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Terrorist Attacks & NEPA: The Third Circuit Creates a Split in Authority

*New Jersey Department of Environmental Protection v. NRC*¹

I. INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, the threat of an airborne attack on a nuclear power plant became a major national security concern. The United States Nuclear Regulatory Commission (hereinafter “NRC”) began implementing new regulations aimed at increasing security at the nation’s nuclear power plants.² However, one major issue that remained was whether the NRC was required under the National Environmental Policy Act of 1969 (hereinafter “NEPA”) to issue an Environmental Impact Statement (hereinafter “EIS”) concerning the threat of an airborne terrorist attack when relicensing a nuclear facility. The Ninth Circuit decided in the affirmative in *San Luis Obispo Mothers for Peace v. NRC*.³ Following *Mothers for Peace*, the New Jersey Department of Environmental Protection (hereinafter “NJDEP”) sought a similar result when it intervened in the NRC’s relicensing of Oyster Creek Nuclear Generating Station (hereinafter “Oyster Creek”), which led to the instant case.⁴ The Third Circuit’s decision in *New Jersey Department of Environmental Protection v. NRC* creates a split in authority among the U.S. Court of Appeals’ Circuits.⁵

This note examines the court’s analysis of the NEPA’s requirements regarding EISs and nuclear power plants. It also discusses the split in authority created by *New Jersey Department of Environmental Protection*, as well as the need for a resolution of this issue by the U.S. Supreme Court. This note will emphasize the NRC’s actions in the wake

¹ 561 F.3d 132 (3d Cir. 2009).

² MARK HOLT & ANTHONY ANDREWS, CONG. RESEARCH SERV., NUCLEAR POWER PLANT SECURITY AND VULNERABILITIES 1-2 (2009), available at <http://ftp.fas.org/sgp/crs/homesecc/RL34331.pdf>.

³ 449 F.3d 1016 (9th Cir. 2006).

⁴ *N.J. Dep’t of Env’tl. Prot.*, 561 F.3d at 132.

⁵ *Id.* at 142.

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of the September 11 attacks and how these actions do not trigger a responsibility to prepare an EIS concerning such attacks under the NEPA.

II. FACTS AND HOLDING

The Oyster Creek Nuclear Generating Station is a nuclear power facility owned by the AmerGen Energy Company, L.L.C. (hereinafter “AmerGen”).⁶ The facility is located in New Jersey near Barnegat Bay.⁷ On July 22, 2005, AmerGen applied to the NRC to renew Oyster Creek’s operating license for an additional twenty years.⁸

Subsequently, in September of 2005, a notice of opportunity for hearing was published by the NRC in the *Federal Register*.⁹ Shortly thereafter, in November of 2005, the NJDEP filed a petition to intervene with the NRC.¹⁰

The NJDEP’s petition raised three contentions.¹¹ The first involved “the appropriate calculation of metal fatigue for the reactor coolant pressure boundary and associated components,” and the second dealt with “whether Oyster Creek had sufficient back-up power to operate during a blackout.”¹² The third contention was the only one raised in the case at hand and became the main issue: “whether the [NRC], when it is reviewing an application to relicense a nuclear power facility, must examine the environmental impact of a hypothetical terrorist attack on that nuclear power facility.”¹³

The NJDEP’s claims were reviewed by the Atomic Safety and Licensing Board (hereinafter “ASLB”).¹⁴ The ASLB found “that terrorism and ‘design basis threat’ reviews, while important and ongoing,

⁶ *Id.* at 135.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* n.1.

¹³ *Id.* at 133, 135.

¹⁴ *Id.* at 135.

lie outside the scope of the NEPA in general and of license renewal in particular.”¹⁵

The decision of the ASLB was appealed by the NJDEP to the NRC.¹⁶ The NRC denied the claim, agreeing “with the Board [ASLB] that terrorism concerns are security issues, which are not addressed during license renewal because they do not relate to the aging of the facility.”¹⁷

The NJDEP then appealed the order of the NRC by filing a petition for review.¹⁸ The U.S. Court of Appeals for the Third Circuit denied the petition for review, stating that because the NJDEP failed to meet its burden of demonstrating that the NRC could evaluate risks more meaningfully than it had already done, the “NJDEP did not present an admissible contention before the NRC[] concerning the environmental effects of a hypothetical aircraft attack on Oyster Creek.”¹⁹ Additionally, in addressing the NJDEP’s contention, the court held that the NRC, in reviewing a relicensing application, was not required to prepare an EIS concerning the effects of potential airborne terrorist attacks.²⁰

III. LEGAL BACKGROUND

A. *Statutes and Regulations*

The Atomic Energy Act of 1954 (hereinafter “AEA”) provides the NRC with the authority to issue a license to operate a commercial nuclear reactor for up to forty years.²¹ The AEA also authorizes the NRC to renew that license for a period not to exceed an additional twenty years.²² The NRC’s review of renewal applications is controlled by two sets of regulatory requirements. The first is 10 C.F.R. Part 54, which requires

¹⁵ *Id.* (internal quotation marks omitted) (quoting *In re Amergen Energy Co.*, 65 N.R.C. 124, 128 (2007)).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 136.

