Nos. 07-71868, 07-72555

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE, INC.,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

and

NUCLEAR ENERGY INSTITUTE
Intervenor-Respondent.

THE STATE OF NEW YORK
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of a Final Rule Issued by the
United States Nuclear Regulatory Commission

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JURISDICTION

The Nuclear Regulatory Commission (NRC) agrees, in all but one respect, with petitioners' statements of jurisdiction. They do not set forth the statutory basis of the agency's subject matter jurisdiction, as is required by Circuit Rule 28-2.2(a). NRC has jurisdiction over the subject of this litigation – the security of nuclear power plants – under section 161.b. of the Atomic Energy Act, 42 U.S.C. 2201(b).

STATEMENT OF THE ISSUES

1. Whether NRC, in promulgating a "design basis threat" rule (DBT) that described the security threat against which NRC licensees must protect, legitimately took into consideration, along with other factors, what could reasonably be expected of private security forces.

2. Whether NRC, acting on Congress's direction to "consider" in the rulemaking the potential for air-based security threats, and on the basis of agency studies and inter-agency sharing of responsibilities, reasonably concluded that the statutory standard of "adequate protection" was met without including the airborne threat in the DBT rule.

3. Whether, by providing the text and background of the proposed rule, NRC provided enough public information to enable the public to comment meaningfully on the issues raised by the proposed rule.

4. Whether NRC met its obligations under the National Environmental Policy Act by preparing an environmental assessment finding that the new rule would have no significant impact on the environment because the rule increased security at nuclear power plants.

THE STATEMENT OF THE CASE

A. The Nature of the Case

Petitioners challenge NRC's revised "design basis threat" (DBT) rule, 10 CFR 73.1(a)(1), which describes, like its predecessors dating back to 1977, the sort of attacks against which the private security forces at nuclear power plants must be prepared to defend. The rule constitutes part of NRC's extensive response to the attacks on September 11, 2001 and makes generally applicable certain measures similar to measures contained in orders NRC issued in 2003, orders which required licensees to increase significantly their security measures.

Petitioners assert that NRC, in setting the new DBT standard, illegitimately took into consideration what could "reasonably be expected" of private security forces; that this "reasonable expectation" approach was new policy insufficiently explained by NRC; that the policy was in fact a cover for violating court rulings on when NRC can take licensees' costs into consideration; that NRC, in not including airborne threats in the DBT rule, was

arbitrary and capricious, and in violation of a Congressional directive; that NRC made insufficient information public during the rulemaking; and that NRC should have prepared an environmental impact statement (EIS) on the rule.

NRC argues below that the "reasonable expectation" approach has existed at least since NRC's first DBT rule in 1977, that NRC did not take licensees' costs into consideration, that NRC followed Congress's directive, that NRC reasonably concluded – partly on the basis of the increased protection provided by measures other federal agencies have taken since 9/11 against air threats – that the statutory standard of "adequate protection" was met without including the airborne threat in the DBT, that the information NRC made available during the rulemaking was fully sufficient to enable meaningful public comment on all the issues in the rulemaking, and that NRC's environmental assessment reasonably concluded that no EIS need be prepared because the revised rule increased protection.

B. The Role of "Design Bases" in the Regulation of Nuclear Reactors

The Nuclear Regulatory Commission (NRC) is authorized to "establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material ... as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to

life and property ...." Atomic Energy Act, §161.b., 42 U.S.C. 2201(b). NRC can license a nuclear power plant only if the agency finds that operation of the facility "will be in accord with the common defense and security and will provide *adequate protection* to the health and safety of the public." AEA, §182.a., 42 U.S.C. 2232(a) (emphasis added).

"The level of adequate protection need not, and almost certainly will not, be the level of 'zero risk.' ... [T]he adequate-protection standard permits the acceptance of some level of risk." *UCS v. NRC*, 824 F.2d 108, 118 (D.C. Cir. 1987) (*UCS I*) (citations omitted). The "adequate protection" standard is "given content through case-by-case applications of [the agency's] technical judgment rather than by a mechanical verbal formula or set of objective standards ...." *UCS v. NRC*, 880 F.2d 552, 558 (D.C. Cir. 1989) (*UCS II*).

To aid NRC in ensuring adequate protection, the agency has, from early on, made use of "design bases" for nuclear power plants. A "design basis" is, generally speaking, applicant or licensee information which identifies the specific functions to be performed by a structure or system. 10 CFR 50.2. Applicants for licenses are required to set forth their design bases and to show how those bases meet NRC's criteria. *See, e.g.*, 10 CFR 50.34(a)(3)(ii). Many NRC rules dictate the kinds of events that design bases must reflect. For example, General Design Criterion 2 – "Design bases for protection against

natural phenomena" – says, "Structures, systems, and components important to safety shall be designed to withstand the effects of natural phenomena such as earthquakes, tornadoes, hurricanes, floods, tsunami, and seiches without loss of capability to perform their safety functions." 10 CFR Part 50, App. A. The subject of this litigation, what terrorist threat nuclear power plant licensees must protect against, is called the "design basis threat," or "DBT," and is codified in 10 CFR 73.1(a).[1]

Necessarily, because "adequate protection" does not require "zero risk," these design bases do not ensure protection against every conceivable risk. For example, "Congress ... did not expect [a licensee] to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it ...." *Siegel v. AEC*, 400 F.2d 778, 784 (D.C. Cir. 1968).

The use of qualitative design basis rules is not the only way to characterize events against which a licensee must design a plant. Regulators do sometimes, for example, require that regulated parties protect against any event with a probability greater than a given number, or consequences greater than a given dollar amount. But qualitative design bases rules are especially useful where probabilities are hard to come by, as in the case of terrorist threats. *See, e.g.*, National Research Council, *Safety and Security of*

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[1]Paragraph (a) covers both sabotage of facilities, in (a)(1), and theft of materials, in (a)(2). This litigation is principally about sabotage.

Commercial Spent Nuclear Fuel Storage (Public Report), Washington D.C. (2006) at 6 (E736) ("The probability of terrorist attacks on spent fuel storage cannot be assessed quantitatively or comparatively.").

C. The History of NRC's "Design Basis Threat" Rule

NRC adopted its first DBT in 1977, only two years after the agency began operation. That first DBT was laid out as part of a "general performance objective," whose purpose was to establish *how well* prepared the licensee had to be to deal with *what* sort of threat.

The DBT defined the "what." *See* 10 CFR 73.55(a), as promulgated at 42 FR 10836, 10838 (1977). The current DBT, though much expanded from the 1977 DBT, still defines the "what," such as the kind of attackers and weaponry against which licensees must be prepared to defend. Their preparations must provide "high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety." 10 CFR 73.55(a).

Since 1977, the DBT for nuclear reactors has undergone two major changes. In 1994, in response to both an intrusion incident at a nuclear power plant and the vehicle bomb attack on the World Trade Center in 1993, the agency revised the DBT to include

such attacks. 59 FR 38889 (1994) (E165). In 1991, the agency had denied a rulemaking petition to include such attacks in the DBT. Based on continuing threat assessments and consultations with other parts of the Executive Branch, NRC concluded at that time that "the likelihood of nuclear terrorism involving the use of large truck bombs against nuclear power reactors in the United States is extremely low ...." 56 FR 26782, 26784 (1991) (E156).

The agency also said, however, that it constantly reviewed intelligence data to ensure that the DBT remained adequate, prudent, and reasonable. *Id.* at 26786 (E158). By 1994, it was clear that the DBT should be revised to include large truck bombs, partly because, "For the first time in the United States, a conspiracy with ties to Middle East extremists clearly demonstrated the capability and motivation to organize, plan, and successfully conduct a major vehicle bomb attack." 59 FR 38891 (E167).

Like the 1977 DBT rule and most design basis rules, the 1994 revision to the DBT rule was stated in general terms. For example, the 1994 rule required licensees to protect against "a four-wheel drive land vehicle used for transporting personnel and their hand-carried equipment," and against "a four-wheel drive land vehicle bomb." *Id.* at 38899 (E175). This much was legally binding. The agency also issued more detailed,

non-binding regulatory guidance to licensees on how to comply with the revised rule. *Id.* at 38897 (E173).

The events of 9/11 called for another reassessment of the DBT. In 2002, the same year Congress established the Department of Homeland Security (DHS) to improve protection against terrorism more generally, NRC established its Office of Nuclear Security and Incident Response to help ensure that NRC's licensees give sufficient attention to protecting against terrorism. The U.S. Government Accountability Office (GAO) has said, "The nuclear power industry and NRC have taken very seriously the need to protect nuclear power plants against a potential terrorist attack and have made important investments to this end." GAO-06-388, *Nuclear Power Plants: Efforts Made to Upgrade Security, but the Nuclear Regulatory Commission's Design Basis Threat Process Should Be Improved*, March 2006, at 41.[2]

D. Orders Issued in 2003

The rule at issue in this litigation is aimed principally at making generally applicable certain measures contained in orders NRC issued in 2003. These orders required nuclear power plant licensees to protect against an enhanced DBT. 68 FR 24517 (2003) (E212). The particulars of the newly imposed DBT were "safeguards information" and so

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[2]Portions of this Report are at E939 and following, but page 41 is not. It is available at http://www.gao.gov/new.items/d06388.pdf.

were not released to the public. The category of "safeguards information," or "SGI," is established by section 147 of the AEA, 42 U.S.C. 2167. That section permits NRC to withhold from public release security information that "could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of [nuclear] material[s] or [a nuclear] facility." *Id.*

NRC has let it be known that its 2003 orders required licensees to make a wide variety of security improvements:

> to make security enhancements such as increased patrols; augmented security forces and capabilities; additional security posts; additional physical barriers; vehicle checks at greater standoff distances; better coordination with law enforcement and military authorities; augmented security and emergency response training, equipment, and communication; and more restrictive site access controls for personnel, including expanded, expedited, and more thorough initial and follow-on screening of temporary and permanent workers.

