

07-0324 ag

07-1276 ag (CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE
UNITED STATES NUCLEAR REGULATORY COMMISSION

BRIEF FOR AMICI CURIAE STATES OF NEW YORK AND
CONNECTICUT IN SUPPORT OF PETITIONERS

BARBARA D. UNDERWOOD
Solicitor General

KATHERINE KENNEDY
Special Deputy Attorney
General

BENJAMIN N. GUTMAN
Deputy Solicitor General

JOHN J. SIPOS
MORGAN A. COSTELLO
Assistant Attorneys General

of Counsel

ANDREW M. CUOMO
Attorney General of the
State of New York
The Capitol
Albany, NY 12224
(518) 486-4550

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250

Dated: July 10, 2007

Attorneys for Amici Curiae

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT | 1 |
| QUESTION PRESENTED | 2 |
| INTEREST OF AMICI CURIAE | 2 |
| STATEMENT OF THE CASE | |
| A. Statutory and Regulatory Framework | |
| 1. The Atomic Energy Act | 3 |
| 2. NRC's Regulations Regarding Emergency Planning and Siting Criteria | 4 |
| 3. NRC's License-Renewal Regulations | 5 |
| B. Overview of Indian Point | 7 |
| C. The Rulemaking Petitions | 14 |
| SUMMARY OF THE ARGUMENT | 17 |
| STANDARD OF REVIEW | 18 |
| ARGUMENT | |
| NRC'S DENIAL OF THE RULEMAKING PETITIONS WAS ARBITRARY AND CAPRICIOUS | |
| A. NRC Ignored New Information Regarding the Inadequacy of Its Ongoing Compliance Efforts | 20 |
| B. NRC's Determination Was Infected By Legal Errors About the Regulation of Cooling-Water Systems | 25 |
| CONCLUSION | 31 |

TABLE OF AUTHORITIES

Page

FEDERAL CASES

| | |
|---|----------------|
| <u>Am. Horse Protection Ass'n (AHPA) v. Lyng,</u> 812 F.2d 1 (D.C. Cir. 1987) | 18,19,20,23,25 |
| <u>Baltimore Gas & Electric Co. v. Natural Resources</u> <u>Defense Counsel, Inc.,</u> 462 U.S. 87 (1983) | 29 |
| <u>Bechtel v. FCC,</u> 957 F.2d 873 (D.C. Cir. 1992) | 19 |
| <u>Calvert Cliffs' Coordinating Comm., Inc. v.</u> <u>U.S. Atomic Energy Comm'n,</u> 449 F.2d 1109 (D.C. Cir. 1971) | 29 |
| <u>Citizens Awareness Network, Inc. v. United States,</u> 391 F.3d 338 (1st Cir. 2004). | 25 n.3 |
| <u>Geller v. FCC,</u> 610 F.2d 973 (D.C. Cir. 1979) | 19 |
| <u>Islander E. Pipeline Co., LLC v. Conn. Dep't of</u> <u>Envtl. Protection,</u> 467 F.3d 295 (2d Cir. 2006) | 21 |
| <u>Massachusetts v. EPA,</u> 127 S. Ct. 1438 (2007) | 18,19,23,25 |
| <u>Motor Vehicle Mfrs. Ass'n v. State Farm</u> <u>Mut. Auto. Ins. Co.,</u> 463 U.S. 29 (1983) | 22 |
| <u>Nat'l Customs Brokers & Forwarders Ass'n, Inc.</u> <u>v. United States,</u> 883 F.2d 93 (D.C. Cir. 1989) | 19 |
| <u>Riverkeeper, Inc. v. Collins,</u> 359 F.3d 156 (2d Cir. 2004) | 24 |
| <u>Riverkeeper, Inc. v. United States EPA,</u> 475 F.3d 83 (2d Cir. 2007) | 16,28 |
| <u>Scenic Hudson Preservation Conf. v. Fed. Power</u> <u>Comm'n,</u> 354 F.2d 608 (2d Cir. 1965) | 21 n.2 |
| <u>WWHT, Inc. v. FCC,</u> 656 F.2d 807 (D.C. Cir. 1981) | 20 |

TABLE OF AUTHORITIES (cont.)

Page

STATE CASES AND ADMINISTRATIVE PROCEEDINGS

| | |
|--|----|
| <u>Entergy Nuclear Indian Point 2, LLC v. N.Y.S. Dep't</u> <u>of Env'tl. Conservation</u> , 23 A.D.3d 811 (3d Dep't 2005), <u>appeal dismissed</u> , <u>leave denied</u> , 6 N.Y.3d 802 (2006) . . . | 27 |
| <u>In re Renewal & Modification of a SPDES</u> <u>Permit by Dynegy Northeast Generation, Inc.</u> , 2005 N.Y. ENV LEXIS 31 (May 13, 2005) | 27 |
| <u>In re Renewal & Modification of a SPDES</u> <u>Permit by Entergy Nuclear Indian Point 2,</u> <u>LLC, et al.</u> , 2006 N.Y. ENV LEXIS 3 (Feb. 3, 2006) | 27 |

FEDERAL STATUTES

Administrative Procedure Act

| | |
|---------------------------------|----|
| 5 U.S.C. § 706(2) (A) | 18 |
|---------------------------------|----|

Clean Water Act

| | |
|-------------------------------|----|
| 33 U.S.C. § 1311 | 26 |
| 33 U.S.C. § 1311(a) | 26 |
| 33 U.S.C. § 1326 | 26 |
| 33 U.S.C. § 1326(b) | 26 |
| 33 U.S.C. § 1342 | 26 |
| 33 U.S.C. § 1342(b) | 26 |
| 33 U.S.C. § 1362(6) | 26 |

Atomic Energy Act of 1954

| | |
|---|------|
| 42 U.S.C. § 2011 <u>et seq.</u> | 3 |
| 42 U.S.C. § 2039 | 23 |
| 42 U.S.C. § 2133(b) | 3, 4 |
| 42 U.S.C. § 2133(c) | 4 |

TABLE OF AUTHORITIES (cont.)

| | <u>Page</u> |
|----------------------------------|-------------|
| 42 U.S.C. § 2201(b) | 20 |
| 42 U.S.C. § 2232(a) | 3,20 |
| 42 U.S.C. § 4332(2)(c) | 29 |

