion. The Board granted NIRS's petition for leave to intervene and request for a hearing, but limited NIRS's proposed contentions to its questions concerning the sand bed region of liner, which showed unaddressed corrosion. (Board Decision at 33 (Pa 82), and 44 (Pa 93)).

contention. The NRC's decision expressly rejected the Ninth Circuit's holding in Mothers for Peace, and instead concluded that "NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities." (NRC Decision at 5, Pa 6). Citing its own prior decisions, the NRC found that the possibility of a terrorist attack was "'simply too far removed from the natural or expected consequences of agency action to require a study under NEPA.'" (NRC Decision at 4-5, (Pa 5-6), citing IMO Private Fuel Storage, 56 N.R.C. 340, 349 (2002).

The NRC reasoned that NEPA does not require it to perform an EIS to address the risk of terrorist attack by air, because there is no proximate cause link between an NRC licensing action "and any altered risk of terrorist attack." (NRC Decision at 6, Pa 7) These risks, the NRC concluded, rather depend on "political, social, and economic factors *external* to the NRC licensing process." (NRC Decision at 6-7, Pa 5-6) (emphasis in original). Consequently, the NRC found that the terrorists themselves, not the licensing decision, would be the proximate cause of an attack on an NRC-licensed facility (NRC Decision at 7, Pa 8). The NRC also pointed out that the license renewal would not involve new construction, so that "(t)he terrorism risk at Oyster Creek remains the same during the renewal period as it was the day before when the plant still operated under its original license." (NRC

Decision at 7, n. 25, Pa 8).

In addition to its conclusions regarding foreseeability, the NRC found an EIS-type review of the environmental effects of air attacks to be outside of the scope of NRC review in a license renewal proceeding, because "'(t)errorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to 'the detrimental effects of aging.'" NRC Decision at 5 (Pa 6), citing McGuire/Catawba, 65 N.R.C. at 364. Further, the NRC noted that Staff "'had already performed a discretionary analysis of terrorist acts in connection with license renewal(,)" by preparing a supplemental GEIS for Oyster Creek (NRC Decision at 8-9, Pa 9-10). This analysis, of course, had relied on the NRC's License Renewal GEIS, supra, NUREG-1438, which had concluded, based on a review of factors common to all facilities, that "the risk from sabotage and beyond design basis earthquakes at existing nuclear power plants is small and additionally, that the risks f[ro]m other external events, are adequately addressed by a generic consideration of internally initiated severe accidents." (NRC Decision at 9, n. 32, Pa 10).

The NRC separately addressed New Jersey's contentions regarding the vulnerability of Oyster Creek's spent fuel pool to 'design basis' accidents, and concluded that review of this issue was particularly inappropriate in that the NRC's regulations do not require it to be addressed (NRC Decision at 11, Pa 12). These

regulations define design basis accidents at reactors, and indeed spent fuel storage itself, as "'Category 1' (or generically resolved) issues." See Part 51, Appendix B, Subpart A. (NRC Decision at 11, Pa 12). Because the impacts of these Category 1 issues are described as "small," "no site-specific NEPA review of design basis accidents is required." (NRC Decision at 11, Pa 12). The NRC found that if New Jersey were to seek a more in-depth review, the proper vehicle to seek departure from this process would be "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." (NRC Decision at 11, Pa 12).

Despite concluding that the terrorist attack scenario is too remote to require analysis under NEPA, the NRC's decision nevertheless concluded that a NEPA review would be superfluous for the further reason that the NRC is already thoroughly addressing terrorism concerns by adopting safety requirements pursuant to the AEA. As an example of the actions it has already taken to examine these issues, the NRC points to its own "extensive efforts to enhance security at nuclear facilities, including ...proposing a new and more stringent 'design basis threat rule.'" (NRC Decision at 7, Pa 8). The NRC concluded that "these ongoing post-9/11 enhancements provide the best vehicle for protecting the public." (NRC Decision at 7, Pa 8). The NRC rejected New Jersey's

contention that these actions are at odds with its characterization of terrorist air attacks as "unforeseeable," however, concluding that its own recognition of the terrorist threat in other contexts "does not compel the agency to analyze the consequences of successful attacks at particular sites under NEPA." (NRC Decision at 8, n. 32, Pa 9), citing Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy, 383 F.3d 1082, 1090 (9th Cir. 2004).

E. NRC Actions to Address the Risk of Terrorist Attack.

As the NRC's own decision points out, that agency has made extensive efforts to address the risk of terrorist attack by developing regulations and safety reviews pursuant to the AEA. In Private Fuel Storage, supra, 56 N.R.C. 340, 343 (2002), on which the NRC relies to support its decision here, (NRC Decision at 5, n. 16, Pa 6), the NRC stressed "its determination, in the wake of the horrific 9/11 terrorist attacks, to strengthen security at facilities we regulate." The NRC indicated that it was "currently ... engaged in a comprehensive review of our security regulations and programs, acting under our AEA [Atomic Energy Act]...." authority. Id.

The NRC's orders for increased security measures at nuclear power plants following 9/11 have cited its specific concern over air attacks on those facilities. On March 4, 2002, the NRC issued an order to all operating power reactor licensees, including Oyster Creek. The order included this language:

> On September 22, 2001, terrorists simultaneously attacked targets in New York, N.Y., and Washington, DC, utilizing large commercial aircraft as weapons. In response to the attacks and intelligence information subsequently obtained, the Commission issued a number of Safeguards and Threat Advisories to its licensees in order to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility. [67 Fed. Reg. 9792, listing Oyster Creek at 67 F.R. 9794] (emphasis supplied)].

The NRC has included identical language in at least two subsequent orders to licensees, including one issued to Oyster Creek on January 13, 2003, 68 Fed. Reg. 1643-44, and on May 7, 2003. 67 Fed. Reg. 24510 and 24512. The NRC similarly raised concerns about air attacks in revisions to its Design Basis Threat rules it adopted on January 29, 2007, in which it stated that it had "conducted detailed site-specific engineering studies of a limited number of nuclear power plants to assess potential vulnerabilities of deliberate attacks involving a large commercial aircraft." 72 Fed. Reg. 12705, 12711. See also Riverkeeper, Inc. v. Collins, 359 F.3d 156, 160-161 (2d Cir. 2004) (citing NRC director's statement that NRC "had taken at least three specific actions to respond to the threat" of terrorist air attacks on nuclear power plants since 9/11); Mothers for Peace, supra, 449 F.3d at 1024 (discussing the NRC's consideration of revisions to the current NRC security requirements), and the NRC's denial of rulemaking petitions by Westchester County, New York, and Brick Township, New Jersey, 71 Fed. Reg. 74853 (discussing the NRC's issuance of "more than 35

Advisories, Orders and Regulatory Issue Summaries to further strengthen security at U.S. power reactors."). The NRC's efforts to address terrorism, however, continue to exclude development of an EIS to address the environmental risks presented by attacks at particular facilities.

LEGAL ARGUMENT

POINT I

THE NRC ERRED, AS A MATTER OF LAW, IN DENYING A HEARING ON NEW JERSEY'S CONTENTION THAT THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRES AMERGEN TO SUBMIT AN EIS ADDRESSING THE ENVIRONMENTAL IMPACTS OF AN AIR ATTACK ON THE BASIS THAT SUCH ATTACKS ARE TOO REMOTE AND UNFORESEEABLE TO REQUIRE EVALUATION.

The NRC rejected New Jersey's Petition and Hearing Request, concluding that NEPA does not require an EIS to evaluate the risk of terrorist attack by air on a licensed nuclear facility. More specifically, the NRC deemed this risk "too far removed from the natural or expected consequences of agency action" to warrant a study of its environmental consequences. (NRC Decision at 6, Pa 7). The NRC's analysis, however, misapplies established theories of causation in order to artificially narrow those instances in which NEPA applies. Moreover, the NRC's conclusion is completely at odds with its own actions and statements in other contexts, which clearly recognize the importance of addressing terrorist risks, including the risk of an airborne attack. See, e.g., Riverkeeper, Inc. v. Collins, supra, 359 F.3d at 160-61; see also Order of the NRC, 67 Fed. Reg. 9792 (March 4, 2002).

The Ninth Circuit has recently reversed another NRC ruling following this same approach in San Luis Obispo Mothers for Peace, supra, 449 F.3d 1016. In that case, the court concluded

that "the possibility of terrorist attack is not so 'remote and highly speculative' as to be beyond NEPA's requirements." Id. at 1031. For the reasons that follow, the NRC's ruling that, as a matter of law, the risk of environmental damage from an air attack on the Oyster Creek nuclear power plant is too "speculative" and "theoretical" to warrant review under NEPA, is unreasonable, as well as arbitrary and capricious, and should be reversed.

A. NEPA Requires the Preparation of an EIS Evaluating the Environmental Impacts of an Air Attack on a Nuclear Power Plant as Part of the NRC's Relicensing of the Oyster Creek Nuclear Power Plant.

1. The Risk of Environmental Damage from an Air Attack on a Nuclear Facility Is Not Too Remote to Trigger NEPA.

The National Environmental Policy Act, ("NEPA"), 42 U.S.C. § 4321 et seq., requires federal agencies to take a "hard look" at possible environmental consequences prior to taking actions that may have a significant impact on the human environment. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). NEPA implements its mandate by requiring federal agencies to prepare and consider a detailed EIS prior to taking any proposed major federal action significantly affecting the quality of the human environment. Id. at 348-49; 42 U.S.C. § 4332(1)(C). NEPA does not call for an agency to reject an action that has environmental impacts, but rather "merely prohibits uninformed - rather than unwise - agency action." Robertson, supra, at 351.

A major federal agency action will trigger NEPA if it

significantly affects the quality of the human environment. 42 U.S.C. § 4332(1)(C). To show that an action will significantly affect the quality of the human environment, the plaintiff must allege facts that, if true, would show that the proposed project *may* significantly degrade some human environmental factor. Sierra Club v. US Forest Service, 843 F.2d 1190, 1193 (9th Cir. 1988). If an environmental effect is reasonably foreseeable, NEPA is triggered. City of Oxford v. FAA, 428 F.3d 1346, 1353 (11th Cir. 2005); Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 958 and 960 (9th Cir. 2003).

The NRC has adopted regulations to govern its implementation of NEPA. See 10 C.F.R. § 51.1 et seq. Nevertheless, the requirement for an EIS, as established by NEPA, exists independent of that agency's authorizing legislation, provided by the AEA. Thus, the NEPA obligation cannot be eliminated, or unduly limited, by the agency's own regulatory requirements. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 741 (3d Cir. 1989); see also Mothers for Peace, 449 F.3d at 1020 (stating that "the NRC does not contest that the two statutes impose independent obligations, so that compliance with the AEA does not excuse the agency from its NEPA obligations.").

In concluding that the risk of terrorist attack is too remote to require review under NEPA, the NRC declined to follow the Ninth's Circuit's holding to the contrary in Mothers for Peace,

supra, 449 F.3d at 1019 (NRC Decision at 4-5, Pa 5-6). Like the case now before this Court, Mothers for Peace concerned "whether the likely environmental consequences of a potential terrorist attack on a nuclear facility must be considered in an environmental review required under the National Environmental Policy Act." Id. at 1019. The Ninth Circuit concluded that "(t)he appropriate inquiry is ... whether such attacks are so 'remote and highly speculative' that NEPA's mandate does not include consideration of their potential environmental effects." Id. at 1030, citing Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980). The Ninth Circuit found that they were not.

In reaching this conclusion, Mothers for Peace took particular note of statements by the NRC highlighting its own "efforts to undertake a 'top to bottom' security review against this same threat." Id. at 1031. As the decision notes, "The NRC's actions in other contexts reveal that the agency does not view the risk of terrorist attacks to be insignificant." Id. at 1032. Based on increased risks of terrorism and the NRC's own actions showing that it recognized those risks, the Ninth Circuit concluded "that it was unreasonable for the NRC to categorically dismiss the possibility of terrorist attack on the Storage Installation and on the entire Diablo Canyon facility as too 'remote and highly speculative' to warrant consideration under NEPA." Id. at 1030.

2. The NRC Erroneously Concluded That NEPA Does Not Apply Based on a Misapplication of Principles of Proximate Cause.

The NRC's decision here rejected the Ninth Circuit's ruling in Mothers for Peace because it found, among other things, that "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 terrorist attack." (NRC Decision at 6, Pa 7). In short, the NRC's decision concludes 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." (NRC Decision at 7, Pa 8).

In support of its analysis of the proximate cause issue, the NRC relies on two decisions of the United States Supreme Court, Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766 (1983), and Department of Transportation, 541 U.S. 752 (2004). Both cases stand for the general principle that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause,' analogous to the "'familiar doctrine of proximate cause from tort law.'" Department of Transportation, supra, 541 U.S. at 767, quoting Metropolitan Edison, supra, 541 U.S. at 774. However, both decisions employ a proximate cause analysis in an effort to address cause and effect relationships that are far more attenuated than the one presented here. Consequently, neither is controlling on the question of whether the

NRC should have prepared an EIS to address the risk of air attack on the Oyster Creek facility.

Metropolitan Edison concerned an attempt to trigger the requirements of NEPA by establishing a causal connection between the relicensing of a nuclear reactor, and the potential for psychological damage to persons anxious about an unrealized possibility of environmental harm from the reactor's operation. Id. at 777. The risk of damage alleged in Metropolitan Edison thus did not concern actual damage to the environment from an accident, but the potential for psychological damage to people worried about possible environmental damage that had not occurred.

The Supreme Court distinguished this indirect psychological damage from direct damage to the physical environment, such as that which New Jersey seeks to have assessed in an EIS here. Id. at 775. As the Supreme Court recognized, because a "risk" concerns damage that has not yet occurred, "a risk of an accident is not an effect on the physical environment." Id. (emphasis in original). The Court further noted that "(a) risk is, by definition, unrealized in the physical world. In a causal chain from the renewed operation of (Three Mile Island) to psychological health damage, the elements of risk and its perception by (the public) are necessary middle links." Id. at 775. The Court found "that the element of risk(,)" as opposed to actual environmental impact, "lengthens the causal chain beyond the reach of NEPA."