70 FR 67380, 67381 (2005) (proposed DBT rule) (E717).

The nuclear industry has argued that NRC's 2003 orders represented the very limit of what non-governmental entities could be asked to do, that anything more than the orders asked was the responsibility of the federal government. In support of its position, the industry has pointed to, in particular, 10 CFR 50.13, which says, in part, "An applicant for a license [for a nuclear power plant] is not required to provide for design

features or other measures for the specific purpose of protection against the effects of ... attacks and destructive acts ... directed against the facility by an enemy of the United States, whether a foreign government or other person ...." *See* Nuclear Energy Institute Comments, Enclosure 4 at 3 (E902).

On the other side, some citizens' groups complained that the new DBTs in 2003 had been imposed by order rather than through notice-and-comment rulemaking. Two of the petitioners in the present litigation, Public Citizen and San Luis Obispo Mothers for Peace (MFP), sued NRC in the D.C. Circuit, arguing that the orders amounted to new rules that should have been issued only after public notice and comment. NRC asserted that the orders were not rules, and that NRC had been well within its authority to proceed by order rather than rule. Brief of respondents in *Public Citzen v. NRC,* No. 03-1181 (D.C. Cir.) (portions at E258). While that lawsuit was pending, NRC announced plans to engage in this DBT rulemaking, in part to codify general aspects of the 2003 orders so that they would apply not only to currently operating plants, but also to all future plants. *See* NRC Semi-Annual Agenda, Long-Term Action No. 4214, 69 FR 38627, 38636 (2004). (The D.C. Circuit ultimately dismissed the lawsuit as moot. Order, No. 03-1181 (D.C. Cir., Apr. 11, 2007)).

In 2005, Congress, in the Energy Policy Act (EPAct), directed NRC to conduct a DBT rulemaking, and to "consider" in the course of that rulemaking certain kinds of threats, including, of pertinence to this litigation, "the events of September 11, 2001," "the potential for attack on facilities by multiple coordinated teams of a large number of individuals," and "the potential for water-based and air-based threats." *See* Section 651 of Pub. L. 109-58, adding a new §170.E. to the AEA, codified at 42 U.S.C. 2210e. [3]

E. Committee to Bridge the Gap's Petition for Rulemaking

A few days after NRC announced the rulemaking, the Committee to Bridge the Gap (CBG) filed a petition for rulemaking, asking NRC to modify the DBT rule in several ways. (E70.) Of particular relevance here, CBG urged that the DBT rule require that licensees protect against a coordinated attack of at least 19 attackers – 19 being the number of attackers involved in the 4 plane hijackings on 9/11 – plus a margin of safety above that level. *See* CBG Petition at 23-4 (E92-3). CBG also urged NRC to require that a steel wire and girder structure, which CBG dubbed "beamhenge," be built at standoff distances around key structures at each nuclear plant, the aim of the structure being to prevent a

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[3]No other statute enacted since 9/11 has addressed the DBT for nuclear power plants, though some other statutes have addressed the nation's critical infrastructure outside the nuclear arena. For example, Public Law 110-53, Implementing Recommendations of the 9/11 Commission Act of 2007, signed into law on August 3, 2007, has a number of titles dealing with critical infrastructure, but does not deal directly with nuclear power plants.

large airliner from reaching the reactor, spent fuel pools, or supporting facilities. 69 FR 64690, 64692 (2004) (E345).

CBG's 27-page petition included a half-page description of "beamhenge" (E94-5), and incorporated by reference a magazine article, the main extra information in the article being a CBG estimate that the structure would cost, per plant, something in the "low tens of millions." (E206.) Neither the petition, article, nor brief animation to which readers of the article were referred contained engineering details. Viewers of the animation, narrated by the actor Martin Sheen, were cautioned that the animation was not to scale. *See* http://www.committeetobridgethegap.org/beamhenge.html

In response to CBG's petition, NRC issued a Federal Register notice that announced receipt of the petition and described the changes the petition sought. The notice set out what the petition said about beamhenge and other proposals, and sought public comment. 69 FR 64692 (E345).

F. NRC's Proposed Rule

CBG's petition had arrived early enough in the rulemaking to enable NRC to have a round of public comment on the petition before the agency published its proposed revisions to the DBT rule. Indeed, the proposed rule made an initial response to CBG's petition, "granting" it in part, in the sense that the proposed rule contained several of the

revisions that CBG sought. 70 FR 67385 (E721). For example, the proposed rule had language requiring licensees to protect against one or more teams of adversaries operating against one or more entry points, adversaries willing to kill and be killed, waterborne threats, a wider range of land vehicles, and coordinated attacks. *Id.*

The proposed rule took no position on whether the DBT should require beamhenge or any similar engineered defense against air attack. But to enable the public to comment usefully on the issue, the agency reminded readers of CBG's beamhenge proposal, alerted readers to the agency's summary of the comments the agency had received in response to the earlier Federal Register notice on CBG's petition, and described for readers what had already been done by licensees, NRC, and other federal agencies to deal with the air threat.

> Federal and other governmental efforts to protect the nation from terrorist attacks by air have increased substantially since September 11, 2001. Those efforts already include a variety of measures such as enhanced airline passenger and baggage screening, strengthened cockpit doors, and the federal Air Marshals program. Federal law enforcement and intelligence agencies have increased efforts to identify potential aircraft-related threats before they can be carried out. Such improvements have already been exercised by the Department of Defense and the Federal Aviation Administration through responses to airspace violations near nuclear power plants that were subsequently determined not to be threats. These and other government-wide efforts have improved protection against air attacks on all industrial facilities, both nuclear and non-nuclear.

Id. NRC also invited public comment on each of the 12 issues – including the issue of the air threat – that the EPAct of 2005 required that the agency consider during its rulemaking. *Id.* at 67382 (E718).

As in earlier DBT rulemakings, not all relevant information in the possession of NRC was, or ought to have been, made public. The 2005 proposed rule did not contain certain information that could be used by a terrorist to better prepare an attack against an NRC licensee. Some such detailed information, NRC said, would eventually be included in non-binding regulatory guidance, called variously "regulatory guides" (RGs) or "adversary characteristics documents" (ACDs), which would be treated as safeguards information and therefore not made public. *Id.* At the time the proposed rule was issued, NRC had hoped to issue the final guidance along with the final rule. *Id.* at 67386 (E722). But in fact the final guidance was issued some months after the final rule. The rulemaking focused on the proposed legally-binding text of the DBT rule itself, which, NRC said, "enable[d] meaningful comment:"

> The text of the proposed rule provided ample information to enable meaningful comment on what the current level of protection for nuclear power plants and Category I fuel cycle facilities should entail. Members of the public can and have provided the Commission their views in this rulemaking on the number of attackers, amounts of explosives, and types of weapons that licensees should be required to defend against, even without having access to classified information or SGI.

> Therefore, access to the ACDs and the RGs was not necessary to enable meaningful public comment on the proposed DBT rule.

72 FR 12705, 12715 (2007) (final rule) (E11).

G. Final Rule

Certain citizens' groups and State agencies, including the three petitioners in this litigation, argued various points rehearsed in one or another of petitioners' briefs in this Court. The industry argued, among other things, that it was being asked to do all it could, that the cost-benefit analysis required by NRC's "backfit" rule (of which, more below) would have to be applied to anything more than what the 2003 orders had required, and that requiring anything more than those orders required would be inconsistent with the rule, 10 CFR 50.13, that licensees did not have to defend against "enemies of the United States."

1. What Can Be "Reasonably Expected"

In responding to comments, NRC made clear that an important basis for its judgments about what should go into the DBT was the idea of what it is reasonable to ask a private entity to be ready to do in response to the sort of threat that intelligence information said existed, and that this idea of what is reasonable to expect was equivalent neither to any sort of cost-benefit standard nor to the "enemy of the state" standard in 10 CFR 50.13. 72 FR 12714-15 (E10-11). On the cost side, NRC took particular care to

be clear on what role cost considerations could and could not play in the agency's deliberations. *Id.* at 12714 (E10). Here NRC's actions conformed to its "backfit rule," 10 CFR 50.109, which describes when and how costs are to be taken into consideration when the agency is "backfitting," that is, imposing new requirements on existing licensees.

NRC's "backfit" rule precludes considering costs when establishing what adequate protection requires. *See* 10 CFR 50.109(a)(4)(ii)-(iii). Thus, because NRC viewed the DBT rule, and the orders aspects of which it codifies, as required for "adequate protection," the agency did not believe that it could, as a matter of law, take costs into consideration in revising the DBT. 70 FR 67387 (E723). NRC did note, though, in the preamble to the final rule, that the backfit rule as affirmed in *UCSII* permitted the agency to consider costs in choosing among alternative ways to *implement* a rule issued on adequate protection grounds. *See* 72 FR 12714 (E10).

NRC indicated that the DBT rule's "reasonableness" standard is not equivalent to the 50.13 "enemy of the state" standard because it *is* reasonable to expect licensees to defend against, say, a handgun, whether wielded by an "enemy of the state" or not.[4] *See*

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[4]During the 1994 rulemaking, the industry had argued that the increased requirements then proposed were inconsistent with 50.13. Then too the agency argued that 50.13 did not resolve every issue concerning the division of responsibilities, because, even though the vehicle bomb attack in the early 1990s on the World Trade Center had been carried out by "enemies of the United States," it had been the sort of attack that clearly could be carried out by a domestic force whose members were not "enemies of the

59 FR 38893 (E169). But it is *un*reasonable to expect a licensee to use weapons not available to private security forces, NRC reasoned, even if those weapons might be useful in defending against someone who is *not* an "enemy of the state."[5] *Id.*

The idea of what level of protection it is reasonable to expect private entities to provide is given content and precedential force by the ways in which NRC has used the idea in approaching particular security issues. Next, we will describe how NRC handled the two main security issues raised in petitioners' briefs: the size of the attacking force, and the threat of air attacks.

