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08-4833-ag(CON); 08-5571-ag(CON)

United States Court of Appeals
For the Second Circuit

THE STATE OF NEW YORK, RICHARD BLUMENTHAL, ATTORNEY GENERAL OF THE STATE OF CONNECTICUT, COMMONWEALTH OF MASSACHUSETTS,

Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION; AND UNITED STATES OF AMERICA,

Respondents,

ON APPEAL FROM THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA, EX REL. EDMUND G. BROWN JR., ATTORNEY GENERAL, IN SUPPORT OF THE STATES OF MASSACHUSETTS, CONNECTICUT AND NEW YORK

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TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF AMICUS CURIAE 4

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. THE NRC'S DENIAL OF THE PETITIONS FOR RULEMAKING IS ARBITRARY AND CAPRICIOUS 7

A. The APA Requires Rational Rulemaking, Supported by the Record. 7

B. The NRC's Reasons for Denying the Petition are Not Justified by the Record. 9

1. The NRC's Reliance on Other Federal Agencies is Unreasonable 11

2. The DBT Rule Does Not Guarantee that Terrorist Attacks Will Not Succeed Against Nuclear Power Plants 12

3. The NRC Has Accorded Undue Weight to the Sandia Report. 14

II. NRC's Generic Presumption of No Significant Environmental Impact From Licensing Spent Nuclear Fuel Pools Violates NEPA 16

A. A Licensing Decision That Approves High Density Storage in Spent Nuclear Fuel Pools is A Major Federal Action With Significant Environmental Impacts and Requires a Site Specific Analysis In An EIS 16

B. New Threats and New Information Require That the NRC Supplement its Regulations 19

III. The Reasoning of The Ninth Circuit in Mothers or Peace v. NRC, Rather Than the Reasoning of the Third Circuit in NJDEP v. NRC, Applies to This Case 20

TABLE OF CONTENTS
(continued)

Page

A. The Ninth Circuit in Mothers for Peace Found NEPA Applicable in Part Because the NRC's Actions Showed That the NRC Itself Did Not Regard the Risk of Terrorist Attacks as Insignificant........ 21

B. The Third Circuit Has Read Public Citizen and Metropolitan Edison Too Broadly, Requiring a Tort-Like Cause and Effect as the Only Way to Trigger a Requirement for NEPA Analysis. 22

CONCLUSION........ 29

TABLE OF AUTHORITIES

Page

CASES

American Horse Protection Assn., Inc. v. Lyng
812 F.2d 1 (D.C. Cir. 1987) 8

Blue Mountains Biodiversity Project v. Blackwood
161 F.3d 1208 (9th Cir. 1998), *cert. denied* 527 U.S. 1003 (1999) .. 16

Center for Biological Diversity, et al. v. National Highway Traffic Safety Administration
538 F.3d 1172 (9th Cir. 2008) 23

City of Davis v. Coleman
521 F.2d. 661 (9th Cir. 1975) 26

D'Amico v. Bd. of Medical Examiners
11 Cal.3d 1 (1974) 5

DOT v. Public Citizen
541 U.S. 752 (2004) .... passim

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma
426 U.S. 776 (1976) 18

Florida Key Deer, et al v. Paulison
522 F.3d 1133 (11th Cir. 2008) 25

Geller v. FCC
610 F.2d 973 (D.C. Cir. 1979) 8

Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission
869 F.2d 719 (3rd Cir. 1989) 16

Marsh v. Oregon Natural Resources Council
490 U.S. 360 (1989) 17, 19, 27

TABLE OF AUTHORITIES
(continued)

Page

CASES

Metropolitan Edison Co. v. People Against Nuclear Energy
460 U.S. 766 .... 22, 27

Mothers for Peace, 779 F.2d 1268, 1270 (9th Cir. 1986) 10

Motor Vehicle Manufacturers Association of the U.S., Inc. et al. v. State Farm Mutual Automobile Insurance Co., et al.
463 U.S. 29 (1983) 8

National Association of Homebuilders, et al. v. Defenders of Wildlife, et al.
__ U.S. __, 127 S.Ct. 2518 (2007) 23

New Jersey Department of Environmental Protection v. United States Nuclear Regulatory Commission
561 F.3d 132 (3rd Cir. 2009) 20-23

Riverkeeper, Inc. v. Collins
359 F.3d (2nd Cir. 2004) 28

Robertson v. Methow Valley Citizens Council
490 U.S. 332 (1989) 16

San Luis Obispo Mothers for Peace v. NRC
449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007)passim

Sierra Club v. Fran Mainella
459 F.Supp.2d 76 (D.D.C. 2006) 15

Sierra Club v. Marsh
769 F.2d 868 (1st Cir. 1985) 26

Tripoli Rocktry Ass'n., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives
437 F.3d 75 (D.C. Cir. 2006) 15

