15-1330

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 15-1330

RICHARD L. BRODSKY, New York State Assemblyman, from the 92nd Assembly District in His Official and Individual Capacities,

Plaintiff-Appellant,

PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), WESTCHESTER CITIZENS AWARENESS NETWORK (WESTCAN), SIERRA CLUB,

Plaintiffs,

—v.—

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Defendant-Appellee,

ENTERGY NUCLEAR OPERATIONS, INC.,

Intervenor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

Preliminary Statement

In the last appeal in this matter, this Court held that nearly all of plaintiffs' claims against the Nuclear Regulatory Commission ("NRC"), which challenge the NRC's grant of fire-safety exemptions regarding the Indian Point power plant, were "generally with-

out merit." *Brodsky v. NRC*, 704 F.3d 113, 125 (2d Cir. 2013). In one respect, however—whether the NRC satisfied public-participation requirements of the National Environmental Policy Act ("NEPA")—the Court concluded that "the administrative record is insufficient" and remanded to the agency for further proceedings. *Id.* at 124–25.

The only question now properly before the Court is that narrow issue: whether the NRC afforded the public a sufficient opportunity to participate in its consideration of the fire-safety exemptions. It did. Following the remand from this Court, the agency published notice of its intent to reconsider the exemptions and invited public comment; after receiving those comments, the agency addressed them and declined to modify its original decision. That procedure plainly gave the public a meaningful voice and a full opportunity for participation, and plaintiffs do not seriously contend otherwise. Instead, plaintiffs attempt to relitigate the NRC's determinations regarding whether the exemptions would affect safety or national defense, focusing on their fear of terrorism—arguments the district court and this Court have already rejected. The district court correctly entered judgment for the government, concluding that plaintiffs are precluded from relitigating the law of this case, and in any event NEPA requires no more than the extensive consideration of both safety and environmental concerns the agency has already given. This Court should affirm.

Jurisdictional Statement

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, as plaintiffs' claims arise under the laws of the United States. Final judgment was entered on March 5, 2015 (2015JA 295), and plaintiffs timely appealed on April 24, 2015 (2015JA 297).[1] Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

Questions Presented

1. Whether the NRC satisfied any requirement of NEPA that an agency permit public participation in connection with issuance of an environmental assessment, where the agency published notice of its intent to take action, solicited public comments, and then considered and responded to those comments before taking action.

2. Whether the district court's holding that NEPA does not require the NRC to consider the threat of terrorism in issuing an environmental assessment is the law of the case that may not be raised on this appeal, or, in any event, is in accordance with NEPA and the precedent of the Supreme Court and other courts of appeals.

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[1] 2015JA refers to the joint appendix submitted with this appeal, and 2011JA refers to the joint appendix in the prior appeal, no. 11-1260.

Statement of the Case

A. Procedural History

The NRC granted the fire-safety exemptions at issue on September 28, 2007, with notice published in the Federal Register on October 4, 2007. On March 26, 2008, plaintiffs petitioned this Court for review of that agency decision under 28 U.S.C. § 2342(4), which vests courts of appeals with jurisdiction over certain NRC orders. *Brodsky v. NRC*, 578 F.3d 175, 177 (2d Cir. 2009). This Court dismissed the petition for lack of jurisdiction. *Id.* at 177–84. Plaintiffs then initiated this action in the district court on December 30, 2009, seeking review of the NRC's exemptions under the Administrative Procedure Act. On March 4, 2011, the district court (Loretta A. Preska, J.) granted summary judgment in favor of the NRC. *Brodsky v. NRC*, 783 F. Supp. 2d 448 (S.D.N.Y. 2011).

On January 7, 2013, this Court affirmed that judgment for the most part, but remanded the NEPA public-participation issue for further agency proceedings. 704 F.3d 113 (2d Cir. 2013); 507 F. App'x 48 (2d Cir. 2013). The NRC then published a notice that it would reconsider the exemptions and soliciting public comment. (2015JA 24); 78 Fed. Reg. 20,144 (Apr. 3, 2013). Following the agency's consideration, the parties cross-moved for summary judgment again in the district court, which granted summary judgment to the government on February 26, 2015. (2015JA 273); 2015 WL 1623824 (S.D.N.Y. Feb. 26, 2015). Judgment was entered on March 5, 2015 (2015JA 10, 295),

and plaintiffs filed this appeal on April 24, 2015 (2015JA 10, 297).

B. The NRC's Fire-Protection Rule, and the NRC's Review of Hemyc

This Court stated the salient facts in its previous opinion. 704 F.3d at 116–18. In brief: the Atomic Energy Act ("AEA") creates a "comprehensive regulatory framework" that gives the NRC the power to "promulgate rules and regulations governing the construction and operation of nuclear power plants" to protect the public welfare. *County of Rockland v. NRC*, 709 F.2d 766, 769 (2d Cir. 1983) (citing 42 U.S.C. § 2201). Among the NRC's regulations are the fire-safety provisions of 10 C.F.R. § 50.48 and 10 C.F.R. Part 50 Appendix R, which require "defense-in-depth" measures to prevent, control, and promptly extinguish fires, and to protect structures, systems, and components necessary for a safe shutdown of a nuclear power plant. The D.C. Circuit has upheld these requirements, but in doing so noted that plant operators must be able to seek exemptions: "If the utility can show that some combination of protective measures provides protection equivalent to that afforded by one of the Commission's three stipulated methods, it will be entitled to an exemption . . . ." *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530, 535–36 (D.C. Cir. 1982).

The NRC's regulations provide three methods for ensuring that at least one of the redundant sets of electrical and mechanical systems used to safely shut down a power plant will remain free of fire damage.

10 C.F.R. Part 50, Appx. R § III.G.2. One of those options is to enclose certain cables and equipment in a fire barrier that is rated to withstand fire for at least one hour, along with fire detection and suppression capability in the area. *Id.* § III.G.2.c; (2011JA 504–05).

"Hemyc" is an insulating material used to protect electrical cables in the event of a fire. Although Hemyc had previously been considered to satisfy the one-hour fire rating, NRC tests in 2005 showed that Hemyc fell short of this standard. (2011JA 172–226). In 2006, the NRC instructed licensees to report on their use of Hemyc and whether they were in compliance with the fire-protection regulations. *See* Generic Letter 2006–03 (2011JA 214–226); *Carolina Power & Light Co.*, 63 NRC 133, 140 (2006); *see also* 71 Fed. Reg. 3344 (Jan. 20, 2006).

