15-1330-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiff-Appellant,

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

Plaintiffs,

– v. –

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Defendant-Appellee,

ENTERGY NUCLEAR OPERATIONS, INC.,

Intervenor.

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

BRIEF FOR PLAINTIFF-APPELLANT

DANIEL J. KRAMER
JACQUELINE P. RUBIN
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Attorneys for Plaintiff-Appellant
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Statutes

Other Authorities

Page(s)

PRELIMINARY STATEMENT

Twenty-five miles north of New York City, on the banks of the Hudson River, sits the Indian Point nuclear power plant ("Indian Point.").[1] It is an aging plant, having begun operation in 1974, and to continue in operation it has increasingly relied on exemptions from safety regulations promulgated by the Nuclear Regulatory Commission ("NRC"). This lawsuit involves two of those exemptions—initially granted without advance notice or public comment—which allow the plant to use insulation on its power cables that can only withstand a fire for 24 minutes, and 30 minutes, respectively, instead of one hour as the NRC ordinarily requires. *See generally* 72 Fed. Reg. 56,798 (Oct. 4, 2007) (issuing exemptions to 10 C.F.R. pt. 50, App. R. II.G.2.A.C). This insulation is important because, in the event of a fire that incapacitates other non-fireproof shutdown capabilities at the plant, the cables are necessary to power down the plant in an orderly fashion and avoid catastrophe.

Fires, and the environmental harms that can result from fires, are not purely theoretical at Indian Point. As recently as May of this year, Indian

[1] *See Indian Point Nuclear Generating Unit 3*, NRC, (Sept. 15, 2015, 11:59 AM), http://www.nrc.gov/info-finder/reactor/ip3.html.

Point shut down a reactor for several weeks because of a transformer fire.[2] The fire resulted in oil and fire-retardant foam flooding the moats around the plant, and ultimately spilled 3,000 gallons of oil into the Hudson River.[3] A severe fire or accident at Indian Point would have disastrous effects: a 2011 study by the Natural Resources Defense Council estimated that an accident at Indian Point on the scale of the one at Japan's Fukushima Daiichi Nuclear Plant could cause a swath of land from Indian Point to the George Washington Bridge to be uninhabitable for generations due to radiant contamination.[4]

Nor are terrorism and the environmental harms from terrorism theoretical. Indian Point sits exposed on the Hudson River, and is vulnerable to attack by air and sea, or sabotage from land. As the 9/11 Commission

---

2 This fire was caused by the failure of another type of insulation than the one at issue here. *See Entergy Probe: Insulation Failure Caused May 9 Indian Point Transformer Fire; Fluid Release into Hudson River Due to Firefighting Water and Foam Exceeding Moat Capacity*, ENTERGY INC., (Sept. 14, 2015, 6:04 PM), http://www.safesecurevital.com/entergy-probe-insulation-failure-caused-may-9-indian-point-transformer-fire-fluid-release-into-hudson-river-due-to-firefighting-water-and-foam-exceeding-moat-capacity/.

3 *Id.*

4 *See Nuclear Accident at Indian Point: Consequences and Costs*, NRDC, (Sept. 15, 2015, 11:59 AM), http://www.nrdc.org/nuclear/indianpoint/files/NRDC-1336_Indian_Point_FSr8medium.pdf.

Report—initiated by former U.S. President George W. Bush and authored by the National Commission on Terrorist Attacks Upon the United States—disclosed, one of the hijackers considered changing his flight course to hit a New York City area nuclear facility, believed to be Indian Point.[5] An attack could set off fires or otherwise distract responders, eating into the limited time the cables will remain insulated and preventing the manual response on which Indian Point depends to compensate for the abbreviated timeframe. (*See* A-235-36; A-87-88.)[6] Such an event in turn could lead to contamination of a major waterway and major urban centers, and substantially affect public health and the natural environment. (*See* A-86.)

Yet, in assessing the environmental concerns raised by granting exemptions that would cut in half certain insulation requirements at Indian Point, the NRC claims that it has "no legal duty" to consider terrorism threats to Indian Point, and owes the public no reasoned answers to concerns raised

---

5 *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at 154, 245 (2004), *available at* http://www.9-11commission.gov/report/911Report.pdf.

