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,

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 FINAL ACTION
OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION

REPLY BRIEF OF PETITIONER STATE OF NEW YORK

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Dated: February 29, 2008

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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 29, 2008

Cathy Catterson
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
95 7th Street
San Francisco, California 94103

Re: *Public Citizen v. NRC*, No. 07-71868
New York v. NRC, No. 07-72555

Dear Ms. Catterson:

Enclosed for filing please find New York State's reply brief and declaration of service.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL REGISTER

SCIENTIFIC AND TECHNICAL REPORTS

PRELIMINARY STATEMENT

The brief of respondent the Nuclear Regulatory Commission ("NRC") is notable for how much it agrees with the arguments advanced by petitioner New York State. The NRC admits that the events of September 11, 2001, demonstrated a serious threat of air-based terrorist attacks on nuclear power plants. See NRC Br. at 19. It admits that existing nuclear power plants were not designed to withstand airborne terrorist attacks using large aircraft. See id. And it admits that in fulfilling its statutory duty to ensure adequate protection of the public, it may not consider the costs of compliance. See id. at 40-41.

The NRC nonetheless contends that it could properly exclude air-based threats from its design basis threat ("DBT") rule because it was not "reasonable" to expect a nuclear power plant to defend against such threats. But this reasonable-expectation standard cannot be explained by anything other than an illegal consideration of compliance costs. The NRC requires licensees to defend against similar land- and water-based attacks, and it offers nothing to justify this inconsistency other than proxies for cost, like the relative ease with which licensees can defend against particular threats. And the NRC has not adequately confronted numerous studies confirming that protection from air-based threats is needed to provide adequate protection to the public.

Nor has the NRC given an adequate justification for refusing

to prepare an environmental impact statement ("EIS"), as required by the National Environmental Policy Act ("NEPA"). The explanations the NRC advances – that an EIS is not required for actions that purportedly benefit the environment and that the connection between the NRC's actions and the risk of terrorism is too remote to consider – have been squarely rejected by recent decisions of this Court.

ARGUMENT

POINT I

THE NRC'S FAILURE TO INCLUDE AIR-BASED THREATS IN THE DBT RULE IS ARBITRARY AND CAPRICIOUS

A. The NRC Has Not Justified Its Reasonable-Expectation Standard.

1. The standard is unprecedented.

The NRC does not dispute that when an agency changes course, it must acknowledge and explain the change. See NY Br. at 26-27 (citing cases). Nor does it dispute that changed positions do not merit the same deference that normally is accorded to administrative interpretations of statutes or regulations. See id. (citing cases). And the NRC admits that before this rulemaking, it never expressly invoked the "reasonable expectation" standard in defining the DBT. See NRC Br. at 33.

The NRC nonetheless claims that its reasonable-expectation approach is not new. But the only examples that it points to

involve the agency's "enemy of the state" ("EOS") rule, 10 C.F.R. § 50.13, which provides that licensees need not protect against threats from military attacks by the armed forces of foreign nations. See NRC Br. at 33-34. In particular, the NRC relies on the 1994 revision to the DBT rule, which rejected the nuclear industry's argument based on the EOS rule that the NRC should exclude vehicular bomb threats from the DBT, and Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968), which upheld the EOS rule soon after it was promulgated.

These two examples demonstrate precisely the point made in New York's opening brief: that the only time the NRC has deviated from a purely threat-based approach has been pursuant to the EOS rule, which NRC concedes does not apply here. See NY Br. at 31-32. The rationale behind the EOS rule is the impracticability of requiring civilian nuclear facilities to defend against attacks that typically could be carried out only by the armed forces of other nations. See Final Rule, Protection Against Malevolent Use of Vehicles at Nuclear Power Plants, 59 Fed. Reg. 38,889 38,893 (Aug. 1, 1994) (E169); Siegel, 400 F.3d at 783. But the NRC admits that "the DBT rule's 'reasonableness' standard is not equivalent to the § 50.13 'enemy of the state' standard." NRC Br. at 16; see also Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705, 12,715 (Mar. 19, 2007) (E11) (stating that the NRC "disagrees that any extension of the DBTs automatically conflicts with" the EOS rule and the NRC

"may revise the DBTs in response to changes in the threat environment without necessarily implicating" the EOS rule).

