

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

Docket Number(s): 08-1454-cv

Caption [use short title]

Brodsky v. U.S. Nuclear Regulatory Commission

Motion for: Leave to file a memorandum of law as amicus curiae in opposition to motion to dismiss.

Set forth below precise, complete statement of relief sought:

The Attorney General of the State of New York seeks leave to file a memorandum of law as amicus curiae in opposition to motion to dismiss.

MOVING PARTY: The State of New York

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Janice Dean
[name of attorney, with firm, address, phone number, and e-mail]
Office of the Attorney General
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-8459
janice.dean@oag.state.ny.us

OPPOSING PARTY: U.S. Nuclear Regulatory Comm'n

OPPOSING ATTORNEY:
[name of attorney, with firm, address, phone number, and e-mail]
Robert M. Rader
Senior Attorney, Office of General Counsel
U.S. NRC, 11545 Rockville Pike, Rockville, MD
20852
(301) 415-1955

Court-Judge/Agency appealed from: U.S. 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 _____

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

Has request relief been made below? Yes No

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

Requested return date and explanation of emergency:

Signature of Moving Attorney:

/s/ Janice Dean

Date: June 27, 2008

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

Date: _____

By: _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RICHARD L. BRODSKY,

Petitioners,

Docket No. 08-1454ag

v.

UNITED STATES NUCLEAR REGULATORY
COMMISSION,

Respondents.

**MOTION OF ATTORNEY GENERAL OF THE STATE OF NEW YORK
FOR LEAVE TO FILE A MEMORANDUM OF LAW AS AMICUS CURIAE
IN OPPOSITION TO MOTION TO DISMISS**

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351

Dated: June 27, 2008

BARBARA D. UNDERWOOD
Solicitor General

KATHERINE KENNEDY
Special Deputy Attorney General

MICHELLE ARONOWITZ
Deputy Solicitor General

JANICE A. DEAN
JOHN J. SIPOS
Assistant Attorneys General

MONICA WAGNER
Assistant Solicitor General
of Counsel

PRELIMINARY STATEMENT

Petitioners challenge the determination by the United States Nuclear Regulatory Commission ("NRC") to grant an exemption from the NRC's fire safety regulations to Entergy Nuclear Operations, Inc. ("Entergy"), the operator of the Indian Point Unit 3 nuclear power plants located in Westchester County, New York. The exemption allowed Entergy to use fire barriers that would withstand fire for only twenty-four minutes, instead of the one-hour period required by NRC's regulations. Petitioners claim that the exemption failed to provide adequate protection of public health and safety and that the NRC should have treated the exemption as an amendment to Indian Point's license requiring notice to the public, an opportunity to comment, and the right to a hearing.

On May 5, 2008, NRC filed a motion to dismiss on the grounds that petitioners' substantive challenge to the exemption is untimely and that petitioners were not entitled a hearing on the exemption. The Attorney General seeks permission to file a twenty-page memorandum of law as *amicus curiae* to oppose the motion to dismiss.

INTEREST OF AMICUS CURIAE

The State of New York has an interest in protecting its citizens, economy, and environment to the extent possible by assuring the safe and secure operation of the Indian Point nuclear power plants. A fire at Indian Point could disable safety systems designed to control nuclear fission and ensure the prompt shut down

of the reactor in the case of an emergency. A major radiation release at Indian Point, which is located in a densely populated area near the New York City metropolitan area, would damage the health, safety, and property of millions of people in New York and could shut down the nation's financial center. Thus, New York has a keen interest in ensuring that NRC follows a thorough, public, and transparent process when it adjusts its fire safety regulations with respect to Indian Point.

RELEVANCE OF AMICUS PARTICIPATION

The NRC exempted Indian Point from NRC's fire safety regulations without giving the people of New York an opportunity to participate in the process that led to that exemption. The NRC seeks to compound the inadequacy of that process by asking this Court to dismiss the petition without an opportunity for full briefing and oral argument. If the Attorney General is granted permission to file the attached twenty-page memorandum of law as amicus curiae, he will argue that in order to ensure a full review of the important issues before the Court, the Court should deny the motion to dismiss or, in the alternative, refer it to the merits panel.

