Assemblyman Richard Brodsky
2121 Saw Mill River Road
White Plains, New York 10607
914.720.8830

Mr. Richard M. Rader, Esq.
General Counsel
United States Nuclear Regulatory Commission
Washington, D.C. 20555-0001

January 4, 2010

Dear Mr. Rader,

Enclosed is a copy of a complaint filed in the Southern District of New York (SDNY) on December 30, 2009 and designated case 09-cv-10594.

Because the complaint named an agency of the United States Government as the defendant, service via certified mail has also been made upon the United States Attorney General and the U.S. Attorney for SDNY as required by Federal Rule of Civil Procedure 4(i).

Also enclosed are a stamped summons, and courtesy copies of SDNY's Electronic Case Filing Rules and Instructions as well as a copy of the Individual Rules of Practice for the Honorable Stephen C. Robinson.

This mailing fulfills the service requirements of the Federal Rules of Civil Procedure.

Sincerely,

Richard Brodsky, Esq.
Plaintiffs' Counsel

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

Richard L. Brodsky; Westchester Citizens' Awareness Network; Public Health and Sustainable *Plaintiff* v. United States Nuclear Regulatory Commission *Defendant*	)	Civil Action No. '09 CIV 10594

JUDGE ROBINSON

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: Richard L. Brodsky
2121 Saw Mill Road
White Plains, NY 10607

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT
J. MICHAEL McMAHON

Date: DEC 30 2009

Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

☐ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

☐ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

☐ I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

☐ I returned the summons unexecuted because _____ ; or

☐ Other *(specify)*:

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

June 10, 2009

INDIVIDUAL RULES OF PRACTICE
STEPHEN C. ROBINSON, UNITED STATES DISTRICT JUDGE

300 Quarropas Street, Room 633
White Plains, NY 10601-4150
(914) 390-4177

Unless otherwise ordered, matters before Judge Robinson shall be conducted in accordance with the following practices:

I. COMMUNICATIONS WITH CHAMBERS

A. **Letters.** Except as otherwise provided below, communications with chambers shall be by letter, with copies simultaneously delivered to all counsel. Copies of correspondence between counsel shall not be sent to the Court. Refer to Rule II(F) below for letters concerning discovery disputes. **Letters to chambers should not be electronically filed.**

B. **Telephone calls.** Except as provided in Rule I(D) below, **telephone calls to chambers should be limited to emergency situations requiring immediate attention.** In such situations, call chambers at (914) 390-4177. *Ex parte* telephone calls will ordinarily not be accepted; wherever possible, counsel for all affected parties should be on the line when a call to chambers is placed, except to the extent that similarly situated parties have designated a lead counsel to represent them on such a call.

C. **Faxes.** Faxes to chambers are permitted only if copies are also simultaneously faxed or delivered to all counsel. No document longer than ten pages may be faxed without authorization. IF FAXING, DO NOT SEND PAPER COPIES BY HAND OR BY MAIL – the fax copy is sufficient. **The fax number is (914) 390-4179.**

> **Please Note:** Stipulations of dismissal and discontinuance should be filed electronically. In non-ECF cases, those stipulations should be filed with the Clerk of the Court. Partial stipulations voluntary dismissal should be submitted by email to the Judgment Clerk to be conformed for the Court's approval. Original settlement papers and consent orders (*i.e.*, original signatures) should be filed with the Clerk of the Court and a courtesy copy should be sent to chambers.

D. **Scheduling matters.** For scheduling and calendar matters, call chambers at (914) 390-4177 between 9:00 a.m. and 4:00 p.m. Questions about docketing procedures should be directed to the Clerk of the Court at (917) 390-4000.

E. **Requests for adjournments or extensions of time**

1. All requests for adjournments or extensions of time must be in writing with copies to all counsel in the case. Requests for adjournments must

state: (i) the original date; (ii) the number of previous requests for adjournment or extension; (iii) whether these previous requests were granted or denied; and (iv) whether the adversary consents, and, if not, the adversary's reasons for refusing to consent.

2. If the requested adjournment or extension affects any other scheduled dates, a proposed Revised Scheduling Order must be attached. If the parties request an adjournment of a court appearance (absent an emergency), such request must be made, in writing, at least 48 hours prior to the scheduled appearance.

II. MOTIONS

A. Pre-motion procedures in civil cases

1. For discovery motions, follow Local Civil Rule 37.2.

2. **Filing of motion papers ("Bundling Rule"):** In all ECF cases, the moving party shall electronically file motion and reply papers with the Clerk **only when the entire motion has been briefed**. The responding party shall electronically file opposition papers **only when noticed by the moving party that reply papers are being filed**. Courtesy copies are to be served on the opposing party not later than the time each submission is due under the Court's scheduling order; parties shall also send one courtesy copy of any submission to chambers at the time of service on opposing party. In non-ECF cases, motion papers shall be filed promptly after service.

3. A pre-motion conference is required for all motions except those listed below in Rules II(A)(4) and II(A)(5). To request a pre-motion conference, the moving party must notify the Court in writing of its request to move. Such requests must be simultaneously served on all counsel. This request must include a brief description of the motion **that shall not exceed three pages**. The Court will either: (i) set a date for a pre-motion conference, if necessary; or (ii) determine the form (*e.g.*, letter motion) and timeline for the motion if the Court decides that no conference is required.

4. Pre-Answer motions pursuant to Fed. R. Civ. P. 12 and motions to remand a removed action to state court may be filed without a pre-motion conference. The parties must confer and jointly submit a proposed briefing schedule to the Court for review. If the parties cannot agree on a briefing schedule, they must submit a joint letter which sets forth each party's proposed schedule.

5. The following motions do not require any prior communication before filing and do not requiring bundling (except as noted below); it is therefore

critical that parties supply a courtesy copy to chambers (see Rule II(B) below):

i. applications for temporary restraining orders;
ii. motions brought on by order to show cause;
iii. motions by incarcerated *pro se* litigants;
iv. motions for admission *pro hac vice*;
v. motions for re-argument / reconsideration (**bundling applies**);
vi. motions for default judgment;
vii. applications for attorneys' fees;
viii. motions for reduction of sentences;
ix. objections to rulings of Magistrate Judges;
x. petitions to compel arbitration or to confirm or modify awards;
xi. motions described in FED. R. CIV. P. 6(b); and
xii. motions described in FED. R. APP. P. 4(a)(4)(A).

B. Courtesy copies. Courtesy copies of all pleadings (including the Complaint) marked as such, must be submitted to chambers at the time the papers are filed or as soon thereafter as is practicable. Courtesy copies shall be submitted to chambers for both ECF and non-ECF designated cases. In non-ECF cases, original documents, with proof of service on opposing counsel, must be filed with the Clerk's Office.

C. Memoranda of law. Unless prior permission has been granted, memoranda of law in support of or in opposition to motions are limited to 25 pages, and reply memoranda are limited to 15 pages. All memoranda shall contain a table of contents and a table of authorities.

D. Motion papers

1. Parties must identify and supply the Court with copies of any unpublished cases cited in their papers that are not available on Lexis or Westlaw.

2. Requests to file memoranda exceeding the page limits set forth herein **must be made in writing at least five days prior to the due date**, except with respect to reply briefs, in which case the request may be made up to two days prior to the due date.

3. On motions for summary judgment, do not attach complete transcripts as exhibits. Attach only pages containing relevant testimony, including pages immediately prior and subsequent to the cited text.

4. All exhibits must be separately tabbed and indexed.

E. Oral argument. Parties may request oral argument by letter at the time they file their moving, opposing, or reply papers. Whether or not requested, the Court will

determine whether argument will be heard and, if so, will advise counsel of the argument date.

III. SETTLEMENT CONFERENCES

A. **Settlement letters.** The settlement conference will **NOT** occur unless the Court receives, three business days prior to the settlement conference, a short letter containing the following:

1. A statement of relevant facts;

2. Important legal authorities, if necessary;

3. Details of settlement offers already made (including specific dollar amounts offered); and

4. An opinion as to a reasonable settlement figure – this must be a specific dollar figure or range.

B. *Ex parte.* Parties should submit their settlement letters *ex parte*. The letters will not be docketed or otherwise included in the public record.

J. MICHAEL McMAHON
CLERK OF COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
500 PEARL STREET, NEW YORK, NY 10007
300 QUARROPAS STREET, WHITE PLAINS, NY 10601

WWW.NYSD.USCOURTS.GOV

Electronic Case Filing Rules & Instructions

August 1, 2008 Edition

IMPORTANT INFORMATION FOR NEW CASES

A party filing a new civil case assigned to the Electronic Case Filing (ECF) system must do the following after obtaining a civil case number:

(1) E-mail a pdf copy of the case initiating documents to the Clerk's Office within 24 hours of delivering the paper documents to the Court; and

(2) Serve each party to the action with the initiating documents and a copy of:

(a) SDNY Electronic Case Filing Rules & Instructions (attached); and

(b) The assigned Judge's Individual Practices.

For complete instructions and e-mail addresses see Section 14 - Opening a Civil Action.

Introduction

The United States District Court for the Southern District of New York implemented an Electronic Case Filing (ECF) system in December 2003. Electronic versions of documents filed by attorneys over the Internet have largely replaced paper documents in the Court's files. Almost all new civil and criminal cases filed in this Court after December 2, 2003 are Electronic Case Filing (ECF) cases. Cases filed before December 2, 2003, Pro se cases (unless the pro se litigant is a member of the bar), Social Security cases and habeas corpus cases however are not ECF cases and must be filed on paper. The information in this document applies only to cases assigned to the ECF system.

Electronic Case Filing has several advantages for both the attorney and the Court:

- Twenty-four hour concurrent access to case files from any location over the Internet
- Remote document filing from any Internet connection worldwide
- Secure access to the ECF system via unique user password
- Immediate e-mail notification of case activity to parties and the Court
- Storage of documents in a reliable and secure electronic format

In addition to the Federal Rules of Civil and Criminal Procedure, the following govern Electronic Case Filing in this District (available at www.nysd.uscourts.gov):

- **SDNY Electronic Case Filing Rules & Instructions (this document):**

  Part I. Electronic Case Filing Rules (ECF Rules), approved by the Board of Judges of this Court, provide the broad outline of the rules of Electronic Case Filing.