Here, just as in the 1994 DBT rulemaking, the NRC in fact rejected application of the EOS rule as the basis for excluding air-based threats from the revised DBT. See 72 Fed. Reg. at 12,714-15 (E10-11); see also 59 Fed. Reg. at 38,893 (E169). Thus, the NRC now cannot rely on the "practicality" considerations underlying the EOS rule to justify its debut of the reasonable-expectation approach to defining the DBT. Rather, the NRC is attempting to extend the concept of practicality beyond the confines of the EOS rule, which the NRC has never done before.

Even if the NRC's consideration of "practicality" under the EOS rule were extended to the DBT rule, the NRC's reasonable-expectation approach is not equivalent to the EOS rule's "practicality" concept. Although the NRC refused in the rulemaking proceedings to explain the criteria it used to determine what it is and is not "reasonable" to expect of a private security force, the NRC now says that it "obviously" includes many considerations, only one of which involves "practicality." NRC Br. at 31-32.

Because the NRC has not pointed to any circumstance outside the inapplicable EOS rule in which it has considered any factor other than a straightforward assessment of the threat when defining the DBT, the NRC's reasonable-expectation approach is a departure from agency precedent that the NRC was required to explain. The

NRC has failed to do so. The Court therefore should reject NRC's final rule as arbitrary and capricious. See N.W. Envtl. Def. Ctr. v. Bonneville Power Admin., 477 F.3d 668, 687-88 (9th Cir. 2007); W. States Petroleum Ass'n v. EPA, 87 F.3d 280 (9th Cir. 1996).

2. The NRC has not justified its use of the standard.

Quite apart from its novelty, the reasonable-expectation standard is an improper criteria for determining the scope of the DBT rule. First, as New York's opening brief explained, the NRC had failed to provide an adequate explanation of its reasonable-expectation standard. See NY Br. at 33-34. In the underlying rulemaking proceeding, the NRC asserted that explaining its criteria would be "unduly restrictive, and would unnecessarily limit the [NRC's] judgment." 72 Fed. Reg. at 12,713 (E9). As the United States General Accounting Office ("GAO") concluded, the NRC has failed to identify "reviewable criteria" for what is and is not reasonable for a private security force to defend against. GAO, Testimony Before the Subcomm. on Nat'l Security, Emerging Threats, & Int'l Relations, House Comm. on Gov't Reform, Nuclear Power Plants Have Upgraded Security, But the NRC Needs to Improve Its Process for Revising the DBT, GAO-06-555T, at 4 (2006) (E967).

Nonetheless, the NRC now claims that the considerations underlying its reasonable-expectation approach are "obvious" and include the "law," "the availability of materials," the

"effectiveness of certain measures," and a "practical division of responsibility between private and public entities." NRC Br. at 23, 31. But if these considerations were so obvious, the NRC had no excuse for refusing to explain them in the rulemaking when asked to do so. Only one of these alleged considerations appears in the final rule itself: legal limitations on licensees. See 72 Fed. Reg. at 12,714 (E10) ("there are legal limitations on the types of weapons and tactics available to private security forces"); see also id. at 12,710 (E6) (stating that it is unreasonable to expect private security forces to defend against airborne attacks because it would require "military weapons and ordnance" that they cannot legally obtain). Nowhere in the rulemaking proceeding did the NRC cite to "availability of materials," "effectiveness," or a "practical division of responsibility" as the basis for its reasonable-expectation rationale.

The Court "may not accept appellate counsel's post hoc rationalizations for agency action." Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962). Further, the Court "may not supply a reasoned basis for the agency's action that the agency has itself not given." Bowman Transp., Inc. v. Ark.-Best Freight Sys., 419 U.S. 281, 285-86 (1974). Rather, if the Court upholds an agency's action, it must do so only "on the same basis articulated in the order by the agency itself." Burlington Truck Lines, 419 U.S. at 169. Because the NRC failed to provide a discernable

explanation in the rulemaking proceeding itself for the criteria it now claims it considered in determining what it is or is not reasonable to expect of a private guard force, the Court should reject the final rule as arbitrary and capricious.[1]