¹⁹ *Id.* at 144.

²⁰ *Id.* at 133.

²¹ 42 U.S.C. §§ 2133, 2134(b) (2006).

²² 10 C.F.R. § 54.31 (2009).

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each applicant to include in its application for renewal an Integrated Plant Assessment showing that “the effects of aging on the functionality of such structures and components will be managed to maintain the [current licensing basis] such that there is an acceptable level of safety during the period of extended operation.”²³

The second set is 10 C.F.R. Part 51, which requires the NRC to complete an environmental review of the applicant’s facility under the NEPA.²⁴ Congress passed NEPA with the intent to declare “a national policy which will encourage productive and enjoyable harmony between man and his environment.”²⁵ The Act’s two goals are to place “upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action” and ensure “that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.”²⁶

When considering the licensing application of a nuclear facility under the NEPA, the NRC divides specific issues into two separate EISs. The first is the Generic Environmental Impact Statement (hereinafter “GEIS”), which contains what are called “Category 1 issues” and is prepared by the NRC.²⁷ The GEIS “summarizes the findings of a systematic inquiry into the environmental impacts of refurbishment activities associated with license renewal and the environmental impacts of continued operation during the renewal period (up to 20 years for each licensing action).”²⁸ The second EIS is the Specific Environmental Impact

²³ *Id.* §§ 54.21, 54.3.

²⁴ *N.J. Dep’t of Envtl. Prot.*, 561 F.3d at 133 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989)).

²⁵ 42 U.S.C. § 4321 (2006).

²⁶ *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978) and citing *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981)).

²⁷ *N.J. Dep’t of Envtl. Prot.*, 561 F.3d at 134; 10 C.F.R. § 51.53(c)(3)(i) (2009); Notice of Intent to Prepare an Environmental Impact Statement for the License Renewal of Nuclear Power Plants and to Conduct Scoping Process, 68 Fed. Reg. 33,209, 33,209 (June 3, 2003).

²⁸ Notice of Intent to Prepare an Environmental Impact Statement for the License Renewal of Nuclear Power Plants and to Conduct Scoping Process, 68 Fed. Reg. at 33,209.

Statement (hereinafter "SEIS"), which addresses "Category 2 issues."²⁹ When submitting its application for renewal of its operating license, the applicant must submit a supplemental Environmental Report (hereinafter "Report").³⁰ Based off of this Report, the NRC staff develops a site-specific supplement to the GEIS and includes a recommendation for each license renewal application.³¹ This site-specific supplement is the SEIS.³²

B. *Traditional Tort Law*

The Restatement (Second) of Torts provides that where a party's negligent conduct affords an opportunity for an actor to commit a criminal act, the criminal's conduct will be deemed a superseding cause unless "the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime."³³ Additionally, there are six factors that are to be considered in determining if the intervening act of another is a superseding cause, thus severing the liability of the original negligent actor:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the

²⁹ *N.J. Dep't of Env'tl. Prot.*, 561 F.3d at 134-35 (citing 10 C.F.R. § 51.53(c)(3)(ii)).

³⁰ Notice of Intent to Prepare an Environmental Impact Statement for the License Renewal of Nuclear Power Plants and to Conduct Scoping Process, 68 Fed. Reg. at 33,209-10.

³¹ *Id.*

³² *N.J. Dep't of Env'tl. Prot.*, 561 F.3d at 134-35 (citing 10 C.F.R. § 51.95(c)); Notice of Intent to Prepare an Environmental Impact Statement for the License Renewal of Nuclear Power Plants and to Conduct Scoping Process, 68 Fed. Reg. at 33,209-10.

³³ RESTATEMENT (SECOND) OF TORTS § 448 (1965).

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other hand, is or is not a normal result of such a situation; (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act; (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.³⁴

The Third Circuit had previously used such an analysis under tort law to determine liability resulting from a terrorist attack.