2. Size of the Attacking Force

The Attorneys General of several States, including New York, argued that the DBT rule should include an attacking force of at least 19, the total number of attackers in 9/11. (E437). NRC decided against this suggestion, adopting instead more general language, part of it proposed in CBG's petition – briefly put: one or more groups, attacking through one or more points, with well-trained and dedicated individuals, willing to kill or

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United States" in the 50.13 sense. 59 FR 38893-94 (E169-70).

[5]The Commission did cite 50.13 as an additional reason why private security guard forces cannot be expected to defend against all conceivable security threats. 72 FR 12714 (E10).

be killed, knowing enough to pick targets necessary for a successful attack, having suitable weapons, and perhaps having knowledgeable inside assistance. *See* 10 CFR 73.1(a)(1)(i).

A precise number of attackers has never been a part of any of the DBT rules, in part because numbers themselves can matter less than the attackers' intentions, training, and weapons and other equipment. Fewer attackers, if they're well-trained, well-equipped, and well-motivated, can inflict much more damage than many ill-trained, -equipped, and -motivated attackers. 44 FR 68184, 68186 (1979) (then final rule). Therefore, from the start, the DBT rule, in describing the attacking force, has focused on the more general characteristics of intentions, training, and equipment. Numbers have been reserved for guidance documents and individual plant security plans, which are more easily changed in response to changes in the threat environment.

NRC also argued that, in any case, 19 was not necessarily the right number. NRC pointed out that the 9/11 attack had been variously described as either one attack by 19 or several attacks by smaller groups. 72 FR 12708 (E4). In thinking about numbers of attackers, NRC did a statistical analysis of terrorist group size, using a variety of classified and unclassified sources, including descriptions of hundreds of attacks that had taken place over several years, large "outlier" events among them, and including terrorist training, tactics, and doctrinal manuals. *Id.* at 12709 (E5).

3. The Air Threat

NRC's decision not to include the air threat in the DBT was based on a wider range of considerations. Of course, NRC fully recognized the threat of an attack from the air:

> Certainly one of the most substantial considerations of the Commission, NRC licensees, the Federal government, and the public is the threat of airborne attacks against critical infrastructures. As stated below, the vast majority of comments received by the Commission on the proposed DBT rule regarded the airborne threat. The Commission has been evaluating the issue of air-based threats long before it was required by the EPAct, and its position on the necessity to add this attribute to the DBTs prior to this rulemaking has been well documented. The Commission's evaluation of the airborne threat has been an ongoing process, and it has spent a significant amount of time and resources as part of this rulemaking in considering whether to make some type of airborne threat part of the DBTs.

Id. at 12710 (E6). NRC has acknowledged that existing plants had not been designed with deliberate air attack in mind. *See Riverkeeper v. Collins*, 359 F.3d 156, 159 (2d Cir. 2004). Even so, as the DBT rule's preamble explains, NRC knows, from classified studies, that in practicality a deliberate attack from the air is unlikely to result in a significant offsite release:

> [A]ircraft attack, another threat likely to result in fires[,] was also considered and studies analyzing the consequences of successful commercial airline attacks were performed. In conducting these studies, the NRC drew on national experts from several DOE [Department of Energy] laboratories using state-of-the-art structural and fire analyses. The NRC also enhanced its ability to realistically predict accident progression and radiological release consequences. For the facilities analyzed, the studies found that the likelihood of both damaging the reactor core and releasing

> radioactivity that could affect public health and safety is low. Even in the unlikely event of a radiological release due to terrorist use of a large aircraft, there would be time to implement mitigating actions and off-site emergency plans such that the NRC's emergency planning basis remains valid ....

72 FR 12712 (E8).

In addition to its own studies, NRC also took into consideration the work of other federal agencies since 9/11 in dealing with the air threat. It is well known that since 9/11 the federal government has taken many steps to prevent another such attack. Some of these steps are described above in section F. of this Statement of the Case. Like the preamble to the proposed rule, the preamble to the final rule listed several of these steps and pointed to the coordination among federal agencies in dealing with the air threat. *See Id.* at 12710-11 (E6-7).

> Ultimately, the Commission NRC has determined that active protection against the airborne threat requires military weapons and ordnance that rightfully are the responsibilities of the Department of Defense (DOD), such as ground-based air defense missiles, and thus, the airborne threat is one that is beyond what a private security force can reasonably be expected to defend against. This does not mean that the Commission is discounting the airborne threat; merely that the responsibility for actively protecting against the threat lies with other organizations of the Federal government, as it does for any U.S. commercial infrastructures.
>
> .... The deployment of ground-based air defense weapons would be a decision for the Departments of Defense, Homeland Security, Transportation and Justice, not the NRC. In addition, the NRC believes that application of ground-based air defense weapons would present significant command and control challenges, particularly relating to the time required to identify and confirm the presence of a hostile aircraft and for a commercial entity to get permission to engage. The

> potential for collateral damage to the surrounding community also would have to be considered. Deployment of protective measures such as no-fly zones, combat air patrols, and ground-based air defenses are undertaken by many other Federal organizations working on preventing and protecting critical infrastructure from terrorist attacks, including the U.S. Northern Command (USNORTHCOM) and North American Aerospace Defense Command (NORAD), the Transportation Security Administration (TSA), and the Federal Aviation Administration (FAA).

Id. at 12710 (E6).

Having this interagency support as an assumption in the background for the final rule, *see id.* at 12714 (E10), and pointing also to requirements that NRC imposed by order on licensees to ensure that they are better able to deal with fires or explosions that might be caused by an aircraft attack, *see* NRC Order, 71 FR 36554 (2006) (E969), NRC concluded that adequate protection did not require that an air threat be included in the DBT, or that licensees be required to implement specific physical security measures such as beamhenge. 72 FR 12711 (E7).

4. Environmental Analysis

NRC's Environmental Assessment (EA) took the same approach to the environmental analysis that the agency had taken, without challenge, in earlier DBT rulemakings, namely, that the rule itself, partly because it increased requirements, would have no adverse impact on the environment. *See* 70 FR 67386-67 (E722-23); *see also* 59 FR 38897 (E173), and 44 FR 68186. In particular, NRC's EA said that the DBT

would not increase the risks of nuclear power – either the probability or the consequences of a major accident. (E65.) Moreover, the EA pointed out that the DBT was, for the most part, making generally applicable certain existing requirements that had been imposed by orders that themselves had no adverse environmental impact. *Id.*

In the final rule preamble, NRC noted that this Court had recently ruled that the agency could not categorically exclude terrorism from its environmental analyses. 72 FR 12718. But NRC noted that this ruling came down in a case that involved licensing a specific facility whose destruction might in fact have some adverse impact, and that the same analysis did not necessarily apply when the agency was issuing a generic rule *increasing* requirements on all future plants, and not increasing either the likelihood or the consequences of an accident. *See* 72 FR 12718n.2 (E14).

SUMMARY OF ARGUMENT

1. The fundamental disagreement between petitioners and NRC is over what constitutes "adequate protection" against terrorism. But because petitioners believe that inadequate protection results from NRC's having based the new DBT rule on what can reasonably be expected of licensees, petitioners focus a major part of their attack on this "reasonable expectation" approach, claiming that it is a new and insufficiently explained policy that hides illicit considerations of cost.

But the "reasonable expectation" approach is not new. It has existed at least since NRC's first DBT rule in 1977. Nor is it insufficiently explained. It is compounded of certain commonsense notions: legal limits on private guards, the availability of materials, the effectiveness of certain measures, and a practical division of responsibility between private and public entities. The "reasonable expectation" approach has a flexibility that is useful from a regulatory point of view. For example, as both the 1994 DBT rulemaking and the current one show, "reasonable expectation" can yield strict requirements beyond what one would expect from an unthinking application of the statement in 10 CFR 50.13 that licensees are not required to defend against "enemies of the United States;" and, looking to the future, "reasonable expectations" can change as licensees' defense abilities improve.

Particularly important, important because petitioners believe NRC equates adequate protection with what can be reasonably expected, the ideas of "reasonable expectation" and "adequate protection" are independent. For example, in the 1994 DBT rulemaking, NRC concluded that it was reasonable to expect *more* than what was required for adequate protection; and in the rulemaking at issue here, NRC's finding of adequate protection by no means rested entirely on what could reasonably be expected of licensees. NRC also looked to vulnerability assessments, analyses of terrorist capabilities, and other studies, and to actions other agencies had taken since 9/11.

Last, in determining what could reasonably be expected of licensees, NRC did not take licensees' costs into consideration, and clearly said so explicitly in the preamble to the final rule. Petitioners believe that only cost considerations can explain why the DBT rule does not require more guards at nuclear power plants, but this criticism misses the point of the DBT rule, which is to describe the *adversary* force, not the guard force; the number of guards is regulated through other rules and guidance; and the numbers even of adversaries are less important than their training, equipment, intentions, and the like, all of which are covered in the DBT rule.

Thus petitioners cannot attack NRC's adequate protection finding by confusing it with some imagined illicit version of NRC's licit "reasonable expectation" policy.

Petitioners must instead face the wide discretion NRC has to determine what constitutes adequate protection. Though the Atomic Energy Act authorizes NRC to issue such rules as it believes necessary for adequate protection, the statute provides no direct guidance on what constitutes adequate protection. But the courts have held that NRC, relying on its expertise and experience, may establish the content of "adequate protection" case-by-case, without applying mechanical formulas, but that, in any case, adequate protection does not require that there be zero risk.

