 To what extent does the Nuclear Regulatory Commission have to consider the threat of terrorist attack in the environmental analysis it undertakes for nuclear power plant licensing decisions? A March 31 decision from the Third Circuit, New Jersey Department of Environmental Protection v. Nuclear Regulatory Commission, creates a circuit split on that question.

In the Third Circuit case, New Jersey argued that the NRC had to consider the risk and consequences of a terrorist airstrike in the EIS it prepared before relicensing the Oyster Creek nuclear power plant for twenty more years of operation. The court disagreed. That puts it at odds with the Ninth Circuit, which ruled in a 2006 case, San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission, 449 F.3d 1016, that the NRC may not categorically refuse to consider the effects of terrorist attacks in its NEPA documents.

The Third Circuit decided that any environmental effects of a terrorist attack were too speculative and remote to be considered "caused by" the relicensing decision. This aspect of the case is troubling. Without considering or even acknowledging the purposes of NEPA, the court extended the Supreme Court's decisions in Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766 (1983), and Department of Transportation v. Public Citizen, 541 U.S. 752 (2004), to cover this situation.

The Supreme Court has repeatedly described NEPA as having two core purposes: to ensure that agencies fully consider the environmental consequences of their actions and to inform the public about those consequences. Both are at stake when the NRC licenses or relicenses nuclear facilities. Had the Third Circuit looked at NEPA's purposes, it would have seen that this case is not governed by either *Metropolitan Edison* or *Public Citizen*.

In *Metropolitan Edison*, the Supreme Court ruled that NEPA analysis need not consider the extent to which people may worry about a nuclear accident. That makes sense. Concern, although it may affect one's health if it becomes extreme, is not an *environmental* effect.

But that does not mean that environmental risks, that is environmental impacts that are not certain to occur, are beyond the scope of NEPA analysis. Both the probability and the

potential intensity of environmental effects must be evaluated for NEPA to serve its purposes of informing agency decisionmakers and the public. So, for example, the Minerals Management Service must consider the risk of oil spills when it approves offshore oil development.

Nor does the *Public Citizen* decision let NRC off the hook. In *Public Citizen*, the Supreme Court said that the Department of Transportation did not have to consider the environmental effects of allowing Mexican trucks access to U.S. roads before issuing rules governing safety inspections at the border. The Department had no control over the admission of Mexican trucks; that decision was in the hands of the President, who is not subject to NEPA. The Department also could not control the environmental impact of any trucks the President chose to admit; its authority extended only to certifying the safety of Mexican trucks. Since the Department had no authority over increased truck traffic or its environmental effects, the Court determined that the twin purposes of NEPA would not be served by requiring it to produce an Environmental Impact Statement.

The NRC's role in nuclear relicensing is not like the Department of Transportation's role in the Mexican trucks case. True, the NRC does not control terrorist activities, or the risk of terrorist activities in the United States. But where it allows nuclear plants to operate, and under what conditions, can affect the extent to which terrorists target a particular location and the consequences should a terrorist strike succeed.

The Third Circuit emphasized that the NRC would not be liable under traditional tort law for harm caused by a terrorist strike on a plant it had licensed. Sure, but so what? Tort liability looks backward to ask who should have taken what actions to prevent a harm. NEPA is very different. It looks forward to ask what the consequences might be for human and environmental health if a federal agency takes, authorizes, or funds an action. That analysis can and should consider the foreseeable actions of others.

None of this is to say that the NRC must engage in an impossible analysis or publicize information that could be helpful to terrorists. If the environmental risks from terrorist attack are in fact insignificant, either because an attack is highly unlikely or because these plants are so well defended that no conceivable attack would cause release of radioactive materials, a brief explanation of that reasoning will suffice. And if detailed discussion of the risks from a terrorist attack might itself be useful to those planning such an attack, those portions of the EIS can be withheld from public release. (See Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981).) Perhaps the risk of terrorism need not even be considered on a site-specific basis. As an alternative to its causation holding, the Third Circuit ruled that the NRC had sufficiently considered the risks of terrorism in a generic EIS applicable to

all nuclear plant licensing. But the NRC should not be allowed to say as a blanket matter that it need never consider the risks of terrorism in the environmental analysis of its licensing decisions.