In any event, even the NRC's post hoc rationalizations fail to justify the reasonable-expectation standard. The NRC contends that the standard is "necessary" because there are things a private security force may not legally do, like use some military-style weapons. NRC Br. at 35-36. But including airborne threats in the DBT would not compel licensees to undertake illegal measures to prevent an air attack. Petitioners never requested that the NRC require such measures. On the contrary, petitioners merely asked the NRC to require licensees to construct passive barriers against such attacks. The NRC already requires many kinds of passive protection of plants against attack from the ground or water, including fencing, barriers, and building materials that are difficult to breach. The NRC has not determined that legal

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[1] Citing to the 1968 Siegel decision, the Nuclear Energy Institute ("NEI") argues that the Atomic Energy Act gives the NRC uniquely broad discretion to conduct its affairs. NEI Br. at 10. Among other things, that argument overlooks the Energy Policy Act of 2005 § 651(a)(1), Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified at 42 U.S.C. § 2210e), through which Congress and the President substantively amended the Atomic Energy Act precisely to instruct the NRC to revamp its DBT regulation and to identify specific threats that could be included within the revised version of 10 C.F.R. § 73.1. Thus, NEI's attempt to return to the standard of review discussed in Siegel and other older cases misses the mark.

limitations preclude licensees from constructing these types of passive physical barriers to protect against air-based threats.

Furthermore, the NRC has never before deemed it necessary to apply a reasonable-expectation approach when defining the DBT to ensure that licensees are not required to take actions that they legally cannot take. For instance, legal limitations on a licensee's ability to use certain weapons to defend against land- or water-based threats did not lead the NRC to exclude those threats completely from the DBT rule. Similarly, such considerations provide no reasoned basis for completely excluding air-based threats from the DBT rule.

Nor is the NRC correct that the reasonable-expectation standard is necessary because, under the EOS rule, licensees are not required to protect against attacks by other nations' military forces. See NRC Br. at 35-36. The NRC does not need a reasonable-expectation standard for this purpose; that is what the EOS regulation is for. Further, the NRC has expressly rejected application of the EOS regulation here. See 72 Fed. Reg. at 12,714-15 (E10-11).

In the end, there is no explanation for the reasonable-expectation standard except as a way to take into account the compliance costs for licensees. The NRC concedes, as it must, that it "may not legally consider economic factors in determining the level of adequate protection." NRC Br. at 40-41 (citing 72 Fed.

Reg. at 12,714); see also Union of Concerned Scientists v. NRC, 824 F.2d 108, 117-18 (D.C. Cir. 1987). But the considerations that the NRC now says underlie its reasonable-expectation standard, such as the practical division of responsibility between public and private security forces, are fundamentally no different from unlawful cost considerations. What it is "reasonable" or "practical" to expect of licensees really comes down to a determination as to who should bear the cost of providing protection against certain threats. With respect to land- and water-based threats, the NRC determined that it was reasonable — i.e., not prohibitively expensive — to require licensees to provide protections, such as physical barriers, against such threats. In the context of air-based threats, however, the NRC determined that governmental agencies, rather than the licensees themselves, should be responsible for providing any protection. The only thing that could make a licensee's obligation to protect against air attacks by installing passive physical barriers "unreasonable," "impractical," or "unfeasible" is the assumed cost of such barriers. The NRC all but admits as much when it explains that it treated land- and water-based threats differently from air-based threats because the former "are dealt with comparatively easily by licensees." NRC Br. at 52. Considerations regarding the ease with which a licensee may defend against certain attacks are inextricably tied to economic cost considerations, which is inconsistent with the Atomic Energy Act.

See Union of Concerned Scientists, 824 F.2d at 114.

Apparently recognizing that the NRC's reasonable-expectation approach involves impermissible cost considerations, intervenor-respondent NEI argues that the NRC did not actually use the reasonable-expectation factor in determining adequate protection. See NEI Br. at 20-21 n.4. But the NRC itself admits that it considered what was reasonable to expect of licensees in determining what was necessary to ensure adequate protection. See NRC Br. at 36-37. Because the NRC admittedly allowed considerations of what was "reasonable" to expect of licensees to influence its finding of adequate protection, and because such considerations are really a pretext for unlawful cost considerations, the NRC's final DBT rule is arbitrary and capricious.

