

# 07-0324ag(L)

07-1276-ag(CON)

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**United States Court of Appeals  
For the Second Circuit**

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ANDREW J. SPANO, as County Executive of the County of Westchester,  
COUNTY OF WESTCHESTER, NEW JERSEY ENVIRONMENTAL  
FEDERATION, and NEW JERSEY CHAPTER OF THE SIERRA CLUB,  
*Petitioners,*

-v.-

UNITED STATES NUCLEAR REGULATORY COMMISSION and  
UNITED STATES OF AMERICA,  
*Respondents.*

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ON PETITION FOR REVIEW OF FINAL ACTION OF THE  
NUCLEAR REGULATORY COMMISSION,

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**BRIEF FOR AMICUS CURIAE COUNTY OF ROCKLAND  
IN SUPPORT OF PETITIONERS**

**(Asking that the Petitions for Review be Sustained, that the Denial of the  
Petitions for Rulemaking be set Aside, and that the Matter be Remanded  
to the Nuclear Regulatory Commission)**

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### **QUESTION PRESENTED**

Was the denial by the Nuclear Regulatory Commission of the petitions for rulemaking, without a hearing, without notice to Petitioners of any deficiencies in their petitions, and even, despite the new evidence pointed to in their petitions, without any efforts at further fact-finding to determine whether its current regulations adequately protect the public arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law?

### **INTEREST OF AMICUS CURIAE COUNTY OF ROCKLAND**

A political subdivision of the State of New York, the County of Rockland is a municipal corporation organized under the laws of the State of New York.

Rockland County abuts the New Jersey-New York border; it lies approximately 30 miles north of New York City, due west of, and immediately across the Hudson River from, Westchester County.

As of the U.S. Census of 2000, there were 286,753 people, 92,675 households, and 70,989 families residing in Rockland County, which has a total area of 199 square miles and a population density of 1,646 per square mile. However, Rocklanders live closer together than the census numbers indicate, because 30 percent of the county is reserved as parkland.

*[http://en.wikipedia.org/wiki/Rockland\\_County,\\_New\\_York](http://en.wikipedia.org/wiki/Rockland_County,_New_York)*

As of 2000, more than 114,000 people (i.e., more than 40 percent of Rockland's 286,753 residents) live within the 10-mile radius (i.e., the Indian Point Emergency Preparedness Zone [EPZ]) drawn around the Indian Point nuclear plants owned and operated by Entergy Nuclear Operations, Inc. at Buchanan, in Westchester County, immediately east across the Hudson River from northern Rockland County.

The County of Rockland has an obvious and undeniable interest in protecting the citizens and environment of Rockland County by assuring, among other things, the safe and secure operation of the nuclear power plants that are situated immediately across the Hudson River, within 10-miles from the dwellings of more than 40 percent of its inhabitants.

This Court has previously observed that the County of Rockland is "clearly qualified as an entity 'whose interest may be affected' by the [Nuclear Regulatory] Commission's review of emergency preparedness at Indian Point." *County of Rockland v. U. S. Nuclear Regulatory Commission*, 709 F.2d 766, 774 (2<sup>nd</sup> Cir., 1983). Even more so does the County of Rockland's interest in making sure that the Nuclear Regulatory Commission's rules governing the renewal of the licenses to operate the nuclear power plants situated immediately across the Hudson River from it adequately protect the more than 40 percent of its people who live within 10-miles from those nuclear power plants. In light of that interest, the County of

Rockland justly seeks leave to file this brief amicus curiae pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

### **SUMMARY OF THE ARGUMENT**

On December 2, 2006, without a hearing, without prior notice to any of the Petitioners of any deficiencies in their petitions, and even, despite the new evidence pointed to in their petitions, without any efforts at further fact-finding, the Nuclear Regulatory Commission denied the petitions for rulemaking that the New York Petitioners filed in May 10, 2005 and that the New Jersey Petitioners filed July 25, 2005, both pursuant to 10 C.F.R. §2.802.

Petitioners had asked the Nuclear Regulatory Commission to revisit the rules governing the renewal of initial licenses that it had first adopted in 1991 and that it had in 1995 amended to narrow the focus of the renewal process only to age-related issues affecting passive structures and components (as opposed to “moving parts”) after the initial 40 year license term. (Spano brief, p. 9-10). In short, Petitioners asked the Nuclear Regulatory Commission to promulgate new rules that would require all future renewal applicants (such as Entergy Nuclear Operations, Inc.) to meet the same criteria and standards that apply to initial licenses (Spano brief, p. 20).