Id. at 775. Indeed, the EIS reviewed in Metropolitan Edison had in fact considered the potential for actual physical environmental harm from accidents. Id.

Metropolitan Edison thus concluded that the link between a risk of psychological damage and its purported cause, which was the contemplation of another, unrealized risk, was too attenuated to require compliance with NEPA. The Court cautioned, however, that "(t)he situation where an agency is asked to consider effects that will occur if a risk is realized, for example, if an accident occurs at (Three Mile Island) is an entirely different case." Id. at 775, n. 9. It is this latter type of analysis, involving the analysis of the actual environmental harm that would follow from an air attack, that New Jersey asks the NRC to evaluate in an EIS here.

In rejecting the NRC's proximate cause arguments in Mothers for Peace, the Ninth Circuit observed that the Supreme Court described Metropolitan Edison as involving a chain of three events: "(1) a major federal action; (2) a change in the physical environment; and (3) an effect." Mothers for Peace, supra, 449 F.3d at 1029. The Ninth Circuit pointed out that Metropolitan Edison "was concerned with the relationship between events 2 and 3," which were "the increased risk of accident resulting from the renewed operation of a nuclear reactor" (event 2, the change in the physical environment) and "the decline in the psychological health

of the human population" (event 3, the effect). Mothers for Peace, 449 F.3d at 1029. In contrast, the relationship at issue in Mothers for Peace was between events 1 and 2, that is, the major federal action of licensing the facility, and the change in the physical environment, which was the potential for environmental effects caused by a terrorist attack. Id. at 1030. The same is true here.

The Supreme Court's decision in Department of Transportation v. Public Citizen, supra, 541 U.S. 572, similarly analyzed a cause and effect relationship that has no bearing on the situation here. In that case, objectors sought to require the Federal Motor Carrier Safety Administration ("FMCSA") to perform an EIS to study the environmental impacts of a proposed rule that would establish a registration program for trucks entering the United States from Mexico. Id. at 765. The objectors used a "but for" analysis, reasoning that until FMCSA issued the regulations at issue, Mexican trucks could not enter the United States; therefore, they argued, the increase in truck traffic, and its environmental effects, could be viewed as an impact of the regulation. Id. at 766-67.

The Supreme Court found that the relationship between this federal agency action and the environmental effect was insufficient to trigger NEPA, because the federal agency's authority did not include the power to prevent the new traffic that

would cause the alleged environmental impact. The Court found that the "legally relevant cause" of the increased truck traffic was not the FMCSA's proposed action, but rather separate actions by the President and Congress that authorized this traffic to enter the United States. Because FMCSA had no ability to categorically exclude the Mexican vehicles, or to regulate them in order to mitigate emissions or other environmental effects of increased traffic, the request for an EIS did not meet the "rule of reason," which "ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decisionmaking process." Id. at 767, citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373-74 (1989). In short, preparation of an EIS would not fulfill the purpose of NEPA, since FMCSA "simply lacks the power to act on whatever information might be contained in the EIS." Department of Transportation v. Public Citizen, supra, at 768.

Here, in contrast, the NRC is the entity charged with ensuring the environmental safety of the facilities it licenses. Its action will determine whether the Oyster Creek facility will continue to operate and what, if any, mitigation measures will be required. Consequently, preparation and analysis of an EIS would fulfill the aim of NEPA to ensure that the NRC takes a "hard look" at the environmental effects of relicensing in light of public input. See Robertson v. Methow Valley Citizens Council, supra, 490

U.S. at 339.

The NRC also attempts to justify its conclusion on the basis that intentional acts of "third party miscreants" are too remote and unforeseeable to require a study under NEPA (NRC Decision at 5-6, Pa 6-7). However, the criminal acts of third parties cannot be dismissed as being unforeseeable as a matter of law. To the contrary, the Supreme Court has held, in the context of a negligence action under the Federal Employers Liability Act, that "(t)he fact that 'the foreseeable danger was from intentional criminal misconduct is irrelevant ...'" to the existence of "a duty to make reasonable provision against it." Harrison v. Missouri Pacific Railroad Co., 372 U.S. 248 (1963), citing Lillie v. Thompson, 332 U.S. 459, 462 (1947). The NRC's reliance on the intentional nature of an air attack to support its conclusions regarding foreseeability therefore is misplaced.

The NRC's refusal to perform an EIS to study the environmental impact of a terrorist air attack relies on its legal conclusion that, "as a general matter, NEPA imposes no legal duty on the NRC to consider intentional malevolent acts ... in conjunction with commercial power reactor license renewal applications." See NRC Decision at 5, (Pa 6), citing McGuire/Catawba, supra, 5 N.R.C. at 365. Similarly, in Private Fuel Storage, 56 N.R.C. 340, 347 (2002), cited generally in the Decision of the NRC at 5, n. 16, (Pa 6), the NRC concluded that "an

EIS is not an appropriate format to address the challenges of terrorism." Thus, as it did in the decision reversed by Mothers for Peace, the NRC has denied New Jersey's petition for an EIS "by simply declaring, without support that, as a matter of law, the possibility of a terrorist attack ... is speculative and simply too far removed from the natural consequences of agency action." Mothers for Peace, supra, at 1030, citing Private Fuel Storage, supra, 56 N.R.C. at 349. The NRC's legal conclusion is unreasonable and violates NEPA both because it fails to address the foreseeable risk of environmental harm posed by the design and location of Oyster Creek, and because it is at odds with the NRC's own actions to address this threat. The NRC's denial of New Jersey's request for a hearing therefore should be reversed.

3. The NRC's Own Treatment of Terrorist Issues for Purposes Other Than NEPA Compliance Reveals Its Recognition That the Risk of Air Attack is Foreseeable.

Although the NRC denied New Jersey's request for an EIS on the basis that the risk of an air attack is too remote and speculative to require review under NEPA, that agency has, at the same time, undertaken extensive efforts to prevent airborne terrorist attacks on nuclear facilities in the context of its authority under the AEA. For example, the NRC's decision denying New Jersey's petition cites its "extensive efforts to enhance security at nuclear facilities," including its proposal of a new, more stringent "design basis threat" rule. (NRC Decision at 7, Pa

8); see also Mothers for Peace, supra at 1031, n. 8. Despite these actions, the NRC nevertheless continues to insist that it is not required to prepare an EIS addressing the potential environmental impact of an air attack at Oyster Creek because it finds such an event too remote and speculative to trigger NEPA.

In Mothers for Peace, the Ninth Circuit took issue with the inconsistency of this approach. As that Court stated, "it appears as though the NRC is attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are 'remote and highly speculative' for NEPA purposes." Id. at 1031. Based largely on this inconsistency, the Court found that the NRC's categorical refusal to consider the environmental impact of terrorist attacks was unreasonable. Id. at 1035. Similarly, in Limerick Environmental Action, Inc. v. NRC, supra, 869 F.2d at 713, this Court found that evidence of regulatory measures undertaken by the NRC to address a risk of severe accidents was relevant to the question of whether the environmental impact of such accidents was sufficiently foreseeable to trigger NEPA requirements. In that case, the NRC had undertaken regulatory measures in response to concerns raised by the accident at Three Mile Island. As this Court observed, "an across-the-board conclusion that the risks of severe accidents are remote and speculative, even if it had been

made, would fly in the face of the expenditure of tens of millions of dollars" to comply with additional safety requirements imposed by the NRC. This Court further noted that, "(a)s the NRC itself has indicated with regard to emergency planning, these 'regulations are premised on the assumption that a serious accident might occur.'" Id. at 740, quoting IMO Philadelphia Electric Co. (Limerick Generating Station), 22 N.R.C. 681, 713 (1985).

It is illogical for the NRC to treat the threat of terrorist attack as being extremely serious and foreseeable in the regulatory context, while at the same time insisting that the threat of an air attack at Oyster Creek is too speculative and theoretical to require it to prepare an EIS to comply with NEPA. Because the NRC's decision here is not only unreasonable as a matter of law, but also arbitrary and capricious, it should be reversed.

POINT II

THE NRC'S REGULATIONS ESTABLISHING THE SCOPE OF ITS REVIEW ON A RELICENSING PROCEEDING DO NOT PRECLUDE THE REVIEW OF THE ENVIRONMENTAL IMPACTS OF AN AIR ATTACK UNDER NEPA.

The NRC attempts to avoid NEPA's requirement for an EIS by concluding that the issues raised by New Jersey are beyond the scope of a license renewal proceeding. More specifically, the NRC concluded that New Jersey's petition did not raise issues related to the detrimental effect of aging on the facility, which is the issue addressed on a license renewal (NRC Decision at 5, Pa 6). The NRC concluded that if New Jersey wished to expand the relicensing inquiry beyond that covered by a GEIS, it would have to file a petition to change the NRC's rules (NRC Decision at 11, Pa 12).

Contrary to the NRC's assertions here, its regulations do provide for the consideration of new information regarding environmental risks specific to a facility, even on renewal of a license. 10 C.F.R. § 51.53(c); 10 C.F.R. §52.95(c). Indeed, if the NRC were to adopt regulations calling for it to ignore this information, they would be contrary to the independent statutory requirements of NEPA. See Limerick, supra, 869 F.2d at 741. Therefore, the NRC's rejection of New Jersey's petition for an EIS addressing these environmental impacts should be reversed.

1. The NRC's Regulations Governing Relicensing Provide for the Analysis of the Risks of Attack on a Facility.

The NRC's regulations governing environmental review on relicensing proceedings do provide for the development and consideration of new information pertaining to environmental impacts, such as that which New Jersey seeks here. For example, 10 C.F.R. § 51.53(c)(3)(ii)(L) requires an applicant for relicensing to submit "a consideration of alternatives to mitigate severe accidents" in those instances where "staff has not previously considered severe accident mitigation alternatives for the applicant's plant in an environmental impact statement or related supplement or in an environmental assessment...." Moreover, the NRC's regulations call for staff evaluation and supplementation of the GEIS in light of "any new information." 10 C.F.R. § 51.95(c)(4).

As the NRC itself noted in Turkey Point, supra, 54 N.R.C. at 17-18, the information in a GEIS must be supplemented for each individual renewal application, as follows:

> Applicants must, ... provide a plant-specific review of all environmental issues for which our Commission was not able to make environmental findings on a generic basis. Our rules refer to these as "Category 2" issues. See 10 C.F.R. Part 51, Subpart A, App. B. In other words, if the severity of an environmental impact might differ significantly from one plant to another, or, if additional plant-specific measures to mitigate the impact should be considered, then

> the applicant must provide a plant-specific analysis of the environmental impact.

The NRC's regulations also allow for the consideration of supplemental information for Category 1 issues. See Id. (providing that, "even where the GEIS has found that a particular impact applies generically (Category 1), the applicant must still provide additional analysis in its Environmental Report if new and significant information may bear on the applicability of the Category 1 finding at its particular plant."). No such information was submitted here by AmerGen, or reviewed by NRC, to evaluate environmental risks or mitigation alternatives for air attacks at the Oyster Creek facility.

The NRC's regulations governing relicensing proceedings thus provide a vehicle for the creation of a site-specific EIS to consider the environmental impacts of an air attack. See 10 C.F.R. § 51.95(c)(4). It becomes clear, therefore, that the NRC's real reason for denying New Jersey's petition is its categorical refusal, as a matter of law, to consider environmental risks posed by possible terrorist air attacks as proper subjects for NEPA review. See Mothers for Peace, supra, 449 F.3d at 1027. For the reasons set forth in Point I, however, the likelihood of an air attack clearly is not so remote and unforeseeable as to excuse the NRC from reviewing this risk in an EIS under NEPA. Therefore, the NRC's rejection of New Jersey's petition is not only unreasonable as a matter of law, but also is arbitrary and capricious, and

should be reversed.

2. NRC Regulations Limiting the Scope of NEPA's Applicability to Exclude Foreseeable Environmental Risks Would Violate the Requirements of that Act.

It is clear from the foregoing that the NRC's existing regulations are consistent with undertaking the EIS analysis that New Jersey seeks in this relicensing proceeding. Indeed, regulations foreclosing an inquiry otherwise required by NEPA would violate that Act. The obligation imposed by NEPA is separate and independent from the NRC's authority under the AEA. Limerick Ecology Action, Inc. v. NRC, supra, 869 F.2d at 741; San Luis Obispo Mothers for Peace v. NRC, supra, 449 F.3d at 1020. As this Court has stated, "there is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA. In addition, there is no language in AEA that would indicate AEA precludes NEPA." Limerick, supra, at 729.

As this Court has recognized, "[I]t is axiomatic that federal regulations can not 'trump' or repeal Acts of Congress." IMO Complaint of Nautilus Motor Tanker Co., 85 F.3d 105, 111 (3d Cir. 1996). The NRC cannot excuse its failure to comply with NEPA, which is a federal statute, based on limits imposed on its relicensing review by regulations it has adopted under the AEA.

POINT III

THE FACT THAT THE NRC'S ACTION CONCERNS THE RELICENSING OF AN EXISTING FACILITY IS IRRELEVANT TO THE EXISTENCE OF THE NRC'S OBLIGATION UNDER NEPA TO PREPARE AN EIS.

Among the reasons advanced by the NRC to support its refusal to prepare an EIS to address the effects of an air attack on Oyster Creek is its conclusion that the relicensing of that facility does not create any new or changed potential for environmental harm. More specifically, the NRC found that because the renewal of AmerGen's license will not involve additions or changes to the Oyster Creek facility, relicensing will not result in the creation of "a new 'terrorist target.'" (NRC Decision at 7, n. 25, Pa 8). The NRC therefore concluded that "(t)he terrorism risk at Oyster Creek remains the same during the renewal period as it was the day before when it operated under its original license." Id.