B. The DBT Rule Does Not Adequately Protect the Public.

1. The NRC has acted inconsistently.

Contrary to the NRC's argument, see NRC Br. at 37, it was unreasonable for the agency to conclude that the measures it has required licensees to take, together with actions by other federal agencies, adequately protect the public. This is apparent from the agency's inconsistency in excluding air-based threats from the DBT while including vehicular and waterborne bomb attacks. With respect to land- and water-based attacks, the NRC has determined

that adequate protection requires not only active defenses by other governmental agencies, but also that licensees (1) mitigate the potential effects of such attacks and (2) establish and maintain onsite physical protection systems to guard against such threats. See 72 Fed. Reg. at 12,717 (E13).[2] But for the similar threat of air-based attack, the NRC has decided that one of these key protective measures is not necessary: Licensees need not establish and maintain any physical security measures, such as passive physical barriers, to prevent radiological sabotage from air-based attacks.

In defending its differential treatment of land- and water-based threats, the NRC does not dispute that the threat posed by an aircraft striking a nuclear power plant is at least the same as, if not greater than, the threat posed by vehicular or waterborne bombs. Rather, the NRC contends that "land and water threats are dealt with comparatively easily by licensees." NRC Br. at 52. But whether it is easier to defend against a particular threat has no

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[2] The NEI erroneously asserts that the defensive measures the NRC requires for vehicular or waterborne bombs exceed the adequate-protection standard. See NEI Br. at 26. While the NRC did determine that the requirements promulgated in the 1994 DBT rulemaking were more than what was required for adequate protection, see 59 Fed. Reg. at 38,898 (E174), the NRC has since concluded that the requirements in the current DBT rulemaking — which include defenses against vehicular and waterborne bomb assaults — are in fact necessary to ensure adequate protection. See 72 Fed. Reg. at 12,717 (E13); see also NRC Br. at 44 ("industry now accepts that [the vehicle bomb] threat is being required by adequate protection").

bearing on whether it is necessary to defend against such threat to ensure adequate protection of the public health and welfare. The NRC determined that it is necessary for licensees to provide passive physical barriers to defend against land- and water-based bomb attacks, not just to mitigate the resulting fires and explosions. There is no good reason, consistent with the NRC's statutory mandate, for the NRC to conclude that adequate protection does not require licensees to erect passive physical defenses against air-based bomb attacks that would result in substantially similar fires and explosions. This consideration of ease is merely an unacknowledged consideration of costs, in violation of the NRC's statutory mandate.

Nor does the record support the NRC's contention that air-based threats, unlike land- and water-based threats, are properly excluded because "traffic on land and water is not regulated nearly so carefully as airline traffic." NRC Br. at 52. The NRC produced no studies, for example, showing that governments regulate air traffic stringently enough to ensure adequate protection of public health and safety against the threat of an air-based attack. If anything, the publicly available evidence suggests to the contrary. See, e.g., GAO, Aviation Security: Vulnerabilities Exposed Through Covert Testing of TSA's Passenger Screening Process, GAO-08-48T (Nov. 15, 2007) (reporting results of tests that demonstrated that "a terrorist group, using publicly available information and few

resources, could cause severe damage to an airplane and threaten the safety of passengers by bringing prohibited [improvised explosive device] and [improvised incendiary device] components through security checkpoints"), available at http://www.gao.gov/new.items/d0848t.pdf.[3] In the absence of any reasoned analysis, it is untenable for the NRC to rely entirely on federal agencies whose primary mission, unlike the NRC, is not the protection of nuclear power plants.

The NRC's own actions belie its contention that the DBT rule can ensure adequate protections even while excluding air-based threats. The NRC admits that there is a real threat of air-based attacks on nuclear power plants and that existing plants are not designed to withstand such attacks. See NRC Br. at 19. It also has also acknowledged that licensees must take at least some measures to protect the public from those threats. For instance, the NRC has required licensees to "develop specific plans and strategies to respond to a wide range of threats, including the impact of an aircraft attack," and has required licensees to participate with NRC staff in "mock exercises to practice imminent air attack responses." 72 Fed. Reg. at 12,710 (discussing the

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[3] This Court may take judicial notice of this public report by a federal agency. See, e.g., United States v. Ritchie, 342 F.3d 903, 909 (9th Cir. 2003), cert. denied, 128 S. Ct. 202 (2007) ("Courts may take judicial notice of some public records, including the records and reports of administrative bodies.") (quotation marks omitted).

