

Nos. 07-71868, 07-72555

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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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, INC.

*Intervenor-Respondent.*

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THE STATE OF NEW YORK

*Petitioner,*

v.

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

*Respondents.*

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

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**ANSWERING BRIEF OF INTERVENOR-RESPONDENT  
NUCLEAR ENERGY INSTITUTE, INC.**

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February 11, 2008

**CORPORATE DISCLOSURE STATEMENT**

The Nuclear Energy Institute, Inc. ("NEI") is a non-profit corporation exempt from taxation pursuant to Section 501(c)(6) of the Internal Revenue Code. NEI functions as a trade association representing the nuclear energy industry. Its objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world. NEI has no parent companies, and no publicly held company has a 10% or greater ownership interest in NEI.

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February 11, 2008

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---

**ANSWERING BRIEF OF RESPONDENT-INTERVENOR  
NUCLEAR ENERGY INSTITUTE**

**I. JURISDICTIONAL STATEMENT**

Intervenor-Respondent Nuclear Energy Institute ("NEI") agrees with the Statement of Jurisdiction in the Brief for Petitioners Public Citizen, Inc.

("Public Citizen") and San Luis Obispo Mothers for Peace, as supplemented by the Brief for Respondents United States Nuclear Regulatory Commission ("NRC" or "Commission") and the United States of America.

**II. STATEMENT OF ISSUES FOR REVIEW**

NEI agrees with the Statement of Issues for review set forth in the Brief for Respondents.

**III. STATEMENT OF THE CASE**

Petitioners challenge on several bases the NRC's revised Design Basis Threat ("DBT") rule, 10 C.F.R. § 73.1(a)(1), promulgated by the Commission in final form on March 19, 2007. 72 Fed. Reg. 12,705 (Mar. 19, 2007) (E1). The final rule codified increased security requirements for nuclear power plants with respect to radiological sabotage. The requirements were initially imposed through orders issued to each nuclear power plant operating licensee in 2003. The enhanced DBT in the orders and in the final rule constitutes one part of the extensive response of the Commission, the federal government, and the nuclear industry to the terrorist attacks of September 11, 2001.

Petitioners principally challenge the final rule because, they believe, it does not adequately consider the threat of deliberate airplane attacks, such as terrorist air crashes into nuclear plants. Petitioners argue that the final rule does not meet the standard of review of the Administrative Procedure Act ("APA") for

five principal reasons: (1) the NRC's final rule does not assure "adequate protection" of public health and safety and the common defense and security as required by the Atomic Energy Act ("AEA"); (2) the NRC, in violation of the AEA, improperly considered the costs to licensees in connection with potential air defense protection by considering in the rulemaking what "can reasonably be expected of private licensees"; (3) the NRC did not comply with the mandate of the Congress in the Energy Policy Act of 2005 ("EPAct 2005"), directing that the agency "consider" air attacks in a DBT rulemaking; (4) the NRC did not disclose sufficient information in the DBT rulemaking to allow meaningful public participation in the notice and comment process; and (5) the NRC violated the National Environmental Policy Act ("NEPA") by failing in connection with the rulemaking to prepare a full-blown Environmental Impact Statement ("EIS") considering the risks of terrorist attacks.

The Nature of the Case and the Course of Proceedings below are more fully described in the Brief for Respondents. NEI agrees with that discussion.

#### **IV. STATEMENT OF FACTS**

Under the AEA the NRC must ensure that its regulation of "the utilization or production of special nuclear material . . . will provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232.a. In carrying out this mandate, the NRC has created a sophisticated and responsive regulatory

framework to ensure the physical security of nuclear facilities. That framework is established in 10 C.F.R. Part 73. Part 73 spans 75 pages in the Code of Federal Regulations. It starts by requiring power plant licensees to establish and maintain a comprehensive physical protection system to protect against radiological sabotage. The NRC's basic approach is to identify the "design basis threat," or DBT, and then to require licensees to protect their facilities against that threat. See 10 C.F.R. § 73.1. The DBT is based on deliberations with local, state, and Federal agencies, and reflects current government intelligence and threat assessment. The DBT has evolved over time and has resulted in additional security measures by licensees as the threat has changed and increased.

Although Part 73 does not include the non-public assumptions underlying the DBT, it does disclose the threat's general contours.<sup>1</sup> Nuclear facility licensees governed by Part 73 must assume that they will suffer a "determined violent external assault, attack by stealth, or deceptive actions" by an adversary force that is "well trained (including military training and skills) and dedicated individuals." *Id.* § 73.1(a)(1)(i)(A). They must expect the attackers will have "knowledgeable inside assistance" to facilitate entry and exit, disable alarms

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<sup>1</sup> Additional guidance on specific assumed adversary characteristics (*e.g.*, the number and training of attackers, specific weaponry, the type and size of explosives) are set out in documents that are not in the rule and that are withheld from public disclosure.

and communications, and offer violent support for the attack. *Id.* § 73.1(a)(1)(i)(B). The attackers are assumed to have: “hand-held automatic weapons, equipped with silencers and having effective long range accuracy”; “incapacitating agents and explosives” for use in gaining entry to or sabotaging the plant or for destroying fuel container integrity; and land and water vehicles to be used in an attack or as vehicle bombs. *Id.* §§ 73.1(a)(1)(i)(C)-(E).

To defend against attacks, Part 73 requires licensees to “establish and maintain an onsite physical protection system and security organization” to ensure that operations “are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety.” *Id.* § 73.55(a). Section 73.55 goes on to specify the nature of that system and organization in meticulous detail, including requirements for armed responders, equipment, training, and access authorization screening.

Further, the NRC periodically assesses and tests licensees’ security systems by inspection, including “force-on-force” exercises. A force-on-force exercise uses both a table-top drill and a realistically simulated commando-style live attack on the licensee’s facility to test the licensee’s security response to DBT attacks. In the simulation, a mock adversary force attacks the facility, using simulated weapons and explosives to ensure the most rigorous test possible of the licensee’s security measure. These performance-based inspections — unique

among federal regulatory programs covering commercial industries — verify that a power plant's physical features (such as fences, walls and other barriers), security devices (such as alarms and detection equipment), and guard forces can protect its facilities, and ensure that the possibility of an attack does not create an unreasonable risk to public health or safety.