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

5 U.S.C. §§ 551-96 5

42 U.S.C. § 2210e(b) 12

42 U.S.C. §§ 4321-35 3

42 U.S.C. § 4332 17

42 U.S.C. § 4332(2)(C) 16, 18

49 U.S.C. § 10922 24

Cal. Gov. Code § 12511 5

Cal. Gov. Code § 12600 5

CONSTITUTIONAL PROVISIONS

Cal. Const., Articlevol. , § 13 5

California Constitution 5

COURT RULES

Rule 29(a) of the Federal Rules of Appellate Procedure 5

OTHER AUTHORITIES

10 C.F.R. Part 51 .... 7, 8, 9

10 C.F.R. § 51.14(b) 26, 27

10 C.F.R. § 51.23(a) 17

10 C.F.R. § 51.23(b) 17

10 C.F.R. § 51, Appendix 17

Page

OTHER AUTHORITIES

10 C.F.R. § 73.1 7

40 C.F.R. § 1500.1(a) 16

40 C.F.R. § 1508.7 27

40 C.F.R. § 1508.8(b) 26

72 Fed. Reg. 12705 (Mar. 19, 2007) 7

72 Fed. Reg. 12718 (Mar. 19, 2007) 12

73 Fed. Reg. at 46207 (Aug. 8, 2008) 11

73 Fed. Reg. 46206-46208, n. 6 (Aug. 8, 2008) 7

73 Fed. Reg. 46207 (Aug. 8, 2008) 6, 12, 14

73 Fed. Reg. 46209 (Aug. 8, 2008) 15

73 Fed. Reg. 46211 (Aug. 8, 2008) 14, 15, 26

73 Fed. Reg. 46212 (Aug. 8, 2008) 14

73 Fed. Reg. 59550 (Oct. 9, 2008.) 3

Gordon R. Thompson, *Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants* 8

Los Angeles International Airport. Bloomekatz and Hennesey-Fiske, *Screeners at LAX Miss 75% of 'Bombs',* Los Angeles Times (October 19, 2007) 12

"Nuclear Power in California: Status Report, Final Consultant Report" at p. 31 11

Page

OTHER AUTHORITIES

Plant Attacks Feared, The New York Daily News, February 1, 2002... 18

Restatement (Second) of Torts § 448, cmt. 23

INTRODUCTION

The State of California files this brief as amicus curiae in support of the consolidated challenges by the States of New York, Connecticut and Massachusetts to the denial by the Nuclear Regulatory Commission (NRC) of petitions for rulemaking asking that the NRC amend its regulations. The States' petitions asked the NRC to adopt regulations that would allow an examination and an analysis of the potential for harm to the environment from accidents or terrorist-caused damage to the pools in which nuclear power plants store their nuclear waste. The NRC denied the petitions, retaining regulations that presume that no such environmental effects can occur because the possibility that the spent fuel pools could suffer an accident or a successful terrorist attack are "very low." California believes this denial to be arbitrary and capricious and without substantial support in the record.

This case concerns the storage and protection of nuclear fuel rods after they have concluded their useful life as fuel in a nuclear power plant. These spent nuclear fuel rods remain highly, even lethally, radioactive for decades, centuries, and even millennia. There are over 100 commercial nuclear power plants in the United States, many near population centers, and they store their highly radioactive used fuel on-site. This deadly detritus of nuclear power generation is stored in pools that were originally designed only for temporary storage, and that are usually

located outside of the containment buildings that protect the nuclear reactors themselves. Over the years, as these spent fuel pools (SFPs) have filled up, while no central nuclear waste repository has been created. As a result,the owners of nuclear plants have packed the spent fuel rods more tightly together in the pools, a procedure called "re-racking."

During those decades, it is not solely the amount of nuclear waste that has increased. So, too, has the danger that terrorists might attack these concentrated pools of potentially lethal materials. We know from the 9-11 Commission Report that the 9-11 attackers originally planned to fly at least one hijacked jet into a nuclear power plant. The National Academy of Sciences (NAS) examined the threat of terrorist attacks on SFPs, reaching the alarming conclusion that such an attack could be successful. Such a successful attack could result in the water in the SFPs partially or fully draining, exposing the radioactive rods and potentially leading to a fire that would destroy the zirconium in which the fuel pellets are wrapped, called "cladding." Were the zirconium cladding to be breached, large amounts of extremely dangerous radioactive materials could aerosolize, escape into the air, and reach surrounding communities. The Ninth Circuit, in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007), citing the 9-11 Commission's report, statements by various government agencies, then-President Bush, and even the NRC itself, held that a

terrorist attack on a nuclear facility is a realistic threat that the NRC should require nuclear plant operators to address when the NRC issues a license for continued or expanded operations.

Nonetheless, the Nuclear Regulatory Commission (NRC) continues to maintain regulations that presume that a relicensed nuclear power plant can safely store its nuclear waste in the existing SFPs, with no possibility of any impact on the human environment, for at least the next thirty years, and NRC may extend that period.[1] In the case at bar, the NRC denied the States' petitions to change regulations that not only do not *require* an analysis of the effects on the human environment of allowing this extended SFP storage, they actually *forbid* a site-specific analysis. The regulations presume that no environmental impacts are possible. The NRC's rule effectively authorizes licensees to add spent nuclear fuel to existing pools for years and decades into the future, totally without environmental analysis, because no environment harm can ever be considered.

Massachusetts, and California, each of which has nuclear power plants in close proximity to urban areas, formally petitioned the NRC to change its regulations to require an analysis under the National Environmental Policy Act, 42 U.S.C. §§ 4321-35 (NEPA), of the potential for environmental damage from

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[1] Recently, the NRC has proposed lengthening the period during which such storage is presumed safe to 60 years. 73 Fed. Reg. 59550 (Oct. 9, 2008.)

terrorist attacks on SFPs. The States submitted expert reports and other solid evidence to the NRC showing that a successful terrorist attack on an SFP is possible, and that it could have potentially catastrophic results. The NRC, relying heavily on studies that it *will not allow the public to see* in any but the most heavily redacted -- essentially useless -- form, denied the petitions on grounds that any risk was "very low". New York and Massachusetts challenge that denial, and California submits this amicus curiae brief in support of that challenge.[2]