The NRC argues that the March 27, 2008, petition for review is untimely because, under the Hobbs Act, it was subject to a sixty-day limitations period which started to run on October 4, 2007,

when the NRC published notice of the exemption in the Federal Register. The Attorney General will argue, however, that the sixty-day limitations period in the Hobbs Act does not apply to petitions for review of exemptions from regulations granted by the NRC. Instead, the six-year limitations period under 28 U.S.C. § 2401(a) for petitions reviewable under the Administrative Procedure Act applies and, as a result, the petition is timely. Alternatively, even if the Hobbs Act limitations period does apply, the running of the limitations period was tolled by petitioners' submission of a request to reopen consideration of the exemption and conduct a hearing and, as a result, the limitations period did not start to run until the NRC denied that request on January 30, 2008.

The NRC further argues that even if the petition were timely, petitioners were not entitled to a hearing on the exemption and that, as a result, the petition for review should be dismissed insofar as it seeks review of the NRC's denial of petitioners' request for a hearing. The Attorney General will refute that claim by pointing out that the exemption had the effect of amending Indian Point's license and NRC's regulations by permanently replacing the existing one-hour fire resistance standard with a twenty-four minute or thirty minute standard. Because of this significant and permanent changes to the safety standards government the operation of Indian Point, the NRC should have

conducted a proceeding to amend either Indian Point's license or the NRC's safety regulations and, as required for those proceedings, provided notice to the public, an opportunity to submit comments, and a hearing "upon the request of any person whose interest may be affected." 42 U.S.C. § 2239(a)(1)(A); 10 C.F.R. §§ 50.91(a), 2.104, 2.800 et seq.

CONCLUSION

The Attorney General's motion to file a memorandum of law as amicus curiae in opposition to the motion to dismiss should be granted.

Dated: New York, New York Respectfully submitted,
June 27, 2008

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

By:

/s/ Janice Dean
JANICE A. DEAN
Assistant Attorney General
120 Broadway, 26th Floor
New York, NY 10271

BARBARA D. UNDERWOOD
Solicitor General

KATHERINE KENNEDY
Special Deputy Attorney General

MICHELLE ARONOWITZ
Deputy Solicitor General

JANICE A. DEAN
JOHN J. SIPOS
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Assistant Solicitor General

of Counsel

UNITED STATES COURT OF APPEALS
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**MEMORANDUM OF LAW FOR AMICUS CURIAE
ATTORNEY GENERAL OF THE STATE OF NEW YORK
IN OPPOSITION TO MOTION TO DISMISS**

ANDREW M. CUOMO
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, NY 10271
(212) 416-6351

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BARBARA D. UNDERWOOD
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MONICA WAGNER
Assistant Solicitor General

of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	2
A. Statutory and Regulatory Framework	2
B. Statement of Facts	7
ARGUMENT	11
POINT I - THE PETITION FOR REVIEW IS TIMELY	11
A. The Petition for Review Is Subject to a Six-Year Limitations Period	11
B. Petitioners' Request for a Hearing Tolloed the Running of the Limitations Period	15
POINT II - THE NRC SHOULD HAVE CONDUCTED A LICENSING OR RULEMAKING PROCEEDING, WITH NOTICE TO THE PUBLIC, AN OPPORTUNITY TO COMMENT, AND THE RIGHT TO A HEARING, INSTEAD OF ISSUING INDIAN POINT AN EXEMPTION	16
CONCLUSION	20

PRELIMINARY STATEMENT

Petitioners claim that the decision of the Nuclear Regulatory Commission ("NRC") to grant an exemption from its fire safety regulations to Entergy Nuclear Operations, Inc. ("Entergy"), the operator of the Indian Point Unit 3 nuclear power plant, failed to provide adequate protection of public health and safety. Petitioners also claim that the NRC should have treated the exemption as an amendment to Indian Point's license requiring notice to the public, an opportunity to comment, and the right to a hearing. The NRC has moved to dismiss the petition. The Attorney General, as amicus curiae, submits this brief in opposition to the NRC's motion.

INTEREST OF AMICUS CURIAE

This proceeding raises substantive and procedural issues of great interest and concern to the State of New York. The Attorney General believes that these critical issues are best resolved only after full briefing and oral argument.

