15-1330-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD BRODSKY, New York State Assemblyman from the 92nd Assembly District in His Official and Individual Capacities, *Plaintiff-Appellant*,
and
PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), WESTCHESTER'S CITIZENS AWARENESS NETWORK (WESTCAN), SIERRA CLUB, *Plaintiffs*,
v.
UNITED STATES NUCLEAR REGULATORY COMMISSION, *Defendant-Appellee*,
and
ENTERGY NUCLEAR OPERATIONS, INC., *Intervenor*.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR AMICUS CURIAE NUCLEAR ENERGY INSTITUTE, INC. IN SUPPORT OF DEFENDANT-APPELLEE, INTERVENOR, AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Nuclear Energy Institute, Inc. (NEI) submits this corporate disclosure statement as required by Fed. R. App. P. 26.1. NEI is a non-profit corporation registered under section 501(c)(6) of the Internal Revenue Code. NEI has no parent companies. No publicly held company has a 10% or greater ownership interest in NEI. NEI functions as a trade association representing the nuclear energy industry. Its objective is to ensure the development of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world.

Respectfully submitted,

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I. INTRODUCTION AND STATEMENT OF INTEREST

The Nuclear Energy Institute, Inc. (NEI) submits this brief in support of the U.S. Nuclear Regulatory Commission (NRC), Entergy Nuclear Operations, Inc., and affirmance of the district court's decision granting NRC summary judgment.[1] NRC granted Indian Point Unit 3 limited relief from a prescriptive fire-protection requirement after finding that the requested exemptions presented no significant risk and were consistent with the common defense and security. This Court previously found Mr. Brodsky's claims concerning these exemptions were "generally without merit."[2] The Court, however, remanded a "narrow" issue under the National Environmental Policy Act (NEPA) because NRC had inadequately explained its reason for not allowing public comment on the exemptions.[3]

Mr. Brodsky now seeks another bite at the apple[4] by arguing that NRC categorically refused to consider public comments relating to terrorism. But the

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1 In accordance with Second Cir. R. 29.1(b), no party's counsel authored this brief in whole or in part; neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting the brief; and other than amicus curiae, its members, and its counsel, no person contributed money that was intended to fund preparing or submitting this brief. All parties have consented to NEI filing this brief.

2 *Brodsky v. NRC*, 704 F.3d 113, 125 (2d Cir. 2013); *see also Brodsky v. NRC*, 507 F. App'x 48, 53 (2d Cir. 2013).

3 *Brodsky*, 704 F.3d at 124-25.

4 *See Brodsky v. NRC*, 783 F. Supp. 2d 448, 462 n.10 (S.D.N.Y. 2011) (rejecting Mr. Brodsky's argument that NRC's environmental assessment

facts do not support Mr. Brodsky as NRC obtained and reasonably responded to all public comments, including those speculating about the risk of terrorism. Nor does the law provide a basis for his contention that "NRC cannot categorically, as a matter of law, refuse to consider terrorism" under NEPA.[5]

NEI files this amicus brief because the acceptance of Mr. Brodsky's argument could significantly affect the licensing and regulation of nuclear energy in the United States.[6] NEI represents the industry in litigation on regulatory, technical, and legal issues, and advocates on policy matters affecting the nuclear energy industry. Our members include all companies licensed to operate

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"should have considered the possibility of a terrorist attack"), *vacated in part on other grounds* 704 F.3d at 125, *aff'd in part on other grounds* 507 F. App'x at 53.

[5] Br. for Pl.-Appellant at 26 (Sept. 15, 2015) (Brodsky Br.).

[6] Nuclear power plants produce nearly 20 percent of our nation's electricity and approximately 63 percent of our carbon-free electricity. The two Indian Point units alone generate about 10 percent of New York State's electricity and prevent the release of 8.5 million metric tons of carbon dioxide annually. *Economic Impacts of the Indian Point Energy Center: An Analysis by the Nuclear Energy Institute*, 3 (June 2015), http://www.nei.org/CorporateSite/media/filefolder/Policy/Papers/Economic-Impacts-of-the-Indian-Point-Energy-Center.pdf?ext=.pdf. Like all of the nation's nuclear power plants, Indian Point also contributes substantially to the community in which it operates. For example, Indian Point annually contributes an estimated $1.6 billion to New York State's economy; employs approximately 1,000 people directly; and pays about $30 million per year in state and local property and sales taxes. *Id.* at 3-4. Indian Point also has maintained a capacity factor of 93 percent, which represents reliability significantly greater than other forms of electric generation. *Id.*