INTEREST OF AMICUS CURIAE

California has a strong interest in the NRC's regulation of commercial nuclear power plants and the management of the threats posed to them by acts of terrorism or accidents. California has two sets of operating nuclear plants, Diablo Canyon Units 1 and 2, and San Onofre Units 2 and 3, and three decommissioned nuclear plants that currently store nuclear waste. California is concerned about the threat of terrorist attacks or an accident resulting from overcrowded spent nuclear fuel pools. A successful terrorist attack on a California nuclear facility, or an accident in a spent fuel pool, could kill or injure thousands of people, permanently contaminate valuable California natural resources, and devastate the economy of the state. Such an attack or accident, moreover, would require California state and

[2] Although California filed a petition for rulemaking, it has decided to limit its involvement in this appeal to the role of an amicus.

local government agencies to spend substantial sums -- potentially in the tens of millions of dollars or more -- responding to the attack or accident, conducting decontamination activities, providing health services for the injured, and repairing damaged infrastructure. California thus has an obvious interest in insuring that the NRC addresses the risks from terrorism and overcrowded spent nuclear fuel pools.

The Attorney General of California has independent powers under the California Constitution, state common law, and the California Government Code to protect the environment and the natural resources of the State. *See* Cal. Const., art. V, § 13; Cal. Gov. Code § 12511; *D'Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 14-15 (1974). California Government Code section 12600 specifically provides that "[i]t is in the public interest to provide the people of the State of California *through the Attorney General* with adequate remedy to protect the natural resources of the State of California from pollution, impairment, or destruction." (Emphasis added.) This brief is submitted as an exercise of those powers and responsibilities, and as a matter of right pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

SUMMARY OF ARGUMENT

California asserts two independent bases for the NRC's violation of federal law. First, the NRC violated the Administrative Procedure Act, 5 U.S.C. §§ 551-96 (APA), by arbitrarily and capriciously denying the petitions for rulemaking in

which California and Massachusetts argued that the NRC should rescind certain presumptions regarding the potential environmental impacts that could result from a successful terrorist attack or accident involving a crowded spent nuclear fuel pool.

Second, the NRC violated NEPA when it erroneously denied the petitions for rulemaking filed by California and Massachusetts that argued for a site-specific environmental review for the licensing or relicensing of any facility utilizing high density pool storage of spent nuclear fuels. New information that has become available since the regulations were promulgated underscores the possibility for catastrophes from terrorist attacks or accidents at nuclear power plants.

To justify its denial of these petitions, the NRC asserts that the possibility of environmental impacts from an event such as a terrorist attack or accident causing a fire involving spent nuclear fuel pools is "very low." 73 Fed. Reg. 46207 (Aug. 8, 2008). Therefore, the NRC presumes in any licensing proceeding that such possibilities never need to be analyzed. This generic presumption, which cannot be challenged in individual licensing proceedings, does not square with the current overcrowded conditions in spent fuel pools, and with the facts that have developed since the regulations were promulgated, as described in recent reports from Gordon Thompson, a leading expert, and the National Academy of Sciences. Joint Appendix (JA) at 000760; JA at 000955.

Additionally, the California believes that the Court should follow the Ninth Circuit decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), *cert. denied*, 127 S.Ct. 1124 (2007) (*Mothers for Peace*). That case held that there is a sufficient connection between a licensing proceeding and the need to analyze the environmental impacts from a potential terrorist attack.

ARGUMENT

I. THE NRC'S DENIAL OF THE PETITIONS FOR RULEMAKING IS ARBITRARY AND CAPRICIOUS.

A. The APA Requires Rational Rulemaking, Supported By the Record.

The NRC's regulations found at 10 C.F.R. Part 51 state that the potential environment effects of high-density pool storage of spent nuclear fuel are not significant for the purpose of NEPA and NEPA analysis. In denying the Petitions, the NRC relied heavily on its belief that other federal agencies will prevent terrorist attacks, that its design basis threat (DBT) rule, 72 Fed. Reg. 12705 (Mar. 19, 2007)[3] requires adequate protection for nuclear plants, and on information contained within secret studies performed at the Sandia National Laboratories that the NRC has not made available except in a heavily-redacted form. 73 Fed. Reg. 46206-46208, n. 6 (Aug. 8, 2008). The NRC's reliance on each is misplaced.

[3]The Design Basis Threat defines the type of threat operators of nuclear power reactors face and is "used to design safeguards systems to protect against acts of radiological sabotage and to prevent the theft or diversion of special nuclear material." 10 C.F.R. § 73.1.

Under the APA, administrative agencies have considerable discretion in interpreting how to fulfill their statutory responsibilities. An agency's decision, however, must not be arbitrary and capricious, and must be supported by the record of decision. *Motor Vehicle Manufacturers Association of the U.S., Inc. et al. v. State Farm Mutual Automobile Insurance Co., et al.*, 463 U.S. 29, 34 (1983). When an agency responds to a petition, the APA requires, at the very least, a reasoned response. *American Horse Protection Assn., Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). Agency decisions receive particular court scrutiny when a petition seeks review of an agency's regulation in response to a significant change in the facts underlying the regulation. *See Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979).

Here, California and Massachusetts seek review of 10 C.F.R. Part 51 because the factual predicates underlying that rule have undeniably changed. The circumstances that occurred on September 11, 2001 established that terrorists are willing to die in their attacks. Further, the September 11th terrorists discussed and contemplated striking nuclear facilities. *9/11 Commission Report*, JA 000905. In addition, new studies have shown that the risk of zirconium fires in overcrowded spent nuclear fuel pools is much greater than previously understood. Gordon R. Thompson, *Risks and Risk-Reducing Options Associated with Pool Storage of Spent Nuclear Fuel at the Pilgrim and Vermont Yankee Nuclear Power Plants*,

May 2006 (Thompson Report), JA 001224. Combined, these changes in the facts mandate a sober reconsideration of the NRC's regulations governing the chances, and the environmental consequences, of accidents and terrorist attacks involving spent fuel pools.

