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, INC.,

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

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

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October 24, 2007

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I certify that Petitioners Public Citizen, Inc., and San Luis Obispo Mothers for Peace, Inc., are non-profit corporations. Neither Public Citizen, Inc., nor San Luis Obispo Mothers for Peace, Inc., has a parent company and no publicly held company has an ownership interest in either corporation.

October 24, 2007

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

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JURISDICTION

This is a petition for review of a final rule issued by the Nuclear Regulatory Commission (NRC) amending the NRC's "design basis threat" (DBT) regulations (10 C.F.R. Part 73), which define the threats of terrorist activity against which nuclear power plants and certain other NRC licensees are required to defend their facilities. The final DBT rule is "dated" March 13, 2007, but was published in the Federal Register (FR) on March 19, 2007. Petitioners Public Citizen, Inc., and San Luis Obispo Mothers for Peace, Inc. (MFP), filed their petition for review on May 11, 2007, less than 60 days after the ostensible date of the final DBT rule.

This Court has jurisdiction under 42 U.S.C. § 2239(b)(1) and 28 U.S.C. §§ 2342(4) & 2344.

STATEMENT OF ISSUES

1. Whether the NRC's DBT rule is arbitrary and capricious or contrary to law in that it requires NRC licensees to defend nuclear power plants only against attacks by "the largest adversary against which the Commission believes private security forces can reasonably be expected to defend," 72 FR 12705, 12714 (ER 10), rather than requiring measures that are adequate to protect the health and safety of the public.

2. Whether the NRC's refusal to require defensive measures against air attacks in the DBT rule, despite an express congressional directive that it consider

the threat of such attacks in promulgating the rule, is arbitrary and capricious or contrary to law.

3. Whether the NRC violated procedural rulemaking requirements by considering comments and communications outside the rulemaking record in establishing the DBT rule's requirements.

4. Whether the NRC violated the National Environmental Policy Act by not preparing an Environmental Impact Statement for the DBT Rule.

STATEMENT OF THE CASE AND FACTS

A. History of the Design Basis Threat Regulation

Since the enactment of the Atomic Energy Act of 1954 (AEA), Pub. L. No. 83-703, 68 Stat. 919 (Aug. 30, 1954), *codified as amended at* 42 U.S.C. § 2011 *et seq.*, the NRC and its predecessor agency, the Atomic Energy Commission, have been charged with the responsibility not only to license civilian nuclear energy facilities, but also to "regulat[e] … the production and utilization of atomic energy and of the facilities used in connection therewith … to assure the common defense and security and to protect the health and safety of the public." 42 U.S.C. § 2012(e). The most fundamental duty that the AEA imposes on the Commission is to "ensure that any use or production of nuclear materials 'provide[s] adequate protection to the health or safety of the public.'" *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 114 (D.C. Cir. 1987) (quoting 42 U.S.C. § 2232(a)).

Among the measures the NRC has taken to fulfill this statutory duty is the promulgation of the DBT rule, a formal regulation defining the threats against which nuclear power facilities must have plans to protect themselves. The DBT regulation, 10 C.F.R. § 73.1, specifies "design basis threats" of "radiological sabotage" and "theft or diversion of special nuclear material" that operators of licensed facilities must be prepared to counter. Under the DBT regulation, for example, a licensed facility must have plans to withstand a "determined violent external assault" by individuals who possess "military training," have "inside assistance," are armed with "hand-held automatic weapons," carry "incapacitating agents and explosives," and use a "land … vehicle" for transport. 10 C.F.R. § 73.1(a)(1)(i). The DBT regulation was updated in 1994, after the truck-bombing of the World Trade Center, to "include use of a land vehicle by adversaries for transporting personnel and their hand-carried equipment to the proximity of vital areas and to include a land vehicle bomb." 59 FR 38889 (Aug. 1, 1994) (ER 165).

Following the attacks of September 11, 2001, the security of nuclear facilities, and in particular their vulnerability to 9/11-style suicide air attacks, again became an issue of intense public scrutiny. The NRC responded by reevaluating security needs at those facilities, but did so in a way that foreclosed effective public participation in the regulatory process. On April 29, 2003, without prior notice or opportunity for public comment, the NRC issued three "orders"

announcing that, on the basis of its internal review of security measures and its consultations with other government agencies and nuclear industry representatives, it had "determined that a revision is needed to the Design Basis Threat (DBT) specified in 10 C.F.R. § 73.1," and that it was therefore "imposing a revised DBT" as set forth in secret attachments to the orders. *See* Orders Modifying Licenses, 68 FR 24517 (May 7, 2003); 68 FR 26675 (May 16, 2003); 68 FR 26676 (May 16, 2003). On June 30, 2003, Public Citizen and MFP filed a petition for review of the orders in the D.C. Circuit on the ground that, in issuing the orders that purported to revise the DBT regulation, the NRC had engaged in rulemaking without complying with the procedural requirements of the Administrative Procedure Act, 5 U.S.C. § 553, the Atomic Energy Act, 42 U.S.C. § 2239, and the agency's regulations, 10 C.F.R. §§ 2.800 *et seq*. (ER 239). After full briefing in the case, the NRC informed the Court that it intended to commence a rulemaking proceeding to revise the DBT. *See* Letter from Jared K. Heck, Office of the General Counsel, NRC, to Mark Langer, Clerk of Court, U.S. Court of Appeals for the D.C. Circuit (Sept. 7, 2004) (ER 325). The case was then held in abeyance (with periodic status reports to the Court) pending the NRC's completion of the lengthy process of drafting a new DBT rule, issuing a notice of proposed rulemaking, receiving public comment, and finalizing a revised DBT rule. *See Order*, U.S. Court of Appeals for

the D.C. Circuit, entered in *Public Citizen v. NRC*, No. 03-1181 (Sept. 17, 2004) (ER 331).

The NRC was not the only entity that believed security requirements needed to be modified to fit a post-9/11 world. On July 23, 2004, the Committee to Bridge the Gap (CBG), a non-profit nuclear policy organization, petitioned the NRC to update its DBT regulations to "a level that encompasses, with a sufficient margin of safety, the terrorist capabilities evidenced by the attacks of September 11, 2001." CBG, *Petition for Rulemaking*, at 1 (July 23, 2004) (ER 70) (emphasis omitted). In particular, CBG sought a revision of the DBT rule to include attacks by air and attacks "at least equal to the nineteen terrorists involved in the 9/11 attacks in numbers, capacity, ruthlessness, dedication, skills, planning, and willingness to die and create large numbers of casualties." *Id*. CBG also proposed requiring construction at reactor sites of "beamhenges," shields of I-beams and cabling built around vulnerable structures on nuclear plant sites that would protect those structures from attacks by airplanes. *Id*. at 1-2. The NRC published a notice of receipt of CBG's petition and a request for comments in the Federal Register on November 8, 2004. *See* 69 FR 64690 (ER 343).

Congress also recognized the need for the NRC to conduct a rulemaking to update the DBT regulation in light of the events of September 11. On August 8, 2005, the President signed into law the Energy Policy Act of 2005, Pub. L. No.

109-58, 119 Stat. 594, which mandated that, within 90 days, the NRC "initiate a rulemaking proceeding, including notice and opportunity for public comment, to be completed not later than 18 months after that date, to revise the design basis threats of the Commission." *Id*. § 651, *codified at* 42 U.S.C. § 2210e. The Act specifically listed 12 factors that the NRC had to consider in conducting its rulemaking, including "the events of September 11, 2001," "the potential for attack on facilities by multiple coordinated teams of a large number of individuals," and "the potential for water-based and air-based threats." 42 U.S.C. § 2210e(b).