STATE STATUTES

N.Y. Environmental Conservation Law

| | |
|---------------------|----|
| § 17-0101 | 27 |
| § 17-0303 | 27 |

FEDERAL REGULATIONS

| | |
|---------------------------------------|--------|
| 10 C.F.R. § 2.321 | 23 |
| 10 C.F.R. § 2.335(b) | 29 |
| 10 C.F.R. § 2.336 | 24 |
| 10 C.F.R. § 2.337(g)(2) | 23 |
| 10 C.F.R. § 2.802(a) | 14,28 |
| 10 C.F.R. § 2.1207 | 24 |
| 10 C.F.R. § 50.33(g) | 4 |
| 10 C.F.R. § 50.47(a)(1) | 5,6 |
| 10 C.F.R. § 50.47(a)(2) | 5 |
| 10 C.F.R. § 50.47(c)(1)(i) | 25 n.3 |
| 10 C.F.R. § 50.54(s)(1) | 4 |
| 10 C.F.R. § 50.54(s)(3) | 5 |
| 10 C.F.R. § 50.54(s)(2)(ii) | 5 |
| 10 C.F.R. § 50.58(a) | 23 |
| 10 C.F.R. § 51.23(a) | 25 n.3 |

TABLE OF AUTHORITIES (cont.)

| | <u>Page</u> |
|--|-------------|
| 10 C.F.R. § 51.92(a) | 30 |
| 10 C.F.R. § 51.95(c)(3) | 30 |
| 10 C.F.R. § 54.21 | 6 |
| 10 C.F.R. § 54.29 | 6 |
| 10 C.F.R. § 54.30 | 6 |
| 10 C.F.R. § 54.31(b) | 6 |
| 10 C.F.R. § 100.2 | 6 |
| 10 C.F.R. § 100.10(b) | 5 |
| 10 C.F.R. § 100.21(h) | 5 |
| 40 C.F.R. § 1502.9(c)(1)(ii) | 30 |

STATE REGULATIONS

| | |
|--------------------------------|----|
| 6 N.Y.C.R.R. § 704.5 | 27 |
|--------------------------------|----|

FEDERAL REGISTER

| | |
|---|--------|
| 40 Fed. Reg. 54,462 (Nov. 24, 1975) | 27 |
| 45 Fed. Reg. 55,402 (Aug. 19, 1980) | 4 |
| 56 Fed. Reg. 64,943 (Dec. 13, 1991) | 5,7 |
| 60 Fed. Reg. 22,461 (May 8, 1995) | 5,7 |
| 61 Fed. Reg. 65,157 (Dec. 11, 1996) | 5,6 |
| 69 Fed. Reg. 2,182 (Jan. 14, 2004) | 25 n.3 |
| 71 Fed. Reg. 74,848 (Dec. 13, 2006) | passim |
| 72 Fed. Reg. 26,850 (May 11, 2007) | 14 |
| 72 Fed. Reg. 37,107 (July 9, 2007) | 28 |

TABLE OF AUTHORITIES (cont.)

Page

SCIENTIFIC AND TECHNICAL REPORTS

| | |
|--|------------|
| GAO, Hearing Before the House Subcomm. on National Security, Emerging Threats and International Relations, <u>Emergency Preparedness Issues at the Indian Point 2 Nuclear Power Plant</u> (2003) (statement of Jim Wells, Director, Natural Resources and Environment, GAO), <u>available at</u> http://www.gao.gov/new.items/d03528t.pdf | 13 n.1 |
| GAO, Report to Congressional Requesters, <u>NRC Needs to More Aggressively & Comprehensively Resolve Issues Related to the Davis-Besse Nuclear Power Plant's Shutdown</u> , GAO-04-415 (2004) | 13 n.1 |
| GAO, Report to Congressional Requesters, <u>NRC: Oversight of Security at Commercial Nuclear Power Plants Needs to Be Strengthened</u> , GAO-03-752 (2003), <u>available at</u> http://gao.gov/new.items/d03752.pdf | 13 n.1 |
| KLD Associates, Inc., <u>Indian Point Energy Center Evacuation Time Estimate</u> (2003) | passim |
| Edwin Lyman, <u>Chernobyl on the Hudson? The Health and Economic Impacts of a Terrorist Attack at the Indian Point Nuclear Plant</u> (2004), <u>available at</u> http://www.ucsusa.org/assets/documents/global_security/IndianPointHealthStudy.pdf | 3,8,9 |
| National Comm'n on Terrorist Attacks Upon the U.S., <u>The 9/11 Commission Report</u> (2004), <u>available at</u> http://www.9-11commission.gov/report/911Report.pdf | 13,14 |
| National Research Council of the Nat'l Academies, <u>Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report</u> (2006) | 9,16,22,23 |
| OIG, <u>NRC Failure to Adequately Regulate Millstone 1 Unit</u> , Case No. 95-771 (1995), <u>available at</u> http://nrc.gov/reading-rm/doc-collections/insp-gen/1996/95-077i.pdf | 13 n.1 |

TABLE OF AUTHORITIES (cont.)

| | <u>Page</u> |
|--|-------------|
| OIG, <u>NRC's Regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head</u> , Case No. 02-03S (2002) | 13 n.1 |
| OIG, <u>NRC's Response to the February 15, 2000 Steam Generator Tube Rupture at Indian Point Unit 2 Power Plant</u> , Case No. 00-03S (2000), available at http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2000/00-03s.pdf | 10,13 n.1 |
| <u>Report of the Office of the Chief Counsel on Emergency Preparedness to the President's Comm'n on the Accident at Three Mile Island 5 (1979)</u> , available at http://threemileisland.org/downloads//194.pdf | 13 |
| James Lee Witt Associates, <u>Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone</u> (2003) | passim |

ARTICLES

| | |
|---|-------|
| Yash P. Aggarwal et al., <u>Earthquakes, Faults, and Nuclear Power Plants in Southern New York & Northern New Jersey</u> , Science, Jan. 1, 1978, abstract available at http://www.sciencemag.org/cgi/content/abstract/200/4340/425 | 8 |
| Randal C. Archibold, <u>Closed or Not, Indian Point and Its Perils Won't Vanish</u> , N.Y. Times (Jan. 28, 2003) | 9 |
| Randal C. Archibold, <u>3 Counties Maneuver in Bid to Close Down Indian Point</u> , N.Y. Times, Jan. 16, 2003 | 12 |
| Greg Clary, <u>Indian Point Sirens Fail Final Test Before Federal Deadline</u> , Journal News, Apr. 13, 2007 | 10,11 |
| Greg Clary, <u>Two Years of Ups and Downs at Indian Point</u> , Journal News, Mar. 25, 2007 | 10 |
| Lisa W. Foderaro, <u>Indian Point Siren Failures Set Off a Storm of Protest</u> , N.Y. Times, Sept. 18, 2005 | 10 |

TABLE OF AUTHORITIES (cont.)