6 References to "A-" refer to pages in the Joint Appendix submitted to this Court with this appeal. References to "JA-" refer to pages in the Joint Appendix submitted to this Court in the prior related action, No. 11-1260-cv, and to the District Court, *see* Torrance Decl., No. 09 Civ. 10594, ECF No. 42 (S.D.N.Y. Apr. 11, 2014).

about how Indian Point would weather a terrorist attack, given the significantly reduced burn time of the cables controlling emergency shutdown. (A-29, 78 Fed. Reg. 52,987, 52,989 (Aug. 27, 2013).) In fact, the NRC has said that it *never* has to consider the environmental consequences of terrorism when conducting an environmental assessment. (*Id*.) As the NRC explained in this case:

> [I]ssues relating to terrorism and other low-probability, high-consequence events are beyond the scope of the EA and FONSI. Acts of terrorism are inherently unpredictable and stochastic and, therefore, are not separately considered in preparing the NRC's environmental analyses. The NRC has, therefore, determined that NEPA imposes no legal duty on the NRC to consider intentional malevolent acts.

(*Id*. (internal quotations omitted).) Put simply, no matter how legitimate the public concern relating to terrorism, the NRC's position is that it has no duty under NEPA to even consider those concerns.

Plaintiffs below previously raised several challenges to these fire safety exemptions, including to the NRC's decision not to notify or solicit feedback from the public before issuing the challenged exemptions. This Court granted Plaintiffs' challenge under the National Environmental Policy Act ("NEPA"), finding that the record did not "permit a reviewing court to determine whether a reasoned basis exists for the NRC's decision not to afford . . . public involvement in the exemption decision," as is required,

where "appropriate and practicable," under NEPA. *Brodsky* v. *NRC*, 704 F.3d 113, 115 (2d Cir. 2013) ("*Brodsky III*").[7] NEPA requires the NRC to consider and attempt to avoid or mitigate significant adverse environmental impacts when taking action with respect to the facilities it licenses. *See* 40 C.F.R. § 1502.14.

This Court remanded for the NRC to "explain its denial or otherwise demonstrate that it has in fact taken the kind of 'hard look at environmental' consequences that it would have taken if the public were allowed to comment on the exemption request." *Brodsky III*, 704 F.3d at 123.

---

[7] NEPA is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA imposes on federal agencies "the obligation to consider every significant aspect of the environmental impact of a proposed action [and to] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Baltimore Gas & Elec. Co.* v. *NRDC,* 462 U.S. 87, 97 (1983). Under NEPA, before an agency may take an action "significantly affecting the quality of the human environment," it must prepare an Environmental Impact Statement ("EIS") assessing how the action will affect the environment and considering alternatives. 42 U.S.C. § 4332(2)(C). If it is unclear whether an agency's action requires drafting an EIS, the agency may take the preliminary step of preparing an Environmental Assessment ("EA"). 40 C.F.R. § 1508.9(a). An EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Id.* If the agency determines in the EA that the preparation of a full EIS is not required, it must issue a "finding of no significant impact" ("FONSI"), presenting "the reasons why the proposed agency action will not have a significant impact on the human environment." 40 C.F.R. § 1501.4(e); § 1508.13.

It instructed the NRC to "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable; or (2) take such other action as it may deem appropriate to resolve this issue." *Id.* at 115.

The NRC decided not to (or that it could not) provide an explanation for its original decision not to solicit public input under NEPA. Instead, it elected to invite public comment. Several comments submitted to the NRC warned that the exemptions would increase the likelihood of a terrorist attack on Indian Point and exacerbate the environmental consequences stemming from an attack, should an attack occur. (*See* A-235-36; A-66-67.) In response, the NRC categorically refused to consider terrorism under NEPA. (A-29, 78 Fed. Reg. at 52,989.) The NRC then granted Indian Point exemptions identical to the first ones it had granted, stating that the public comments did not change its initial assessment that the exemptions would not reduce "overall fire safety" at the nuclear power plant and "present[ed] no added challenge to the credited post-fire safe-shutdown capability." (A-27, 78 Fed. Reg. at 52,987.)

By refusing to consider public comments regarding terrorism, the NRC violated NEPA and this Court's remand order. Specifically, the NRC erred as a matter of law in finding that it has no legal duty to consider

terrorism in assessing proposed agency action under NEPA. On review, the District Court adopted the NRC's erroneous conclusion. The District Court's decision must therefore be reversed and remanded with instructions to the NRC to consider and meaningfully respond to comments regarding the potential environmental impacts of these exemptions.

JURISDICTIONAL STATEMENT

This appeal is taken from the final order entering summary judgment for Defendant on February 26, 2015 in the United States Court for the Southern District of New York by Chief Judge Loretta A. Preska. The District Court had subject matter jurisdiction under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*.

In *Brodsky III*, this panel retained jurisdiction over any subsequent appeal challenging the agency action on remand. 704 F.3d at 115. This Court also has jurisdiction to review the District Court's opinion and judgment under 28 U.S.C. § 1291 because the opinion and judgment finally disposed of all of the parties' claims. The District Court entered an opinion on February 26, 2015 and judgment on March 5, 2015. Richard Brodsky filed a timely notice of appeal on April 24, 2015.