New York has an interest in protecting its citizens to the extent possible from the health and safety risks posed by the Indian Point nuclear power plants. A fire at Indian Point could disable safety systems designed to control nuclear fission and ensure the prompt shut down of the reactor in the case of an emergency and could ultimately lead to a major radiation release at Indian Point, which is located in a densely populated region near New York City. Such a release would have a disastrous impact on

the lives, health and property of the people of New York. The NRC's decision to exempt Indian Point from safety requirements that the NRC itself has established is of grave concern to New York.¹

Procedurally, New York has an interest in ensuring a thorough, public, and transparent process in connection with any determinations the NRC makes regarding fire safety at Indian Point. In this case, the NRC exempted Indian Point from NRC's fire safety regulations without giving the people of New York an opportunity to participate in the process that led to that exemption. The NRC seeks to compound the inadequacy of that process by asking this Court to dismiss the petition without an opportunity for full briefing and oral argument. In order to ensure a full review of the important issues before the Court, the Attorney General respectfully suggests that the Court deny the motion to dismiss or, in the alternative, refer it to the merits panel.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Atomic Energy Act

The Atomic Energy Act, 42 U.S.C. § 2011 et seq., requires the NRC to ensure that nuclear power plants are secure against

¹ Based on his concerns about the public safety and health impacts of the Indian Point nuclear power plants, the Attorney General has opposed their relicensing and seeks their closure. He has identified his concerns in New York's petition to intervene in the NRC's proceeding to consider whether to renew the operating licenses for Units 2 and 3. In the interim, the Attorney General seeks to ensure the strongest possible safety and health protections at the plants.

accidents and deliberate attacks. In particular, the NRC must determine that the operation of a 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).

The NRC's Fire Safety Regulations

In 1975, a major fire caused by a single candle broke out at the Browns Ferry (Alabama) nuclear power station, burned for seven hours, and caused extensive damage to many safety systems, including the emergency core cooling system needed for the quick and safe shutdown of the reactor. NRC, A Short History of Nuclear Regulation, 1946 - 1999, ch. 3 (2000), available at <http://www.nrc.gov/about-nrc/short-history.html>; see also 45 Fed. Reg. 36,082 (May 29, 1980). A subsequent NRC review concluded that improvements in fire prevention and control were essential and proposed a number of recommendations. One recommendation identified the need to protect redundant electrical cables that provide power to critical safety systems that, in turn, achieve and maintain safe shutdown of the nuclear reactor. See Office of the Inspector General Special Inquiry, NRC, NRC's Oversight of Hemyc Fire Barriers 2 (Jan. 22, 2008) (ML 080250003).²

The NRC subsequently promulgated fire safety regulations. See generally 10 C.F.R. pt. 50, App. R; 45 Fed. Reg. 76,602, 76,608

² The NRC uses ML accession numbers for documents available through its "Electronic Reading Room." To find documents, use the agency search engine (ADAMS) at www.nrc.gov/reading-rm/adams/web-based.html.

(November 19, 1980). The new regulations prescribed fire barriers as a means of protecting electrical cables from fire damage and required nuclear power plants to install barriers with at least one hour of fire resistance in areas with fire detection and automatic suppression (e.g., sprinkler systems) and barriers with at least three hours of fire resistance in other areas. See 10 C.F.R. pt. 50, app. R, III-(G) (2) (a), (c). In promulgating these requirements, the NRC made clear that its goal was to provide a minimum fire resistance of three hours, but that it would permit an absolute minimum of one hour of fire protection for barriers installed in conjunction with sprinkler systems. 45 Fed. Reg. at 76,608.

Operating Licenses

No corporation may operate a nuclear power reactor unless it has received an operating license from the NRC pursuant to 10 C.F.R. pt. 50. The requirements imposed by the fire safety regulations are incorporated into operating licenses through 10 C.F.R. § 50.54(h) and this incorporation is made explicit in operating licenses. Accordingly, the Indian Point Unit 3 operating license specifically obligates the licensee to comply with the NRC's regulations. See Indian Point Nuclear Generating Unit No. 3 Amended Facility Operating License, License No. DPR-64, Amendment No. 225, at 1-3 (ML 003767953).

