Nos. 07-71868, 07-72555

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

and

NUCLEAR ENERGY INSTITUTE,
Intervenor-Respondent.

THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and
THE UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of a Final Rule Issued by the
United States Nuclear Regulatory Commission

REPLY BRIEF FOR PETITIONERS PUBLIC CITIZEN, INC., and SAN LUIS OBISPO MOTHERS FOR PEACE

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INTRODUCTION AND SUMMARY OF ARGUMENT

The NRC's defense of its revised design basis threat (DBT) rule does not come to grips with the fundamental deficiencies of the Commission's reasoning in adopting it. The NRC is incorrect in asserting that including in the DBT only threats against which a licensee may reasonably be expected to defend is consistent with the existing case law and previous Commission actions, and its assertion is contradicted by the Commission's own final rulemaking notice.. Moreover, the NRC's concession in its brief that the reasonable expectation standard limits the otherwise applicable legal standard of adequate protection fatally undermines the Commission's own reasoning in adopting the standard. And, most important, the NRC's attempts to explain how and why the reasonable expectation standard was used to limit the size of the attacking force in the DBT all fail to provide a coherent explanation of what would be unreasonable about requiring licensees to defend against larger attacking forces—other than that a larger security force would be costly, which the Commission concedes is an impermissible consideration.

The NRC's attempts to justify its failure to include threats of air attacks in the DBT—despite the express congressional directive that it consider this threat—are equally unavailing. The NRC essentially concedes that the Commission's principal rationale—that licensees cannot lawfully use active air defenses such as anti-aircraft weapons—does not explain why licensees should not be required to

use *passive* defensive measures. The NRC's argument that the Commission properly determined that such measures were unnecessary because the active air defenses provided by other government agencies already provide adequate protection against air attack is wrong: The Commission made no such finding. By contrast, the NRC makes little effort to defend the Commission's primary rationales, that all defensive measures are outside the "scope" of the DBT and that after-the-fact efforts to mitigate the effects of an attack will suffice to provide adequate protection to the public. That is likely because those rationales are indefensible: The first runs counter to the congressional directive that the NRC consider air attacks in the DBT rulemaking, and the second rests on the facially irrational proposition that it is better to try to contain or clean up the consequences of an air attack than to prevent an attack in the first place.

Finally, the process leading to the DBT rule was fatally infected by two flaws: the NRC's consideration of non-public communications with licensees about key issues, and the NRC's failure to prepare an environmental impact statement (EIS). As to the first, the NRC does not deny the significance of the communications, but relies on the formality that they took place outside of the rulemaking process. But that is no answer to the problem—that *is* the problem. And the NRC's explanation in its brief for not preparing an EIS is not only

different from the explanation actually offered by the Commission, but directly contrary to recent and controlling opinions of this Court.

ARGUMENT

I. THE PROPER STANDARD OF REVIEW IS THE STANDARD FOR REVIEW OF THE ISSUANCE OF A RULE, NOT FOR REVIEW OF THE FAILURE TO INITIATE A RULEMAKING.

Some of what the NRC says about the standard of review is uncontroversial and not inconsistent with the principles set forth in our opening brief. *Compare* NRC Br. 27-28 *with* PC/MFP Br. 19-23. The NRC's assertion that the standard of review applicable to the DBT's failure to encompass threats of air attack is the highly deferential standard applicable to an agency's discretionary decision *not to conduct a rulemaking*, NRC Br. 28-29, however, is flatly wrong.

This case does not involve an agency's discretionary refusal to conduct a rulemaking. Indeed, the NRC was specifically directed by Congress to conduct a DBT rulemaking. If the agency had refused to conduct a rulemaking in the face of that direct congressional command, the standard of review applicable to that refusal would not be deferential at all; rather, the agency's decision, being contrary to an express statutory requirement, would be overturned on the basis of a "plain error of law." *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910 (D.C. Cir. 2004). But the agency did not refuse to conduct a rulemaking. It performed the required rulemaking and issued a revised DBT rule. The question

thus is not whether the agency properly refused to engage in rulemaking, but whether the rule resulting from the rulemaking that the agency *did* conduct is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). That the agency, in the course of issuing the rule, also formally denied (in part) the Committee to Bridge the Gap's petition for rulemaking does not transform the agency's rulemaking proceeding into a failure to conduct a rulemaking. The partial denial was based on the agency's decision about the scope of the rule it issued; it did not reflect a decision not to engage in rulemaking at all.