STATEMENT OF THE ISSUES PRESENTED

1. Did the District Court err as a matter of law in finding that the NRC complied with NEPA in reissuing the fire safety exemptions when the agency refused to consider terrorism?

2. Did the District Court err as a matter of law in finding that the agency complied with this Court's remand order when the NRC refused to consider public comments relating to terrorism?

STATEMENT OF THE CASE

I. The Fire Safety Program

In 1975, the fire at Browns Ferry Nuclear Power Plant caused such extensive damage to the cables controlling the plant's shutdown systems that it knocked out "many of the systems relied on for shutdown of the reactor under normal and emergency conditions." 45 Fed. Reg. 36,082, 36,082 (May 29, 1980). In response, the NRC promulgated Fire Safety Rules designed to protect nuclear power plants' shutdown systems, which help protect the reactor from damage and prevent potential radiological leakage. (*See* JA-7, Fire Protection Program for Operating Nuclear Power Plants, 45 Fed. Reg. 76,602, 76,602 (Nov. 19, 1980), codified at 10 C.F.R. § 50.48 and 10 C.F.R. pt. 50 App. R ("Fire Safety Program").)

The objective of the Fire Safety Program regulations is to protect nuclear facilities from the threat of catastrophic fire by requiring them to

install safety features to ensure that one method of shutting down the reactor in an emergency can avoid being impaired by fire before it can effect safe shutdown. 10 C.F.R. § 50.48(c)(2). In order to comply with these regulations, Entergy Nuclear Operation, Inc. ("Entergy"), Indian Point's owner and operator, chose to enclose the cables of one shutdown system in a barrier capable of withstanding fire for at least one hour and installing fire detectors and an automatic fire suppression system. (*See* JA-484; 10 C.F.R. pt. 50 App. R, at III.G.2.) The barrier it chose to use is the fire retardant insulating material Hemyc ERFBS ("Hemyc"). (*See* JA-484.)

II. 2007 Indian Point Fire Safety Exemptions

In 2006, the NRC discovered and notified all nuclear facilities that it had determined that Hemyc could not withstand a fire for the required one-hour burn time. Instead, tests revealed that Hemyc protects these essential shutdown cables in some cases for only 27 minutes. (JA-180.) Instead of replacing Hemyc with an alternative insulation, Entergy sought exemptions (the "Fire Safety Exemptions") from the NRC regulations. (*See* JA-242-51.) In its supplemental exemption application materials, Indian Point informed the NRC that its own internal tests showed that Hemyc could withstand a fire for only 24 minutes in one area of the plant. (JA-471.)

In response, the NRC issued a Safety Evaluation (as required by NRC regulations), (*see* JA-477-491), and published in the Federal Register a draft Environmental Assessment ("EA"). *See generally* 72 Fed. Reg. 55,254 (Sept. 28, 2007). The draft EA contained a "finding of no significant impact" on the environment (a "FONSI"). The NRC declined to undertake a more rigorous Environmental Impact Statement. Within a week of the EA publication, the NRC issued Indian Point's requested exemption from the Fire Safety Rules. *See generally* 72 Fed. Reg. 56,798 (Oct. 4, 2007) (issuing exemption to 10 C.F.R. pt. 50, App. R. II.G.2.A.C).

In so doing, the NRC did not conduct a site visit related to its Safety Evaluation and relied on Entergy's assurances that the Fire Safety Exemptions would not affect the facility's safety during a fire. (*See* JA-477-491.) Nor did the NRC offer the public an opportunity for comment or any other form of public participation prior to issuing the Fire Safety Exemptions. *See Brodsky III,* 704 F.3d at 115.

III. ***Brodsky II***

Plaintiffs below brought an action in the District Court alleging, among other things, that the NRC failed to provide an opportunity for meaningful public participation as required by NEPA. The NRC moved to dismiss or, in the alternative, for summary judgment. *See* Gov't Mem. Law at

9, *Brodsky* v. *NRC*, 09 Civ. 10594, ECF No. 6 (S.D.N.Y. May 25, 2010). The District Court granted the government's motion for summary judgment in its entirety on March 4, 2011. *Brodsky* v. *NRC*, 783 F. Supp. 2d 448, 450 (S.D.N.Y. 2011) ("*Brodsky II*"), *vacated in part*, 704 F.3d 113 (2d Cir. 2013), and *aff'd in part,* 507 F. App'x 48 (2d Cir. 2013).

The District Court did not address Plaintiffs' argument that the NRC failed to comply with NEPA's public participation requirement. (*See generally id*.)