February 2005 Interim Compensatory Measures "B.5.b" Orders) (E6).[4]

It is inconsistent for the NRC to refuse, on the one hand, to include the demonstrated threat of air-based attacks in the DBT rule and, on the other hand, to require licensees to take actions to address these same threats. If the threat of air-based attacks demands measures to ensure adequate protection for the public, then the NRC is compelled to include that threat in the DBT rule. Once a threat is included in the DBT rule, the NRC may determine the specific physical protection measures that are needed to address the threat. See 10 C.F.R. § 73.55 ("[t]he physical protection system shall be designed to protect against the design basis threat of radiological sabotage as stated in § 73.1(a)"). But by not including air-based threats in the DBT rule in the first instance, the NRC contradicts its determination that some protective measures are needed to protect the public adequately, even if the NRC believes that such measures consist only of mitigation of large fires and explosions. The NRC's failure to reconcile this apparent inconsistency is arbitrary and capricious.

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[4] The NRC also has determined that it is "prudent" to require certain newly designed power plants to take into account the potential effects of the impact of a large commercial aircraft. Proposed Rule, Consideration of Aircraft Impacts for New Nuclear Power Reactor Designs, 72 Fed. Reg. 56,287, 56,288 (Oct. 3, 2007).

2. The NRC has not adequately responded to the evidence contradicting its determination.

New York's opening brief pointed out that NRC had ignored numerous studies, many of which were conducted by or for the NRC, demonstrating the vulnerability of nuclear power plants to air-based threats. NY Br. at 38-40. The NRC now asserts that those studies "do not argue for changes in NRC's approach." NRC Br. at 53. But the NRC addresses just one of the cited studies, Ian B. Wall, Probabilistic Assessment of Aircraft Risk for Nuclear Power Plants, 15 Nuclear Safety 276 (1974) [hereinafter GE Study] (E97-105), and erroneously claims that this study concluded that "the agency's rules and licensing procedures offer sufficient protection from the crashes it considered." NRC Br. at 53. The study in fact concluded that, given the low probability that an aircraft would accidentally strike a nuclear power plant that was not in close proximity to an airport or was not located in a busy air corridor, the risk to the public from an aircraft striking a nuclear power plant was acceptable. See GE Study, at 283 (E104). As the NRC has acknowledged, however, probabilities mean very little when assessing the risk of deliberate terrorist attacks. See NRC Br. at 5; see also Nat'l Acad. of Scis., Safety and Security of Commercial Spent Fuel Storage: Public Report, at 6 (2006) [hereinafter NAS Study] (E736) ("The probability of terrorist attacks on spent fuel storage cannot be assessed quantitatively or comparatively," because "it is not possible to predict the behavior and motivations

of terrorists"). For plants that were at greater risk of an aircraft crash – which, since 9/11, includes all nuclear power plants in the country – the GE Study actually determined that it may be necessary to harden those structures to ensure adequate precautions. See GE Study, at 283 (E104).

The NRC also draws the wrong conclusion from the National Academy of Sciences study – the one study acknowledged in the final rule, which found that nuclear storage pools are susceptible to fire and radiological release from intentional attacks with large civilian aircraft. See NAS Study, at 49, 57 (2006) (E779, 787). The NRC suggests that the NAS Study concluded that the nation's limited resources would be better spent protecting less robustly protected facilities. See NRC Br. at 53-54. But this rulemaking is not about whether the nation should expend more resources to protect nuclear power plants, but rather whether licensees should incur the costs of protecting against air-based threats. It is the NRC's current rule – which leaves the protection of nuclear power plants from air-based threats solely to the federal government, and hence taxpayers, rather than the nuclear industry – that takes the nation's limited resources away from protecting other industrial facilities.

The NRC continues to ignore the results of the remaining studies cited by petitioners, including:

- the 1982 study by the Argonne National Laboratory, which concluded that an aircraft crash could set

off an accident sequence resulting in core damage or meltdown and that an aircraft hitting a nuclear power plant would produce vibrations exceeding those experienced during an earthquake;

- the 1987 study commissioned by the NRC on the effects of earthquake forces on electrical switches at nuclear power plants, which demonstrated that vibrations associated with an earthquake could result in core damage;

- the 1982 study of safety at the Indian Point Energy Center in New York, which determined that a core meltdown could occur if either of the control buildings were hit by even a light aircraft;

- the 2001 NRC study of spent fuel pools at decommissioning nuclear power plants, which concluded that one of two aircraft crashes would damage a spent fuel pool enough to uncover the stored fuel, which could lead to serious consequences from a zirconium cladding fire; and

- the post-9/11 study by the German Reactor Safety Organization, which found that large jetliners crashing into nuclear facilities under a variety of scenarios could cause uncontrollable situations and the release of radiation.[5]

See NY Br. at 7-10, 14-15.