Amendments of Operating Licenses

The Atomic Energy Act authorizes licensees to seek amendments of operating licenses. See 42 U.S.C. § 2237. The Act also provides that an interested person may request an administrative hearing in a proceeding for an amendment of a license. See 42 U.S.C. § 2239. NRC regulations provide for public notice of the proposed amendment, the solicitation of public comments on the proposal, and a 30-day comment period. 10 C.F.R. § 50.91(a); see also 10 C.F.R. § 2.104.

Exemptions from Regulations

The NRC has promulgated a regulation that authorizes it to grant an "exemption" from a specific regulation upon an application from an interested person or on the NRC's own initiative. 10 C.F.R. § 50.12. Such an exemption may issue when, among other things, it "will not present an undue risk to the public health and safety" and "[a]pplication of the regulation in the particular circumstances would not serve the underlying purpose of the rule or is not necessary to achieve the underlying purpose of the rule." Id.

Heightened Fire Safety Concerns Post-9/11

Fire safety at nuclear power plants has taken on greater importance since September 11, 2001, when terrorists hijacked four jet airliners and crashed three of them into their intended targets, causing explosions and large, long-lasting fires. Those

explosions and fires destroyed a portion of the Pentagon in northern Virginia and caused the collapse of the World Trade Center towers and nearby buildings in New York City. See Nat'l Inst. of Standards & Tech., Final Report on the Collapse of the World Trade Center Towers, 175-76 (2005) (concluding that dislodged fire insulation and long-lasting fires were significant factors in the collapse of the twin towers); see generally Nat'l Comm'n on Terrorist Attacks Upon the U.S. ("9/11 Commission"), The 9/11 Commission Report (2004). Minutes before hitting the World Trade Center, two of the hijacked planes flew near or over the Indian Point reactors, located on the Hudson River twenty-four miles north of New York City. See id. at 32. The 9/11 Commission's report found that Khalid Sheikh Mohammad, the mastermind of the 9/11 attacks, originally planned to hijack additional aircraft to crash into targets on both coasts, including nuclear power plants. Id. at 154. As late as July 2001, the terrorists were considering attacking a specific nuclear facility in New York, which one of the pilots "had seen during familiarization flights near New York." Id. at 245. This facility was most likely Indian Point.

Following 9/11, the NRC amended all existing power-reactor licenses "to address the generalized high-level threat environment in a consistent manner throughout the nuclear reactor community." See generally 67 Fed. Reg. 9,792 (Mar. 4, 2002). The amended licenses required the identification of mitigative measures to

reduce the potential consequences of explosions or fire at nuclear plants.³ Id.

Just this month, the NRC reiterated that "[t]he results of [plant examinations] and actual fire events indicate that fire can be a significant contributor to nuclear power plant risk, depending on design and operational conditions." NRC, Information Sheet: Fire-Induced Electrical Cable Failure Testing, (June 6, 2008) ML08161009.

B. Statement of Facts

Fire Safety at Indian Point

In 1983, the NRC approved the use in nuclear power plants of Hemyc, which is the brand name of a fire barrier material that is wrapped around electrical equipment. In or about 1986, Indian Point installed Hemyc fire barriers around certain Unit 3 electrical cables and other equipment that served its reactor shutdown system. See 72 Fed. Reg. 56,798.

In 1993, the National Institute of Standards and Technology found that the "fire endurance period [for a Hemyc fire barrier] was 1390 seconds (23.2) minutes" (Office of the Inspector Gen., NRC's Oversight of Hemyc Fire Barriers, at 5), less than half the required one-hour resistance period. In 2005, Sandia National

³ Although the "Mitigative Measures" portion of the February 25, 2002, order was not released, various public NRC documents have quoted or discussed it. See, e.g., Letter from J. Boska, NRC, to M. Balduzzi, Entergy Nuclear Operations (July 11, 2007) (ML 071920023).

Laboratories found that a Hemyc fire barrier "d[id] not provide the level of protection expected for a rated 1-hour fire barrier." Office of the Inspector Gen., NRC's Oversight of Hemyc Fire Barriers, at 9. On April 10, 2006, the NRC issued Generic Letter 2006-03, Potentially Nonconforming Hemyc and MT Fire Barrier Configurations, which gave licensees until December 1, 2007, to provide a description of actions taken to resolve problems with Hemyc fire barriers. See 71 Fed. Reg. 24,871 (Apr. 27, 2006) (notice of letter).