commercial nuclear power plants in the United States, as well as nuclear plant designers, major architect/engineering firms, nuclear material licensees, and other entities involved in the nuclear energy industry. NEI has an interest in ensuring that both NEPA and NRC regulations are sensibly interpreted and implemented to ensure a fair and efficient regulatory process. Although this case involves specific Indian Point exemptions, adoption of Mr. Brodsky's proposal could unnecessarily burden the process for other NRC regulatory approvals. Given nuclear energy's value as part of a diverse energy portfolio, and NRC's methodical and rigorous oversight of nuclear facilities, the Court should not impose additional procedures on the NRC regulatory process that would neither enhance security nor improve the information in the agency's environmental analysis.

II. SUMMARY OF ARGUMENT

NRC properly addressed this Court's decidedly narrow remand by requesting and giving "conscientious consideration" to public comments on proposed exemptions from a limited fire-protection requirement.[7] In this appeal, Mr. Brodsky attempts to compel NRC to reconsider the impacts of a hypothetical terrorist attack on Indian Point. As NRC and Entergy explain, the law of the case and waiver doctrines preclude this argument.[8] Mr. Brodsky's argument also fails on its merits.

NRC maintains stringent regulatory programs ensuring reactor licensees maintain secure and safe plants. Indeed, the Atomic Energy Act (AEA) mandates that NRC impose requirements it deems necessary "to promote the common defense and security or to protect health or to minimize danger to life or property."[9] NRC implements this mandate through stringent physical security requirements with which all licensees must comply. Neither NRC nor the public would benefit from expanding NEPA's reach to require a duplicative review of terrorism risks in the context of exemptions or other licensing actions.

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7 *Brodsky v. NRC*, No. 09 CIV. 10594 LAP, 2015 WL 1623824, at *6 (S.D.N.Y. Feb. 26, 2015).

8 *See* Br. for Def.-Appellee at 26-29 (Dec. 15, 2015); Br. for Intervenor at 11-14 (Dec. 15, 2015).

9 42 U.S.C. § 2201(b); *see also id.* § 2232(a).

In the current situation, contrary to Mr. Brodsky's suggestion, the exemption process is not a way for NRC or licensees to cut corners on safety. Rather, the regulatory framework ensures the required level of safety continues to be met. If an exemption request did not meet the necessary safety standards, NRC would simply deny the request. But here Entergy has demonstrated in its exemption request, and NRC has confirmed in its review, that Indian Point achieves the requisite safety level (*i.e.*, the same level that would be achieved by compliance with the prescriptive regulations). Therefore, as this Court previously found, the exemptions were properly granted.

Notwithstanding Mr. Brodsky's reliance on an outlier case from the Ninth Circuit, NEPA does not require an analysis of the environmental effects of a hypothetical terrorist attack. In *Metropolitan Edison Co. v. People Against Nuclear Energy*,[10] and again more than 20 years later in *Department of Transportation v. Public Citizen*,[11] the Supreme Court unambiguously held that there must be a "reasonably close causal relationship" between an environmental effect and its alleged cause in order for NEPA review to be required. The Supreme Court directed courts to look to common law principles of proximate cause to define that standard. There is no plausible interpretation of such principles under

[10] 460 U.S. 766 (1983).

[11] 541 U.S. 752 (2004).

which the environmental effects of a third-party criminal act—*i.e.*, the terrorist act postulated by Mr. Brodsky—could be said to be proximately caused by NRC allowing a narrow fire-protection exemption at a nuclear power plant. The weight of authority from other courts supports this conclusion.

While not required by NEPA, NRC also adequately addressed the risk of terrorism in its environmental assessment for the exemptions. Rather than ignore comments speculating about the risk of terrorism, NRC evaluated those concerns. It reasonably concluded that a severe fire in the areas of the plant affected by the exemptions, however initiated and whatever its consequences, is a remote and speculative event. Because these findings were well supported, nothing more is required.

III. ARGUMENT

A. Because NRC already administers a stringent regulatory program, consideration of the potential environmental impacts of a terrorist attack would not improve plant security or NRC's NEPA analysis.