B. The NRC's Reasons for Denying the Petition Are Not Justified by the Record.

In light of the changed circumstances, California petitioned the NRC to: (1) rescind the presumptions found in 10 C.F.R. Part 51, that the potential environmental effects of high-density pool storage of spent nuclear fuel are not significant for purposes of NEPA and NEPA analysis; (2) adopt and issue a generic determination that approval of such storage at a nuclear power plant or any other facility does constitute a major federal action that may have a significant effect on the human environment; and (3) order that no NRC licensing decision that approves high-density pool storage of spent nuclear fuel at a nuclear power plant or other storage facility may issue without the prior adoption and certification of an environmental impact statement that complies with NEPA in all respects. JA at 001622-1623. Such an environmental impact statement would include full identification, analysis, and disclosure of the potential environmental effects of high-density on-site storage, including the potential for accidental or deliberately caused release of radioactive products to the environment, as well as full and

adequate discussion of potential mitigation for such effects, and full discussion of an adequate array of alternatives to the proposed storage project.

California asked for these changes in light of new information about the danger posed by the new generation of terrorist threats and of overcrowded spent fuel pools. Indeed, the National Academy of Sciences has pointed out that there are various severe accident scenarios involving the storage of spent nuclear assemblies in pools that needs to be considered. NAS Committee on the Safety and Security of Commercial Spent Nuclear Fuel Storage, *Safety and Security of Commercial Spent Fuel Storage* (NAS Report), JA 001013-14. Overcrowding in the spent nuclear fuel pools increases the potential for severe accidents if water is partially lost from the pool. Thompson Report, JA 001216. If the water drops to the point where the spent fuel assemblies are sufficiently exposed to the air, the zirconium in which the spent fuel is wrapped will burn. *Id.* The fire may spread to other assemblies in the pool, potentially leading to a catastrophic fire and release of airborne radioactive material. NAS Report, JA 001009-001010; 001013. Because the California plants are operating in active earthquake fault zones, an incident that could involve loss of water from the pools is a reasonable possibility. *Mothers for Peace*, 779 F.2d 1268, 1270 (9th Cir. 1986). Case in point: a moderate earthquake caused damage to the Humboldt Bay Nuclear Plant in Eureka, California, which

was subsequently closed because a seismic retrofit was not economical.[4] In addition, spent fuel pools such as the ones at Indian Point in New York, have been shown to leak. JA 001690. Such leaks could lead to a loss of the water that cools spent nuclear fuel and keeps its zirconium cladding from burning.

1. The NRC's Reliance on Other Federal Agencies is Unreasonable

The NRC, in its denial of the Petitions for Rulemaking, states that one of the reasons it believes the risk of a successful terrorist attack is low is that federal intelligence, defense, and aviation regulatory agencies, such as the Department of Homeland Security, will detect and prevent terrorist attacks. 73 Fed. Reg. at 46207 (Aug. 8, 2008). California believes that it is unreasonable, given the nation's experiences in this century, for the NRC to base such a serious regulatory decision on the belief that federal agencies, their best efforts notwithstanding, will be able to detect and prevent *each and every* potential terrorist attack from the air on specific targets -- in this case, nuclear facilities and sites -- both now and into the future. We know that airport screening, for example, does not detect *each and every* weapon carried by a potential passenger, or prevent *each and every* potential

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[4] "Nuclear Power in California: Status Report, Final Consultant Report" at p. 31, California Energy Commission (March 2006), CEC 150-2006-001-F; http://www.energy.ca.gov/2007publications/CEC-100-2007-005/CEC-100-2007-005-F.PDF

hijacking of an aircraft. As the Los Angeles Times has reported, a test by the Transportation Security Administration indicated the screeners failed to detect the majority of simulated bombs at Los Angeles International Airport. Bloomekatz and Hennesey-Fiske, *Screeners at LAX Miss 75% of 'Bombs',* Los Angeles Times (October 19, 2007); *available at* 10/19/07 L.A. Times 2007, WLNR 20547260. This demonstrates the fallacy of relying on airport screening as a major component in protecting nuclear reactors from commercial airplane assaults.

2. The DBT Rule Does Not Guarantee That Terrorist Attacks Will Not Succeed Against Nuclear Power Plants

The NRC also relies on the DBT rule, 72 Fed. Reg. 12718 (Mar. 19, 2007), in justifying its denial of the instant petitions, assuming that the DBT rule is adequate to protect nuclear power plants from a terrorist attack. 73 Fed. Reg. 46207 (Aug. 8, 2008). Yet in creating the DBT rule, the NRC ignored Congress' direction in the Energy Policy Act of 2005 that it thoroughly examine the threat of airborne attacks on such plants. Specifically, the Energy Policy Act called for consideration of the events of September 11, 2001, as well as airborne assaults, as two of the twelve factors to be considered by the NRC in constructing the DBT rule. 42 U.S.C. § 2210e(b). Instead of following this mandate, the NRC categorically excluded airborne assaults from the DBT rule. The DBT rule, as revised, does not require nuclear plant operators to provide passive protection for

the nuclear reactors and for spent fuel pools (which lack the containment buildings that house reactors) against airborne terrorist attacks, relying *not* on factual studies about the ability of reactors and spent fuel pools to resist air strikes, nor on studies about the benefits of passive protection, but on the NRC's own policy judgment -- in direct contravention of the direction of Congress -- that it is "unreasonable" to require a private plant to take any steps to impede air-based threats.