IV. ***Brodsky III*—The Appeal**

Plaintiffs below, with the support of New York State as *amicus curiae*, petitioned this Court for review of the District Court's decision in *Brodsky II*. *Brodsky III*, 704 F.3d 113. This Court affirmed the District Court in part, but vacated the District Court's opinion with respect to Plaintiffs' NEPA claim. *Id.* at 124. While the Court reserved decision on whether public participation is invariably required under NEPA, it noted that the NRC had failed to cite any case "in which a court has held an agency's issuance of an EA and FONSI to satisfy NEPA despite a comparable lack of participation" and held that, in this instance, the administrative record was insufficient to allow it to evaluate whether the NRC's decision to proceed

despite the complete absence of public participation was appropriate. *Id.* at 121-22.

Thus, this Court remanded the case to the District Court with instructions that, consistent with NEPA, the NRC was to: "(1) supplement the administrative record to explain why allowing public input into the exemption request was inappropriate or impracticable; or (2) take such other action as it may deem appropriate to resolve this issue." *Id.* at 115.

V. Agency Proceedings on Remand

On remand, the NRC chose to publish a notice in the Federal Register declaring that it was "reconsidering its issuance" of the original exemptions and inviting comments on a draft EA and FONSI. (A-24-25, 78 Fed. Reg. 20,144, 20,144-45 (Apr. 3, 2013).) The draft EA disclosed to the public that the NRC agreed with Entergy's determination that using the ineffective Hemyc barrier would not "reflect a reduction in overall fire safety, and present[ed] no added challenge to the credited post-fire safe-shutdown capability which remains materially unchanged," although it acknowledged that Hemyc did not provide fire protection "as originally designed." (A-26, *id.* at 20,146.)

During the comment period, the agency received submissions from Plaintiff Richard Brodsky and over 100 other individuals and groups,

including the State of New York. Many were concerned that the exemption could increase both the probability and the environmental consequences of a terrorist attack on Indian Point. Commenters reminded the NRC that an attack on Indian Point is not hypothetical: commenters cited evidence that 9/11 hijacker Mohammed Atta "spotted a nuclear power plant" while he was "conducting his surveillance flights" in the region and considered "redirecting the strike" and that Pakistani nuclear scientists have reportedly offered Al Qaeda assistance with targeting such facilities. (A-90). Others expressed concern with the NRC's "complete[] silen[ce] about the ways in which the exemption makes a terrorist attack more likely." (A-67.) Plaintiff argued that the probability terrorists would target Indian Point would be increased if the NRC granted the exemptions because, "if history is a guide, such attacks are carefully planned and target the weakest and most easily disrupted security measures." (A-235-36.)

Other commenters questioned the assumption that a fire started by a terrorist attack would be no different than a fire started by some other cause. (*See* A-66.) Some argued that the NRC had failed to consider whether the 24 minutes of protection that Hemyc provides would be sufficiently long to allow employees or first responders to control a fire caused by a terrorist attack, rather than another cause. (*See* A-86.) One commenter urged the

NRC to consider that "[d]uring the chaos and threat level that would surely exist during a terrorist attack, human beings cannot be presumed to be able to take the actions necessary to protect critical systems from fire. The systems themselves must have integral safeguards." (A-99.) Others encouraged the NRC to consider the delays that employees and first responders might experience if responding to a terrorist attack, instead of an ordinary fire. (A-234-36.)

Despite the comments, the NRC issued a notice in the Federal Register on August 27, 2013, declaring that the Fire Safety Exemptions "will not be modified." (A-27, 78 Fed. Reg. at 52,987.) Again, the NRC chose not to conduct the more rigorous Environmental Impact Statement. The NRC expressly declined to consider the "[m]any comments [that] raised the specter of a terrorist attack or other event that would defeat the Indian Point 3 defense-in-depth fire protection measures," explaining that "issues relating to terrorism and other low-probability, high-consequence events are beyond the scope of the EA and FONSI." (A-29, 78 Fed. Reg. at 52,989.) Relying on the Third Circuit's opinion in *New Jersey Department of Environmental Protection* v. *NRC*, 561 F.3d 132 (3d Cir. 2009) ("*NJDEP*"), the NRC maintained that it had no duty to consider "intentional malevolent acts

because those acts [were] too far removed from the natural or expected consequences of agency action." (*Id.*)[8]

VI. ***Brodsky IV*—The District Court Action on Remand**

On February 14, 2014, Plaintiffs below timely filed a challenge to the NRC's actions in the District Court, pursuant to this Court's remand order. *Brodsky* v. *NRC*, No. 09 Civ. 10594, ECF No. 38 (S.D.N.Y. Feb. 14, 2014). Plaintiffs argued that the NRC's blanket refusal to consider the possibility of acts of terrorism violated NEPA's public participation requirements and was not entitled to deference as it was a ruling of law. *Id.* at 5-6.