The NRC's analysis reflects an apparent attempt to infer, without expressly so stating, that its relicensing of Oyster Creek is not a major federal action triggering NEPA. See 42 U.S.C. § 4332(1)(c). However, the likelihood that the Oyster Creek facility will be relicensed without modification does not alter the fact that, by authorizing a facility to operate for another 20 years, the NRC has taken an action that has a significant impact on the human environment requiring review under NEPA. See Robertson v.

Methow Valley Citizens Council, supra, 490 U.S. at 339. Allowing an additional 20 years of operation clearly creates additional potential for events causing environmental harm, such as an air attack. Consideration of these impacts is particularly important and appropriate where, as here, the concern is one that was not addressed in an earlier EI or EIS, because it was not considered a risk at the time of Oyster Creek's initial licensing. See 10 C.F.R. § 51.53(c).

The NRC's own rules provide for the evaluation of these environmental impacts as a necessary element of relicensing review. Most notably, the NRC requires a consideration of severe accident mitigation alternatives on relicensing where staff "has not previously considered" such alternatives. 10 C.F.R. § 51.53(c)(3)(ii)(L). The NRC itself has stated that the environmental analysis it must undertake on a renewal application is designed to identify "possible environmental impacts, generic and plant-specific, that could result from an additional 20 years of nuclear power plant operation." Turkey Point, supra, 54 N.R.C. at 17 (Pa).

The NRC further has expressly recognized that analysis of design basis risks, such as the risk of terrorist attacks, should be treated in the same way on an application for relicensing as it is for new facilities. Specifically, in its response to public comments on its recent revisions to the Design Basis Threat ("DBT")

rules, 10 C.F.R. § 73.1, the NRC stated its agreement with commenters "that the radiological sabotage DBT should be uniformly applicable to new and currently operating nuclear power plants." Consequently, the NRC "did not propose different radiological sabotage DBTs for new nuclear power plants in the proposed rule." 72 Fed.Reg. 12,705, 12,716.

In summary, the NRC's regulations requiring an evaluation of environmental impacts and design basis threats on a relicensing proceeding reflects its recognition that the action of relicensing a facility to operate for another 20 years creates additional environmental impacts that trigger the need for NEPA review.

POINT IV

THE NRC'S OBLIGATION TO COMPLY WITH NEPA IS NOT EXCUSED BY OTHER ACTIONS IT HAS TAKEN TO ADDRESS SECURITY AT A NUCLEAR FACILITY.

The NRC found that a NEPA review of terrorism concerns "would be largely superfluous" in light of its ongoing, extensive efforts to address these issues through rulemaking, including the proposal of "a new and more stringent 'design basis threat rule.'" (NRC Decision at 7, Pa 8). The fact that the NRC has concluded that its own regulatory actions under the AEA are the best vehicle to address terrorism, however, does not relieve it from the need to comply with NEPA. Development of an EIS is necessary to ensure that the NRC's relicensing decision fully implements NEPA's goals of causing the agency to take a "hard look" at the environmental impacts of its proposed action, and to take into account public input. Robertson v. Methow Valley Citizens Council, supra, 490 U.S. at 339.

Compliance with NEPA is required "unless specifically excluded by statute or existing law makes compliance impossible." Limerick Ecology Action, supra, 869 F.2d at 729. Although the obligation to comply with NEPA is subject to a "rule of reason" that obviates the need for an EIS where its preparation "would serve 'no purpose' in light of NEPA's regulatory scheme as a whole," Department of Transportation v. Public Citizen, supra, 541 U.S. at 767-68 (citation omitted), that exception does not apply

here.

In Department of Transportation v. Public Citizen, for example, the preparation of an EIS was not required under the "rule of reason" because the agency that was proposing to take action lacked the authority to implement any recommendations that might be received in the EIS process, even if it wished to do so. Id. at 768. Here, in contrast, the NRC has the authority to act. Its denial of New Jersey's request for an EIS rests instead on its determination that the use of AEA rulemaking to address terrorism concerns represents a better allocation of its administrative resources. See NRC Decision at 12, citing I/M/O Duke Energy Corporation (McGuire/Catawba), 56 N.R.C. 365 (2002) (Pa 13), (concluding that "it is sensible not to devote resources to the likely impact of terrorism during the licensure renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities.'"). The NRC's concerns with protecting its own administrative resources and choice of administrative procedures cannot excuse compliance by application of the "rule of reason."

The NRC is also incorrect that the preparation of an EIS would be superfluous. The two goals of NEPA are, first, to require the agency to "consider every significant aspect of the environmental impact of a proposed action" and, second, to "inform the public that it has indeed considered environmental concerns in

the decisionmaking process." Baltimore Gas & Elec. Co. v. NRDC, 462 U.S. at 67, 97 (1983); accord, Concerned Citizens Alliance v. Slater, 176 F.3d 686, 705 (3rd Cir. 1999). The fact that the NRC may have taken regulatory measures under the AEA to address plant security does not provide assurance that it has evaluated the human environmental impacts of its action, taking into account public input, as required by NEPA.

Similarly, an EIS is not made superfluous by the GEIS review already performed for the Oyster Creek relicensing proceeding, which addressed only the effects of a severe accident common to all nuclear power plants. This generic review did not include an analysis of the environmental effects of an air attack on Oyster Creek, taking into account its particular design, including its elevated fuel pool, or its location near population centers. See NRC Decision at 8 (Pa 9). Thus, neither the adoption of security rules under the AEA, nor a GEIS review limited to the effects of severe accidents without reference to the particular risk of air attack, is an effective replacement for an EIS specific to Oyster Creek.

Finally, the NRC's suggestion that New Jersey file a rulemaking petition seeking revision of the NRC's process and criteria to better address the environmental impacts of an air attack on a nuclear plant does not identify an adequate means to address New Jersey's concerns regarding Oyster Creek (See NRC

Decision at 11, Pa 12). The rulemaking process is, by nature, uncertain both in its timing and its effectiveness. Those uncertainties may cause irreparable harm to New Jersey and its residents, since even if ideas for mitigation measures are generated from public participation in the rulemaking process, it is unlikely that they will be implemented in time to affect the Oyster Creek relicensing decision. See Citizens for Better Environment v. Costle, 515 F.Supp. 264, 274 (D. Ill. 1981) (finding delayed administrative action caused irreparable harm). By denying the statutorily mandated process provided by NEPA in favor of a process that is unlikely to address these environmental concerns, the NRC has abused its discretion.

Indeed, the NRC has recently indicated what its response would likely be to a petition for rulemaking like the one it suggests here. In December 2006, it denied petitions for rulemaking sought by Westchester County, New York, and Brick Township, New Jersey. 71 Fed.Reg. 74848. Each of those petitions sought, in part, revision of the NRC's process and criteria for relicensing on the ground that they do not adequately address security of nuclear plants in light of the 9/11 terrorist attacks. 71 F.R. 74849. The Brick Township petition specifically concerned Oyster Creek. Id. The NRC denied the petitions on the ground that nuclear plant security issues are "monitored through an on-going regulatory process," which is outside the scope of a license

renewal proceeding. 71 Fed.Reg. 74853.

The NRC's rationale for denying these petitions mirrors that which it has applied to deny New Jersey's contentions here. Thus, the NRC's decision in this case, and its denial of the Westchester County and Brick Township petitions for rulemaking, taken together, show that it is unwilling to allow meaningful public input on security issues within relicensing proceedings for nuclear facilities, including Oyster Creek. This approach reflects an unreasonable and incorrect reading of the law, as well as an arbitrary and capricious action that should be reversed.

POINT V

THE SENSITIVITY OF SECURITY INFORMATION IS NOT A LEGITIMATE REASON TO REFUSE TO PERFORM AN EIS ANALYSIS UNDER NEPA.

In addition to finding that the possibility of an air attack is too remote to trigger the application of NEPA, the NRC concluded that the sensitive nature of the information necessary to evaluate that environmental risk makes it inappropriate for consideration in an EIS (NRC Decision at 7-8, Pa 8-9). More specifically, the NRC concluded that, due to the need to safeguard security information for Oyster Creek, any attempt to comply with the public participation requirements of NEPA would be "meaningless or even prohibited...." Ibid. The NRC's reasoning, however, ignores the fact that the purposes of NEPA can be served even where the ability of the government to share information with the public is limited. See Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 143 (1981).

As the Ninth Circuit found in Mothers for Peace, supra, at 1034, the NRC has been required to comply with NEPA, even where the sensitive nature of the information necessary to prepare an EIS required it to be protected from disclosure. In reaching that conclusion, Mothers for Peace relied on the decision in Weinberger, supra, in which the Navy argued that the need to safeguard information on security issues precluded its ability to comply with NEPA. The Weinberger Court, however, found that the classified

nature of the information did not give rise to a complete exemption from NEPA. Id. at 145-146. Because NEPA requires only that an agency comply with its dictates "to the fullest extent possible(,)" Weinberger, supra, at 142, quoting 42 U.S.C. 4332(2)(c), the Court concluded that compliance with NEPA contemplates that "a federal agency might have to include environmental considerations in its decisionmaking process, yet withhold public disclosure of any NEPA documents," in those cases where its analysis involves classified or sensitive information. Id. at 143.

As the Weinberger Court found, NEPA's first goal, which is to ensure that the agency integrates an environmental analysis into its decisionmaking process, can be fulfilled by preparing an EIS even if the agency is not able to provide the EIS to the public. Weinberger, supra, at 143. Further, NEPA's second goal of providing a public process can be advanced even if little information can be publicly released. As noted in Mothers for Peace, supra, 449 F.3d at 1034, "that the public cannot access the resulting information does not explain the NRC's determination to prevent the public from *contributing* information to the decisionmaking process." (emphasis in original). See also, Concerned About Trident v. Rumsfeld, 555 F.2d 817 (D.C. Cir. 1977). Indeed, the very announcement that an EIS considering impacts of terrorist air attacks has been completed will serve one of the functions of a public process, by assuring the public that these

impacts have been considered by the NRC.

New Jersey, of course, does not suggest that all security information necessarily be disclosed to the public. It simply suggests that the NRC is capable of conducting an analysis of the environmental impacts of a terrorist air attack on Oyster Creek that serves the goals of NEPA "to the fullest extent possible," 42 U.S.C. § 4332(2)(c), while still preserving confidentiality of legitimate security information. As NRC Commissioner Gregory B. Jaczko observed in his dissent from the NRC's denial of New Jersey's petition, the NRC "has successfully engaged the public, while protecting security information, in the context of the DBT rulemaking." (NRC Decision, Dissent, at 16, Pa 17). Therefore, the NRC's determination that the sensitive nature of the information involved here precludes the need to prepare an EIS is an unreasonable reading of the law, and is further arbitrary and capricious, and should be reversed.

POINT VI

NEW JERSEY'S CONTENTIONS ARE WITHIN THE SCOPE OF ITS PETITION, AND PRESENT SERIOUS ENVIRONMENTAL CONCERNS BASED UPON SITE SPECIFIC CHARACTERISTICS OF OYSTER CREEK.

For the reasons set forth in Points I through V of this Brief, the environmental questions raised by an air attack scenario are, on their face, of sufficiently immediate concern that NEPA required them to be addressed by the preparation of an EIS in this relicensing proceeding. Nevertheless, in its appeal before the NRC, New Jersey argued in the alternative that the nature of the risk surrounding Oyster Creek also would justify an exercise of the NRC's discretion to consider serious safety, environmental or common defense and security matters in extraordinary circumstances, even where those factors were not specifically recited by the pleadings. (New Jersey Brief on Appeal to NRC at 16, citing 10 C.F.R. § 2.760 (other citations omitted)(Pa 399). These risk factors include the Oyster Creek facility's location near population centers, and the older design of its elevated spent fuel pool, which makes it particularly vulnerable to an air attack. Id.

In denying New Jersey's contention, the NRC concluded that the "special risk factors" identified by New Jersey are inadmissible because they were "not part of the original contention(.)" (NRC Decision at 10, Pa 11). To the extent that the NRC's denial of an EIS relies on this purported defect in New

Jersey's pleadings, however, it must fail. The patently obvious nature of these "special factors" requires their examination by the NRC, which has an affirmative obligation to meet the mandate of NEPA.

As the Supreme Court has recognized, "(p)ersons challenging an agency's compliance with NEPA must 'structure their participation so that it ... alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." Department of Transportation v. Private Citizen, supra, 541 U.S. at 764, citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978). Nevertheless, the Court in Private Citizen recognized that "the agency bears the primary responsibility to ensure that it complies with NEPA(.)" The Court also recognized that "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." Id. at 765.

One of the NRC's objectives in the adjudicatory hearing process is to "produce an informed adjudicatory record that supports agency decisionmaking on matters related to the NRC's responsibilities for protecting public health and safety, the common defense and security, and the environment." NRC Policy Statement on Conduct of Adjudicatory Proceedings, 63 F.R. 41872, 41873 (August 5, 1998). Clearly, the fact that Oyster Creek is

located near the population centers of Philadelphia and New York, along with the fact its older design dates from a time when the risk of terrorist attack was of less concern it is now, are not obscure technical facts that the agency would be unable to identify unless they are specifically spelled out in a hearing request. To the contrary, it is patently obvious from the nature of that inquiry itself that these factors would be critical and necessary to any review of the environmental risks posed by terrorist air attack on the Oyster Creek facility or its elevated fuel pool. Each of those characteristics of the Oyster Creek facility justifies a site-specific, rather than generic, analysis of severe accident mitigation alternatives under NEPA. The NRC thus has failed in its obligation under NEPA, which requires here that it consider the vulnerability of the facility to air attack.

CONCLUSION

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

Respectfully submitted,

ANNE MILGRAM
ATTORNEY GENERAL of NEW JERSEY
Attorney for Petitioner

By: Eileen P. Kelly
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Dated: Sept. 21, 2007

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31.1(c)

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

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

Company: Networks Associates Technologies, Inc.