2. It was reasonable for NRC to have decided that the adequate protection standard was met without including the air threat in the DBT rule. NRC based its decision in significant part on the many well-known actions that other federal agencies have taken since 9/11 to protect against terrorist attacks from the air. In particular, it was not unreasonable of NRC to have declined to require licensees to build new passive air defenses, such as the "beamhenge" urged by CBG's rulemaking petition. Petitioners argue that NRC should not have rejected CBG's proposal without first showing that it was impracticable, but NRC was under no obligation to expend significant resources analyzing CBG's spare description of its proposal, when NRC had already concluded that the adequate protection standard had been met already.

Contrary to petitioners' views, there is nothing inconsistent in relying on other agencies to protect against airborne threats and yet requiring licensees to protect against land and waterborne threats. These latters threats are more easily dealt with by private forces, and less regulated by federal agencies. Likewise contrary to petitioners' views, NRC did not disregard a statutory directive in not including the airborne threat in the DBT rule. The directive was simply to "consider" the airborne threat in the "rulemaking", not "include" that threat in the DBT "rule."

3. The information NRC made available during the rulemaking was fully sufficient to enable meaningful public comment on all the issues in the rulemaking. All comments received during the rulemaking were made public. Petitioners argue that, because earlier NRC *orders* – aspects of which the DBT rule makes generally applicable – had been the subject of non-public comments by appropriately cleared stakeholders, the *rulemaking* was insufficiently public. To the contrary. The process leading to the orders was rightly different from the process leading to the rule. The orders contained many details that NRC has a statutory obligation to protect from disclosure, because the details could be useful to a terrorist. But the rule, like all its predecessors over the last 30 years, and like most rules, was general enough to permit full public discussion of its elements. And the discussion was indeed very full.

4. NRC's environmental assessment reasonably concluded that, because the new DBT rule did not increase the risk of terrorism but protected against it, an environmental impact statement (EIS) discussing the effects of a terrorist attack need not be prepared. An EIS is required only when agency action may cause significant degradation to the environment. But the new DBT rule, by increasing protection against terrorism, increases protection of the environment. Neither is an EIS required when an agency refuses to take action, as NRC did here in response to CBG's petition to require further protection against airborne threats. To require an agency to prepare an EIS every time the agency declined to exercise authority would require commitment of excessive resources and probably cripple an agency.

ARGUMENT

Standard of Review

This Court reviews NRC's final rule and supporting EA under the "arbitrary or capricious" standard of the Administrative Procedure Act (APA). Under the APA, agency decisions may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006), *quoting* 5 U.S.C. 706(2)(A).

Review under this standard is narrow, and the reviewing court may not substitute its own judgment for the agency's. *Earth Island*, 442 F.3d at 1156-57. The court's inquiry must "be searching and careful," but "the ultimate standard of review is a narrow one." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989). *See also Morongo Band of Mission Indians v. Fed. Aviation Adm.*, 161 F.3d 569, 573 (9th Cir. 1998).

Indeed, "[t]his deferential standard of review *presumes* [the agency's] action to be valid." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1180 (9th Cir. 1997) (emphasis added). And the presumption is not easily overcome: "Agency action may not be set aside as arbitrary or capricious unless there is *no* rational basis for the action. " *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1027 (9th Cir. 1980) (emphasis added):

This lawsuit in part concerns NRC's partial denial of CBG's petition for rulemaking. "Agency decisions not to conduct rulemaking ... are tested under a 'very narrow' reading of the arbitrary and capricious test." *State Farm Mut. Auto. Ins. Co. v. DOT*, 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated on other grounds*, 463 U.S. 29 (1983). Review of denials of a rulemaking petition is "particularly deferential." *Midwest Independent Transmission System Operator, Inc. v. FERC*, 388 F.3d 903, 910 (D.C. Cir. 2004). *See*

also Massachusetts v. EPA, 127 S.Ct. 1438, 1459 (2007). An agency has a "limited burden of justification" of refusals to engage in rulemaking. *Midwest Independent Transmission*, 388 F.3d at 913. *See also O'Keeffe's, Inc. v. U.S. Consumer Product Safety Commission*, 92 F.3d 940, 942 (9th Cir. 1996), *citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983).

In short, "an agency's decision not to initiate a rulemaking" may be overturned "only for compelling cause, such as plain error of law or a fundamental change in the factual premises previously considered by the agency." *Midwest Independent Transmission*, 388 F.3d at 911 (citation omitted). "This standard is at the high end of the range of deference." *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (internal quotation marks and citation omitted). The review is "extremely limited." *Massachusetts*, 127 S.Ct. at 1459.

Finally, this lawsuit in part raises the question whether NRC met its statutory obligation under the Energy Policy Act to "consider" certain factors, including the airborne threat, in setting the DBT. Here, the familiar two-part test set out in *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984), applies. If the statutory language is clear, the court enforces that. If not, the court defers to the agency's interpretation, if it is based on a "permissible" or "reasonable" reading of the statute, regardless of the Court's

own preference. *See, e.g., Resident Councils of Washington v. Leavitt*, 500 F.3d 1025, 1030 (9th Cir. 2007).

I. Considering What Can Be "Reasonably Expected" of Private Security Forces is a Reasonable and Legitimate Part of the Foundation of the DBT Rule.

Petitioners' essential argument is this: that the DBT, despite its announced aim of providing adequate protection, does not actually ensure adequate protection, and that this failure flies in the face of facts and, partly for that reason, but also for other reasons, violates law.

The key source of this failure, say petitioners, is that NRC has based the DBT not on the threat actually being faced, but instead on a new, and insufficiently described notion of what can "reasonably be expected" of licensees, see PC/MFP Brief at 24-25, a notion moreover that they say is an unexplained change from NRC's previous, more threat-based approaches. New York Brief at 29. Petitioners maintain that the notion of "reasonable expectation" can be explained only by cost considerations, considerations that are in violation of *UCSI*, which holds that the agency may not take costs into consideration when deciding what is necessary to meet the "adequate protection" standard in the Atomic Energy Act (AEA). PC/MFP Brief at 27-8.

In the end, say petitioners, the notion of what can reasonably be expected of private entities has led NRC to ignore studies showing the seriousness of the threat from

the air, New York Brief at 38-9, and to ignore possible "passive" approaches to protection against a terrorist threat from the air, such as CBG's "beamhenge" proposal. PC/MFP Brief at 39. Petitioners argue that NRC's refusal to seriously consider such approaches violates Congressional direction, in EPAct, to include air threats in the DBT rulemaking. PC/MFP Brief at 33-39. In fact, say petitioners, NRC, contrary to its own concept of what can be reasonably expected, did not show that it was unreasonable to have expected every licensee to build a beamhenge around its plant. New York Brief at 35.

This core argument overlooks what in fact NRC did, and misconstrues what relevant law requires. NRC believes that taking account of what can be reasonably expected of private security forces accords with common sense, that compliance with the DBT will help provide reasonable assurance of adequate protection, that NRC's adequate protection finding is not based solely on what can reasonably be expected of licensees, and that the "reasonable expectation" approach is, in any case, not new, not as limiting as petitioners believe, and not illicitly based on considerations of cost.

A. The Idea of What Can Be "Reasonably Expected" of Private Security Forces Is Easily Comprehended and is Not a New Idea in NRC Security Regulation.

NRC's "reasonable expectation" approach is a compound of obvious considerations – of law, of the availability of materials, of effectiveness, and of a practical

division of responsibility between private and public entities.

For example, NRC's long-standing "enemy of the state" rule, 10 CFR 50.13, is rooted in the nation's "settled tradition" that national security forces, not a private industry, must defend against certain military-style attacks. *Dominion Nuclear Connecticut, Inc.* (Millstone Power Station, Unit 3), CLI-02-27, 56 NRC 367, 369 n.7 (2002), *citing Siegel v. AEC*, 400 F.2d at 782. Congress followed that tradition in recently enacting section 161.A.b. of the AEA, 42 U.S.C. 2201a, which permits nuclear power plant guard forces to have certain weapons not available to most private security forces, but not grenades or anti-tank weapons or anti-aircraft weapons, all of which are available only to the military. Similarly, since 1994, the DBT has required only that barriers against vehicles be made from commercially available materials and technology, and has not demanded new, special "nuclear grade" materials. *See* 59 FR 38895 (E171). Unsurprisingly, NRC's DBT rule expects private forces to be capable of an effective initial response to an attack, but they should not be expected to be entirely self-sufficient, requiring no outside help from government police or military forces following a terrorist attack. 72 FR 12720 (E16).

In addition to being based on such commonsense notions, the DBT rule's "reasonable expectation" approach was not invented for the occasion of the new rule.

Though the phrase may occur for the first time in the notice of proposed rulemaking for this newest DBT, *see* 70 FR 67381 (E717), the "reasonable expectation" approach has long been followed, certainly clearly even in the 1994 revision of the DBT, the very revision that New York claims NRC has wrongly departed from. *See* New York Brief at 29.

During that 1994 rulemaking, the industry had argued that it needn't protect against vehicle bombs, because the World Trade Center bombing in 1993 had been the work of "enemies of the United States," as that phrase is used in 10 CFR 50.13, and because the regulation said that the industry didn't have to protect against such enemies. *See* 59 FR 38893 (E169). The agency's principal reply was that, though it was not "practical" to expect private security forces to defend against the full range of possible threats by foreign enemies, licensees nonetheless could defend against vehicle bombs of the sort used in the attack on the World Trade Center. "There is a significant difference in the practicality of defending against a missile attack and constructing a vehicle barrier at a safe standoff distance from vital areas." *Id.* "Practicality" as used here clearly focuses not on engineering or cost feasibility but rather on the division of responsibility between public and private entities: Private forces raise vehicle barriers, but they don't mount defenses against a missle attack.