The District Court granted summary judgment to the NRC as a matter of law. The court held that the NRC had complied with the public participation requirement of NEPA and that the agency had adequately considered the question of terrorism in its safety analysis under the AEA. *See Brodsky* v. *NRC,* No. 09 Civ. 10594, 2015 WL 1623824, at *6, *8 (S.D.N.Y. Feb. 26, 2015) ("*Brodsky IV*").

---

[8] The NRC also included in the Federal Register notice that it had recently promulgated a regulation categorically excluding the issuance of exemptions from the NEPA process, although the agency conceded that this regulation allowing the NRC to grant future exemptions in secrecy did not apply retroactively. (A-29-30, 78 Fed. Reg. at 52,989-90; *see also* 10 C.F.R. § 51.522(c)(9).)

As to Plaintiffs' other claims, the District Court held that it had already decided those claims, decisions that were affirmed by the Second Circuit. This included Plaintiffs' allegations that the NRC improperly failed to consider terrorism. *Brodsky IV*, 2015 WL 1623824, at *8. In so holding, the court disregarded Plaintiffs' argument that their claims related to the process by which the NRC conducted the public comment period on remand, and arose only when the NRC elected to effectuate this Court's order through a public comment period. *Id.*

On April 24, 2015, Plaintiff Richard Brodsky timely filed a Notice of Appeal to this Court. (A-297, *Brodsky* v. *NRC*, No. 09 Civ. 10594, ECF No. 50 (S.D.N.Y. Apr. 24, 2015).)

STANDARD OF REVIEW

"Because NEPA does not itself provide for judicial review, the APA controls." *Brodsky III*, 704 F.3d at 119; *see also Sierra Club* v. *U.S. Army Corps of Eng'rs*, 722 F.2d 1043, 1050 (2d Cir. 1985). "On appeal from a grant of summary judgment in a challenge to agency action under the APA, we review the administrative record and the district court's decision de novo." *Yale New Haven Hosp.* v. *Leavitt*, 470 F.3d 71, 77 (2d Cir. 2006). "Under the APA, this Court reviews errors of law de novo." *J. Andrew Lange, Inc.* v.

FAA, 208 F.3d 389, 391 (2d Cir. 2000). This Court thus reviews the NRC's statement of law de novo.

SUMMARY OF THE ARGUMENT

This Court remanded this case to the NRC to "explain its denial or otherwise demonstrate that it has in fact taken the kind of 'hard look at environmental consequences' that it would have taken if the public were allowed to comment on the exemption request." *Brodsky III*, 704 F.3d at 123 (citing *Coalition on W. Valley Nuclear Wastes* v. *Chu*, 592 F.3d 306, 310 (2d Cir. 2009). This Court gave the agency two options: explain why public input on the exemptions was "inappropriate or impracticable"; or take steps to correct the public participation deficiency. *See Brodsky III*, 704 F.3d at 115. The NRC chose not to explain why it had foreclosed public input and instead opened a notice and comment period. (*See generally* A-27-30.) However, the NRC failed to comply with NEPA in conducting this notice and comment period.

Specifically, the NRC's refusal to consider issues of potential terrorism under NEPA is error as a matter of law. By the NRC's own admission, agencies must consider a wide range of factors in performing an analysis under NEPA. *See* NRC Mem. of Law, *Brodsky* v. *NRC*, No. 09 Civ. 10594, ECF No. 6 (S.D.N.Y. May 25, 2010). Furthermore, as this and many

other courts have explained, one of the fundamental goals of NEPA is to give the public an opportunity to provide information for the agency to consider before taking final action. *See*, *e.g.*, *Brodsky III*, 704 F.3d at 120; *Friends of Ompompanoosuc* v. *FERC*, 968 F.2d 1549, 1557 (2d Cir. 1992); *Town of Rye* v. *Skinner*, 907 F.2d 23, 24 (2d Cir. 1990).

However, of all the potential incidents that have environmental effects, the NRC has unilaterally decided that it does not have a responsibility to consider terrorism within its wide-ranging NEPA review. (*See* A-29 (claiming that "issues relating to terrorism" are "beyond the scope of the EA and FONSI").) It has made this choice even though this topic—and concern—was raised by many commenters, including Plaintiff. (*See, e.g.*, A-234-36; A-66-67; A-86.) This self-declared "terrorism exception" lacks support in the law and should be rejected.

