



JON S. CORZINE  
Governor

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
25 MARKET STREET  
PO Box 093  
TRENTON, NJ 08625-0093

ANNE MILGRAM  
Attorney General

ROBERT J. GILSON  
Director

December 4, 2008

Marcia M. Waldron, Clerk  
United States Court of Appeals  
for the Third Circuit  
21400 United States Courthouse  
601 Market Street  
Philadelphia, Pa. 19106-1790

Re: New Jersey Department of  
Environmental Protection v. NRC  
No. 07-2241  
**Scheduled for Oral Argument December 10, 2008**  
Submitted Pursuant to F.R.A.P. 28(j)

Dear Ms. Waldron:

Respondent Nuclear Regulatory Commission, ("NRC"), has identified *Massachusetts v. United States*, 522 F.3d 115 (1<sup>st</sup> Cir. 2008), as supporting its argument that an intervenor cannot seek consideration of new information regarding the risk of airborne terrorism in a relicensing proceeding, except by seeking new rulemaking.<sup>1</sup> However, unlike petitioners in *Massachusetts*, New Jersey seeks to examine the particular vulnerability of Oyster Creek to terrorist attack, given its unique design and location. In contrast, the contentions in *Massachusetts* concerned "a safety issue common to all plants." *Id.* at 124. Given these

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<sup>1</sup>The NRC has indicated that the appropriate result is rulemaking whether the application is for a waiver of its GEIS, see 10 C.F.R. § 2.335, or for separate rulemaking. NRC Brief at 8.



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circumstances, the First Circuit found NRC's insistence on rulemaking to be "reasonable in context..." *Id.* at 127.

New Jersey's site-specific contention is more appropriately addressed in light of this Court's decision in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 738-39 (3d Cir. 1989), which recognized that issues related to design and location of particular plants are, by their nature, not generic. Consideration of this information is permitted under the NRC's existing rules, which call for supplementation of its generic rules with "new and significant information(,)" 10 C.F.R. § 51.53. The NRC's reading of *Massachusetts* would render this provision, which is necessary to National Environmental Policy Act ("NEPA") compliance, meaningless and ineffective.

Petitioner also calls to the Court's attention the recent decision in *Nash v. The Port Authority of New York and New Jersey*, 856 N.Y.S.3d 583, 589 (App. Div. 2008), which concluded that the World Trade Center landlords had a duty of care to protect against the 1993 terrorist attack. See F.R.A.P. 28(j). This decision more closely addresses the question of whether the causal connection between relicensing and terrorism risks is sufficient to warrant NEPA review than those cited by NRC. See NRCBf 35-37, citing *Port Authority of New York and New Jersey v. Arcadian Corp.*, 189 F.3d 305, 317-19 (3d Cir. 1999) (denying liability of manufacturers of fertilizer used in terrorist attacks).

Sincerely yours,

ANNE MILGRAM  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Eileen P. Kelly  
Deputy Attorney General

c: John F. Cordes, Jr., Soliciter  
✓ Charles E. Mullins, Esq.  
Tamara Rountree, Esq.  
Brad Fagg, Esq.  
Michael A. Bauser, Esq.