As the NRC has concluded, by virtue of these and other security arrangements:

[N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

*Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 160 (2d Cir. 2004) (quoting *Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296, 297 (Nov. 18, 2002)).

For their part, NRC licensees have made extraordinary investments to fulfill their obligations under the AEA and NRC regulations. *See, e.g., Riverkeeper*, 359 F.3d at 168-169; *Private Fuel Storage, LLC* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 344 (2002). Since September 11, 2001, NEI's industry members have spent more than \$1 billion to implement NRC's interim security orders and to respond to the revised DBT

originally included in those orders. Those resources have gone to hire and train additional security personnel at power plants and fuel storage facilities, and to add security patrols, security posts, and physical and vehicle barriers. *See Private Fuel Storage*, 56 NRC at 344. NEI members have added measures to guard adjacent waterways and additional land areas. *See id.* They have evaluated potential facility vulnerabilities, and developed plans for responding to events that could cause damage to their plants. *See Riverkeeper*, 359 F.3d at 161. And they have improved their coordination with law enforcement and military authorities and imposed additional restrictions on site access. *See Private Fuel Storage*, 56 NRC at 344.

As a result of NRC regulatory and nuclear licensee efforts — including the DBT and substantial industry upgrades to address the DBT — nuclear power plants are hardened and well-defended facilities. In this context, the NRC and the industry must continuously consider the prospect of new or different threats in light of the relative attractiveness and protection of other sensitive, symbolic and infrastructure facilities. Security resources are not unlimited and must be deployed carefully, recognizing other societal targets and other relative risk. Protecting only one industry to a "zero-risk" level will not eliminate the terrorist threat. Moreover, the NRC must consider the response capabilities of its licensees integrated with the capabilities of the government agencies that address

risks more broadly. All of these factors, taken together, have guided the agency to define the DBT and other security requirements necessary to achieve “adequate protection” under the AEA.

#### V. SUMMARY OF ARGUMENT

The NRC conducted a rulemaking in connection with the DBT Rule that fully complied with the APA, AEA, EPAct 2005, and NEPA. The Petitioners and the *Amicus Curiae* fundamentally challenge that rulemaking because they disagree with the result. They believe that the DBT should specifically include a deliberate airplane attack. But in fact the NRC carefully considered the comments on the issue, reviewed threat information and consulted with the relevant government agencies and departments, evaluated the protection measures in place at nuclear plants, as well as plant design features and response capabilities, and — in its expert capacity — determined that these threats did not need to be specifically included in the DBT in order to assure adequate protection of public health and safety. The NRC explained its rationale carefully in publishing the final rule. Applying an appropriate standard of review, the agency’s decision therefore should be upheld.

Petitioners argue that the NRC — in considering what threats a licensee should reasonably be expected to defend against — improperly considered costs, contrary to the AEA. However, the NRC in fact considered the “reasonable

expectation” criterion only in the context of the allocation of responsibility for protection of nuclear plants from airborne threats as between private parties and the government. The agency found that the government initiatives and response capabilities, coupled with plant security and design features, and licensee response capabilities, collectively assure adequate protection from these terrorist threats. In evaluating this issue, the agency’s approach was similar to that it has taken in the past in considering potential threats from foreign enemies. The agency even considered the public commenter’s ill-defined “beamhenge” passive defense proposal. The NRC determined, quite simply, that such a measure is not necessary to provide adequate protection of safety. The NRC, therefore, fully met its statutory obligation and the Court should not substitute its judgment for that of the agency with respect to the final result of the rulemaking.

The NRC also complied with its obligations under EPLA 2005 and NEPA. The agency, in accordance with EPLA 2005, “considered” the threat of airplane attacks, along with other issues, in the DBT rulemaking. EPLA 2005 mandated a process, not a specific result. With respect to NEPA, the agency completed an Environmental Assessment and determined that the final DBT rule merely codified the 2003 plant-specific orders, and did not cause impacts on the environment. The agency — which did consider the terror threat in detail by the very nature of the rulemaking — was under no further obligation under NEPA.

NEPA does not compel further analysis of the impacts of speculative attacks — attacks for which the NRC concluded in the rulemaking there is adequate protection.

Finally, the NRC met its obligation to provide information regarding the issues under consideration in the rulemaking, the results of its deliberations, and the basis for its final rule. The NRC also provided public stakeholders with an opportunity for comment fully consistent with APA requirements.

## VI. ARGUMENT

### A. **THE STANDARD OF REVIEW IS HIGHLY DEFERENTIAL**

The AEA specifically authorizes the Commission to issue rules and orders as it “may deem necessary or desirable . . . to protect health or to minimize danger to life or property.” 42 U.S.C. § 2201.b. The AEA does not otherwise prescribe how the NRC is to discharge its duties. *See Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968) (in the AEA Congress enacted a “regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.”). With respect to the risks that potential terrorists may pose to nuclear power plants, the NRC has acted to address those risks and to ensure adequate protection of the public.

NEI agrees with the discussion of the standard of review in the Brief for Respondents. As discussed there, the Court of Appeals reviews NRC final rules under the “arbitrary or capricious” standard of the APA. *See, e.g., Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1156 (9th Cir. 2006), *citing* 5 U.S.C. § 706(2)(A), *cert. denied*, — U.S. — , 127 S. Ct. 1829 (2007). As also discussed in the Brief for Respondents, this deferential standard of review also applies to the agency’s actions to satisfy NEPA. *See, e.g., Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730, (9th Cir. 2001); *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 556 (9th Cir. 2000) (“Review under this standard is to be searching and careful, but remains narrow, and a court is not to substitute its judgment for that of the agency.”). Other Courts of Appeals have recognized that under the APA standard of review, the role of a reviewing court is not to usurp the technical role prescribed by the AEA to the NRC. *County of Rockland v. NRC*, 709 F.2d 766-77 (2d Cir. 1983) (review of NRC orders is deferential because the NRC and its Staff have special expertise and a wide range of experience in nuclear power plant operation and safety); *see also Riverkeeper*, 359 F.3d at 171. Accordingly, in carrying out its regulatory responsibilities, the NRC is entitled to substantial deference.