Further, because the NRC improperly excluded certain comments from its review under NEPA, the NRC failed to fulfill this Court's mandate on remand. By failing to account for the public comments made about terrorism, which included concerns about the environmental consequences of terrorism, the possibility that the exemptions would increase the probability of an attack, and the delay in response time that would arise in the event of an attack, the NRC did not undertake the "hard look" at the

consequences of actions that may have a significant impact on the human environment that is required by NEPA, *Brodsky III*, 704 F.3d at 123, nor did it "weigh[] all the factors essential to exercising its judgment [under NEPA] in a reasonable manner," *Friends of Ompompanoosuc*, 968 F.2d at 1557. This Court should remand for the agency to fulfill its responsibilities under NEPA.

This issue is rightly before the Court. This Court remanded for the NRC to "supplement its decision," *Brodsky III*, 704 F.3d at 125, and instructed that "if plaintiffs conclude that the agency's response fails to allay their NEPA concerns, they should timely seek further review." *Id.* at 124. The NRC's refusal to consider comments regarding terrorism is an issue that arose out of the NRC response on remand, and therefore was not briefed to or decided by this Court in the prior actions.

ARGUMENT

I. The Terrorism Exception That the NRC Seeks to Impute in Its NEPA Analysis Has No Basis in the Law

Although several courts have provided guidance as to what factors need to be considered under NEPA, none has taken the position espoused by the NRC: that review under NEPA categorically excludes any consideration of any kind of terrorism. Instead, the two leading cases to decide whether review was required closely analyzed the case-specific facts

and circumstances in coming to the conclusion that a review by the NRC pursuant to NEPA was or was not required. *See NJDEP*, 561 F.3d 132, 140-43 (3d Cir. 2009); *San Luis Obispo Mothers for Peace* v. *NRC*, 449 F.3d 1016, 1031 (9th Cir. 2006) ("*Mothers for Peace*"). That is what the NRC should have done, but did not do, here. This case should be remanded to the NRC for further consideration of this issue and development of the record.

The Supreme Court's decision in *Metropolitan Edison* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983) is instructive. There, the Supreme Court assessed whether the NRC was required to prepare an Environmental Impact Statement ("EIS") to analyze the potential effects on nearby residents' psychological health due to the reopening of the Three Mile Island nuclear plant after the 1979 accident that caused a shutdown of one of the reactors. *See Metro. Edison*, 460 U.S. at 768-69. In determining that the NRC was not required to prepare an EIS in that specific situation, the Supreme Court set out the relevant standard: agencies and the 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." *Id.* at 773. The Supreme Court likened this to "the familiar doctrine of proximate cause from tort law." *Id.* at 774.

In *Metropolitan Edison*, although the Court acknowledged that psychological damage flowing directly from the effects of an agency action could constitute reviewable injury under NEPA, the Court found that in that specific case the harm raised by plaintiffs (*i.e.*, psychological trauma) did not flow from any actual change to the physical environment arising from the agency's proposed action (*i.e.*, restarting the plant). *Id.* at 775; *see also id.* at 779. The Court also found it difficult to separate out the perceived injury—potential psychological health issues—from other related events that might cause that same injury. As the Court explained:

> [I]t is difficult . . . to see the differences between someone who dislikes a government decision so much that he suffers anxiety and stress, someone who fears the effects of that decision so much that he suffers similar anxiety and stress, and someone who suffers anxiety and stress that "flow directly" from the risks associated with the same decision.

Id. at 777-78 (internal citation omitted).

As the Court made clear however, the operative factor in determining whether a "reasonably close causal relationship" exists between agency action and the alleged harm is whether the effect "flows directly" from the real, physical action taken by the agency. In so doing, the Court did not categorically remove or exclude any topics or issues from NEPA review. Quite the contrary: the Court made it clear that agencies and the reviewing courts should look at the particular effect at issue, and analyze the relationship

between that and the change the federal action causes in the physical environment. *Id.* at 773.

Following the Supreme Court's decision in *Metropolitan Edison*, the Ninth Circuit and the Third Circuit have both looked at whether the NRC is required to analyze issues of terrorism as part of its NEPA review. Although the two courts came to different conclusions as to whether such review was required given the specific facts before it, both courts engaged in analysis of the specific circumstances and neither court held that any and all types of terrorism concerns may be categorically excluded from review under NEPA.

At issue in *NJDEP* was the renewal of AmerGen Energy Company's operating license for the Oyster Creek Nuclear Generating Station. *NJDEP*, 561 F.3d at 135. AmerGen was not proposing, and the NRC was therefore not reviewing, new construction, any physical change or alteration of the current plant environment, or any exemption or other relief from a regulation. Plaintiffs nonetheless alleged that as part of the relicensing review, the NRC "must examine the environmental impact of a hypothetical terrorist attack on that nuclear power facility." *Id.* at 133. Applying *Metropolitan Edison*'s "reasonably close causal relationship" test, the Third Circuit found that the action (the federal relicensing of an already existing

plant) was too far removed from the effect (terrorism) to require an EIS. *Id.* at 140-43.