II. THE NRC IMPROPERLY LIMITED THE NUMBER OF ATTACKERS IN THE DBT BASED ON ITS FLAWED "REASONABLENESS" STANDARD.

The NRC does not dispute that the final DBT rule limited the number of attackers against which a nuclear power plant must defend based on the Commission's judgment about how large and capable a defensive force it is "reasonable" to expect a plant operator to employ. *See* 72 FR 12714 (ER 10) ("The rule text set forth at § 73.1 represents the largest adversary against which the Commission believes private security forces can reasonably be expected to defend."). The NRC's attempts to defend this limitation in its brief all share the fundamental failing of the final rule itself: They do not provide a coherent explanation for this limitation that is consistent with the statutory requirement of

adequate protection and the corollary principle of law (which the Commission claims to accept fully) that cost considerations can play no role in the definition of adequate protection.

The NRC's brief appears to acknowledge that its new reasonable expectation concept is an independent limitation on the AEA's requirements that, at least in some instances, will require less of a plant operator than the statutory requirement of adequate protection found in 42 U.S.C. § 2232(a) would otherwise demand. *See, e.g.*, NRC Br. 24 ("[T]he ideas of 'reasonable expectation and 'adequate protection' are independent."). Although the candor of the NRC in acknowledging this point in its brief may be commendable, the problem is that the Commission in promulgating the final rule did *not* recognize the difference between the two concepts. Rather, in explaining its limitation on the size of the attacking force, the Commission explicitly stated that the adequate protection standard was satisfied *because* the DBT encompassed the largest attacking force against which licensees could reasonably be expected to defend. That is the only meaning that can plausibly be attached to the Commission's statement that "*[t]hus*, when the DBT rule is used by licensees to design their site specific protective strategies, the Commission is *thereby* provided with reasonable assurance that the public health and safety and common defense and security are adequately protected." 72 FR 12714 (ER 10) (emphasis added).

Apparently recognizing that the agency's actual reasoning cannot withstand scrutiny,[1] the NRC's lawyers now seek to justify the reasonable expectation limitation on a different basis—as a permissible limitation on the adequate protection concept. But because that is not how the Commission itself explained and justified its action, it cannot now be considered by this Court. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007).

In any event, the NRC's argument that the reasonable expectation limitation, as elaborated in its brief, is a permissible construction of the Atomic Energy Act and is consistent with both prior judicial and administrative constructions of the

[1] The NRC attempts to explain away the Commission's statement as being based on the Commission's "underlying background 'assumption'" that the defensive capabilities of governmental entities will fill any gap in protection, *see* NRC Br. 37, but that is not what the Commission said. Indeed, the Commission itself acknowledged on the same page that for "beyond-DBT events" (which would include events excluded from the DBT because they were deemed beyond what a licensee could reasonably be expected to defend against), it expected not that governmental entities would provide the needed protection, but that the private security forces would do the best they could with a "graded reduction in effectiveness." 72 FR 12714 (ER 10). Nowhere does the Commission find, let alone provide a reasoned explanation for finding, either that attacks by larger forces are unlikely (in which case there would be no need to rely on the reasonable expectation concept to cap the size of the attacking force), or that a response by governmental defense or police forces will necessarily be adequate and timely in the event of an attack by forces larger than those the Commission believes it is "reasonable" to expect licensees to defend against. The Commission's assertion that the reasonableness limitation will result in adequate protection is thus nothing more than a purely conclusory statement.

Act is wrong. Rather, the doctrine is newly minted, inconsistent with the judicial and administrative authority the NRC invokes, inconsistent with the statutory requirement of adequate protection, and, as applied to limit the size of the attacking force incorporated in the DBT, impossible to square with the prohibition on consideration of cost in determining adequate protection.

The NRC contends that its reasonable expectation concept is no more than an elaboration of the longstanding enemy-of-the-state doctrine accepted in *Siegel v. AEC*, 400 F.2d 778 (D.C. Cir. 1968), which held that licensees are not required to protect their facilities against attacks by the armed forces of foreign enemies of the United States. Again, the NRC's argument in this Court flies in the face of the Commission's acknowledgment in the final rulemaking notice that the enemy-of-the-state rule upheld in *Siegel* and the reasonable expectation standard enshrined in the new DBT rule reflect fundamentally different considerations. As the Commission explained (72 FR 12714-15 (ER 10-11)):