Page

Matthew L. Wald, Regulatory Comm'n Downgrades
Indian Point Reactor After Fire & Another
Shutdown, N.Y. Times, Apr. 7, 2007 11

Debra West, Indian Point to Begin Test to Aid
Groundwater Cleanup, N.Y. Times, Aug. 20, 2006 11

MISCELLANEOUS

Entergy Corp., Indian Point Energy Center Units
2 & 3, at [http://www.entergy-nuclear.com/
plant_information/indian_point.aspx](http://www.entergy-nuclear.com/plant_information/indian_point.aspx)
(last visited June 18, 2007) 8

EPA, Proposed NPDES Permit Fee Incentive for Clean Water
Act Section 106 Grants, EPA-832-F-06-041
(December 2006), available at [http://www.epa.gov/
owm/cwfinance/permit-fee-fact-sheet.pdf](http://www.epa.gov/owm/cwfinance/permit-fee-fact-sheet.pdf). 27 n.4

Memorandum from Benjamin Grumbles, EPA Assistant
Commissioner, to EPA Regional
Administrators (Mar. 20, 2007) 28

NRC, Backgrounder on Reactor License Renewal,
at [http://nrc.gov/reading-rm/doc-collections/
fact-sheets/license-renewal-bg-html](http://nrc.gov/reading-rm/doc-collections/fact-sheets/license-renewal-bg-html) 7

NRC, Fact Sheet on Plutonium, at [http://nrc.gov/
reading-rm/doc-collections/fact-sheets/
plutonium.html](http://nrc.gov/reading-rm/doc-collections/fact-sheets/plutonium.html) 8

NRC, Frequently Asked Questions About Indian Point,
at [http://www.nrc.gov/reactors/
plant-specific-items/indian-point/faq.html](http://www.nrc.gov/reactors/plant-specific-items/indian-point/faq.html) 11

NRC, Indian Point Unit 1, at [http://www.nrc.gov/
info-finder/decommissioning/power-reactor/
indian-point-unit-1.html](http://www.nrc.gov/info-finder/decommissioning/power-reactor/indian-point-unit-1.html)
(last visited June 18, 2007) 8

NRC, Uranium Enrichment, at [http://www.nrc.gov/
materials/fuel-cycle-fac/ur-enrichment.html](http://www.nrc.gov/materials/fuel-cycle-fac/ur-enrichment.html) 8

PRELIMINARY STATEMENT

The States of New York and Connecticut respectfully submit this brief as amici curiae in support of the combined petitions for review of a determination by the Nuclear Regulatory Commission ("NRC") filed by County Executive Andrew J. Spano and the County of Westchester; and the New Jersey Environmental Federation and the New Jersey Sierra Club (collectively, "Petitioners"). Petitioners challenge NRC's refusal to amend its relicensing regulations to consider siting and safety criteria when deciding whether to renew the operating license of a nuclear power plant beyond its initial forty-year term. These criteria have significantly changed since many nuclear power plants were initially licensed in the 1960s and 1970s. Petitioners requested that before renewing a license for another twenty years, NRC evaluate all of factors that bear on a nuclear power plant's safety in proceedings in which the public can participate.

In rejecting the administrative petitions, NRC ignored new information that undermines the factual premise upon which it based its license-renewal rule: that the ongoing regulatory process ensures that existing plants are reasonably safe. Recent studies, which NRC failed to consider, demonstrate that NRC's ongoing regulatory process does not ensure adequate emergency preparedness. Furthermore, NRC made legal errors about the regulation of power plants' cooling-water systems under the federal Clean Water Act. Because NRC's determination was

arbitrary and capricious, this Court should remand the petitions back to NRC with instructions to reconsider them.

QUESTION PRESENTED

In deciding whether to amend its license-renewal regulations for aging nuclear power plants, did NRC ignore new evidence that its current regulations inadequately protect the public and impermissibly restrict public participation and judicial review of NRC's actions?

INTEREST OF AMICI CURIAE

New York and Connecticut have an interest in protecting their citizens and environment by assuring the safe and secure operation of nuclear power plants. A major radiation release at the Indian Point Energy Center ("Indian Point"), which is located in a densely populated area near New York City and in close proximity to Connecticut, would damage the health and property of millions of people in both New York and Connecticut and could shut down the financial center of the nation. Further, Connecticut is home to several other aging nuclear power plants that could affect the safety and welfare of its citizens. Thus, when NRC considers relicensing an aging nuclear power plant such as Indian Point, New York and Connecticut have a keen interest in ensuring that NRC takes into account all issues that may affect

public health and the environment during the period of extended operation.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

1. The Atomic Energy Act

A significant release of radiation into the environment from a nuclear power plant – whether through a sudden catastrophic event like a terrorist attack or through slow leakage because of chronic conditions like structural deterioration – could have catastrophic consequences. See, e.g., Edwin Lyman, *Chernobyl on the Hudson? The Health & Economic Impacts of a Terrorist Attack at the Indian Point Nuclear Plant* 19-20 (2004), available at http://www.ucsusa.org/assets/documents/global_security/IndianPointHealthStudy.pdf. The Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq., charges NRC with ensuring, through licensing and regulation, that the generation and transmission of nuclear power does not threaten the public welfare. The Act requires NRC to determine whether the licensing and operation of a proposed facility is “in accord with the common defense and security and will provide adequate protection to the health and safety of the public.” 42 U.S.C. § 2232(a); see also id. § 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.")

If a nuclear power plant's operators can adequately protect the public's safety, NRC may issue them a license to operate the plant for a finite period of up to forty years. 42 U.S.C. § 2133(b) & (c). While the Act provides that such license "may be renewed upon the expiration of such period," 42 U.S.C. § 2133(c), it does not guarantee the license-holders the vested right to continue operating a plant beyond the initial forty-year period.

2. NRC's Regulations Regarding Emergency Planning and Siting Criteria

In the wake of the 1979 Three Mile Island accident, NRC promulgated emergency-planning regulations that applied to all previously approved reactors. 45 Fed. Reg. 55,402 (Aug. 19, 1980). Under those regulations, each nuclear power plant operator must submit to NRC the radiological emergency response plans prepared by state and local governments that are within the ten-mile "plume exposure pathway" emergency planning zone ("EPZ"), as well as plans of the state governments within the fifty-mile "ingestion pathway" EPZ. 10 C.F.R. §§ 50.33(g), 50.54(s)(1). NRC may not issue an original operating license or allow the continued operation of a nuclear power plant without finding that "adequate protective measures can and will be taken

in the event of a radiological emergency." 10 C.F.R.

§§ 50.47(a)(1), 50.54(s)(2)(ii). NRC bases its findings about the state of emergency preparedness on determinations made by the Federal Emergency Management Agency ("FEMA"). 10 C.F.R.

§ 50.47(a)(2); see also 10 C.F.R. § 50.54(s)(3).

NRC also has developed criteria for deciding where to site nuclear reactors, and it has made those criteria more stringent in recent years. See, e.g., 61 Fed. Reg. 65,157 (Dec. 11, 1996). For example, for reactor applications filed after January 1997, the NRC's regulations specifically mandate that "reactor sites should be located away from very densely populated centers." 10 C.F.R. § 100.21(h). In contrast, for applications filed before January 1997 - i.e., all of the existing reactors in the country - the regulations merely required NRC to "take . . . into consideration . . . population density and use characteristics of the site environs." 10 C.F.R. § 100.10(b).