C. The Indian Point Reactor and Its Fire-Safety Exemptions

Indian Point 3 is a nuclear power reactor located in Westchester County, New York, and at present is operated by Entergy Nuclear Operations, Inc.

In response to the NRC's regulatory action regarding Hemyc, on June 8, 2006, Entergy informed the NRC that it had declared its Hemyc "inoperable" at Indian Point 3, meaning that it no longer claimed that the one-hour fire rating was satisfied. (2011JA 235). Entergy proposed to resolve the nonconforming Hemyc by revising existing fire protection exemp-

tions[2] at Indian Point 3 "to reflect that the installed Hemyc [electric raceway fire barrier system] configurations [in two designated areas, Fire Area ETN4 and Fire Area PAB-2] provide a 30-minute fire resistance rating" instead of a one-hour rating. (2011JA 240). For Fire Area ETN-4, that request was later modified to allow a 24-minute rating. (2011JA 466–67).

The NRC performed a detailed safety evaluation, finding that Entergy had provided a sound technical basis for the revised exemptions, consistent with NRC fire-protection requirements. (2011JA 477–517). In accordance with NEPA, the NRC issued an environmental assessment ("EA") accompanied by a "finding of no significant impact" ("FONSI") on September 24, 2007. (2011JA 496–99); 72 Fed. Reg. 55,254 (Sept. 28, 2007). The EA/FONSI noted that the NRC had conducted a safety evaluation; found "reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate," and that the proposed exemptions would not "significantly increase the probability or consequences of accidents"; and therefore concluded "there are no significant environmental impacts associated with the proposed ac-

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[2] Indian Point 3 received exemptions from the fire-safety rule in 1984 and 1987 for Fire Area ETN (Electric Cable Tunnel)-4 (Fire Zones 73A, 7A and 60A) and Fire Area PAB (Primary Auxiliary Building)-2 (Fire Zone 1), based on considerations such as the spatial separation between trains, the absence of fire hazards in the areas, and other fire-protection features. (2011JA 49, 132, 505–06).

tion." (2011JA 497–98). The agency then granted the revised exemptions on September 28, 2007. (2011JA 500); 72 Fed. Reg. 56,798 (Oct. 4, 2007). In the revised exemptions, the NRC concluded, in light of the agency's own safety evaluation, "that given the existing fire protection features" and the lack of combustible materials in the affected fire zones, "[Entergy] continues to meet the underlying purposes" of the fire-protection rule (2011JA 507, 510–14). Thus, NRC determined that the proposals "met the criteria for granting exemptions stated in the NRC's regulation," including that they "'will not present an undue risk to the public health and safety" and "are consistent with the common defense and security," and that application of the regulation was not necessary to serve the underlying fire-protection purpose of the rule. (2011JA 514).

D. Plaintiffs' Litigation Regarding the Exemptions

1. Petition for Review and Action in This Court

In 2008, plaintiffs petitioned this Court for review of the 2007 exemptions. *Brodsky v. NRC*, 578 F.3d 175 (2d Cir. 2009); (2011JA 915). After the Court dismissed the petition for lack of jurisdiction, plaintiffs filed the present action in December 2009. (2011JA 2).

The district court granted summary judgment in favor of the NRC. *Brodsky v. NRC*, 783 F. Supp. 2d 448 (S.D.N.Y. 2011). As relevant here, the district court ruled that no environmental impact statement

("EIS") was required under NEPA, and that the agency's EA sufficed based on its FONSI. *Id.* at 460–62. In particular, the district court held that the NRC was not required to consider the possibility of a terrorist attack in its EA, because the effect on the environment from such an attack would be no worse than that of a severe accident at the plant, and the NRC's EA referred to the detailed safety evaluation issued at the same time that sufficiently analyzed accident scenarios. *Id.* at 462 & n.10. That safety evaluation, the district court determined, was "comprehensive" and demonstrated that the NRC had "considered the factors listed in the specific regulations and in the end acted reasonably." *Id.* at 462–64. In sum, the district court held that "[t]his is a case where deference to the substantive decision of the [NRC], as it relates to nuclear safety, is warranted," and granted summary judgment to the NRC. *Id.* at 465–66.

2. Brodsky's First Appeal

On appeal, this Court affirmed nearly all of the district court's decision.

By summary order, among other holdings, the Court noted plaintiffs' concession that the NRC had adequate support for its finding that the exemptions presented no "'undue risk to the public health and safety,'" and the Court further concluded that plaintiffs' "speculation that a terrorist attack would disable more firefighting personnel than would a significant fire, thus making increased reliance on manual fire suppression unsafe, is insufficient" to undermine the agency's regulatory finding that the exemptions

were " 'consistent with the common defense and security.' " *Brodsky v. NRC*, 507 F. App'x 48, 51–52 (2d Cir. 2013) (quoting 10 C.F.R. § 50.12). Indeed, the Court deferred to the NRC's conclusion that the change at issue "bore 'no relation to security issues.' " *Id.* at 52. Ultimately, the Court held that NEPA did not require an EIS in this case; whether to prepare an EIS rests in the agency's discretion, and the NRC had met its "minimal burden" to justify forgoing that step. *Id.* at 53.