In the present case the Petitioners do not deny the substantial and costly measures that have been required by the NRC to increase nuclear power

plant security since the terrorist attacks of September 11, 2001. Rather, the Petitioners collectively disagree with and focus principally on one aspect of the NRC's DBT Rule: whether the rule should specifically include an airborne attack on a nuclear power plant. In so doing, Petitioners paint a picture of government penny-pinching on behalf of the industry, and ultimately government irrationality and abdication of responsibility. This picture, however, is strained, unpersuasive, and highly distorted. It is a picture that does not comport with the reality of the aggressive steps the NRC has required and the substantial expenses that have been incurred by the nuclear industry to ensure the protection of important baseload energy assets. Indeed, the agency has pushed the industry to levels of protection that exceed what the industry has maintained are necessary and appropriate. Nuclear power plants are now, unquestionably, the most robust, best protected, and best defended element of our nation's critical infrastructure.

In setting new security standards, the NRC has carried out its statutory obligations based on its substantial interactions with other government agencies, including the Departments of Defense, Homeland Security, and Transportation, as well as the Federal Bureau of Investigation. As a result, the agency is well versed in current intelligence information and threat assessment, various government and military defensive capabilities and strategies, and the relative roles of various government and military entities to both prevent and respond to terrorist attacks of

all conceivable types. The NRC — as the agency vested with the responsibility to license and regulate nuclear power plants — has not abdicated any responsibility. It has considered the issues carefully and acted within its authority and expertise. Consistent with an appropriate standard of review with respect to an agency rulemaking, the NRC must be accorded substantial deference to set safety and security standards.

**B. THE NRC'S DBT RULE IS A PROPER AND WELL-SUPPORTED EXERCISE OF AGENCY EXPERTISE.**

Petitioners principally argue that the DBT Rule is “arbitrary and capricious or contrary to law” in that it violates the AEA by failing to obligate licensees to implement specific defensive measures against air attacks. Petitioners maintain that the agency reached this result because it limited the DBT Rule to those threats “that a licensee can reasonably be expected to defend against.” This limitation, Petitioners assert, embodies an inherent and improper consideration of the “feasibility” and/or costs of such defensive measures. This, they maintain, is contrary to the AEA and to the decision of the D.C. Circuit in *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114 (D.C. Cir. 1987) (“In setting or enforcing the standard of ‘adequate protection’ that [the AEA] requires, the Commission may not consider the economic costs of safety measures.”). However, the Petitioners mischaracterize the “reasonable expectation” limitation stated by the NRC in the rulemaking. In fact, the NRC has enacted a rule that specifically addresses and

provides for adequate protection of public health and safety. The rule is a well-supported exercise of the agency's expertise. The NRC has not improperly considered the feasibility or cost of defensive measures.

**1. THE DBT RULE PROVIDES ADEQUATE PROTECTION OF PUBLIC HEALTH AND SAFETY AND COMMON DEFENSE AND SECURITY**

The basis for the NRC's DBT Rule is amply explained in the Statement of Consideration for the final rule. *See* 72 Fed. Reg. 12,705 (E1). The NRC specifically addressed the issue of "air-based threats" and potential defensive measures. *Id.* at 12,710-11 (E 6-7). The Commission noted that it "has been evaluating the issue of air-based threats long before it was required [to do so] by the EPAct, and its position on the necessity to add this attribute to the DBTs prior to this rulemaking has been well documented." *Id.* at 12,710 (E 6).

In the Statement of Consideration the Commission first addressed "active protection against air attacks." The Commission concluded:

Ultimately, the Commission 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.*

*Id.* (emphasis added). Thus, as the NRC made clear, the absence of air attacks in the DBT does not equate to an absence of security or an absence of adequate protection with respect to air attack scenarios.

The Commission then identified and credited further measures “beyond active protection” in the overall defense of nuclear power plants. This includes “specific protective strategies and physical protection measures that are not within the scope of the DBTs.” *Id.* For example, protection could be provided by deployment of “ground-based air defense weapons.” Recognizing the command and control issues involved, as well as the potential for collateral damage to the surrounding community, the NRC concluded that this would be “a decision for the Departments of Defense, Homeland Security, Transportation and Justice, not the NRC.” *Id.* Accordingly, these measures — while potentially available — would not be a licensee responsibility and therefore would not be a matter for the DBT.

Further, the Commission recognized that 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, the North American Aerospace Defense Command, the Transportation Security Administration, and the Federal Aviation Administration. *Id.* The Commission

also pointed to a number of significant post-9/11 security measures related to potential air-based attacks, including:

- Criminal history checks on flight crews;
- Reinforced cockpit doors;
- “No-fly” lists;
- Increased Air Marshall presence;
- Improved screening of passengers and baggage;
- The Federal Flight Deck Officer Program;
- Requirements for charter aircraft;
- Enhanced vigilance of flight training; and
- Improved coordination and communication between civilian and military authorities.

*Id.* All of these measures substantially reduce the air attack threat.

Next, the NRC referenced its mock exercises with licensees “to practice imminent air attack responses,” and inspections of licensee “mitigation strategies to limit the effects of such an event.” *Id.* The NRC considered these initiatives along with “detailed, site-specific engineering studies” of some plants to gain insights into the capabilities and vulnerabilities of nuclear power plants with respect to deliberate air attacks. *Id.* The NRC concluded that the studies “confirm the low likelihood of both damaging the reactor core and releasing radioactivity that could affect public health and safety.” *Id.* Moreover, the NRC determined

from its studies that, in the unlikely event of a radiological release, “there would be time to implement the required on-site mitigation actions” that reduce the potential public consequences from large fires or explosions. *Id.*

Overall, the agency recognized that existing nuclear plants were not designed specifically with deliberate air attacks in mind. Accordingly, the agency carefully considered the potential for airborne attacks on nuclear power plants, preventive and defensive measures of the federal government, and the capabilities of the existing plants to absorb and mitigate the consequences of air attacks. The agency concluded that, in the overall context, it is unnecessary to add this one specific threat to the DBT Rule in order to achieve adequate protection of public health and safety. Petitioners may argue that the NRC’s DBT Rule does not ensure adequate protection of public health and safety. *See, e.g.,* Public Citizen Br. at 29-33. In fact, however, the NRC has set forth a thorough and reasonable basis and explanation for its expert conclusion that in fact there is adequate protection of nuclear power plants from airborne threats.