In *Port Authority of New York & New Jersey v. Arcadian Corp.*,³⁵ the owners of the World Trade Center brought suit against several fertilizer manufacturers whose products were used in the 1993 bombing of the World Trade Center.³⁶ The plaintiffs alleged negligence on the part of the manufacturers, claiming that their products made up part of the explosive devices used in the bombing.³⁷ After reviewing relevant precedent and state concepts of tort law, the court found that "the World Trade Center bombing was not a natural or probable consequence of any design defect in defendants' products," and held that "the terrorists' actions were superseding and intervening events breaking the chain of causation."³⁸

C. NEPA and EIS

There are two important cases in which the Supreme Court discussed the situations where the NEPA would require an agency to prepare an EIS.³⁹ The first was *Metropolitan Edison Co. v. People*

³⁴ *Id.* § 442.

³⁵ 189 F.3d 305 (3d Cir. 1999).

³⁶ *Id.* 308-09.

³⁷ *Id.* at 309.

³⁸ *Id.* at 318-19.

³⁹ *N.J. Dep't of Env'tl. Prot. v. NRC*, 561 F.3d 132, 137 (3d Cir. 2009).

Against Nuclear Energy,⁴⁰ which involved the reopening of the nuclear power plant on Three Mile Island after an accident in one of the reactors forced the plant to be shut down.⁴¹ While determining whether activity at the plant could be safely resumed, the NRC did not determine whether to consider the psychological harm or other indirect effects of the accident or of renewed operation.⁴² The petitioners in the case, People Against Nuclear Energy, argued that the NEPA and the AEA required the NRC to consider such issues.⁴³

The Court held that “[t]o determine whether [NEPA] requires consideration of a particular effect, we must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.”⁴⁴ The Supreme Court first observed that NEPA only required that the NRC assess the impact or effect of its decision on the physical environment.⁴⁵ The Court went on to explain that NEPA only attaches when there is a “reasonably close causal relationship between a change in the physical environment and the effect at issue.”⁴⁶ The Supreme Court, like the Third Circuit in *New Jersey Department of Environmental Protection*, analogized the causal relationship to tort law and the doctrine of proximate cause.⁴⁷ Under such an analysis, the Court found that damage to psychological health caused by the fear of a nuclear accident was too attenuated.⁴⁸

The second case in which the Supreme Court decided when the NEPA would require an agency to prepare an EIS was *Department of Transportation v. Public Citizen*,⁴⁹ which involved the operation of

⁴⁰ 460 U.S. 766 (1983).

⁴¹ *See id.* at 766.

⁴² *Id.* at 769.

⁴³ *Id.* at 770.

⁴⁴ *Id.* at 773.

⁴⁵ *Id.* at 772.

⁴⁶ *Id.* at 774.

⁴⁷ *Compare id.*, with *N.J. Dep’t of Env’tl. Prot. v. U.S. NRC*, 561 F.3d 132, 140 & n.8 (3d Cir. 2009).

⁴⁸ *Metro. Edison Co.*, 460 U.S. at 775.

⁴⁹ 541 U.S. 752 (2004).

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Mexican tractor-trailer trucks on U.S. roads.⁵⁰ The Federal Motor Carrier Safety Administration (hereinafter “FMCSA”), published safety regulations and procedures for the certification of these Mexican trucks before the trucks were allowed to operate within the country.⁵¹ In addition to these regulations, the FMCSA prepared an environmental assessment that focused on the effects of the regulations.⁵² However, “[b]ecause FMCSA concluded that the entry of the Mexican trucks was not an ‘effect’ of its regulations, it did not consider any environmental impact that might be caused by the increased presence of Mexican trucks within the United States.”⁵³ The respondents in the case petitioned for review, asserting that the NEPA required such an analysis of the impact of increased traffic from Mexican trucks.⁵⁴

The Court held “that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁵⁵ In reaching its decision, the Court first noted that FMCSA does not have the authority to exclude Mexican trucks from the U.S.⁵⁶ The Court also applied *Metropolitan Edison Co.* and considered the causal relationship between the FMCSA’s actions and the environmental impact.⁵⁷ It found that the “‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”⁵⁸

D. Ninth Circuit Decisions

The Ninth Circuit dealt with a case involving the NEPA and the

⁵⁰ *Id.* at 759.

⁵¹ *Id.* at 760.

⁵² *Id.* at 761.

⁵³ *Id.*

⁵⁴ *Id.* at 762.

⁵⁵ *Id.* at 770.

⁵⁶ *Id.* at 766.

⁵⁷ *Id.* at 767.