> The enemy of the state rule, 10 CFR 50.13, was promulgated in 1967 amid concerns that Cuba might launch attacks against nuclear power plants in Florida. That rule (32 FR 13455; September 26, 1967) was primarily intended to make clear that privately-owned nuclear facilities were not responsible for defending against attacks that typically could only be carried out by foreign military organizations. By contrast, the DBT rule does not focus on the identity, sponsorship, or nationality of the adversaries. Instead, it affirmatively defines a range of attacks and capabilities against which nuclear power plants and Category I fuel cycle facilities must be prepared to defend. An adversary force that falls outside of the range of attacks against which nuclear facilities are reasonably expected to defend is considered to be ''beyond-DBT,''

> regardless of whether it would or would not be deemed an "enemy of the state."

The NRC's current argument that the reasonable expectation standard is simply an elaboration or extension of *Siegel* is not only inconsistent with the Commission's explanation of the rule; it is also incorrect. *Siegel* was based on the reasoning that the statutory adequate protection standard could not possibly be construed to require that nuclear plant licensees be capable of defending against the armed might of foreign enemies of the United States; such a requirement, the court stated, would "stifle utterly the peaceful utilization of atomic energy in the United States." *Siegel*, 400 F.2d at 783-84. Thus, the court concluded, Congress could not have "expect[ed] [a licensee] to demonstrate how his plant would be invulnerable to whatever destructive forces a foreign enemy might be able to direct against it …." *Id.* at 784. Nothing in *Siegel* suggested a more general "reasonableness" limitation on a licensee's obligation to provide adequate protection to the public, or, indeed, any limit on a licensee's obligation to provide adequate protection against attacks that do not fall within the enemy-of-the-state rule.

Nor can the reasonable expectation standard be squared with the NRC's earlier truck-bomb rulemaking, which amended the DBT to require protection against vehicular bombs. To begin with, that rulemaking rejected the notion now advanced in the NRC's brief that the enemy-of-the-state doctrine reflected some

general reasonableness limitation on the statutory requirement of adequate protection of public health and safety. Rather, the Commission's explanation of the truck-bomb rule reiterated *Siegel*'s point that the enemy-of-the-state rule was based on considerations specific to defense against attacks by the armed forces of "another nation" or a "foreign state." 59 FR 38893 (ER 169). Thus, the Commission concluded, the enemy-of-the-state rule was "irrelevant" (59 FR 38894 (ER 170)) to whether the DBT rule should encompass threats, such as truck bombs, that could emanate either from foreign or domestic terrorist groups and for which "participation or sponsorship of a foreign state … is not necessary." 59 FR 38893 (ER 169).

Nor did the truck-bomb rule reflect, as the NRC's brief suggests, some notion that vehicular bombs should be included in the DBT rule simply because it was reasonable to expect licensees to defend against them. Rather, the Commission explained that it amended the DBT because requiring licensees to protect facilities against truck bombs would yield a "substantial increase in overall protection of the public health and safety" and because the threat of truck-bomb attacks, "although not quantified, is likely in a range that warrants protection against a violent external assault…." 59 FR 38890 (ER 166). Nowhere in the truck-bomb rule is there any support for a reasonable expectation limit on the

obligation of the Commission to require adequate protection of public health and safety.[2]

More fundamental than the NRC's failure to establish that its new reasonable expectation standard is consistent with *Siegel* and the truck-bomb rulemaking is its failure to establish that it is consistent with the statutory command that the NRC's standards provide adequate protection of public health and safety. 42 U.S.C. § 2232(a). The NRC cites no authority for the proposition that that obligation is limited by considerations of mere "reasonableness," and its arguments in support of the reasonableness limitation are largely make-weights.

The NRC insists, for example, that the reasonableness limitation is necessary because the NRC cannot empower licensees to arm their defensive forces with weapons that private entities cannot lawfully possess. NRC Br. 32. But the Commission need not adopt a general "reasonableness" limitation to justify not requiring licensees to break the law. Legal prohibitions on the use by private security forces of particular weapons and tactics obviously constitute independent

[2] The NRC's brief states that the truck-bomb rule did not require "nuclear grade" materials for vehicular barriers, but that was because the Commission determined that commercially available barriers would "suffice for the construction of the vehicle barrier *if the barrier is capable of countering the design basis vehicle threat.*" 59 FR 58895 (ER 171) (emphasis added). Thus, the Commission pointedly did *not* authorize the use of inadequate barriers based on some notion of reasonableness, nor did it necessarily limit the DBT threat to what commercially available barriers were capable of countering.

limitations on the Commission's power to require licensees to use those weapons and tactics, but they hardly justify limiting the DBT rule (or any other measures intended to protect public health and safety) to the extent that the rule would *not* require use of prohibited weapons or tactics. And, as discussed further below, neither in the context of the size of the attacking force nor of defenses against airborne attack can the Commission's application of the reasonableness limitation be justified by the legal limitations on the type of weapons and tactics licensees may employ.