3. NRC's License-Renewal Regulations

In the 1990s, as the first forty-year licenses approached their expiration dates and at the nuclear industry's urging, NRC promulgated regulations governing the renewal of operating licenses. 56 Fed. Reg. 64,943 (Dec. 13, 1991); see also 60 Fed. Reg. 22,461 (May 8, 1995). Under these regulations, NRC may renew a license to operate a nuclear power plant for an

additional twenty years beyond the expiration of the original operating license. 10 C.F.R. § 54.31(b). These regulations seek to limit the scope of NRC's review of a license-renewal application to one matter only: consideration of age-related structural degradation of passive components, such as the reactor core and the containment system. 10 C.F.R. §§ 54.21 & 54.29.

The regulations avoid consideration of any other factors, including both the safety and security of current plant operation (such as questions about emergency planning, evacuation, and plant security,) and siting considerations (such as demographic changes). See, e.g., 10 C.F.R. §§ 50.47(a)(1), 100.2. For example, even if an existing plant does not meet the criteria that apply to siting a new reactor, such as being located away from very densely populated areas, NRC will not consider that fact when deciding whether to renew the plant's license. See 61 Fed. Reg. at 65,163.

An applicant for a renewed license need not even demonstrate compliance with ongoing regulatory requirements. To the contrary, while the regulations require plants to complete an "Integrated Plant Assessment" as part of the renewal application, they prohibit NRC from reviewing any operational deficiencies during the license-renewal process. 10 C.F.R. § 54.30.

NRC based its decision to exclude issues relevant to the safety and security of current plant operation in the license-

renewal process on the assumption that - except perhaps with respect to the aging of certain components and a few other issues relating to safety only during the period of extended operation - NRC's ongoing oversight of operating plants adequately assures that the plants are safe. 56 Fed. Reg. at 64,946; 60 Fed. Reg. at 22,464. Thus, NRC concluded that reviewing issues relevant to current plant operation during license renewal would be unnecessarily duplicative. 56 Fed. Reg. at 64,946. NRC also concluded that limiting the scope of its inquiry would make the license-renewal process "more stable and predictable" for the licensees, 60 Fed. Reg. at 22,462 - in other words, less rigorous for the regulated industry. NRC has granted approximately forty-eight license renewal applications; it has yet to deny one. NRC, Backgrounder on Reactor License Renewal, at <http://nrc.gov/reading-rm/doc-collections/fact-sheets/license-renewal-bg-html>.

B. Overview of Indian Point

Indian Point is on the east bank of the Hudson River, twenty-four miles north of the New York City line and thirty-five miles from mid-Manhattan. This puts Indian Point not only near the City's reservoirs and close to important water supply resources for Connecticut, but also in the most densely populated area in the United States: Approximately seventeen million people, about six percent of the nation's population, live within

fifty miles of Indian Point. Lyman, supra, at 23. Indian Point is on or close to the Ramapo Fault and is close enough to the coast to be vulnerable to hurricanes. See Yash P. Aggarwal et al., Earthquakes, Faults, and Nuclear Power Plants in Southern New York & Northern New Jersey, Science, Jan. 1, 1978, abstract available at <http://www.sciencemag.org/cgi/content/abstract/200/4340/425>.

The Indian Point nuclear compound contains three reactors: Indian Point 1 ("IP1"), completed in 1962 but retired in 1974 after spending over half the time out of service for repairs; Indian Point 2 ("IP2"), licensed in 1973; and Indian Point 3 ("IP3"), licensed in 1976. See NRC, Indian Point Unit 1, at <http://www.nrc.gov/info-finder/decommissioning/power-reactor/indian-point-unit-1.html> (last visited June 18, 2007); Entergy Corp., Indian Point Energy Center Units 2 & 3, at http://www.entergy-nuclear.com/plant_information/indian_point.aspx (last visited June 18, 2007). The fuel has been removed from IP1, but the reactor cores of the other plants contain highly radioactive uranium and fission byproducts such as plutonium. See generally NRC, Uranium Enrichment, at <http://www.nrc.gov/materials/fuel-cycle-fac/ur-enrichment.html>; NRC, Fact Sheet on Plutonium, at <http://nrc.gov/reading-rm/doc-collections/fact-sheets/plutonium.html>.

In addition, all three plants have "spent fuel pools" outside their protective containment shells that contain large quantities of highly radioactive material. Randal C. Archibold, Closed or Not, Indian Point and Its Perils Won't Vanish, N.Y. Times (Jan. 28, 2003). After it is used in nuclear reactors to generate energy, spent nuclear fuel remains extremely hot and radioactive. National Research Council of the Nat'l Academies, Safety and Security of Commercial Spent Nuclear Fuel Storage: Public Report 17, 40 (2006) [hereinafter NAS Study] (A-274 & 298). To protect workers, facilities, and neighboring communities, most nuclear power plants in the nation have constructed large swimming-pool-like structures in which the spent fuel was to be stored temporarily until it cooled sufficiently to allow its transfer to a final disposal site. Id. at 19 (A-277). Because no final disposal site has yet been developed, that fuel has remained for decades in these temporary storage pools. The storage pools are susceptible to fire and radiological release from a wide range of conditions, including intentional attacks. See, e.g., NAS Study, supra (A. 258-336).

A 2004 study by the Union of Concerned Scientists concluded that a major release at Indian Point could kill as many as 44,000 people within a week and more than 500,000 people over time. See Lyman, supra, at 5-6, 17. The study estimated just a portion of the direct economic loss – the cost of decontamination,

compensation for lost real estate, and lump-sum payments to enable those displaced to restart their lives – at between \$1.1 trillion and \$2.1 trillion. Id. at 6.