  Part II. Electronic Case Filing Instructions (ECF Instructions), written by the Clerk of Court under the authority of the ECF Rules, provide step by step instructions for Electronic Case Filing.

- **The Judge's Individual Practices**

  Each Judge's Individual Practices outline their own specific filing requirements.

The Court is prepared to assist you in filing electronically in several ways:

- The SDNY Electronic Case Filing Rules & Instructions will answer many of your ECF questions.
- Training in Electronic Case Filing (ECF) is available both in person at the courthouse and on-line at www.nysd.uscourts.gov (*See section 24 - ECF Help Desk and Training*).
- ECF Help Desk operators are available by telephone to answer your electronic filing questions (*See section 24 - ECF Help Desk and Training*).

Part I. Electronic Case Filing Rules

The Court will accept for filing documents submitted, signed or verified by electronic means that comply with the following rules.

Section 1. Scope of Electronic Filing

1.1 The Court will designate which cases will be assigned to the Electronic Case Filing (ECF) system. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the Court in a case assigned to the ECF system must be filed electronically. A paper may be filed electronically (a) from a remote location, (b) by bringing it to the Clerk's office during regular business hours, in a form or electronic format prescribed by the Clerk, for input into the system, or (c) by bringing the paper and the Filing User's SDNY ECF password and log-in to the Clerk's Office during regular business hours to be scanned into the system by the Filing User.

1.2 Unless limited by their terms to civil cases, the provisions of these procedures relating to electronic filing apply in criminal cases that are initiated by the filing of an indictment or information. Electronic filing procedures shall not apply to applications for arrest, search or electronic surveillance warrants; for other orders in aid of or ancillary to a criminal investigation; or to proceedings relating to the grand jury.

1.3 Electronic filing procedures shall not apply to Social Security cases, Pro Se cases (unless the pro se litigant is a member of the bar), Habeas Corpus cases or cases initiated before December 2, 2003.

(*See section 13 - ECF Basics*).

1.4 The filing and service of the initial papers in a civil case, including the complaint, the issuance of the summons and the proof of service of the summons and complaint, as well as service of non-party subpoenas, will be accomplished in the traditional manner on paper in accordance with the Federal Rules of Civil Procedure and applicable Local Rules governing service, rather than electronically. In a criminal case, the indictment or information, including any superseders, shall also be filed and given to the defendant in the traditional manner on paper in accordance with the Federal Rules of Criminal Procedure and applicable Local Rules rather than electronically; in addition, service of subpoenas shall be made in the traditional manner on paper in accordance with the Federal Rules of Criminal Procedure and applicable Local Rules. In a case assigned to the ECF system after it has been opened, parties must promptly provide the Clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these Rules & Instructions or as ordered by the Court.

(*See section 14 - Opening a Civil Action*).

1.5 The Clerk shall write and revise as necessary Instructions to guide Filing Users and maximize the efficiency of the Electronic Case Filing system.

(*See Part II - Electronic Case Filing Instructions*)

3.2 When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Court (subject to the exception set out in Rule 4 below), and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed on the date and time stated on the Notice of Electronic Filing from the Court.

3.3 Electronic filing must be completed before midnight local time where the Court is located in order to be considered timely filed that day.

3.4 Individual Judges' Practices should continue to be followed with respect to delivery of courtesy copies.

(*See section 19 - Service of Electronically Filed Documents*).

Section 4. Entry of Court Orders

4.1 All orders, decrees, judgments and proceedings of the Court will be filed in accordance with these procedures and entered on the docket kept by the Clerk under Fed. R. Civ. P. 58 and 79 and Fed. R. Crim. P. 49 and 55. Each document signed by a judge shall be scanned so as to contain an image of the judge's signature and shall be filed electronically by the Court, and the manually signed original shall be filed by the Clerk. In the event of a discrepancy between the electronically filed copy and the manually signed original, the manually signed original shall control.

4.2 A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such other form as the Court requires, if any.

Section 5. Attachments and Exhibits

5.1 Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the Court permits paper filing.

5.2 A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are relevant to the matter under consideration by the Court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this procedure do so without prejudice to their right to file timely additional excerpts or the complete document. Responding parties may file timely additional excerpts that they believe are relevant or the complete document. A party may move for permission to serve and file in hard copy documents that cannot reasonably be scanned.

5.3 In cases where the record of an administrative or other prior proceeding must be filed with the Court, such record may be served and filed in hard copy without prior motion and order of the Court.

(*See section 15 - Motions*).

8.5 Documents requiring signatures of more than one party must be electronically filed either by: (a) submitting a scanned document containing all necessary signatures; (b) representing the consent of the other parties on the document; (c) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (d) in any other manner approved by the Court.

(*See section 13 - ECF Basics*).

Section 9. Service of Documents by Electronic Means

Transmission of the Clerk's Notice of Electronic Filing of a document shall constitute service of such document upon any Filing User in that case. It remains the duty of the attorney for a party to review regularly the docket sheet of the case. Attorneys and pro se parties who are not Filing Users shall be served with a paper copy of any electronically filed pleading or other document. Service of such paper copy must be made according to the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure and the Local Rules.

(*See section 19 - Service of Electronically Filed Documents*).

Section 10. Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in a proceeding assigned to the ECF system, the Clerk will transmit to all Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Crim.P. 49(c) and Fed.R.Civ.P. 77(d). It remains the duty of the attorney for a party to review regularly the docket sheet of the case. The Clerk must give notice in paper form to a person who is not a Filing User in accordance with the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure.

(*See section 19 - Service of Electronically Filed Documents*).

Section 11. Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the Court.

(*See section 23 - ECF Computer System Information*).

Section 12. Public Access

A person may review at the Clerk's Office filings that have not been sealed by the Court. A person also may access the ECF system at the Court's Internet site www.nysd.uscourts.gov by obtaining a PACER log-in and

Part II. Electronic Case Filing Instructions

Section 13. ECF Basics

13.1 May letters be filed electronically?

No. Letters are submitted in the traditional manner on paper. An attorney should not file a letter electronically on the ECF system. The Judge may direct the Clerk to place a letter on the docket if it is deemed appropriate.

13.2 In brief, how do I file a document electronically?

(a) Use your secure SDNY ECF password (*see section 22 - ECF Passwords*) to log-in to the ECF system from any Internet connection.

(b) Select the appropriate category, CIVIL or CRIMINAL.

(c) Find the appropriate ECF Filing Event, or title, for your document. (*See below*).

(d) Indicate the party filing the document (hold down the control key to designate more than one party).

(e) Upload a PDF copy (*see section 23 - ECF Computer System Information*) of your document. Include any exhibits as attachments to the main document. File supporting documents separately.

(f) Print the final screen, the Notice of Electronic Filing (NEF), for your records.

(g) Service is complete provided all parties receive electronic notice of the filing (via the NEF email sent automatically by the Court - see the NEF for a list of who was/was not served electronically). If a party will not receive electronic notice via the NEF email, you must serve him/her in the traditional manner, on paper, then electronically file an affidavit of service (*see section 19 - Service of Electronically Filed Documents*).

(h) Submit a paper courtesy copy to the Judge if required (*see the Judge's Individual Practices at www.nysd.uscourts.gov*).

13.3 What is the secure website for electronic filing on the SDNY ECF system?

To file electronically go to **https://ecf.nysd.uscourts.gov**, or link to the filing website via the Court's public website (see below). You will need your SDNY ECF log-in and password to file electronically.

13.11 May I file documents electronically in a non-ECF (paper) case?

No. Do not file documents electronically in non ECF (paper) case. Only those cases filed after December 2, 2003 are subject to electronic filing. Pro Se cases, Social Security cases, habeas corpus cases and cases filed before December 2, 2003, will not be assigned to the ECF system and must be filed on paper.

(*See section 1 - Scope of Electronic Case Filing*).

13.12 Will the Court file documents electronically in a non-ECF (paper) case?

Yes, the Court may file Orders and Opinions in electronic format (pdf) in a non-ECF (paper) case. This will not convert a non-ECF case to an ECF case, and parties should continue to file documents on paper.

13.13 Can I file electronically at any time?

Yes. You can file electronically 24 hours a day, 7 days a week, 365 days a year from any Internet connection worldwide. Filing must be completed before midnight local time where the Court is located in order to be considered timely filed that day.

(*See section 3 - Consequences of Electronic Case Filing*).

13.14 When is an electronically filed document deemed filed?

An electronically filed document is deemed filed on the date and time stated on the Notice of Electronic Filing (also referred to herein as the "filing receipt") from the Court.

(*See section 3 - Consequences of Electronic Case Filing*).

13.15 What is a docket sheet, and how can I view one?

The docket sheet is the official record of all filings in a case. You can view the docket sheet, including images of electronically filed documents, via the PACER public access system (for details go to http://pacer.psc.uscourts.gov or call 800-676-6856). Or you can use one of the public access computers available in the Clerk's Office.

(*See section 12 - Public Access*).

13.16 Should I routinely view the docket sheet in my case?

Yes. In ECF cases, service is accomplished by an e-mail sent by the Court. However e-mail is not foolproof, and you may miss an e-mail message. Therefore it remains the duty of the attorney for a party to review regularly the docket sheet of the case in order not to miss a filing.

(*See section 9 - Service of Documents by Electronic Means*).

Dictionary (a pdf document available on our public website at www.nysd.uscourts.gov) is also very useful for finding your event and the category in which it's listed. Print the dictionary for future reference. If you cannot find the appropriate event for your document do not file it using the wrong event. Call the ECF Help Desk at (212)805-0800 for assistance if necessary.

(*See section 24 - ECF Help Desk and Training*).

13.23 Must I retain paper originals of documents I electronically file?

Yes. Filing Users must retain original versions of electronically filed documents for a period of time after filing. On request of the Court, the Filing User must provide original documents for review.

(*See section 7 - Retention Requirements*).