Similarly beside the point is the NRC's claim that its reasonable expectation standard may in some instances be applied to provide *greater* protection than the statutory standard of adequate protection—a result the NRC says petitioners should applaud, not challenge. *See, e.g.*, NRC Br. 41. That the NRC may have discretion to require *more* protection than the statute requires if it is reasonable to do so and would benefit the public does not justify invoking concerns of reasonableness to *reduce* protection below the minimum required by the statute. The statute *compels* the Commission to provide for adequate protection of the public, regardless of cost or "reasonableness," and then *permits* it to impose additional protections if their benefits are justified. As the D.C. Circuit explained in *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114 (1987):

> In our view, the Act establishes a two-tier structure for protecting the public health and safety. Section 182(a) of the Act commands the NRC to

> ensure that any use or production of nuclear materials "provide[s] adequate protection to the health or safety of the public." 42 U.S.C. § 2232(a). In setting or enforcing the standard of "adequate protection" that this section requires, the Commission may not consider the economic costs of safety measures. The Commission must determine, regardless of costs, the precautionary measures necessary to provide adequate protection to the public; the Commission then must impose those measures, again regardless of costs, on all holders of or applicants for operating licenses. "Adequate protection," however, is not absolute protection; thus, even when the adequate-protection standard is satisfied, safety improvements will be possible. Section 161 of the Act empowers (but does not require) the Commission to establish safety requirements that are not necessary for adequate protection and to order holders of or applicants for operating licenses to comply with these requirements.

In short, the Commission's power to require more from licensees than the legal minimum is no excuse for a standard that provides *less* than adequate protection.

Finally, the NRC's attempts to justify the reasonable expectation limit on the size of the attacking force in the DBT as based on considerations other than cost (which it concedes would be an impermissible basis for limiting protection) are unavailing. The NRC's brief states, for example, that the DBT does not itself "require a certain number of security guards," but only "describe[s], in legally binding terms, the nature of the *adversary* force against which the licensee must defend," and even then it does not precisely "fix the size of the attacking force." NRC Br. 39. Those statements are all true as far as they go. But what the DBT rule does do—according to the express statement of the Commission in the rulemaking notice—is limit the size of the attacking force against which the licensee is legally obligated to defend based on the Commission's judgment about

the largest attacking force against which it is "reasonable" to require a defense. 72 FR 12714 (ER 10). And despite the Commission's disavowal in the rulemaking notice that it took costs into account in making that determination (*see* NRC Br. 40), and its efforts in its brief to defend that position (*id.* at 40-43), the NRC's brief never provides any *other* consideration that would make it "unreasonable" to expect a licensee to defend against larger attacking forces.

To be sure, as the NRC states, size is not the only variable that determines the efficacy of either an attacking or defending force. NRC Br. 18. But other things being equal, size matters a great deal. That is, as between two attacking forces that possess the other attributes specified in the DBT (hand-held automatic weapons, support vehicles, multiple teams, inside assistance, and a willingness to kill and be killed), the larger force will be more effective; and, holding other factors constant (for example, the legal limitations on weapons available to defenders), a larger defensive force will be required to counter the larger attacking force. The NRC identifies no other *relevant* "reasonableness" constraint, other than the size of the defensive force, that justifies a limit on the size of an attacking force against which a licensee can be required to defend.[3] Nor does the NRC

[3] "Legal limits" (NRC Br. 23) on the weapons available to licensees, which the NRC's brief refers to again and again, are not relevant to the size of the attacking force issue; there is nothing about larger numbers of attackers that in itself requires prohibited weaponry for the defenders if the defensive force is large enough. Similarly, the other factors identified in the NRC's brief as bearing on

identify any consideration *other* than cost that would make it "unreasonable" to require licensees to hire larger security forces. There are, for example, no legal limitations on the size of the security force a power plant may hire.

Thus, the Commission either relied on the impermissible consideration of cost (despite its disavowal), or else its "reasonableness" limitation on the size of the attacking force is completely irrational. In either event, the Commission has failed to provide an adequate explanation of its decision to limit the size of the attacking force in the DBT to what it is reasonable to expect a licensee to defend against, and the rule must be vacated and remanded in this respect.