At the time of the promulgation of the DBT rule, the NRC ignored the *Mothers for Peace* case, which held that the likelihood of a terrorist attack was not remote or speculative. Instead, the NRC dismissed the case in a footnote by proclaiming that the fact that potential environmental impacts from terrorist attacks should be considered in an NRC licensing decision at one specific nuclear power plant does not mean that the NRC must consider similar environmental effects in a rule that affects the safety of *all* nuclear power plants in the United States. In fact, the analysis of the potential impacts of a terrorist attack on the environment is even more important in a rule that applies to the safety and security of all nuclear plants in the nation than a proceeding that applies to just one.

The incomplete DBT rule is currently being challenged in the Ninth Circuit in *Public Citizen, Inc. v. United States Nuclear Regulatory Commission* (No. 07-718698) and *The State of New York v. United States Nuclear Regulatory*

Commission (No. 07-72555).[5] The NRC chose not to await the appellate court decision, and instead has relied on the DBT rule without rational basis.

3. The NRC Has Accorded Undue Weight to the Sandia Report.

The NRC insists that the risk of a spent fuel pool fire that would release deadly radiation is "very low." 73 Fed. Reg. 46211 (Aug. 8, 2008). Therefore, the NRC argues, such a spent fuel fire at any plant, anywhere, any time, is remote and speculative, and not within the reasonably foreseeable environmental effects that mandate NEPA compliance. *Id.* There are several problems with the NRC's argument.

In its denial decision, the NRC identifies two Sandia studies, drafted after September 11, 2001, and implies that these support its finding that the risk of a successful terrorist attack is very low. 73 Fed. Reg. 46207, fn. 6 (August 8, 2008). These studies were withheld from the public, and the portions of the studies eventually made available to the public are so redacted as to be near worthless. JA 001373; 000819. Instead of relying solely on studies that the public -- and this Court -- are not allowed to see and the conclusions of which are not reviewable, the NRC should have considered the information supplied by the petitioners and used the information as part of its analysis. See Jaczko dissent, 73 Fed. Reg.

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[5] The California Attorney General has filed an amicus brief in that case.

46212 (Aug. 8, 2008). Under the APA the NRC must provide a reasoned response to the facts in California's and Massachusetts' petitions, something it has not done.

These petitions assert that an accident or a terrorist attack could completely or partially drain the cooling water from the spent fuel pools in which nuclear waste is stored. If a pool does fully or partially drain, the zirconium cladding around the spent fuel pellets could catch fire. Thompson Report, JA 001224. The NRC acknowledges that if such a zirconium cladding fire starts, it could spread to the cladding on other fuel assemblies, 73 Fed. Reg. 46209 (Aug. 8, 2008). The NAS Report concludes that such a zirconium cladding fire could release "large amounts of radioactive material" if the cladding ceases to fully cover the spent fuel, and NRC does not deny this possibility. 73 Fed. Reg. 46211 (Aug. 8, 2008).

The NRC does not provide consistent definition of the vague and unquantified terms "low" and "very low." Courts have held that, in order to earn the deference to their expertise that NRC claims here, agencies must engage in reasoned rulemaking, providing a clear and articulated path of reasoning that supports their conclusions. This reasoned rulemaking must include terms whose use is clear, consistent, and specific enough to enable meaningful judicial review.

> An unbounded term cannot suffice to support an agency's decision because it provides no objective standard for determining what kind of differential makes one impact more or less significant than another.

Sierra Club v. Fran Mainella, 459 F.Supp.2d 76, 101 (D.D.C. 2006) (citing *Tripoli Rocktry Ass'n., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 437

F.3d 75, 81 (D.C. Cir. 2006). The NRC has not provided such an objective standard here. Its elastic and indefinite use of the terms "low" and "very low" means little, and does not constitute the reasoned rulemaking that the APA demands.

II. NRC'S GENERIC PRESUMPTION OF NO SIGNIFICANT ENVIRONMENTAL IMPACT FROM LICENSING SPENT NUCLEAR FUEL POOLS VIOLATES NEPA

A. A Licensing Decision That Approves High Density Storage in Spent Nuclear Fuel Pools Is a Major Federal Action With Significant Environmental Impacts and Requires a Site Specific Analysis in an EIS.

NEPA is the basic national charter for protection of the environment and is implicated whenever a federal action has the potential for "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1500.1(a). NEPA "ensures that the agency will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1212 (9th Cir. 1998), *cert. denied* 527 U.S. 1003 (1999) (quoting *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989).). There is no exemption from NEPA for activities taken under the Atomic Energy Act. *Limerick Ecology Action, Inc. v. U.S. Nuclear Regulatory Commission*, 869 F.2d 719, 729

(3rd Cir. 1989). All agencies, including the NRC must carry out NEPA "to the fullest extent possible." 42 U.S.C. § 4332.

NEPA requires that federal agencies, before taking a major action, take a "hard look" at new and significant information bearing on the impacts of an action. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (*Marsh*). Accordingly, in light of the new information about significant impacts that can occur from high density pool storage of spent nuclear fuels, NEPA requires that the NRC amend its regulations found at 10 C.F.R. § 51.23(a), 10 C.F.R. § 51.23(b), and 10 C.F.R. § 51, Appendix A, Table B-1, to require that individualized environmental review be done at each nuclear plant seeking a license to operate. Such review should be based on the specifics of a particular spent nuclear fuel pool, such as its physical setup and storage practices.