Indian Point has had numerous safety incidents over the years that can be attributed to human error or equipment failure. The metal in an IP2 steam generator tube cracked on February 15, 2000, allowing a small amount of radiation to escape. NRC Office of the Inspector General, NRC's Response to the Feb. 15, 2000 Steam Generator Tube Rupture at Indian Point Unit 2 Power Plant, Case No. 00-03S (2000), available at <http://www.nrc.gov/reading-rm/doc-collections/insp-gen/2000/00-03s.pdf>. IP2 and IP3 have been shut down more than ten times just in the last year and a half, due to a variety of safety problems such as malfunctioning discharge valves, electrical complications that caused the steam generator to stop functioning, a leaking alloy pipe, worn wiring that tripped the main generator, low water levels in steam generators, and a fire and explosion in IP3's transformer yard. See, e.g., Greg Clary, Two Years of Ups and Downs at Indian Point, Journal News, Mar. 25, 2007. While the plants have emergency sirens intended to warn the surrounding area if there is an emergency, they have been beset by problems and recently failed tests. See, e.g., Lisa W. Foderaro, Indian Point Siren Failures Set Off a Storm of Protest, N.Y. Times, Sept. 18, 2005; Greg Clary, Indian Point Sirens Fail Final Test Before Federal

Deadline, Journal News, Apr. 13, 2007. In addition, in 2005 and 2006, Indian Point's current operator, Entergy, found two separate leaks of tritium and strontium-90 at levels above EPA drinking water limits from both IP2's and IP1's spent fuel pools. Debra West, Indian Point to Begin Test to Aid Groundwater Cleanup, N.Y. Times, Aug. 20, 2006; see also NRC, Frequently Asked Questions About Indian Point, at <http://www.nrc.gov/reactors/plant-specific-items/indian-point/faq.html>. Plumes of these radioactive isotopes have now leached into the groundwater underneath the plant and likely are seeping into the Hudson River. Matthew L. Wald, Regulatory Comm'n Downgrades Indian Point Reactor After Fire & Another Shutdown, N.Y. Times, Apr. 7, 2007.

Indian Point's emergency-preparedness plan is woefully inadequate. A 2003 report prepared by the consulting firm headed by James Lee Witt - former director of FEMA, the agency to whom NRC delegates primary responsibility for reviewing the adequacy of such plans - concluded that safe evacuation of the area surrounding Indian Point is highly unlikely, if not impossible. James Lee Witt Associates, Review of Emergency Preparedness of Areas Adjacent to Indian Point and Millstone viii (2003) [hereinafter Witt Report] (A-340). The Witt Report found that the NRC-approved Indian Point plan fails to consider (1) that many essential personnel will take care of their families rather

than focus on their response activities, (2) the possible ramifications of a terrorist-caused event, and (3) the likelihood and effects of spontaneous or "shadow" evacuation. Id. at vi (A-338). The Witt Report's conclusions are bolstered by a 2003 traffic study by KLD Associates, which concluded that evacuation times for the EPZ around Indian Point had doubled since 1994 and could take up to 9.25 hours in good weather conditions and 12 hours in snow conditions. KLD Associates, Inc., Indian Point Energy Center Evacuation Time Estimate, Table 7-1D, at 7-14 (2003) [hereinafter KLD Traffic Study] (A-685). Due in large part to the inadequacies identified in the Witt Report and the information contained in the KLD Traffic Study, three out of the four county governments with territory in the ten-mile EPZ for Indian Point - Westchester, Orange, and Rockland - have refused to cooperate with updating the Indian Point evacuation plan or in exercises to test the plan. Randal C. Archibold, 3 Counties Maneuver in Bid to Close Down Indian Point, N.Y. Times, Jan. 16, 2003.

According to both NRC's Office of Inspector General ("OIG") and the U.S General Accounting Office ("GAO"), NRC's ongoing regulatory oversight has failed to correct significant problems affecting the safe operation of Indian Point and other nuclear

power plants.¹ As far back as 1979, Robert Ryan, NRC's Director of the Office of State Programs, stated that it was "insane to have a three-unit reactor on the Hudson River in Westchester County, 40 miles from Times Square," and that Indian Point is "one of the most inappropriate sites in existence." Report of the Office of the Chief Counsel on Emergency Preparedness to the President's Comm'n on the Accident at Three Mile Island 5 (1979), available at <http://threemileisland.org/downloads//194.pdf>. This was even before the significant population growth in Westchester, Rockland, and Orange Counties over the last two decades and before the events of September 11, 2001, when two of the hijacked planes flew near or over the site. See National Comm'n on Terrorist Attacks Upon the U.S., The 9/11 Commission Report 32

¹ See, e.g., OIG, NRC Failure to Adequately Regulate Millstone 1 Unit, Case No. 95-771 (1995), available at <http://nrc.gov/reading-rm/doc-collections/insp-gen/1996/95-0771.pdf>; OIG, NRC's Response to the Feb. 15, 2000 Steam Generator Tube Rupture at Indian Point Unit 2 Power Plant, *supra*; OIG, NRC's Regulation of Davis-Besse Regarding Damage to the Reactor Vessel Head, Case No. 02-03S (2002) (A-533-558); GAO, Hearing Before the House Subcomm. on National Security, Emerging Threats and International Relations, Emergency Preparedness Issues at the Indian Point 2 Nuclear Power Plant (2003) (statement of Jim Wells, Director, Natural Resources and Environment, GAO), available at <http://www.gao.gov/new.items/d03528t.pdf>; GAO, Report to Congressional Requesters, NRC: Oversight of Security at Commercial Nuclear Power Plants Needs to Be Strengthened, GAO-03-752 (2003), available at <http://gao.gov/new.items/d03752.pdf>; GAO, Report to Congressional Requesters, NRC Needs to More Aggressively & Comprehensively Resolve Issues Related to the Davis-Besse Nuclear Power Plant's Shutdown, GAO-04-415 (2004) (A-559-624).

(2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

Indian Point's original forty-year operating licenses for IP2 and IP3 end in 2013 and 2015, respectively. In May 2007, Entergy submitted to NRC license-renewal applications for IP2 and IP3, seeking to extend their operating licenses for another twenty years. 72 Fed. Reg. 26,850 (May 11, 2007). Under NRC's current regulations, the agency will not consider concerns about Indian Point's location or operational safety when deciding whether to renew the licenses.

C. The Rulemaking Petitions

NRC's regulations authorize interested persons to file a petition seeking to amend or rescind currently applicable regulations. 10 C.F.R. § 2.802(a) ("Any interested person may petition the Commission to issue, amend or rescind any regulation."). On May 10, 2005, Westchester filed a formal petition with NRC requesting that NRC amend its license-renewal regulations to provide for de novo review of plant safety and security issues upon relicensing. In July 2005, the New Jersey Environmental Federation, the New Jersey Sierra Club, and Mayor Joseph Scarpelli of Brick Township, New Jersey, filed similar petitions for rulemaking.

Westchester's petition referred specifically to the findings of former FEMA director Witt related to Indian Point (A-9-13). In comments that it submitted in support of the petition, Riverkeeper, Inc. expanded upon the reference to the 2003 Witt Report by providing specific citations to the report's conclusion that Indian Point's "current radiological response system and capabilities are not adequate to . . . protect the people from an unacceptable dose of radiation in the event of a release from Indian Point" (A-24). Riverkeeper also requested that NRC consider during license renewal several pressing issues raised by the Witt Report that had yet to be addressed by NRC, including the report's findings that Indian Point's emergency evacuation plan: (1) fails to address the site-specific, hazardous conditions of a possible terrorist attack; (2) fails to deal with a scenario involving an earthquake; (3) fails to address adequately an emergency scenario involving a "multiplier" effect in which a radiological or biological weapon is discharged in the vicinity of the plant, which would prevent plant employees from taking action to prevent a meltdown; and (4) unjustifiably relies upon a "sheltering" option despite evidence that a significant number of people would self-evacuate in spite of such instructions (A-25). Further, Riverkeeper directed NRC's attention to the 2003 KLD Traffic Study (A-24). The petition and

comments also noted the problems with the safety and security of spent nuclear fuel pools detailed in the NAS Study (A-23).