B. The Proposed Rule

On November 7, 2005, the NRC published a notice of proposed rulemaking to revise the DBT. *See* 70 FR 67380 (ER 716). According to the notice, the "principal objectives of the proposed rule" were "to make generically applicable the security requirements previously imposed by the Commission's April 29, 2003 DBT orders" and "to define in NRC regulations the level of security necessary to ensure adequate protection of the public health and safety and common defense and security." *Id*. at 67381. The proposed rule described the DBTs in general terms and explained that more specific details were contained in adversary characteristic documents that contained classified and safeguards information and could not be disclosed. *Id*. at 67382.

The notice explained that the proposed rule's requirements were already contained in existing NRC regulations and orders, *id,* and stated that the NRC had imposed the 2003 orders after "soliciting and receiving comments from Federal, State, local agencies, and industry stakeholders." *Id.* at 67380. After "gaining experience under these orders over the past two years," the notice stated, "the Commission believes that the attributes of the orders should be generically imposed on certain classes of licenses." *Id*. at 67381.

The notice claimed that the NRC was "giving consideration" to the 12 factors in the Energy Policy Act of 2005, *id*., and that it was granting in part CBG's petition for rulemaking. *Id*. at 67385. However, in spite of Congress's explicit instruction that, in promulgating a revised DBT rule, the Commission consider "the potential for … air-based threats," 42 U.S.C. § 2210e(b)(6), the Commission's notice acknowledged that this factor was "not included in the proposed rule," which included "no provision … for an attribute of air-based threats." 70 FR at 67382. Instead of addressing each of the enumerated factors, the NRC invited comment on "*whether* or how the 12 factors should be addressed in the DBT rule," *id.* (emphasis added), and it "defer[red]" any discussion of "the defense of nuclear power plants against aircraft" until its "final action on this proposed rule." *Id.* at 67385.

In addition, although the notice claimed that "[a]n important part of [the agency's security] review was the consideration of a terrorist attack similar to that which occurred on September 11, 2001," it then stated that, "[h]owever, the DBT is based upon review and analysis of actual demonstrated adversary characteristics in a range of terrorist attacks, and a determination as to the attacks against which a private security force could reasonably be expected to defend." *Id.* The notice did not make clear whether it was requiring licensees to defend against attacking forces at least as large as the terrorist teams assembled on 9/11, nor did it explain how the "reasonableness" limitation affected the proposed DBT rule's definition of the size of the attacking force against which licensees would be required to defend.

Finally, the notice noted that the NRC had conducted an Environmental Assessment and had determined that the proposed rule, if adopted, would not be a major federal action significantly affecting the quality of the human environment and that, therefore, the National Environmental Policy Act (NEPA) did not require preparation of an Environmental Impact Statement (EIS). *Id*. at 67386-87. The Environmental Assessment conducted by the NRC found that the proposed rule would have no environmental impact because "the proposed rule requirements would not impose new requirements beyond those already imposed through the DBT orders." NRC, *Environmental Assessment Supporting Proposed Rule* (Nov. 2005), at vii (ER 711).

In its comments on the notice of proposed rulemaking, petitioner MFP pointed out that although the NRC had claimed to have partially granted CBG's petition, the revised DBT did not include crucial elements of the September 11, 2001, attacks, such as the capacity of the attackers to strike by air. *Comments of MFP* (submitted Jan. 23, 2006, corrected March 1, 2006), at 1 (ER 926). Moreover, MFP commented that the NRC's limitation of the scope of the DBT to "attacks against which a private security force could reasonably be expected to defend" implied that the scope had been determined by cost considerations, which are inappropriate to consider in determining what measures are necessary for the protection of the public. *Id.* To the extent the NRC relied on considerations other than cost in determining what measures could reasonably be expected of a licensee, MFP pointed out, the NRC gave the public "no hint of what those considerations might be." *Id.* Further, MFP explained that the NRC needed to prepare an EIS for the proposed rule, noting that "the fact that these generic regulatory requirements were once imposed on individual licensees through plant specific enforcement orders does not affect NEPA's applicability to the rulemaking." *Supplemental Comments of MFP* (Feb. 22, 2006), at 3 (ER 907).

Petitioner Public Citizen, in comments filed together with CBG, also pointed out that the NRC's proposed rule did not increase security to a degree consistent with the threat environment of the post-September 11 era and noted that it was

inappropriate to lower safety requirements based on considerations of burdens on industry. *Comments of CBG and Public Citizen* (Jan. 23, 2006) (ER 847). In addition, it objected to the NRC's deferring consideration of air attacks until the final rule, pointing out that failing to describe proposed action until after the comment period closed made meaningful comment impossible. *Id*. at 4 (ER 850). The comments further stated that an adequate DBT must include an attacking force at least as large as the 19 attackers on September 11 and must address the need to protect nuclear facilities against air attack. *Id*. at 5-6 (ER 851-52). Public Citizen and CBG continued to advocate requiring beamhenges to protect nuclear facilities from aerial attacks. *Id*. at 6.

C. The Final Rule

The NRC published its final rule in the Federal Register on March 19, 2007. 72 FR 12705 (ER 1). Although the Commission made some changes in the language of the proposed rule (adding, for example, a provision requiring defense against the threat of cyber-attacks), the agency made no changes in response to comments that had challenged its refusal to conduct an EIS and its failure to require a defense against attacking forces as large as those assembled by al Qaeda on 9/11 and against the threat of suicide attacks by large aircraft. Indeed, the Commission explicitly declined to require a defense against a force as large as that

involved in the 9/11 attacks (72 FR at 12708), and it refused to incorporate any provisions concerning air attacks in the DBT (*id.* at 12710-11).

1. The Size of the Attacking Force and the Commission's "Reasonableness" Limit on the DBT

Throughout the preamble to the final rule, the Commission emphasized that a fundamental principle animating the DBT was that it would require a licensee to do no more than defend against attacks that a private security force could reasonably be expected to counter. As the agency put it, "The Commission has determined that the DBTs, as articulated in the rule, are based on adversary characteristics against which a private security force can reasonably be expected to defend." 72 FR at 12713.

The agency provided only one example of what might make it "unreasonable" to expect a private security force to respond to a threat: that there are "legal limitations" on the types of weapons and defensive systems available to private security forces. "Thus," the agency asserted, "it would be unreasonable to establish a DBT that could only be defended against with weapons unavailable to private security forces." *Id*. at 12714. As discussed further below, the agency invoked this consideration to explain its refusal to require licensees to use antiaircraft weapons to defend against air attacks. *See id.* at 12710. But the agency also invoked the reasonableness limitation with respect to the *size* of the

attacking force against which it would require licensees to defend, *see id*. at 12714, a context in which "legal limitations" on weaponry are not relevant.

Specifically, the agency stated that it "disagreed" with comments that urged it to make clear that licensees were required to defend against an attacking force *at least* as large as the 19 attackers assembled by al Qaeda on September 11, 2001. *Id.* at 12708.[1] Instead, the Commission stated that the limit on the size of the attacking forces incorporated in the DBT was based on the "reasonableness" concept: The DBT, in the Commission's words, "represents the largest adversary against which the Commission believes private security forces can reasonably be expected to defend." *Id*. at 12714.