Thus the notion of what private security forces at nuclear power plants can "reasonably be expected" to do is not new – among other things, it was subsumed within the 1994 rule's "practicality" concept, which in turn was designed to help allocate responsibilities between public and private entities. The "reasonable expectation" approach therefore is not a change in policy that needs special justification. Indeed, arguably, "reasonable expectation" is as old as *Siegel v. AEC*, in which the Court quoted with approval an NRC comment on the role of "practicability" in its decisions regarding protection against hostile acts:

> One factor underlying the Commission's practice ... has been a recognition that reactor design features to protect against the full range of the modern arsenal of weapons are simply not practicable and that the defense and internal security capabilities of this country constitute, of necessity, the basic 'safeguards' as respects possible hostile acts by an enemy of the United States."

Siegel v. AEC, 400 F.2d at 783, *quoting* 32 FR 13445 (1967) (final 10 CFR 50.13).[6]

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[6] *Siegel* supports wider discretion than NRC asserted in the preamble to the final DBT rule at issue here. The Court said,

> Congress certainly can be taken to have expected that an applicant for a license should bear the burden of proving the security of his proposed facility as against *his own* treachery, negligence, or incapacity. It did not expect him to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it in 1984.

Siegel v. AEC, 400 F.2d at 784 (emphasis added). There is, in the Court's analysis of the action at issue in *Siegel*, even the suggestion that NRC can take costs into consideration in determining what promotes the common defense and security: "What the Commission

B. "Reasonable Expectation" is a Useful, Even Necessary, Consideration in Deciding What a DBT Should Encompass.

As GAO has recognized, "consideration of issues such as what is reasonable for a private security force to defend against is an appropriate role of the Commission in approving changes to the DBT." See GAO-06-388, *Nuclear Power Plants: Efforts Made to Upgrade Security, But the Nuclear Regulatory Commission's Design Basis Threat Process Should Be Improved* (2006), at 23 (E955). The concept is flexible. As both the 1994 rulemaking and the current one show, "reasonable expectation" can yield strict requirements beyond what one would expect from an unthinking application of section 50.13's statement that licensees are not required to defend against enemies of the United States. And looking to the future, the Commission said in the preamble to the latest DBT rule that "reasonable expectation" can change if licensees' defensive capabilities improve. *See* 72 FR 12715 (E1).

But to whatever extent useful, "reasonable expectation" is in any case a *necessary* category in the analysis on which a DBT must be based, for, at the very least, as petitioners themselves recognize, PC/MFP Brief at 24-25, there are certain things private security forces *may* not do, under law; and, as indicated in *Siegel v. AEC* and codified in

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has essentially decided is that to impose such a burden would be to stifle utterly the peaceful utilization of atomic energy in the United States." *Id.* at 783-84.

10 CFR 50.13, there are certain things private security forces at nuclear power plants do not *have* to do, in particular provide all defense against "enemies of the United States," whether "a foreign government or other person." 10 CFR 50.13.

C. But Reasonable Expectation and Adequate Protection Are Not Equivalent.

The 1994 rulemaking is instructive in yet another way, for it helps demonstrate that, contrary to petitioners' claims, PC/MFP Brief at 30, NRC is not using "reasonable expectation" to define "adequate protection." Unlike the requirements promulgated in the recent DBT rulemaking, the requirements promulgated in the 1994 DBT rulemaking were more than what was required for adequate protection. See 59 FR 38898 (E174). Thus what is reasonably expected can exceed what is required for adequate protection.

But the rulemaking at issue in this litigation shows that what is reasonably expected can be one among other factors that leads to a finding of adequate protection. The agency's decision that this DBT rule helps justify an adequate protection finding rests not only on the rule's requiring what can be reasonably expected but also on "certain assumptions about ... shared responsibilities" among government agencies for the defense of the nation's critical infrastructure. See 72 FR 12714 (E10).

Petitioners fail to grasp the agency's thinking here. They argue that the following quote is a *non-sequitur*, that it makes adequate protection rest entirely on the DBT rule.

> The rule text set forth at § 73.1 represents the largest adversary against which the Commission believes private security forces can reasonably be expected to defend. Thus, when the DBT rule is used by licensees to design their site specific protective strategies, the Commission is thereby provided with reasonable assurance that the public health and safety and common defense and security are adequately protected.

PC/MFP Brief at 30, *quoting* 72 FR 12714 (E10). But against NRC's underlying background "assumption" – namely, government agencies' "shared responsibilities" for defense – the quote is no more a *non-sequitur* than saying that, having 2 in hand, 2 more makes 4.

It was not unreasonable for NRC to find that requiring private security forces to do all they could be expected to do in practicality, effectively augmented by national security forces and other national measures, amounts to "adequate protection."[7]

D. In the 2006 DBT Rulemaking, Cost Considerations Did Not Determine What Could Be Reasonably Expected.

Petitioners, believing that NRC has insufficiently explained what it means by "reasonable expectation," assert that "reasonable" must mean "cost-effective," that the agency in fact took costs into consideration in the recent rulemaking, in violation of *UCSI*, which held that costs cannot be taken into consideration under the AEA when, as in the current DBT rulemaking, the agency is setting forth what is required for "adequate

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[7]Cf. *Riverkeeper*, 359 F.3d at 170 ("Relying on other governmental bodies to address a risk is not equivalent to ignoring the risk.")

protection." Petitioners, granting that there are legal limits on the weapons that private security forces may use, point out that there are no such limits on the size of either the attacking force or the private security force at a nuclear power plant. PC/MFP Brief at 25. They also reject the idea that an agency's long experience in doing threat assessments is anything on which a reviewing court can rely. *Id.* at 26. Petitioners conclude that the only possible explanation for the DBT's not requiring more security guards is cost. *Id.* at 28-9.

Petitioners here engage in mere speculation, giving no credit to the deference due the agency's expertise, misconstruing the aim of the rule, and ignoring what the rulemaking record says about the size of the adversary force, and about whether the agency considered costs when it decided what could reasonably be expected of a private security force.

Petitioners recognize that NRC could not make all relevant information available to the public during this rulemaking, *see* PC/MFP Brief at 24. It is not consistent of petitioners then to argue that NRC's assessment of the threat information – necessarily not public – is due no deference from the courts. *See* "Standard of Review" above; *cf. Public Citizen v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993) (citations omitted) (FAA adequately explained why security rule did not contain more detail).

Petitioners' argument that only cost can explain why NRC didn't require more security guards is irrelevant. First, the point of the DBT is not, and never has been, to require a certain number of security guards. Its point is rather to describe, in legally binding terms, the nature of the *adversary* force against which the licensee must defend, not the force with which the licensee must meet the DBT. *See, e.g.*, 72 FR 12705 and 12708 (E1 and 4). "The DBTs describe specific adversary characteristics against which licensees must be prepared to defend. Fires, in contrast, are not adversary characteristics ...." 72 FR 12711 (E7). And neither are security forces. The actual size of the security force, like any other characteristic of plant security, is regulated not by the DBT but by other means. See, for example, proposed 10 CFR 73.55(k)(1)(i), which, rather than establish a definite number for every guard force, would require each licensee to maintain the armed guard force necessary to protect against the DBT. *See* 71 FR 62664, 62720 (2006) (proposed rule on power reactor security requirements).

Second, though the number of *attackers* is important in *guidance* NRC has issued to help licensees understand how to comply with the DBT rule, *see* 72 FR 12708-09 (E4-5), and in individual plant security plans approved by NRC, the DBT rule itself has never fixed the size of the attacking force. As the agency said in the 1979 DBT rulemaking,

> [T]he numbers [of adversaries] are not as significant as are the capabilities and resources of the adversary. For example, the threat from a disorganized mob of fifty or so people is much different from that of only a few well-organized, well-trained people.

44 FR 68186.

Thus the DBTs have for years described attackers in more relevant terms, the latest rule especially: as willing to kill and be killed, as knowledgeable about specific target selection, as possibly attacking at several points, as well-equipped, as assisted by possibly more than one knowledgeable insider, and so on. See 10 CFR 73.1(a)(1)(i). Indeed, the DBT at issue here drops even the imprecisely quantitative terms of the 1994 DBT's description of the attacking force, to provide more flexibility than a rule can provide for responding to changes in the threat environment. See 72 FR 12709 (E5).

Even such numbers as exist in guidance are not cost-based. They are instead the result of "a careful and deliberative process involving not only NRC staff, but Federal law enforcement, and intelligence community, and homeland security agencies using a variety of classified and unclassified sources." *Id.* In other words, the numbers are threat-based, not cost-based.

The preamble to the new DBT says clearly that the scope of the DBT was not based on cost considerations. "[T]he DBTs are not defined by cost considerations .... The Commission agrees with the commenters that it may not legally consider economic

factors in determining the level of adequate protection ...." 72 FR 12714 (E10), *citing UCS I*, 824 F.2d at 117-118.

Petitioners cite nothing in the rule, preamble, or votes to the contrary. They do attempt a misinterpretation of a passage in the preamble, where NRC says, "the Commission's determination of specific aspects of implementation of and compliance with the DBT rule ... may involve consideration, along with other factors, of the relative costs of various methods of implementing particular requirements of the DBTs." 72 FR 12714 (E10). Petitioners claim that these words show that NRC has illicitly taken costs into consideration. PC/MFP Brief at 28. To the contrary, the preamble is merely alluding to that part of NRC's "backfit" rule that says that, once NRC has established, in a particular subject area, what adequate protection requires, NRC may take costs into consideration in choosing among alternatives for a "way to comply" with the requirements. *See* 10 CFR 50.109(a)(7). This particular provision was part of the rule the D.C. Circuit affirmed in *UCS II*.