III. THE NRC UNLAWFULLY DECLINED TO REQUIRE DEFENSIVE MEASURES AGAINST AIR ATTACKS.

The NRC's attempts to justify its failure to require defensive measures against air attacks fare no better. The NRC's brief makes little effort to defend the principal basis for the Commission's exclusion of air attacks: its argument that active air defense measures are, as a legal matter, the exclusive domain of the armed forces (72 FR 12710 (ER 6)). Because that rationale does not in any way address whether licensees should be required to take the sorts of passive defensive

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what is reasonable to expect of licensees (namely, "the availability of materials, the effectiveness of certain measures, and a practical division of responsibility between public and private entities," NRC Br. 23) all fail to explain how a limitation on the size of the attacking force is justified by what is reasonable to expect from a defending force.

measures petitioners advocate, it fails to answer the question whether the airborne threat should be included in the DBT, a point the NRC implicitly acknowledges by not defending this aspect of the Commission's reasoning.

The NRC contends, however, that the Commission was justified in not addressing the merits of the principal passive defensive proposal before it—the beamhenge concept—because the Committee to Bridge the Gap, the original proponent of that defensive strategy, failed to provide adequate technical specifications detailing how the beamhenge would work. *See* NRC Br. 11-12, 54-55; *see also* NEI Br. 27-29. Again, however, this is a purely post hoc rationalization by counsel. The Commission itself nowhere hinted that it lacked sufficient information about the potential efficacy of passive defensive measures to determine whether it should include the airborne threat in the DBT. Indeed, the Commission's own rules provide that if a rulemaking petition provides insufficient information to enable the Commission to rule on it, the Commission shall inform the petitioner and provide an opportunity to supplement the petition. 10 CFR 2.802(f).[4] The Commission never so informed the Committee to Bridge the Gap.

[4] Subsection (f) of 10 CFR 2.802 provides:

> If it is determined by the Executive Director for Operations that the petition does not include the information required by paragraph (c) of this section and is incomplete, the petitioner will be notified of that determination and the respects in which the petition is deficient and will be accorded an opportunity to submit additional data. Ordinarily this determination will be

Thus, the Commission's decision not to include the risk of airborne attack in the DBT must rise or fall on the adequacy of its explanation for rejecting passive defensive measures, not on any claimed inadequacy in the technical details of the beamhenge concept advocated by the Committee to Bridge the Gap and other commenters on the NRC's proposed rule. Notwithstanding the NRC brief's attempt to defend it, the Commission's reasoning remains deficient in critical respects.

The NRC, as well as NEI, spill a great deal of ink attacking a straw man: namely, the notion that the Energy Policy Act's requirement that the Commission consider the threat of air attack in revising the DBT means that the revised DBT *must* include the airborne threat. As our opening brief (at 34-35) made clear, that is not our argument. Rather, our position is that, by taking the highly unusual step of directing the NRC to conduct a rulemaking on a specific subject *and* identifying the particular factors the agency must consider in that rulemaking, the Act imposed a very focused burden of explanation on the agency if it chose not to deal with one of those factors. That burden is heightened by the fact that the statutory

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made within 30 days from the date of receipt of the petition by the Office of the Secretary of the Commission. If the petitioner does not submit additional data to correct the deficiency within 90 days from the date of notification to the petitioner that the petition is incomplete, the petition may be returned to the petitioner without prejudice to the right of the petitioner to file a new petition.

considerations are not competing, to be weighed against one another, but could all consistently be addressed by a final rule. *Kutler v. Carlin*, 139 F.3d 237, 245 (D.C. Cir. 1998).[5]

In addition, the express direction that the airborne threat be considered *in the DBT rulemaking* necessarily rules out certain of the justifications offered by the Commission in its final rule—that both active and passive defensive measures against air attack are "beyond the scope" of the DBT rule (72 FR 12710 (ER 6)), and that the measures licensees should be required to take with respect to air attack should be addressed in other orders or rulemakings rather than in the DBT rulemaking (72 FR 12710-11 (ER 6-7)).[6] Similarly, the express congressional directive that the NRC consider the airborne threat to its licensees renders irrelevant the NRC's suggestion in its brief (which is in any event a post-hoc rationalization not articulated by the NRC in the final rule) that our society's

[5] NEI's reliance on *Siegel* for the proposition that the AEA does not prescribe how the NRC shall discharge its duties (NEI Br. 10) overlooks that this case involves a specific statutory directive not only that the NRC must engage in a particular rulemaking, but also that it must consider the risk of air attack.