Instead, the current regulations make a generic determination that there can *never* be an environmental impact from the storage of nuclear waste in any spent nuclear fuel pool at any plant, anywhere in the United States, no matter its age, design, location, past safety record, or the amount or radioactivity of the waste stored there. An EIS prepared for the licensing or relicensing of a nuclear power plant, done in accordance with the current NRC regulations, would not have to identify, analyze, or disclose the dangers to the environment posed by potential accidents or terrorist attacks on spent fuel pools at the plant, even if the NRC

discovered or was presented with evidence that such dangers were reasonably foreseeable at that particular facility. These NRC regulations prevent the agency from fully complying with section 102(2)(C) of NEPA, which requires all agencies to administer their laws in accordance with NEPA "to the fullest extent possible," in order to further NEPA's action-forcing mandate. 42 U.S.C. § 4332(2)(C); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787-89 (1976).

The NRC's conclusory dismissal of terrorist threats against nuclear power plants is irrational in light of the acknowledged risk. *Mothers for Peace*, 449 F.3d at 1032. The NRC itself issued an alert to the nation's nuclear power plants on January 23, 2002 that warned of the potential for an attack by terrorists who planned to crash a hijacked airliner into a nuclear facility. Bazinet and Sisk, *Plant Attacks Feared*, The New York Daily News, February 1, 2002, *available at* WL 3165383. The NAS Report pointed out the potential dangers of a civilian aircraft attack on spent nuclear fuel stored at nuclear power plants, stating, "....the committee judges that it is not prudent to dismiss nuclear plants, including their spent fuel storage facilities, as undesirable targets for attacks by terrorists." NAS Report, JA 000995. Moreover, the 9-11 Commission's report indicates that the original terrorist plot included a total of "ten aircraft to be hijacked, nine of which would crash into targets on both coasts," including nuclear power reactors. *9-11 Commission Report*, JA 000901. Given the demonstrable and widely

acknowledged risk of an attack, and the enormous potential consequences, it is arbitrary and capricious for the NRC to continue to uphold decades-old regulations that preclude adequate analysis and discussion during the licensing or relicensing of nuclear power plants of the environmental impacts of crowded spent nuclear fuel pools and the risks posed by the threat of a successful terrorist attack. *Mothers for Peace v. NRC*, 449 F.3d at 1032.

B. New Threats and New Information Require that the NRC Supplement Its Regulations.

NEPA requires supplementation when 1) there is significant change in circumstances; and 2) when there is significant new information. *Marsh*, 490 U.S. at 374. Under NRC's rule, *no* change in circumstance, and *no* new information, can *ever* trigger the NEPA duty to supplement the environmental analysis of the long-term storage of nuclear waste. This sweeping conclusion is unsupported by the record and violates NEPA.

Under the current rule, no supplemental EIS could ever be required – indeed, it would be effectively forbidden – even if a major new fault with a high capability for seismic movement were discovered near a plant with long-term storage, even if actual leaks from a spent fuel pool were detected that might reach groundwater, or if other serious new circumstances that substantially changed the environmental picture arose. Because this violates NEPA's requirements, it exceeds NRC's legal authority to adopt its own rules to carry out NEPA's mandate.

III. THE REASONING OF THE NINTH CIRCUIT IN *MOTHERS FOR PEACE V. NRC*, RATHER THAN THE REASONING OF THE THIRD CIRCUIT IN *NJDEP V. NRC*, APPLIES TO THIS CASE

Two Circuits have considered the issue of terrorism aimed at nuclear facilities and have come to different conclusions. California believes that the correct reasoning was set out by the Ninth Circuit in *Mothers for Peace*, and urges this Court to decline to follow the tort, rather than NEPA-oriented, analysis engaged in by the Third Circuit in *New Jersey Department of Environmental Protection v. United States Nuclear Regulatory Commission,* 561 F.3d 132 (3rd Cir. 2009) (*NJDEP*).

Both cases examined the NRC's responsibility to analyze the environmental consequences arising from terrorist attacks as part of a relicensing proceeding. The *NJDEP* case involved the relicensing of the Oyster Creek nuclear power plant in New Jersey. New Jersey had asked the NRC to analyze the possible effects on the human environment of a terrorist attack on the Oyster Creek plant, and the NRC refused. The Third Circuit denied New Jersey's petition for review on two grounds. First, the Third Circuit opined that New Jersey had not shown a "reasonably close causal relationship" between the relicensing and the environmental impacts from potential terrorism. Second, the *NJDEP* court believed that the NRC had already analyzed and identified the effects at a nuclear

plant from serious *accidents*, and that the analysis of impacts from an accident was adequate to cover impacts from a terrorist attack. *NJDEP* at 136.

California notes initially that the Third Circuit suggested to NJDEP that if New Jersey believed the NRC's generic determination was not appropriate, its remedy was to file a petition for rulemaking with the NRC requesting a change in the NRC's licensing renewal regulations. *NJDEP* at 143. That is precisely what the States have done here. The difference between the procedural posture of the instant case, where the States challenge the denial of a properly presented APA rulemaking petition, distinguishes this case from the *NJDEP* case, where the Third Circuit held that – based on the record before it there -- the challenge to a generic regulatory determination in an individual licensing case was inappropriate and impermissible.

A. The Ninth Circuit in *Mothers for Peace* Found NEPA Applicable in Part Because the NRC's Actions Showed That the NRC Itself Did Not Regard the Risk of Terrorist Attacks as Insignificant.