⁵⁸ *Id.*

licensing of a nuclear facility in *Mothers for Peace*.⁵⁹ In *Mothers for Peace*, the NRC approved a license to construct and operate a facility in Diablo Canyon that stored spent fuel from two nuclear reactors on the site.⁶⁰ In granting the license, the NRC rejected the petition of the San Luis Obispo Mothers for Peace arguing that the NEPA required a terrorism review.⁶¹ The Ninth Circuit held that “in considering the policy goals of NEPA . . . the possibility of terrorist attack is not so ‘remote and highly speculative’ as to be beyond NEPA’s requirements.”⁶²

The court in *Mothers for Peace* attempted to distinguish *Metropolitan Edison Co.* by describing it as involving a chain of three events: “(1) a major federal action; (2) a change in the physical environment; and (3) an effect.”⁶³ The Ninth Circuit said that *Metropolitan Edison Co.* “was concerned with the relationship between events 2 and 3.”⁶⁴ In contrast, the court said that the instant case involved “the disputed relationship . . . between events 1 and 2,” with step one being “the federal act, or the licensing of the Storage Installation” and event two being the “change in the physical environment, or the terrorist attack.”⁶⁵ Therefore, the Ninth Circuit found that the “reasonably close causal relationship” test from *Metropolitan Edison Co.* did not apply, and instead created a test requiring agencies to consider, under the NEPA, all events that are not “remote and highly speculative.”⁶⁶

Another case decided by the Ninth Circuit involving the requirements of the NEPA was *Ground Zero Center for Non-Violent Action v. Department of the Navy*,⁶⁷ in which several environmental groups challenged the United States Navy’s missile upgrade program at a submarine base in Bangor, Washington.⁶⁸ The petitioners in the case

⁵⁹ San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006).

⁶⁰ *Id.* at 1019-21.

⁶¹ *See id.* at 1021-22.

⁶² *Id.* at 1031 (internal quotation marks omitted).

⁶³ *Id.* at 1029.

⁶⁴ *Id.*

⁶⁵ *Id.* at 1030.

⁶⁶ *Id.* (internal quotation marks omitted).

⁶⁷ 383 F.3d 1082 (9th Cir. 2004).

⁶⁸ *Id.* at 1083-84.

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asserted “that NEPA requires the Navy to issue a new or supplemental EIS assessing the environmental risk of an accidental explosion of a . . . missile during operations at Bangor . . . [and] to assess the environmental impact that would occur.”⁶⁹ The court stated that established law shows not every conceivable environmental impact requires an EIS.⁷⁰ Instead, the court said, an EIS only requires a reasonable discussion of the probable environmental consequences, not remote and speculative consequences.⁷¹ The court went on to hold that since “the Navy has made detailed study of the risk of an accidental explosion, and has determined this risk to be extremely remote,” it had already satisfied all that is required under the NEPA.⁷²

E. Mid States Coalition for Progress v. Surface Transportation Board

Among the cases decided by the Eighth Circuit of the U.S. Court of Appeals, the one that is most relevant to this note is *Mid States Coalition for Progress v. Surface Transportation Board*.⁷³ In *Surface Transportation Board*, several organizations challenged the Surface Transportation Board’s (hereinafter “Board”) decision to approve the Dakota, Minnesota & Eastern Railroad Corporation’s construction of 280 miles of rail line and an additional upgrade to 600 miles of existing rail line in Minnesota and South Dakota.⁷⁴ One of the petitioner’s assertions was that the Board should have considered issues raised by a train derailment in Maryland that released toxic materials, and the terrorist attacks on September 11, 2001, in a supplemental EIS.⁷⁵ The Board contended that the project would actually increase safety “because it

⁶⁹ *Id.* at 1086.

⁷⁰ *Id.* at 1089 (quoting *No GWEN Alliance of Lane County, Inc. v. Aldridge*, 855 F.2d 1380, 1385 (9th Cir. 1988)).

⁷¹ *Id.* at 1089-90 (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)).

⁷² *Id.* at 1091.

⁷³ 345 F.3d 520 (8th Cir. 2003).

⁷⁴ *Id.* at 532.

⁷⁵ *Id.* at 543.

entailed system-wide improvements to existing track.”⁷⁶ The Board also noted that the two incidents (the train derailment and the September 11 attacks) did not pose a specific threat to the areas in which the project was located.⁷⁷

The court began its analysis by stating that an agency’s EIS does not need to be supplemented every time additional information is brought to light.⁷⁸ “To require otherwise would render agency decision-making intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”⁷⁹ As such, denials of requests to supplement an EIS are reviewed with the rule of reason.⁸⁰ The court went on to say that deference should be given to the agency as long as the decision was not arbitrary or capricious.⁸¹ Following these statements, the court held that “the Board exercised its permissible discretion when it determined that any increased threat was general in nature and did not bear specifically on . . . the proposed DM & E project.”⁸²

With this legal background, the Third Circuit addressed the issues presented in the instant case.