The Commission insisted that its reasonableness limitation was not based on cost, which it acknowledged would be unlawful. *See id.* The Commission did not, however, explain how "reasonableness" figured into a limit on the *size* of the attacking force (and hence the size of the defending force) if it was not a cost-based consideration. The Commission also denied that the reasonableness limitation was a violation of its obligation to ensure adequate protection of the

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[1] These comments did not ask the Commission to say exactly how many attackers it was requiring licensees to defend against, as such a disclosure would create an obvious risk that an attacker would tailor the size of its force to exceed that specified in the rule. Rather, commenters urged the Commission to make clear that the DBT required defense against forces the size of the 9/11 attack groups, but not that it was limited to groups of that size.

public health and safety, but its explanation on this point amounted only to the assertion that adequate protection of safety and health somehow followed logically from the reasonableness limit:

> 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. Thus, 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.

Id.

Elsewhere, the Commission appeared to acknowledge that the defense forces required by the DBT would not be "adequate" if attacked by a force larger than the Commission felt it was "reasonable" to expect a private security force to defend against, but it stated that it was "confident" that the defenders would still try their best if attacked by such a superior force:

> Within this requirement is the expectation that, if confronted by an adversary beyond its maximum legal capabilities, on-site security would continue to respond with a graded reduction in effectiveness. The Commission is confident that a licensee's security force would respond to any threat no matter the size or capabilities that may present itself.

Id.

2. The Commission's Refusal to Address Air Attacks

The Commission's entire explanation for its decision not to require defensive measures against air attacks in the DBT is set forth in two pages of the final rulemaking notice. *See* 72 FR at 12710-11. Even while explicitly

acknowledging that what it called "the airborne threat" (*id.*) to nuclear power plants is substantial and stating that it was not "discounting the airborne threat" (*id.* at 12710), the Commission stated that because "active protection against the airborne threat requires military weapons and ordnance that rightfully are the responsibilities of the Department of Defense (DOD), such as ground-based air defense missiles," it had concluded that "the airborne threat is one that is beyond what a private security force can reasonably be expected to defend against." *Id.* The Commission further asserted that "[b]eyond active protection, the Commission believes that some considerations involving airborne attack relate to the development of specific protective strategies and physical protection measures that are not within the scope of the DBTs." *Id.*[2]

The Commission also briefly discussed the efforts of other governmental agencies to improve airport and aircraft security and opined that these measures "g[o] a long way toward protecting the United States, including nuclear facilities, from an aerial attack." *Id.* The Commission did not, however, assert that these measures rendered the threat negligible or were themselves sufficient to meet the AEA's standard of "adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). Indeed, the agency acknowledged that the need to provide

[2] In explaining this point, however, the Commission reverted to its previous point that *active* air defense measures were the province of the military and that other measures, such as no-fly zones, were the responsibility of other agencies.

additional protection had led it to issue orders to existing nuclear power plant licensees requiring them to "develop specific plans and strategies to respond to a wide range of threats, including the impact of an aircraft attack." 72 FR at 12710. According to the agency, these orders and subsequent interactions between the Commission and its licensee focus on "mitigation strategies to limit the effects of" an air attack, *id.*, including "on-site mitigating actions" in response to "radiological release due to a terrorist use of a large aircraft against a nuclear power plant." *Id.* The Commission acknowledged that such releases were a possible consequence of such an attack, albeit one that the agency characterized as "unlikely." *Id.*

Finally, the Commission briefly addressed the principal alternative advocated by public commenters: namely, amending the DBT to require licensees to employ *passive* air defenses, such as "beamhenges" that would intercept incoming aircraft before they could reach critical structures such as a reactor's containment vessel or control buildings. *See id.* at 12711. The Commission first repeated that it had concluded "that active protection against the airborne threat rests with other organizations of the Federal government, such as NORTHCOM and NORAD, TSA, and FAA." *Id.* Second, the Commission again referred to the "mitigative measures to limit the effects of an aircraft strike" that it had directed licensees to take, and stated that it had "considered" also imposing "specific physical security measures such as the 'beamhenges' concept," but had "rejected

the concept because it believes that the mitigation measures in place are sufficient to ensure adequate protection of the public health and safety." *Id.* The Commission did not, however, find or even suggest that such physical security measures would be unworkable or ineffective to prevent the threat of damage to nuclear power plants resulting from an air attack.

SUMMARY OF ARGUMENT

When tested against general administrative-law requirements of rationality and coherence, as well as the NRC's fundamental statutory duty to provide adequate protection to the safety and health of the public, the DBT rule has two fatal substantive flaws: its limitation to threats against which a private security force can be "reasonably expected" to defend, and its failure to provide for any defensive measures against air attacks.

In providing that a nuclear power plant need not be able to defend itself against an attack force that is larger than a private security force can be reasonably expected to counter, the DBT rule is both arbitrary and capricious and contrary to law. One measure of its arbitrariness is the failure of the agency to provide any explanation, let alone a coherent one, of what would make it unreasonable to require a private security force to protect against an attacking force above a certain size. More disturbingly, it appears that the only sensible understanding of the limitation, at least as applied to the size of the attacking force, is that it permits

licensees to limit the protection of the public's health and safety based on cost considerations, which the agency itself concedes is not permitted under the AEA. And even if the "reasonableness" limitation could somehow be described as involving something other than cost considerations, the agency has completely failed to explain how the limitation is consistent with the agency's obligation to require adequate protection of the public safety and health. Indeed, the agency's "explanation" that requiring licensees to defend against the largest force that a private security force can reasonably be expected to defend against necessarily means that the public health and safety will be adequately protected is, on its face, illogical.

The agency's failure to require licensees to take protective measures against air attacks, in the face of an explicit congressional directive that the DBT rulemaking consider the airborne threat, is equally indefensible. By defining all measures that could be taken against air attacks, whether active or passive, as outside the scope of the DBT rulemaking, the agency has rendered meaningless the congressional command that it consider airborne threats *in* that rulemaking. Moreover, the Commission's rejection of the proposal that licensees be required to erect defensive structures such as beamhenges to protect against air attack is arbitrary and capricious in two respects: First, it rests in part on the non sequitur that licensees cannot lawfully employ antiaircraft weapons; and second, it depends

on an insufficiently explained and illogical preference for mitigation measures (*i.e*, evacuating affected populations and trying to contain and clean up radioactive releases after an air attack occurs) over preventive ones.

These substantive flaws in the DBT rulemaking are heightened by flaws in the rulemaking process. It is well established that a regulation must be based upon the record of the rulemaking proceeding and that the critical information and data on which the rule is based must be found in that record. Here, however, the agency admits that the specific requirements of the revised DBT rule (which are secret) are the result of consultations with industry stakeholders that preceded the rulemaking process. The substance of these communications, and the data and information the Commission derived from them and on which it based the rule, are nowhere to be found in the rulemaking record. Nonetheless, the agency's own statements in the final rulemaking notice reveal that these consultations informed, in critical respects, the agency's views on the key subjects of what threats a licensee's security force can reasonably be expected to defend against, and what mitigation measures licensees have taken or will take with respect to the consequences of air attacks. The absence of information on these subjects in the rulemaking record makes it all the more difficult to discern and understand the agency's explanations for adopting the "reasonableness" limitation on the DBT and for preferring "mitigation" to defense against air attacks. Even allowing for the limitations on

access to information regarding matters of national security in a rulemaking on this subject, the agency's acknowledged reliance on extra-record information in promulgating the rule, coupled with the apparent illogic of its explanations of what it has done, make it impossible for the results of the DBT rulemaking to be sustained using the standards of review under the Administrative Procedure Act (APA).

