

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

Motion for: Leave to File Opposition to Motion To Dismiss

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

file a brief in opposition to Respondent's

Motion to Dismiss.

Riverkeeper, Inc.

v.

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

MOVING PARTY: Attorney General Richard Blumenthal

☐ Plaintiff ☐ Defendant ☒ Amicus Curiae
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: _____

MOVING ATTORNEY: Robert Snook, AAG
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OPPOSING ATTORNEY [Name]: _____
[name of attorney, with firm, address, phone number and e-mail]

~~FROM COURT~~ 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: *Robert Snook*

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
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Certificate of Service

Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I hereby certify that on this 30th 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:

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A handwritten signature in dark ink, appearing to read "Robert D. Snook", written over a horizontal line.

Robert D. Snook
Assistant Attorney General