In *Mothers for Peace*, petitioners challenged the NRC's refusal to analyze environmental impacts of terrorist attacks in its review of an application to license an interim spent fuel storage system at California's Diablo Canyon nuclear facility. 449 F.3d at 1031. The NRC argued that the possibility of such an attack was a worst case scenario and "pure conjecture", while NEPA applies only to impacts that are reasonably foreseeable. 449 F.3d at 1033. The Ninth Circuit held that the

NRC's refusal to perform a NEPA analysis was not reasonable, since it was inconsistent with the government's efforts and expenditures to combat just such an attack against nuclear facilities. In fact, as the *Mothers for Peace* decision noted, "The NRC's actions in other contexts reveal that the agency does not view the risk of terrorist attacks to be insignificant." 449 F.3d at 1032. While the NRC is not required to consider consequences that are wholly speculative, the Ninth Circuit found that the NRC itself regarded such an attack as possible, even if the risk was not quantifiable. Accordingly, the Ninth Circuit held, "NEPA obligates the NRC to take a 'hard look' at the environmental consequences of that risk." 449 F.3d at 1032. The decision also noted that the NRC position seemed to clash with the position of the Department of Homeland Security that the country remains at an elevated risk for terrorist attack. 449 F.3d at 1033-34, fn. 10.

B. The Third Circuit Has Read *Public Citizen* and *Metropolitan Edison* Too Broadly, Requiring a Tort-Like Cause and Effect As the Only Way to Trigger a Requirement for NEPA Analysis.

The *NJDEP* decision rejected, with the briefest of comment, the Ninth Circuit's analysis in the *Mothers for Peace* case. *NJDEP* at 142-143. Instead of focusing on whether there is a reasonably foreseeable risk of a terrorist attack on a nuclear facility, as the *Mothers for Peace* court did, the Third Circuit focused on whether an NRC's licensing decision would be viewed as causing such an attack for purposes of tort law. Relying on the Supreme Court's decision in *DOT v.*

Public Citizen, 541 U.S. 752 (2004) (*Public Citizen*), the Third Circuit imported into NEPA a causation standard taken from tort theory. Its decision would reduce NEPA to an extension of tort law. *NJDEP* holds that unless the petitioner demonstrates that the NRC could be held liable under a negligence standard for any future harm arising from a nuclear facility, the NRC need not consider the potential environmental impact of licensing the facility.[6]

However, the holding of *Public Citizen* is limited to situations in which the agency involved, by statute, has *no* discretion to refuse to take the action that will result in environmental impacts. See, also *National Association of Homebuilders, et al. v. Defenders of Wildlife, et al.*, __ U.S. __, 127 S.Ct. 2518, 2535 (2007) (internal citations omitted) "'where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant "cause" of the effect'"; *Center for Biological Diversity, et al. v. National Highway Traffic Safety Administration*, 538 F.3d 1172, 1212 (9th Cir. 2008) ("The Court reasoned [in *Public Citizen*] that where an agency has no ability to prevent a certain effect due to its limited

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[6] Interestingly, even if one were to apply the standard of the Restatement (Second) of Torts cited by the Third Circuit for when a party must anticipate the acts of a third party, Al Queda is just the "persons of peculiarly vicious type" whose acts should be anticipated and which trigger liability. Restatement (Second) of Torts § 448, cmt. b., *NJDEP* at 140.

statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect . . . .").

In *Public Citizen*, the Federal Motor Carrier Safety Administration (FMCSA) did not have statutory authority to close the border to Mexican trucks after the President had opened it; Congress gave the President sole authority to keep the border closed or to open it. *Public Citizen* at 759, citing 49 U.S.C. § 10922. It was this lack of authority to refuse to allow Mexican trucks into the country that excused FMCSA from examining and disclosing the environmental effects of opening the border and admitting those trucks. Rather, the Court held that NEPA only required the FMCSA to analyze and disclose the environmental impacts of the action it did have statutory authority to take or not take, namely the details of permitting and inspecting the trucks that the President had allowed into the country. *Public Citizen* at 767.

The Third Circuit misapplies the holding of this case, selectively quoting language about proximate causation and attempting to read NEPA as though it were a tort law. However, the Supreme Court's holding is clear, explicit, and narrow:

> "We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect. Hence, under NEPA and the implementing CEQ regulations, the agency need not consider these effects in its EA when determining whether its action is a 'major Federal action.' Because the President, not FMCSA, could authorize (or not

> authorize) cross-border operations from Mexican motor carriers, and *because FMCSA has no discretion to prevent the entry of Mexican trucks*, its EA did not need to consider the environmental effects arising from the entry." 541 U.S. at 770 (emphasis added).

In *Public Citizen*, the Court did analogize the causal relationship between an agency's decision and the environmental harm at issue to the concept of proximate cause in tort law. In doing so, the Court made clear that it was rejecting a "but for" causation model for NEPA and requiring a closer causal connection; however, the Court did not base its holding on the purposes of tort law, which seems to be the focus of the Third Circuit's opinion. Rather, the Court based its holding on the purposes of NEPA, which are to provide the decision making agency and the public with full information on the environmental consequences of the agency's action, in order to ensure good decision making and full public accountability by the agency for its decisions. *Public Citizen* at 767. None of these NEPA purposes can be served by applying NEPA to a decision that the agency literally has no discretion to make. No amount of information on the environmental consequences of allowing high-emitting Mexican trucks into the U.S. could have allowed the FMCSA to refuse to allow them in, since that decision had already been made by the President. As the Eleventh Circuit held in *Florida Key Deer, et al v. Paulison*, 522 F.3d 1133, 1144 (11th Cir. 2008), "*Public Citizen*. . . stands for nothing more than the intuitive proposition that an agency cannot be held accountable for the effects of actions it has no discretion not to take."