On July 24, 2006, Entergy asked the NRC to exempt certain locations in Indian Point Unit 3 from the one-hour resistance requirement imposed by the NRC's fire safety regulations and, instead, to impose resistance requirements of thirty minutes for some of its electrical equipment and twenty-four minutes for other electrical equipment. 72 Fed. Reg. 56,798. The NRC did not publish any notice of the exemption application in the Federal Register.⁴

The first notice to the public of the exemption occurred on September 28, 2007, when the NRC published a "Finding of No Significant Impact" concluding that exempting Indian Point from the one-hour fire resistance standard would not have a significant environmental impact requiring review under the National

⁴ The NRC did contact an employee of the New York State Energy Research and Development Authority in February 2007. At that time, Ms. Peterson informed the NRC that she had "no comment" concerning the NRC's environmental review of the potential impacts of Entergy's waiver request. 72 Fed. Reg. at 55,254.

Environmental Policy Act. 72 Fed. Reg. 55,254 (Sept. 28, 2007). The decision to exempt Indian Point Unit 3 from the NRC's fire safety regulations was signed that same day, thereby precluding any public comment on it before it was finalized, but not published in the Federal Register until a week later, on October 4, 2007. 72 Fed. Reg. at 56,801. According to the explanation published at that time, the exemption was granted because, in the NRC's view, the one-hour fire resistance requirement was "not necessary" to achieve the underlying purpose of the rule, which it described as ensuring that one redundant cable train remained free of fire damage in the event of a fire. 72 Fed. Reg. at 56,801. That determination made no reference to the NRC's 1980 determination that the one-hour standard was the absolute minimum fire protection standard even for areas with automatic sprinkler systems.⁵

Petitioners' Request to the NRC and Petition for Review

On December 3, 2007, petitioners filed objections to the exemption and asked the NRC to reopen its consideration of the exemption, grant them leave to intervene, and convene a public hearing. On January 30, 2008, the NRC denied the request for a hearing on the ground that petitioners were not entitled to a

⁵ On October 4, 2007, the Attorney General filed a written objection to the exemption and the NRC's environmental analysis of the exemption and requested that the NRC reconsider the exemption and solicit public comment on it. The NRC rejected that request by letter dated October 31, 2007.

hearing regarding an exemption from regulations; the NRC did not respond to the request to reopen.

Petitioners filed this petition for review on March 27, 2008. They claim that the NRC's decision granting Indian Point an exemption from safety regulations did not meet the standards for granting an exemption pursuant to 10 C.F.R. § 50.12 because it failed to provide adequate protection of public health and safety. They also claim that the exemption effectively amended Indian Point's license and as a result, the NRC should have provided public notice, an opportunity to comment, and the right to a hearing.

The NRC's Motion to Dismiss

On May 5, 2008, the NRC moved to dismiss the petition for review. The NRC argues in its motion that the Court should dismiss petitioners' substantive challenge to the exemption because the petition for review was not filed within sixty days of issuance of the exemption, as required by the Hobbs Act. Federal Respondents' Motion to Dismiss ("NRC Mot.") at 3-7. The NRC does not contest the timeliness of petitioners' request for judicial review of the NRC's rejection of their request for a hearing but argues that, because the NRC issued an exemption from regulations rather than amending Indian Point's permit, petitioners did not have the right to a hearing. Id. at 7-10.

ARGUMENT

POINT I

THE PETITION FOR REVIEW IS TIMELY

The NRC argues that the March 27, 2008, petition for review is untimely because, under the Hobbs Act, it was subject to a sixty-day limitations period which started to run on October 4, 2007, when the NRC published notice of the exemption in the Federal Register. However, the sixty-day limitations period in the Hobbs Act does not apply to petitions for review of exemptions from regulations granted by the NRC. Instead, the six-year limitations period under 28 U.S.C. § 2401(a) for petitions reviewable under the Administrative Procedure Act applies and, as a result, the petition is timely. Alternatively, even if the Hobbs Act limitations period does apply, the running of the limitations period was tolled by petitioners' submission of a request to reopen consideration of the exemption and conduct a hearing and, as a result, the limitations period did not start to run until the NRC denied that request on January 30, 2008.