The NRC also specifically considered the passive defensive measures advocated by the Petitioners, such as the so-called “beamhenges.” This was a conceptual proposal by a public stakeholder — a proposal unsupported by any engineering details or analysis. *See* Resp. Br. at 12. The NRC did not reject the proposal because “beamhenges” were not feasible or because they were too costly.

The NRC rejected the concept because it was unnecessary. The NRC stated that it “has considered on the issue, but has rejected the concept because it believes that the mitigation measures in place are sufficient to ensure adequate protection of the public health and safety.” 72 Fed. Reg. at 12,711 (E 7). Moreover, as noted by the Respondents (Resp. Br. at 6), even if the DBT Rule had included this threat, under the NRC’s regulatory approach to security it would remain open to the licensee to determine *how* it would protect the plant from that threat.

No more should be expected from an expert federal agency than what the NRC has done. The NRC conducted a thorough rulemaking; had access to up-to-date threat information; considered the comments of all stakeholders; and addressed those comments in a comprehensive, well-reasoned and documented manner. The agency concluded — fully consistent with its statutory mandate — that, in the totality of circumstances, including the actions and strategies of other Federal organizations, the DBT Rule provides adequate protection of public health and safety. Ultimately, as the Court of Appeals concluded in *County of Rockland*, 709 F.2d at 768, “it is the United States Nuclear Regulatory Commission . . . which must decide the difficult questions concerning nuclear power safety.”<sup>2</sup> In connection with this matter, it has done so properly.

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<sup>2</sup> See also *Riverkeeper*, 359 F.3d at 171.

**2. THE NRC'S "REASONABLE EXPECTATION" CONSIDERATION RELATES TO THE ALLOCATION OF RESPONSIBILITY TO ASSURE ADEQUATE PROTECTION, NOT TO COSTS**

Petitioners specifically challenge the NRC's DBT Rule to the extent it is based on any consideration of "feasibility" of defensive measures or what a private security force "can reasonably be expected to defend against." Petitioners view the reasonable expectation standard as insufficiently explained to satisfy APA Section 553(c). Public Citizen Br. at 23-25. More emphatically, Petitioners argue that any reliance on feasibility for a private entity, or on what a private security force can reasonably be expected to defend against, is unlawful. Public Citizen Br. at 26-29; New York Br. at 33-37. However, the Petitioners' arguments are based on an oversimplification of the NRC's rule and the basis for that rule. In fact, the NRC does not base its rule on feasibility, and it relies on practical considerations and the "reasonable expectation" factor only in discussing the *allocation of responsibility* between private security and government agencies. Overall, the rule is based on a finding that there *will be* adequate protection.

More specifically, as discussed above, the NRC in its rulemaking recognized that there are capabilities and defenses with regard to certain terrorism risks that are beyond those provided by a private licensee (*e.g.*, threat assessment, airport security, air marshals, air defenses and weapons).<sup>3</sup> These defenses and

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<sup>3</sup> As stated in NEI's comments on the proposed rule:

capabilities do not depend upon the DBT Rule, yet they contribute to the NRC's overall assessment that there is adequate protection of nuclear plants with respect to aircraft attacks. The NRC also recognized that there are measures a private entity cannot and should not take to assure adequate protection of nuclear plants — irrespective of cost considerations. Nothing in the AEA or the *Union of Concerned Scientists* case prohibits the NRC from considering these factors in allocating responsibility between its licensees and the government to assure adequate protection. Stated another way, nothing in the AEA or precedent prohibits the NRC — in making its adequate protection finding — from crediting the totality of circumstances, including the government's overall response to the terror threat, the ability of the plant to withstand attacks, and potential mitigating responses after an attack.<sup>4</sup>

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The threat continuum for any facility ranges from simple intrusion to full scale warfare, with the protection responsibility of the owner/operator falling somewhere in between. The DBT must be based on recognition of the proper role of government in protecting against a threat generated by an enemy of the United States. Defining the appropriate boundary between the private and public sectors in the protection of commercial nuclear facilities is a difficult task, but one which must be accomplished.

NEI Comments on Proposed Rule, 10 C.F.R. Part 73, Design Basis Threat (70 Fed. Reg. 67,380 (Nov. 7, 2005)) (E 872 at E 873).

<sup>4</sup> Public Citizen tangentially argues that the NRC has not adequately explained how it decides what a private security force can reasonably be

The agency's approach in this matter is not unprecedented. Similar logic was applied many years ago with respect to the allocation of responsibility for security that is inherent in the NRC's rule 10 C.F.R. § 50.13. Under Section 50.13, upheld by the Court of Appeals in *Siegel*, 400 F.2d at 784, nuclear plants do not need to be specifically designed to protect (or have security forces to defend) against an "enemy of the state" seeking to damage the plant.<sup>5</sup> The rule recognizes

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expected to defend against. Public Citizen Br. at 23-26. Public Citizen also implies that this lack of explanation covers for the real reason — that it is based solely on costs. However, the argument for further explanation is beside the point. Since the "reasonable expectation" factor does not go to adequate protection, but only to allocation of responsibilities, there are no specific constraints on the NRC. Cost, practicality, and feasibility considerations are not necessarily inappropriate in this context. Moreover, a reasonableness standard of any kind (including the reasonable expectation factor used by the Commission in this case) must turn on situation-specific facts. In this case the NRC has provided a very clear and rational explanation of why it allocated responsibilities the way it did in connection with the matter at hand. This explanation passes muster under an APA "arbitrary or capricious" standard of review.