The NRC states in its decision denying the States' petition that "[t]he NRC renewal of a nuclear power plant license would not cause a terrorist attack; a terrorist attack would be caused by the terrorists themselves. Thus, the renewal of a nuclear power plant license would not be the 'proximate cause' of a terrorist attack on the facility." 73 Fed. Reg. 46211 (Aug. 8, 2008). NRC's reading of NEPA, that an agency need only consider the environmental impacts that the agency directly causes, would fundamentally reconfigure NEPA. Such a reading would eliminate the requirement, codified in the Council on Environmental Quality's regulations at 40 C.F.R. § 1508.8(b),[7] that NEPA requires an agency to consider the significant *indirect*, as well as the direct, effects of its actions on the environment. For example, NEPA requires that federal agencies consider the growth-inducing potential of their actions, even though the federal government has no direct authority over local land use decisions. *City of Davis v. Coleman*, 521 F.2d. 661, 675-676 (9th Cir. 1975); *Sierra Club v. Marsh*, 769 F.2d 868, 877-878 (1st Cir. 1985). Requiring as close a causal link as the Third Circuit requires could also eliminate the requirement that agencies look at the cumulative effects of their actions, when considered in combination with the decisions of other agencies and

[7] The NRC has adopted this CEQ regulation into its own NEPA regulations, at 10 C.F.R. §51.14(b).

entities over which they have no control. 40 C.F.R. § 1508.7.[8] Such a reading would cripple NEPA's central purpose of providing full environmental information to assist federal agencies in making decisions that will affect the environment. *Marsh*, 490 U.S. at 371.

In further support of its use of a doctrine of proximate cause from tort law, the Third Circuit cites to *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, where the Supreme Court analogized the reasonably close causal relationship required to trigger NEPA analysis to the proximate cause standard of tort law. *Metropolitan Edison,* 460 U.S. at 774. However, the Court made it clear that it was not suggesting that the requirement for a "causal-effect relationship" that triggers NEPA review would be the same as that required to establish liability for damages under tort law. 460 U.S. at 774, n. 7. In *Public Citizen*, the Court focused on the *making* of a decision, finding no NEPA causation where the administrative agency lacked the power and discretion to refrain from making a decision that would affect the environment. In *Metropolitan Edison*, the Court focused on the *effects* of the decision, namely on the type of environmental effects that the agency's decision could cause. In *Metropolitan Edison*, the Court held that NEPA applies only to effects on the physical environment caused by an agency's actions, and to social and economic effects that result from such changes

[8] The NRC has also adopted this CEQ regulation, at 10 C.F.R. § 51.14(b).

in the physical environment. Effects solely on the human psyche, rather than on the physical world, were held to be beyond the intended reach of NEPA. Again, the Court placed boundaries on the causal analysis that triggers NEPA in order to further the purposes of NEPA. It did not make NEPA applicable only when the agency involved would be liable in tort, and does not limit the NRC's NEPA obligations here.

Here, the NRC is not helpless to prevent environmental impacts, it can and has regulated in this area, and can certainly require a NEPA analysis of the environmental impacts on the physical environment of the licensing or relicensing of a nuclear reactor, including effects from terrorism. Indeed, the NRC is required by the Atomic Energy Act to regulate in order to protect the health and safety of the public. *Riverkeeper, Inc. v. Collins,* 359 F.3d at 156, 167 (2nd Cir. 2004). It is reasonably foreseeable that granting a license that extends for decades the expansion of spent nuclear fuel pools when we know that terrorists have already noted nuclear facilities as potential terrorist targets, may ultimately result in a terrorist attack on such a pool. It is not reasonable to presume such an attack to be impossible. And, since there is reasonable foreseeability, NEPA requires an analysis of the environmental effects of a such a terrorist attack. *Mothers for Peace* at 1030-31. This Court should require the NRC to hold a rulemaking on whether its regulations should be amended to permit the consideration of

environmental impacts from terrorism or from spent fuel pool accidents in its licensing and relicensing decisions.

CONCLUSION

Because the NRC has violated Administrative Procedure Act and National Environmental Policy Act, this Court should void the NRC's denial decision and remand the matter to the agency for action in accordance with the law.

Dated: May 11, 2009

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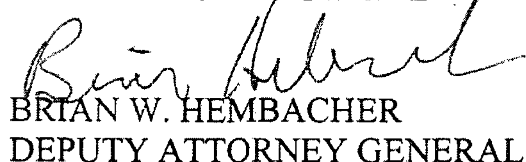

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Attorney for State of California

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I, TINA M. HOUSTON declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **FEDERAL EXPRESS NEXT DAY MAIL**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business. On ***May 11, 2009***, I served the following:

1. **Notice of Appearance for Substitute, Additional, or Amicus Counsel;** ***(2 copies on Clerk of the Court and 1 copy on each party)***
2. **Brief of Amicus Curiae State of California, Ex Rel. Edmund G. Brown Jr., Attorney General, in Support of the States of Massachusetts, Connecticut and New York;** ***(2 copies of Brief and copy via electronic mail on all parties, and one original and ten copies and a copy via electronic mail on the Clerk of the Court)*****, and**
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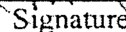
Tina M. Houston	
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United States Court of Appeals for the 2nd Circuit
Case No.: 08-3903-ag(L); 08-4833-ag(CON); 08-5571-ag(CON)

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