13.24 Should I continue to submit courtesy copies?

Yes, continue your current practice. In the past if you would have submitted a paper courtesy copy of a document, you should now submit a paper courtesy copy of the document in an ECF case. For example, most Judges require courtesy copies of motion papers. Read the Judge's Individual Practices for specific practices.

(*See section 3 - Consequences of Electronic Case Filing*).

13.25 Are Administrative Records filed electronically?

Yes, if possible. However, if the administrative record is too large to be scanned it may be served and filed in hard copy without prior motion and order of the Court.

(*See section 5 - Attachments and Exhibits*).

13.26 In Consolidated and MDL cases can I file simultaneously in member cases?

Yes. When filing in Consolidated and Multi-District Litigation (MDL) cases you can save time by electronically filing a document simultaneously in the member case(s) using the computer function titled "Spread Text and Effects" (not available in related cases). Please observe the following MDL filing rules:

- In consolidated and MDL cases you must file all documents first under the Lead or MDL case number.

- You may then precisely designate the member case(s) in which you wish to simultaneously file.

- Do not file in all cases unless it is appropriate. Your document may not relate to all member cases.

- The case caption must include all the case numbers in which your document will be filed.

- Instructions for Spread Text and Effects and information on in-person training are available on-line at www.nysd.uscourts.gov

(a) Electronically file the Affidavit of Service for the initiating document on the ECF system (do not e-mail), and

(b) Deliver the original paper Affidavit of Service, with summons attached, to the Clerk's Office. Include a copy of the ECF Notice of Electronic Filing for this document (the filing receipt),

(*See section 19 - Service of Electronically Filed Documents*).

14.5 Subsequent documents, including the Defendant's Answer, must be filed electronically on the ECF system at **https://ecf.nysd.uscourts.gov**. With certain exceptions outlined below, the Clerk's Office will not accept a paper document for filing in an ECF case.

(*See section 1 - Scope of Electronic Filing* and *section 18 - Non-electronic Documents*).

Section 15. Motions

15.1 What ECF Filing Event should be used to file a motion?

A motion must be filed using an ECF Filing Event beginning with the word "Motion". The ECF system contains over 160 separate motion Filing Events for your use, all beginning with the word "Motion" (eg. "Motion for Summary Judgment", etc.). See the ECF Events Dictionary at www.nysd.uscourts.gov for a complete list of motions and supporting documents. Do not use the "Notice" filing event to file a motion.

15.2 Should I file supporting papers as attachments to the motion?

No. File supporting or response documents separately under the appropriate ECF Filing Event found in the category "Replies, Opposition and Supporting Documents". For example, a motion, an affidavit in support and a memorandum of law in support must be filed separately.

15.3 What ECF Filing Event should be used to file supporting papers?

Use the appropriate ECF Filing Events for supporting papers found in the category "Replies, Opposition and Supporting Documents" (eg. Affidavit in Support of Motion, Memorandum of Law in Support of Motion, etc.). Never use the ECF Filing Event for Motion to file supporting papers. For example, filing a motion, an affidavit in support and a memorandum of law in support, and labeling each one "Motion" would make it appear incorrectly that three motions were filed instead of one.

15.4 How do I file exhibits?

Exhibits shall be filed only as attachments to a document, such as a motion or an affidavit. Do not use the ECF Filing Event for "Motion" to file exhibits separately. Exhibits are the only items that should be attached to electronically filed documents. You are limited to electronically filing only relevant excerpts of exhibits.

Include courtesy copies of all documents.

(b) If signed by the Court, the Clerk's Office will electronically file only the Order. After the Order appears on the docket sheet, the attorney must electronically file all supporting papers.

(c) Electronically file an Affidavit of Service for the Order to Show Cause.

16.4 Default Judgment brought on by Default Judgment and Order:

(a) Submit to the Orders, Appeals & Judgments Clerk: a paper original of the proposed Default Judgment and Order; the Affidavit in Support; a Statement of Damages (unless requesting an inquest); a copy of the Summons and Complaint with proof of service; and a Clerk's Certificate. The papers will be forwarded to the Judge for signature.

(b) If signed by the Court, the Clerk's Office will electronically file only the Order. After the Order appears on the docket sheet, the attorney must electronically file all supporting papers.

Section 17. Appeals

17.1 Are appeals filed electronically?

No. Appeals in ECF and non-ECF cases must be filed in the traditional manner, on paper.

17.2 How do I file an appeal in an ECF case?

File the appeal in the traditional manner, on paper either at the courthouse or by mail. Include the filing fee if necessary. Then within 24 hours of filing the paper copy of your Appeal, you are required to e-mail to the Clerk's Office an electronic copy of the Appeal in PDF format. Include any exhibits. Each document must be in a separate PDF file no larger than 2.5 megabytes. The District Court case number followed by the Judge's initials and "ECF CASE" must appear in the document's case caption. When sending e-mail, the subject line of the e-mail should always list the case number followed by a document description (ex. "Re: 01cv1234-appeal"). Questions may be directed to the Orders, Appeals & Judgments Clerk in Manhattan at (212)805-0636, or in White Plains at (914)390-4000. Send the e-mail (do not file on the ECF system) to:

- For appeals from an ECF case assigned to a Manhattan Judge e-mail to:

  appeals@nysd.uscourts.gov

- For appeals from an ECF case assigned to a White Plains Judge e-mail to:

  wpclerk@nysd.uscourts.gov

18.4 Are Proposed Orders, Proposed Judgments, Stipulations or Consents filed electronically?

No. Any document that requires the signature of a Judge should not be electronically filed. Proposed orders, judgments, stipulations and consents should not be submitted through the ECF system. Instead they should be sent by e-mail to the Clerk. Proposed orders should be submitted in word processing format (WordPerfect or Word) rather than as a pdf document. Stipulations should be submitted in pdf format. Stipulations must contain ink signatures. Faxed signatures are acceptable, the last person to sign may e-mail it to the clerk. [Please note, effective August 1, 2008, Stipulations of Voluntary Dismissal pursuant to F.R.C.P. Rule 41(a)(1)(A)(ii) do not require the signature of a Judge, and should be electronically filed in ECF cases.] Questions may be directed to the Orders, Appeals & Judgments Clerk in Manhattan at (212)805-0143 or in White Plains at (914)390-4000. E-mail the proposed order, judgment or stipulation to:

- For cases assigned to a Manhattan Judge e-mail to:

  judgments@nysd.uscourts.gov

- For cases assigned to a White Plains Judge e-mail to:

  wpclerk@nysd.uscourts.gov

18.5 Must a Stipulation or Consent include a traditional ink signature?

Yes. You cannot substitute s/ for a traditional ink signature for these documents. Faxed signatures are acceptable.

(*See section 8 - Signatures*).

18.6 Are Orders to Show Cause filed electronically?

No. An Order to Show Cause (with or without a Temporary Restraining Order) must be submitted in the traditional manner, on paper, to the Orders, Appeals & Judgments clerk. If signed by the Court, the Clerk's Office will electronically file only the Order. After the Order appears on the docket sheet, the attorney must electronically file all supporting papers

18.7 Are Motions for Admission pro hac vice filed electronically?

No. A Motion for Admission pro hac vice is filed in the traditional manner, on paper. See the Attorney Admissions page at www.nysd.uscourts.gov for details and sample forms.

18.8 Are Miscellaneous cases filed electronically?

No. Miscellaneous cases are filed in the traditional manner, in paper form. Miscellaneous cases are those that use an "M" docket number (eg. "M 8-85") instead of a traditional case number, and require payment of a Miscellaneous filing fee for each document.

19.3 Am I required to electronically file an Affidavit of Service in an ECF case?

Only two circumstances require the electronic filing of an Affidavit of Service in an ECF case:

(a) The Affidavit of Service for the initiating document (complaint, notice of removal, etc.) must be filed as follows:

(1) Electronically file the Affidavit of Service for the initiating document on the ECF system (do not send by e-mail), and

(2) Deliver the original paper Affidavit of Service with summons attached to the Clerk's Office. Attach a copy of the ECF filing receipt for this document. And

(b) An Affidavit of Service must be electronically filed anytime a party is served with a paper document. This usually occurs when a party will not receive electronic notice of the filing (via e-mail) from the Court. See the Notice of Electronic Filing (NEF) for a list of who was or was not served electronically.

(*See section 9 - Service of Documents by Electronic Means*).

19.4 Is a filing timely if it is completed before midnight?

Yes. Filing must be completed before midnight local time where the Court is located in order to be considered timely filed that day.

(*See section 3 - Consequences of Electronic Case Filing*).

19.5 Do I receive a receipt (Notice of Electronic Filing) when I file electronically?

Yes. When you successfully complete an electronic filing the final screen will display a NOTICE OF ELECTRONIC FILING (NEF), or filing receipt. Print a copy for your records. The NEF receipt will tell you what was filed, by whom, when it was filed and if a document number was assigned on the docket sheet (not all case activity merits a document number). If you do not see the NEF screen your filing may not have been successful and you are advised to check the docket sheet.

19.6 Should I routinely view the docket sheet in my case?

Yes. Although service is accomplished in ECF cases by an e-mail sent by the Court, e-mail is not foolproof and you risk missing an e-mail message. Therefore it remains the duty of the attorney for a party to review regularly the docket sheet of the case in order not to miss a filing.

(*See section 9 - Service of Documents by Electronic Means*).

For information go to www.nysd.uscourts.gov or call the Attorney Admissions Clerk at (212) 805-0645. Follow the steps below to change your contact information:

(a) If you have a pending case provide notice to the Court and your adversary(s) by electronically filing a NOTICE OF CHANGE OF ADDRESS in each open case where you remain the attorney of record, or

(b) If you do not have a pending case mail written notice of the change to: Attorney Admissions Clerk, United States District Court, 500 Pearl Street, NY, NY 10007.

20.6 What if only my e-mail address has changed?

You can make a simple change of your e-mail address yourself on the ECF system. To update your primary e-mail address click on Maintain Your Account and E-mail Information. However, if your other contact information has changed you must follow the directions above to update your full contact information.