NRC denied the petitions. NRC stated that it already had considered the issues when it developed the license-renewal rules in the 1990s. It viewed those issues as either managed by the ongoing regulatory process or else beyond NRC's regulatory authority. 71 Fed. Reg. 74,848 (Dec. 13, 2006). NRC concluded that no new information had been presented that would undermine its prior conclusions. Id.

NRC offered a response to one particular issue raised by Westchester. Westchester had argued that NRC should consider recent changes to state environmental laws that would require Indian Point to change its design for using cooling water. Id. at 74,853. The design is significant because once-through cooling water intake systems, such as those at Indian Point, can injure or kill billions of aquatic organisms each year. Riverkeeper, Inc. v. EPA, 475 F.3d 83, 89 (2d Cir. 2007).

Alternative technologies, such as closed-cycle cooling, would substantially reduce fish mortality. NRC responded that Westchester was incorrect in two respects. 71 Fed. Reg. at 74,853. First, it maintained that federal, not state, law controlled the design of a nuclear power plants' cooling-water intake system. Id. Second, it asserted that the federal standard that had been promulgated by the U.S. Environmental

Protection Agency ("EPA") could be met in several ways, not just closed-cycle cooling. Id. at 74,854.

SUMMARY OF THE ARGUMENT

To make the process for renewing an aging nuclear power plant's license to operate for another twenty years more "stable and predictable" for the licensees, NRC has adopted regulations that avoid consideration of safety-related issues — such as changes in local demographics, the adequacy of emergency evacuation plans, and the threat of a terrorist attack — during renewal proceedings. These regulations limit the scope of NRC's review, as well as public participation in and judicial review of such evaluation, to age-related degradation of passive structural components. NRC based its license renewal regulations on the assumption that its ongoing regulatory oversight of nuclear power plants adequately addresses safety issues.

Petitioners presented new evidence that NRC's ongoing oversight does not ensure adequate levels of emergency preparedness or plant security. NRC ignored this new information. NRC's failure to consider this evidence and provide a reasoned explanation for refusing to amend its license-renewal regulations demonstrates that NRC has been blind to its mandate from Congress to protect the public from the dangers inherent in nuclear power generation.

NRC's denial of the rulemaking petitions also was infected by legal errors regarding the role of the federal government in regulating nuclear power plants' cooling-water systems. Contrary to NRC's assertion, the federal Clean Water Act delegates to a state the authority to regulate such systems upon federal approval of the state's water pollution control program. Because NRC's denial of the petitions was arbitrary and capricious, the Court should remand the petitions back to the agency for proper consideration of the information presented by the Petitioners.

STANDARD OF REVIEW

An agency's denial of a petition for rulemaking is susceptible to judicial review. See Massachusetts v. EPA, 127 S. Ct. 1438, 1459 (2007) (vacating EPA's decision not to initiate rulemaking regulating carbon dioxide emissions). Under the Administrative Procedure Act, a reviewing court may set aside an agency's failure to act when such failure is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

Judicial review of an agency's refusal to initiate rulemaking proceedings is "extremely limited" and "highly deferential." Massachusetts, 127 S. Ct. at 1459. But even under this deferential standard, a court must consider whether the agency's decisionmaking was "reasoned." Am. Horse Protection

Ass'n (AHPA) v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987). Thus, courts have overturned the refusal to initiate rulemaking in compelling circumstances, such as those "involving grave health and safety problems for the intended beneficiaries of the statutory scheme." Nat'l Customs Brokers & Forwarders Ass'n, Inc. v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989).

An agency's failure to initiate rulemaking is arbitrary and capricious if the agency fails to provide a "reasoned explanation" for its decision. See Massachusetts, 127 S. Ct. at 1463; see also AHPA, 812 F.2d at 6. A reviewing court must assure itself that the agency considered the relevant factors, that it explained the "facts and policy concerns" relied on, and that the facts have some basis in the record. AHPA, 812 F.2d at 5.

Further, a court will not lightly uphold agency refusals to initiate rulemaking in the face of new information. "Changes 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). For example, "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." AHPA, 812 F.2d at 5 (citing Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979)). 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." Id. (quoting WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981)).

ARGUMENT

NRC'S DENIAL OF THE RULEMAKING PETITIONS WAS ARBITRARY AND CAPRICIOUS

A. NRC Ignored New Information Regarding the Inadequacy of Its Ongoing Compliance Efforts.

NRC is responsible for protecting the public from the dangers inherent in the generation of nuclear power. See, e.g., 42 U.S.C. § 2201(b). In particular, NRC may not issue a license to a nuclear power plant unless it determines that operation of the plant will adequately protect the health and safety of the public. Id. § 2232(a).

The petitions brought to NRC's attention serious flaws in its current license-renewal regulations. Those regulations avoid consideration of issues related to current plant operation, such as emergency planning, based upon the assumption that ongoing regulatory requirements ensure adequate levels of safety. That assumption is wrong: NRC's ongoing regulation does not adequately protect the public, and even if it did, it still would be appropriate to consider these issues during relicensing to ensure public participation and judicial review of NRC's actions.

The petitions and comments submitted in support presented compelling new evidence that a nuclear power plant's mere compliance with ongoing regulations is not adequate to protect the public. For example, the Witt Report (which concluded that Indian Point's NRC-approved evacuation plan would not protect the public from an unacceptable dose of radiation in the event of a release) and the 2003 KLD Traffic Study (which found that evacuation times for the EPZ around Indian Point had doubled since 1994) belie NRC's claim that current ongoing regulation ensures adequate levels of emergency preparedness. The reports' conclusions have ramifications for other nuclear power plants around the country as well.

Although Westchester's petition referenced the Witt Report and Riverkeeper's comments contained specific citations to the report along with a citation to the KLD Traffic Study, NRC ignored them entirely. NRC's failure even to mention these reports is by itself arbitrary and capricious.² Islander E. Pipeline Co., LLC v. Conn. Dep't of Env'tl. Protection, 467 F.3d 295, 313 (2d Cir. 2006) (finding a denial of an application to be

² NRC cannot claim that petitioners' failure to include a copy of the Witt Report with their comments relieved NRC of the responsibility to consider it. NRC had an "affirmative duty to inquire into and consider" all facts relevant to its statutory obligation to protect the public and to "see to it that the record is complete." Scenic Hudson Preservation Conf. v. Fed. Power Comm'n, 354 F.2d 608, 620 (2d Cir. 1965).

arbitrary and capricious where the agency failed to mention scientific studies in the record with findings contrary to those relied upon by the agency); see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 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"). Because it failed to consider the Witt Report or the KLD Traffic Study, NRC did not address how the information in those documents affects its assumption that it need not review emergency preparedness plans and increases in population density upon relicensing to ensure that such plans adequately protect the public throughout the life of the plant. Rather, employing a circular analysis, 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. 71 Fed. Reg. at 74,852.