Simultaneously, the Court issued a separate opinion addressing plaintiffs' claim that NEPA and accompanying regulations required the NRC to allow a greater degree of public participation in formulating its EA. 704 F.3d 113 (2d Cir. 2013). On that question, the Court ruled that the record was insufficient to determine if the NRC's action was permissible. *Id.* at 115. The Court acknowledged that "NEPA itself does not assign the public any particular role" in the process of issuing an EIS or EA, but noted that "implementing regulations" promulgated by the Council on Environmental Quality ("CEQ") "identify public scrutiny as an 'essential' part of the NEPA process." *Id.* at 120 (quoting 40 C.F.R. § 1500.1(b)).[3] The regulations provide for environmental information to be made

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[3] The Court assumed, for purposes of the appeal, that the CEQ regulations bind the NRC, while noting possible authority to the contrary. *Id.* at 120 n.3. Although the NRC disagrees with that conclusion, it accepts that assumption for the purposes of this litigation.

public in advance of decisions, and for public involvement in some circumstances. *Id.* (citing 40 C.F.R. §§ 1500.1(b), 1506.6(a), (d)). "Such involvement can include public hearings 'whenever appropriate,' a determination informed by whether there is '[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.'" *Id.* (quoting 40 C.F.R. § 1506.6(c)). But "[g]iven the discretion afforded agencies by the regulatory text," courts should not "second guess an agency decision not to hold a public hearing in a particular case." *Id.* at 120–21 (citing *Friends of Ompompanoosuc v. FERC*, 968 F.2d 1549, 1557 (2d Cir.1992)).

The Court recognized that "these regulations do not clearly define how public involvement requirements might apply where, as here, an agency prepares only an EA (and FONSI) and not an EIS." *Id.* at 121. In that case, "the agency is required to 'involve environmental agencies, applicants, and the public' only 'to the extent practicable.'" *Id.* (quoting 40 C.F.R. § 1501.4(b)). More specifically, only in "'limited circumstances'" must an agency make a FONSI "'available for public review'" prior to agency action. *Id.* (quoting 40 C.F.R. § 1501.4(e)(2); citing *Pogliani v. U.S. Army Corps of Engineers*, 306 F.3d 1235, 1238 (2d Cir. 2002)). A court reviewing the agency's action "properly considers whether the lack of public input prevented the agency 'from weighing all the factors essential to exercising its judgment [under NEPA] in a reasonable manner.'" *Id.* (quoting *Friends of Ompompanoosuc,* 968 F.2d at 1557).

Addressing the facts of this case, the Court found no explanation in the record for the lack of public participation prior to the issuance of the EA. *Id.* at 121–22. While noting some indicia of public controversy regarding Hemyc and the exemptions here, the Court specifically did "not suggest" that a public hearing was required, even if it may have been beneficial. *Id.* at 122–23. But the Court concluded that it was unable to review whether the NRC could have weighed the relevant factors in issuing the EA, in the absence of either public participation or an agency explanation for its decision not to seek public input. *Id.*

Accordingly, the Court remanded to the NRC for it to "explain its denial or otherwise demonstrate that it has in fact taken the kind of 'hard look at environmental consequences' that it would have taken if the public were allowed to comment on the exemption request." *Id.* Emphasizing that its "decision . . . is narrow," that it "pronounce[d] no rule as to the degree or form of public participation required before the NRC can grant exemptions from its protocols," and that it "[did not] hold that agencies always need to explain their decisions as to how much public participation to afford pursuant to NEPA," the Court remanded so the NRC could "(1) supplement the administrative record to provide an explanation . . . as to why affording public input into the exemption request was inappropriate or impracticable; or (2) take other such

action as it may deem appropriate to resolve this issue." *Id.* at 124.[4]

3. Proceedings on Remand to the NRC

On remand, the NRC elected the second option, and on March 26, 2013, issued a notice indicating that the Commission is "reconsidering its issuance" of the revised exemptions at issue in this litigation. (2015JA 24); 78 Fed. Reg. 20,144, 20,144 (Apr. 3, 2013). The notice included a draft EA and FONSI, substantially the same as the 2007 EA/FONSI, solicited public comments on that draft,[5] and indicated that, "[a]s necessary, the underlying action (i.e., approval of the exemptions) may be modified in light of public comments." (2015JA 25).

On August 19, 2013, the NRC issued a second notice, which reissued the 2007 exemptions without change. (2015JA 27); 78 Fed. Reg. 52,987 (Aug. 27, 2013). In considering the "environmental impacts of the proposed action"—i.e., the impacts of granting the exemptions—the NRC stated that it had "completed its safety evaluation" and found "reasonable assurance that a severe fire is not plausible and the exist-

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[4] The Court's panel retained jurisdiction for any subsequent appeal, such as this one, and stated no oral argument would be held absent further order of the Court. 704 F.3d at 124–25.

[5] By May 3, 2013, *id.*, later extended to June 3, 2013, at the request of plaintiff Brodsky, 78 Fed. Reg. 26,662, 26,662 (May 7, 2013).

ing fire protection features are adequate." (2015JA 28). Based on facts that would minimize fire hazard, the agency concluded "that the use of this Hemyc fire barrier in these zones will not significantly increase the consequences from a fire in these fire zones." (2015JA 28). Granting the exemptions also would not "significantly increase the probability or consequences of accidents." (2015JA 28). Thus, "there are no significant environmental impacts associated" with granting the exemptions. (2015JA 28). The NRC also considered the environmental impact of denying the exemptions and concluded that would result in "no change in current environmental impacts"; thus the impacts of the grant or denial of the exemptions would be "similar." (2015JA 28).

The NRC then addressed the public comments it had received. In the notice itself, the NRC considered comments categorically. (2015JA 28). Among other things, the NRC denied requests for a hearing on the ground that no hearing was required by the AEA or NRC regulations, and it noted that the courts had accepted that position. (2015JA 28). The agency next addressed comments squarely aimed at the protection of public health and safety. (2015JA 28–29). This concern, the agency stated, is beyond the scope of the opportunity to comment on the EA/FONSI, which is limited to environmental effects; in any event, the NRC noted that the courts have already upheld the agency's judgment on this matter. (2015JA 28–29). However, the NRC stated that it had issued a separate "comment resolution document," which addressed this issue and others outside the scope of the NEPA review. (2015JA 28–29, 31–62).

Regarding concerns of a terrorist attack, the agency again found these to be outside the scope of the EA/FONSI. (2015JA 29). Furthermore, the NRC has determined in its precedent that NEPA "'imposes no legal duty on the NRC to consider intentional malevolent acts' because these acts are 'too far removed from the natural or expected consequences of agency action.'" (2015JA 29 (quoting *Amergen Energy Co.*, 65 NRC 124, 128 (2007), *aff'd*, *New Jersey Dep't of Environmental Protection v. NRC* ("*NJDEP*"), 561 F.3d 132 (3d Cir. 2009))). The agency acknowledged that the Ninth Circuit has ruled otherwise, but explained that outside that jurisdiction it adheres to the view that NEPA does not require consideration of terrorist attacks. (2015JA 29). The NRC also pointed to separate regulatory actions in which it acted to address the threat of terrorism or similar destructive acts. (2015JA 29). In any event, the NRC reiterated that its safety evaluation had concluded that there was reasonable assurance that a severe fire, whether resulting from a terrorist attack or some other event, was not plausible in the fire zones at issue here, and existing protections are adequate; thus, further environmental analysis is not needed. (2015JA 29).