20.7 Can I specify additional e-mail addresses to receive notification of activity in my cases?

Yes. You can add an alternate e-mail address for yourself, or add a colleague's e-mail address. On the ECF system click on Utilities, Maintain Your Account, and E-mail Information.

20.8 Can I receive electronic notification of activity in cases where I do not represent a party?

Yes. You can add cases to your e-mail notification list on the SDNY ECF system even if you don't represent a party to the case. Click on Utilities, Maintain Your Account, and E-mail Information.

Section 21. Privacy and Public Access to ECF Cases

21.1 Has electronic filing expanded public access to documents?

Yes, documents filed electronically on the ECF system are more widely available than ever before. Electronic documents can now be viewed over the Internet via a PACER account. In order to protect people's privacy and reduce the threat of identity theft, parties should be cautious when filing sensitive information.

21.2 Who is responsible for redacting sensitive information from filed documents?

It is the sole responsibility of counsel and the parties to be sure that all documents comply with the rules of this Court requiring redaction of personal identifiers. Neither the judge nor the Clerk of Court will review documents for compliance with this rule.

21.3 Am I required to redact certain sensitive information in a document?

Yes. Amendments to Federal Rule of Civil Procedure 5.2 and Criminal Procedure 49.1 require that personal

from publicly filed documents. The Court may later require counsel to furnish the unredacted information.

21.8 What if I mistakenly file sensitive or confidential information?

(a) Immediately contact the ECF Help Desk at (212)805-0800. The filing will be temporarily sealed and made invisible to the public.

(b) After notifying the ECF Help Desk, the filing party must ask the Judge, in writing, for the entry to be formally sealed by the Court.

(c) Electronically file a redacted version of the mistaken filing.

Section 22. ECF Passwords

22.1 To file electronically in this Court, do I need an ECF password from the United States District Court for the Southern District of New York?

Yes. To file electronically in this District Court you must have an ECF log-in and password issued by this Court. This password is unique, and is not the same as a password from another District or Bankruptcy Court, or a PACER password. Protect the security of your password by reporting a lost or stolen password immediately to the ECF Help Desk at (212)805-0800.

(*See section 2 - Eligibility, Registration , Passwords*).

22.2 Is my SDNY ECF password the same as my PACER password?

No. Your SDNY ECF password is unique and is not the same as your password for the PACER public access system. For information on PACER go to http://pacer.psc.uscourts.gov or call 800-676-6856.

22.3 Must I be an attorney admitted to this Court to obtain an ECF password?

Yes. ECF passwords are available only to attorneys in good standing with this Court.

22.4 How do I obtain an ECF password if I am already admitted to practice in this Court?

An attorney admitted to practice in this court may register for an ECF password on-line at www.nysd.uscourts.gov. From the homepage click on CM/ECF, then Attorney Registration. You will need your SDNY bar code (your first and last initials followed by four numbers of your own choosing), and the exact date you were admitted to practice in this Court (the date is printed on your Certificate of Good Standing). Contact the Attorney Admissions Office at (212) 805-0645 if you have forgotten any of this information. Click to submit your application on-line, and wait for your ECF password to arrive by e-mail.

Section 23. ECF Computer System Information

23.1 What Internet browser should I use to file electronically on the ECF system?

Each new version of ECF is tested with specific Internet browsers before release. Check the ECF log-in page for a list of approved Internet browsers.

23.2 What is a PDF file and how do I create one?

All documents filed on the ECF system must be PDF computer files (portable document format). A PDF file is created by scanning a printed document using PDF writer software such as Adobe Acrobat (go to Adobe.com for details). PDF files cannot be altered, providing security to the filer and the Court.

23.3 Can I file electronically at the courthouse?

Yes, you may scan and electronically file documents using the document scanners and computers available at the ECF Help Desk in the Clerk's Office. Bring your paper documents and your SDNY ECF log-in and password.

23.4 Is there a limit to the size of a document that can be filed on ECF?

Yes. No single PDF computer file may be larger than 2.5 megabytes (2.5 mb). No single filing event including attachments (eg. Affidavit in Support with exhibits attached) may be larger than 15 megabytes. If the filing is too large, the ECF system will not allow it to be filed, and you will not see a Notice of Electronic Filing (filing receipt) screen. To determine the size of an Adobe Acrobat PDF file click on File, Document Properties, Summary.

23.5 What if my document exceeds the file size limit?

Scan your documents at low resolution. Within the Adobe Acrobat program, on the "Scan Manager" screen, adjust the settings for black and white and 200 dpi (dots per inch). This creates a good quality picture and allows you to fit more pages into a single PDF file. If that doesn't work, separate an oversized file into 2 or more parts. Simply label each file 1a, 1b, 1c, etc. Only relevant excerpts of exhibits should be electronically filed (see below). Finally, if you still experience problems call the ECF Help Desk at (212)805-0800.

(*See section 24 - ECF Help Desk and Training*).

23.6 Do I need the Court's permission to file on paper in an ECF case?

Yes. If your document is too large to file electronically after following the directions above, you may seek permission from the Judge to file on paper. Call the ECF Help Desk first for guidance at (212)805-0800.

(*See section 5 - Attachments and Exhibits*).

24.2 How do I sign up for free e-mail alerts concerning ECF news?

Sign up for free e-mail alerts from the Court at www.nysd.uscourts.gov. From the homepage click on CM/ECF, then POC. You will receive periodic e-mails alerting you to planned ECF service interruptions for maintenance, and unplanned interruptions due to technical difficulties. You will also receive periodic ECF Newsletter e-mails containing news and helpful filing hints. You do not need to be an attorney to sign up for free e-mail alerts.

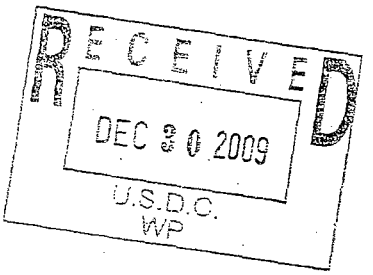
24.3 How do I contact the ECF Help Desk?

The ECF telephone Help Desk is available from 8:30 AM to 7:00 PM Monday through Friday at (212) 805-0800. Or you can e-mail your ECF questions to **helpdesk@nysd.uscourts.gov**

The preceding Rules for Electronic Case Filing were approved by the Board of Judges of the Southern District of New York on May 28, 2008.

The preceding Electronic Case Filing Instructions were written by the Clerk of Court under the authority of the ECF Rules and were last revised on August 1, 2008.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



RICHARD L. BRODSKY, NEW YORK STATE ASSEMBLYMAN, FROM THE 92ND ASSEMBLY DISTRICT IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, WESTCHESTER'S CITIZENS' AWARENESS NETWORK (WESTCAN), PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE), AND SIERRA CLUB – ATLANTIC CHAPTER (SIERRA CLUB),

Plaintiffs,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION

Defendants.

CIVIL ACTION No. '09 CIV 10594

JUDGE ROBINSON

December 30, 2009

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action for adjudication, annulment, declaratory judgment and/or for injunctive relief. This action arises under the Constitution and statutes of the United States, including, but not limited to the Atomic Energy Act 42 U.S.C. § 2011 et seq. ("AEA"), the Administrative Procedures Act 5 U.S.C. § 1001 et seq. ("APA"), and the National Environmental Policy Act 42 U.S.C. § 4321 et seq. ("NEPA"), the regulations of the Council on Environmental Quality ("CEQ"), and regulations promulgated pursuant to powers granted by those statutes.

2. This matter arises from a set of illegal acts by the Nuclear Regulatory Commission ("NRC") which permit Entergy Nuclear Operations, Inc., ("Entergy") the owner, operator, and licensee of Indian Point Energy Center ("IPEC") to evade critical safety requirements in violation of law and of the terms and conditions of its license. The NRC has for decades required commercial

reactor operators to provide physical insulation against fire for electric cables that control reactor shutdown in an emergency and thereby protect against a meltdown of the reactor core and the consequent massive release of radiation. The insulation is required to last for at least one hour. On September 28, 2007 the NRC, illegally and in complete secrecy permitted IPEC to permanently operate with physical insulation that lasts only 24 minutes. That permission took the form of an "exemption" from the one hour requirement. The laws governing the NRC, notably the AEA, do not mention or grant to the NRC the power to issue an "exemption," to such a license condition, or safety and/or regulatory standard. The "exemption" was illegally granted in complete secrecy with no public notice, no opportunity for public comment, no opportunity to offer or question evidence, no public hearing, in violation of the NRC's own procedural requirements, and in violation of the AEA, APA, NEPA and their duly promulgated regulations. As a result of these actions, IPEC is not in compliance with the terms and conditions of its license and the laws and regulations governing commercial nuclear reactors and is now operating with a greatly enhanced danger to the public. Furthermore, the NRC currently has before it dozens of requests for additional illegal "exemptions" from important health and safety requirements at IPEC and elsewhere, which have the same legal and public health and safety defects as the September 28, 2007 "exemption."

3. On or about October 4, 2007, without any prior public notification, public hearings, or any opportunity for public participation, the NRC, via a final order, granted to Entergy the licensee of the nuclear reactor Unit 3 at IPEC an "exemption" from a binding, duly promulgated NRC fire safety regulation 10 C.F.R. pt. 50, App. R, III-(G)(2)(a),(c) ("Appendix R") concerning insulation on critical electrical safety cables, which control reactor shutdown in an emergency, thereby avoiding a core meltdown and massive public release of radiation. Upon discovering this, on December 3, 2007 Plaintiffs filed a petition with the NRC objecting to the "exemption,"

and to the secretive and arbitrary process used by the NRC to grant it. On January 30, 2008 the NRC rejected that Petition, which constituted a final order of the Commission.

4. On March 27, 2008 Plaintiffs filed a petition with the United States Court of Appeals, which possesses original jurisdiction over final orders of the NRC pursuant to the Hobbs Act 28 U.S.C. § 2342(4), appealing from the NRC's rejection of their objection and asserting a variety of factual and legal grounds for judicial annulment of the "exemption." On August 27, 2009, the Second Circuit dismissed the Petition on the grounds that the Hobbs Act did not impart jurisdiction to that court. The ruling also stated that Petitioners were free to seek review of the NRC's "exemption" in federal district court, under jurisdiction granted by the APA. "Petitioners are free to seek review in the district court of the NRC's actions pursuant to the APA" *Brodsky v. NRC* August 27, 2009, 08-1454.