NRC also failed to offer an adequate response to the concerns the petitions raised about the storage of spent nuclear fuel. Plants such as Indian Point were not designed for extended onsite storage of spent fuel (A-13). The comments requested that NRC amend its regulations to require that security of spent fuel pools be comprehensively assessed during relicensing based upon the NAS Study, which concluded that a successful terrorist attack

on spent fuel pools was possible and recommended an independent assessment of current security measures (A-23). Although NRC mentioned the NAS Study in passing as "one of many instruments that supplements NRC's understanding of the safety of the interim storage of spent fuel," 71 Fed. Reg. at 74,857, it failed to explain why it was ignoring the study's results. NRC's conclusory explanations are insufficient to assure this Court that its refusal to act was the product of reasoned decisionmaking. Massachusetts, 127 S. Ct. at 1463; AHPA, 812 F.2d at 6.

Allowing parties to present siting and safety issues relating to current plant operation, such as emergency planning, in a license-renewal proceeding, rather than having NRC staff review such issues without a public hearing, provides substantive and procedural advantages that increase the overall safety of nuclear power plants. Under NRC's regulations, an independent panel of scientists and lawyers who sit on the Atomic Safety and Licensing Board ("ASLB") conducts the license-renewal proceedings. 10 C.F.R. § 2.321. The Advisory Committee on Reactor Safeguards, a congressionally created safety review board, see 42 U.S.C. § 2039, reviews each license-renewal application and provides an opinion on safety issues, which is made a part of the license-renewal hearing record. 10 C.F.R. §§ 2.337(g)(2) & 50.58(a). Further, the license-renewal hearing

provides for full disclosure of relevant documents relied upon by the parties in developing their positions, sworn testimony from technically competent experts, oral hearings, and an opportunity for parties to either cross-examine opposing witnesses or submit areas of cross-examination to the ASLB for its use in questioning the witnesses. See 10 C.F.R. §§ 2.336 & 2.1207. Including all of the safety and siting issues that Petitioners seek to include in a license-renewal proceeding would give independent experts and parties a meaningful opportunity to address important issues affecting the safe operation of the nuclear power plants.

It is no answer to suggest -- as NRC did -- that concerned citizens can improve NRC's ongoing oversight by petitioning the agency to initiate an enforcement action against a specific reactor. 71 Fed. Reg. at 74,855-56. NRC's refusal to take enforcement action is presumptively not subject to judicial review. Riverkeeper, Inc. v. Collins, 359 F.3d 156, 158 (2d Cir. 2004). Thus, by excluding regulatory-compliance issues from renewal proceedings, NRC has effectively foreclosed judicial review of its inaction.³

³ This is not the only instance in which NRC, in the name of "efficiency" and "predictability," has developed rules that limit public participation and judicial review. NRC has used generic rulemaking on a wide range of nuclear safety and environmental issues to substitute for individualized findings for particular nuclear power plants, and it has artificially segmented issues so that some are totally excluded from consideration with regard to particular

(continued...)

The facts presented here "strongly suggest that [NRC] has been blind to the nature of [its] mandate from Congress." AHPA, 812 F.2d at 7. NRC's failures to consider new information about emergency preparedness and plant security call into question the fundamental factual premise underlying its license-renewal rule: that the ongoing regulatory process ensures an acceptable level of safety. See AHPA, 812 F.2d at 5. Thus, the petitions should be remanded back to NRC for consideration of the new information and whether, in view of that information, the agency should amend its relicensing rules. See Massachusetts, 127 S. Ct. at 1463; AHPA, 812 F.2d at 7.

B. NRC's Determination Was Infected By Legal Errors About the Regulation of Cooling-Water Systems.

In denying the rulemaking petition, NRC stated that the federal government, not the State, regulates nuclear power plants' cooling-water systems. 71 Fed. Reg. at 74,853-54. NRC

³ (...continued)
decisions. See, e.g., 10 C.F.R. § 50.47(c)(1)(i) (promulgating a "realism doctrine" in the emergency planning context); id. § 51.23(a) (promulgating a "waste confidence rule" that Yucca Mountain disposal site will open by 2025). Similarly, it has restricted the ability of interested parties to question witnesses during proceedings for initial or renewed licenses. See 69 Fed. Reg. 2,182 (Jan. 14, 2004); Citizens Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004).

also stated that the federal rule promulgated by EPA provides "performance based standards that can be met in various ways" and then concluded that rule did not require existing power plants to convert to closed-cycle cooling. Id. at 74,854. Both statements are incorrect.

The federal Clean Water Act prohibits nuclear power plants from discharging pollutants - including warm water from their cooling loops - to "navigable waters" without a permit. 33 U.S.C. §§ 1311(a), 1342, 1362(6), 1326 ("Thermal discharges"). It also requires that intake structures that remove water from navigable waters for cooling purposes must "reflect the best technology available for minimizing adverse environmental impact." 33 U.S.C. § 1326(b) ("Cooling water intake structures"). Power plants must obtain a permit from the EPA or from an EPA-authorized state program for both their intake and discharge activities. 33 U.S.C. §§ 1311, 1326(b), 1342.

Congress envisioned that the states would have the principal responsibility for implementing the Clean Water Act. To that end, Congress authorized the federal government to approve state water pollution control programs that fulfilled the Act's objectives. 33 U.S.C. § 1342(b). New York has a comprehensive permitting system to control water pollution. N.Y. Environmental Conservation Law §§ 17-0101 & 17-0303. EPA has approved New York's program under the Clean Water Act, and the New York State

Department of Environmental Conservation ("DEC") has primary responsibility for administering and enforcing the pollution discharge program. See 40 Fed. Reg. 54,462-63 (Nov. 24, 1975) (formal notice of EPA approval of New York's program).⁴ Within New York, then, a nuclear power plant must obtain a state permit from DEC, rather than a federal permit from EPA, for its cooling-water intake system and thermal discharges. See Entergy Nuclear Indian Point 2, LLC v. N.Y.S. DEC, 23 A.D.3d 811, 813 (3d Dep't 2005) (discussing federal authorization of New York's water-pollution-control program); see also 6 N.Y.C.R.R. § 704.5.