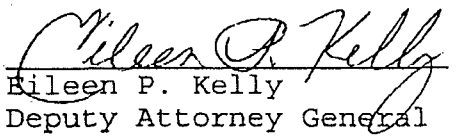
Product: McAfee VirusScan Enterprise 8.0.0

Eileen P. Kelly
Deputy Attorney General

Dated: September 21, 2007
Trenton, New Jersey

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

I, Eileen P. Kelly, a member in good standing of the bar of the United States Court of Appeals for the Third Circuit, certify that this Brief complies with Fed. R. App. P. 32(a)(7)(B) in that the principal portions of the brief contain 11,549 words according to the software program employed by the office of the Attorney General of New Jersey. I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it has been prepared in a monospaced typeface using Word Perfect version 12 with 12 point Courier New font.



Eileen P. Kelly
Deputy Attorney General

Dated: September 21, 2007
Trenton, New Jersey

CERTIFICATE OF SERVICE

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

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Eileen P. Kelly
Deputy Attorney General

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Trenton, New Jersey

CERTIFICATE OF BAR MEMBERSHIP

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

Eileen P. Kelly
Deputy Attorney General

Dated: September 21, 2007

United States Court of Appeals for the Third Circuit

In the Matter of	)	
AMERGEN ENERGY COMPANY, LLC	)	
(License Renewal for Oyster Creek Nuclear Generating Station)	)	
New Jersey Department of Environmental Protection, Petitioner,	)	Petition for Review
v.	)	
United States Nuclear Regulatory Commission, Respondent.	)	

Petitioner New Jersey Department of Environmental Protection hereby petitions the Court for review of the Order of Respondent United States Nuclear Regulatory Commission, dated February 26, 2007, which affirmed the denial by the United States Atomic Safety and Licensing Board of the admissibility of a contention submitted by Petitioner that the National Environmental Policy Act of 1970, 42 U.S.C. 4321 to 4361, requires Respondent Commission to consider the environmental consequences of an attack by air on the Oyster Creek Nuclear Generating Station, located in Lacey Township, New Jersey, as part of its license renewal review for that facility. The Order is attached as Exhibit 1.

STUART RABNER
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April 25, 2007

Pal

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

February 26, 2007 (1:25pm)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

SERVED February 26, 2007

COMMISSIONERS

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-0219-LR
	)	
(License Renewal for Oyster Creek Nuclear Generating Station)	)	
	)	

CLI-07-08

MEMORANDUM AND ORDER

This is a proceeding to renew the operating license of the Oyster Creek Nuclear Generating Station. Several months ago, in CLI-06-24, we affirmed a Licensing Board decision[1] rejecting two contentions proposed by the New Jersey Department of Environmental Protection (New Jersey).[2] We postponed deciding one other question New Jersey raised on appeal[3] – whether the Board properly rejected a contention claiming that the National Environmental Policy Act (NEPA) requires the NRC to consider, as part of its license renewal review, the consequences of a hypothetical terrorist attack on the Oyster Creek reactor. Today, notwithstanding a recent decision by the United States Court of Appeals for the Ninth Circuit,

[1]LBP-06-07, 63 NRC 188 (2006).

[2]CLI-06-24, 64 NRC 111 (2006).

[3]Brief on Behalf of Petitioner New Jersey Department of Environmental Protection on Appeal from Order LBP-06-07 of the Atomic Safety and Licensing Board Denying Request for Hearing and Petition to Intervene (New Jersey Appeal) (March 28, 2006).

holding that the NRC may not exclude NEPA-terrorism contentions categorically,[4] we reiterate our longstanding view that NEPA demands no terrorism inquiry. We also point out that, for license renewal, the NRC has in fact examined terrorism under NEPA and found the impacts similar to the impacts of already-analyzed severe reactor accidents. Hence, we affirm the Board's rejection of New Jersey's NEPA-terrorism contention.

In addition, in today's decision we address, and find moot, pending appeals filed by AmerGen Energy Company, LLC (AmerGen)[5] and the NRC Staff[6] concerning a "dry well liner" contention filed by a coalition of organizations opposed to renewing the Oyster Creek operating license.

I. INTRODUCTION

A. Preliminary Matter

Appeals filed by AmerGen and the NRC Staff both sought reversal of the Board's decision to admit a contention filed by the Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively, "Citizens") on Oyster Creek's plan, or (alleged) lack of a

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[4] *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied sub nom. Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Jan. 16, 2007). Pacific Gas and Electric Company, not the government, filed a certiorari petition in the *San Luis Obispo Mothers for Peace* case. In responding to the certiorari petition, the government made clear its disagreement with the Ninth Circuit decision on the merits, but pointed out that the NEPA-terrorism issue had not yet been addressed directly by other courts of appeals, and thus was not yet ripe for Supreme Court review. *See* Brief for the Federal Respondents, *Pacific Gas & Elec. Co. v. San Luis Obispo Mothers for Peace*, No. 06-466 (Supreme Court, filed December 15, 2006).

[5] AmerGen Appeal of LBP-06-07 (License Renewal Proceeding for the Oyster Creek Nuclear Generating Station, Docket No. 50-219) (AmerGen Notice) (March 14, 2006) and Brief in Support of Appeal from LBP-06-07 (AmerGen Appeal) (March 14, 2006).

[6] NRC Staff Notice of Appeal of LBP-06-07 (NRC Staff Notice) (March 14, 2006) and NRC Staff's Brief in Support of Appeal from LBP-06-07 (NRC Staff Appeal) (March 14, 2006).

plan, for monitoring the reactor's dry well liner.

After AmerGen's and the NRC Staff's appeals were filed, the Board issued a new decision finding that Citizens' contention, as originally admitted, was a contention of "omission" that had later been cured.[7] The Board permitted Citizens to file a new contention based upon AmerGen's docketed commitment to perform periodic ultrasonic testing in the sand bed region of the dry well liner.

We postponed our consideration of the AmerGen and NRC Staff appeals to await the outcome of the process the Board had set in motion. Since then, the Board has granted Citizens' petition to file a new contention on the dry well liner issue.[8] While AmerGen and the NRC Staff have not formally withdrawn their appeals, the Board's latest decision effectively shifts the focus of potential future agency litigation to the newly admitted contention. In recognition of this change, we tie up loose ends today by dismissing the pending AmerGen and NRC Staff appeals – which were directed to Citizens' now-superseded original contention – as moot.

B. Background – New Jersey's NEPA-Terrorism Contention

New Jersey maintains that NEPA requires the NRC to consider the consequences of a terrorist attack on Oyster Creek. Under NEPA, in New Jersey's view, the NRC Staff's environmental analysis ought to have included a more elaborate examination of "Severe Accident Mitigation Alternatives" at Oyster Creek, including an inquiry into the consequences of a potential aircraft attack on the reactor, the vulnerability of the spent fuel pool to terrorist attack

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[7]LBP-06-16, 63 NRC 737 (2006). *See generally Duke Energy Corp.* (McGuire Nuclear Energy Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-02-28, 56 NRC 373, 382-84 (2002).

[8]LBP-06-22, 64 NRC 229 (2006).

and to "design basis" threats,[9] and long-term compensatory measures to defend against terrorism.[10]

The Board held that terrorism and "design basis threat" reviews, while important and ongoing, lie outside the scope of NEPA in general and of license renewal in particular,[11] and rejected New Jersey's proposed NEPA contention.[12]

II. ANALYSIS

New Jersey argues that the Board erred in rejecting its proposed contention regarding the adequacy of AmerGen's Severe Accident Mitigation Alternatives analysis. This contention focused particularly on AmerGen's failure to analyze Oyster Creek's vulnerability to terrorist air attack, including risk of potential damage to the reactor core (based on the specifics of the Oyster Creek design and current design basis threat information), vulnerability of the spent fuel pool, and the sufficiency of interim compensatory measures intended to improve Oyster Creek's damage response capabilities.

Last June, in *San Luis Obispo Mothers for Peace v. NRC*, the Ninth Circuit issued a decision holding that the NRC could not, under NEPA, categorically refuse to consider the consequences of a terrorism attack against a spent fuel storage facility on the Diablo Canyon reactor site in California. New Jersey points to the Ninth Circuit decision as authority for its NEPA-terrorism contention in the current license renewal proceeding.[13] Respectfully, however,

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[9]The "design basis threat" rule describes general adversary characteristics that designated NRC licensees, including nuclear power plant licensees, are required to defend against with high assurance. *See generally* 10 C.F.R. § 73.1.

[10]*See* New Jersey Petition at 3-6 (unnumbered).

[11]*See* LBP-06-07, 63 NRC at 199-204.

[12]*See id.* at 199-211.

[13] *See* New Jersey Department of Environmental Protection's Notice of Pertinent New (continued...)

we disagree with the Ninth Circuit's view. We of course will follow it, as we must, in the *Diablo Canyon* proceeding itself. But the NRC is not obliged to adhere, in all of its proceedings, to the first court of appeals decision to address a controversial question.[14] Such an obligation would defeat any possibility of a conflict between the Circuits on important issues.[15] For the reasons we gave in our prior decisions,[16] and for the reasons the Solicitor General gave in his recent Supreme Court brief in the *Diablo Canyon* case,[17] we continue to believe that NEPA does not require the NRC to consider the environmental consequences of hypothetical terrorist attacks on NRC-licensed facilities.

We find that the Board properly applied our settled precedents on the NEPA-terrorism issue. "Terrorism contentions are, by their very nature, directly related to security and are therefore, under our [license renewal] rules, unrelated to 'the detrimental effects of aging.' Consequently, they are beyond the scope of, not 'material' to, and inadmissible in, a license renewal proceeding."[18] Moreover, as a general matter, NEPA "imposes no legal duty on the NRC to consider intentional malevolent acts . . . in conjunction with commercial power reactor

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[13](...continued)
Case Law Affecting Appeal and Request for its Consideration (June 12, 2006). As pointed out in note 4, *supra*, the Supreme Court recently declined to review the Ninth Circuit decision.

[14]An agency is not required to acquiesce in an unfavorable decision when faced with the same legal issue in another circuit: under preclusion doctrines a court of appeals decision may prevent the government from re-litigating the same issue with the same party, "but it still leaves [the government] free to litigate the same issue in the future with other litigants." *United States v. Stauffer Chemical Company*, 464 U.S. 165, 173 (1984). *See also United States v. Mendoza*, 464 U.S. 154, 160 (1984).

[15] A conflict in the Circuits is a key criterion informing the exercise of the Supreme Court's certiorari jurisdiction. *See* Supreme Court Rules, Rule 10.

[16]*See generally Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002).

[17] *See* note 4, *supra*.

[18]*McGuire/Catawba*, CLI-02-26, 56 NRC at 364.

license renewal applications."[19] "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."[20] "[T]he claimed impact is too attenuated to find the proposed federal action to be the 'proximate cause' of that impact."[21]

Our prior precedents are consistent with Supreme Court NEPA doctrine. In two major decisions – *Metropolitan Edison Co. v. People Against Nuclear Energy* (1983) and *Department of Transportation v. Public Citizen* (2004) – the Court has said that a "reasonably close causal relationship" between federal agency action and environmental consequences is necessary to trigger NEPA; the Court analogized NEPA's causation requirement to the tort law concept of "proximate cause."[22]

The Ninth Circuit brushed aside the Supreme Court's "proximate cause" test as somehow "inapplicable" to NRC licensing decisions.[23] But the Supreme Court has held, unconditionally, that the test is "required."[24] 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 terrorist attack. Instead, the level of risk

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[19] *Id.* at 365.

[20] *Id.*, quoting *Private Fuel Storage*, CLI-02-25, 56 NRC at 349.

[21] *Private Fuel Storage*, CLI-02-25, 56 NRC at 349, citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-75 (1983). *See also Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004).

[22] *Department of Transportation*, 541 U.S. at 767; *Metropolitan Edison*, 460 U.S. 774.

[23] *See* 449 F.3d at 1029.

[24] *Department of Transportation*, 541 U.S. at 767; *Metropolitan Edison*, 460 U.S. 774. 460 U.S. 774, 541 U.S. at 767.

depends upon political, social, and economic factors *external* to the NRC licensing process. [25] It is not sensible to hold an NRC licensing decision, rather than terrorists themselves, the "proximate cause" of an attack on an NRC-licensed facility.

In any event, 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,[26] including (most recently) proposing a new and more stringent "design basis threat rule."[27] These ongoing post- 9/11 enhancements provide the best vehicle for protecting the public.[28] And, as the NRC has pointed out in other cases, substantial practical difficulties

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[25] The terrorism risk at Oyster Creek remains the same during the renewal period as it was the day before when the plant still operated under its original license. In fact, since renewal applications typically are processed before the expiration of the initial license, a plant may continue to operate under the terms of its original license for some time after the renewal decision. Consequently, even if NEPA required a terrorism analysis of the sort advocated by New Jersey, any such analysis would leave Oyster Creek's present operation unaltered.

A license renewal proceeding is distinguishable from the situation considered in *San Luis Obispo Mothers for Peace*, where the NRC had before it a proposal to construct a dry cask storage facility at a nuclear reactor site. Unlike the situation in that case, a license renewal application does not involve new construction. So there is no change to the physical plant and thus no creation of a new "terrorist target."

[26] *See, e.g., Private Fuel Storage*, CLI-02-25, 56 NRC at 343-44.

[27] *See* Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005); Final Rulemaking to Revise 10 C.F.R. 73.1, Design Basis Threat, 72 Fed. Reg. ____ (approved on Jan. 29, 2007).