The Nuclear Regulatory Commission failed to provide a “reasoned explanation” for its December 2006 denial of the May and July 2005 petitions.

Consequently, its decision to deny those petitions should be overturned as being arbitrary and capricious. *Massachusetts v. Environmental Protection Agency (EPA)*, 127 S. Ct. 1438, 1463, 549 U.S. \_\_\_\_ (2007).

In their amicus brief (p. 18-19), the Attorneys General for New York and Connecticut, citing *American Horse Protection Association (APH) v. Lyng*, 812 F.2d 1,5 (D.C. Cir., 1987), point out that a reviewing court must assure itself that an administrative agency such as the Nuclear Regulatory Commission considered the relevant factors, that it explained the “facts and policy concerns” relied on, and that the facts have some basis in the record. Moreover, “an agency’s refusal to initiate a rulemaking naturally sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises.” *Ibid.* A reviewing court may force an agency that had denied a rulemaking petition to institute rulemaking proceedings if a significant predicate of the agency’s prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed. *Ibid.* In the case at bar, the Nuclear Regulatory Commission shirked its obligation (triggered by Petitioners’ suggestion that the factual and legal circumstances that underlay its 1991 rules and the 1995 amendments to those rules have since changed) either to reconsider its settled policy regarding the license renewal process or to explain its failure to do so. *See Bechtel v. Federal Communications Commission (FCC)*, 957 F.2d 873, 881 (D.C. Cir., 1992). The

Nuclear Regulatory Commission's failure in that regard was aggravated by its willful and unjustified refusal to hold any hearing whatsoever on the petitions, or even to afford petitioners, as required by its own rule, 10 CFR §2.802(f), notice of any deficiencies in their petitions and an opportunity to cure those deficiencies.

Under all of the circumstances, the denial by the Nuclear Regulatory Commission of Petitioners' rulemaking petitions was arbitrary and capricious, was an abuse of discretion, or was otherwise not in accordance with law.

## ARGUMENT

**THE DENIAL BY THE NUCLEAR REGULATORY COMMISSION OF  
THE PETITIONS FOR RULEMAKING, WITHOUT A HEARING,  
WITHOUT PRIOR NOTICE TO ANY OF THE PETITIONERS OF ANY  
DEFICIENCIES IN THEIR PETITIONS, AND EVEN, DESPITE THE NEW  
EVIDENCE POINTED TO IN THEIR PETITIONS, WITHOUT ANY  
EFFORTS AT FURTHER FACT-FINDING TO DETERMINE WHETHER  
ITS CURRENT REGULATIONS ADEQUATELY PROTECT THE PUBLIC  
WAS ARBITRARY AND CAPRICIOUS, WAS AN ABUSE OF  
DISCRETION, OR WAS OTHERWISE NOT IN ACCORDANCE WITH  
LAW**

### **1. The Atomic Energy Act (Adequate Protection of the Public)**

The Atomic Energy Act of 1954, 42 U.S.C. §2011 *et seq.*, imposes on the Nuclear Regulatory Commission (NRC) the clear duty to ensure by licensing and regulation that those who generate and transmit nuclear power do not threaten the public welfare. The NRC is statutorily obligated to refuse to issue a license to a nuclear power plant operator unless and until it determines that the licensing and operation of that proposed nuclear power plant is “in accord with the common defense and security” and that it will “provide adequate protection to the health and safety of the public.” 42 U.S.C. §2232(a); *see also* §2133(b)[*no license may issue where it “would be inimical to the common defense and security or to the health and safety of the public.”*]

Even though 42 U.S.C. §2133(b) & (c) authorize the NRC to issue an initial license for up to 40 years to a would-be nuclear plant operator that can demonstrate that its operations will adequately protect the public safety, and further authorize

the NRC to renew such license for up to 20 additional years upon the expiration of that initial period, those statutory provisions do not guarantee the holder of an initial license the right to continue operating a nuclear plant beyond the initial 40-year period. Moreover, it is quite possible, as Petitioners point out (Spano brief, p. 36), that the technology supporting any particular nuclear power plant could become obsolete even in as little as 5 or 10 years, well before the end of the initial 40-year term.