It is unnecessary to use NEPA as a legal vehicle for requiring that NRC consider the effects of a terrorist attack on a nuclear power plant. The AEA requires that NRC consider public health, safety, and security in its regulatory decisions.[12] To comply with the AEA's requirements in this area, NRC has created a sophisticated, continually evolving regulatory framework to ensure the physical security of nuclear facilities.[13] These NRC security regulations require that reactor licensees establish and maintain a comprehensive physical protection system at a level needed in any threat environment to provide "high assurance" of the safety and security of the plant.[14]

NRC's robust response to the events of September 11, 2001, illustrates how NRC's regulatory process maintains an appropriate level of security even in the face of new threats. Since September 11, 2001, NRC has thoroughly reviewed its security regulations in concert with officials from the U.S. Department of Homeland Security, the Federal Bureau of Investigation, and the U.S. Departments

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12 *See, e.g.*, 42 U.S.C. §§ 2201(b), 2232(a).

13 *See* 10 C.F.R. Part 73, Physical Protection of Plants and Materials (spanning more than 125 pages in the Code of Federal Regulations).

14 *See, e.g.*, 10 C.F.R. § 73.55(b)(1).

of Transportation and Energy.[15] It has redefined the "design basis threat" used as the basis for security measures at nuclear power plants.[16] And it has required that licensees implement new and more stringent anti-terror measures at their facilities.[17] These new measures include procedures to consider potential aircraft threats and mitigation strategies to address the loss of large areas of the plant due to explosions or fires from events that are beyond the design basis of the facility.[18]

For their part, NRC licensees have made extraordinary investments to fulfill their obligations to meet NRC requirements and ensure that nuclear facilities are protected against a terrorist attack.[19] NEI's members have spent more than $1 billion to implement new NRC requirements since September 11, 2001. That

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15 *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 160-61, 168-69 (2d Cir. 2004).

16 *Public Citizen v. NRC*, 573 F.3d 916 (9th Cir. 2009); Final Rule, Design Basis Threat, 72 Fed. Reg. 12,705 (Mar. 19, 2007); Revised Design Basis Threat Order, 68 Fed. Reg. 24,517 (May 7, 2003).

17 *See* Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. 13,926 (Mar. 27, 2009); Security Personnel Training and Qualification Requirements Order, 68 Fed. Reg. 24,514 (May 7, 2003); Access Authorization Order, 68 Fed. Reg. 1643 (Jan. 13, 2003); Order Modifying Licenses, 67 Fed. Reg. 65,150 (Oct. 23, 2002); Order Modifying Licenses, 67 Fed. Reg. 65,152 (Oct. 23, 2002); Interim Compensatory Measures Order, 67 Fed. Reg. 9792 (Mar. 4, 2002).

18 Final Rule, Power Reactor Security Requirements, 74 Fed. Reg. at 13,955-57 (codified at 10 C.F.R. § 50.54(hh)(1)-(2)).

19 *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340, 344 (2002).

money has gone to hire and train more security personnel, and to add security patrols, security posts, and physical barriers.[20] NEI members have evaluated potential facility vulnerabilities and developed plans for responding to events that could damage their plants.[21] And they have improved coordination with law enforcement and military authorities, and imposed additional restrictions on site access.[22]

As this Court has observed, based on these actions NRC has concluded:

> [N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.[23]

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20 *See id*.

21 *See Riverkeeper*, 359 F.3d at 161.

22 *See Private Fuel Storage*, 56 NRC at 344.

23 *Riverkeeper*, 359 F.3d at 160 (citation omitted). Because Mr. Brodsky and amici raise the specter of the Fukushima Daiichi accident in Japan, it also is worth noting the similarly robust response in the United States to that event. After reviewing available information shortly after the Fukushima accident, NRC found that "U.S. plants continue to operate safely." Statement by Gregory B. Jaczko, Chairman, NRC, Joint Hearing Before Subcommittee on Clean Air and Nuclear Safety and Committee on Environment and Public Works, U.S. Senate, Review of the Nuclear Emergency in Japan and Implications for the United States, at 24 (Apr. 12, 2011), https://www.gpo.gov/fdsys/pkg/CHRG-112shrg88763/pdf/CHRG-112shrg88763.pdf. Nonetheless, NRC took swift action. For example, NRC

Overall, based on an informed threat assessment and a robust regulatory framework, NRC deems any facility that meets its requirements to be adequately protected from credible threats. In contrast to the AEA, NEPA requires an environmental evaluation, not a threat assessment. Requiring a NEPA analysis of the environmental consequences of a terrorist attack on a given facility during exemption or licensing proceedings would not alter the agency's conclusions regarding the adequacy of that facility's security measures. An analysis of environmental impacts of a terrorist attack at a licensee facility, therefore, would not lead to site-specific modifications of security requirements for a facility.