[28] New Jersey argues that a 10 C.F.R. Part 51 NEPA review differs from a Part 54 review because a Part 54 review "centers on 'the detrimental effects of aging' on the components of the facility." New Jersey Appeal at 9. But New Jersey concedes the limited nature of the Part 51 environmental review, acknowledging that it "focuses on the potential environment impacts anticipated to occur *over the 20 years of proposed license renewal*." *Id.* (emphasis added). The NRC's ongoing security program covers current operations and extends into the renewal period. We do not see the value in diverting limited agency resources from our ongoing anti-terrorist efforts to undertake a special NEPA review of terrorism risks and consequences over the renewal period.

impede meaningful NEPA-terrorism review,[29] while the problem of protecting sensitive security information in the quintessentially *public* NEPA and adjudicatory process presents additional obstacles.[30]

Beyond all of this, and even if as a general matter we were to accede to the Ninth Circuit's view and decide to consider terrorism under NEPA, there is no basis for admitting New Jersey's NEPA-terrorism contention in this license renewal proceeding. As the Licensing Board pointed out, the NRC Staff's Generic Environmental Impact Statement (GEIS) for license renewal has already "performed a discretionary analysis of terrorist acts in connection with license renewal, and concluded that the core damage and radiological release from such acts would be no worse than the damage and release to be expected from internally initiated events."[31] And, as required by the GEIS,[32] the NRC Staff performed a site-specific analysis of

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[29] See, *e.g., Private Fuel Storage,* CLI-02-25, 56 NRC at 350-51. *See also Limerick Ecology Action v. NRC,* 869 F.2d 719, 743-44 (3d Cir. 1989). As in *Limerick Ecology Action,* where the court of appeals upheld an NRC refusal to admit for hearing a NEPA-terrorism contention, it's not clear from New Jersey's contention how the NRC Staff, or the Licensing Board, is to go about assessing, meaningfully, the risk of terrorism at the particular site in question (Oyster Creek).

[30] *See, e.g., Private Fuel Storage,* CLI-02-25, 56 NRC at 354-357.

[31] LBP-06-07, 63 NRC at 201 n.8. New Jersey apparently believes that the NRC's ongoing attention to protecting nuclear facilities against terrorism equates to an obligation to perform a site-specific NEPA-terrorism review. *See* New Jersey Appeal at 21-22. This is not so. The NRC's decision to use its *Atomic Energy Act* authority to require all of its power reactor licensees to take precautionary measures against improbable, but potentially destructive, terrorist attacks does not compel the agency to analyze the consequences of successful attacks at particular sites under NEPA. *See Ground Zero Center for Non-Violent Action v. U.S. Dept. of Navy,* 383 F.3d 1082, 1090 (9th Cir. 2004).

[32] The GEIS provides:

> 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 [C]ommission has long used deterministic criteria to establish a set of regulatory requirements for the physical protection of nuclear power plants from the threat of sabotage, 10 CFR Part 73, "Physical Protection of Plants and
>
> (continued...)

alternatives to mitigate severe accidents.[33] As though the NRC had conducted no site-specific inquiry at all, New Jersey argues that the Board mistakenly relied on a "general rule that plant-specific issues relating to a plant's 'current licensing basis' are *ordinarily* beyond the scope of a license renewal review."[34] According to New Jersey, this reliance was misplaced because of specific distinguishing characteristics of the Oyster Creek site, which make it particularly

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[32](...continued)
Materials", delineates these regulatory requirements. In addition, as a result of the World Trade Center bombing, the Commission amended 10 CFR Part 73 to provide protection against malevolent use of vehicles, including land vehicle bombs. This amendment requires licence[e]s to establish vehicle control measures, including vehicle barrier systems to protect against vehicular sabotage. The regulatory requirements under 10 CFR [P]art 73 provide reasonable assurance that the risk from sabotage is small. Although the threat of sabotage events cannot be accurately quantified, the [C]ommission believes that acts of sabotage are not reasonably expected. Nonetheless, if such events were to occur, the [C]ommission would expect that resultant core damage and radiological releases would be no worse that those expected from internally initiated events.

Based on the above, the [C]ommission concludes that the risk from sabotage and beyond design basis earthquakes at existing nuclear power plants is small and additionally, that the risks f[ro]m other external events, are adequately addressed by a generic consideration of internally initiated severe accidents.

Although external events are not discussed in further detail in this chapter, it should be noted that the NRC is continuing to evaluate ways to reduce the risk from nuclear power plants from external events. For example, each licensee is performing an individual plant examination to look for plant vulnerabilities to internally and externally initiated events and considering potential improvements to reduce the frequency or consequences of such events. Additionally, as discussed in Section 5.4.1.2, as part of the review of individual license renewal applications, a site-specific consideration of alternatives to mitigate severe accidents will be performed in order to determine if improvements to further reduce severe accident risk or consequences are warranted.

Generic Environmental Impact Statement for License Renewal of Nuclear Plants, NUREG-1437, Vol. 1, p. 5-18 (May 1996).

[33] *See* Generic Environmental Impact Statement for License Renewal of Nuclear Plants, Supplement 28 (Oyster Creek Nuclear Generating Station), *Final Report* (January 2007), especially at pp. 5-3 to 5-11 and Appendix G ("NRC Staff Evaluation of Severe Accident Mitigation Alternatives for Oyster Creek Nuclear Generating Station in Support of License Renewal Application").

[34] New Jersey Appeal at 16 (emphasis in original).

vulnerable to terrorist threats. These characteristics, New Jersey argues, justify the exercise of the Commission's "discretion to consider serious safety, environmental or common defense and security matters in extraordinary circumstances."[35]

New Jersey identifies Oyster Creek's special distinguishing characteristics as: the (allegedly) obsolete Mark 1 containment design of the reactor and the elevated spent fuel pool; the location of the reactor, specifically its proximity to both Philadelphia, Pennsylvania and Newark, New Jersey; and the facts that nuclear facilities (purportedly) were among the original al Qaeda targets and that the Coast Guard "has implemented a permanent safety zone" around Oyster Creek because of its finding that there is a "'specific and continuing threat' to Oyster Creek."[36]

We agree with AmerGen[37] that, as a legal matter, the specific characteristics of the Oyster Creek facility now identified by New Jersey as special risk factors amount to new information, not part of the original contention and improperly introduced for the first time on appeal.[38] Moreover, New Jersey's site-specific claims go to the safe *ongoing* operation of Oyster Creek, but are not matters peculiar to plant aging or to the license extension period. If New Jersey believes it has in hand information requiring license amendments or other protective measures at Oyster Creek, it may petition the NRC for relief under 10 C.F.R. § 2.206 (providing for petitions for enforcement relief).

New Jersey also asks the NRC, as part of its NEPA review, to revisit the vulnerability of

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[35] *Id.*

[36] *Id.* at 21.

[37] AmerGen Brief in Opposition to New Jersey Department of Environmental Protection Appeal from LBP-06-07 (Apr. 10, 2006), at 9.

[38] *See USEC Inc.* (American Centrifuge Plant), CLI-06-10, 63 NRC 451, 458 (2006). It is unfair to other litigants and to our licensing boards to consider issues and allegations raised for the first time on appeal.

Oyster Creek's spent fuel pool to "design basis" accidents. In rejecting this aspect of New Jersey's contention as beyond the scope of this proceeding, the Board pointed to existing regulations that define design basis accidents at reactors, as well as spent fuel storage, as so-called "Category 1" (or generically resolved) issues.[39] Our GEIS and our regulations characterize the impacts as "small."[40] So no site-specific NEPA review of design basis accidents is required.[41] 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 adjudicatory contention.[42]

We also agree with the Board's analysis of New Jersey's argument on the adequacy of interim compensatory measures to counter design basis threats. As the Board pointed out, the "design basis threat" – the nature of a terrorist attack that NRC reactor licensees must be prepared to defend against -- is the subject of an ongoing agency rulemaking.[43] In New Jersey's view, this fact should not have barred the admission of New Jersey's proposed contention, because the uncertain conclusion of the rulemaking, both in terms of content and timing, makes the rulemaking an inadequate vehicle for addressing "the imminent risk of

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[39] LBP-06-07, 63 NRC at 201-02.

[40] Part 51, Subpart A, Appendix B.

[41] *See* LBP-06-07, 63 NRC at 201-02.

[42] *See* 10 C.F.R. §§ 2.335, 2.802. *See generally Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 12 (2001).

[43] *See* LBP-06-07, 63 NRC at 203-04, citing Proposed Rule, Design Basis Threat, 70 Fed. Reg. 67,380 (Nov. 7, 2005). In addition, the Board correctly noted that "[w]here, as here, the Commission has initiated rulemaking proceedings that apply to the facility in question and that directly implicate a proposed contention, a Board ordinarily should refrain from admitting that contention." LBP-06-07, 63 NRC at 203 (citation omitted).

irreparable harm posed to Oyster Creek by the threat of terrorist attack by aircraft."[44] But agencies have discretion to proceed case-by-case or by rulemaking. And here, the Commission has determined that a rulemaking is the appropriate vehicle for addressing the current terrorism risk – a risk faced by nuclear facilities in general (and for that matter by other industrial facilities), rather than a risk peculiarly related to operating a nuclear facility beyond its initial license.

As we have previously held, "[p]articularly in the case of a license renewal application, where reactor operation will continue for many years regardless of the Commission's ultimate decision, it is sensible not to devote resources to the likely impact of terrorism during the license renewal period, but instead to concentrate on how to prevent a terrorist attack in the near term at the already licensed facilities."[45]

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[44]New Jersey Appeal at 22.

[45]*McGuire/Catawba*, CLI-02-26, 56 NRC at 365.

III. CONCLUSION

For the foregoing reasons and for the reasons given by the Board, we *affirm* the Board's decision in LBP-06-07 with respect to New Jersey's appeal of the rejection of its first contention (its NEPA-terrorism contention). We *dismiss* as moot the appeals from LBP-06-07 filed by AmerGen and the NRC Staff.

IT IS SO ORDERED.

For the Commission,

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February, 2007.

Commissioner Gregory B. Jaczko, Respectfully Dissenting:

As I indicated in response to the Commission's last Order in this proceeding postponing the decision on the NEPA terrorism issue, I respectfully disagreed with my colleagues then on not quickly resolving the issue, and I continue to respectfully disagree with my colleagues now on the majority's decision to ignore the Ninth Circuit's ruling outside of the Ninth Circuit's geographical boundary.

Following the horrific events of September 11, the Commission worked admirably and diligently to deal with a variety of difficult questions raised regarding issues of terrorism and nuclear energy. The Commission reached a decision regarding the issues of terrorism and NEPA in that context. Since then, the agency successfully walked the difficult line between engaging in public discussion and protecting vital security information in the context of the recent proposed rule on the design basis threat (DBT). Thus, I have confidence in our ability to do the same in the NEPA context without jeopardizing our nation's security.

The Commission, in originally addressing NEPA and terrorism, was faced with a difficult legal issue. But now, the Commission is faced with a policy issue – whether or not to implement the Ninth Circuit's mandate nationwide. I believe doing so is the right policy decision today. The majority's decision not to do so is an unnecessary and risky decision that, unfortunately, will not provide regulatory stability or national consistency.

Moreover, several assumptions must be made in order to support the majority's position – namely that another Circuit will answer this question differently than the Ninth Circuit and then that the Supreme Court will take review of the issue. None of this, however, forecloses the possibility that, in the end, even if all these steps occur as the majority hopes, the Supreme Court will not eventually agree, at least to some extent, with the Ninth Circuit's ruling. Ultimately, the majority position paints a portrait of a long and arduous path filled with

uncertainty and frustration. I am concerned about the implications of such a potentially time-consuming and circuitous path, especially when the Commission could instead, resolve the issue by directing the use of a well-established and traveled road.

While the majority contends that following the Ninth Circuit's mandate nationwide is unnecessary and superfluous, I believe the opposite to be true. Regardless of what eventually is determined to be the "right" legal answer, the practical reality is that the agency must and will find a way to consider the impacts of terrorism in a NEPA analysis, at least regarding applications within the jurisdiction of the Ninth Circuit. Thus, it appears to me to be unnecessary and superfluous to place all non-Ninth Circuit applicants at risk of years of regulatory instability in the hope that a different legal answer is ultimately reached. In the end, the "important questions" surrounding this decision are not important because they are legal, but are important because they have broad policy implications. Thus, I believe the right policy answer is to have a consistent, nationwide approach to a NEPA terrorism analysis.

Furthermore, I also have confidence that this agency is capable of performing a NEPA terrorism review as to any potential application. As the majority notes, in the NRC's Generic Environmental Impact Statement (GEIS) for license renewal, the staff performed a discretionary analysis of terrorist acts in connection with license renewal, concluding that the core damage and radiological release from such acts was not expected to be worse than the damage and release to be expected from internally initiated events. Because the staff has already reviewed this issue to some extent, applying the Ninth Circuit's mandate nationwide should not be particularly challenging – and may, in fact, be satisfied by the GEIS, at least regarding license renewal.

For all of these reasons, I believe it is in the best interest of the agency and its stakeholders to move forward with a discussion of the best way to address this issue rather

than continuing to focus on whether to address this issue. In the long term, one approach for resolution of this issue might be for the Commission to direct preparation of a generic environmental impact statement on the effect of terrorism on nuclear facilities and their surrounding communities. As I mentioned, the agency has successfully engaged the public, while protecting security information, in the context of the DBT rulemaking. Thus, the agency now has the benefit of some experience in this realm. But if this is determined to be the best long-term approach, it will only come after much public discussion and dialogue. I am concerned that belaboring the discussion of whether or not to do this analysis will only lengthen the amount of time before we reach consensus on how to do the analysis. Given this, I believe that the Commission and our stakeholders would be best served by beginning the discussion now.

Until a long-term solution is reached, I believe the best approach in this case and others is to direct the staff to include a terrorism analysis in its NEPA documents (EIS or EA) in each case, preparing a supplement if necessary. The NEPA analysis should discuss, in general terms, what, if any, environmental impacts result from a particular licensing action by terrorism-caused radiation releases, whether better alternatives exist, and whether effective mitigating measures are planned. While any revised NEPA documents would then be open to late-filed contentions, this is not a basis not to proceed with the Ninth Circuit's mandate. Instead, in assessing the appropriate path forward, the Commission should revisit the procedures currently in place regarding access to Safeguards or classified information and create any necessary modifications to them in order to ensure that there is no question that vital security information will be protected.

While this is certainly not the only path forward that would comply with the Ninth Circuit's mandate, I believe it is a consistent and familiar approach that would provide regulatory stability

and NEPA compliance. This approach does not ensure an end to litigation in this area. But it does move us past the legal debate, and the accompanying years of uncertainty, and into the policy debate of where to go from here.

Concurring Opinion of Commissioner Merrifield:

I fully agree with both the reasoning and the outcome of the majority opinion. I write separately to emphasize my strong disagreement with the dissent.