5. Plaintiffs now seek such judicial review in this district court. Plaintiffs seek judgment ruling that the "exemption" itself, the procedures used and the substance of the NRC's decision violate the Constitution and laws of the United States and regulations promulgated thereto, and injunctive relief with respect to similar, pending NRC "exemption."

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over the claims asserted herein under the statutes violated by the NRC including the AEA 42 U.S.C. § 2011 et seq., the APA 5 U.S.C. § 1001 et seq., and the NEPA 42 U.S.C. § 4321 et seq. and C.F.R. § 50.12.

7. Venue is proper because the administrative decision giving rise to these claims affects a nuclear facility located in Buchanan, New York, which is within the geographic boundaries of the Southern District of New York, and because the parties challenging that administrative decision are domiciled within the geographic boundaries of the Southern District of New York. Venue is proper because the administrative decision giving rise to these claims affects a nuclear

facility located in Buchanan, New York, which is within the geographic boundaries of the Southern District of New York, and because the parties challenging that administrative decision are domiciled within the geographic boundaries of the Southern District of New York.

8. Petitioners have standing under U.S.C.A. Const. Art. III, §2, cl. 1. Persons and/or landowners in close proximity to the nuclear power facility in question have alleged sufficient injury to establish standing. *See Kelly v. Selin*, 42 F.3d 1501, 1508-1510 (6th Cir. 1995). The NRC's "rule of thumb" is that "persons who reside or frequent the area within a 50-mile radius of the facility" are presumed to have standing. *See Sequoyah Fuels Corp.*, 40 N.R.C. 64, 75 n. 22, CLI-01-02 (1994).

PARTIES

9. Plaintiff Brodsky, represents the 92nd Assembly District of New York State, which encompasses communities located within 50 miles of IPEC. Plaintiff Brodsky also maintains his primary residence at 2121 Saw Mill River Road, White Plains, NY 10607, which is within fifty miles of IPEC.

10. Plaintiff, Westchester Citizens Awareness Network ("WESTCAN"), is a chapter of the Citizen's Awareness Network, a national organization dedicated to environmental issues. The Westchester County chapter is located at 2A Adrian Court, Cortlandt Manor, NY 10567, which is within fifty miles of IPEC.

11. Plaintiff, Sierra Club Atlantic Chapter, is a chapter of the Sierra Club, a national organization dedicated to environmental issues. The group maintains a national office at 1350 Broadway, Suite 201, New York, NY 10018, which is within fifty miles of IPEC.

12. Plaintiff, Public Health and Sustainable Energy ("PUSH") is a Rockland County, NY organization dedicated to environmental issues. It maintains an address at 21 Perlman Drive,

Spring Valley, NY 10977, which is within 50 miles of IPEC.

13. Defendant, the United States NRC, is a United States Government Agency established by the 1974 Energy Reorganization Act. The NRC oversees aspects of commercial nuclear operations in the United States including nuclear reactor safety and the operation of the Indian Point facilities.

FACTS

History of Fire Safety Actions By The NRC

14. The NRC operates under a broad grant of authority from the Congress requiring it to regulate commercial nuclear reactors by the issuance of licenses and rules and regulations which a licensee is required to observe. The broad purpose of the statutes is to protect the health and safety of the public and to permit the effective operation of commercial reactors. The right of the public to participate in NRC processes and decisions, especially when public health and safety is involved, is woven throughout the authorizing statutes.

15. Fire safety, and the particular danger of fire damage to electric cables that control reactor shutdown and prevent a consequential meltdown of the reactor's radioactive core have been problems at American nuclear facilities for decades and subject to repeated NRC actions. Following a major fire in 1975 at the Browns Ferry nuclear facility in Alabama which came close to causing a catastrophic loss of reactor control and a core meltdown, the NRC undertook a sweeping review of fire safety problems at all of the nation's nuclear facilities, and determined that among other major public health and safety problems, the lack of adequate fire insulation on electric control cables presented a clear threat to public health and safety. It then implemented a number of stringent requirements regarding fire safety and operating procedures by promulgating a series of regulations contained in Appendix R, which requires, among other things, that critical electrical cables that control nuclear reactor shutdown must be physically

insulated sufficient to withstand a fire for three hours, or for one hour if additional mitigating steps are taken. Such a regulatory requirement is a condition of operation and a condition of the license and has the force of law.

16. Pursuant to these regulatory requirements, cable insulation known as Hemyc, was accepted by the NRC as acceptable insulation pursuant to Appendix R.

17. It was initially believed by the NRC that Hemyc would meet the one hour insulation requirement, if additional protective steps are taken. It is now undisputed that Hemyc does not meet the one hour regulatory standard, the NRC itself having concluded it insulates against fire for only 27 minutes. "The test results indicated that Hemyc did not achieve the fire endurance consistent with its rating for the configurations tested." http://www.nrc.gov/reactors/operating/ops-experience/fire-protection/firebarriers/fire-barriers-overview.html

18. In the face of the failure of Hemyc to meet the one hour requirement, Entergy requested and the NRC granted IPEC the "exemption" at issue in this case, requiring the insulation to last only 24 minutes. Upon information and belief, the 24 minute standard was chosen only because test results indicated Hemyc lasts for only 27 minutes, not because of any reason related to safety or the public interest. Although the NRC's governing statutes do not authorize or mention an "exemption" from the regulatory and safety requirements of a license, the NRC issued this "exemption" pursuant to 10 C.F.R. § 50.12 a regulation that sets forth a process by which such "exemptions" are issued.

19. The AEA does not empower the NRC to grant such an "exemption." It does empower the NRC to take a specific and limited set of actions. "The terms and conditions of all licenses shall be subject to amendment, revision, or modification, by reason of amendments of this Act or by reason of rules and regulations issued in accordance with the terms of this Act." 42 U.S.C. § 2237.

20. When the NRC undertakes any of its authorized actions the Congress has protected and explicated the public's constitutional and statutory rights to know of and participate in significant decisions including changes in operating standards, especially when they affect the public health and safety. The AEA requires public participation in these decisions, including the right to a hearing under 42 U.S.C. § 2239. The APA has similar requirements

21. NEPA, as part of consideration of the environmental impacts of matters affecting the public health and safety, similarly grants a right of public participation in matters of "substantial controversy." "Exemptions," at IPEC, including the September 28th "exemption" to significant public health and safety requirements, have been a matter of concern and controversy for the public, environmental groups, and elected officials for years. Criteria to be considered in whether a NEPA hearing should be held include "Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing." 42 U.S.C. § 1506.6(c)(1).

22. The NRC may take only those actions authorized by law. It is required to follow its own regulations under the provisions of the APA which sets forth the required procedures and legal standards that a federal agency must observe. 5 U.S.C. § 706(2).

23. Moreover, the APA guarantees the right to a hearing under 5 U.S.C. § 554, governing adjudications. The APA defines an "adjudication" as a process that results in the issuing of a final order. The "exemption" itself was a final order. The public has a right to a hearing as mandated by the AEA, NEPA and the APA.

24. The NRC's current fire safety regulations as contained in Appendix R still require a minimum of sixty minutes of fire insulation on electrical cables. The "exemption" at issue in this case is the sole legal basis for current operations at IPEC which continue to violate that regulatory standard by requiring the insulation to last only 24 minutes.

History of the 2007 IPEC "Exemption"

25. In the context of these long-standing controversies about fire safety, electric control cable insulation, and Hemyc's failure to meet regulatory requirements, Entergy, on or about July 24, 2006, asked the NRC to permit it to violate the Appendix R requirement that cable fire safety insulation last for one hour and instead permit the permanent and continuing use of insulation that lasts only 30 minutes, one half of the one hour requirement. It sought permanent relief from a significant public health and safety requirement. Entergy characterized this request as an "exemption" from fire safety rules. There is no mention in the AEA, or any other governing statutes, of "exemptions" from NRC health and safety requirements and/or the conditions of a license.

26. No public notice, of any kind, of the Entergy "exemption" request was provided by either Entergy or the NRC. No notice was published in the Federal Register or elsewhere, nor was there any opportunity for public comment or participation in the ensuing NRC process.

27. On or about August 16, 2007, 13 months after its initial 30 minute request and after tests of the insulation showed it would not last 30 minutes, Entergy made a second "exemption" request, asking that its fire insulation standard be reduced to 24 minutes, an additional 6 minute or 20% violation of the 60 minute requirement. There was no public notice of the second request nor was any opportunity for public comment or participation given by Entergy or the NRC.

28. Because of the lack of notice, disclosure or public participation, and the absolute wall of secrecy that surrounded the decision, little is known about the process used by the NRC as it considered and decided the "exemption" request. However, it is undisputed that the NRC possessed a significant number of documents that were relevant and probative with respect to the issues raised in the "exemption." The NRC has admitted that it chose to ignore many of the most probative documents, and instead collected a small number of documents as a basis for the

decision. The NRC has sworn that this small number of documents were the only documents considered and included in the administrative record, even though the Supreme Court has required that an agency consider and produce all relevant and probative documents in its possession at the time the decision was made, on the grounds that an agency may not arbitrarily ignore evidence in its possession. On information and belief, the NRC, using this truncated and arbitrary list of documents and evidence, entered into extended secret negotiations with Entergy on the "exemption" requests, failed and refused to consider other evidence in its possession, and summarily, secretly and against the weight of evidence approved the second request on September 28, 2007, constituting a final order. That final order was issued only 42 days after the second request was received. It is notable that the the 24 minute standard conforms to test results showing that Hemyc only lasts 27 minutes. Conforming the regulatory standard to the test results rather than establishing public health and safety validity is an example of egregious illegal, arbitrary and capricious behavior by the NRC. It is also notable that the text of the "exemption" itself states that it relies on a document entitled "the licensee's Fire Hazards Analysis," which is not on the list of documents the NRC says it considered, and is not known to exist.