The Third Circuit did not decide—as the NRC claims—that as a matter of law that under NEPA the NRC is *never* required to consider the impact of agency action on the threat of and environmental consequences from terrorism when the public raises specific concerns. Instead, it held that an EIS was not required where the plaintiffs failed to show a reasonably close causal relationship between the relicensing and the environmental effects. *Id.* at 141-42. Indeed, it conceded that where there was an actual change to the physical environment rather than a "mere relicensing," the facts might raise a closer causal relationship to a potential terrorist and require an EIS. *See id.* at 142.

And, in *Mothers for Peace*, the Ninth Circuit held that "in considering the policy goals of NEPA and the rule of reasonableness that governs its application," a categorical refusal to account for concerns raised about terrorism violates NEPA. 449 F.3d at 1031. There, the court considered arguments concerning the proposed construction of a new storage installation at the Diablo Canyon reactor. *Id.* at 1019-20. The plaintiffs alleged that, under NEPA, the NRC impermissibly neglected to address the potential environmental impacts of a terrorist attack. *Id.* at 1021-22. The

plaintiffs argued that the construction and operation of the storage installation increased both the probability that a terrorist attack would occur and the environmental consequences that could result if a terrorist attack did occur. *Id.* at 1029-30. In rejecting that contention, the NRC made the same argument it makes here: that the "possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action," and therefore it need not consider terrorism in its NEPA review. *Id.* at 1029.

The *Mothers for Peace* court found that the NRC's position was inconsistent with the agency's own efforts to combat the threat of terrorism post-September 11th. *Id.* at 1030. Pointing out this contradiction, the Ninth Circuit took the NRC to task for "attempting, as a matter of policy, to insist on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat, while concluding, as a matter of law, that all terrorist threats are "'remote and highly speculative' for NEPA purposes." *Id.* at 1031.

The Ninth Circuit noted that the NRC had responded to plaintiffs' comments and concerns by simply declaring—as it has here—that "as a matter of law, 'the possibility of a terror attack . . . is speculative and simply too far removed from the natural or expected consequences of an agency action to require a study under NEPA.'" *Id.* at 1030 (quoting *Private*

Fuel Storage L.L.C., 56 N.R.C. 340, 349 (Dec. 18, 2002)) (alteration in original). It also noted that the NRC had failed to account for the plaintiffs' factual contentions that the storage installation would lead to or increase the risk of a terrorist attack. The Ninth Circuit then determined that the connection between the two events was not too "remote and highly speculative" to render reasonable the NRC's decision to categorically dismiss the possibility of terrorist attack. *Mothers for Peace,* 449 F.3d at 1030.

So too here. In the case at bar, there has been a change to the physical environment of the plant. One of the exemptions the NRC granted to Indian Point reduces *by more than half* the amount of time that insulation is required to withstand fire, thus rendering it significantly more vulnerable to failure. As several comments noted, the Fire Safety Exemptions would lead to, or increase the risk of, a terrorist attack because the facility has a known vulnerability that could be exploited by terrorists. (*See* A-66-67; A-86; A-235-36.) And as several comments also pointed out, the exemptions are likely to make an attack more devastating. (*See* A-86; A-235-36.) Moreover, an attack would likely make any response to a fire at the plant more time consuming and less effective. (*See* A-66-67; A-235-36.) Given these comments, and the concerns that they raise, the NRC violated its NEPA responsibilities by its categorical refusal to consider terrorism.

Even if this Court were to agree with the NRC's broad reading of *NJDEP*'s holding, the Second Circuit should follow the Ninth Circuit and find that under NEPA, the NRC cannot categorically, as a matter of law, refuse to consider terrorism and the environmental risk associated with it. As this Court acknowledged in *Brodsky III*, "public scrutiny [is] an 'essential' part of the NEPA process." 704 F.3d at 120 (quoting 40 C.F.R. § 1500.1(b)). Drawing a bright line that terrorism is "beyond the scope of the EA and FONSI" and that NEPA "imposes no legal duty on the NRC" to consider terrorism, contradicts NEPA's "twin aims," which obligate the NRC 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 decision-making process." *Baltimore Gas & Elec. Co.* v. *Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

Accordingly, the NRC's insistence that it need not consider terrorism under NEPA is legal error, and the District Court should not have found that the NRC satisfied its public participation obligations under NEPA when it reissued the Fire Safety Exemptions.