Finally, the NRC has failed to provide a coherent explanation of its failure to conduct an EIS. The Commission's contention that the rulemaking is not a major federal action because it replicates requirements previously imposed in a series of orders is no answer, because those orders themselves were issued without an EIS. An agency cannot avoid NEPA's requirements by ignoring them twice instead of just once. And the Commission's further rationale—that terrorist threats are too speculative to be considered in an EIS—has recently and definitively been rejected by this Court.

ARGUMENT

I. STANDARD OF REVIEW

The APA requires a court to "hold unlawful and set aside agency action" if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or if it was taken "without observance of procedure required by law." *Id.* § 706(2)(D). An action is arbitrary and capricious

or an abuse of discretion "if the agency has relied on factors that Congress has not intended it to consider, has entirely failed to consider an important aspect of the problem, or has offered an explanation for that decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1157 (9th Cir. 2006) (citing *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003), *amended by* 352 F.3d 1187 (9th Cir. 2003)); *accord Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

When promulgating a regulation using the notice-and-comment procedures of 5 U.S.C. § 553, an agency must provide a statement of the basis and purpose of its final rule that allows a court to conduct meaningful judicial review of the agency's action. *See* 5 U.S.C. § 553(c); *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (1968). The agency "must articulate the reason or reasons for its decision," *Pac. Coast Fed'n of Fishermen's Ass'ns v. U.S. Bur. of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005), and "articulate a rational connection between the facts found and the conclusions reached." *Earth Island Inst.*, 442 F.3d at 1156-57. When the agency fails to articulate such a rational connection, or when "the reasoning behind the agency's plan cannot be reasonably discerned," its action is arbitrary and capricious. *Pac. Coast Fed'n*, 426 F.3d at 1092. Similarly, an

agency's failure to address an important issue posed by its action renders the action arbitrary and capricious. *Ry. Labor Execs.' Ass'n v. ICC*, 784 F.2d 959, 971-72 (9th Cir. 1986).

In addition, "[t]he APA empowers [a court] to set aside an agency decision that is contrary to governing law," *Nw. Envtl. Def. Center v. BPA*, 477 F.3d 668, 682 (9th Cir. 2007), and, "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995). In determining whether an agency's action is contrary to law, a reviewing court must "review purely legal issues de novo." *Go Leasing, Inc. v. NTSB*, 800 F.2d 1514, 1517 (9th Cir.1986).[3] "We should not defer to an agency's interpretation of a statute if Congress' intent can be clearly ascertained through analysis of the language, purpose and structure of the statute." *Natural Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 877 (9th Cir. 2005). In such cases, the reviewing court must "reject

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[3] *Accord City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) ("We review de novo the question whether [the agency] complied with its statutory mandate."); *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1306 (9th Cir. 1997) ("An agency's interpretation of a statute … is a question of law that we review de novo.").

administrative orders that are contrary to congressional intent." *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir.1997).

In this case, the fundamental statutory mandate against which the NRC's action must be measured is the agency's obligation under the AEA to regulate licensees so as to "provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). The Commission may not stop short of requiring measures necessary to the adequate protection of the public on the basis of such other considerations as the cost or convenience of the licensee:

> 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.

Union of Concerned Scientists v. NRC, 824 F.2d at 114. In addition, in this rulemaking, the NRC was subject to a more specific statutory mandate that required it to "consider" twelve factors, including "(1) the events of September 11, 2001; … (3) the potential for attack on facilities by multiple coordinated teams of a large number of individuals; … [and] (6) the potential for water-based and air-based threats…." 42 U.S.C. § 2210e(b).

Thus, the Commission's action is "contrary to law" if it is based on consideration of costs or convenience to licensees rather than on adequate protection of the public health and safety, or if the agency has refused to consider

one or more of the factors set forth in 42 U.S.C. § 2210e(b). Moreover, even if the Commission has purported to base its regulation solely on the adequate protection standard and claimed that it has considered all the required factors, its regulation must be set aside as "arbitrary and capricious" if the agency has failed to supply a coherent explanation for its action that rationally accounts for how the required considerations support the rule without reference to impermissible considerations such as cost.

Finally, a court reviews an agency's compliance with "procedure required by law" (5 U.S.C. § 706(2)(D)) de novo. *Kern County Farm Bur. v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). The court's review, though limited to "ensuring that statutorily prescribed procedures have been followed," is "exacting," and the court "determine[s] the adequacy of the agency's notice and comment procedure, without deferring to an agency's own opinion of the ... opportunities it provided." *Id.*

II. THE SCOPE OF THE DESIGN BASIS THREAT RULE SHOULD NOT BE BASED ON WHAT A PRIVATE SECURITY FORCE CAN REASONABLY BE EXPECTED TO DEFEND AGAINST.

A. The NRC Has Not Adequately Explained How It Determines What a Private Security Force Can Reasonably Be Expected to Defend Against.

To meet its burden of providing a statement of the basis and purpose of its final rule that allows a court to conduct meaningful judicial review, *see* 5 U.S.C.

§ 553(c); *Auto. Parts & Accessories Ass'n*, 407 F.2d at 338, an agency must provide a coherent explanation of its action—its reasoning must be both discernible and rational. *See Pac. Coast Fed'n*, 426 F.3d at 1092. Because the DBT rule is written in general terms, with the specific details of the threats against which a nuclear licensee must defend contained in documents that are not made available to the public rather than in the regulation itself, it is particularly important that the agency make clear, without giving away classified or safeguards information, the criteria on which it based its final decision. The NRC has failed to do so.

The preamble to the final rule asserts that the scope of the DBT was "based on adversary characteristics against which a private security force could reasonably be expected to defend." 72 FR at 12713. However, it does not define "reasonable" or delineate what factors go into the agency's decision of whether it is reasonable to expect a private force to defend against a threat. The only example given in the final rule's preamble of what may make it unreasonable to expect a private security force to defend against a certain threat is that "[f]or instance, there are legal limitations on the types of weapons and tactics available to private security forces." 72 FR at 12714; *see also id.* at 12710 (explaining that the agency thinks it is unreasonable for private security forces to be expected to defend against airborne threats because it would require them to have military weapons and ordnance they

cannot legally obtain). Except for these asserted legal limitations, the agency gives no insight into what would make it reasonable or unreasonable to expect a private security force to defend against a threat, and therefore no hint of what factors went into determining the DBTs.

Nonetheless, the Commission invoked the "reasonableness" limitation not only in explaining why it did not require a defense against air threats, but also in explaining the limitations on the *size* of an attacking force against which a nuclear plant must provide a defense. According to the Commission, the DBT represents "the largest adversary force against which the Commission believes private security forces can reasonably be expected to defend." *Id*. at 12714. Legal limitations on the types of weapons that a private security force may possess, however, do not prevent a nuclear plant from employing guards in sufficient *numbers* to deter or defend against a large attacking force. The Commission's invocation of the "reasonableness" limitation with respect to the size of the attacking force thus strongly implies that, at some point, the Commission sees something "unreasonable" about requiring a licensee to employ enough guards to fight off an attacking force that exceeds some threshold size. But what could make such a requirement "unreasonable" (beyond the expense involved) is difficult to imagine, and the Commission provides no explanation.