<sup>5</sup> In promulgating 10 C.F.R. § 50.13, the Commission specifically underscored the division of responsibility:

*The protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies having internal security functions. The power reactors which the Commission licenses are, of course, equipped with numerous features intended to assure the safety of plant employees and the public. . . . One factor underlying the Commission's practice in this connection 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*

that the responsibility to deter and prevent these threats is provided by other government/military means.<sup>6</sup> That rule, like the present DBT Rule, goes to the allocation of responsibility for a security risk. The fact that the agency relies upon the government actions to provide part of the basis for its finding that there is reasonable assurance of adequate protection, notwithstanding the threat, does not undermine either the legitimacy of the rule or the overall finding of adequate protection.

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capabilities of this country constitute, of necessity, the basic “safeguards” as respects possible hostile acts by an enemy of the United States.

Exclusion of Attacks and Destructive Acts by Enemies of the U.S. in Issuance of Facility Licenses, 32 Fed. Reg. 13,445 (Sept. 26, 1967) (preamble accompanying publication of the final rule promulgating 10 C.F.R. § 50.13) (emphasis added).

<sup>6</sup> The U.S. Court of Appeals for the Second Circuit in *dictum* in *Riverkeeper*, 359 F.3d at 168 n.14, suggested that circumstances have changed since *Siegel* was decided and therefore the court did not find itself “compelled” to follow *Siegel*. The nature and perhaps even the degree of the threat may have changed since *Siegel*. However, recall that *Siegel* was decided during the height of the Cold War and threats were perceived at that time just as they are today (*see, e.g.*, the Cuban missile crisis of October 1962). Moreover, any changes in circumstances as alluded to by the court do not change the fundamental distinction made in *Siegel* regarding federal versus private responsibility. Regardless of changes in the threat environment, it remains impractical and perhaps ill-advised for private entities to duplicate or replace the national defense function, especially absent specific Congressional action.

3. **THE BASIS FOR THE DBT RULE IS COMPLETELY CONSISTENT WITH OTHER RELATED NRC REGULATORY MEASURES**

New York argues that the NRC's rationale for the DBT Rule is in conflict with other actions of the agency and the rulemaking record. New York Br. at 29-40. Specifically, New York finds the NRC's rationale to be in conflict with the NRC's prior changes to the DBT Rule. *Id.* at 29-32. It further argues that NRC's rationale is inconsistent with the agency's treatment of vehicular and waterborne attacks. *Id.* at 38. In addition, New York challenges the portion of the NRC's rationale that credits the ability of the plant to withstand explosions and large fires, such as might be caused by a deliberate aircraft crash. *Id.* The Petitioner believes that this logic would lead the NRC to find it unnecessary to include *any* bombs in the rule, including vehicular and waterborne bombs, because the licensee could simply rely on mitigation of the explosions and subsequent fires. *Id.* These arguments all lack merit.

First, New York asserts that in past revisions to the DBT Rule, the decision as to what threats would be included was based solely on a risk-based determination of what threats are credible — excluding only those threats for which the NRC determined the risk to be very low (or not credible). This, however, is not true. As already noted (and as acknowledged by New York), the “enemy of the state” rule in 10 C.F.R. § 50.13 is based on an allocation of responsibility to the federal government without any conclusion that the threats are

credible or otherwise. Moreover, New York does not point to any statutory provision in the AEA that mandates the NRC to require its licensees to address all credible threats without the support of government, military, and other external resources. Therefore, even if the Commission's approach in the 2007 DBT Rule differs from its approach to the 1994 DBT Rule, there is no showing that the difference is arbitrary, capricious, or not in accordance with law.

Second, as pointed out by New York, the NRC has included vehicle and waterborne attacks in the DBT. In fact, the agency first added vehicle bombs to the evolving DBT in the 1994 rulemaking. Resp. Br. at 7. These threats must be addressed by the licensees to a degree defined in non-public guidance documents.<sup>7</sup> In order to add the threat to the DBT, the NRC at that time distinguished the "enemy of the state" rule based on an analysis similar to what was applied in the current DBT rulemaking. In essence, the NRC found that these threats might come from domestic entities outside the Section 50.13 rule. In addition, the NRC found it reasonable (or "practical") to expect licensees to defend against truck bomb attacks, in contrast to defending against the types of missile

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<sup>7</sup> Even with respect to these threats, as noted above guidance documents must set specific adversary characteristics. One can *always* postulate a threat bigger than the specified adversary characteristics, regardless of the level. Therefore, even for threats within the DBT, the NRC is at some level concluding that a threat is either not "credible" or that a threat will be addressed by external threat assessment/security measures.

attacks left to the government under 10 C.F.R. § 50.13. Resp. Br. at 33. In allocating responsibility for the truck bomb threat, the NRC in 1994 came down on the side of assigning responsibility (specifically, for installing barriers) to the licensee. The agency further found that including this threat in the DBT, which resulted in licensees designing and installing appropriate barriers, was more than what was required for adequate protection. Resp. Br. at 36, *citing* 59 Fed. Reg. 38,889, 38,891, 38,898 (Aug. 1, 1994).

The NRC, in the current rulemaking, has applied logic very similar to that which it applied in 1994 — only this time it has come to a different result with respect to the allocation of responsibility. The NRC has not invoked the Section 50.13 exemption, but it has concluded that the government bears much of the responsibility for preventing air attacks. The agency has again also found that there is a level of protection that at least meets the adequate protection standard. There is no irrational, arbitrary, or capricious inconsistency here.

Third, in its argument that crediting a plant's ability to mitigate the consequences of attacks would undermine the need for any security with respect to all types of bombs, New York is challenging a hypothetical rulemaking decision that the NRC has not made. The NRC in fact requires protection from attacks utilizing vehicle or waterborne bombs. The NRC has imposed a requirement that leads licensees to install active and passive defenses with respect to these threats.

As noted, according to the NRC in 1994 these measures may actually exceed an adequate protection standard. The NRC has not, in connection with these threats, specifically relied upon mitigation measures for fires and large explosions as a basis to find adequate protection. That does not mean that the NRC cannot or may not lawfully rely on mitigation of security threats — either for bombs or any other threat. For air attacks it is a factor the NRC has considered. It is a perfectly rational factor and one well within the agency's discretion to consider.<sup>8</sup>

The *Amicus* also challenges the NRC's consideration of the licensees' abilities to mitigate fires and large explosions, calling mitigation an inadequate response and analogizing the NRC's position to not taking actions to protect Hoover Dam based on plans to get people to higher ground. California Br. at 13-14. The argument, however, is based on a poor analogy.