B. Exemptions are a well-established means for NRC to approve a proposed alternative means to achieve an equivalent level of safety.

Mr. Brodsky's challenge to NRC's conclusions ignores another aspect of the regulatory context: Entergy's actions and analyses to support its exemption requests assure that the plant achieves the same safety level as would compliance

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required that all nuclear power plants implement mitigation strategies to allow them to cope with extreme natural events. Order Modifying Licenses With Regard to Requirements for Mitigation Strategies for Beyond-Design-Basis External Events (Effective Immediately); All Power Reactor Licensees and Holders of Construction Permits in Active or Deferred Status, 77 Fed. Reg. 16,091 (Mar. 19, 2012). In response, the entire industry is procuring comprehensive, targeted backup safety equipment through what is known as the "FLEX" strategy that involves another layer of backup equipment stationed at multiple locations, away from the plant site but readily available after an emergency.

with the prescriptive requirements set forth in regulations.[24] NRC does not allow licensees to use the exemption process to reduce the level of safety. Rather, an exemption is an anticipated—and indeed required—means for NRC to approve a licensee's alternative measures to provide an equivalent level of safety.[25]

After NRC adopted new fire-protection rules in 1980, a group of licensees challenged the rule as unreasonably stringent and inadequately justified. The D.C. Circuit upheld these rules because the rules would afford licensees "flexibility" in compliance by allowing them to seek exemptions "from any aspect of the fire protection program . . . that did not conform to the new rules."[26] The opportunity for exemptions played a central role in the *Connecticut Light* court's assessment of the new rule's reasonableness:

> 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 . . . . Whatever the Commission's present expectations, it must remain open to power companies to show in individual

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[24] The exemption regulation requires a showing that the exemption will not present "an undue risk" to safety or security. 10 C.F.R. § 50.12(a)(1).

[25] *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) ("It is well established that an agency's authority to proceed in a complex area [of] regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances.").

[26] *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982).

> exemption applications that [other means] can provide adequate levels of fire protection.[27]

Thus, the court found that "the exemption procedure is crucial" to the acceptability of the rule.[28] Indeed, this Court earlier recognized the importance of the exemption process in this case.[29]

Here, Entergy availed itself of this procedure and NRC concluded that Entergy's proposed protective measures afford protection equivalent to that provided by compliance with the prescriptive standards in the regulations. The Court found this decision complied with the AEA and NRC's exemption regulation, rejecting Mr. Brodsky's "speculation" about a terrorist attack causing severe fires.[30] Mr. Brodsky's disagreement with that determination provides no basis to require further analysis under NEPA.[31]

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27 *Id.* at 535-36.

28 *Id.* at 536.

29 *See Brodsky*, 704 F.3d at 116.

30 *Brodsky*, 507 F. App'x at 52.

31 *See id.* (observing that NRC is "much better situated than is this court to make such a finding") (citing *Natural Res. Def. Council v. U.S. Envtl. Prot. Agency*, 658 F.3d 200, 215 (2d Cir. 2011)).

C. NRC need not evaluate the impacts of terrorist attacks under NEPA because the agency is not the proximate cause of those impacts.

The consequences of terrorist attacks are not environmental impacts or consequences of NRC licensing actions; they would be the consequences of future criminal actions by terrorists. Applying the reasoning of the Supreme Court in *Metropolitan Edison*, an NRC regulatory decision is not the "proximate cause" of an attack or its consequences. As a matter of law, therefore, agencies need not address security threats under NEPA.

In *Metropolitan Edison*, the Supreme Court found that, to be within the scope of a NEPA review, there must be a close causal relationship between a proposed federal action and potential environmental effects.[32] It held that the requirement for "a reasonably close causal relationship between a change in the physical environment and the effect at issue . . . is like the familiar doctrine of proximate cause from tort law."[33] By adopting this standard, the Supreme Court emphasized that courts must "draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[34]

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32 *Metropolitan Edison*, 460 U.S. at 773.