In short, the NRC is statutorily required to determine the standards governing the grant of an initial license to a nuclear power plant operator, as well as those standards governing the renewal of such license. Nevertheless, the NRC may never promulgate or implement any licensing or renewal standards, unless and until it can by way of “reasoned explanation” demonstrate, in the event those standards are challenged, that those standards meet the continuing Congressional prohibition against issuing or renewing any license unless the applicant for such license or renewal affirmatively demonstrates that its operations will adequately protect the public safety. Otherwise, such standards would be arbitrary and capricious.

As Petitioners have argued (Spano brief, p. 37), the current renewal standards embodied in the 1991 rulemaking and the 1995 amendments simply have no teeth; since their promulgation, 48 out of 49 license renewal applications have

been approved. This apparent *de facto* guarantee that the NRC will renew virtually every initially granted license is the direct result of the NRC's deliberate refusal, in contravention of its Congressional mandate, to promulgate license renewal rules that would require the renewal applicant affirmatively to demonstrate, in the same way as would an applicant for an initial license, that the renewal applicant's continued operation of a nuclear power plant would not be inimical to the health and safety of the public. When challenged in 2005 by the Petitioners to revisit its 1991 and 1995 rulemaking and to promulgate new license renewal rules that would require the renewal applicant affirmatively to demonstrate, as would an applicant for an initial license, that its continued operation of a nuclear power plant would not be inimical to the health and safety of the public, the NRC refused to do so and instead provided, not the "reasoned explanation" required by *Massachusetts v. EPA, supra*, but rather a self-serving display of circular reasoning demonstrating a lack of any responsiveness to public input, with respect to its rulemaking, to such an extent that it could be inferred that it may have already made a *sub rosa* decision to renew virtually all soon-to-expire initial licenses, such as those held by Entergy Nuclear Operations, Inc. ("Entergy"). That the NRC is well on its way to becoming the poodle of the nuclear power industry is corroborated even by the "2002 Survey of NRC's Safety Culture and Climate" (<http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2003/03a-03.pdf>) issued by the NRC's own Office of

the Inspector General. The survey found that many NRC employees were concerned “that NRC is becoming influenced by private industry” and that “its power to regulate is diminishing” (p.4). Finding that only “slightly more than half (53%) of the employees feel that it is ‘safe to speak up in the NRC’” (p. 36), the survey not only corroborates the suggestion that the NRC lacks any honest interest in public input with respect to its rulemaking and licensing activities; it also suggests that the NRC discourages such input even from its own loyal employees.

**2. Refusal by the Nuclear Regulatory Commission to Hold a Hearing as Provided by 10 C.F.R. §2.803 or to Notify Petitioners, as Required by 10 C.F.R. §2.802(f), of any Deficiencies in their Petitions and to Afford them an Opportunity to Cure such Deficiencies**

According to 10 C.F.R. §2.803, “[n]o hearing will be held on the petition unless the Commission deems it advisable.” That is, the NRC’s regulations invest it with discretion to determine whether to hold a hearing on a rulemaking petition filed pursuant to 10 C.F.R. §2.802. Nevertheless, any decision to hold or not to hold a hearing on such a petition must have a reasonable basis. In the case at bar, the NRC refused, because it likely was unable, to articulate to Petitioners any principled explanation, supported by fact and rooted in reason, for its denial of their rulemaking petitions without a hearing. It may very well be that even now, as this court reviews the NRC’s denial of the rulemaking petitions, the NRC will continue to be unable to articulate any principled explanation for its denial that is rooted in fact and reason. An administrative agency that refuses or is

unable to articulate on behalf of its decision any principled explanation supported by fact and rooted in reason is *ipso facto* an administrative agency that has acted arbitrarily and capriciously, that has abused its discretion, and whose decision is not in accordance with law. *See Massachusetts v. EPA, supra, at 1463.*

As was pointed out in Petitioner Spano's brief:

The NRC did not say that holding a hearing would be too time consuming. The NRC did not offer any reason for not holding a hearing. Instead the NRC found that the Petition lacked merit because there was no new information since 1991 and 1995. On its face, that decision was arbitrary. (p. 38)