IV. INSTANT DECISION

The Third Circuit focused on two flaws in the NJDEP’s argument in reaching its holding, stating that each by itself was enough to support the lower court’s decision.⁸³

⁷⁶ *Id.* at 543-44.

⁷⁷ *Id.* at 544.

⁷⁸ *Id.* (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 363 (1989)).

⁷⁹ *Id.* (internal quotation marks omitted) (quoting *Marsh*, 490 U.S. at 373).

⁸⁰ *Id.* (citing *Marsh*, 490 U.S. at 374).

⁸¹ *Id.* (citing *Marsh*, 490 U.S. at 377).

⁸² *Id.*

⁸³ *N.J. Dep’t of Env’tl Prot. v. NRC*, 561 F.3d 132, 136 (3d Cir. 2009). A third issue regarding the standard of review was discussed by the court, but no decision was made. *Id.* at 137 n.4. Both the NRC and AmerGen argued that the court should use the “arbitrary and capricious standard” that is required by the Administrative Procedure Act, while NJDEP contended that since the NRC’s decision was one of law, the court should

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The first failure in the NJDEP's argument, according to the court, was that it did not show that there was a reasonably close causal relationship between the environmental impact of a terrorist attack and the Oyster Creek relicensing proceedings.⁸⁴ The court began its discussion of this issue by drawing rules of law out of two Supreme Court decisions regarding the circumstances in which the NEPA requires a governmental agency to prepare an EIS.⁸⁵ First, the court noted that in determining "when NEPA requires consideration of a particular environmental effect, agencies and reviewing courts 'must look at the relationship between that effect and the change in the physical environment caused by the major federal action at issue.'"⁸⁶ Following this, the court said that a reasonably close causal relationship is required before the NEPA will require an agency to prepare an EIS.⁸⁷ Second, the court observed that when an agency's action is considered a cause of an environmental effect, and the agency has no authority to prevent the effect, it is considered a "but for" cause; a "but for cause" is not enough to delegate responsibility for that effect to the agency under the NEPA.⁸⁸ With these rules in mind, the court stated that the NRC had no authority over the airspace above its facilities, indicating that an aircraft attack would be beyond the reasonably close causal relationship required for the NEPA to attach.⁸⁹

The court went on to analyze the issue under traditional tort law concepts of causation, and then applied those concepts to a situation in which the NRC would play the role of the negligent party.⁹⁰ The court concluded that the act of a third party, in this case a terrorist attacking Oyster Creek in an airplane, would be a superseding cause; and as such, under traditional tort law concepts of causation, the NRC would not be

apply the "reasonableness standard." *Id.* The court declined to rule on this issue since the NRC's decision would stand under either standard of review. *Id.*

⁸⁴ *Id.* at 136.

⁸⁵ *Id.* at 137.

⁸⁶ *Id.* (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 773 (1983)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 139 (quoting *Metro. Edison Co.*, 460 U.S. at 767).

⁸⁹ *Id.* at 139-40.

⁹⁰ *Id.* at 140.

responsible for the effect of the attack.⁹¹ The court further supported its argument by discussing *Port Authority of New York & New Jersey* in which the Third Circuit said that “the World Trade Center bombing was not a natural or probable consequence of any design defect in defendants’ products . . . [and] the terrorists’ actions were superseding and intervening events breaking the chain of causation.”⁹²

Next, the court noted that it was rejecting the decision of the Ninth Circuit in *Mothers for Peace*. In *Mothers for Peace*, the Ninth Circuit abandoned the reasonably close causal relationship test of the Supreme Court.⁹³ In *New Jersey Department of Environmental Protection*, the Third Circuit stated that the Supreme Court’s test was still the rule of law in the Third Circuit, and it also noted that the Ninth Circuit was the only one in which the test was abandoned.⁹⁴ The Third Circuit also said that *Mothers for Peace* could be distinguished from the instant case because it involved the proposed construction of a new facility.⁹⁵ The court acknowledged that this change to the physical environment could arguably hold “a closer causal relationship to a potential terrorist attack than the mere relicensing of an existing facility.”⁹⁶

Finally, the court rejected the assertion that the NRC’s other efforts to prevent terrorist attacks were relevant to the issue of whether there was a close causal relationship between the environmental impact of a terrorist attack and the Oyster Creek relicensing proceedings.⁹⁷ The court relied on, rather than rejecting, a Ninth Circuit decision that held “precautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis.”⁹⁸ Taking into account all of the preceding discussion,

⁹¹ *Id.* at 140-41.

⁹² *Id.* at 141 (internal quotation marks omitted) (quoting *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305, 319 (3d Cir. 1999)).

⁹³ *Id.* at 142 n.10 (citing *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 143.