A. The Petition for Review Is Subject to a Six-Year Limitations Period

The petition for review of the exemption is not subject to the sixty-day limitations period in the Hobbs Act. The Hobbs Act grants the courts of appeals jurisdiction to hear petitions to review orders of the NRC "made reviewable by" 42 U.S.C. § 2239 and provides that a petition for review must be filed within sixty days

of entry of such an order. 28 U.S.C. §§ 2342(4), 2344; see also Riverkeeper, Inc. v. Collins, 359 F.3d 156, 164 (2d Cir. 2004); Massachusetts v. Nuclear Regulatory Comm'n, 878 F.2d 1516, 1519 & n.4 (1st Cir. 1989); Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 666 F.2d 595, 601 (D.C. Cir. 1981). Thus, a petition for review of an order of the NRC is subject to the sixty-day limitations period in the Hobbs Act only if it concerns a proceeding under 42 U.S.C. § 2239.

42 U.S.C. § 2239, a provision of the Atomic Energy Act, provides, in relevant part, that a proceeding "for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control," or "for the issuance or modification of rules and regulations dealing with the activities of licensees," is reviewable under the Hobbs Act. See also Massachusetts v. NRC, 878 F.2d at 1519 n.4. However, the NRC argues strenuously that it did not issue the exemption pursuant to such a licensing or rulemaking proceeding even as it seeks to dismiss the petition for review as untimely under the Hobbs Act. NRC Mot. at 8; Federal Respondents' Reply in Support of Motion to Dismiss ("NRC Reply Br.") at 5-7. The NRC is correct that the issuance of the exemption was not conducted as a rulemaking or licensing proceeding.⁶ As a result, the exemption is not

⁶ As shown in Point II below, the NRC should have initiated a licensing amendment proceeding or a rulemaking proceeding instead of issuing an exemption, but did not. Hence, neither the Hobbs Act nor the sixty-day limitations period applies here.

reviewable under the Hobbs Act and the sixty-day limitations period in the Hobbs Act does not apply here.

Where, as here, a final agency action is not made reviewable by the agency's enabling statute, it is subject to judicial review under the Administrative Procedure Act, which provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added); see also Heckler v. Chaney, 470 U.S. 821, 828 (1985); Jersey Heights Neighborhood Ass'n v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999); Sierra Club v. Slater, 120 F.3d 623, 630-31 (6th Cir. 1997); Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988).

The NRC mistakenly suggests that the exemption may not be reviewable under the APA. NRC Mot. at 4. A final agency action is reviewable under the APA unless (1) "statutes preclude judicial review;" or (2) "[the] agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). Neither exception applies here. The first exception "requires construction of the substantive statute involved to determine whether Congress intended to preclude judicial review of certain decisions." Heckler, 470 U.S. at 828. There is nothing in the Atomic Energy Act precluding judicial review of exemptions from regulations. Indeed, exemptions from regulations are not even mentioned in the Act and the NRC's authority to grant exemptions is derived solely from its regulations. See 10 C.F.R. § 50.12; 50 Fed. Reg. 50,764 (December 12, 1985).

Nor is the grant of an exemption "committed to agency discretion by law." An agency action falls under that exception only when "a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler, 470 U.S. at 830. The prime example of such an action is an agency's refusal to take action, including a refusal to take enforcement action. Id. at 831; Riverkeeper, Inc., 359 F.3d at 164-65. The NRC's grant of an exemption to Indian Point is an action, not a refusal to take action. Moreover, 10 C.F.R. § 50.12 provides meaningful standards for judicial review of the exemption, including whether the exemption "will . . . present an undue risk to the public health and safety." Thus, the grant of the exemption is not committed to agency discretion by law and, as a result, the exemption is reviewable under the APA.