The dissent ignores the compelling reasons not to follow the Ninth Circuit decision in *San Luis Obispo Mothers for Peace* outside of the Ninth Circuit. Our reason for not applying the holding of *San Luis Obispo Mothers for Peace* nationwide is, as the majority opinion states, that the Ninth Circuit decision is wrong and conflicts with Supreme Court precedent, the actual law of the land. The National Environmental Policy Act (NEPA) only requires federal agencies to analyze the reasonably foreseeable environmental effects of proposed federal actions. Thus, in preparing agency NEPA documents we examine the environmental impacts of the proposed action and alternatives, as appropriate. Examining the alleged effects of terrorism in a NEPA document sets the process into a potentially limitless quest to predict how the irrational behavior of terrorism may impact a nuclear facility and then to connect this prediction to the environment surrounding the facility. Unlike traditional matters examined in NEPA documents, the issue of terrorism has no connection to the environment or to the proposed federal action. The proximate cause of any possible environmental effects of a hypothetical terrorist attack would be the terrorist attack, not the NRC licensing action. It is sensible to draw a distinction between the likely impacts of an NRC licensed facility and the impacts of a terrorist attack on the facility. Absent such a line, the NEPA process could become truly bottomless, subject only to the ingenuity of those claiming that the agency must evaluate this or that potential adverse

effect, no matter how indirect its connection to agency action.

The dissent asserts that because we were successfully challenged in the Ninth Circuit, we should apply this erroneous decision nationwide in order to avoid "regulatory uncertainty." The logical outgrowth of this position is that any time a party challenges a NRC licensing decision as legally erroneous, we should agree with the party and impose additional requirements and perform additional environmental reviews, not just in the challenged action, but nationwide in the name of regulatory certainty. I'm not sure why, if we were to adopt this position, we should stop at challenges lodged in a court. Perhaps we should revamp our licensing processes nationwide every time we receive a public comment that has generic applicability suggesting that a particular review was insufficient. This would quickly lead not to regulatory certainty, but to regulatory strangulation with an ever increasing regulatory burden not based on ensuring adequate protection of the public health and safety, but rather, based on political expediency.

In my view, the better approach is the approach we have taken in this case. When we were first confronted with the question of whether we should include a terrorism review under NEPA we carefully considered the issue, received input from many stakeholders, and we ultimately determined that such a review was unnecessary. Upon receipt of the Ninth Circuit decision disagreeing with that determination, we carefully considered the decision and decided that our previous determination was still correct. In my mind, this is how we provide regulatory certainty, we do not disturb previous determinations without adequate justification.

The dissent's implication that this issue can be easily resolved by preparing a generic environmental impact statement is simply wrong. There will be nothing easy about resolving this issue on a generic basis. While we may eventually determine that some limited scope rulemaking is the best course to resolve these issues, one cannot ignore the obvious practical

difficulties with this approach. We were able to resolve certain issues related to license renewal generically since, among other reasons, the location of the operating nuclear power plants was known, and the proposed federal action was the same, renewal of an operating license. In order to attempt a generic analysis of all potential impacts of a hypothetical terrorist attack at a hypothetical facility we would presumably have to postulate a location and type of facility that would result in the most significant consequences. Assuming it could be done at all, I think it would tend to lead to an extremely misleading impression of environmental effects. For example, no one is likely to site a category one facility in lower Manhattan. Rather than informing our decision-making about actual environmental consequences of an actual licensing decision, we would be constantly distinguishing the generic analysis to demonstrate why the alleged greater consequences do not apply to any particular facility.

We must comply with this decision in the Ninth Circuit. I believe this decision was wrongly decided, and I do not think other courts reviewing this issue will reach the same result.[46] Unless and until we are forced to comply elsewhere, I am not willing to require this type of review in all currently pending and future licensing decisions nationwide.

[46]This issue is currently being considered by the Court of Appeals of the D.C. Circuit as part of the *Private Fuel Storage* appeal.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
AMERICAN ENERGY COMPANY, LLC	)	Docket No. 50-219-LR
(ALSO KNOWN AS AMERGEN)	)	
	)	
(Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-07-08) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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Evangeline S. Ngbea
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 26th day of February 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 09/06/06

SERVED 09/06/06

COMMISSIONERS

Dale E. Klein, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
AMERGEN ENERGY COMPANY, LLC	)	Docket No. 50-0219-LR
(License Renewal for Oyster Creek Nuclear Generating Station)	)	

CLI-06-24

MEMORANDUM AND ORDER

In this Memorandum and Order, we consider appeals of two Atomic Safety and Licensing Board decisions: LBP-06-07 and LBP-06-11. Both concern an application filed by AmerGen Energy Company, LLC ("AmerGen") for renewal of its operating license for its Oyster Creek Nuclear Generating Station ("Oyster Creek"). The appeals come to us in a rather complicated procedural posture.

In *LBP-06-07*,[1] the Board considered proposed contentions contained in two petitions to intervene filed in this operating license renewal proceeding. The New Jersey Department of Environmental Protection ("New Jersey") filed one petition,[2] and the Nuclear Information and Resource Service ("NIRS"), Jersey Shore Nuclear Watch, Inc., Grandmothers, Mothers and

[1]LBP-06-07, 63 NRC 188 (2006).

[2]Request for Hearing and Petition for Leave to Intervene per 10 CFR 2 – AmerGen Oyster Creek Nuclear Generating Station License Renewal Application – (Docket 50-219) ("New Jersey Petition") (Nov. 14, 2005).

More for Energy Safety, New Jersey Public Interest Research Group, New Jersey Sierra Club, and New Jersey Environmental Federation (collectively, "Citizens"[3]) filed the second.[4] The Board found that New Jersey failed to submit an admissible contention, and denied New Jersey's petition.[5] The Board granted Citizens' petition, finding that a narrowed version of its proposed contention was admissible.[6]

New Jersey has appealed, seeking to revive its three contentions. The first of New Jersey's contentions maintains that the National Environmental Policy Act ("NEPA") requires the NRC to consider the consequences of a terrorist attack on Oyster Creek, as well as appropriate severe accident mitigation alternatives. In connection with its "NEPA-terrorism" contention, New Jersey has asked us to consider a recent Ninth Circuit decision, holding that the NRC cannot categorically refuse to perform a NEPA-terrorism review.[7] Also, the Supreme Court has extended (by 30 days) the August 31 deadline for asking the Court to review the Ninth Circuit decision. As a result of these factors, we postpone our consideration of New Jersey's NEPA-terrorism arguments for now. As for New Jersey's other two contentions, we find the reasons given by the Board for their rejection persuasive, and affirm the Board's decision for these reasons and for the reasons we give below.

AmerGen and the NRC Staff have also appealed, seeking to eliminate Citizens' single

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[3]The Board referred to these groups collectively as "NIRS." The groups now identify themselves collectively as "Citizens" (Citizens' Brief in Opposition to Appeal from LBP-06-07 ("Citizens' Appeal") *passim* (Mar. 24, 2006)), and we will use this designation here.

[4]Request for Hearing and Petition to Intervene ("Citizens' Petition") (Nov. 14, 2005).

[5]LBP-06-07, 63 NRC at 194, 211.

[6]*Id.* at 194, 217, 225-26.

[7]New Jersey Department of Environmental Protection's Notice of Pertinent New Case Law Affecting Appeal and Request for its Consideration (June 12, 2006), citing *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006).

contention. Events have interposed themselves here as well. In response to AmerGen's motion[8] to dismiss Citizens' proposed contention as moot,[9] the Board found the contention indeed moot (based upon the Board's interpretation of commitments made by AmerGen), and therefore subject to dismissal.[10] The Board refrained from issuing an order of dismissal for twenty days to allow Citizens the opportunity to file a new contention, with specific challenges regarding the new information.[11] Citizens did file a new contention,[12] accompanied by a motion seeking leave to supplement[13] this filing to incorporate another newly docketed AmerGen commitment regarding its drywell liner aging management program.[14] In response to this motion for leave to supplement, the Board permitted the parties to make certain limited new

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[8]AmerGen's Motions to Dismiss Drywell Contention as Moot and to Suspend Mandatory Disclosures ("AmerGen Motion to Dismiss") (April 25, 2006).

[9]LBP-06-16, 63 NRC __, slip op. (June 6, 2006).

[10]*Id.* at __, __, slip op. at 2, 9.

[11]*Id.*

[12][Citizens'] Petition to Add a New Contention (June 23, 2006).

[13][Citizens'] Motion for Leave to Supplement the Petition (June, 23, 2006).

[14]Summary of Commitments, Enclosure 2 to Supplemental Information Related to the Aging Management Program for the Oyster Creek Drywell Shell, Associated with AmerGen's License Renewal Application (TAC No. MC7624) (June 20, 2006), ADAMS Accession Number ML061740573.

filings.[15] Citizens made its initial filing,[16] AmerGen[17] and the NRC Staff[18] filed their answers, and Citizens responded to the answers.[19] As a result of these developments, it is premature, and may ultimately prove unnecessary, to decide AmerGen's and the NRC Staff's appeals of LBP-06-07.

In *LBP-06-11*,[20] the Board denied Citizens' motion for leave either to add two contentions or to supplement the basis of its original contention.[21] Citizens filed an "appeal"[22] of this decision with the Commission simultaneously with a motion for reconsideration[23] before the Board; in its appeal, Citizens indicated that its brief on the motion for reconsideration before the Board also serves as the supporting brief for its appeal. The Board has since issued a decision denying Citizens' motion for reconsideration, finding that Citizens had not satisfied the

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[15]Order (Granting NIRS's [Citizens'] Motion for Leave to Submit a Supplement to its Petition) (July 5, 2006). Per the Board's order, AmerGen and the NRC Staff had 25 days to answer, and Citizens then had 7 days to reply to the answers. *Id.* at 4.

[16][Citizens'] Supplement to Petition to Add a New Contention; Preliminary Statement (July 25, 2006).

[17]AmerGen's Answer to Citizens' Petition to Add a New Contention and Supplement Thereto (Aug. 11, 2006).

[18]NRC Staff Answer to Petition to Add a New Contention and Petition Supplement (Aug. 21, 2006).

[19]Citizens' Reply to AmerGen's Answer to the Petition to Add a New Contention and Supplement Thereto (Aug. 18, 2006); Citizens' Reply to NRC Staff's Answer to the Petition to Add a New Contention and Supplement Thereto (Aug. 29, 2006).

[20]LBP-06-11, 63 NRC 391 (2006).

[21]Motion for Leave to Add Contentions or Supplement the Basis of the Current Contention (Citizens' Contention Motion") (Feb. 7, 2006).

[22]Citizens' Notice of Appeal ("Citizens' Notice") (Apr. 6, 2006).

[23]Motion for Reconsideration of Motion to Add New Contentions or Supplement the Basis of the Current Contention and Leave to File Such a Motion ("Citizens' Reconsideration Brief") (Apr. 6, 2006).

requirements for seeking reconsideration.[24]

We find that an "appeal" of LBP-06-11 does not lie under our regulations, and we deny any implicit petition for review of LBP-06-11 arguably contained in Citizens' appeal. Citizens' appeal includes no justification for granting what, under our regulations, could only be considered a petition for interlocutory review.

I. BACKGROUND

A. Regulatory Overview

1. License Renewal Rules.

As part of the NRC's review in a license renewal proceeding, the NRC Staff conducts a health and safety review under 10 C.F.R. Part 54, and an environmental review under 10 C.F.R. Part 51.

The scope of the health and safety review is limited to "those potential detrimental effects of aging that are not addressed by ongoing regulatory oversight programs"; a license renewal review does not revisit the full panoply of issues considered during review of an initial license application.[25] Renewal applicants must demonstrate that they will adequately manage the detrimental effects of aging for all important components and structures,[26] with attention, for example, to "[a]dverse aging effects [resulting] from [potential] metal fatigue, erosion, corrosion, thermal and radiation embrittlement, microbiologically induced effects, creep, and shrinkage,"[27] which "can affect a number of reactor and auxiliary systems, including the reactor vessel, the

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[24]Memorandum and Order (Denying [Citizens'] Motion for Reconsideration) (Apr. 27, 2006) (unpublished) ("Reconsideration Decision").

[25]*Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-01-17, 54 NRC 3, 7, 9 (2001).

[26]*Id.* at 8, citing 10 C.F.R. § 54.21(a) and Final Rule, "Nuclear Power Plant License Renewal; Revisions," 60 Fed. Reg. 22,461, 22,462, 22,463 (May 8, 1995).

[27]*Turkey Point*, CLI-01-17, 54 NRC at 7.

reactor coolant system pressure boundary, steam generators, electrical cables, the pressurizer, heat exchangers, and the spent fuel pool."[28] Further, to the extent that any health and safety analyses performed during the initial licensing process were limited to the initial 40-year license period, the applicant must show that it has reassessed these "time-limited aging analyses" and that these analyses remain valid for the period of extended operation.[29] However, review of a license renewal application does not reopen issues relating to a plant's current licensing basis, or any other issues that are subject to routine and ongoing regulatory oversight and enforcement.[30]

A Part 51 license renewal environmental review has both a generic component and a plant-specific component.[31] In a generic environmental impact statement, the NRC has already considered certain environmental issues common to all (or to a certain category of) reactors. These issues are designated "Category 1" issues, and include such matters as onsite land use, noise, bird collisions with cooling towers, and onsite spent fuel storage.[32] The site-specific environmental review does not routinely reconsider Category 1 issues, but requires applicants (and ultimately the NRC Staff) to assess certain site-specific, "Category 2" issues.[33] As with our

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[28] *Id.* at 7-8.

[29] *Id.* at 8, citing 60 Fed. Reg. at 22,480, 10 C.F.R. §§ 54.21(c), 54.29(a)(2).

[30] *Turkey Point*, CLI-01-17, 54 NRC at 8-9.