II. The NRC Failed to Comply with This Court's Remand Order

The District Court erred in finding that "the NRC has satisfied its public participation obligations as set out by the Court of Appeals." *Brodsky IV*, 2015 WL 1623824, at *2. On remand, this Court ordered the NRC to "explain its denial or otherwise demonstrate that it has in fact taken the kind of 'hard look at environmental consequences' that it would have taken if the public were allowed to comment on the exemption request." *Brodsky III*, 704 F.3d at 123 (citing *Coalition on W. Valley Nuclear Wastes* v. *Chu*, 592 F.3d 306, 310 (2d Cir. 2009)). This Court explained that, "to the extent that the [the NRC] found that the exemption will not 'significantly increase the probability or consequences of accidents,' this conclusion is precisely the point disputed by plaintiffs and on which they seek to be heard." *Brodsky III*, 704 F.3d at 123 (internal citation omitted).

The intent of this Court's decision was that if the agency chose a route other than explaining why no public participation was warranted, it would engage with the public as required under NEPA, and explain its reasoning for issuing the exemptions. In other words, on remand the NRC was called upon to fulfill NEPA's goals of considering every significant aspect of the environmental impact of the proposed exemptions, and of

ensuring that the agency would inform the public of its considerations. *See, e.g.*, *Baltimore Gas & Elec. Co.*, 462 U.S. at 97.

Instead, all the agency did was to give the illusion of public participation. Although it invited public comment, and claimed to address the comments received, in actuality it hid behind an overbroad legal interpretation and formulaic responses to categorically ignore the many comments that raised serious concerns about the specter of terrorism at Indian Point and its environmental consequences. (*See, e.g.*, A-66-67; A-86; A-234-36; *see also* A-39 (stating generically that "concerns related to security and terrorism are not relevant to the environment effects of the subject exemptions and are thus outside the scope of the NEPA review of this proposed action").)

Finally, this Court should reject any argument that, despite the NRC's statement that it need not consider terrorism, the agency nevertheless adequately considered terrorism concerns and satisfied the remand order by virtue of a general Safety Evaluation conducted in 2007. *See Brodsky IV*, 2015 WL 1623824, at *8 (citing A-28.). The District Court placed weight on the NRC's conclusion following its Safety Evaluation "that the configuration of the fire zones under review provide reasonable assurance that a severe fire is not plausible and the existing fire protection features are adequate." *See id.* (citing A-28, 78 Fed. Reg. at 52,988; *see also* JA-477-91.)

But that Safety Evaluation—now over 8 years old—did not take into account public comment, and contains no discussion or analysis of whether a terrorist attack on the nuclear plant might affect the agency's assumptions that a severe fire at Indian Point is not plausible. (*See generally* JA-477-491.) Instead, that older study simply adopts the conclusions of Indian Point's owner and operator that a severe fire at the facility would remain unlikely even after issuance of the Fire Safety Exemption because of "the presence of redundant safe-shutdown trains, minimal fire hazards and combustibles, automatic cable tray fire suppression system, manual fire suppression features, fire barrier protection, existing [fire-retardant coating] configuration, and the installed smoke detection system." (A-28; *see also* JA-477-491.)

Pointing to this out-of-date conclusion, reached in a different regulatory context without public comment or input, does not satisfy this Court's remand order, which required the NRC to demonstrate on remand that it had taken a "hard look" at the environmental consequences of the exemption. See *Brodsky III*, 704 F.3d at 123. Instead, the NRC's reliance on this analysis further supports the conclusion that the agency failed to do what it should have during the remand process—fully consider and respond to the comments submitted to it arguing that these fire prevention methods could be

intentionally disabled or additionally hindered by a terrorist attack, leading to potentially harmful environmental consequences. (*See, e.g.*, A-66-67; A-86; A-234-36.)

CONCLUSION

For the reasons set out above, the District Court erred in granting summary judgment to the NRC. The case should be reversed and remanded to the District Court with instructions requiring that the NRC engage in a meaningful comment and response period, one that includes issues of terrorism.

Dated: September 15, 2015
New York, New York

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP

/s/ Daniel J. Kramer

Daniel J. Kramer
Jacqueline P. Rubin
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. (212) 373-3020
Fax (212) 492-0020
dkramer@paulweiss.com
jrubin@paulweiss.com

Attorneys for Plaintiff-Appellant Richard Brodsky

Certificate of Compliance With Federal Rule of Appellate Procedure 32(a)

Certificate of Compliance With Type-Volume Limitations, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,920 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/ Daniel J. Kramer

Daniel J. Kramer
Jacqueline P. Rubin
1285 Avenue of the Americas
New York, New York 10019-6064
Tel. (212) 373-3020
Fax (212) 492-0020
dkramer@paulweiss.com
jrubin@paulweiss.com

Dated: September 15, 2015
New York, New York