Accordingly, based on its environmental assessment and in light of its consideration of the comments, the NRC concluded that granting the exemptions would have "no significant impact on the quality of the human environment," and an EIS was therefore not necessary. (2015JA 30).

4. District Court's Decision

Plaintiffs again challenged the NRC's exemptions in the district court. That court concluded that "most of [plaintiffs' arguments] attempt to re-litigate issues previously decided by this Court and affirmed by the Court of Appeals," and in any event, "the record demonstrates that the NRC has satisfied its public participation obligations as set out by the Court of Appeals" and "reveals no reason to disturb the prior rulings of this case." (2015JA 273). Accordingly, the court granted summary judgment in favor of the government. (2015JA 273).

As relevant to this appeal, the district court first rejected plaintiffs' argument that the NRC had failed to evaluate the public interest in the exemptions at issue and was therefore required to hold a public hearing. (2015JA 286). The court concluded that this contention was "belied by the record," as the NRC had "reviewed all public comments and 'concluded that the record is sufficient' " to weigh the factors relevant to NEPA. (2015JA 286, quoting 2015JA 44). As the record demonstrated "the NRC's conscientious consideration of and response to all public comments," its decision not to hold a hearing was entitled to deference. (2015JA 287). Indeed, the district court observed that the NRC had demonstrated "diligence in soliciting, considering, and responding to all public input," confirming it had taken the necessary "hard look" at environmental consequences "expected to arise out of public commentary." (2015JA 287). These actions, the district court held, addressed the concerns expressed in this Court's remand opinion.

(2015JA 288). As plaintiffs had raised no other challenges to public participation, the court concluded that the NRC was entitled to summary judgment. (2015JA 288).

The district court then observed that plaintiffs' remaining concerns "raise legal issues that have already been addressed by prior decisions in this case." (2015JA 288; *accord* 2015JA 285–86 (discussing law of the case doctrine)). "A complete reconsideration of all previously decided legal questions based solely on additional commentary" would waste judicial resources and render this Court's affirmance "meaningless." (2015JA 288). The district court described certain of plaintiffs' complaints (those now at issue on appeal) as challenging the NRC's "alleged refusal to consider safety-related concerns raised by public comments"—but determined that "[t]o the extent these argument focus on a potential terror attack, [the district court] and the Court of Appeals have already found that" plaintiffs' speculation about terrorism is insufficient to undermine the NRC's regulatory action. (2015JA 291). "Nothing in the recent public comments adds credibility to Plaintiffs' concern, and NEPA does not require further consideration of the environmental impacts of terrorism-related fires 'because the effect on the environment would be no worse than that of a severe accident at the plant.'" (2015JA 291–92 (quoting 783 F. Supp. 2d at 462 n.10)). But, the district court held, even though it was not necessary, "the NRC addressed commenters' concerns about a potential terrorist attack, noting that it 'has analyzed plausible threat scenarios' and concluded 'from its independent safety evaluation'" that

"'a severe fire is not plausible and the existing fire protection features are adequate.'" (2015JA 292 (quoting 2015JA 29)). The district court determined this response was "reasonable" and "undermines any claim that the NRC failed to consider a potential terror attack and demonstrates that its analysis regarding such a scenario was not arbitrary and capricious." (2015JA 292). Indeed, the court concluded, the NRC addressed "every safety concern raised in the public comments" and concluded that the exemptions would have no effect on safety, a decision the courts have already ruled was within the NRC's expertise, properly reached, and entitled to deference from the courts. (2015JA 292–93).

Accordingly, the district court entered judgment for the government. This appeal followed.

Summary of Argument

The requirements of this Court's remand were limited, and the NRC has satisfied them. In the prior appeal, the Court determined that the record was inadequate to assess whether the agency had satisfied NEPA's requirements for public participation in the issuance of an environmental assessment. On remand, the NRC solicited, received, and responded to public comments. Thus, it is now beyond doubt that whatever public-participation requirements NEPA imposes have been satisfied. While plaintiffs complain that their concerns were ignored, the record demonstrates that to be incorrect. The comments plaintiffs point to were conclusory and insubstantial,

but in any event the NRC responded to them thoroughly. *See infra* Point A.

The remaining issues are not properly before this Court. Plaintiffs' main argument is that NEPA requires the NRC to address the environmental effects of a terrorist attack on the Indian Point power plant. But in its 2011 ruling, the district court agreed with the Third Circuit and held that the statute does not impose a requirement to independently consider a possible terrorist attack. Plaintiffs did not raise that issue in their first appeal, and accordingly it is the law of the case and may not be raised now. Nor did plaintiffs challenge, in their present brief to this Court, the district court's holding that the law of the case controls—and they have therefore waived the issue again. *See infra* Point B.1.

In any event, NEPA only requires agencies to consider environmental effects that are caused by the agency's action. But, as the Third Circuit has held, in line with precedent of the Supreme Court and other courts of appeals, there is no causal relationship between an NRC regulatory action and a possible terrorist attack. That logic applies here: the NRC's grant of the exemptions at issue in this case cannot be said to cause the environmental effects of a hypothetical terrorist attack, which implicates matters well beyond the NRC's control. To the extent the Ninth Circuit has ruled otherwise, that case is distinguishable on its facts and misapplied the Supreme Court's precedent. *See infra* Point B.2. Finally, even if NEPA did require an agency to consider the effects of a possible terrorist attack, the NRC did so. The record demon-

strates that the NRC considered the potential for a severe fire, however initiated, to be so unlikely that further environmental analysis was not required—a determination this Court has already upheld. *See infra* Point B.3.

For all those reasons, the district court's judgment should be affirmed.