First, insofar as NEI can determine, there is no regulation or other requirement for the protection of Hoover Dam from airborne threats, so the analogy is not helpful to the *Amicus's* cause from the start. Second, with respect to nuclear plants the argument assumes that the NRC is relying only on emergency

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<sup>8</sup> In addressing security, like many aspects of reactor safety, the agency is addressing risk. In the classic formulation, risk is a product of the *probability* of an event and the *consequences* of that event. Mitigation capability is a factor in addressing consequences of events. It, therefore, is a normal and appropriate consideration in determining whether there is adequate protection with respect to a security risk.

response. In fact, the NRC is relying upon structural and thermal analyses and upon the ability of plant responders to suppress fires before those fires could cause significant damage that would lead to offsite consequences. NRC's studies confirmed that in these events there is a low likelihood of both damaging the reactor core and releasing radioactivity. 72 Fed. Reg. at 12,710. Finally, the presumptions by the *Amicus* that one would, in the case of Hoover Dam, be "left with a ruined dam and destruction of nearby residences and businesses," or in this case, a "compromised nuclear facility and severely contaminated landscape," are completely unsupported — for either Hoover Dam or a nuclear power plant. The agency's rule is not inconsistent with past practice or arbitrary or capricious in violation of the APA.

**4. THE NRC'S REJECTION OF A "BEAMHEDGE" OR OTHER AIR DEFENSE IS NEITHER ARBITRARY NOR CAPRICIOUS**

One complaint of Petitioners is the NRC's analysis and rejection of the "beamhenge" concept. Public Citizen Br. at 39-42. Public Citizen finds it to be "irrational" for the NRC to assert in the rulemaking (as discussed above) that the responsibility for active protection against airborne threats lies with the Federal government, yet, fail to answer why licensees should not be required to use "available" passive measures. *Id.* at 39. Public Citizen argues that the agency was remiss in not further addressing the "efficacy" of the beamhenge concept, and in so arguing assumes that a beamhenge structure would work. *Id.* at 40. However,

Petitioners' argument places an undue and unnecessary burden on the NRC to disprove the assumption.

As explained above, the beamhenge concept was sketched by a public stakeholder. The NRC did not determine whether or not a beamhenge was feasible. It determined that such a structure was unnecessary. *See also* Resp. Br. at 55. At that point the agency was under no duty to more fully develop or further consider the proposal. Most assuredly, had they done so, they would have faced a major challenge. A large passive structure of the type envisioned would need to be uniquely designed for every operating nuclear plant in the country. It would need to be analyzed for seismic and other structural considerations to assure that the structure itself would not create unintended new safety risks. A beamhenge design would also need to be evaluated for its efficacy with respect to the very security risks being considered (for example, whether the impact of crash debris would cause different and/or greater consequences than the postulated air attack). When the NRC finds a security or other safety measure to be necessary for adequate protection of safety, it has no qualms in requiring information from its licensees and in analyzing and imposing further requirements. (The post-9/11 security orders which imposed substantial new burdens on licensees and on NRC resources is but one example.) The APA, however, does not impose a requirement that NRC

develop, evaluate and require measures that — even if feasible — would go beyond an adequate protection standard.<sup>9</sup>

In this context, the *Amicus* invokes the concept of “defense in depth” often utilized in nuclear design for safety reasons, and faults the NRC for stating that measures such as beamhenges “are unreasonable, without providing evidence to support this conclusion.” California Br. at 14-15. However, this misrepresents the NRC’s conclusion in the rulemaking. The NRC did not state that the concept was “unreasonable” (and no citation to such a statement is provided). The NRC stated that it rejected the concept because it believes the “measures in place are sufficient to ensure adequate protection of the public health and safety.” 72 Fed. Reg. at 12,711. “Defense in depth” is a valid safety concept, but there is no legal basis in either the APA or AEA to require the NRC to mandate defense in depth beyond adequate protection. And the NRC is under no statutory burden to provide evidence that beamhenges, or any other hypothetical safety enhancements, are unreasonable before it can decline to impose a requirement for those enhancements.

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<sup>9</sup> The AEA, for example, does not require the NRC to impose all “feasible” security measures or “best available” safety technology.

**C. NRC'S CONSIDERATION OF ENVIRONMENTAL IMPACTS COMPLIED WITH THE NATIONAL ENVIRONMENTAL POLICY ACT**

Petitioners and *Amicus Curiae* next maintain that the NRC failed to comply with NEPA in adopting the DBT rule. However, as discussed in the Brief for Respondents and below, the agency performed an Environmental Assessment (“EA”)<sup>10</sup> in connection with the rulemaking that is fully consistent with the requirements of NEPA.<sup>11</sup>

**I. THERE ARE, IN FACT, NO SIGNIFICANT ENVIRONMENTAL IMPACTS ASSOCIATED WITH ADOPTION OF THE DBT RULE**

In adopting the DBT Rule, the NRC amended its regulations to codify generic security requirements that are very similar to those requirements previously imposed by the Commission’s 2003 plant-specific DBT orders. *See* 72 Fed. Reg. 12,705 (E 1). Specifically, as noted in the NRC’s EA, the rule changes pertained only to security requirements and simply aligned NRC regulations more

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<sup>10</sup> Environmental Assessment Supporting Final Rule, 10 C.F.R. Part 73.1 - Design Basis Threat (Feb. 2007) (E 59).