⁹⁸ *Id.* (citing *Ground Zero Ctr. for Non-Violent Action v. Dep’t of the Navy*, 383 F.3d 1082, 1090-91 (9th Cir. 2004)).

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the court held that the NRC was correct in deciding that a reasonably close causal relationship did not exist between Oyster Creek's relicensing and the environmental effects that would be caused by a terrorist attack.⁹⁹

The court went on to discuss the second flaw in the NJDEP's argument, which was that the NRC had already made an assessment of the environmental effects of a hypothetical terrorist attack on a nuclear facility.¹⁰⁰ The court said that the NRC addressed the risk of a terrorist attack in its GEIS, and concluded that even though the risk was impossible to quantify it was still relatively small.¹⁰¹ The court also found that the GEIS said that if such an event were to occur, the effects would be no different than those expected from an internal malfunction.¹⁰² Additionally, the court pointed to the fact that the NRC's SEIS analyzed alternatives to mitigate severe accidents at Oyster Creek.¹⁰³ The court said that these two statements, taken together, "provide both generic and site-specific analyses of potential environmental impacts at Oyster Creek arising from terrorist attacks."¹⁰⁴ Furthermore, the court found that the NJDEP failed to provide evidence to suggest that the NRC could have engaged in a more meaningful analysis of the risks of an attack, which it was required to do according to *Limerick Ecology Action v. NRC*.¹⁰⁵ The court stated that since the NJDEP had failed to meet that burden, it did not present an admissible contention before the NRC.¹⁰⁶

Ultimately, the court concluded that the NJDEP did not show that a reasonably close causal relationship existed between the environmental effects of a hypothetical terrorist aircraft attack and the Oyster Creek relicensing proceeding.¹⁰⁷ As such, a NEPA evaluation was not required in the court's view.¹⁰⁸ Additionally, the NRC already addressed the

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 144.

¹⁰⁵ *Id.* (citing *Limerick Ecology Action v. NRC*, 869 F.2d 719, 744 (3d Cir. 1989)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 143.

¹⁰⁸ *Id.* at 136.

environmental effects of a terrorist attack in both its GEIS and SEIS.¹⁰⁹ Since the NJDEP did not provide any evidence to show that the NRC could have undertaken a more meaningful analysis of these risks, it did not present an admissible contention before the NRC.¹¹⁰

V. COMMENT

The issue presented in *New Jersey Department of Environmental Protection* appears, at first glance, to be simple and straightforward: should the NRC, before issuing a license to a nuclear plant, be required to assess the environmental impact of an airborne terrorist attack? It seems that most Americans would answer in the affirmative, particularly in the wake of the September 11 attacks and the fear of a nuclear disaster. However, as the foregoing discussion will show, the issue really is not so clear-cut, especially when one observes the lack of abilities of the NRC to prevent a potential terrorist attack. The proceeding comment will discuss the current split in authority surrounding this issue, as well as the potential effects of the NRC's increase in security regulations aimed at dealing with an attack. It will conclude with a brief discussion on the implications for Missouri and the lack of a Supreme Court decision regarding this particular issue.

A. Split Decision

As mentioned, *New Jersey Department of Environmental Protection* presents a split in authority among the various circuits of the U.S. Court of Appeals concerning the NEPA requirements.¹¹¹ In holding that the NEPA does not require the NRC to prepare an EIS concerning the effect of an airborne terrorist attack on a nuclear facility, the Third Circuit followed the decisions of several other circuits similarly finding no requirement in the NEPA to analyze the environmental effects of third

¹⁰⁹ *Id.* at 144.

¹¹⁰ *Id.*

¹¹¹ Robert I. McMurry et al., *NEPA in 2009: The National Environmental Policy Act: New Challenges and Applications*, SR004 A.L.I.-A.B.A. 369, 372-73 (2009).

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party sabotage.¹¹² The court's holding, along with precedent set in other circuits, conflicts with the decision of the Ninth Circuit in *Mothers for Peace*, which the Third Circuit specifically discussed and rejected.¹¹³ As a result, there are now two different controlling decisions on the same issue. The effect of this split is to create different requirements for the NRC to follow when issuing a license to a nuclear power plant, with the only reason for the distinction between the two sets of requirements being the location of the nuclear plant. Such a distinction would appear to be trivial; but when one looks at the likelihood of a terrorist attack, and the NRC's ability to prevent it, the Third Circuit's decision seems to be the more logical approach.