[31] *Id.* at 11-12. The generic component is contained in NUREG-1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Plants," Final Report, Vol. 1 ("GEIS") (May 1996). The conclusions of the GEIS were ultimately codified in 10 C.F.R. Part 51. *See* Final Rule, Environmental Review for Renewal of Nuclear Power Plant Operating Licenses, 61 Fed. Reg. 66,537 (Dec. 18, 1996). The site-specific component is addressed in a Supplemental Environmental Impact Statement ("SEIS") to the GEIS, prepared by the NRC Staff.

[32] 10 C.F.R. part 51, Subpart A, Appendix B, Table B-1.

[33] *See* § 51.53(c)(3).

Part 54 review, we have tailored our Part 51 environmental review requirements to provide an efficient and focused renewal-specific review, rather than duplicating the review required for an initial license.[34]

2. Contention Pleading Rules.

To intervene in a Commission proceeding, including a license renewal proceeding, a person must file a petition for leave to intervene. In accordance with 10 C.F.R. § 2.309(a), this petition must demonstrate standing under 10 C.F.R. § 2.309(d), and must proffer at least one admissible contention as required by 10 C.F.R. §§ 2.309(f)(1)(i)-(vi). The requirements for admissibility set out in 10 C.F.R. §§ 2.309(f)(1)(i)-(vi) are "strict by design,"[35] and we will reject any contention that does not satisfy these requirements. Our rules require "a clear statement as to the basis for the contentions and the submission of . . . supporting information and references to specific documents and sources that establish the validity of the contention."[36] "Mere 'notice pleading' does not suffice."[37] Contentions must fall within the scope of the proceeding – here, license renewal – in which intervention is sought.[38]

3. Appeals.

Under our rules, where (as here) the NRC Staff or the license applicant argues that the

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[34] *Id.* at 11.

[35] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for reconsideration denied,* CLI-02-1, 55 NRC 1 (2002). *See also Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP site), CLI-05-29, 62 NRC 801, 808 (2005), citing *Millstone*, CLI-01-24, 54 NRC at 358.

[36] *Arizona Public Service Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, & 3), CLI-91-12, 34 NRC 149, 155-56 (1991). *Accord Clinton*, CLI-05-29, 62 NRC at 808.

[37] *Clinton*, CLI-05-29, 62 NRC at 808, citing *Duke Energy Corp.* (McGuire Nuclear Station, Units 1 and 2; Catawba Nuclear Station, Units 1 and 2), CLI-03-17, 58 NRC 419, 428 (2003).

[38] *See* 10 C.F.R. § 2.309(f)(1)(iii).

Board ought to have rejected all contentions, an appeal lies.[39] An appeal also lies where (as here) a potential intervenor claims that the Board wrongly rejected all contentions.[40] Finally, in cases where an "appeal" does not lie, we have discretion to grant interlocutory review at the request of a party in limited circumstances.[41] However, "[t]he Commission's longstanding general policy disfavors interlocutory review."[42] We recognize "an exception where the disputed ruling threatens the aggrieved party with serious, immediate, and irreparable harm or where it will have a 'pervasive or unusual' effect on the proceedings below."[43] We grant review under the "pervasive and unusual" effect standard "only in extraordinary circumstances."[44]

B. Board Decision in LBP-06-07

The Board found that both New Jersey[45] and Citizens[46] had standing. The Board rejected all of New Jersey's proposed contentions,[47] and admitted Citizens' one proposed contention, in a form narrowed by the Board.[48] Judge Abramson dissented from that portion of

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[39]10 C.F.R. § 2.311(c).

[40]10 C.F.R. § 2.311(b).

[41]10 C.F.R. § 2.341(f).

[42]*Duke Energy Corp.* (Catawba Nuclear Station, Units 1 and 2), CLI-04-6, 59 NRC 62, 70 (2004).

[43]*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-1, 53 NRC 1, 5 (2001).

[44]*Id.*

[45]LBP-06-07, 63 NRC at 194.

[46]*Id.* at 195.

[47]*See id.* at 199-211.

[48]*See id.* at 211-26.

the opinion admitting Citizens' narrowed contention.[49] Since we do not decide the appeals challenging the admission of Citizens' contention today, we omit any discussion of the Board's decision on that topic. We also omit any discussion of the Board's decision on New Jersey's NEPA-terrorism contention, since we also do not decide that today.

New Jersey's second and third contentions are the two relevant here:

1. Second contention: In evaluating metal fatigue at Oyster Creek, AmerGen must use a 0.8 "cumulative usage factor"[50] rather than the less restrictive 1.0 factor AmerGen used in its license renewal application;[51] and

2. Third contention: A contractual arrangement between AmerGen and FirstEnergy[52] does not provide adequate assurance that combustion engines Oyster Creek relies on for back-up power will continue to operate, will comply with AmerGen's aging management plan, or will meet regulatory requirements should a corrective action plan ever be required.[53]

With respect to these two contentions, the Board held that controlling NRC regulations and industry standards render AmerGen's 1.0 "cumulative usage factor" permissible on its face,[54] and that New Jersey had raised no specific, non-speculative flaws in the AmerGen-

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[49]*Id.* at 228 n.39, 229-33.

[50]The cumulative usage factor "assists in describing the level of a component's cumulative fatigue damage – that is, damage caused by the repeated stresses of operating load cycles during the component's operating life." LBP-06-07, 63 NRC at 204 n.11.

[51]*See* New Jersey Petition at 6-9 (unnumbered).

[52]FirstEnergy is the owner/operator of the Forked River Combustion Turbines, which provide back-up power to Oyster Creek. *See* LBP-06-07, 63 NRC at 207.

[53]*See* New Jersey Petition at 9-11 (unnumbered).

[54]*See id.* at 204-07.

FirstEnergy contractual arrangement on back-up power.[55]

C. Board Decision in LBP-06-11

The Board denied Citizens' motion to add two new corrosion contentions or to supplement the basis of its originally proposed contention.[56] The Board based its decision on findings that the allegedly new information that prompted Citizens' motion was not, in fact, new, and that, even had the information been new, it did not satisfy our contention admissibility standards.[57] Citizens sought reconsideration, but the Board denied Citizens' motion.[58]

II. ANALYSIS

A. New Jersey Appeal of LBP-06-07

We give "substantial deference" to our boards' determinations on threshold issues, such as standing and contention admissibility.[59] We regularly affirm "Board decisions on the admissibility of contentions where the appellant 'points to no error of law or abuse of discretion.'"[60] We find no error of law or abuse of discretion with respect to the portions of New Jersey's appeal of LBP-06-07 under consideration here (New Jersey's second and third contentions): the Board thoroughly analyzed the issues, the arguments, and the underlying supporting facts and expert opinions. We do not reiterate the Board's reasoning in full below,

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[55]*See id.* at 207-11.

[56]LBP-06-11, 63 NRC at 393, 402.

[57]*Id.* at 396.

[58]Reconsideration Decision at 3-10.

[59]*See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 324 (1999); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-855, 24 NRC 792, 795 (1986).

[60]*USEC Inc.* (American Centrifuge Plant), CLI-06-09, 63 NRC 433, 439 n.32 (2006), citing *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 and 3), CLI-04-36, 60 NRC 631, 637 (2004). *Accord Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

but focus instead on certain questions raised in the appellate briefs.

1. Second Contention: Cumulative Usage Factor.

In its license renewal application, AmerGen employs a cumulative usage factor (one measure of the damage caused by the repeated stresses of operating load cycles) of 1.0.[61] This is less stringent than the 0.8 factor in place when the reactor was built.[62] New Jersey argues that the more stringent 0.8 factor, rather than the 1.0 factor, should have been used in the license renewal application.

On appeal, New Jersey concedes that under NRC rules AmerGen may update its current licensing basis to a new cumulative usage factor, but argues that AmerGen has not complied with or completed the process it must follow to effectuate the update.[63] Docketing a commitment with NRC Staff to update the current licensing basis to the 1.0 factor, as AmerGen has done, is insufficient, according to New Jersey. Moreover, New Jersey says, employing a cumulative usage factor of 1.0, instead of 0.8, results in a 25 percent increase in permitted metal fatigue, which significantly reduces the margin of safety at Oyster Creek. New Jersey asserts that NRC rules require the Director of the NRC's Office of Nuclear Reactor Regulation ("NRR") to evaluate this reduction in the margin of safety[64] and that AmerGen should use the 0.8 factor until the Director has approved a different factor. For these reasons, New Jersey argues that the Board erred in refusing to admit the proposed cumulative usage factor contention.

We agree with AmerGen that on appeal New Jersey (in effect) has rewritten its

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[61]LBP-06-07, 63 NRC at 204, 204 n.11.

[62]*Id.* at 204, 206.

[63]New Jersey Appeal at 24-25. *See* 10 C.F.R. § 50.55a.

[64]New Jersey Appeal at 24-26.

proposed contention, converting it into an impermissible new contention.[65] New Jersey's new contention on appeal focuses on the question of NRR approval. But New Jersey's original proposed contention said nothing about any alleged failure to seek NRR approval of the change in the cumulative usage factor. Additionally, as AmerGen argues, New Jersey misconstrues the pertinent NRC rule – 10 C.F.R. § 50.55a(a)(3). Contrary to New Jersey's interpretation, section 50.55a(a)(3) expressly states that authorization from the NRR Director is required only when "alternatives" to the established requirements in subsections (c), (d), (e), (f), (g), and (h) are used. As NRC Staff puts it, "no . . . approval is required where the updated version of the Code has already been endorsed by Commission regulation."[66] That is the case here. As the Board pointed out, "[u]tilizing a [cumulative usage factor] of 1.0 is permitted under the current, relevant portion of the ASME [American Society of Mechanical Engineers] Code . . . . Moreover, that portion of the Code is specifically referenced in, and endorsed by, 10 C.F.R. § 50.55a(g)(4)."[67] Since AmerGen's change in cumulative usage factor is "already endorsed" by subsection (g), the approval requirements of subsection (a)(3) do not apply. New Jersey's argument thus fails.

Further, in recasting its contention on appeal and arguing only on the basis of that rewritten version, New Jersey does not controvert the Board's decision rejecting the originally proposed version of this contention as "unsupported as a matter of law or fact."[68] We reject the

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[65]*See American Centrifuge Plant*, CLI-06-10, 63 NRC at 458, citing *Louisiana Energy Services, L.P.* (National Enrichment Facility), CLI-04-35, 60 NRC 619, 622-23 (2004), *Private Fuel Storage*, CLI-04-22, 60 NRC at 140, *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-04-2, 59 NRC 5, 8 n.18 (2004), and *Commonwealth Edison Co.* (Zion Nuclear Power Station, Units 1 and 2), CLI-99-4, 49 NRC 185, 194.

[66]NRC Staff's Brief in Opposition to Appeal from LBP-06-07 ("NRC Staff Response") (Apr. 10, 2006) at 9.

[67]LBP-06-07, 63 NRC at 206. As the Board notes, AmerGen's License Renewal Application provides for a cumulative usage factor of 1.0. *Id.* at 205.

[68]*See* LBP-06-07, 63 NRC at 204-07.

new, rewritten proposed contention, and affirm the Board's unchallenged rejection of the original proposed contention.

2. Third Contention: Back-up Power.

New Jersey also appeals the denial of one portion of its proposed contention relating to the combustion turbines that provide backup power for Oyster Creek. The contention had three components in its original formulation.[69] The point New Jersey appeals, which it characterizes as "included" in its original proposed contention, concerns AmerGen's alleged failure to show the existence of an "updated" interconnection agreement requiring FirstEnergy to comply with AmerGen's aging management plan. New Jersey argues that 10 C.F.R. § 54.21(c), which requires an applicant for a license renewal to "demonstrate that . . . (iii) [t]he effects of aging on the intended function(s) will be adequately managed for the period of extended operation,"[70] requires evidence of a contractual obligation to comply with the aging management plan where the alternate power source is not owned and operated by the renewal applicant.[71]

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[69]New Jersey Petition at 7 (unnumbered).

[70]10 C.F.R. § 54.21(c)(1)(iii).

[71]New Jersey argues that the Board erred in finding this proposed contention inadmissible for failure to provide supporting documentation. New Jersey maintains that an updated interconnection agreement has not been finalized and therefore does not exist, and that copies of the current interconnection agreement are considered by AmerGen to be confidential and proprietary and have not been made available. According to New Jersey, the NRC Staff failed to alert the Board to the existence of this confidential, proprietary interconnection agreement, and this deprived the Board of options it would otherwise have had – namely, rejecting, as impossible, the NRC Staff's effort to impose an obligation on New Jersey to have produced the document in order to support its proposed contention; reviewing the document itself *in camera*; or issuing a protective order so that New Jersey could have access to the document. New Jersey protests the "unfairness" of requiring it to cite to or produce a document when it cannot use the Commission's discovery processes unless and until it is allowed to intervene as a party to the proceeding. In response, AmerGen points out that the Commission's hearing notice clearly placed the responsibility for requesting documents, and for contacting the applicant to discuss the need for a protective order with respect to any document, on petitioners. 70 Fed. Reg. 54585, 54586 n.1 (Sept. 15, 2005). AmerGen asserts that, to its knowledge, New Jersey made no such request at any time during the contention

(continued...)

We agree with AmerGen that, as formulated in New Jersey's appeal, the proposed contention – demanding an updated interconnection agreement – does not match any of the three pieces that formed its original proposed contention. Neither New Jersey's petition as a whole nor the proposed contention as originally formulated made any reference to an "updated interconnection agreement."[72] New Jersey cannot raise new contentions for the first time on appeal to the Commission.[73] We note in any event that AmerGen has made a commitment –

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[71](...continued)
filing period. We agree with AmerGen that the onus of obtaining supporting documentation was on New Jersey, and further, that appropriate mechanisms were in place to enable New Jersey to obtain copies of documents necessary to support its proposed contentions. *See American Centrifuge Plant*, CLI-06-10, 63 NRC at 460 ("Under longstanding agency precedent, petitioners and intervenors may request and, where appropriate, obtain – under protective orders or other measures – information withheld from the general public for proprietary or security reasons."). New Jersey never requested the documents.