Instead of explaining how the NRC decides whether a private security force can reasonably be expected to defend against a threat, the final rule's preamble states that "the requirements in the DBT rule are determined by the Commission's consideration of the staff's threat assessments based on coordination with [other] agencies, the Commission's considerable experience in these matters, and the legal limitations on security forces available to licensees." *Id.* at 12714. But the agency's claims that it has experience in this area and has conducted threat assessments are useless in determining whether the agency has made proper decisions about the scope of the DBT. A reviewing court cannot just trust that the agency has made proper assessments and has experience in the relevant topic area; it needs to be able to understand what the agency has done. *See Pac. Coast Fed'n*, 426 F.3d at 1092. The NRC has not provided a sufficient explanation of how it decides the scope of the DBTs for a court to be able to determine whether it engaged in reasoned decisionmaking.

B. The DBT Rule's Limitation to Threats Against Which a Licensee Can "Reasonably" Defend Unlawfully Limits Protection of the Public Based on Cost Considerations.

Without an explanation from the NRC about how it defines "reasonable," an obvious assumption is that the NRC, in deciding whether it is reasonable to require a private security force to defend against a threat, considers the cost to the licensee of protecting against that threat. For example, as noted above, there is no apparent

limitation, other than cost, on the number of guards a nuclear plant could employ to defend itself against an attacking force, but the Commission employed the reasonableness standard in deciding the number of attackers a licensee must be able to protect against. It thus appears that the NRC based the number of attackers a facility must be able to protect against on whether it would be "reasonable" to require employment of a security force of the size that would be necessary to protect against that many attackers. In other words, the Commission's explanation of the rule indicates that it decided that requiring facilities to hire more than a certain number of security officers would be unreasonable and that, therefore, it would be unreasonable to expect a private security force to defend against any number of attackers that would require the facility to hire that many security officers to ensure an adequate defense.

As the NRC itself concedes, however, the agency is not permitted to consider the cost of protection to the licensee when crafting regulations that are necessary to protect public health and safety. The goal of the DBT rule is "to ensure that the public health and safety and common defense and security are adequately protected," 72 FR at 12705, in accordance with the statutory mandate of 42 U.S.C. § 2232(a). "[I]n setting or enforcing the standard of 'adequate protection' … 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." *Union of Concerned Scientists*, 824 F.2d at 114. Cost considerations can only come into account when deciding whether to establish requirements beyond those necessary for adequate protection. *Id*.

The NRC recognizes that it cannot legally consider economic factors in determining the level of adequate protection and claims that it did not take cost considerations into account in "deciding what level of protection it considers to be adequate in this rulemaking." 72 FR at 12714. At the same time, however, it applauds its formulation of the DBT standard as providing it with flexibility, *id*. at 12713, and it concedes that its "determination of specific aspects of implementation of and compliance with the DBT rule, as described in the ACDs and regulatory guidance, may involve consideration, along with other factors, of the relative costs of various methods of implementing particular requirements of the DBTs." *Id*. at 12714. More importantly, the NRC's repeated invocation of the "reasonableness" standard in contexts where the only conceivable element of *unreasonableness* that would be involved in providing an adequate defense would be the cost of employing a sufficient defensive force indicates that the Commission's denial that it took costs into account cannot be credited by a reviewing court. If the reasonableness limitation, as a limit on the size of the

attacking force against which a licensee must defend, is *not* based on cost considerations, it is impossible to understand from the NRC's explanation of its actions what it *is* based on.

C. Basing the DBT on What a Licensee Can Reasonably Be Expected to Defend Against Does Not Ensure Adequate Protection of Public Health and Safety.

Even apart from the lack of clarity in the agency's definition of "reasonable" and its apparent illicit consideration of costs, the agency's decision to define DBTs based on the adversary characteristics against which a private security force could reasonably defend was arbitrary and capricious. The DBT rule is supposed to "redefine[] the level of security requirements necessary to ensure that the public health and safety and common defense and security are adequately protected." 72 FR at 12705. Determining the scope of DBTs by the abilities of the licensee's security force, rather than by the abilities of the potential attackers, fails to ensure that adequate protection. With DBTs based on the abilities of the licensee's security force, if a certain threat is one that the NRC decides is unreasonable for a private security force to defend against—based on whatever criteria the agency is using to determine reasonableness—then the licensee will not be expected to defend against that threat, even if it is a threat the licensee may face.

The NRC paid lip-service to its obligation to provide an adequate level of protection of the public health and safety, but it failed to explain how limiting

protection to that which a private security force may "reasonably" provide accomplishes this objective. Indeed, the Commission's attempt to explain how its "reasonableness" standard satisfies the statutory command that it provide adequate protection is a classic non sequitur:

> 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. Thus, 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.

Id. at 12714. Notwithstanding the Commission's use of the words "thus" and "thereby," the Commission's conclusion does not follow from its premise. As a matter of simple logic, it just does not follow that protecting against the largest adversary against which a private security force can "reasonably" be expected to defend will provide a reasonable assurance of an adequate defense. Indeed, if it is reasonably likely that a facility will be attacked by a *larger* force than the Commission believes it is reasonable to require private security forces to defend against, it follows that compliance with the DBT will assure that public health and safety are *not* adequately protected.

In other words, contrary to the preamble's statement, "when the DBT rule is used by licensees to design their site specific protective strategies," the NRC, and the public, are *not* "thereby provided with reasonable assurance that the public health and safety and common defense and security are adequately protected." *Id.*

There may be a large gap between what is required by a DBT rule based on what adversary characteristics the NRC has decided a private security force can reasonably be expected to defend against, and what would be objectively required to ensure adequate protection of the public health and safety. By simply equating the so-called reasonable capability of a private security force with an *adequate* defense, the Commission has failed to provide a coherent and rational justification for its rule.

In its response to comments, the NRC attempts to justify this gap by claiming it is reasonable to make "certain assumptions" about the shared responsibilities of the Department of Defense, Department of Homeland Security, Federal and State law enforcement agencies, and other agencies. *Id.* But the NRC provides no assurance that these agencies will, in fact, step into the gap and ensure adequate protection of public health and safety and common defense and security. The NRC's decision to base its DBT rule on what threats a private security force can reasonably be expected to defend against may leave threats against which *no one* is prepared to defend.

The NRC's other responses to comments similarly do not tackle the problems created by its formulation of the DBT rule. First, the NRC claims that basing the DBT on the adversary characteristics against which a private security force could reasonably be expected to defend provides it with "the flexibility

necessary to make reasoned, well-informed decisions," whereas "detailed, prescriptive criteria would be unduly restrictive, and would unnecessarily limit the Commission's judgment." *Id.* at 12713. But a standard based on objective security needs, like a standard based on what can reasonably be expected of a private security force, could be stated in a way that provides the agency with flexibility and is not unduly restrictive. The agency's desire for flexibility does not explain its decision not to require nuclear licensees to provide a level of protection that ensures public safety.

The NRC next explains that it considers it neither necessary nor prudent to require military forces to protect nuclear facilities, because the existence of private and public security forces at the same facility could create "command and control issues" that reduce safety, and because private nuclear security forces are well trained in the specific security concerns of nuclear facilities. *Id.* Neither of these rationales addresses threats outside the scope of the DBT rule that must be protected against to ensure adequate protection.