[6] NEI denies that the NRC stated that air attacks are beyond the scope of the DBT rule, *see* NEI Br. 36, but the Commission expressly stated that both active air defenses and other "protective strategies and physical protection measures" are "not within the scope of the DBT." 72 FR 12710 (ER 6). Having excluded both active and passive defensive measures from the DBT's "scope," the NRC effectively defined any defense against the airborne threat out of the DBT. Notably, the NRC itself does not deny our characterization of the Commission's action as excluding the airborne threat from the scope of the DBT.

resources might better be spent defending *other* types of facilities against airborne or other terrorist attacks. *E.g.*, NRC Br. 53-54; *see also* NEI Br. 7. The short answer is that Congress specifically charged the NRC with devising adequate protection for its licensees against, among other threats, the threat of air attack, and the possibility that our nation's resources might be better spent by other agencies or private entities against other threats is not a permissible consideration for the NRC.

The issue, then, is the adequacy of the NRC's explanation for not addressing the airborne threat, viewed in the context of an explicit congressional directive that the DBT be based in part on consideration of that specific threat. The NRC's brief contends that the Commission properly chose not to include the threat of air attack in the DBT primarily because other governmental measures to enhance air security provide adequate protection to the public. NRC Br. 51-52. But the Commission made no such finding. *See* 72 FR 12710-11 (ER 6-7). What the NRC concluded about the efforts of other agencies was that they had primary responsibility for "*active* protection against the airborne threat," *id.* at 12711 (ER 7) (emphasis added), and that since the 9/11 attacks they had implemented "improvements" in security that "*g[o] a long way toward* protecting the United States, including nuclear facilities, from an aerial attack." *Id.* at 12710 (ER 6) (emphasis added). Going a long way toward providing protection is not the same as providing

adequate protection, and the Commission did *not* purport to find that the efforts of other agencies satisfied the statutory standard.

Indeed, the Commission itself acknowledged the continuing existence of a significant threat of air attack that it expressly said it was "not discounting." *Id.* The agency's own recognition of the reality of the threat is underscored by its description of its ad hoc efforts to "work with" licensees on response to air attacks, and its express acknowledgment that there is a "need for some additional enhancements." *Id.* The Commission's more recent initiation of a rulemaking to require protective measures against air attacks for new nuclear plants, *see* 72 FR 56287 (Oct. 3, 2007)—which the NRC does not even mention in its brief—further underscores the Commission's own recognition that the efforts of other agencies are not enough to provide adequate protection.

Similarly unfounded is the NRC's contention that the Commission's statement that there is a "low likelihood" that a jetliner attack on a nuclear power plant would "both damage[e] the reactor core and release[e] radioactivity that could affect public health and safety," 72 FR 12710 (ER 6), equates to a determination that defensive measures are not necessary to provide adequate protection to the public. NRC Br. 53. To begin with, the Commission's statement in this regard is hard to square with its earlier finding in the truck-bomb rulemaking that in a vehicular bomb attack, the "contribution to core damage

frequency could be high." 59 FR 38891 (ER 167). The idea that a truck bomb (which damaged the World Trade Center) poses a greater threat to reactor cores than a suicide attack by a jumbo jet (which destroyed the World Trade Center completely) is implausible.

More fundamentally, however, that a threat may be of "low likelihood" does not mean that the statutory adequate protection standard does not require protective measures against it. To be sure, as the NRC points out, adequate protection does not mean "absolute protection" or "zero risk," *Union of Concerned Scientists v. NRC*, 824 F.2d at 114, 118, and the Commission need not protect against "speculative," "infinitesimal," and "extraordinarily low likelihood" events. *San Luis Obispo Mothers for Peace v. NRC*, 789 F2d. 26, 37, 40 (D.C. Cir. 1986). But that by no means suggests that the Commission can disregard a risk—particular one whose consequences for public health or safety could be grave—just because the Commission believes that the likelihood is "low." Indeed, many protective measures mandated by the Commission address risks that are low but not insubstantial.

That leaves only the actual basis on which the Commission found that the adequate protection standard would be satisfied without inclusion of air attacks in the DBT: that after-the-fact efforts to "mitigate" the effects of such attacks would suffice to protect the public health and safety. 72 FR 12710-11 (ER 6-7).