B. *Prior NRC Actions and Its Current Responsibilities*

There is no doubt that nuclear power plants would be considered by terrorists to be prime targets for airborne attacks.¹¹⁴ Indeed, “[m]ost existing nuclear power plants were not specifically designed to withstand crashes from large jetliners.”¹¹⁵ Since the September 11 attacks, Congress and the NRC have taken extensive efforts to increase the security of nuclear power plants. In December 2008, the NRC imposed a series of new regulations requiring plants to develop new strategies for handling the

¹¹² *N.J. Dep't of Envtl Prot.*, 561 F.3d at 142-43; see also *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003) (stating that the Board's decision was within its permissible discretion and not arbitrary or capricious in declining to supplement an EIS in the wake of September 11, 2001 terrorist attacks); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 743 (3d Cir. 1989) (upholding an NRC decision not to analyze risks of sabotage because the risk could not properly be assessed and petitioner presented no meaningful method to do so); *Glass Packaging Inst. v. Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984) (upholding an agency decision not to issue an EIS on potential criminal tampering with bottles); *City of New York v. Dep't of Transp.*, 715 F.2d 732, 750 (2d Cir. 1983) (finding the Department of Transportation's decision that “risks of sabotage were too far afield for consideration” in a NEPA analysis justified).

¹¹³ *N.J. Dep't of Envtl Prot.*, 561 F.3d at 142.

¹¹⁴ In his January 2002 State of the Union speech, President Bush said that U.S. forces “found diagrams of American nuclear power plants” in al-Qaeda materials in Afghanistan. President George W. Bush, State of the Union Address (Jan. 29, 2002).

¹¹⁵ HOLT & ANDREWS, *supra* note 2, at 1.

effects of an aircraft crash and to improve training for security personnel.¹¹⁶ Additionally, in February of 2009, the NRC began requiring any new nuclear facility to be capable of withstanding the collision of a large airplane without releasing radioactivity.¹¹⁷

With all of the NRC's increased security regulations, one could make the assumption that the NRC is recognizing the possibility of a terrorist attack, and as such should be responsible for conducting a NEPA analysis of that risk. However, recognizing the possibility that an event will occur and preparing for it does not trigger a responsibility to base one's final decision on that possibility. Both the Third Circuit and Ninth Circuit recognized this principle.¹¹⁸

To illustrate this point, consider a typical law student, who most likely rents his/her respective residence while still in school. Most law students recognize the chance that their personal property could be destroyed by arson or stolen while they are spending long hours in the library. As such, it would be prudent for them to purchase renter's insurance to protect the value of their personal property. Such an act can be characterized as recognizing and preparing for an event. However, simply purchasing renter's insurance does not trigger a responsibility on the student's part to choose an apartment based on the possibility of arson or burglary occurring at that location. Admittedly, this situation is very different from the instant case, but the same basic principles hold true. In recognizing and preparing for a terrorist attack, the NRC has not triggered a duty to consider the possibility of such an event in its decision to relicense a nuclear facility.

Along these lines, all of the NRC's increased security regulations show that the NRC is only responsible for mitigating the chances that such an attack will succeed once it is commenced. There is no indication that the NRC is responsible for preventing the planning or implementation of

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2.

¹¹⁸ *N.J. Dep't of Env'tl Prot.*, 561 F.3d at 143 (“[P]recautionary actions to guard against a particular risk do not trigger a duty to perform a NEPA analysis.” (citing *Ground Zero Ctr. for Non-Violent Action v. Dep't of the Navy*, 383 F.3d 1082, 1090-91 (9th Cir. 2004))).

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terrorist attacks on the facilities it oversees. Those responsibilities fall upon other governmental agencies, such as the FBI, the Department of Homeland Security, the Department of Defense, and the Federal Aviation Administration.¹¹⁹ To suggest that the NRC would be responsible for such things would enlarge its regulatory power beyond both the agency's financial resources and its intended scope of power.¹²⁰ This was one of the arguments the court was making in *New Jersey Department of Environmental Protection* when it discussed the Supreme Court's holding in *Public Citizen*, which said that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."¹²¹

Returning to the hypothetical law student, even though a student has purchased renter's insurance, he/she cannot be considered a "cause" of an arson or burglary when there was nothing he/she could do to prevent it. The same can be said for the NRC, which has no power or authority to prevent an airborne terrorist attack. All it can do is prepare for the event and attempt to mitigate the resulting damage as much as possible, much like law students who purchase renter's insurance. Accordingly, the Third Circuit was correct in holding that there was no reasonably close causal relationship between the NRC's relicensing of Oyster Creek and a potential terrorist attack, since the NRC could not be said to have triggered a responsibility to perform a NEPA analysis when it prepared for such an attack and it lacked the power to prevent it.