Petitioners hint that this flexibility in the rule – its allowance for alternative ways to comply – impermissibly allows cost considerations to come in the back door. PC/MFP Brief at 32. But it is hard to believe that petitioners themselves would prefer a less flexible rule, for it allows, as noted before, for an *increase* in what is to be reasonably expected,

and for changes in the threat environment. Moreover, many, if not most NRC rules have a similar flexibility, and it would be surprising if they didn't, for rules must be adapted to a variety of circumstances. Their adaptability is a sign of prudence, not ill intent.

Petitioners also cite a GAO report and testimony calling for changes to NRC's process for determining the DBT. See New York Brief at 13 and16, *citing* GAO-06-388 (E939). There, GAO, writing about the process that led to the DBT orders on which the DBT rule is largely based, had said that NRC did not say whether cost was a consideration in deciding what was reasonable for a private security force to defend against. *Id.* at 23 (E955).

But GAO's statements are quite different from petitioners'. GAO says NRC did not say whether cost was among the criteria for determining what could reasonably be expected of a private security force, *id.*, but petitioners say that cost *must* have been a criterion. PC/MPF Brief at 29. Moreover, GAO points to no instance where NRC actually took cost into consideration in deciding that something should not be part of the DBT. *See* GAO-06-388 at 23-26 (E956-57).[8] GAO's grievance was a failure to explain the *orders* in terms of cost. The DBT *rule* at issue here explicitly discusses the role of cost and explicitly says cost played no role in setting the DBT. Petitioners offer no sound

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[8]Pages 25 and 26 of the report may be found in the PDF file of the report available at http://www.gao.gov/new.items/d06388.pdf.

reason not to take NRC at its word. The DBT rule and the rulemaking that led to it must be judged on their own terms, without attributing to them whatever faults might be attributed to the process that led to the DBT orders.

II. The Public is Adequately Protected Against the Air Threat.

Petitioners' whole argument about "reasonable expectation" – that NRC has based the DBT exclusively on it, that the notion is so opaque that it must hide illicit cost considerations – is merely a way of trying to get some foothold against the agency's conclusion that, given the efforts other federal agencies have made to protect against the air threat, the current DBT is sufficient for adequate protection. With the arguments on "reasonable expectation" now out of the way, we are left with the central disagreement, which is about what constitutes adequate protection, in particular adequate protection with respects to air threats.

A. What Constitutes Adequate Protection Is Decided by the Agency on the Basis of Technical Expertise and Experience.

Petitioners have taken aim at "reasonable expectation" because they are otherwise on difficult ground, for NRC's decision about what constitutes adequate protection is one that is entrusted to the agency by statute, and the statute, the AEA, provides little guidance to the agency on what constitutes adequate protection. See, *e.g.*, AEA, §161.b., 42 U.S.C. 2201(b).

The D.C. Circuit has added a little content to "adequate protection:" *UCS I* ruled that adequate protection is established without regard to cost. 824 F.2d at 117. And adequate protection does not demand "zero risk." *Id.* at 118. Also, *UCS II* says that the notion of adequate protection "may be given content through case-by-case applications of [the agency's] technical judgment rather than by a mechanical verbal formula or set of objective standards ...." 880 F.2d at 558.

This is especially true in the context of terrorism, whose risk is essentially not measurable. *See* National Academy of Sciences, *Safety and Security of Commercial Spent Nuclear Fuel Storage*, Washington D.C. (2006) at 6 (E736). NRC's judgments about adequate protection against terrorism are nonetheless not baseless. As *UCS II* says, adequate protection is exhibited largely in rules, guidance, and individual licensing decisions, which reflect the agency's considered technical judgment and experience. 880 F.2d at 558. The industry and citizens' groups are often unhappy with these judgments. For example, the industry in 1994 argued that NRC's having included a vehicle bomb threat in the DBT was not required by adequate protection, *see* 59 FR 38890 (E166), but the industry now accepts that particular threat as being required by adequate protection. Now it is citizens' groups and others who disagree with NRC, for having *not* included a particular threat in the DBT. But these calls for requiring less or for requiring

more do not mean that the agency's judgments about adequate protection have been arbitrary or capricious.

Courts have been reluctant to second-guess NRC's technical and policy findings – hence the latitude given NRC in rulemaking cases, see "Standard of Review" above, the "heightened deference" it enjoys in licensing cases, *Massachusetts v. NRC*, 924 F.2d 311, 324 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 899 (1991), and the limited review available in enforcement cases, *Riverkeeper v. Collins*, 359 F.3d 156, 164-68 (2d Cir. 2004). In the latter case, the Second Circuit, after noting a case on the deference generally due NRC's expertise, *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir.) *cert. denied*, 515 U.S. 1159, (1995), *citing Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (NRC is making predictions at the frontiers of science; when examining this kind of scientific determination, reviewing court must generally be at its most deferential), declined to second guess NRC's determination not to require specific air-defense measures as a matter of adequate protection, and upheld NRC's rejection of a citizens' enforcement petition demanding such measures. The Court ended with a general statement about the nuclear debate, a statement that might well apply to the case at hand:

> One of the most emotional issues confronting our society today is the adequacy of safety measures at nuclear power facilities. Fueled by the Three Mile Island

> incident, the debate over nuclear safety persists as public interest groups charge that serious problems remain and operator-utilities seek to assure the public that all reasonable measures have been taken to protect surrounding populations in the event of a major nuclear accident. But it is the United States Nuclear Regulatory Commission . . . which must decide the difficult questions concerning nuclear power safety.

Riverkeeper, 359 F.3d at 171, *citing County of Rockland v. NRC*, 709 F.2d 766, 768 (2d Cir. 1983), *cert. denied*, 464 U.S. 993 (1983).

As the preamble to the DBT rule says, NRC's "judgment is guided by the Commission's considerable expertise in nuclear security matters, developed over the course of 30 years of experience regulating the physical protection of nuclear facilities." 72 FR 12713 (E9). That judgment has been informed here by threat analyses, *id.* at 12717 (E13), by experience in the enforcement of the DBT orders, *id.* at 12705 (E1), by knowledge about the robustness of nuclear power plants, compared to other criticial infrastructure, *id.* at 12714 (E10), by a knowledge that nuclear power plants are better guarded than any other private critical infrastructure, and the guard forces subject to more oversight than any other civilian industry security force, *id.*, by new studies of how plants might respond to an air crash, *id.* at 12710 (E6), and by a knowledge of actions that other Federal agencies have taken since 2001 to protect against the air threat. *Id.*

B. The Decision Not to Put the Air Threat in the DBT Rule Was Well-considered and Justified, and Followed Congressional Direction to Consider the Air Threat During the Rulemaking.

In attacking NRC's determination of what constitutes adequate protection, petitioners focus on one aspect of the DBT – that it doesn't contain an air threat. About this aspect petitioners argue essentially two things: that Congress directed NRC to include the air threat in the DBT, see PC/MFP Brief at 33-38, and that NRC was arbitrary and capricious in not having included in the DBT "passive" defenses – for example, the "beamhenge" CBG suggested – against the air threat. *See* PC/MFP Brief at 39.

Petitioners do not argue that licensees should be required to provide "active" air defenses, such as anti-aircraft weapons.[9] Petitioners argue simply that it is wrong for NRC to rely wholly on the active defenses provided by, for example, the FAA and the military. In particular, California as *amicus* in this litigation asserts that NRC cannot rely on such active defenses unless they would work "in each and every case". *See* Amicus Brief at 12. Petitioners, while not arguing such an extreme position, do argue that NRC has provided no assurance that other agencies will "step into the gap", PC/MFP Brief at 31, that NRC has made no showing that "beamhenge" is impractical, New York Brief at 35, PC/MFP

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[9]CBG, which filed the petition urging "beamhenge," but is not a party here, did at one time argue for anti-aircraft weapons at nuclear power plants. *See* the September 14, 2001 letter from CBG and the Nuclear Control Institute to then NRC Chairman Richard Meserve. http://www.nci.org/01nci/09/letter-mserve-14.htm.

Brief at 40, that NRC has ignored studies that show the magnitude of the threat from the air, New York Brief at 38-39, and that it is inconsistent of NRC to rely on other agencies for air defense but not for defense against a waterborne threat, which the DBT rule does include. See New York Brief at 31.

These arguments misconstrue the law, draw misleading analogies, come close to arguing that adequate protection requires zero risk, and misplace the burden of explanation.

1. NRC Has Complied With the Energy Policy Act of 2005.

Section 651 of EPAct, codified at AEA 170.E., 42 U.S.C. 2210e., directs NRC, "[w]hen conducting its rulemaking" to "consider" several issues , including "the potential for water-based and air-based threats." AEA 170.E.b.(6), 42 U.S.C. 2210e.

And "consider" the air-based threat is what NRC most certainly has done. NRC's preamble to the DBT rule explained its ongoing attention to the air threats:

> The Commission has been evaluating the issue of air-based threats long before it was required by the EPAct, and its position on the necessity to add this attribute to the DBTs prior to this rulemaking has been well documented. The Commission's evaluation of the airborne threat has been an ongoing process, and it has spent a significant amount of time and resources as part of this rulemaking in considering whether to make some type of airborne threat part of the DBTs.

72 FR 12710 (E6). NRC has conducted studies of the possible impact of a large plane on a plant, *see id.*, incorporated CBG's petition into the DBT rulemaking, *see* 70 FR

67383 (E719), explicitly invited comment on the issue of air threats, *see* 70 FR 67382-83 (E718-19), and fully responded to the comments. *See* 72 FR 12710-11 (E6-7).