<sup>11</sup> Petitioner New York and the Amicus correctly agree that the proper standard of review to be applied in this matter in connection with the agency’s NEPA review is the APA “arbitrary and capricious” standard. *See, e.g.,* New York Br. at 42, California Br. at 7. Public Citizen, however, refers to a “less deferential reasonableness standard.” Public Citizen Br. at 48, n.7. At bottom, however, the distinction is of little if any significance because, in this Court, the two standards are “essentially applied in the same manner.” *Center for Biological Diversity v. Forest Services*, 349 F.3d 1157, 1165-66 (9th Cir. 2003) (citation omitted).

closely with the plant-specific DBT orders already imposed on licensees.<sup>12</sup> In general, implementation by licensees of the DBT Rule did not involve additional actions beyond the actions that had already been taken to address the 2003 orders. This being the case, the NRC correctly concluded that there were no environmental impacts caused by adoption of the rule.<sup>13</sup> Accordingly, the NRC issued a Finding of No Significant Impact, determining as follows:

On the basis of the environmental assessment, the NRC concludes that the action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined an environmental impact statement is not needed for the action.<sup>14</sup>

In fact, if anything, by codifying the security requirements of the 2003 orders the DBT requirements (and the 2003 orders) *protect* the plant and the environment. As noted by the Respondents (Resp. Br. at 59-60), this Court has held that a NEPA analysis is unnecessary for agency actions conserving rather than degrading the environment. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1503 (9th Cir. 1995). Thus, the requirements of NEPA were met in adopting the rule.

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<sup>12</sup> EA at v (E 64).

<sup>13</sup> EA at v-vii (E 64-66).

<sup>14</sup> *Id.* at vii (E 66).

2. **PETITIONERS AND THE *AMICUS* FUNDAMENTALLY MISCONSTRUE THE REQUIREMENTS OF NEPA IN THE CONTEXT OF THE SUBJECT RULEMAKING**

Petitioners and the *Amicus* take issue with the NRC's failure to consider and analyze in the EA the environmental impacts of a successful terrorist attack against a nuclear power plant.<sup>15</sup> In so doing, however, they fundamentally misconstrue the requirements of NEPA in the context of a rulemaking such as the one that is the subject of this case. The substantive issue that was the focus of the NRC's rulemaking is achieving adequate protection with respect to terrorist risk. Given that the final rule was found by the NRC to provide adequate protection of safety with respect to airborne terrorist attacks, NEPA does not compel further analysis of the environmental consequences of hypothetical failures of the rule to achieve absolute protection.

First, NEPA clearly requires that the direct environmental impacts of government action be evaluated. The action at issue here is the adoption of an NRC regulation. The EA prepared by the NRC properly evaluated the direct environmental impacts associated with the adoption and the imposition of the rule which, as discussed above, were and are essentially zero. Implementation of the

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<sup>15</sup> See Public Citizen Br. at 16, 48-50; New York Br. at 25-26, 40-47; California Br. at 2-3, 22-27. Within this context, Petitioners specifically take issue with the Commission's not preparing a full blown EIS, while *Amicus Curiae* — if not actually arguing specifically that an EIS was required — strongly implies that it was.

rule, as noted above, does not impact or degrade the environment. If anything, it enhances protection of the environment.

Next, NEPA does not require evaluation of the consequences of what might happen if something that a regulation is directed at precluding in fact occurs, and neither Petitioners nor the *Amicus* cite any authority to the contrary. None of the cases referenced in the briefs is on point. Rather, the decisions generally address the requirement for environmental analyses in various contexts, and the need to consider cumulative impacts. Here, the NRC's DBT Rule substantially reduces the *risk* of terrorist attack. The cumulative *impact* concept has no applicability.

The *San Luis Obispo Mothers for Peace* decision of this Court<sup>16</sup> is also not to the contrary. That case does not consider an agency's obligation to consider the impacts of a potential terrorist attack within the context of a rulemaking specifically addressing terrorist risk. Rather, that decision simply holds that the impacts of such an attack cannot be categorically excluded from an environmental review associated with the site-specific licensing of a new facility — specifically, in the context of an NRC decision approving the construction and operation of a used fuel storage installation at a nuclear power plant site. In the

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<sup>16</sup> *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, — U.S. —, 127 S. Ct. 1124 (2007).

instant case, unlike *San Luis Obispo Mothers for Peace*, the NRC did not categorically exclude the terrorism issue from consideration. By its very nature, the DBT rulemaking in this case was itself a careful consideration of the terrorism issue. Moreover, unlike *San Luis Obispo Mothers for Peace*, this is not a site-specific licensing action and there is no new nuclear facility or activity involved.

Further, the position of Petitioners and the *Amicus* does not stand up to a common sense critique. Under their implicit approach, environmental analyses associated with the adoption of regulations would need to analyze negative consequences should the regulations prove to be inadequate. For example, in imposing fire protection requirements for nuclear plants<sup>17</sup> the NRC would be compelled to consider the impact of the power plant burning down. It is safe to say, neither the NRC nor any other safety agency takes this approach to NEPA. Taking another example, if an agency were to issue regulations (with no direct environmental impacts) that impose quality assurance requirements on airplane manufacturers to reduce the risk of crashes, the agency would, by the logic of Petitioners and *Amicus*, be required to analyze the environmental consequences of hypothetical airplane crashes. This approach would distort NEPA, jam the government rulemaking process, and materially impede adoption of new safety standards.

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<sup>17</sup> See, e.g., 10 C.F.R. § 50.48

Finally, when an agency imposes safety standards that meet the statutory mandate (e.g., achieve “adequate protection”) — as the NRC has done here — no further NEPA analysis is needed to justify a decision not to impose additional standards. The agency’s action cannot be said to be either the direct or proximate cause of the hypothetical environmental consequences of speculative scenarios that exceed the adequate protection standard.<sup>18</sup> Such requirements would not be logical or practical, and are not compelled by NEPA.

**D. THE NRC HAS FULLY COMPLIED WITH THE ENERGY POLICY ACT OF 2005**

Public Citizen next asserts that the NRC’s final rule is contrary to law because it does not comply with the mandate of Congress. Public Citizen Br. at 33-39. Public Citizen is here alluding to the direction in Section 651 of EPAct 2005, 42 U.S.C. § 2210e, that the NRC “consider” several issues in a DBT rulemaking, including the “potential for water-based and air-based threats.” The

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<sup>18</sup> Cf. *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007) (the Court required an EIS where the agency had the authority to impose more stringent fuel economy standards but declined to do so), *petition for rehearing filed*, No. 06-71891 (9th Cir. Feb. 6, 2008). In that case one can at least arguably conclude that the agency’s decision *was* the proximate cause of additional emissions and environmental impacts. By not imposing restrictions, additional emissions would occur. That logic and conclusion are significantly more strained for the current situation — where the NRC’s rule leaves no impacts in place; at most, it does not reduce the residual, negligible *risk* of environmental impacts (impacts that would be caused by terrorists, not by the NRC) to zero.