ARGUMENT

The NRC has easily satisfied the narrow requirements of this Court's remand. The Court held that it could not assess on the record before it whether the NRC's decision not to invite public participation was justified. On remand, the NRC obviated that question by inviting public comment on the EA/FONSI. It then considered and addressed the public's comments, examined the environmental consequences of the proposed action, and reached a reasoned decision that there would be no significant environmental impact to granting the exemptions. In short, the agency fully dispelled the Court's concerns about public participation by permitting and considering public participation. Plaintiffs have no response to these facts except to speculate, implausibly and inexpertly, that the NRC's decision about fire insulation in discrete areas of the power plant will increase the probability and consequences of a terrorist attack. But, besides being unfounded, those concerns were outside the scope of this Court's remand, and were addressed in the prior decisions. For those reasons, the district court properly awarded summary judgment to the government, and this Court should affirm.

A. The NRC Permitted Adequate Public Participation

In order to address this Court's concerns about the lack of public participation, the agency allowed public participation. 78 Fed. Reg. 20,144; 78 Fed. Reg. 52,987. Although the NRC does not concede that the public input it allowed was required by either the statute, the regulations, or the Court's remand opinion, its decision to do so was sufficient to fill the narrow gap the Court identified in the record and to conclusively resolve this matter.

The Court identified several principles from NEPA and the CEQ's regulations (though it expressly declined to rule that they compelled any particular action by the NRC in this case). 704 F.3d at 120–21. The Court observed that in general public scrutiny is an "'essential'" part of the NEPA process, and environmental information should typically be made available to the public before agency decisions are made. *Id.* (quoting 40 C.F.R. §§ 1500.1(b)). At the same time, the Court stated that when an agency issues an EA instead of an EIS, it is "required to 'involve . . . the public' only 'to the extent practicable,'" and need only make a FONSI publicly available before agency action in "'limited circumstances.'" *Id.* (quoting 40 C.F.R. § 1501.4(b), (e)). However those principles apply in this case, there can be no question that they were satisfied on remand when the NRC opened its proposal to public comment and responded in detail to the input it received.

Plaintiffs' only response is the conclusory assertion that "all the agency did was to give the illusion of

public participation" by "ignor[ing] the many comments that raised serious concerns about the specter of terrorism at Indian Point and its environmental consequences." (Br. 28). It is impossible to square that contention with the record. Plaintiffs point to Richard Brodsky's "Comment 4" (2015JA 234–36) along with similar but less detailed comments from Susan Shapiro (2015JA 66–67) and Michel Lee[6]—which asserted that granting the exemptions would increase the risk and consequences of a terrorist attack—as the comments the NRC supposedly "ignore[d]." (Br. 28). It is questionable whether these conclusory comments were "significant enough to step over a threshold requirement of materiality" that would require "agency response or consideration"—the fact that a comment is "forcefully presented" cannot overcome its insubstantiality. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553–54 (1978) (quotation marks omitted); *accord Thompson v. Clark*, 741 F.2d 401, 408–09 (D.C. Cir. 1984) (agency not obliged to "respond to every comment, or to analyse every issue or alternative raised by the comments, no matter how insubstantial"), *cited in Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203

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[6] Brodsky is a plaintiff here; Shapiro signed her comment on behalf of plaintiff Public Health and Sustainable Energy ("PHASE") (2015JA 68); and Lee, while submitting the comment "on [his] own behalf," has worked with Brodsky, PHASE, and other plaintiffs here on issues regarding Indian Point (2015JA 89).

(2015) (agency must "respond to significant comments"). But regardless, the NRC addressed them in detail. (2015JA 39–40; *see* 2015JA 53 (stating that Lee's and Shapiro's comments had been addressed in the response to other comments, including the response to Brodsky Comment 4)).

Brodsky's comment offered only unsupported conjecture that fire-suppression systems would fail in a terrorist attack, and that the risk of such an attack would be increased. (2015JA 234–36). The NRC rebutted each of Brodsky's points in turn, first noting that it had analyzed the safety issues and determined that "the effect of the exemptions on the common defense and national security appears nil"; that the fire protection systems in the affected areas are subject to quality assurance programs and NRC inspections; and that the fire protection systems in those areas taken as a whole are consistent with the NRC's "defense in depth" fire regulations and demonstrate adequate protection. (2015JA 39 (quotation marks omitted)). The NRC further observed that concerns about security and terrorism are not relevant to NEPA review (as discussed below), but that the agency's other regulatory actions have enhanced security requirements and have addressed the threats from sabotage, aircraft, explosions, and other scenarios that could lead to radiological consequences. (2015JA 39–40). In addition, the NRC noted that the agency itself "routinely assesses threats and security-related information" as part of an ongoing regulatory process. (2015JA 39–40). Moreover, the agency stated that "even if it were required by NEPA to consider acts of terrorism, any incremental risk of terrorism is too

low to require environmental analysis." (2015JA 40 (citing *New York v. NRC*, 589 F.3d 551, 554 n.1 (2d Cir. 2009) ("NRC did sufficiently take into account acts of terrorism when deciding that the risk . . . was uniformly low")). Thus, the agency concluded, the NRC's safety evaluation showed that "[w]hether resulting from a terrorist attack or some internally-initiated event," the measures in place "provide reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate." (2015JA 40 (quotation marks omitted)). "This finding renders a severe fire in the affected areas . . . , however initiated and whatever the offsite consequences, so unlikely as not to require further environmental analysis." (2015JA 40).

As the district court put it, "the record reflects the NRC's conscientious consideration of and response to all public comments," its "diligence in soliciting, considering, and responding to all public input," and the fact that "the agency has indeed taken the kind of hard look at environmental consequences expected to arise out of public commentary." (2015JA 287–88 (quotation marks omitted)). Although plaintiffs disparage the NRC's careful response as "formulaic" and "generic[ ]," they do not specify what more it would be reasonable to expect. In the end, the comments amount to nothing more than the commenters' disagreement with the NRC's evaluation of safety and security concerns—an evaluation this Court has already upheld, concluding that "the agency is much better situated than is this court to make such a finding." 507 F. App'x at 51–52. Nor is there any reason to believe that the commenters have any expertise in

safety, security, or terrorism risk assessment, and certainly not enough to undercut the determination of the agency charged by Congress with making those assessments. Plaintiffs cannot be permitted to engage in "unjustified obstructionism" by raising unsupported and inexpert concerns that have already been addressed by the courts, then seeking to overturn the agency's reasonable action simply because they believe the comments "'ought to be'" considered. *Vermont Yankee*, 435 U.S. at 553–54.