33 *Id.* at 774.

34 *Id.* at 774 n.7. Mr. Brodsky suggests that *Metropolitan Edison* demands a fact-based inquiry into the causal relationship that exists between an agency action and the alleged environmental impact, to determine whether there is a reasonably close causal relationship akin to "proximate cause." Contrary to these arguments, the Supreme Court in *Metropolitan Edison* decided the

It reiterated the importance of the "proximate cause" standard under NEPA in *Department of Transportation v. Public Citizen*.[35]

The Third Circuit in *New Jersey Department of Environmental Protection (NJDEP) v. NRC*,[36] applied this causation analysis to the issue of whether NRC is required to address terrorism impacts as part of a NEPA review and found, as a matter of law, that due to the intervening events required between an NRC licensing action and a terrorist attack, there is not a reasonably close causal relationship. The court reasoned that a terrorist attack "requires at least two intervening events: (1) the act of a third-party criminal and (2) the failure of all government agencies specifically charged with preventing terrorist attacks."[37] It concluded that "this causation chain is too attenuated to require NEPA review."[38]

If the Court were to address this issue in the present case (which NEI does not believe is necessary in view of the narrow remand), it should adopt the Third Circuit's reasoning in *NJDEP*. A generalized risk of a terrorist attack may exist for any infrastructure facility, including a nuclear power plant. For nuclear plants, this

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causation issue as a matter of law. Thus, a remand to the agency is not needed to make this analysis.

35 541 U.S. at 767.

36 561 F.3d 132, 140 (3d Cir. 2009).

37 *Id.*

38 *Id.*

risk is addressed by NRC requirements established to allow the facilities to operate and provide the public benefits of economical, reliable, carbon-free electricity. Any connection between an NRC regulatory action, particularly an exemption, to an increase in the likelihood of an attack at a particular facility, or an increase in consequences due to the attack, is so highly attenuated that it strains any sense of proximate causation.

The Third Circuit correctly applied traditional tort concepts in concluding that NRC would not proximately cause the effects of subsequent criminal acts by terrorists—unless NRC's action invited "temptations to which a recognizable percentage of humanity is likely to yield" or the acts took place "where persons of [a] peculiarly vicious type are likely to be" present.[39] In this case, granting Indian Point exemptions from certain fire-protection regulations would not invite a "recognizable percentage of humanity" to launch terrorist attacks against the plant. And the residents living near the facility cannot and should not be presumed to be "likely" terrorists.

Mr. Brodsky attempts to distinguish *NJDEP* as a case involving "mere relicensing" of an operating plant, and suggests that the present facts involve an "actual change to the physical environment" that "might raise a closer causal

[39] *Id.* (citing Restatement (Second) of Torts § 448).

relationship to a potential terrorist attack."[40] But this suggestion is specious. First, there is nothing "mere" about relicensing. It involves a change in the physical environment: continued operation for 20 more years.[41] While there theoretically may be "but for" causation for a terrorist attack that occurs after relicensing, there is still no proximate cause for the reasons articulated by the court in *NJDEP*. Second, in a case involving an exemption for existing fire barriers, there is even *less* of an argument (than for relicensing) that the approval involves either a physical change in the environment or "but for" causation. For example, in its environmental assessment, NRC concluded that the exemption would not significantly increase the probability or consequences of a severe fire or accident.[42] Thus, the causal connection in the present case is even more attenuated than in *NJDEP*.

Several decisions from this Court and other Circuits are consistent with *NJDEP*. For example, this Court upheld an agency's decision not to consider acts of sabotage in a NEPA review for a rule designed to reduce the risk of transporting

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40 Brodsky Br. at 23.

41 *See* 10 C.F.R. Part 51, Subpart A, App. B, Environmental Effect of Renewing the Operating License of a Nuclear Power Plant (summarizing NRC's evaluation of the environmental impacts of license renewal and noting that some issues require further evaluation).