A petition for review under the APA is subject to the six-year limitations period for bringing civil actions against the United States under 28 U.S.C. § 2401(a). Instituto De Educacion Universal Corp. v. U.S. Dep't of Educ., 209 F.3d 18, 20 (1st Cir. 2000); Jersey Heights Neighborhood Ass'n, 174 F.3d at 186; Polanco v. U.S. Drug Enforcement Agency, 158 F.3d 647, 652 (2d Cir. 1998); Slater, 120 F.3d at 631; Penfold, 857 F.2d at 1315. Because the petition for review is subject to a six-year limitations period, it is timely regardless of whether the limitations period started to run

when the exemption was issued or when the NRC denied petitioners' request to reopen and conduct a hearing.⁷

B. Petitioners' Request for a Hearing Tolloed the Running of the Limitations Period

Even if the Hobbs Act were the proper vehicle for judicial review of the exemption, the sixty-day statute of limitations would be tolled by petitioners' request to reopen consideration of the exemption and conduct a hearing. As the NRC points out (NRC Mot. at 6), the Supreme Court held in Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs, 482 U.S. 270, 287 (1987), that a petition for reconsideration tolls the running of the sixty-day limitations period for filing a petition for judicial review under the Hobbs Act. Thus, petitioners' request to reopen consideration of the exemption tolled the running of the limitations period.

The NRC contends that petitioners' request to reopen did not toll the running of the limitations period because that request was "nowhere authorized by statute or regulation." NRC Mot. at 6. Even if it were true that a request for reconsideration standing alone is not authorized by law, petitioners have also requested a hearing. In insisting that the Hobbs Act and its sixty-day

⁷ The courts of appeals have jurisdiction to review agency actions made reviewable by the Hobbs Act. 28 U.S.C. § 2342. If the Hobbs Act does not apply here, it appears that the district court may have jurisdiction, in which case this Court has authority under 28 U.S.C. § 1631 to transfer this proceeding to the district court. See Instituto De Educacion Universal Corp., 209 F.3d at 21.

limitations period govern here, the NRC necessarily concedes that petitioners' request for a hearing would be authorized, since proceedings reviewable under the Hobbs Act afford interested persons the right to request a hearing. See 42 U.S.C. § 2239(a)(1)(A). Like a request for reconsideration, it should toll the running of the statute of limitations.

Under the NRC's regulations, a request for a hearing is timely so long as it is filed within sixty days of publication of notice of a proceeding in the Federal Register. 10 C.F.R. § 2.309(b)(3)(iii). Petitioners filed their request for a hearing on December 3, 2007, within sixty days of the October 4, 2007, notice of the exemption and, as a result, their request tolled the running of the limitations period until the NRC rejected their request on January 30, 2008.

POINT II

THE NRC SHOULD HAVE CONDUCTED A LICENSING OR RULEMAKING PROCEEDING, WITH NOTICE TO THE PUBLIC, AN OPPORTUNITY TO COMMENT, AND THE RIGHT TO A HEARING, INSTEAD OF ISSUING INDIAN POINT AN EXEMPTION

The NRC argues that petitioners were not entitled to a hearing on the exemption and that, as a result, the petition for review, even if timely, should be dismissed insofar as it seeks review of the NRC's denial of petitioners' request for a hearing. The petition should not be dismissed on that ground. The exemption effectively amended Indian Point's license by permanently replacing the existing one-hour fire resistance standard with a twenty-four

minute or thirty minute standard. See Brooks v. Atomic Energy Comm'n, 476 F.2d 924, 926 (D.C. Cir. 1973) (the NRC conceded that an the extension of construction permit completion dates amended the permit). It also effectively amended the NRC's regulations by approving a shorter fire resistance standard for Indian Point than currently allowed by those regulations. As a result, the NRC should have conducted a proceeding to amend either Indian Point's license or the NRC's safety regulations and, as required for those proceedings, provided notice to the public, an opportunity to submit comments, and a hearing "upon the request of any person whose interest may be affected." 42 U.S.C. § 2239(a)(1)(A); 10 C.F.R. §§ 50.91(a), 2.104, 2.800 et seq.

By granting an exemption that amended both Indian Point's license and the regulatory standards for fire resistance as applied to Indian Point, the NRC deprived petitioners - and the people of New York - of the process to which they are entitled when a nuclear power plant's license or regulatory standards are amended. The NRC cannot deny the public their right to participate in licensing and rulemaking proceedings by manipulating the form of the proceeding. Nor should nuclear power plants be permitted to avoid public participation by requesting an exemption from a regulation when they are actually seeking to amend their license or the standards imposed by a regulation.⁸

⁸ The NRC indicates that petitioners can raise their concerns about the safety implications of the exemption in a "citizens' petition" under 10 C.F.R. § 2.206. NRC Mot. at 9-10. Section (continued...)