Accordingly, the district court correctly determined that the NRC's actions "addressed [this Court's] concerns regarding public participation." (2015JA 288).

B. The NRC Need Not Further Address Concerns About Terrorism

Nothing further was required. The only issues plaintiffs raise on this appeal concern their fear of terrorism. But those issues have been addressed already in this litigation, and plaintiffs may not raise them again now. Indeed, this Court's prior decision was "narrow," and its remand limited to a single purpose: to allow the agency to supplement the record to resolve the issue of public participation in the issuance of the EA. 704 F.3d at 124. As explained above, that purpose has been accomplished, and no other issue is now before the Court. In any event the NRC correctly concluded that NEPA and the Supreme Court's precedent do not require the agency to address terrorism in an EA. And finally, the record

demonstrates that the NRC did indeed address concerns of terrorism, well beyond what was required.

1. The Law of the Case Doctrine Precludes the Argument That the NRC Must Consider Terrorism in Issuing an EA

To begin with, the law of this case precludes plaintiffs from arguing that the NRC was required to consider the threat of terrorism in issuing an EA.

In its 2011 order granting summary judgment to the government, the district court held that plaintiffs' argument that "the [NRC], in drafting the EA, should have considered the possibility of a terrorist attack" must be "rejected." 783 F. Supp. 2d at 462 n.10. The district court followed the Third Circuit in deciding that "the NRC did not need to consider independently a terrorist attack because the effect on the environment would be no worse than that of a severe accident at the plant." *Id.* (citing *NJDEP*, 561 F.3d at 136–44). Plaintiffs appealed that judgment to this Court, but did not raise the issue of whether the agency must address the threat of terrorism in deciding to issue an EA. (Brief for Plaintiffs-Appellants, No. 11-2016). Accordingly, they waived any challenge regarding that issue. *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs [on appeal] are considered waived . . . .").[7]

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[7] And accordingly, this Court did not reach that issue. It did, however, address a similar concern in the context of the requirements of the Atomic Energy

Although plaintiffs now fail to mention the district court's holding with respect to the need to consider terrorism in an EA, or their own decision not to challenge it, those facts now preclude them from raising the same issue on this appeal. "Where 'an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine bars an appellate court in a subsequent appeal from reopening such issues.'" *Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) (quoting *United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002); alteration omitted); *accord*

Act (rather than NEPA), concluding that "Plaintiffs' speculation that a terrorist attack would disable" means of fire protection "is insufficient to demonstrate that the agency's defense-and-security finding was arbitrary and capricious." 507 F. App'x at 52. There is no logical reason that plaintiffs' "speculation" about terrorism would be insufficient to require consideration when the agency is examining effects on public safety and common defense—the context in which evaluation of terrorist threats would more naturally occur—but would nonetheless require consideration when the agency is assessing environmental effects. *See New York v. NRC*, 589 F.3d 5512 554 n.1 (2d Cir. 2009) (in concluding risk of fire is "uniformly low," NRC has "sufficiently take[n] into account acts of terrorism"); *cf. NJDEP*, 561 F.3d at 143–44 (even if NEPA requires analysis of effects of terrorist attack, analysis not necessary when "the NRC has already made this assessment").

Quintieri, 306 F.3d at 1225 ("The 'mandate rule' ordinarily forecloses relitigation of all issues *previously waived* by the defendant or decided by the appellate court." (emphasis added)). As in *Johnson*, plaintiffs here had "ample opportunity to make [their] current argument" in the 2011 appeal, but did not. 564 F.3d at 99. "[I]t would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Quintieri*, 306 F.3d at 1229 (quotation marks omitted). Nor is there any "cogent or compelling" reason to depart from the law-of-the-case rule, as the district court's decision (which simply followed the ruling of a federal court of appeals) was not "clearly erroneous," nor would it result in "manifest injustice," and there is no newly discovered evidence or an intervening change in law. *Johnson*, 564 F.3d at 99–100 (quotation marks omitted). For that reason, plaintiffs may not belatedly raise their contention that the NRC was required to consider the threat of terrorism in issuing the EA.

Plaintiffs are also precluded for a second reason: they have not adequately challenged the district court's current decision in their brief. The district court, in its most recent ruling, held that its 2011 decision was the law of the case. (2015JA 285–86, 288, 291–92). Plaintiffs, in their current brief to this Court, do not argue otherwise. They have therefore waived the point once again. *Norton*, 145 F.3d at 117.

In short, plaintiffs waived this argument on the initial appeal of this case, this Court did not include it in the matter remanded to the district court, and

plaintiffs do not now challenge the district court's decision that its prior decision was the law of the case. Accordingly, the legal question of whether the NRC must consider terrorist threats in issuing an EA is not properly before the Court, and need not be considered.

2. The NRC Was Not Required to Consider Terrorist Threats in This Limited NEPA Proceeding

In any event, plaintiffs' theory that NEPA requires an assessment of the effects of a speculative terrorist attack, no matter that neither those effects nor the attack could be caused by the agency's proposed action, is contrary to Supreme Court law. As the Court held in *Department of Transportation v. Public Citizen*, NEPA requires an agency to address direct and indirect effects that are "caused by the [agency's] action." 541 U.S. 752, 763–64 (2004). An agency's action is the "cause of an environmental effect" under NEPA when there is "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). This analysis, akin to proximate cause in tort law, establishes a "'manageable line between those causal changes that may make an actor responsible for an effect and those that do not.'" *Id.* (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7).