29. On September 28, 2007 the public, for the first time, was made aware of the existence of the request and the amended request when a Federal Register notice was published concerning a NEPA Finding of No Significant Impact ("FONSI") regarding the "exemption." On or about October 4, 2007, the NRC published in the Federal Register its final approval of the 24-minute "exemption," which had actually been granted on or about September 28, 2007.

30. Upon information and belief, the NRC issued the "exemption" without an Environmental Impact Statement ("EIS") as required by NEPA, without addressing facts presented and available to it, and without consideration or analysis of documents, studies, safety information

and impact data and other relevant and probative evidence in its possession.

31. Upon information and belief, the NRC made the decision to grant the "exemption" in an amount of time that did not allow for adequate review of the materials. It could not have conducted a legally adequate review of the 24 minute "exemption" from the promulgated 1 hour safety standard since it only had the request for that specific "exemption" under review for 42 days, while it considered the previously requested 30 minute "exemption" from the promulgated 1 hour safety standard for 13 months.

32. On or about December 3, 2007, Plaintiffs filed a formal petition with the NRC objecting to its grant of the "exemption" at IPEC and asking the agency to reopen the matter. Among other requests for relief, the petition sought a public hearing on the issue.

33. On or about January 30, 2008, the NRC rejected Plaintiff's petition, refusing to conduct a public hearing, constituting a final action and thereby exhausting all of Plaintiffs' administrative remedies.

34. The NRC's granting of the "exemption" on September 28, 2007 was only one of many repeated failures to deal openly and effectively with respect to fire safety standards. The fire insulation known as Hemyc has been the subject of Congressional and NRC Inspector General's Office investigations, including a June 2008 Report of the Government Accounting Office that criticized the NRC's inaction regarding deficiencies in Hemyc as well as other fire resistant wrappings.

35. Upon information and belief, due to its proximity to the New York City Metropolitan Area, and particular defects in the construction and operation of the facilities, IPEC is considered especially susceptible to a terrorist threat, although the NRC did not consider or give any weight to the consequences of the "exemption" on IPECs ability to withstand a terrorist attack without catastrophic radiation releases as a result of fire affecting the cables that control reactor

shutdown.

36. The "exemption" now allows the nuclear reactor to operate with greatly reduced fire protection thereby putting the public at heightened risk of the consequences of a loss of reactor control resulting from a fire, catastrophic event, terrorist attack, or a combination of those events.

37. After consultation with officials at the New York State Energy Research and Development Authority ("NYSERDA") and the Office of the Governor of the State of New York, and the review of Entergy documents, Plaintiffs have evidence that Entergy and the NRC are engaged in ongoing attempts to issue a massive number of additional "exemptions" to public health and safety requirements. Upon information and belief, the NRC is now secretly and without public notice or participation considering or processing at least 54 other illegal "exemption" requests at IPEC's nuclear facilities and elsewhere. Without judicial intervention, the NRC may approve those "exemptions" in the same secretive, unlawful, and arbitrary and capricious manner as the specific "exemption" at issue in this case.

38. Any further secret, illegal, arbitrary and capricious "exemption" approvals by the NRC at IPEC will put the public at continuing and increased risk of fire damage to essential electrical cables that control reactor shutdown in an emergency and protect against a core meltdown and the consequent release of radiation and will violate the public's right of participation under applicable statutes.

39. As a result of the NRC's granting of the illegal "exemption" on September 28, 2007, which is now in effect, the insulation at IPEC protects electrical cables for only 24 minutes. Accordingly, a fire in remote cable locations must be detected, responded to by a fire brigade, and fully extinguished in less than 24 minutes or loss of reactor control will occur. Such complete fire suppression is a physical impossibility in most IPEC electric control cable

locations. Indian Point is now more vulnerable to catastrophic fire damage and loss of reactor shutdown capability than any time after the Brown's Ferry accident of 1975.

40. As a result of the decision by the NRC to grant the fire safety "exemption" hereinof complained, Entergy's license to operate IPEC is not in compliance with the requirements of law set forth by the NRC and the AEA, and now operates in violation of long-standing public health and safety requirements.

41. Because of the lack of legal authority to issue the "exemption," and because of the failure by the NRC to provide any public notice, information, ability to comment, question or present evidence, public hearing or any form of public participation, and because the NRC violated its own procedural requirements, and because the decision was arbitrary and capricious in its failure to consider relevant and probative material and because the decision was not supported by the weight of available evidence, the Plaintiffs' statutory and constitutional rights have been violated.

History of Federal Court Proceedings

42. On or about March 27, 2008, Plaintiffs filed a petition in the Second Circuit, which maintains original jurisdiction to consider challenges to final actions by regulatory agencies under the Hobbs Act, for review of NRC's final decision regarding the "exemption." The petition included claims that the NRC violated the AEA, NEPA, CEQ and APA in granting the fire safety "exemption" to IPEC.

43. Plaintiffs argued that the "exemption" was invalid because the NRC had no statutory authority to issue the "exemption," that even if an "exemption" may be issued, public participation is required, that the NRC failed to observe the requirements of its own § 50.12 regulations, that the NRC failed to consider relevant and probative materials and documents in its possession and failed to include such documents in the Certified Record, that it failed to

follow the requirements of NEPA, that the issuance of the "exemption" was arbitrary and capricious and raised other issues as well.

44. Entergy, which owns and operates IPEC, was accepted as an intervenor on May 1, 2008. On May 5, 2008, the NRC filed a motion to dismiss the Petition and moved for summary denial of the Petition on the grounds that Petitioner's request to the NRC for a hearing had been properly denied under the law. Petitioners opposed the NRC's motion, as did the Office of the New York State Attorney General via an amicus brief. The motion to dismiss was referred to the merits panel.

45. On December 15, 2008 Petitioners filed a Motion to Supplement and Correct the Record on Review under Federal Rule of Appellate Procedure (FRAP) 16 on grounds that the Certified Record submitted to the court by the NRC was incomplete and omitted specific documents in the possession of the NRC which were material and relevant. Petitioner specifically named a series of such documents directly related to the issues before the NRC. The motion also was referred to the merits panel, but was not addressed in the final decision of the court.

46. On May 11, 2009, after some additional motion practice, oral argument was heard before a panel of three judges, including now Supreme Court of the United States Justice Sonya Sotomayor. The Court heard from Petitioners, the NRC, Entergy, and the Office of the New York State Attorney General. Following Justice Sotomayor's accession to the Supreme Court, a final decision was issued on August 27, 2009 by former Chief Judge of the Second Circuit John M. Walker and Honorable J. Clifford Wallace, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

47. The Second Circuit dismissed the Petition on the sole grounds of lack of jurisdiction. The Court offered no opinion on whether the NRC's denial of a hearing was proper, whether the "exemption" at issue was arbitrary and capricious, or whether statutory authority for an

"exemption" exists at all. The Second Circuit specifically stated that "because we lack jurisdiction, we also express no opinion as to whether the NRC's hearing denial was proper, whether the "exemption" at issue is arbitrary and capricious, or the other issues raised by Petitioners." *Brodsky v. NRC* August 27, 2009, 08-1454, p. 19.

48. The Court of Appeals instructed Petitioners that the district court was the proper venue in which to bring the raised issues. "We note that our holding does not necessarily shut off every avenue Petitioners may have at their disposal for relief. Petitioners are free to seek review in the district court of the NRC's actions pursuant to the APA." *Brodsky v. NRC* August 27, 2009, 08-1454, fn.6.

49. Following the Second Circuit's ruling, the NRC filed a Petition for Rehearing and Rehearing En Banc. Plaintiffs were not invited to respond and the Second Circuit issued an order denying the NRC's petition on December 1, 2009.

50. In light of the ruling of the Second Circuit, Plaintiffs now appear before this district court and seek relief from the NRC's unlawful actions and the consequences thereof.

First Cause of Action

AEA

The NRC Violated The AEA By The Issuance Of The Putative "Exemption" Without Statutory Authority To Do So

51. Plaintiff repeats and re-alleges each and every allegation set forth in paragraphs 1 through 50 with the same force and effect as if set forth in full herein.

52. The NRC may take only those actions authorized by its governing statutes, specifically the AEA. The AEA authorizes the NRC to take specified actions with respect to the operations of a commercial reactor. These specified actions are the power to grant, suspend, revoke or amend a license 24 U.S.C. § 2235 and to issue or modify rules and regulations. A reactor operator must

scrupulously conform to the conditions and terms of such licenses, rules, and regulations. The AEA contains no mention of and does not authorize the NRC to issue an "exemption" to health and safety standards, or regulatory requirements, or license conditions.

53. The September 28, 2007 "exemption," and the January 30, 2008 rejection of Plaintiffs' petition, and the processes used to issue those decisions were beyond the legal authority of the NRC, arbitrary and capricious, illegal, violated the public's right to notice and participation, and created an ongoing danger to public health and safety.

54. The NRC had no legal authority enabling it to issue the "exemption" described herein, which "exemption" excuses IPEC from compliance with the duly promulgated and binding requirements of NRC 10 C.F.R. pt. 50, App. R, III-(G)(2)(a),(c), ("Appendix R"), including the 60 minute fire insulation safety requirement. The issuance and continued operation of said "exemption" therefore violates the AEA.

Second Cause of Action

APA

The NRC Violated The APA By The Issuance Of The Putative "Exemption" Without Statutory Authority To Do So

55. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 54 with the same force and effect as if set forth in full herein.

56. The NRC may take only those actions authorized by its governing statutes, specifically the AEA. The AEA authorizes the NRC to take specified actions with respect to the operations of a commercial reactor. These specified actions are the power to grant, suspend, revoke or amend a license CITE and to issue or modify rules and regulations. A reactor operator must scrupulously conform to the conditions and terms of such licenses, rules, and regulations. The AEA contains no mention of and does not authorize the NRC to issue an "exemption" to health and safety

standards, or regulatory requirements, or license conditions. The September 28, 2007 "exemption," and the January 30, 2008 rejection of Plaintiffs' petition, and the processes used to issue those decisions were beyond the legal authority of the NRC, arbitrary and capricious, illegal, violated the public's right to notice and participation, and created an ongoing danger to public health and safety.