The NRC argues, based on Massachusetts v. NRC, 878 F.2d 1516, and Kelley v. Selin, 42 F.3d 1501, 1515 (6th Cir. 1995), that the exemption was not tantamount to an amendment to Indian Point's license. NRC Mot. at 7-8. However, both those cases stand for the proposition that a temporary exemption granted during a transitional period, after which the licensee returns to compliance with the terms of its license, does not constitute an amendment to a license regarding which the public has a right to notice, comment, and a hearing. The exemption here, in contrast, was not issued in response to a temporary change in circumstances but instead permanently replaced the existing one-hour fire resistance standard with a more lenient standard.

At issue in Massachusetts v. NRC was the exemption of the Pilgrim nuclear power plant from emergency evacuation drill requirements during a period of time when the plant was not in operation. As a condition of the exemption, the NRC required Pilgrim to conduct an emergency evacuation drill within 120 days after it resumed operations. 878 F.2d at 1519. The court held that that exemption did not amend Pilgrim's license because it was "not a situation in which the NRC permanently exempted the license from a specific license requirement." Id. at 1521.

⁸ (...continued)
2.206 gives "any person" the right to submit a "request to modify, suspend, or revoke a license, or for any other action as may be proper." However, a § 2.206 petition is not a substitute for the rights that petitioners have to participate in a proceeding in which a license is amended because, absent special circumstances, a decision of the NRC to deny such a petition is not subject to judicial review. Riverkeeper, Inc., 359 F.3d at 158.

The exemption at issue in Kelley v. Selin permitted a manufacturer of spent fuel storage casks to construct a limited number of casks prior to issuance of a certificate of compliance. 42 F.3d at 1513-14, 1517. The manufacturer ultimately obtained the certificate of compliance and no spent fuel was loaded into the casks until after the NRC had issued the certificate. Id. at 1514. Thus, the exemptions reviewed in Massachusetts v. NRC and Kelley simply excused a licensee from the obligations of its permit for a brief period of time to reflect a temporary need. Unlike the exemption granted Indian Point, neither exemption effected a permanent change to the safety standards under which a nuclear power plant is operated.

The NRC argues in its reply brief that the exemption it granted Indian Point is comparable to the exemption at issue in Massachusetts v. NRC because Indian Point "was not excused from regulatory compliance, even temporarily." NRC Reply Br. at 8. NRC misses the point. The exemptions reviewed in Massachusetts v. NRC and Kelley were consistent with the power plants' licenses because they did not change the licenses' underlying requirements for operation of the plants, and thus were permissible without notice to the public, the opportunity for comment, and the right to hearing. Here, in contrast, the exemption drastically and permanently changed the safety standards for operation of the Indian Point Unit 3 reactor by relieving Indian Point of its obligation to ensure that the electrical equipment required to shut down the reactor will remain operational for at the least the first

hour of a fire. That modification to the underlying requirements of Indian Point's license and to the NRC's regulatory standards is invalid without the protections attendant to a licensing or rulemaking proceeding.

Thus, instead of granting Indian Point an exemption that effectively amended its license as well as the existing regulatory standards for fire resistance, the NRC should have conducted a licensing or rulemaking proceeding that provided for public notice, comment, and the right to a hearing.

CONCLUSION

NRC's motion to dismiss should be denied because the petition for review was timely and petitioners as well as the public were entitled to notice of the exemption, an opportunity to comment, and the right to hearing.

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

By: /s/ Janice Dean
JANICE A. DEAN
Assistant Attorney General
120 Broadway, 26th Floor
New York, NY 10271

BARBARA D. UNDERWOOD
Solicitor General

KATHERINE KENNEDY
Special Deputy Attorney General

MICHELLE ARONOWITZ
Deputy Solicitor General

JANICE A. DEAN
JOHN J. SIPOS
Assistant Attorneys General

MONICA WAGNER
Assistant Solicitor General

of Counsel