Finally, the NRC expresses its confidence "that a licensee's security force would respond to any threat no matter the size or capabilities that may present itself. … [and] use whatever resources are necessary in response to both DBT and beyond-DBT events." *Id.* at 12714. But the agency's confidence that private security forces will attempt to meet threats does not demonstrate that they will, in

fact, be able to meet those threats. Security officers' good intentions or even personal heroism do not ensure adequate safety protection in the face of a superior force. Custer's Last Stand is hardly a paradigm for effective nuclear plant security.

In short, although the agency claims confidence in the ability of its DBT rule to ensure adequate protection, it provides no assurance that its formulation of the rule will ensure that threats will, in actuality, be met. Instead of focusing on the NRC's assessment of the reasonableness of expecting private security forces to respond to threats, the DBT rules should provide an objective standard designed specifically to protect security.

III. THE FINAL RULE'S FAILURE TO REQUIRE PROTECTIVE MEASURES AGAINST AIR ATTACKS RENDERS IT ARBITRARY AND CAPRICIOUS AND CONTRARY TO LAW.

A. The Commission's Exclusion of Air Attacks from the "Scope" of the DBT Rulemaking Is Directly Contrary to Congress's Expressed Intent.

The Commission's stated reasons fail to satisfy its obligation to provide a coherent and rational explanation, consistent with its statutory mandates, for its refusal to include protection against air attacks in the DBT. To begin with, the congressional directive that the NRC's revision of the DBT include consideration of "the potential for … air-based threats" reflects an intention that, should the NRC find that such threats exist, it address them in the DBT rule. Nonetheless, the

Commission, even while acknowledging the existence and substantiality of the threat of air attack, declined to include responses to the threat in the DBT.

An agency's failure in a rulemaking proceeding to address issues that Congress has required it to consider in promulgating the rule renders its action both contrary to law and arbitrary and capricious. *See, e.g., Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005); *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216, 1221 (D.C. Cir. 2004). Moreover, it is not enough that an agency merely says that it has considered a factor: rather, the agency's "assertion that it also considered the remaining factors in promulgating its rules ….—where the regulation fails to reflect or account for those individualized concerns in any way—is insufficient to discharge the agency's duties, given that the list of required considerations is both mandatory and inclusive." *Levine v. Apker*, 455 F.3d 71, 85 n.9 (2d Cir. 2006). And although an agency may have discretion ultimately to choose not to address a statutorily enumerated factor in a regulation when Congress has required it to weigh *competing* or potentially *conflicting* considerations, that is not the case when, as in this case, Congress has provided a set of considerations that are consistent in the sense that a final regulation can address all of them: "The deference that might be appropriate in reviewing regulations enacted pursuant to conflicting statutory instructions is not appropriate

in analyzing regulations enacted pursuant to consistent guidelines." *Kutler v. Carlin*, 139 F.3d 237, 245 (D.C. Cir. 1998).

Even assuming, however, that the statute might in theory permit the NRC to choose not to revise the DBT to address an acknowledged potential for air-based threats, its explanation for any such decision must still meet the tests of coherence, rationality, and consistency with statutory mandates that APA § 706(2)(A) imposes. The agency's explanation here fails these tests in several ways.

Stripped to its essentials, the agency's reasoning for not addressing air attacks in the DBT is that it cannot lawfully require licensees to employ *active* defensive measures (i.e., antiaircraft weapons) because such measures are the exclusive domain of the nation's defense forces, and that all other "protective strategies and physical protective measures" are "not within the scope of the DBTs." 72 FR at 12710. But the Congress that enacted the requirement that the NRC's DBT rulemaking consider air-based threats must be presumed to have been aware of whatever legal constraints there may be on the NRC's authority to require licensees to employ active air-defense weapons systems,[4] so its directive that the NRC consider air attacks in revising the DBT rule, to have any meaning at all, must require the Commission to consider adding other "protective strategies and

[4] *See, e.g., Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006) ("[W]e presume that Congress is aware of the legal context in which it is legislating.").

physical protective measures," to use the NRC's phrase, to the DBT. Even allowing that the statute may not have required the agency to incorporate in the DBT measures against air attacks, it at least "require[d] the agency to evaluate seriously" whether to do so. *Public Citizen v. FMCSA*, 374 F.3d at 1221. By stating that all measures that a licensee could legally undertake to protect against air attacks are "not within the scope of the DBTs," the NRC has effectively nullified Congress's directive that it seriously evaluate measures to protect against such attacks in the DBT rulemaking.

Put another way, the congressional mandate that the NRC consider the air-based threat in the DBT rulemaking necessarily placed protection against air attacks *within* the scope of the DBTs. As the D.C. Circuit has observed, "A statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency, as it is for Congress in the first instance to define the appropriate scope of an agency's mission. When Congress says a factor is mandatory, that expresses its judgment that such a factor is important." *Public Citizen v. FMCSA*, 374 F.3d at 1216. An agency's declaration that such a statutorily required consideration is outside the scope of its rulemaking proceeding is just as contrary to the congressional mandate as a failure to discuss the issue at

all.[5] The NRC's insistence that all protective measures against air attacks are outside the DBTs' scope is thus arbitrary and capricious and contrary to law, and therefore cannot suffice as an explanation for the revised DBTs' failure to address air attacks.

Had the Commission concluded that no measures to deal with air attacks were necessary to meet the standard of adequate protection of the health and safety of the public, its erroneous notion that such measures are beyond the scope of the DBT rule might be overlooked as harmless or unnecessary surplusage in its explanation for the rule's failure to cover air attacks. But the NRC's rulemaking notice in fact reveals that the Commission concluded just the opposite: That it is necessary to impose requirements on licensees with respect to air attacks. Thus, the Commission stated that it has "directed nuclear power plant licensees to develop specific plans and strategies to respond to a wide range of threats, including the impact of an aircraft attack," has required each licensee to participate with NRC staff in "mock exercises to practice imminent air attack responses," and "has continued to work with licensees on these issues and has inspected licensee actions to identify and implement mitigation strategies to limit the effects of such

[5] It is, of course, well-settled that such a complete failure to consider an issue renders a rulemaking arbitrary and capricious or contrary to law. *See*, *e.g.*, *Ry. Labor Execs.' Ass'n v. ICC*, 784 F.2d at 971-72; *Public Citizen v. FMCSA*, 374 F.3d at 1216, 1221; *Chamber of Commerce v. SEC*, 412 F.3d at 144.

an event." 72 FR at 12711.[6] These actions, however, not only have been taken outside of the DBT rulemaking, but have not been incorporated in NRC regulations at all; rather, they have apparently been imposed on licensees by "order," as the DBT revisions initially were. But the statutory requirements that the NRC conduct a DBT rulemaking and that the rulemaking include consideration of the airborne attack threat reflect a clear congressional preference that, to the extent the NRC concludes measures should be taken against air attack, it include the requirement that licensees take such measures in the DBT regulation rather than addressing them through other means. Having concluded that the protection of the public demands that licensees take some actions to respond to air attacks, it was incumbent on the Commission either to incorporate those requirements in the DBT or, at a minimum, explain why it chose not to proceed through the DBT regulation

[6] The Commission's recognition of the need for nuclear power plants to be protected against air attacks was further reflected in the Commission's public announcement on April 24, 2007, that it proposed to require applicants for new reactor licenses to "assess how the design, to the extent practicable, can have greater built-in protections to avoid or mitigate the effects of a large commercial aircraft impact." NRC, *NRC Proposes Adding Plane Crash Security Assessments to New Reactor Design Certification Requirements*, News Release No. 07-053 (April 24, 2007), *available at* www.nrc.gov. On October 3, 2007, the Commission issued a notice of proposed rulemaking to require certain applicants for new nuclear plant licenses and for plant design certifications to assess the effects of air crashes on nuclear plants and provide design features to avoid or mitigate those effects. 72 FR 56287 (Oct. 3, 2007). The rule would not apply to existing licensees, and the rulemaking notice continues to insist that such crashes are a "beyond-design-basis event." *Id.* at 56288.

in the face of Congress's expressly stated intention that the DBT rulemaking reflect consideration of air attacks.