[72]The original proposed contention read:

> It is [New Jersey's] contention that th[e] arrangement [between FirstEnergy and AmerGen] will NOT assure that:
>
> 1. First Energy [sic] will continue to operate the combustion turbines during the proposed extended period of operation at Oyster Creek.
> 2. The combustion turbines will be maintained, inspected and tested in accordance with AmerGen's aging management plan that, when developed, will become part of the license renewal commitments. There will be a reliance on a competitor to manage and perform this work with little opportunity for AmerGen to oversee any of it.
> 3. All deficiencies encountered by First Energy [sic] in the course of operating, maintaining, inspecting and testing the combustion turbines will be entered into a corrective action program that meets the requirements of 10 CFR 50 Appendix B, Quality Assurance Criteria for Nuclear Power Plants and Fuel Reprocessing Plants.

New Jersey Petition at 7 (unnumbered).

[73]See n.62, *supra*.

which it acknowledges is binding – to ensure adherence to its aging management programs.[74]

Again, by rewriting its proposed contention to convert it into an impermissible new contention and arguing on appeal solely for the new version, New Jersey fails to challenge the Board's rejection of its originally proposed contention. We agree with the Board, for the reasons it gives, that the proposed contention, as originally formulated, lacked factual or expert support, lacked an adequate basis, and did not demonstrate "a genuine issue of material fact or law."[75] As the NRC Staff argues, New Jersey's proposed contention regarding the combustion turbines "fails to reference any factual grounds for disagreement with the aging management plan or AmerGen's assertions about its implementation."[76]

We reject the new proposed contention and affirm the Board's finding in LBP-06-07 that New Jersey's originally proposed contention regarding the combustion turbines was inadmissible.

B. Citizens' Appeal of LBP-06-11

In LBP-06-11, the Board rejected a motion to supplement the basis of Citizens' original contention (on corrosion of the drywell liner) or to add two new contentions. Citizens asked to add certain "previously unavailable information"[77] to support the initial contention; alternatively, Citizens asked to add two new contentions, one "alleging that the proposed corrosion

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[74]AmerGen Opposition at 15, quoting from AmerGen's Brief in Response to Order Directing Supplemental Briefing on Hearing Requests at 9-10 (January 17, 2006).

[75]LBP-06-07, 63 NRC at 209.

[76]NRC Staff Response at 11.

[77]Citizens maintained that the NRC Staff communicated certain "conclusions" during a conference call regarding the Generic Aging Lessons Learned ("GALL") Report. Citizens described these alleged conclusions as decisions by the NRC Staff "that not only is corrosion of the drywell liner within the scope of license renewal proceedings, but the sources of the water which is the root cause of of this corrosion are also included." Citizens' Contention Motion at 10. The Board found that this information was "not new, not materially different from previously available information, and not timely presented." LBP-06-11, 63 NRC at 402.

management of inaccessible areas of the drywell liner is inadequate,"[78] and the second arguing that a "root cause analysis" of the source of the corrosion must be performed.[79]

In its notice of appeal, Citizens states that it is appealing "[o]ut of an overabundance of caution, and in order to ensure that [the group's] rights are preserved."[80] As support for its "appeal," Citizens attaches the same brief to its notice that it filed in support of its (since denied) motion for reconsideration before the Board.[81] Neither the notice nor the brief includes any arguments in support of an "appeal" (as opposed to a motion for reconsideration). While Citizens makes passing reference to 10 C.F.R. §§ 2.311 and 2.341 in its notice, it ignores both the requirements for an appeal under 10 C.F.R. § 2.311, and the requirements for a petition for (discretionary) Commission review under 10 C.F.R. § 2.341.

As the NRC Staff points out, section 2.311 is not applicable to the Board's refusal to supplement the basis of Citizens' contention or to add new contentions because the section applies only where a board decision rules on a request for hearing, petition to intervene, or selection of hearing procedures. It does not authorize appeals from an order like LBP-06-11 refusing to supplement an admitted contention.

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[78]Citizens' Contention Motion at 10. Citizens argued "that the monitoring regime for inaccessible areas of the drywell liner . . . must at least include ongoing, regular, direct measurements of the thickness at all areas where corrosion could have occurred for the life of the plant and clear acceptance criteria for the measurements." *Id.* at 11. The Board found that the information underlying this new proposed contention was "neither new . . . nor materially different than information that was previously available." LBP-06-11, 63 NRC at 397. The Board also found that the submission of the new contention was untimely. *Id.* at 398.

[79]Citizens' Contention Motion at 10-11. In addition to the root cause analysis, Citizens argued that AmerGen must "implement a verifiable program to eliminate leakage of water onto the drywell liner." *Id.* at 13. Again, the Board found that the information underlying this new proposed contention was "neither new . . . nor materially different from previously available information." LBP-06-11, 63 NRC at 400.

[80]Citizens' Notice at 1.

[81]Reconsideration Decision at 3-10.

Although section 2.311 does not apply, 10 C.F.R. § 2.341 – the section of our regulations setting out procedures for petitions for Commission review – conceivably could. But Citizens makes none of the arguments required in a petition for review in either its notice of appeal or its dual-duty "motion for reconsideration" brief. For a viable petition for review – since LBP-06-11 is not a final decision on the merits – Citizens needed to make a case for *interlocutory* review under section 2.341(f).[82] Under section 2.341(f), a petitioner must show that the issue for which interlocutory review is sought: "(i) [t]hreatens the party adversely affected by it with immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision; or (ii) [a]ffects the basic structure of the proceeding in a pervasive or unusual manner."[83] Citizens asserts no immediate and irreparable impact on itself and no pervasive effect on the litigation. Nor is it obvious how Citizens could make such a showing, since it has already successfully intervened in the proceeding on the drywell liner issue.[84] In fact, Citizens makes absolutely no showing (and no argument) to justify interlocutory review. For these reasons, we decline to take up LBP-06-11 on interlocutory review.

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[82]Section 2.341(b)(6) expressly prohibits granting review where a petitioner has simultaneously filed for reconsideration before the Board: "A petition for review will not be granted as to issues raised before the presiding officer on a pending motion for reconsideration." Citizens ought not have filed a simultaneous appeal and petition for reconsideration. But that procedural problem is moot, now that the Board has rejected Citizens' reconsideration motion.

[83]10 C.F.R. § 2.341(f)(2).

[84]*See Private Fuel Storage*, CLI-01-1, 53 NRC at 5 ("We have repeatedly held that refusal to admit a contention, where the intervenor's other contentions remain in litigation, does not constitute a pervasive effect on the litigation calling for interlocutory review.").

CONCLUSION

For the foregoing reasons and for the reasons given by the Board, we *affirm* the Board's decisions in LBP-06-07 with respect to New Jersey's appeal of the rejection of its second and third contentions only and *deny* review of LBP-06-11. Decisions on New Jersey's appeal of the rejection of its first contention and on AmerGen's and the NRC Staff's appeals of LBP-06-07 are *postponed* until further notice.

IT IS SO ORDERED.

For the Commission,

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 6th day of September, 2006.

Commissioner Gregory B. Jaczko respectfully dissents, in part:

I dissent in this order because the NEPA terrorism issue is a significant matter that needs resolution. I believe the agency should conduct a review of the impacts of terrorist attacks on nuclear facilities as part of a NEPA analysis. More importantly, I believe continuing to refuse to consider the environmental effects of terrorist attacks will subject the agency to unnecessary judicial challenges. Thus, I am fully supportive of all efforts to give this matter the thorough and deliberate review warranted.

In addition, I believe that the current uncertainty surrounding the impact of this issue may lead to unnecessary confusion in the review of new reactor licenses. To eliminate this uncertainty, the agency should expeditiously develop a process to review terrorism issues as part of a NEPA analysis. This particular case presents a timely opportunity for the Commission to resolve these matters, providing clarity and certainty for the potential increase in licensing reviews the Commission may conduct in the next few years.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
AMERICAN ENERGY COMPANY, LLC	)	Docket No. 50-219-LR
(ALSO KNOWN AS AMERGEN)	)	
	)	
(Oyster Creek Nuclear Generating Station)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-06-24) have been served upon the following persons by electronic mail this date, followed by deposit of paper copies in the U.S. mail, first class, and NRC internal mail.

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III. A NEPA Review Is Not "Superfluous." NRC May Not Preclude NEPA Review Through Regulations Which Purport to Limit the Scope of a Relicensing Proceeding.

The NRC's decision distinguishes the proceeding here from that considered in Mothers for Peace because it a relicensing proceeding. The NRC concludes that New Jersey's contentions are beyond the scope of a license renewal proceeding because they are unrelated to aging of components of the nuclear facility (NRC Decision at 5) (Pa). The scope to which this risk will be addressed in a relicensing proceeding under the AEA is established by —. In this proceeding, the NRC staff addressed the question of nuclear attacks in its GEIS, which concluded that "the risk from sabotage ... at existing nuclear powers plants is small and additionally, that the risks from other external events, are adequately addressed by a generic consideration of internally initiated severe accidents." NRC Decision at 9, n. 32. The NRC Staff did perform an analysis of alternatives to mitigate such severe accidents. NRC Decision at 8-9.

The NRC also found the relicensing procedure to be distinguishable from the Mothers for Peace scenario to the extent that it does not alter the risk of terrorist attack. Specifically, the NRC based this distinction on the fact that "a license renewal application does not involve new construction. So there is no change to the physical plant and thus no creation of a new 'terrorist target.'" Decision at 7, n. 25.

The NRC's decision claims that a NEPA review "would be

largely superfluous" in light of its ongoing, extensive efforts to enhance security at nuclear plants. (NRC Decision at 7) (Pa). It claims that those ongoing security measures "provide the best vehicle for protecting the public." Id. That position is untenable. The NRC cannot ignore NEPA's requirements through a unilateral decision that its own actions are the best vehicle for protection of the public. NEPA is intended to assure a process that obligates the agency to "consider every significant aspect of the environmental impact of a proposed action" and to "inform the public that it has indeed considered environmental concerns in the decisionmaking process." Baltimore Gas, supra, 462 U.S. at 87; accord, Concerned Citizens Alliance, supra, 176 F.3d at 705. A significant element of the process is that it provides a "springboard for public comment." Robertson, supra, 490 U.S. at 370.

The NRC cannot ignore that public process. While the NRC may think that its non-NEPA approach provides the best protection to the public, it can neither logically nor legally reach that conclusion on its own. The mandatory exchange of information between agency and public inherent in the NEPA process may indeed yield ideas which will improve upon those of the Commission. As discussed previously herein (page), even if security concerns restrict the extent of information coming to the public from the NRC, concerns should not restrict the amount of information coming from the public to the NRC.

The NRC's decision quotes from the GEIS, which states "that the NRC is continuing to evaluate ways to reduce the risk from [sic] nuclear power plants from external events." (NRC Decision at 9, note 32) (Pa). Yet the NRC seems reluctant to involve the public in that evaluation. As the Ninth Circuit observed in Mothers for Peace: "The NRC simply does not explain its unwillingness to hear and consider the information that Petitioners seek to contribute to the process, which would fulfill both the information-gathering and the public participation functions of NEPA." Id., 449 F.3d at 1034. Another ground upon which the NRC based its decision was its ruling that contentions such as New Jersey's are unrelated to aging of components of the nuclear facility and are therefore purportedly beyond the scope of a license renewal proceeding (NRC Decision at 5) (Pa). Yet the NRC's own rules provide for an environmental review in a relicensing proceeding. 10 C.F.R. 51; Turkey Point, supra, 54 N.R.C. at 7 (Pa); see page 27, infra. That review is subject to NEPA. Limerick, supra, 869 F.2d at 725. To the extent that the NRC believes that its regulations eliminate the applicability of NEPA from the scope of a relicensing proceeding, it is in error. Those regulations would be void if so interpreted. NEPA is, of course, a federal statute. As this Court has recognized, "[I]t is axiomatic that federal regulations can not 'trump' or repeal Acts of Congress." IMO Complaint of Nautilus Motor Tanker Co., 85 F.3d 105 (3d Cir. 1996). The NRC's regulations therefore cannot provide a

justification for its failure to follow NEPA.

(3) There Is No Valid Distinction On The Foreseeability Issue Between New and Existing Facilities. The NRC's DBT Regulations Make No Such Distinction.

2 points on renewal:

1. Foreseeability is not changed. Can we say something about how the NRC is doing something new by giving another 20 years?

2. Can't limit the scope of NEPA by limiting the inquiry on relicensing, because NEPA is a separate obligation.

The NRC attempts to distinguish the Mothers for Peace and this case by stating that, unlike the proposed spent fuel storage facility at issue in Mothers for Peace, Oyster Creek is an existing facility and therefore would not present a new target for attack (NRC Decision at 7, note 25) (Pa). Yet the foreseeability of attack on a nuclear facility is not affected by whether the facility is a proposed one or an existing one. Further, the NRC itself has expressed no such distinction between new and existing nuclear facilities concerning radiological sabotage. In its recent revisions to the Design Basis Threat ("DBT") rules, the NRC said in response to comment: "The NRC agrees with the commenters that the radiological sabotage DBT should be uniformly applicable to new and currently operating nuclear power plants. In fact, the NRC did not

propose different radiological sabotage DBTs for new nuclear power plants in the proposed rule." ___ F.R. ____

Similarly, the DBT rule applies both to new facilities and relicensing proceedings.

The NRC notes, on this point, that its authority to issue orders for security at nuclear facilities arises under the AEA, 42 U.S.C. 2011 (NRC Decision at 8, note 31) (Pa). To the extent that the NRC is alleging that its assertion of authority pursuant to the AEA allows it to disregard NEPA, that argument must fail. In Limerick, supra, this Court addressed a similar contention by the NRC, "that by making decisions under the [AEA], it has precluded the need for consideration of environmental implications under NEPA." Id., 869 F.2d at 723. This Court held that NEPA was not precluded by the AEA. It found that "there is no language in NEPA itself that would permit its procedural requirements to be limited by the AEA. Moreover, there is no language in AEA that would indicate AEA precludes NEPA." Id. at 729.