In *NJDEP*, the Third Circuit correctly held that there was not a "'reasonably close causal relation-

ship' between [an NRC] relicensing proceeding and the environmental effects of a hypothetical aircraft attack." 561 F.3d at 136. As the NRC had held, "'there simply is no proximate cause link between an NRC licensing action . . . and any altered risk of terrorist attack,'" which depends on "'political, social, and economic factors *external* to the NRC licensing process.'" *Id.* at 137 (quoting *Amergen Energy Co.*, 65 NRC at 130). The Third Circuit observed that the "manageable line" of causation that the Supreme Court has required "appears to approximate the limits of an agency's area of control," and therefore an agency need not consider effects it cannot control. *Id.* at 139 (citing *Metropolitan Edison* as holding that the NRC could control a nuclear facility but not the public's perception of risk, which thus need not be analyzed under NEPA); *see id.* at 141 ("manageable line" is drawn to prevent agencies from having to spend limited resources on matters extraneous to their authority or NEPA's goals). Because the responsibility for preventing terrorist attacks rests with other government agencies, and such an attack would require an intervening criminal act as well as the intervening failure of those authorities charged with preventing terrorism, the causal chain between an NRC regulatory action and the effect of a terrorist attack is "too attenuated to require NEPA review." *Id.* at 140.

The same analysis controls here. The effects of a hypothetical terrorist attack are not directly or indirectly "caused by" the exemptions the NRC granted Indian Point, *Public Citizen*, 541 U.S. at 764; there is no proximate causal link between the exemptions and a heightened risk of attack, *NJDEP*, 561 F.3d at 136–

37; and the NRC has no regulatory authority over airspace or other areas beyond the plant that could be exercised to prevent a terrorist attack, which would result from intervening causes, *id.* at 139.

Plaintiffs rely on the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006), which held that the NRC cannot "categorically" refuse to consider terrorist risk in EAs. To begin with, that case is distinguishable: it involved the contention that the probability of terrorist attack would increase due to the NRC's grant of permission to construct a new facility for disposal of radioactive waste that allegedly could become a terrorist target. *Id.* at 1030; *see NJDEP*, 561 F.3d at 142. Nothing about the exemptions at issue here creates such an alleged new target or increases the odds that the existing plant will be attacked.

In their brief on appeal, plaintiffs point to the Third Circuit's description of the new construction in *Mothers for Peace* as a "a change to the physical environment arguably with a closer causal relationship to a potential terrorist attack than the mere relicensing of an existing facility," 561 F.3d at 142, apparently in an effort to suggest that the fire-safety exemptions in this case are more like the building of a radioactive-waste facility in terms of the increased risk of terrorism than like the renewal of a plant's license. (Br. 23–25). In truth, fire-safety exemptions relating to the insulation on electrical systems in discrete areas of a power plant are not much like either the construction of a waste facility or a plant's license renewal. Indeed, it is entirely illogical to conclude that the ex-

emptions concerning insulation could somehow increase the attractiveness of a terrorist attack more than the long-term continuation of an entire nuclear power facility as in *NJDEP*.[8] And to the extent plain-

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[8] Plaintiffs insist that the continued use of Hemyc is a "known vulnerability that could be exploited by terrorists" and is "likely to make an attack more devastating." (Br. 25). Yet plaintiffs have failed to explain how either of those statements is true beyond simply saying they have said so earlier, in their comments. Nevertheless, they are incorrect that the exemptions create a "vulnerability" or would worsen the consequences. The entire rationale for granting the exemptions is that there is no diminishment in effective fire protection: the system in place provides fire protection at a level equivalent to adherence to the methods prescribed in the regulations. *See* 704 F.3d at 116 ("The exemption process has been recognized to afford a critical element of flexibility in potentially cumbersome fire safety compliance by allowing power plants to show that alternative fire protection systems protect the public safety at *the same high level as the system chosen by the Commission*." (emphasis added; quotation marks omitted)); 72 Fed. Reg. 56,798, 56,799 (Oct. 4, 2007) (grant of exemptions in this case, concluding "given the existing fire protection features in the affected fire zones, [the licensee] continues to meet the underlying purpose" of the regulations). The Court has upheld that aspect of the agency's action. 507 F. App'x at 51–53; *see id.* at 53 (Court has "considered plaintiffs' remaining arguments and, with the exception of the public participa-

tiffs are suggesting that the pertinent factor is a "change to the physical environment of the plant" (Br. 25), that is not what *NJDEP* said. Instead, what mattered to the court there (and what matters under the Supreme Court's test) was whether there was a causal relationship between the NRC's action and an environmental effect, not whether the NRC's action left the physical environment altered or unaltered. And lastly, plaintiffs are wrong that the regulatory action here effected a "change to the physical environment." (Br. 25). To the contrary, by granting the exemptions, the NRC permitted the fire barriers at the affected parts of Indian Point 3 to remain the same as they have been for decades.

Regardless, as the Third Circuit explained, the *Mothers for Peace* reasoning is inconsistent with *Public Citizen* and cases in other circuits. *NJDEP*, 561 F.3d at 142–43 (citing *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003); *Limerick Ecology Action v. NRC,* 869 F.2d 719, 743-44 (3d Cir. 1989); *Glass Packaging Institute v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984); *City of New York v. Dep't of Transp.*, 715 F.2d 732, 750 (2d Cir. 1983)). *Mothers for Peace* reasoned that in the chain of three events—(1) the agency action, (2) the change to the physical environment, and (3) the "effect"—the Supreme Court's proximate cause test only applies between steps (2) and (3), but the link be-

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tion challenge under NEPA addressed in our related opinion issued today, conclude they are without merit").

tween steps (1) and (2) was established as long as it was not "so remote and highly speculative that NEPA's mandate does not include consideration of the[ ] potential environmental effects." 449 F.3d at 1030 (quotation marks omitted). But the Third Circuit expressly disagreed, calling that distinction "unsuccessful[ ]," *NJDEP*, 561 F.3d at 142 n.10, as it contradicts *Public Citizen*—a case the *Mothers for Peace* court did not even address in its analysis—where the Supreme Court applied its proximate cause test throughout the chain of events. 541 U.S. at 768 ("the causal connection between [the agency action, i.e., the Ninth Circuit's step (1)] and the entry of Mexican trucks [step (2)] is insufficient to make [the agency] responsible under NEPA to consider the environmental effects of the entry [step (3)]"); *id.* at 769 ("the legally relevant cause of the entry of the Mexican trucks [step (2)] is *not* [the agency's] action [step (1)]"); *id.* at 770 ("the agency cannot be considered a legally relevant 'cause' of the effect," and therefore need not consider those effects under NEPA). *Mothers for Peace* was, accordingly, wrongly decided, and the NRC reasonably "adheres to its position, outside the Ninth Circuit, that NEPA does not require consideration of terrorists['] attacks." (2015JA 29).