42 NRC, Entergy Nuclear Operations, Inc., Indian Point Nuclear Generating Unit 3, Environmental Assessment and Finding of No Significant Impact, 78 Fed. Reg. 52,987, 52,989 (Aug. 27, 2013) (J.A. A-29).

large quantities of radioactive materials by highway.[43] With respect to the risk of sabotage, the Court reversed the district court's finding that the U.S. Department of Transportation (DOT) "was obligated to state its view on the probability of such an event, even if that view was only that no estimate could reasonably be made."[44] The Court explained:

> With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess. Here DOT simply concluded that the risks of sabotage were too far afield for consideration. To a large degree this judgment was justified by the record. Substantial evidence indicated that sabotage added nothing to the risk of high-consequence accidents. Even the least sanguine commentators could say only that sabotage added *an unascertainable risk.* In light of these conflicting points of view, it was within DOT's discretion not to discuss the matter further beyond adopting the NRC security requirements.[45]

The same assessment applies to speculative and unascertainable risks of hypothetical attacks at specific nuclear plant sites.[46]

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43 *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983).

44 *Id.* at 750 (quoting *City of New York v. U.S. Dep't of Transp.*, 539 F. Supp. 1237, 1271 (S.D.N.Y. 1982)).

45 *Id.* (citations omitted) (emphasis added).

46 *See, e.g.*, *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989) (rejecting an argument that a NEPA evaluation must encompass "sabotage risk," given a lack of any "method or theory" by which the NRC could conduct a "meaningful analysis of the risk").

The D.C. Circuit also has rejected a claim that agencies must review criminal acts in NEPA analyses, because this would exceed "[t]he limits to which NEPA's causal chain may be stretched before breaking."[47] And the Eighth Circuit determined that agencies may decline to consider generalized risks of terrorism in NEPA analyses.[48] These decisions are consistent with the longstanding principle that NEPA reviews are subject to a "rule of reason."[49]

Despite the weight of authority, Mr. Brodsky asks this Court to follow the lone Circuit Court decision expressing a contrary view.[50] In *San Luis Obispo Mothers for Peace v. NRC*,[51] the Ninth Circuit held that NEPA required NRC to analyze the potential impacts of terrorist attacks on a dry-cask spent-fuel storage facility. The Ninth Circuit construed a footnote in *Metropolitan Edison* as making

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47 *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1091-92 (D.C. Cir. 1984) (finding that NEPA did not require the Bureau of Alcohol, Tobacco, and Firearms to analyze food-security concerns more properly addressed by the U.S. Food and Drug Administration).

48 *Mid States Coalition for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 543-44 (8th Cir. 2003).

49 *See, e.g.*, *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 295 (D.C. Cir. 1988) (NEPA "should be construed in the light of reason," and does not demand infinite study and resources).

50 Brodsky Br. at 23-25.

51 449 F.3d 1016 (9th Cir. 2006).

the Supreme Court's "proximate cause" test irrelevant.[52] Instead, the court ruled that NRC must consider terrorist attacks under NEPA unless they can be shown to be "remote and speculative."[53] Under this alternative standard, the Ninth Circuit found NRC's legal analysis to be insufficient to justify excluding hypothetical attacks from its NEPA review.

As the Third Circuit recognized, the Ninth Circuit incorrectly dismissed the Supreme Court's "proximate cause" test as inapplicable and inexplicably "made no mention of *Public Citizen.*"[54] *Public Citizen* states unambiguously that "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause."[55] The discussion in *Metropolitan Edison* of the *application* of the proximate cause test to the specific issue before the Court (the link between a licensing action, stress, and physical injuries) does not preclude the *applicability* of the test to other situations such as the one involved here (the link between a licensing action and the impacts of terrorist attacks). The "proximate cause" standard applies and NEPA reviews of terrorist scenarios are precluded directly as

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52 *Id*. at 1029 (citing *Metropolitan Edison*, 460 U.S. at 775 n.9).

53 *Id.* at 1030.

54 *NJDEP*, 561 F.3d at 142 n.10.

55 *Public Citizen*, 541 U.S. at 767.

a matter of law based on the attenuated chain of causation between a government approval and consequences from those events.

