

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 03-4313

Riverkeeper, Inc.

Motion for: Leave to File Opposition to Motion To Dismiss

v.

Set forth below precise, complete statement of relief sought: Amicus Curiae is seeking permission to

Samuel J. Collins, Director, Office of Nuclear Reactor Regulation, et al.

file a brief in opposition to Respondent's

Motion to Dismiss.

MOVING PARTY: Attorney General Richard Blumenthal
Plaintiff Defendant X Amicus Curiae
Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY:

MOVING ATTORNEY: Robert Snook, AAG
[name of attorney, with firm, address, phone number and e-mail]
Robert Snook, Assistant Attorney General
Office of the Attorney General
55 Elm Street, Hartford, CT 06106
Robert.Snook@po.state.ct.us
860.808-5020

OPPOSING ATTORNEY [Name]:
[name of attorney, with firm, address, phone number and e-mail]

Agency appealed from: Nuclear Regulatory Commission

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No

Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No
If yes, enter date

Signature of Moving Attorney: [Handwritten Signature]

Date: 7/30/2003

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No

Has this relief been previously sought in this Court? Yes No

Requested return date and explanation of emergency:

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: ROSEANN B. MacKECHNIE, Clerk of Court

Date:

By:

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

RIVERKEEPER, INC.	:	NO. 03-4313
v.	:	
SAMUEL J. COLLINS, DIRECTOR, OFFICE OF NUCLEAR REACTOR REGULATION, ET AL.,	:	July 30, 2003

**MOTION FOR LEAVE TO FILE MEMORANDUM IN OPPOSITION TO  
RESPONDENT'S MOTION TO DISMISS**

Pursuant to Federal Rule of Appellate Procedure 27(a), amicus curiae, Richard Blumenthal, Attorney General of the State of Connecticut, files this motion seeking leave to file a memorandum in opposition to the Respondent's motion to dismiss in the above-captioned matter.

**Background**

The amicus curiae brings this motion in his capacity as the chief legal officer representing the legal interests of the State of Connecticut and its residents. The underlying appeal involves a challenge to the emergency planning and response procedures at the Indian Point Energy Center, a nuclear power station in Buchanan, New York. Pursuant to federal law and regulation, these emergency planning procedures affect both an immediate 10-mile radius planning zone around the facility and a further separate 50-mile radius ingestion pathway zone. The 50-mile radius zone includes substantial portions of the State of Connecticut, including its

largest city, Bridgeport, and its most populous county, Fairfield. Furthermore, the movement of evacuees from the more limited 10-mile zone would also directly impact the transportation network in and around southwestern Connecticut.

Therefore, because the Indian Point emergency plans affect significant portions of the State of Connecticut, including Fairfield County, the Attorney General, individually, and in his capacity as chief legal officer of the state, has filed a brief as amicus curiae in order to inform the Court of the position of the State in this matter.

On June 3, 2003, counsel for the Respondent, United States Nuclear Regulatory Commission ("NRC"), filed a motion to dismiss the underlying appeal for lack of jurisdiction. On June 16, 2003, the Petitioner, Riverkeeper, Inc., filed a memorandum in opposition.

**The Attorney Generals' Memorandum Will be of Assistance to the Court**

The amicus curiae seeks leave to file a memorandum in opposition to the motion to dismiss in order to support the jurisdiction of the Court in this matter. Specifically, the NRC has claimed that, pursuant to the terms of 10 C.F.R. Section 2.206, the actions requested below by Riverkeeper are committed to the discretion of the agency and, as such, any review thereof is beyond the jurisdiction of this Court. In support of there argument, NRC relies on the case of *Hecker v. Chaney*, 470 U.S. 821 (1985).

The Respondent's claim fails for several reasons, as detailed in the memorandum in opposition. On the one hand, *Chaney* itself makes clear that even wholly discretionary administrative acts are reviewable if, as here, the claim is that the agency abdicated its statutory responsibilities. Beyond this, however, the NRC's assertion that its decision is discretionary is based solely on the code of federal regulations, not on a grant of statutory authority. *Chaney* is clear that only when Congress has committed enforcement authority solely to the discretion of the agency *by statute* can the federal judiciary be divested of jurisdiction. Obviously, any rule that permits agencies to remove their decision-making process beyond the power of the federal courts by merely adopting a regulation would have far-reaching and extremely negative effect on the ability of the public to seek independent scrutiny of the actions of government officials.

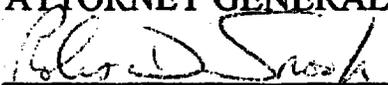
The amicus, as attorney general, is often obligated to both appear before, and on occasion defend, the actions of administrative agencies. As such the amicus brings a unique viewpoint to this very important question of jurisdiction.

**Conclusion**

For the foregoing reasons, the Attorney General seeks leave to file the attached memorandum in opposition to Respondent's motion to dismiss.

**RICHARD BLUMENTHAL  
ATTORNEY GENERAL**

BY:

  
**Robert D. Snook  
Assistant Attorney General  
Federal Bar No. ct10897  
55 Elm Street  
P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020  
Fax: (860) 808-5347  
Robert.Snook@po.state.ct.us**

**Certificate of Service**

Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I hereby certify that on this 30<sup>th</sup> day of July, 2003, the original and 9 copies of the foregoing were filed in accordance with Rule 25(a)(2)(B(ii)) to Roseann B. MacKechnie, Clerk, Second Circuit Court of Appeals, 40 Foley Square, New York, New York 10007.

I further certify that seven copies of the foregoing were delivered to the following counsel of record:

Karl Coplan  
Pace Environmental Litigation Clinic, Inc.  
78 N. Broadway  
White Plains, NY 10603  
Tel: (914) 422-4143

William A. Isaacson  
Boies, Schiller & Flexner  
5301 Wisconsin Avenue, Suite 800  
Washington, DC 20015  
Tel: (202) 237-2727

John Fulton, Esq.  
Entergy Nuclear Operations, Inc.  
440 Hamilton Avenue  
White Plains, NY 10601

Jay E. Silberg  
Matia F. Travieso-Diaz  
Paul A. Gaukler  
Shaw Pittman, LLP  
2300 N Street, NW  
Washington, DC 20037  
Tel: (202) 663-8000

J. Michael McGarry, III, Esq.  
Katheryn M. Sutton, Esq.  
Brooke D. Poole, Esq.  
L. Michael Rafky, Esq.  
Winston & Strawn  
1400 L Street, NW  
Washington, DC 20005-3502  
Tel: (202) 371-5700

Sara E. Brock, Esq.  
Catherine L. Marco, Esq.  
Office of the General Counsel  
Mail Stop --O-15 D21  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

John Ashcroft  
United States Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001  
Tel: (202) 353-1555



**Robert D. Snook**  
**Assistant Attorney General**