The NRC has never disputed the results of any of these studies, all of which directly contradict the "limited number" of secret studies that the NRC cited in the final rule. 72 Fed. Reg. at 12,710 (E6). The NRC's failure even to mention the other studies, let alone reconcile their findings with the agency's conclusions, is arbitrary and capricious. See Islander E. Pipeline

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[5] The website link for the German study in New York's opening brief, NY Br. at 15, contained a typographical error. The correct link is http://www.greenpeace.org/raw/content/international/press/reports/protection-of-german-nuclear-p-2.pdf.

Co., LLC v. Conn. Dep't of Envtl. Protection, 467 F.3d 295, 313 (2d Cir. 2006) (finding a denial of an application to be arbitrary and capricious where the agency failed to mention scientific studies in the record with findings contrary to those relied upon by the agency); see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (stating that an agency's rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency").

POINT II

THE NRC VIOLATED NEPA BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE DBT RULE

New York's opening brief explained that the NRC was required to prepare an EIS because the DBT rule has a significant effect on the degree to which nuclear power plants are protected from terrorist attacks, the consequences of which may be environmentally catastrophic. Continued operation of nuclear power plants without protection against air-based threats increases the risk of a successful terrorist attack. See NY Br. at 40-46.

Both of the justifications that the NRC offers for failing to prepare an EIS are squarely foreclosed by this Court's precedents. First, it argues that an EIS was unnecessary because the DBT rule is intended to conserve, rather than degrade, the environment. See

NRC Br. at 59-60. Thus, the NRC contends, its refusal to require more stringent protective requirements in the DBT rule was not a "major Federal action" subject to NEPA. Id. at 61-62 [emphasis added]. This Court, however, rejected that argument in its recent decision in Center for Biological Diversity v. NHTSA, 508 F.3d 508 (9th Cir. 2007).

At issue in Center for Biological Diversity, as here, was a rulemaking that a federal agency contended would have a beneficial impact on environmental resources, but that petitioners claimed was not stringent enough. Specifically, petitioners challenged the National Highway Traffic Safety Administration's ("NHTSA") final rule establishing a new increased fuel economy standard for light trucks. Despite NHTSA's finding that the new standard would have a "minor beneficial impact," the Court held that NHTSA was required to prepare an EIS for its rule. Id. at 553. The Court found that "simply because the Final Rule may be an improvement over the [prior] standard does not necessarily mean that it will not have a 'significant effect' on the environment." Id. at 557. Further, the Court determined that "NHTSA failed to provide a convincing statement of reasons for why a small decrease (rather than a larger decrease) in the growth of CO_2 emissions would not have a significant impact on the environment." Id. at 553.

Similarly here, even if the DBT rule increases the security licensees must provide, that does not justify the NRC's failure to

conduct a NEPA analysis. That the NRC has refused to enact more stringent protective requirements does not excuse it from analyzing the impacts of the action that it did take – i.e., promulgating a generic rule that affects the degree to which nuclear power plants are protected from terrorist attacks that could result in radiological contamination of the environment.

The NRC attempts to distinguish Center for Biological Diversity by claiming that the DBT rule "neither creates nor keeps in place tangible or measurable adverse environmental effects similar to those that concerned this Court in the NHTSA case." NRC Br. at 61. To the contrary, however, the DBT rule allows the continued operation and relicensing of nuclear power plants that are not protected from air-based threats. In this respect, the circumstances present here are distinguishable from those at issue in the cases cited by the NRC, such as Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), in which the Court determined that EISs are not required for federal action that merely preserves the environmental status quo. Rather, the facts here are more akin to those in Pit River Tribe v. USFS, 469 F.3d 768, 784 (9th Cir. 2006), in which the Court found that the United States Forest Service's extension of certain leases for the development and utilization of geothermal steam on federal lands was not a preservation of the status quo because it gave the lessee additional time to develop the land and the possibility of