C. *The Implications for Missouri*

Since Missouri is located within the Eighth Circuit of the U.S. Court of Appeals, that court's precedent controls the NRC's actions in relicensing nuclear power plants located within the state.¹²² The only

¹¹⁹ *Id.* at 141.

¹²⁰ *Id.*

¹²¹ *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004).

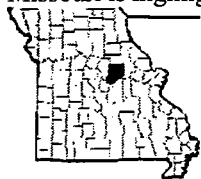
¹²² *See* U.S. Courts, Circuit Map, <http://www.uscourts.gov/courtlinks/> (last visited Feb. 21, 2009).

nuclear power reactor currently functioning in Missouri is located in Callaway County.¹²³ The Callaway Plant was issued its license on October 18, 1984, and the license is valid until October 18, 2024.¹²⁴ As such, it seems unlikely that there will still be a split in authority regarding whether the NEPA requires the NRC to prepare an EIS on potential airborne terrorist attacks once the Callaway Plant's license is up for renewal. However, it is important to note that in 2007 the Supreme Court declined to review the decision in *Mothers for Peace*.¹²⁵ One can speculate that the Supreme Court's denial of certiorari in *Mothers for Peace* combined with the Third Circuit's decision in *New Jersey Department of Environmental Protection* will soon force the Supreme Court to settle the split between the circuits.

Yet, if the circuit split remains at the time the Callaway Plant's license is up for renewal, the issue will be one of first impression for the Eighth Circuit. Among the cases decided by the Eighth Circuit, the most analogous to *New Jersey Department of Environmental Protection* is *Surface Transportation Board*, in which the court upheld a Board's decision declining to supplement a previously issued EIS in the wake of the September 11 attacks because "any increased threat was general in nature and did not bear specifically on" the proposed project.¹²⁶

While *Surface Transportation Board* can be distinguished from *New Jersey Department of Environmental Protection*, there are a number

¹²³ See U.S. NRC, Callaway Plant, Unit 1, <http://www.nrc.gov/info-finder/reactor/call.html> (last visited Feb. 21, 2009). The location of Callaway County in Missouri is highlighted in red below:



¹²⁴ *Id.*

¹²⁵ John H. Stam & Mike Ferullo, *Radioactive Waste: U.S. Supreme Court Declines to Review Case on Terror Assessment in NEPA Review*, DAILY ENV'T REP. (BNA), Jan. 17, 2007, at A-1.

¹²⁶ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003).

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of similarities that warrant attention. First, both cases involved an agency's responsibility under the NEPA to consider the threat of a potential terrorist attack in the form of an EIS. Second, the responsible agency in both cases declined to include such an assessment because the risk was general in nature and too remote from the proposed action. Finally, in both cases the responsible agency had already analyzed the potential risk of a terrorist attack before deciding not to include a more detailed analysis in the form of an EIS. When one looks at the similarities between the two cases, it is likely that if a case like *New Jersey Department of Environmental Protection* came before the Eighth Circuit, then it would be decided in a similar manner.

Another factor that supports this assertion is that the Eighth Circuit specifically said in *Surface Transportation Board* that it applies the "rule of reason" when reviewing an agency's denial to supplement an EIS.¹²⁷ In *New Jersey Department of Environmental Protection*, the Third Circuit stated that it was rejecting the decision in *Mothers for Peace*, partly because the Ninth Circuit had abandoned the Supreme Court's "rule of reason" test.¹²⁸ This suggests that since the Eighth Circuit has already decided a case similar to *New Jersey Department of Environmental Protection* using the "rule of reason" test, and the Third Circuit's decision also applied the test (while rejecting another decision that abandoned the test), the Eighth Circuit is likely to decide a case like *New Jersey Department of Environmental Protection* in the same way as the Third Circuit. Still, the issue is currently undecided in Missouri, and will remain so until either the Supreme Court or the Eighth Circuit rules on it.

VI. CONCLUSION

The Third Circuit's decision that NEPA does not require the NRC to prepare an EIS concerning a hypothetical terrorist attack, contrary to an earlier ruling by the Ninth Circuit, recognizes the NRC's lack of control over preventing such an attack. Given the NRC's inability to thwart these

¹²⁷ *Id.* (citing *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989)).

¹²⁸ *N.J. Dep't of Env'tl Prot. v. NRC*, 561 F.3d 132, 142 (3d Cir. 2009) (construing *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006)).

threats, it would be irrational to require it to consider such a possibility when relicensing a nuclear power plant. Still, the current split in authority shows that there is a clear need for the Supreme Court to review this issue, despite the Court's reluctance to grant certiorari in *Mothers for Peace*. Without a clear resolution, the NRC is left with two different requirements to follow when licensing a nuclear power plant, with the only distinction being the federal circuit in which the particular facility is located.

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