The test in *Metropolitan Edison* should be applied as in *NJDEP* for practical reasons as well. As recognized in *City of New York* and *Limerick*, these hypothetical events are so speculative, and of such low likelihood, that NEPA reviews would be meaningless and even misleading. As applied to major infrastructure projects, these analyses would consume undue time and resources. And neither the public nor the government would be better informed, particularly given the lack of any means to compare the negligible risks to the overall risks of attacks on other hypothetical targets.[56] Should an agency deny an approval for an important project because of an unquantifiable risk? That result would not advance the public interest. And, what effect would a denial have on overall risk, given the myriad other potential targets (and risks) that would still exist? None. NRC already considers threats and addresses credible risks in adopting physical protection requirements under the AEA. Burdening site-specific approvals with consideration of issues better addressed in establishing generic security

[56] For similar reasons, NEPA does not require a "worst case" analysis. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 344-55 (1989).

requirements would serve neither the public interest in security nor NEPA's underlying policies.[57]

D. NRC reasonably addressed terrorist-related fires and determined that the risk of such fires is remote and speculative.

Mr. Brodsky acknowledges that even under the Ninth Circuit's *Mothers for Peace* decision, it is unnecessary for NRC to consider environmental impacts that are "remote and highly speculative."[58] Terrorist attacks and any consequences of such attacks are indeed "remote and speculative," and NRC has adequately explained its basis for concluding that limited fire-protection exemptions do not involve significant environmental impacts.

In the current news cycle, it may seem easy to hypothesize terrorist attacks. But generalized speculation does not equate to a finding that there is a significant risk of an attack at any particular nuclear plant. Tying any risk of an attack to a particular NRC regulatory action, and then to actual consequences of a *successful* attack, are even more speculative propositions. In reality, it is a combination of government intelligence, law enforcement operations, NRC requirements imposed under the AEA, and the extensive security measures implemented by nuclear plant operators, that provides high assurance that activities under an NRC license will

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57 *See Public Citizen*, 541 U.S. at 768-69.

58 Brodsky Br. at 24. As discussed above, NEPA reviews are limited by a rule of reason. "It is undisputed that NEPA does not require consideration of remote and speculative risks." *Limerick Ecology Action*, 869 F.2d at 739.

not constitute an unreasonable risk to public safety, security, or the environment. Terrorist attacks at nuclear plants, with significant consequences, remain "remote and speculative" events. Such attacks and consequences traceable to a limited regulatory exemption are even more so.

With respect to the fire-protection exemptions at issue here, NRC in its environmental assessment addressed comments on the risks of terrorism as well as the risks of other "low-probability, high-consequence events." Relying on many of the security requirements discussed above, NRC reasonably explained that it had "high assurance that a terrorist act will not lead to significant radiological consequences," and that "a severe fire in the affected areas resulting from granting the exemptions, however initiated or whatever its consequences, [was] so unlikely as not to require further environmental analysis."[59] Under NEPA's "rule of reason," a terrorist attack linked to the fire-protection exemptions at issue is a "remote and speculative" event.

The district court, drawing upon the prior decision of this Court, correctly upheld NRC's expert determinations.[60] Mr. Brodsky's disagreement with NRC's

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[59] 78 Fed. Reg. at 52,989 (J.A. A-29).

[60] *See Brodsky*, 2015 WL 1623824, at *8.

conclusions and with the district court's decision provides no basis for reversal.[61]

IV. CONCLUSION

The Court should reject Mr. Brodsky's argument that NRC's NEPA review for exemptions from specific fire-protection regulations was inadequate because it failed to address terrorism issues (and related public comments). Aside from not being properly before the Court, these issues exceed the scope of a NEPA review under the causation test established by the Supreme Court. A decision to broaden the scope of NEPA reviews as urged by Mr. Brodsky is unnecessary and would undermine NRC's regulatory processes.

Respectfully submitted,

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[61] *See California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) (NEPA does not require that an agency resolve conflicts raised by opposing viewpoints); *Comm. for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 787 (D.C. Cir. 1971) (an agency's obligation under NEPA is only to make any differences in opinion readily apparent); *Silva v. Lynn*, 482 F.2d 1282, 1285 (1st Cir. 1973) (an agency's obligation under NEPA is only to provide a good faith, reasoned response to comments).

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Office Word 2010 in a proportionally-spaced typeface in 14-point Times New Roman font.

This brief complies with the type-volume limitation of Fed. R. App. P. 29 and 32(a)(7)(B) because it contains 5,083 words, excluding the corporate disclosure statement, table of contents, table of authorities, and certificates of counsel.

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