Surprisingly, given that this was the actual basis for the Commission's refusal to consider the merits of passive defensive measures, the NRC's brief makes almost no effort to defend this rationale. Thus, the NRC has no answer to petitioner New York's point that the Commission made no effort to explain how its judgment in this respect (which it admitted was based only on a "limited number" of engineering studies, *id.* at 12710 (ER 6)), could be squared with the wealth of other materials in the record demonstrating the potentially devastating effects of releases of radioactive material in the event of a core breach caused by an air crash. NY Br. 38-40. Nor does the NRC even attempt to answer our point that it is fundamentally irrational to prefer a strategy of cleaning up a dangerous mess if there are available means of preventing the mess in the first place. Beyond its conclusory statement that mitigation is adequate, the Commission has not even attempted to articulate a coherent explanation for why mitigation can be considered adequate if prevention is available.

Finally, the NRC has no convincing response to the question why, if mitigation of the effects of core breaches caused by air attacks is sufficient to protect the public, the Commission has required defensive measures against attacks by truck bombs and boat bombs, when any damage they might inflict would be just as easy (indeed, easier) to mitigate as the damage caused by a suicide air attack. The NRC's only answer appears to be that vehicular and water-borne bombs were

included in the DBT not because doing so was necessary in the Commission's view to provide adequate protection, but as an exercise of the Commission's discretion to provide more than adequate protection. NRC Br. 52; *see also* NEI Br. 25. It is certainly true that the NRC has discretion to require greater protection than the adequate protection standard would itself demand, *see Union of Concerned Scientists*, 824 F.2d at 114, and it appears that that may indeed have been what the NRC thought it was doing when it issued the truck-bomb rule.[7] Even if that is the case, however, the Commission still is obliged —particularly in light of the express congressional directive that it consider the airborne threat in amending the DBT—to explain why it exercised its discretion to provide for greater-than-adequate protection against truck and boat bombs (despite the availability of mitigation measures) but declined to do the same with respect to air attacks. The Commission offered no such explanation, and the justification offered in the NRC's brief—the unsubstantiated statement that "[t]he land and water threats are dealt with comparatively easily by licensees," NRC Br. 52—is merely another post-hoc rationalization by counsel.

[7] The rulemaking notice for the truck-bomb amendment to the DBT stated that the Commission had concluded there was no "need to redefine adequate protection" but that the amendment was nonetheless justified by "a substantial increase in overall protection of the public health and safety (a less stringent test of the justification for a rule change)." 59 FR 38891 (ER 167).

IV. THE AGENCY RELIED IMPROPERLY ON NON-PUBLIC INFORMATION.

The NRC does not deny that in shaping the revised DBT the Commission relied on non-public communications with licensees that preceded the earlier orders that had purported to "supersede" the former DBT. 72 FR 12705 (ER 1). Nor does it contest that, as the Commission conceded in a letter to Senator Hagel, the licensees' comments were critical to defining the Commission's view of what could be "reasonably expected" of licensees. ER 237. Further, the NRC does not deny that its communications with licensees about mitigation informed its decision not to require air defenses in the DBT. *See* 72 FR 12710 (ER 6). And it is undisputed that there is no record of any of these communications in the rulemaking record.

The NRC's principal response is that most of these communications concerned not the rulemaking proceeding itself, but the earlier orders that, without notice and comment, purported to amend the DBT. According to the NRC, "the process that led to the DBT *orders*" and "the proceeding that led to the final DBT rule" were "distinct, both in form and content." NRC Br. 56-57.

The NRC's position elevates form over substance. According to the NRC itself, the formal amendment of the DBT rule that resulted from the rulemaking process largely conformed to the earlier, unlawful purported amendment of the DBT in the 2003 orders, and the DBT rulemaking, like the earlier process that led

to the orders, was informed in important respects (including with respect to the specific features of the rule challenged by the petitioners in this case) by non-public communications with licensees. The NRC's assurance in its brief that the public had "enough" information, without access to or even any description of these communications, to participate meaningfully in the rulemaking (*see* NRC Br. 57-58), is no substitute for a genuine notice and comment process. To be sure, members of the public could offer their views on "what could reasonably be expected of licensees," NRC Br. 58, but without any knowledge of what the NRC had heard under the table from industry on this issue (or even any understanding of what the NRC meant by its reasonable expectation standard), members of the public could only shoot in the dark.