Plaintiffs also point to the Ninth Circuit's view that it was "inconsistent" for the NRC to describe the risk of terrorist attack as "low," but at the same time take regulatory action to guard against that threat. (Br. 24, citing *Mothers for Peace*, 449 F.3d at 1030). But there is no contradiction: given the severe potential consequences of terrorism, a prudent regulatory agency would plan for, and take action to lower the

risk of, an attack even if the probability is already low. That the agency has done so does not implicate its NEPA responsibilities. *NJDEP*, 561 F.3d at 143 (citing *Ground Zero Center for Non-Violent Action v. Dep't of the Navy*, 383 F.3d 1082, 1090-91 (9th Cir. 2004)). Nor is there anything improper in the NRC's assessment of the low probability. *See County of Rockland*, 709 F.2d at 776 (upholding NRC decision based on determination that "likelihood" of event was "extremely remote"). And the issue is irrelevant because, as the NRC explained, protective and mitigation measures have been taken "without regard to the probability of an attack." (2015JA 40).

Plaintiffs contend (Br. 23) that the Third Circuit did not categorically agree with the NRC's position that NEPA "'imposes no legal duty on the NRC to consider intentional malevolent acts' because those acts are 'too far removed from the natural or expected consequences of agency action.'" (2015JA 29 (quoting *Amergen Energy Co.*, 65 NRC at 128 (2007), *aff'd*, *NJDEP*, 561 F.3d 132)). Thus, they claim that the *NJDEP* holdings should reach no further than the license renewal proceedings at issue there. But they disregard the *NJDEP* court's reasoning that "if NEPA required the NRC to analyze the potential consequences of an airborne attack, the NRC would spend time and resources assessing security risks over which it has little control and which would not likely aid its other assigned functions to assure the safety and security of nuclear facilities"; that "an analysis of the risks of a terrorist attack on [the power plant] . . . implicate[s] security concerns that are broader than those at issue under NEPA"; and that "security re-

views involve analysis of sensitive information not available to the public, while NEPA requires public participation and transparency." 561 F.3d at 141–42. These rationales would apply to any NRC action, not just license renewal.

But this Court need not decide the precise degree to which *NJDEP* agreed with the NRC. Regardless of whether that case endorsed the NRC's "categorical" view, its "holding" applies here: a terrorist attack "lengthens the causal chain beyond the 'reasonably close causal relationship' " between the agency action and an environmental effect that would require NEPA review. 561 F.3d at 140. It was not arbitrary or capricious for the NRC to conclude that there is no proximate-causal link between the fire barriers in two areas of the Indian Point plant and the effects of a terrorist attack. The grant of the exemptions therefore fully complied with NEPA.

3. The NRC Already Considered Safety Issues Affecting the Environment

Finally, even if NEPA required the NRC to consider the threat of terrorism, it already did so adequately. The NRC's EA reiterated its safety analysis, concluding that a severe fire is "not plausible" in the affected areas. 78 Fed. Reg. at 52,988; (2015JA 28, 40). "This finding renders a severe fire in the affected areas resulting from granting the exemptions, *however initiated* and whatever the offsite consequences, so unlikely as not to require further environmental analysis." (2015JA 40 (emphasis added)). That conclusion was upheld by this Court as justifying the is-

suance of an EA instead of an EIS. 507 F. App'x at 53 (upholding EA based on its "discussion of why the exemption does not create any fire safety risk" and "examination [of] whether this exemption would have any other adverse environmental effect"); *accord* 783 F. Supp. 2d at 461–62 (ruling it was "reasonable" that NRC's EA/FONSI relied on its safety evaluation's conclusion that probability or consequences of accident would not increase due to exemptions, to conclude there would be no significant environmental impact). That holding is the law of the case and should not be revisited. Nevertheless, on remand, the district court concluded that "[n]othing in the recent public comments adds credibility to Plaintiffs' concern" about terrorism—though, as described above, the NRC addressed those comments anyway. (2015JA 291–92). NEPA certainly requires no more.

Because the EA incorporates the conclusions of the NRC's safety analysis, plaintiffs suggest that the safety analysis is outdated. (Br. 29). But they do not point to anything that has changed in the intervening years that would affect the safety evaluation. They state that the safety analysis did not take into account public comment, but this Court has already held that it was valid without public participation, 507 F. App'x at 51–52, and plaintiffs fail to explain how the conclusory and unsupported public comments would change the analysis, *Thompson*, 741 F.2d at 408–09 ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." (quotation marks omitted)).

Plaintiffs contend that the NRC did not analyze whether a terrorist attack "might affect [its] assumptions that a severe fire at Indian Point is not plausible" (Br. 29), ignoring the agency's recent statements that that assessment holds for the possibility of fire "resulting from a terrorist attack or some internally-initiated event," or "however initiated." (2015JA 40). And they assert that the safety evaluation "simply adopts the conclusions of Indian Point's owner and operator" (Br. 29), which is simply wrong. The record demonstrates, and the district court has concluded, that "it is apparent that *the Commission* conducted a detailed [safety] evaluation," 783 F. Supp. 2d at 463–64 (emphasis added); (2011JA 483 ("The [NRC] staff reviewed the licensee's evaluation . . . .")), a conclusion bolstered by the NRC's memorandums examining materials initially submitted by the licensee and determining that more information was needed before the agency could reach a determination (2011JA 280–88).

For all those reasons, the district court was correct to conclude that the NRC's response to terrorism concerns in issuing the EA was "reasonable" and far from "arbitrary and capricious," and the record reflects the agency's "diligent consideration of and response to every public comment," including those that raised questions about terrorism. (2015JA 292). Thus, even assuming that the terrorism arguments that plaintiffs raise were not barred by the law of the case doctrine or waived, their arguments fail because NRC more than satisfied the requirements of NEPA and this Court's remand order.

CONCLUSION

The judgment of the district court should be affirmed.

Dated: New York, New York
December 15, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 9235 words in this brief.

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