B. The Commission's Explanation for Rejecting the Beamhenge Concept Is Irrational.

The Commission's specific explanation for its failure to incorporate passive or structural air defenses (such as the "beamhenge" structures advocated by many commenters) into the DBT fails to supply cogent, plausible, and rational reasons, consistent with the statutory mandate of adequate protection of the public health and safety, for the agency's choice. Indeed, the first of the two reasons the agency offered for its rejection of such defensive measures is a non sequitur: The agency repeated its assertion that responsibility for "*active* protection against the airborne threat rests with other organizations of the Federal government." 72 FR at 12711. Regardless of the validity of the NRC's view on this point, it does not even begin to answer why licensees should not be required to use available *passive* means of defending themselves.

The NRC's second explanation for rejecting structural air defenses is little better: The agency stated with virtually no elaboration that it had concluded that "certain mitigative measures to *limit the effects* of an aircraft strike" were "sufficient to ensure adequate protection of the public health and safety" without the adoption of "physical security measures" aimed at preventing those effects altogether. *Id.* (emphasis added). The "mitigative measures" the Commission

referred to apparently include both "on-site mitigating actions" to limit radiological releases in the event that an air attack resulted in a breach of containment of a reactor core and "off-site emergency planning" (i.e., preparations for evacuation of areas surrounding a plant). *Id.* at 12710.

Notably lacking from the Commission's stated reasons are any expressed doubts about the efficacy of a beamhenge or similar defensive structure to prevent damage to nuclear reactors from suicide air attacks, or about the technological feasibility of installing defensive structures of the type advocated by the commenters. Nor did the Commission even suggest that such structures would not be cost-effective. The Commission's rejection of the beamhenge "concept" (*id.* at 12711) must therefore be evaluated on the assumption that such a structure would do exactly what it was designed to do: protect nuclear power plants against damage from 9/11-style air attacks. Indeed, any argument that the NRC's action could be sustained on the basis that the beamhenge concept would not work is foreclosed by the venerable principle of *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), that a court's "review of an administrative agency's decision begins and ends with the reasoning that the agency relied upon in making that decision." *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007).

Approving the agency's reasoning would thus amount to acceptance of the proposition that a measure that would effectively prevent a dangerous release of

radiation altogether should be rejected in favor of measures that, at best, would limit the likelihood that any such release would be catastrophic and would facilitate evacuation by people placed in harm's way by the release. At a minimum, the Commission's close-the-barn-door-after-the-horses-are-gone approach requires greater explanation to meet the test of minimum rationality. There may be instances where the availability of mitigation responses to extremely unlikely threats is protective enough to obviate the need to take preventive measures. But the NRC does not contend that the risk of air attacks on reactors is insubstantial; it acknowledges that the threat is real and necessitates responsive actions from licensees. 72 FR at 12710. This Court, too, has recently recognized the reality of the threat. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016, 1030-34 (9th Cir. 2006).

Moreover, although the NRC asserts in conclusory fashion that there is only a "low likelihood of [an air attack] both damaging the reactor core and releasing radioactivity that could affect public health and safety," 72 FR at 12710, adequate protection of the public may require preventive measures aimed even at relatively "unlikely" events where the consequences, should they occur, may be sufficiently grave. "Mitigating" harmful effects, cleaning up contamination, and instituting emergency evacuations are poor substitutes for practical and available means of preventing releases of radiation in the first place. The NRC's "explanation,"

however, pays scant attention to any of these considerations. Its failure to come to grips with the choice of prevention versus mitigation in anything but the most superficial way renders it arbitrary and capricious. As in the *State Farm* case, the agency has "failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard." *State Farm*, 463 U.S. at 56.

Finally, the Commission stated that it was rejecting a requirement of physical barriers against *waterborne* attacks because requiring such barriers was beyond the scope of this rulemaking but within the scope of a parallel rulemaking to amend 10 CFR § 73.55. *See* 72 FR at 12711. But the Commission nowhere suggested that physical security measures against *air* attack could be put aside because they were more properly the subject of some different rulemaking. Indeed, the Commission specifically acknowledged that this rulemaking was the appropriate forum for considering the beamhenge proposal when it stated in the Notice of Proposed Rulemaking that it had decided that those aspects of the Committee to Bridge the Gap's rulemaking petition that "deal with the defense of nuclear power plants against aircraft" would be addressed "as part of the final action on this proposed rule." 70 FR at 67385.

Thus, under the *Chenery* principle, the agency's rejection of the beamhenge concept could not be affirmed on the ground that such physical barriers are outside

the scope of the DBT rule. In any event, even if the agency had offered such a justification, it would be arbitrary and capricious because the agency has previously considered physical barriers to be *within* the scope of a DBT rulemaking proceeding: In 1994, it required precisely such measures to be taken by licensees when it amended the DBT to require them to defend against truck-bomb threats. 59 FR 38889. An unexplained reversal of the view the agency took of the scope of DBT rulemaking proceedings in 1994 would itself violate the principle that an agency acts arbitrarily and capriciously when, without a reasoned analysis, it changes a longstanding position even on a matter within its discretion to decide. *See State Farm*, 463 U.S. at 41-42. Particularly in light of Congress's express directive that the DBT rulemaking consider airborne threats, any decision by the agency to exclude from the scope of the DBT rulemaking an entire class of protective measures that it has expressly included in prior DBT rulemaking proceedings would be arbitrary and capricious.

IV. THE AGENCY FAILED TO MAKE CRITICAL FACTUAL INFORMATION PUBLICLY AVAILABLE.

Not only did the NRC not supply a reasoned basis for its final rule, but it did not provide the public with the opportunity to comment on factual information critical to the development of the proposed and final rule. "The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making

process." *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982). Accordingly, "[a]n agency commits serious procedural error when it fails to reveal portions of the technical basis for a proposed rule in time to allow for meaningful commentary.'" *Kern County Farm Bur.*, 450 F.3d at 1076 (citation omitted); *see also Air Transp. Ass'n of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("[T]he most critical factual material that is used to support the agency's position on review must have been made public *in the proceeding* and exposed to refutation." (emphasis in original) (citation omitted)); *Wash. Trollers Ass'n v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981) ("'It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data, or on data that (to a) critical degree, is known only to the agency.'" (citation omitted)).