57. The NRC had no legal authority enabling it to issue the "exemption" described herein, which excuses IPEC from compliance with the duly promulgated and binding requirements of NRC 10 C.F.R. pt. 50, App. R, III-(G)(2)(a),(c), ("Appendix R"), including the 60 minute fire insulation safety requirement. The issuance and continued operation of said "exemption" therefore violates the AEA.

58. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" "without observance of procedure required by law;" "unsupported by substantial evidence;" or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2).

59. The "exemption" was issued in violation of the standards of 5 U.S.C. § 706(2) and is therefore a violation of the APA.

Third Cause of Action

AEA

The NRC Is In Violation Of the AEA By Its Ongoing Consideration and Approval Of Additional "Exemptions."

60. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 59 with the same force and effect as if set forth in full herein.

61. The NRC is currently secretly and illegally considering for approval dozens, if not hundreds, of requests for additional "exemptions" including "exemptions" from compliance with mandatory health and safety requirements at IPEC.

62. Upon information and belief, the NRC is using the same illegal, arbitrary and capricious procedures in the consideration of these requested "exemptions" as it did in the consideration and issuance of the September 28, 2007 "exemption," including a lack of public participation.

63. The NRC may take only those actions authorized by its governing statutes, specifically the AEA. The AEA authorizes the NRC to take specified actions with respect to the operations of a commercial reactor. These specified actions are the power to grant, suspend, revoke or amend a license and to issue or modify rules and regulations. A reactor operator must scrupulously conform to the conditions and terms of such licenses, rules, and regulations. The AEA contains no mention of and does not authorize the NRC to issue an "exemption" to health and safety standards, or regulatory requirements, or license conditions.

64. The NRC has no legal authority enabling it to issue "exemptions" from compliance with duly promulgated and binding operational requirements. The consideration, approval and issuance of such "exemptions" constitute an ongoing violation of the AEA.

65. The "exemptions" are being considered "without procedure required by law" and constitute an ongoing violation of the AEA.

Fourth Cause of Action

APA

The NRC Is In Violation Of the APA By Its Ongoing Consideration and Approval Of Additional "Exemptions."

66. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 65 with the same force and effect as if set forth in full herein.

67. The NRC is currently secretly and illegally considering for approval dozens, if not hundreds, of requests for additional "exemptions" including "exemptions" from compliance with mandatory health and safety requirements at IPEC.

68. Upon information and belief, the NRC is using the same illegal, arbitrary and capricious procedures in the consideration of these requested "exemptions" as it did in the consideration and issuance of the September 28, 2007 "exemption," including a lack of public participation.

69. The NRC may take only those actions authorized by its governing statutes, specifically the AEA. The AEA authorizes the NRC to take specified actions with respect to the operations of a commercial reactor. These specified actions are the power to grant, suspend, revoke or amend a license and to issue or modify rules and regulations. A reactor operator must scrupulously conform to the conditions and terms of such licenses, rules, and regulations. The AEA contains no mention of and does not authorize the NRC to issue an "exemption" to health and safety standards, or regulatory requirements, or license conditions.

70. The NRC has no legal authority enabling it to issue "exemptions" from compliance with duly promulgated and binding operational requirements. The consideration, approval and issuance of such "exemptions" constitute an ongoing violation of the AEA.

71. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

72. The "exemption" was issued in violation of the standards of 5 U.S.C. § 706(2) and is therefore a violation of the APA.

Fifth Cause of Action

AEA

The NRC Violated The AEA By Failing To Provide For Public Participation In The "Exemption" Process

73. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 72 with the same force and effect as if set forth in full herein.

74. The "exemption" granted to IPEC by the NRC with respect to fire safety standards was issued without any public notice, opportunity to comment or provide evidence and information, and without a public hearing during the time when the NRC was considering the "exemption" and subsequently when it refused undertake such public participation when formally requested to do so by Plaintiffs.

75. § 187 and § 189(a) of the AEA provide the public with statutory rights to notice, an opportunity to be heard, a public hearing and other forms of public participation:

> in any proceeding under this chapter, for the granting, suspending, revoking, or modification of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under Sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a)

76. The NRC's failure to provide for such public participation is a violation of the AEA.

Sixth Cause of Action

APA

The NRC Violated The APA By Failing To Provide For Public Participation In The "Exemption" Process

77. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 76

with the same force and effect as if set forth in full herein.

78. The "exemption" granted to IPEC by the NRC with respect to fire safety standards was issued without any public notice, opportunity to comment or provide evidence and information, and without a public hearing during the time when the NRC was considering the "exemption" and subsequently when it refused undertake such public participation when formally requested to do so by Plaintiffs.

79. § 187 and § 189(a) of the AEA provide the public with statutory rights to notice, an opportunity to be heard, a public hearing and other forms of public participation:

> in any proceeding under this chapter, for the granting, suspending, revoking, or modification of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under Sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.
>
> Atomic Energy Act of 1954 § 189(a), 42 U.S.C. § 2239(a)

80. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;" or "without observance of procedure required by law." 5 U.S.C. § 706(2).

81. The NRC's failure to undertake such public participation is a violation of the APA.

Seventh Cause of Action

APA

Failure to Provide Hearing

82. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 81 with the same force and effect as if set forth in full herein.

83. The APA 5 U.S.C. § 554 requires a public hearing, notice of such hearing, and an opportunity to present evidence "in every case of adjudication." 5 U.S.C. §551(1)(7) defines an "adjudication" as an "agency process for the formulation of an order."

84. The NRC's issuance of an "exemption" on September 28, 2007 was a final order.

85. The process by which the NRC decided to issue that "exemption" was an "adjudication."

86. The NRC did not provide the public or interested parties any notice, hearing or opportunity to submit evidence.

87. The failure and refusal of the NRC to provide such public participation is a violation of the APA.

Eighth Cause of Action

NEPA

The NRC Violated NEPA Because Of Its Failure to Provide Statutorily Required Public Participation

88. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 87 with the same force and effect as if set forth in full herein.

89. The NRC violated NEPA by failing to provide for public participation as required by 42 U.S.C. § 1506.6(c)(1), which states that a hearing shall be held when there is "Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing."

90. IPEC operations have been a matter of "substantial environmental controversy" for several years, prompting several administrative challenges and litigation spearheaded by both citizens and environmental action groups. An "exemption" to fire safety standard creates further "substantial environmental controversy," due to the possibility of IPEC as a terrorist target and general concerns of public health and welfare in the face of a catastrophic fire.

91. The failure and refusal of the NRC to provide such public participation is a violation of the NEPA § 1506.6(c)(1).

Ninth Cause of Action

NEPA

The NRC Violated NEPA By Its Failure to Provide Public Notice of NRC Actions With Respect To The Putative "Exemption"

92. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 91 with the same force and effect as if set forth in full herein.

93. Under NEPA, federal agencies are required to provide public notice of "NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 42 U.S.C. § 1506.6(b).

94. Upon information and belief, the only environmental document prepared in reference to the "exemption" at issue is a "Finding of No Significant Impact" ("FONSI").

95. The Federal Register of October 4, 2007 was the first time that the public was made aware of the FONSI regarding the "exemption" issued to IPEC on September, 28, 2007, and the first time the public was made aware that the "exemption" to fire safety standards had been issued.

96. The notice of both the FONSI and the fact that the "exemption" had been approved in the same issue of the Federal Register demonstrates that interested parties were precluded from requesting additional information or the availability of environmental documents regarding the decision to issue the "exemption" to IPEC prior to the approval of that "exemption."

97. The NRC failed to "provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected," as required by 42 U.S.C. § 1506.6(b).

98. The NRC's failure to provide such notice and opportunity constitutes a violation of NEPA.

Tenth Cause of Action

NEPA

The NRC Violated NEPA By Its Failure to Prepare a Full Environmental Impact Statement ("EIS")

99. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 98 with the same force and effect as if set forth in full herein.

100. NEPA requires federal agencies to prepare a "detailed statement" regarding the environmental impacts of all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1501.4. This "detailed statement," often referred to as an "environmental impact statement" ("EIS"), must be prepared prior to initiating any major federal action so that the environmental impacts of the proposed government action can be disclosed to the public during the decision making process. 40 C.F.R. § 1501.2; 1501.5.

101. Through an EIS, a federal agency must analyze the direct, indirect, and cumulative impacts of the proposed action, must consider alternative actions and their comparative impacts, and must identify all irretrievable and irreversible commitments of resources associated with the action. 42 U.S.C. § 4332(2).

102. Pursuant to NEPA, the effects to be considered in an EIS also include "aesthetic, historical, cultural, economic, social or health [effects], whether direct, indirect or cumulative." 40 C.F.R. § 1508.8.

103. 40 C.F.R. § 1502.2(c) requires that the EIS discusses how alternatives will advance the policies set forth in NEPA, such as assuring the citizens of the United States safe, healthful, aesthetically and culturally pleasing surroundings. The EIS must serve as "the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions

already made." 40 C.F.R. § 1502.2(c).

104. The NRC failed to prepare an EIS before approving the September 28th "exemption" issued to IPEC. By failing to prepare an EIS, the NRC failed to fully analyze and evaluate all of the direct, indirect and cumulative impacts of the "exemption," failed to identify alternatives to issuing the "exemption," failed to identify all the irretrievable and irreversible commitment of resources caused by issuing the "exemption," and failed to discuss how alternatives to the "exemption" might better assure citizens of healthful surroundings.

105. The FONSI prepared by NRC as related to the September 28th "exemption," merely "justified a decision already made," to issue an "exemption" to IPEC. A full EIS was required as a "means of assessing the environmental impact" and cover the full extent of the health and safety issues raised by the September 28th "exemption."

106. The NRC failed to prepare the "detailed statement" of the environmental effects of the September 28th "exemption" in the form of a full EIS in violation of NEPA.

Eleventh Cause of Action

NEPA

The NRC Violated NEPA Because The FONSI Prepared For The Putative "Exemption" Failed To Consider a Terrorist Attack

107. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 106 with the same force and effect as if set forth in full herein.