*Amicus Curiae* makes a similar argument. California Br. at 19-21. Both parties assert that the air threat is real and that the NRC has not adequately addressed that threat. Public Citizen goes so far as to suggest (without citation) that the Commission declared that the air-based threat “is outside the scope of its rulemaking proceeding” (Public Citizen Br. at 36) and that the Commission “concluded that no measures to deal with air attacks were necessary to meet the standard of adequate protection.” *Id.* These arguments again mischaracterize what the Commission has said and done. In fact, the Commission responsibly and completely met its obligations under EAct 2005.

First, in accordance with Fed. R. App. P. 28(i), NEI notes its agreement with and specifically adopts by reference the position and arguments on this issue in the Brief for Respondents. *See* Resp. Br. at 48-51. In EAct 2005, Congress intended that the NRC “consider,” among other issues, “the potential for water-based and air-based threats.” As already discussed here, and as discussed by Respondents, the Commission did precisely this. The Commission plainly met the intent of Congress to consider the issue in a notice and comment rulemaking. Congress did not mandate any particular result with respect to the DBT.

Moreover, contrary to the unsupported and erroneous suggestions of Public Citizen, the Commission did not conclude that air-based threats were “outside the scope of the rulemaking.” In fact, as discussed above and in the

Respondents Brief, the rulemaking specifically encompassed these issues. Accordingly, case law cited by Public Citizen related to an agency's "complete failure to consider an issue" is inapposite. *See* Public Citizen Br. at 37, n.5.

Likewise, contrary to Public Citizen's characterization, the NRC did not conclude that no measures were necessary to deal with air attacks to provide adequate protection of safety. The Commission concluded that no further efforts need to be imposed on licensees through the DBT Rule to address the threat and provide adequate protection. This is by no means the same as concluding that no measures were necessary. The Commission in fact cataloged a wide range of measures in place or to be taken by licensees and by state and Federal agencies, that provide adequate protection of public safety. Public Citizen acknowledges (Public Citizen Br. at 36) that Congress only "require[d] the agency to evaluate seriously" whether to incorporate air attacks into the DBT. And Public Citizen recognizes (Public Citizen Br. at 37-38) that the Commission was free to "explain why it chose not to proceed through the DBT regulation" to address air attacks. The NRC in fact both seriously considered the issue and thoroughly explained why it chose not to include the air threat in the DBT. The Commission therefore fully satisfied its EAct 2005 obligations.

**E. THE NRC DID NOT IMPROPERLY WITHHOLD CRITICAL INFORMATION FROM THE PUBLIC**

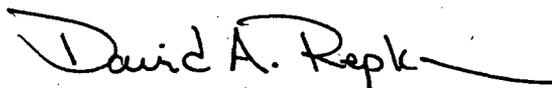
Public Citizen lastly asserts that the NRC failed to make “critical factual information” publicly available during the rulemaking, “undermining” the rulemaking process. Public Citizen Br. at 43-48. NEI fully agrees with the discussion of this issue in the Brief for Respondents, and specifically adopts those positions and arguments in accordance with Fed. R. App. P. 28(i). *See* Resp. Br. at 56-58.

Moreover, Public Citizen provides no specific showing as to how it was deprived of an opportunity to provide comment on, and input to, the NRC rulemaking process. Public Citizen and other stakeholders were given a comment opportunity and clearly made their views known with respect to the DBT and airplane attacks. While they have never proffered any unique expertise with respect to threat assessment, Federal response capabilities, or analysis of nuclear plant mitigation capabilities, they had an opportunity to affirmatively state their views on the relevant issues. For this reason, in addition to the reasons stated by Respondents, this argument must be rejected.

## VII. CONCLUSION

For the reasons given above, the Commission in promulgating the final DBT Rule acted in accordance with the AEA, EPA 2005, and NEPA, and acted well within its expert agency discretion. Under an APA standard of review, the Petition for Review should be denied.

Respectfully submitted,



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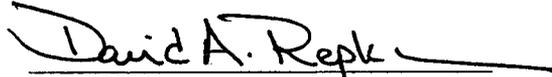
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Dated in Washington, D.C.  
this 11th day of February 2008

**STATEMENT OF RELATED CASES**

Intervenor-Respondent is not aware of any related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

  
David A. Repka, Esq.

**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P 32(a)(7)(C) and Circuit Rule 32-1, the undersigned counsel hereby certifies that the foregoing Answering Brief of Intervenor-Respondent is proportionally spaced, has a type face of 14 points or more, and contains 8,864 words, excluding the title page, Table of Contents, Table of Authorities, Corporate Disclosure Statement, and certificates of counsel. The word count was determined by Microsoft Word.

  
David A. Repka, Esq.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PUBLIC CITIZEN, INC. AND SAN LUIS OBISPO )  
MOTHERS FOR PEACE, INC., )  
*Petitioners* )

v. )

UNITED STATES NUCLEAR REGULATORY )  
COMMISSION AND THE UNITED STATES OF )  
AMERICA, AND )  
*Respondents* )

Nos. 07-71868  
07-72555

NUCLEAR ENERGY INSTITUTE, INC. )  
*Intervenor-Respondent* )

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THE STATE OF NEW YORK, )  
*Petitioner* )

v. )

UNITED STATES NUCLEAR REGULATORY )  
COMMISSION AND THE UNITED STATES OF )  
AMERICA, )  
*Respondents* )

**CERTIFICATE OF SERVICE**

I hereby certify that on February 11, 2008, hard copies of the foregoing "ANSWERING BRIEF OF INTERVENOR-RESPONDENT NUCLEAR ENERGY INSTITUTE, INC." were served as follows:

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United States Court of Appeals for the Ninth Circuit  
95 Seventh Street  
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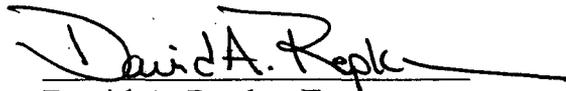
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