Here, information on which the NRC based both its proposed and final rule was not made public during the rulemaking proceedings. The NRC conducted the DBT rulemaking to make generally applicable the requirements imposed by its April 29, 2003, orders, *see* 70 FR at 67381—indeed, the NRC contended that the proposed amendments reflected requirements already "in place under NRC regulations and orders," *id*. at 67382—and, according to the Commission, the final rule contained requirements similar to the orders. 72 FR at 12705. The NRC repeatedly specified that the orders it was seeking to extend through the rulemaking were imposed after the NRC "solicit[ed] and review[ed] comments

from Federal, State, local agencies, and industry stakeholders," 70 FR at 67381; *see also* 72 FR at 12705 ("After soliciting and receiving comments from Federal, State, and local agencies, and industry stakeholders … the NRC imposed supplemental DBT requirements by order on April 29, 2003."), yet none of these comments that informed the DBT orders was entered in the docket. Except for a Federal Register notice and a document on the national strategy to secure cyberspace, the DBT rulemaking record contains no documents that pre-date April 29, 2003. In other words, the Commission did not make available for comment during the notice and comment period any of the communications that formed the basis for the orders, and that it considered important enough to mention in the preambles to both its proposed and final rule, even though its primary goal in the rulemaking was to extend those orders generally to nuclear licensees.

The Commission's failure to provide the factual information that informed the April 2003 orders exacerbates its failure to explain what it means by "the attacks against which a private security force can reasonably be expected to defend." 70 FR at 67385. Not only do the rule's preamble and other supporting documents themselves not provide an explanation of the scope of the rule, but the docket is missing records of the communications that the agency used in determining the scope of the DBT. In a May 9, 2003, letter to Senator Chuck Hagel, the NRC Chairman explained that the NRC acknowledged "that certain

threats may be beyond the reasonable capabilities of licensee security forces" and that the agency had "specifically sought comments on the public-private threshold when [it] circulated NRC staff draft views on adversary attributes associated with the DBT in January 2003." Letter from Nils J. Diaz to Chuck Hagel (May 9, 2003) (ER 237). None of these comments on the "public-private threshold" is in the docket. Yet only after soliciting these comments, and "after extensive deliberation and interaction with appropriately cleared stakeholders," did the agency impose the April 2003 orders "changing the DBT" to represent what the agency believed was "the largest reasonable threat against which a regulated private guard force should be expected to defend under existing law." *Id.*

The NRC Chairman's letter demonstrates that the concept that the DBT should be based on the largest threat against which a regulated private security force could reasonably be expected to defend, along with specifics about what the NRC believed could reasonably be expected of licensee, was developed before or during 2003. But even though they form the basis for the rule, the factual information the agency used in establishing the concept that the DBT should be based on the largest threat a private security force could reasonably defend against, and the specifics that implement it, were not made available to the public. Failing to place in the docket the information that the agency used in developing its view of the largest threat against which a private force could be expected to defend

deprived the public of the ability to provide fully meaningful comments on the agency's rationales for not requiring licensees to defend against particular threats and to ensure the agency's final rule was completely informed.

Similarly, the agency did not place in the docket communications on which it relied in deciding not to require licensees to defend against airborne attacks. One of the agency's excuses for not requiring defense against air attacks is that "it believes that the mitigation measures in place are sufficient to ensure adequate protection of the public health and safety." 72 FR at 12711. The agency acknowledges that it has had communications with licensees on mitigation, *see id.* at 12710 ("The NRC has continued to work with licensees on these issues … ."), but no record of the NRC's "work with licensees" on mitigation is in the docket.

That various communications on which the NRC based its rule likely contained sensitive information does not excuse not placing *any* record of those communications in the docket. The purposes of requiring critical factual material used by the agency to be subject to comment are "to ensure that agency regulations are tested through exposure to public comment, to afford affected parties an opportunity to present comment and evidence to support their positions, and thereby to enhance the quality of judicial review." *Chamber of Commerce v. SEC*, 443 F.3d 890, 900 (D.C. Cir. 2006). By withholding information that was critical to the development of the rule, the NRC undermined all of these purposes. The

Court should remand to the agency to supplement the docket and provide the public with notice and an opportunity to comment on the added materials. *See Idaho Farm Bur. Fed'n v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995) (remanding to agency where report on which agency relied to support its final rule was not made available to the public).

IV. THE NRC HAS PROVIDED NO COHERENT EXPLANATION FOR ITS FINDING THAT THE DBT RULE WOULD HAVE NO SIGNIFICANT ENVIRONMENTAL IMPACT.

Public Citizen and MFP join the State of New York's argument that the NRC violated NEPA by not preparing an EIS for the DBT Rule. We emphasize that the NRC failed to supply a coherent explanation for its finding of no significant environmental impact.[7] If an agency "opts not to prepare an EIS, it must put forth a 'convincing statement of reasons' that explain why the project will impact the environment no more than insignificantly." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 864 (9th Cir. 2005) (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). Here, just as the NRC did not adequately explain how it determines what a

[7]This Court reviews factual decisions under NEPA under the arbitrary and capricious standard, s*ee Akiak Native Community v. U.S. Postal Service,* 213 F.3d 1140, 1144 (9th Cir. 2000), but reviews predominantly legal questions, including "whether NEPA requires consideration of the environmental impacts of a terrorist attack," under a less deferential reasonableness standard. *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1028.

private security force can reasonably be expected to defend against, and failed to offer a rational reason for excluding air attacks from the DBT rule, it failed to provide a rational explanation for not requiring an EIS.

The primary explanation offered by the NRC in its Environmental Assessment was that the rule would not have a significant environmental impact because "the rule requirements do not impose new requirements beyond those already imposed through the DBT Orders and Interim Compensatory Measures." NRC, *Environmental Assessment Supporting Final Rule* (Feb. 2007), at vi (ER 65). However, the NRC did not conduct an EIS for the DBT orders, which themselves were challenged for violating the APA, AEA, and agency regulations. The Commission cannot insulate itself from NEPA by first imposing the rule's requirements on individual nuclear licensees through plant-specific orders and then claiming that its rulemaking does not place any new requirements on the licensees. NEPA's requirement that agencies consider the environmental consequences of their actions would be gutted if agencies were permitted to circumvent NEPA by putting a rule into effect before it is promulgated and then claiming the rule itself has no effect.

The Commission also sought to justify its finding of no significant environmental impact associated with the rule on the ground that "analyzing the effects of a terrorist attack would be speculative at best." 72 FR at 12718-19. This

Court held in *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d at 1031, however, that it was unreasonable for the NRC to categorically refuse to consider the environmental effects of a terrorist attack on the ground that the possibility of a a terrorist attack "is so 'remote and highly speculative' as to be beyond NEPA's requirements." The NRC acknowledged in the preamble to the final rule that *San Luis Obispo Mothers for Peace v. NRC* "called into question" its position on the necessity of a terrorism analysis, 72 FR at 12718, but asserted that this Court's decision that the "potential environmental effects of a terrorist attack as a result of the licensing of an Independent Spent Fuel Storage Installation should be considered does not necessarily lead to the conclusion that such effects should be considered as part of this rulemaking action." *Id*. The Commission offered no explanation, however, of why it might make sense to consider the environmental effects of a nuclear attack in the licensing context but not in this rulemaking. Because the NRC failed to explain its determination that an EIS was not necessary, this Court should "remand for the agency to fulfill its responsibilities under NEPA." *San Luis Obispo Mothers for Peace*, 449 F.3d at 1035.

CONCLUSION

For the foregoing reasons, the Court should remand the DBT rule for the agency to supplement the rulemaking record, prepare an EIS, and further consider, including by providing further opportunities for notice and comment, the issues 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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October 24, 2007

STATEMENT OF RELATED CASES

Petitioners Public Citizen and San Luis Obispo Mothers for Peace do not know of any related cases pending in this Court.

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 12,285 words.

October 24, 2007

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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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