108. IPEC's nuclear facilities are considered particularly vulnerable to a terrorist attack because of its proximity to the New York City Metropolitan area and the events of September 11, 2001.

109. The catastrophic consequences of a terrorist attack at a nuclear facility would affect the quality of the human environment.

110. NEPA requires that federal agencies provide a detailed assessment of all possibilities

affecting the quality of the "human environment" 42 U.S.C. 4332(2)(C)(i) before issuing a final decision on a matter before it.

111. The FONSI prepared as part of the NRC action to grant the "exemption" failed to consider or address the environmental impacts of a terrorist attack on fire safety and other regulatory requirements, thereby failing to provide a detailed assessment of all possibilities.

112. The NRC's failure to consider and assess the consequences of a terrorist attack on IPEC constitutes a violation of NEPA.

Twelfth Cause of Action

APA

The NRC Violated The APA When It Failed To Follow Its Own Regulatory Requirement That It Offer Evidence In Support Of The Required Finding That The "Exemption" Is "Authorized by Law"

113. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 112 with the same force and effect as if set forth in full herein.

114. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" is "authorized by law."

115. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary and conclusive statement that the "exemption" is "authorized by law." It offered no documents, discussion, evidence or analysis in support of that conclusion.

116. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

117. The NRC's failure to offer any support for its conclusion is a violation of the APA.

Thirteenth Cause of Action

AEA

The NRC Violated The AEA When It Failed To Follow Its Own Regulatory Requirement That It Offer Evidence In Support Of The Required Finding That The "Exemption" Is "Authorized by Law"

118. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 117 with the same force and effect as if set forth in full herein.

119. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" is "authorized by law."

120. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary and conclusive statement that the "exemption" is "authorized by law." It offered no documents, discussion, evidence or analysis in support of that conclusion.

121. The NRC's failure to offer any evidence or support for its conclusion is a violation of the AEA.

Fourteenth Cause of Action

APA

The NRC Violated The APA When It Failed To Offer Evidence In Support Of Its Required Finding That The "Exemption" Will Not Present An "Undue Risk to Public Health and Safety"

122. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 121 with the same force and effect as if set forth in full herein.

123. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" does not present an "undue risk to public health and safety."

124. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary

and conclusive statement that the "exemption" will not present an "undue risk to public health and safety" It offered no documents, discussion, evidence or analysis in support of that conclusion.

125. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

126. The NRC's failure to offer any evidence or support for its conclusion is a violation of the APA.

Fifteenth Cause of Action

AEA

The NRC Violated The AEA When It Failed To Offer Evidence In Support Of Its Required Finding That The "Exemption" Will Not Present An "Undue Risk to Public Health and Safety"

127. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 126 with the same force and effect as if set forth in full herein.

128. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" does not present an "undue risk to public health and safety."

129. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary and conclusive statement that the "exemption" does not "present an undue burden to public health and safety." It offered no documents, discussion, evidence or analysis in support of that conclusion.

130. The NRC's failure to offer any evidence or support for its conclusion is a violation of the AEA.

Sixteenth Cause of Action

APA

The NRC Violated The APA When It Failed To Offer Evidence In Support Of Its Required Finding That The "Exemption" is "Consistent With Common Defense and Security"

131. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 130 with the same force and effect as if set forth in full herein.

132. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" is "consistent with the common defense and security."

133. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary and conclusive statement that the "exemption" is "consistent with the common defense and security." It offered no documents, discussion, evidence or analysis in support of that conclusion.

134. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

135. The NRC's failure to offer any evidence or support for its conclusion is a violation of the APA.

Seventeenth Cause of Action

AEA

The NRC Violated The AEA When It Failed To Offer Evidence In Support Of Its Required Finding That The "Exemption" is "Consistent With Common Defense and Security"

136. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through

135 with the same force and effect as if set forth in full herein.

137. 10 C.F.R 50.12(a) states that the NRC may issue an "exemption" only upon a finding that the "exemption" is "consistent with the common defense and security."

138. The "exemption" issued to IPEC by the NRC on September 28, 2008 contains an arbitrary and conclusive statement that the "exemption" is "consistent with the common defense and security." It offered no documents, discussion, evidence or analysis in support of that conclusion.

139. The NRC's failure to offer any evidence or support for its conclusion is a violation of the AEA.

Eighteenth Cause of Action

APA

The NRC Violated the APA By Its Failure To Consider And Give Weight To Relevant And Probative Evidence In Its Possession

140. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 139 with the same force and effect as if set forth in full herein.

141. Due to the NRC's knowing and conscious failure to comply with NEPA, Plaintiffs have suffered legal wrongs because of an agency action, ie the issuance of the September 28th "exemption" and are adversely affected and aggrieved by the NRC's action within the meaning of 5 U.S.C. § 702(2) which requires that an agency decision may not arbitrarily ignore relevant and probative evidence in its possession and must consider and weigh all such relevant and probative material.

142. The NRC has provided a list of all documents it considered when it issued the "exemption." That list intentionally and admittedly omits numerous documents in the possession of the NRC which are relevant and probative, and which were specified by Plaintiffs

in the course of litigation. The NRC has stated that it is not required to consider or make part of the administrative record all relevant and probative evidence in its possession, only those documents it chose to consider.

143. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," "unsupported by substantial evidence" and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

144. The NRC's refusal to consider and/or make part of the administrative record such material violated the APA.

Nineteenth Cause of Action

APA

The NRC Violated the APA By Relying on a Document Not Contained in the Certified Record

145. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 144 with the same force and effect as if set forth in full herein.

146. The text of the September 28th "exemption" explicitly states that the "exemption" is being granted "... based upon consideration of information in the licensee's Fire Hazards analysis ..." No such document exists in the administrative record which the NRC swears contains all documents it considered, and no such document has been found to be in the possession of the NRC, or to exist.

147. The NRC may not rely on a document which it does not possess, was not part of the administrative record and was not actually considered, and which does not exist. The NRC may not make a decision which relies which they do not possess, was not part of the administrative record and may not exist.

148. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," "unsupported by substantial evidence," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

149. By issuing an "exemption" which explicitly relies on a document the NRC did not possess consider, or include in the administrative record the NRC violated the APA.

Twentieth Cause of Action

APA

The NRC Violated the APA's Requirement That It Give Full and Appropriate Consideration To Evidence Due to Inadequate Time to Review The 24 Minute Exemption Request.

150. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 149 with the same force and effect as if set forth in full herein.

151. Due to the NRC's knowing and conscious failure to comply with NEPA, Plaintiffs have suffered legal wrongs because of an agency action, ie the issuance of the September 28th "exemption" and are adversely affected and aggrieved by the NRC's action within the meaning of 5 U.S.C. § 702 (2) which requires that an agency decision may not arbitrarily ignore relevant and probative evidence in its possession and must consider and weigh all such relevant and probative material.

152. The NRC, after considering Entergy's original request for an "exemption" reducing the time the fire insulation had to remain effective from one hour to 30 minutes, received, considered and granted Entergy's request for a 24 minute "exemption" in less than 30 days.

153. Given the wide range of issues raised by the "exemption" requests, and the over 13 months the NRC considered the original 30 minute request, and given the fact that NRC tests showed

that Hemyc only lasts for 27 minutes, it was not possible for the NRC to give rational and full consideration to the 24 minute request in only 42 days.

154. The APA forbids agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," actions that are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," actions that are made "without observance of the procedure required by law," "unsupported by substantial evidence," and actions that are "unwarranted by the facts." 5 U.S.C. § 706(2).

155. The NRC's haste and secrecy in receiving, considering and granting the 24 minute exemption in 42 days, a time insufficient to give full and appropriate consideration to the evidence before it, violates the APA.

Twenty First Cause of Action

APA

The Evidence Before The NRC Was Insufficient To Justify The Decision To Grant The "Exemption."

156. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 155 with the same force and effect as if set forth in full herein.

157. Due to the NRC's knowing and conscious failure to comply with NEPA, Plaintiffs have suffered legal wrongs because of an agency action, ie the issuance of the September 28th "exemption" and are adversely affected and aggrieved by the NRC's action within the meaning of 5 U.S.C. § 702 (2) which requires that an agency decision may not arbitrarily ignore relevant and probative evidence in its possession and must consider and weigh all such relevant and probative material.

158. The APA requires that the NRC make only those decisions that are supported by sufficient evidence, and only after that evidence has been appropriately weighed, analyzed and discussed.

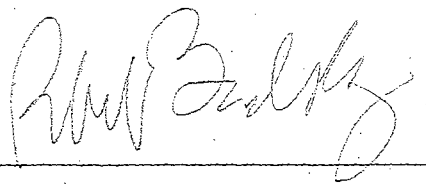
The decision to issue the September 28th "exemption" was illegal, arbitrary and capricious in that it was not supported by the evidence, that there was insufficient evidence to justify the decision, that evidence was ignored or excluded from the deliberations and the administrative record, that it relied on evidence not in the administrative record, that the consideration and decision were done in secrecy and without public notice or participation and in violation of the NRC's own requirements. These individually and collectively constitute illegal, arbitrary and capricious actions which violate the APA.

PRAYER FOR RELIEF

WHEREFORE Plaintiffs request that this court:

1. Declare that Defendants have violated the AEA, APA, NEPA and CEQ. Annul and render void the September 28, 2007 "exemption" and the NRC rejection of Plaintiffs' petition.
2. Enjoin the Defendant from any present, continuing and/or future violations of said laws and any and all unlawful acts and practices complained of herein.
3. Require the Defendant provide to Plantiffs' and the public notice and participation, including but not limited to a public hearing, with respect to the September 28, 2007 "exemption" and all similar actions or request for actions.
4. Require the Defendant to conform to the requirements of NEPA with respect to the requirement for an EIS and the required contents of a FONSI.
5. Require the NRC to conform to the requirements of its own regulations and the requirements of the AEA, APA and NEPA.
6. Award Plaintiffs reasonable attorneys fees and other litigation costs as permitted by 28 U.S.C. § 2412(a).
7. Order such other and further relief as this Court deems just and proper.

Respectfully submitted,



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