Petitioners argue that all this was not enough, that in fact, the Congressional direction to "consider" the air threat during the rulemaking amounts to a Congressional requirement that the air threat actually be included in the DBT rule itself. PC/MFP Brief at 33.

But this argument does no more than put words into Congress's mouth. Petitioners have no statutory text or legislative history to support their interpretation of a statutory directive that the DBT include air threats, and their interpretation moreover conflicts with the plain text of the statute. Under *Chevron*, 467 U.S. at 842, if traditional statutory interpretation demonstrates clear Congressional intent, "that is the end of the matter." That is certainly the case here, where the text itself says "consider" in the "rulemaking," not "include in the rule." The meaning here is entirely clear.

Reading the 12-factor list in section 170.E.b. as a recipe to be included in the rule itself runs against the very notion of notice and comment rulemaking, which section 170.E. also directed the agency to do, and which implies an open process, with issues to be decided after comments, not settled at the start. Moreover, not everything on the list in section 170.E.b. is the sort of thing that *can* be included in a *rule*, though everything

on the list can be *considered* in a *rulemaking*. Take the very first item on the list: "the events of September 11, 2001." It would be nonsensical to incorporate in the DBT rule a provision on airborne attacks on two skyscrapers. It is far from nonsensical, on the other hand, for the DBT rulemaking to "consider" the 9/11 events.

Attempting to make up for the lack of support provided by legislative materials for their position, petitioners turn to certain court cases, in particular *Levine v. Apker*, 455 F.3d 71 (2d Cir. 2006), for the proposition that where a regulation fails to reflect the statutory concerns in any way, the rule fails. PC/MFP Brief at 34. But *Levine* has no bearing here, because the statute underlying the agency action in *Levine* gave an instruction very different from the one that section 170.E.b. gives.

The statute in *Levine*, 18 U.S.C 3621(b), empowers the U.S. Bureau of Prisons (BOP) to "designate the place of the prisoner's imprisonment," "considering" several factors, among them "the resources of the facility contemplated" and "the nature and circumstances of the offense." BOP issued a rule that declared categorically that inmates could be designated for "community confinement only as part of pre-release custody and programming ..." 28 CFR 570.20(a), and that this pre-release custody period was "the last ten percent of the prison sentence being served, not to exceed six months." 28 CFR 570.21(a). See *Levine* 455 F.3d at 83. The Second Circuit concluded that the rule, in

limiting community confinement by a single, numerical, categorical criterion, had ignored certain non-numerical factors that would have a bearing on individual determinations of placement. *Id.* at 86-87.

But section 170.E., rather than directing NRC to consider, in *individual* licensing decisions, how well the applicant has dealt with the air threat, directs that certain factors be considered in reaching a *generic* decision, namely, on what constitutes the DBT. And whereas the court found that BOP had in effect entirely eliminated consideration of certain factors in reaching individualized decisions, here NRC most clearly did consider, at great length and expense, the factor of the air threat in reaching its *generic* decision. 72 FR 12710 (E6). NRC has fully complied with the statutory direction in the EPAct.

2. The Decision Not to Include the Air Threat in the DBT Rule Was Reasonable.

The argument the *Amicus* makes that NRC cannot rely on other agencies unless they stop "each and every" threat is, in effect, an argument that there should be zero risk, for, if, in the layers of protection that are provided, one layer should be perfect, the overall risk is zero. And it is well established that zero risk is not called for. *UCS I*, 824 F.2d 118. The *amicus* misses this implication of its remarkable claim, and moreover points to no authority for it.

Of course, while not perfect, the protection provided by the work of these other agencies, when considered along with other measures taken to deal with terrorist threats, must justify an overall finding of adequate protection, and the preambles to both the proposed and final DBT rules make an unrefuted case that these other agencies do justify such a finding, most notably by the changed level of protection against air threats since 9/11, and by the continuing ways in which that protection is exercised and improved. *See* 72 FR 12710-11 (E6-7).

New York in particular argues that NRC is inconsistent in deciding whether to rely on other agencies. New York notes that NRC looks to other agencies to deal with the air threat, but not land or water threats, even though other Federal agencies also deal with those latter threats, for example the Coast Guard with the water threat. NY Brief at 31.

The analogies will not bear scrutiny. The land and water threats are dealt with comparatively easily by licensees, and traffic on land and water is not regulated nearly so carefully as airline traffic.

Petitioners also argue that NRC has ignored pertinent studies. Not so. Indeed, as the preamble to the DBT says, and as described in the Statement of Case, NRC spent large amounts of resources on studies more recent than those cited by petitioners, and

the more recent studies "confirm the low likelihood of both damaging the reactor core and releasing radioactivity that could affect public health and safety." 72 FR 12710 (E6).

The studies petitioners cite do not serve them well, because they do not argue for changes in NRC's approach. For example, petitioners cite an early article by I.B. Wall, "Probabilistic Assessment of Aircraft Risk for Nuclear Power Plants," 15 *Nuclear Safety* 276 (1974) (E97-105). But that article concludes that the agency's rules and licensing procedures offer sufficient protection from the crashes it considered.

Similarly, petitioners cite the National Academy of Sciences study of the safety of spent fuel storage, a matter of particular concern to petitioners, see New York Brief at 38-9. But this study argues that further steps in the way of protection must consider the possibility that the money would be better spent on less robustly protected facilities.

> Congress asked the National Research Council for technical advice related to the vulnerability of spent fuel storage facilities to terrorist attacks. Congress, the Nuclear Regulatory Commission, and the Department of Homeland Security are responsible for translating this advice into policy actions. This will require the balancing of costs, risks, and benefits across the nation's industrial infrastructure. The committee was not asked to examine the potential vulnerabilities of other types of infrastructure to terrorist attacks or the consequences of such attacks. While such comparisons will likely be difficult, they will be essential for ensuring that the nation's limited resources are used judiciously in protecting its citizens from terrorist attacks.

National Research Council, *Safety and Security of Commercial Spent Nuclear Fuel Storage*, at 2 (E733).[10]

In its report, the Academy quoted this passage from an earlier Academy report on terrorism, suggesting that nuclear power plants are in fact less vulnerable to terrorist attack than other industrial facilities:

> The potential vulnerabilities of NPPs [nuclear power plants] to terrorist attack seem to have captured the imagination of the public and the media, perhaps because of a perception that a successful attack could harm large populations and have severe economic and environmental consequences. There are, however, many other types of large industrial facilities that are potentially vulnerable to attack, for example, petroleum refineries, chemical plants, and oil and liquefied natural gas supertankers. These facilities do not have the robust construction and security features characteristic of NPPs, and many are located near highly populated urban areas.

Id. at 27 (E757), *quoting* National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism*, Washington, D.C. (2002), at 43.

Petitioners lastly argue that, in any case, NRC should have given more attention to "passive" protection such as beamhenge, whatever the "active" measures taken by other agencies might be. Petitioners assert that the burden was on NRC to show that

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[10]Echoing the Academy's view, NRC, in responding to arguments that security at nuclear power plants should be federalized, said, "The security for nuclear facilities should be addressed in the context of the protection of other sensitive infrastructure. Society should allocate its security resources according to the relative risks, and, as a result, the separation of nuclear facilities from all other types of sensitive infrastructure will fragment the analysis inappropriately." 72 FR 12719 (E15).

beamhenge was not feasible, not on the rulemaking petitioner, CBG, to provide real information about its proposal. New York Brief at 35, PC/MFP Brief at 40.

The most important reason why NRC should not be expected to show the infeasibility of beamhenge – or other passive elements not already incorporated in the design, construction, or operation of a nuclear power plant[11] – is that infeasibility is only one argument against increased passive defense, and not the argument the agency in fact made. The argument NRC made was that beamhenge was not necessary for adequate protection. See 72 FR 12711 (E7). The agency therefore didn't have to reach the question of its feasibility, even if CBG had provided enough information to do so.[12]

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[11]NRC has in fact given consideration to passive protection against the air threat. The agency's studies, mentioned above, were devoted to perhaps the most significant passive protection, namely, the design, construction, and operation of the plant itself. 72 FR 12710 (E6). This passive protection is expected only to increase in future designs, permitting less reliance on security forces. 72 FR 12716 (E12).

[12]CBG's 27-page rulemaking petition contains barely half a page on beamhenge, and provides no real engineering information. *See* CBG Petition at 25-6 (E94-5). And the article CBG cites is no better. *See* Joel Hirsch, "Beamhenge," *Bulletin of the Atomic Scientists*, May/June 2003, pp. 46-7 (E205-06).

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vermont Yankee v. NRDC, 435 U.S. 519, 553-554 (1978).

Here again we come face to face with NRC's wide discretion to decide what constitutes adequate protection. Industry or citizens' groups may disagree with the agency's decision; they may misinterpret the agency's decision as one based on cost, or feasibility, or reasonable expectations alone about what licensees can do; but these confusions do not constitute an argument against that decision.

III. NRC Gave the Public Enough Information to Participate Meaningfully in the Rulemaking.

Petitioners also assert that NRC failed to make "critical factual information publicly available" in the course of the rulemaking, thus "undermining" the purposes of notice-and-comment rulemaking. PC/MFP Brief at 43-48. The single fact petitioners offer in support of their assertion is that NRC did not make public any communications it had with its licensees before the agency issued the *orders* that the DBT rule in part codifies. *Id.* at 45. Petitioners argue in particular that NRC should have made public the comments it received from appropriately cleared stakeholders in early 2003 in response to the NRC staff's draft views on what licensees could reasonably be expected to defend against. *Id.* at 45-47.