V. THE NRC'S EXPLANATION FOR NOT PREPARING AN ENVIRONMENTAL IMPACT STATEMENT IS CONTRARY TO LAW.

The NRC's principal argument in this Court in support of its failure to prepare an EIS is that an EIS is never required for an action that "*upgrades* environmental protection." NRC Br. 59. The Commission's argument is unavailing for two reasons. First, this reasoning was not the NRC's basis for not performing an EIS. In the final rulemaking notice, the Commission explained that the basis for its finding of "no significant environmental impact" and consequent refusal to prepare an EIS was that the rule did not add to the requirements imposed

by its earlier "orders" that unlawfully amended the DBT without notice and comment—a rationale that, as explained in our opening brief, is patently inadequate (Opening Br. 49) and that the NRC's brief makes no effort to defend. The Commission also relied expressly on the very reasoning this Court had rejected in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)—that is, the theories, all discredited by this Court, that environmental effects of terrorism are not "reasonably foreseeable," are "remote," "speculative," or involve "worst-case outcome[s]," and cannot be attributable to the Commission's actions. *See* 72 FR 12718-19 (ER 14-15). By contrast, the Commission nowhere alluded to the theory now advanced in its brief. As a post hoc rationalization by counsel, the argument must therefore be disregarded. *See California v. Norton*, 311 F.3d 1162, 1175-76 (9th Cir. 2002) (rejecting post hoc rationalization for refusing to conduct an EIS).

Second, as the Commission acknowledges (NRC Br. 61), this Court in *Center for Biological Diversity v. NHTSA*, 508 F.3d 508 (9th Cir. 2007), recently rejected the argument that an agency need never perform an EIS when it adopts a rule that increases environmental protection. In *Center for Biological Diversity*, the Court held that although NHTSA's new fuel economy standards would reduce greenhouse gases relative to existing standards, the agency was required to prepare an EIS because there was a substantial question whether its standard might cause

significant environmental degradation relative to more stringent standards that would achieve greater reductions in emissions. As the Court put it, "simply because the Final Rule may be an improvement over the [preexisting] standard does not necessarily mean that it will not have a 'significant effect' on the environment." *Id.* at 556.

The NRC's effort to distinguish *Center for Biological Diversity* is unconvincing. The Commission asserts that the DBT rule, unlike the fuel economy standards at issue in *Center for Biological Diversity*, "neither creates nor keeps in place tangible or measurable adverse environmental effects similar to those that concerned this Court in the NHTSA case." NRC Br. 61. But the rule in fact does just that: It "keeps in place" the risk of those terrorist attacks that it fails to address—attacks by large groups of terrorists and airborne attacks—just as NHTSA's fuel economy rules kept in place the risks attributable to the greenhouse gas emissions that it did not adequately limit.

As for whether or not those risks are sufficiently "measurable," or properly attributable to the NRC's rule, this Court's opinion in *San Luis Obispo Mothers for Peace* disposes of the NRC's contentions that terrorism risks are not quantifiable enough to be included in an EIS and cannot be considered causally related to the Commission's actions. *See* 449 F.3d at 1031-34. And the Commission's brief does not even attempt to defend the unexplained statement in its rulemaking notice

that the reasoning of *San Luis Obispo Mothers for Peace* somehow does not apply to rulemakings. *See* 72 FR 12718 n.2 (ER 14).

The Commission finally attempts to distinguish *San Luis Obispo Mothers for Peace* on the ground that because the DBT rule, unlike the licensing decision at issue there, "would create no new facility for terrorists to strike" it could not be considered a "proximate cause" of any environmental consequences of a terrorist attack. NRC Br. 53. The Commission, however, has it precisely backward. If the mere existence of a facility is causally enough related to a terrorist attack and its attendant environmental consequences to require consideration of those consequences in an EIS, then surely an *inadequate* antiterrorism rule, which is more directly connected to the *likelihood* of a successful terrorist attack, must also satisfy the causation requirement.

CONCLUSION

For the foregoing reasons as well as those set forth in our opening brief and the briefs of the State of New York and the Attorney General of the State of California, the Court should remand the agency's DBT rule for further consideration of (1) the size of the attacking force against which a licensee's defensive forces must be prepared to defend, and (2) the inclusion of measures for responding to or defending against air attacks in the DBT.

Respectfully submitted,

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March 3, 2008

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 6,902 words.

March 3, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on this date I am causing two copies of the foregoing brief to be served by first-class mail, postage pre-paid, on counsel for the parties as follows:

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