Assuming for the sake of argument, but not in the least conceding, that the NRC correctly determined that the petitions offered no new information since the 1991 and 1995 rulemakings, and assuming further that the petitions were therefore incomplete, having failed to include information required by 10 C.F.R. § 2.802(c)(3) ["relevant technical, scientific or other data involved which is reasonably available to petitioner"], the NRC was nevertheless absolutely bound by its own rules, specifically 10 C.F.R. §2.802(f), to notify Petitioners of that incompleteness determination and of "the respects in which the petition is deficient," as well as to accord Petitioners "an opportunity to submit additional data" "within 90 days from the date of notification...that the petition is incomplete." Having likely already determined to deny the rulemaking petitions,

the NRC brazenly chose to deprive Petitioners of the very notification and opportunity to cure any deficiencies that its own rules required it to give Petitioners. The only conclusion that can be fairly drawn from the NRC's remarkable behavior in this regard is that, were Petitioners accorded their opportunity, rooted in the NRC's own rules, to submit any additional factual data that might demonstrate the need for the NRC to consider new rulemaking with respect to its license renewal standards, the NRC was simply disinclined to entertain any additional data, consideration of which might inconveniently break its habit of approving virtually all license renewal applications submitted to it. As Petitioner Spano stated, "[f]or this reason alone, the NRC's denial of the petition for rulemaking was arbitrary and capricious and should be reversed and remanded to provide the County with an opportunity to submit additional data" (p. 41). *See the Administrative Procedure Act, 5 U.S.C. §706(2)(A)*.

**3. Refusal by the Nuclear Regulatory Commission, Despite the New Evidence Pointed to in Petitioners' Petitions, to Make any Efforts at Further Fact-Finding to Determine Whether its Current License Renewal Regulations Adequately Protect the Public**

Citing *APHA v. Lyng, 812 F.2d 1, 5 (D.C. Cir., 1987)*, the amicus brief (p. 19) of the Attorneys General emphasized that "[a]n agency's refusal to initiate a rulemaking naturally sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises." In fact, "[c]hanges in factual and legal circumstances may impose upon the agency an

obligation to reconsider a settled policy or explain its failure to do so.” *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir., 1992).

Thus, “an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed.” *WHHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir., 1981).

Denying Petitioners’ rulemaking petitions, the NRC incorrectly claimed that it had already considered, in its 1991 and 1995 rulemakings, the same issues raised by Petitioners’ in their 2005 petitions; the NRC asserted that Petitioners did not present any new information that would contradict the position taken by the NRC in those 1991 and 1995 rulemakings (Spano brief, p. 21-22).

However, in the face of a number of post-1995 events and other changed circumstances documented in various studies referred to in the petitions, the NRC, demonstrating a remarkable lack of curiosity, stubbornly refused to make any of the further fact-finding efforts that those events and changed circumstances would seem naturally to suggest.

For example, the NRC denied, as not germane to the age-related degradation to which the NRC’s 1991 and 1995 rulemakings narrowed its plant-evaluative focus, Petitioners’ request that the NRC’s license renewal rules be revised to include criteria that take into account the sufficiency of emergency planning in

light of changes in local demographics and infrastructure that may have occurred since the time of initial licensing (Spano brief, p. 23). Petitioners had pointed out that the problems associated with evacuation planning and with the ability to evacuate areas surrounding the Indian Point facilities operated by Entergy, in light of changing demographics, were well-documented by the “KLD Report” (Spano brief, p. 23) and the “Witt Report” (Spano brief, p. 24), both of which pointed to the “inescapable reality” that an “increase in population coupled with a stagnant infrastructure has dramatically slowed the evacuation response time in the event of an emergency” to 5 to 12 hours (Spano brief, p. 24).

The “Witt Report” also expressed concern over protection of the water supply upon which the dense population surrounding the Indian Point facilities is dependent, as well as over the inability of the facilities’ hazard assessment technology to account for complex weather patterns that could affect the radiation status and movement of the radioactive “plume” that could escape in the event of a nuclear disaster. (Spano brief, p. 25).

The scientific and technical evidence, provided by the “KLD Report” and the “Witt Report”, of the need for improved emergency planning that adjusts to changes in population, infrastructure, and technology was sufficient to suggest that the NRC should at least consider including among its license renewal criteria the viability of current emergency evacuation planning, the facilities’ current ability to

protect the local water supply, and the ability of the facilities' current hazard assessment technology to account for complex weather patterns that could affect the radiation status and movement of any radioactive "plume". Nevertheless, in denying the petitions, the NRC merely acknowledged the existence of those reports, without even discussing them, let alone analyzing them. Rather, employing a circular analysis, the NRC stated that it would not revise the regulations as requested by the Petitioners because the agency previously had decided "to limit the scope" of the renewal proceedings (Brief of Attorneys General, p. 22, citing 71 Fed. Reg. at 74,852). That refusal by the NRC, despite the new evidence pointed to in the petitions, to make any efforts at further fact-finding to determine whether its current license renewal regulations adequately protect the public flies in the face of its Congressional mandate. That refusal seriously to consider such new evidence rendered the NRC decision to deny the petitions arbitrary and capricious within the meaning of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)) and thus susceptible to reversal and remand by this reviewing court. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*, 463 U.S. 29, 43 (1983)[stating that an agency's rule is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency."]