obtaining future lease extensions of up to 40 years. Similarly, here, the DBT rulemaking allows the continued operation and relicensing of nuclear power plants for an additional 20 years without protection from air-based threats, which increases the risk to the environment of a successful air-based terrorist attack. See also Douglas County, 48 F.3d at 1506, n. 13 (distinguishing Confederated Tribes & Bands of the Yakima Indian Nation v. FERC, 746 F.2d 466, 476 (9th Cir. 1984), cert. denied, 471 U.S. 1116 (1985), which involved the relicensing of a hydroelectric plant, because "there was a serious question about the impact on fish populations from the continued operation of the hydroelectric plant").

Second, the NRC argues that there is no proximate cause link between the DBT rule and a terrorist attack, and thus no need to study the impacts of a terrorist attack in an EIS. See NRC Br. at 62-63. That argument is inconsistent with this Court's holding in San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006), cert. denied, 127 S. Ct. 1124 (2007). This Court held that there can be a causal link between NRC actions that affect licencing decisions and the altered risk of terrorist attack, and that it was unreasonable for the NRC to treat such attacks as too remote or speculative to warrant consideration under NEPA. Id. at 1029-30. The NRC argues that unlike a specific licensing decision, the DBT rule has no effect on the environment because it would

create no new facility for terrorists to strike and, therefore, would not increase any pre-existing terrorist risk. See NRC Br. at 63. But the effect of this rulemaking on the environment is at least as great as the effect of an individual licensing decision. The NRC is currently considering whether to relicense numerous aging nuclear power plants around the country that have been designed and constructed without consideration of the threat of airborne attacks. The effect of the generic DBT rule is to remove from every one of these licensing decisions any requirement to consider security requirements necessary to protect against such threat. Thus, the rulemaking bears directly on the chances of a successful terrorist attack on a nuclear power plant.

The NEI advances a third argument not made by the NRC: that because the NRC found the final rule to provide adequate protection of safety, NEPA does not compel any further analysis of the environmental consequences of the NRC's failure to impose additional standards. See NEI Br. at 32 & 35. But a finding of adequate protection of public health and safety under the Atomic Energy Act does not preclude the need for further consideration under NEPA. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719, 729-30 (3d Cir. 1989); see also Center for Biological Diversity, 508 F.3d at 546-47 (finding that the Energy Policy and Conservation Act of 1975 did not limit the NHTSA's duty under NEPA to assess the environmental impacts of its rules).

The NRC has the statutory authority to establish the level of protection necessary to ensure adequate protection of the public from nuclear terrorism and the NRC "could have, in exercising its discretion, set higher standards if an EIS contained evidence that so warranted." Center for Biological Diversity, 508 F.3d at 546. Further, the NRC's own regulations implementing NEPA require it to consider "the alternatives available for reducing or avoiding adverse environmental and other effects." 10 C.F.R. § 51.71(d). Thus, the NRC's conclusion that its final DBT rule is adequate to protect the public does not limit the NRC's duty under NEPA to assess the environmental impacts of its rule.

CONCLUSION

This Court should vacate the NRC's decision to exclude air-based threats from the final rule and remand the matter to the NRC for prompt action.

Dated: Albany, New York
February 29, 2008

Respectfully submitted,

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Form 8. **Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number** 07-72555

(see next page) Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

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✓ 1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

- ☐ Proportionately spaced, has a typeface of 14 points or more and contains _____ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

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__ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

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2/28/08
Date

Morgan Costello
Signature of Attorney or
Unrepresented Litigant

DECLARATION OF SERVICE

LISA HOLLNER, pursuant to 28 U.S.C. § 1746, declares under penalty of perjury as follows:

I am over eighteen years of age and an employee in the office of Andrew M. Cuomo, Attorney General of the State of New York.

On the 29th day of February, 2008, I served the State of New York's Reply Brief on Petition for Review of Final Action of the United States Nuclear Regulatory Commission upon the individuals named below by depositing true copies thereof, properly enclosed in a sealed, Federal Express wrapper, in a drop box located at 146 State Street, Albany, New York, directed to said individuals at the addresses designated by them for that purpose as follows:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on 2/24/08.

LISA HOLLNER