Thus, although EPA issued rules governing plants' cooling-water systems, DEC has determined that the federal rule does not apply to Indian Point. See In re Renewal & Modification of a SPDES Permit by Entergy Nuclear Indian Point 2, LLC, et al., 2006 N.Y. ENV LEXIS 3, *48-9 (Feb. 3, 2006) (interim decision) [hereinafter In re Entergy]; see also In re Renewal & Modification of a SPDES Permit by Dynegy Northeast Generation, Inc., 2005 N.Y. ENV LEXIS 31, *55-62 (May 13, 2005). Indeed, DEC staff has issued a draft state permit requiring Entergy to implement closed-cycle cooling at Indian Point subject to certain terms and conditions. See In re Entergy, 2006 N.Y. ENV LEXIS 3,

⁴ EPA has approved similar permitting programs for forty-four other states. See EPA, Proposed NPDES Permit Fee Incentive for Clean Water Act Section 106 Grants, EPA-832-F-06-041 (Dec. 2006), available at <http://www.epa.gov/owm/cwfinance/permit-fee-fact-sheet.pdf>.

*10-12. Thus, NRC's assumption that the federal rule applies across the country is incorrect.

Furthermore, NRC's statement that the federal rule imposed "performance standards that can be met in various ways" is no longer accurate. Five weeks after NRC issued its decision, this Court invalidated EPA's rule as inconsistent with the Clean Water Act. Riverkeeper, Inc. v. United States EPA, 475 F.3d 83 (2d Cir. 2007). Two months later, EPA circulated a notice that the entire rule "should be considered suspended." See Memorandum from Benjamin Grumbles, EPA Assistant Commissioner, to EPA Regional Administrators (Mar. 20, 2007); 72 Fed. Reg. 37,107-09 (July 9, 2007). Thus, even if NRC had been correct that EPA regulates Indian Point's cooling-water system, its reliance on the EPA rule would have been erroneous.

On remand, the Court should direct NRC to correct this error and to reconsider the petition with a proper understanding of the governing legal framework.

* * * * *

While the administrative petitions at issue here — petitions under 10 C.F.R. § 2.802(a) to amend NRC's regulations — provide an important mechanism to seek to compel NRC to consider safety and environmental issues during license-renewal proceedings, these petitions are not the exclusive mechanism for doing so.

NRC's regulations also allow any party to an adjudicatory proceeding to petition NRC to waive the application of a specific NRC regulation. 10 C.F.R. § 2.335(b). Such a petition must show that, because of special circumstances with respect to the subject matter of the particular proceeding, application of the rule or regulation would not serve the purposes for which the rule or regulation was adopted. Id. Under this regulation, NRC may waive application of its restrictive license-renewal regulations on a plant-specific basis to consider all issues that might affect the safe and secure ongoing operation of aging nuclear power plants.

Additionally, the National Environmental Policy Act ("NEPA") requires NRC, as a federal agency, to examine the environmental impacts of its regulatory decisions and to inform the public that it has considered environmental concerns in its decision-making. See Baltimore Gas & Electric Co. v. Natural Resources Defense Counsel, Inc., 462 U.S. 87, 97 (1983); see also 42 U.S.C. § 4332(2)(c) (identifying the requirements of an environmental impact statement); Calvert Cliffs Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971) (holding that NEPA applies to NRC's predecessor). NEPA also imposes continuing responsibilities on NRC after it completes an environmental analysis or substantive decision. If NRC receives significant new information calling in to question a previous

determination, NEPA requires NRC to reevaluate its earlier analysis. 40 C.F.R. § 1502.9(c)(1)(ii). NRC's own regulations reflect this ongoing responsibility to evaluate new information both as a general matter and particularly in the context of license-renewal applications. 10 C.F.R. §§ 51.92(a), 51.95(c)(3).

These mechanisms, while more cumbersome than the rule-change sought by these petitions, exist no matter how this Court rules on the petitions. Indeed, it is not surprising that a certain amount of redundancy is inherent in the procedural mechanisms available to ensure the safety of nuclear power plants. If one procedural mechanism adequately guarantees safety, then other redundant mechanisms will take little time and have no work to do. If, on the other hand, one mechanism fails, the public safety is best served by the existence of alternative mechanisms. For this reason, NRC's concern about "duplicative" procedures, 71 Fed. Reg. at 74,851, is entirely misplaced.

Because of the importance of these alternative procedures, New York and Connecticut urge the Court to recognize explicitly that - no matter how it rules on the petitions - the public retains the right to seek NRC review of the issues raised by the petitions and comments in an adjudicatory proceeding involving Indian Point's relicensing application. Interested parties will

be able to do so either by seeking and obtaining waiver of NRC's generic relicensing regulations or through the NEPA process.

CONCLUSION

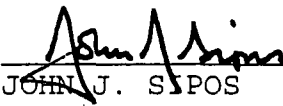
For the foregoing reasons, the Court should overturn NRC's denial of the petitions and remand the petitions back to NRC for proper consideration of the issues they raise.

Dated: Albany, New York
July 10, 2007

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the
State of New York

By:


JOHN J. SIPOS
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224
(518) 402-2251

BARBARA D. UNDERWOOD
Solicitor General

KATHERINE KENNEDY
Special Deputy Attorney General,
Environmental Protection Bureau

BENJAMIN N. GUTMAN
Deputy Solicitor General

JOHN J. SIPOS
MORGAN A. COSTELLO
Assistant Attorneys General
Environmental Protection Bureau
of Counsel

RICHARD BLUMENTHAL
Attorney General of the
State of Connecticut
P.O. Box 120, 55 Elm St.
Hartford, CT 06141-0120
(860) 808-5250

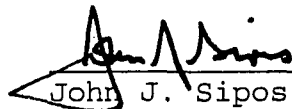
CERTIFICATE PURSUANT TO FRAP 32(a)(7)(C)

JOHN J. SIPOS, an attorney licensed to practice 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 States of New York and Connecticut 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 6,660 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: July 10, 2007
New York, New York


John J. Sipos

CERTIFICATE OF SERVICE

I hereby certify that I caused two copies of the Brief for Amici Curiae States of New York and Connecticut in Support of Petitioners to be served by Federal Express on the following counsel for the parties:

Grace H. Kim, Esq.
U.S. Nuclear Regulatory Commission
1 White Flint North, 15D21
11555 Rockville Pike
Rockville, MD 20852-2738

Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530

Ken Weckstein, Esq.
Epstein Becker & Green, P.C.
1227 25th Street, N.W., Suite 700
Washington, DC 20037-1156

Linda M. Trentacoste
Office of the Westchester,
County Attorney
148 Martine Avenue
White Plains, NY 10601

Richard Webster, Esq.
Rutgers, The State University of NJ
Rutgers Environmental Law Clinic
123 Washington Street
Newark, NJ 07102-3094

Dated: July 10, 2007


Teresa Fountain