Illustrative of the NRC's habitual disinclination to bring genuine fact-finding to bear on its license renewal rulemaking process is its inadequate response to the Petitioners' environmental and security concerns about the storage of spent nuclear fuel (i.e., the radioactive waste that is the byproduct of the reactions that occur inside nuclear reactors). The NRC's "Waste Confidence Rule" (10 C.F.R. § 51.23), adopted in 1984, declares that "spent fuel...can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a...renewed license) of that reactor...." That 1984 rule relied heavily upon the then-expected availability of Yucca Mountain in Nevada as a long-term off-site storage solution for spent fuel (Spano brief, p. 30). However, the approval of Yucca Mountain for long-term off-site spent fuel storage continues to be delayed (Spano brief, p. 30). A 2003 report by the National Academy of Sciences (NAS), referred to in the public comments and in the petitions, concluded that even newer nuclear power plants designed with larger-capacity on-site spent fuel pools will run out of space if they operate beyond their initial 40-year license and that such on-site pools are vulnerable to terrorist attacks (Spano brief, p. 30-32). Despite requests that the license renewal process be revised to include a comprehensive assessment of the security of spent fuel pools, the NRC did not substantively address the analysis contained in the NAS report but stated in conclusory fashion that security issues, not being "age-related",

are irrelevant to the license renewal process (Spano brief, p. 32). The NRC's merely conclusory explanation why it was ignoring the NAS report was insufficient to assure this reviewing court that its refusal to revise or even to revisit its license renewal criteria was the product of the reasoned decisionmaking required by *Massachusetts v. EPA* and *AHPA v. Lyng* (Brief of Attorneys General, p. 22-23). At a minimum, this court should remand the matter to the NRC with directions to provide a substantive response to the NAS report (Spano brief, p.33).

**CONCLUSION**

For the reasons set forth above, this court should overturn the NRC's denial of the petitions and remand the petitions to the NRC for proper consideration of the issues that they raise.

Dated: New City, New York  
August 13, 2007

Respectfully submitted,

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CERTIFICATE PURSUANT TO F.R.A.P. 32 (a) (7) (c)

MICHAEL P. O'CONNOR, an attorney licensed to practice law in the State of New York and a member of the bar of this Court makes the following statement subject to 28 U.S.C. § 1746.

1. Pursuant to Rule 32 (a) (7) (c); the attached brief of Amicus Curiae County of Rockland complies with the work limitation contained in Rule 32 (a) (7) (b). The "Document Summary" software associated with this Office's word processing software indicates that the brief contains 3,619 words, exclusive of the cover, table of contents, table of authorities, this certification, and the certificate of service.

2. I declare under penalty of perjury that the foregoing is true and Correct.

Dated: New City, New York  
August 13, 2007

  
\_\_\_\_\_  
MICHAEL P. O'CONNOR

**ANTI-VIRUS CERTIFICATION FORM**

*See Second Circuit Local Rule 32(a)(1)(E)*

CASE NAME: Andrew J. Spano et al. v. United States Nuclear Regulator Commission

DOCKET NUMBER: 07-0324 ag (L), 07-1276 ag (CON)

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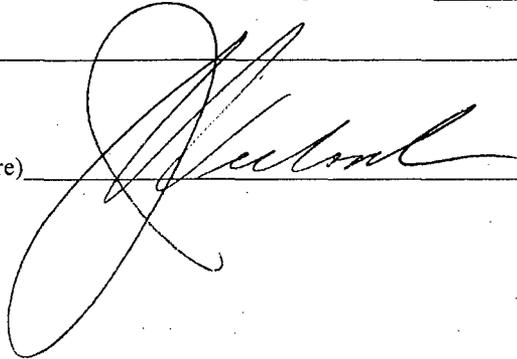
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**ANTI-VIRUS CERTIFICATION FORM**

*See Second Circuit Local Rule 32(a)(1)(E)*

**CASE NAME:** *Andrew J. Spano et al. v. United States Nuclear Regulator Commission*

**DOCKET NUMBER:** 07-0324 ag (L), 07-1276 ag (CON)

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