But an argument about what NRC did, or did not do, during the process that led to the DBT *orders* is no argument against the proceeding that led to the final DBT *rule*. The

two processes are distinct, in both form and content; and the form of each process was appropriate to its content.

In the rulemaking, NRC could not make everything public, nor, in the process leading up to the orders, could NRC tell the industry nothing. The orders contained details about power plant security, details that had to be treated, and continue to be treated, as safeguards information under AEA §147, 42 U.S.C. 2167. Thus the comments on this detail by appropriately cleared NRC licensees were not, and cannot, be made public. But the DBT *rule*, though it makes generally applicable certain measures that reflect the general features of the orders, contains no detailed safeguards information; the text of the rule and all of the comments the agency received on the proposed rule have been made public. This was enough to allow petitioners and others to offer useful comments:

> The text of the proposed rule provided ample information to enable meaningful comment on what the current level of protection for nuclear power plants and Category I fuel cycle facilities should entail. Members of the public can and have provided the Commission their views in this rulemaking on the number of attackers, amounts of explosives, and types of weapons that licensees should be required to defend against, even without having access to classified information or SGI.
>
> . . . .
>
> The Commission reiterates that no SGI or classified information was necessary to enable public comment, nor were any non-public comments received or considered

> over the course of this rulemaking. All of the comments received and considered in this rulemaking have been made publicly available.

72 FR 12715 (E11).

In particular, there was no lack of public discussion of petitioners' chief issues in this litigation – what could reasonably be expected of licensees, and what was NRC obliged to do in connection with terrorist air threats. Indeed, those questions were an essential thread through most of the comments and the agency's analysis of those comments. *See* 72 FR 12706-19 (E2–15).

IV. The DBT Rule Does not Degrade the Environment, but Protects It, and the Rule's Failure to Provide Still More Protections Did not Require an Environmental Impact Statement.

Petitioners argue that NRC violated the National Environmental Policy Act (NEPA) when it issued an environmental assessment (EA), rather than an environmental impact statement (EIS), on the basis of an agency finding of no significant impact. PC/MFP Brief at 48-50; New York Brief at 40-45. NRC's EA found that "[the final DBT rule] will not significantly increase the probability or consequences of accidents, nor result in changes being made in the types of any effluents that may be released off-site, and there would be no significant increase in occupational or public radiation exposure." (E64).

This is certainly a reasonable finding, well within NRC's technical and scientific expertise. *See National Environmental Advocates v. NMFS*, 460 F.3d 1125, 1133 (9th

Cir. 2006). The new DBT rule relates to security only, does not create new risks or dangers, and is in fact purely protective. Insofar as petitioners argue that NRC ought to analyze the environmental effects of agency *inaction* – for example, NRC's not adopting petitioners' own DBT proposals – their argument is unpersuasive as a matter of law.

NEPA requires an EIS instead of an EA only if agency action may cause "significant degradation" of the environment. *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of* Engineers, 2008 WL 43711, *13 (9th Cir., Jan. 3, 2008). NRC's new DBT rule cannot meaningfully be said to "degrade" the environment. On the contrary, it *upgrades* environmental protection against terrorism by establishing a binding, generic rule imposing security "enhancements." *See* 72 FR 12705-06. (E3-4.) It puts into the form of an agency rule certain elements of earlier interim security orders that, the EA said, themselves had no environmental impacts. (E65.) The whole point of the new rule is to conserve the environment (and to protect human health). The new rule significantly increases the security that each private reactor must provide, thereby decreasing the likelihood that a security breach will lead to a potentially environmentally harmful radioactive release.

This Court, like other courts, has held expressly that a NEPA analysis is unnecessary for agency actions conserving rather than degrading the environment. *See*

Douglas County v. Babbitt, 48 F.3d 1495, 1505 (9th Cir. 1995); *see also Friends of Fiery Gizzard v. Farmers Home Admin.*, 61 F.3d 501, 505-06 (6th Cir. 1995); *Indiana Forest Alliance, Inc. v. U.S. Forest Serv.*, 2001 U.S. Dist. LEXIS 11996 (S.D. Ind. 2001), *aff'd*, 325 F.3d 851 (7th Cir. 2003). "When we consider the purpose of NEPA in light of Supreme Court guidance on the scope of the statute, we conclude that an EA or an EIS is not necessary for federal actions that conserve the environment." *Douglas County*, 48 F.3d at 1505.

It's true that the Council on Environmental Quality (CEQ) directs agencies to consider "[i]mpacts that may be *both* beneficial and adverse ... even if the Federal agency believes that *on balance* the effect will be beneficial." 40 CFR 1508.27(b)(1) (emphasis added).[13] That's only natural, given that cost-benefit "balancing" is a key feature of NEPA. *See, e.g.*, 40 CFR 1502.23. Here, though, this Court doesn't face a situation where an agency has weighed environmental costs and benefits, and gone on to find the proposed agency action beneficial, "on balance." NRC's new DBT rule is only beneficial. It requires NRC licensees to protect against new security threats and against threats of greater severity. The rule can only be construed as offering more protection against terrorist attacks, and thus by its nature it lacks the adverse environmental impact (effects

[13] NRC, as an independent agency, is not bound by CEQ regulations implementing NEPA but "takes account" of them "voluntarily." 10 CFR 51.10(a).

of terrorist attacks) that petitioners fear.

Recently, in *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th cir. 2007), this Court required an environmental impact statement for a new fuel economy standard despite a finding by the National Highway Traffic Safety Administration in an EA that the new standard would have "a minor beneficial impact." 508 F.3d at 553.[14] But under the panel's rationale, the agency had declined to consider readily identifiable alternative standards that would lead to calculable reductions in ongoing harm to the environment from carbon emissions. By contrast, as we have stressed, NRC's new DBT rule is beneficial; it neither creates nor keeps in place tangible or measurable adverse environmental effects similar to those that concerned this Court in the NHTSA case.[15]

Just as NEPA does not apply to environmentally beneficial federal actions, it does not apply to a federal agency's refusal to take action demanded by interested citizens or groups. By its own terms NEPA applies to "major Federal *actions*" only. 42 U.S.C.

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[14] The government is currently reviewing whether to seek further review in the *Center for Biological Diversity* case.

[15] It's also far from clear just how, in practical terms, NRC would go about conducting a NEPA review of the environmental consequences of its new DBT rule, as compared to the alternate DBT approaches petitioners would prefer. The inquiry would be hopelessly open-ended. As NRC suggests in its preamble (E14), a generic rule enhancing security has no tangible causal link to an increased risk of terrorism and is not really susceptible of meaningful environmental analysis.

4332. If an agency were required to prepare an EIS whenever it decided against taking action, federal resources would be squandered and agencies hobbled: "No agency could meet its NEPA obligations if it had to prepare an environmental impact statement every time the agency had the power to act but did not do so." *Defenders of Wildlife v. Andrus*, 627 F.2d. 1238, 1244 (D.C. Cir. 1980). "[T]he non-exercise of power by an executive-branch officer does not call for compliance with NEPA." *State of Alaska v. Andrus*, 591 F.2d 537, 538 (9th Cir. 1979).

This Court should not compromise NRC's mandate to regulate civilian use of nuclear materials by requiring a NEPA analysis whenever NRC declines to add a proposed security precaution, such as CBG's beamhenge proposal. Such a NEPA requirement to analyze inaction would cripple agency decision-making.

Finally, petitioners argue that this Court's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1124 (2007) ("*Mothers for Peace*"), requires NRC to consider the environmental effects of a terrorist attack in its NEPA analysis of the DBT rule. *See* PC/MFP Brief at 50; New York Brief at 44. But *Mothers for Peace* does not address NRC's NEPA obligation to consider the environmental effects of terrorist attacks in connection with the DBT rulemaking. *Mothers for Peace* held simply that NRC may not "categorically" decline to consider the effects of a

terrorist attack in connection with licensing a new facility. 449 F.3d at 1030.

Here, NRC's EA reasonably found that its new DBT rule adding security enhancements would have no effect on the environment. (E65.) Unlike the spent fuel storage facility at issue in *Mothers for Peace,* the DBT rule would create no new facility for terrorists to strike, no increase in pre-existing terrorist risk, indeed no environmental effects at all resulting from terrorism. *Mothers for Peace* thus does not require a NEPA-based terrorism review of NRC's DBT rule.

Moreover, the Supreme Court has held that NEPA reviews need consider only environmental effects "proximately caused" by agency action – which the consequences of a criminal, terrorist attack decidedly are not. *See AmerGen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-07-8, 65 NRC 124, 126 (2007) *(pet. for review pending,* No. 07-02271 (3d Cir.)), *citing Department of Transportation v. Public Citizen,* 541 U.S. 752, 763-64 (2004), and *Metropolitan Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774 (1983).

But even assuming, as *Mothers for Peace* held, that there is a sufficient "proximate cause" link between licensing a particular nuclear facility and a terrorist attack on it, the causal link between a new, more protective agency *rule* and terrorist attacks is attenuated, to say the least, and is better characterized as non-existent. *See* 72 FR 12718 (E14)

("the consequences of a terrorist attack cannot be said to be an 'effect' of this rule"). No NEPA review is called for.

CONCLUSION

For the reasons given above, this Court should deny the petition for review of NRC's design basis threat rule.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Respondents the U.S. Nuclear Regulatory Commission and the United States of America do not know of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief has a proportionally spaced, roman typeface of 14 points, and, as calculated by my word processing software (WordPerfect X3), contains 15,123 words, as permitted by 9th Circuit Rule 28-4 when respondents are filing a single response to multiple briefs.

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January 15, 2008

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2008, copies of Respondents' Brief in Nos. 07-71868 and 07-72555 were served by first-class mail, postage prepaid, upon the following counsel:

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