

# 15-1330-CV

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

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RICHARD BRODSKY, New York State Assemblyman from the 92<sup>nd</sup> Assembly  
District in his Official and Individual Capacities,

*Plaintiff-Appellant,*

PUBLIC HEALTH AND SUSTAINABLE ENERGY (PHASE),  
WESTCHESTER'S CITIZENS AWARENESS NETWORK (WESTCAN),  
SIERRA CLUB,

*Plaintiffs,*

– v. –

UNITED STATES NUCLEAR REGULATORY COMMISSION,

*Defendant-Appellee,*

ENTERGY NUCLEAR OPERATIONS, INC.,

*Intervenor.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF OF *AMICUS CURIAE* UNITED STATES  
CONGRESSMAN SEAN PATRICK MALONEY  
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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## STATEMENT OF IDENTITY AND INTEREST OF *AMICUS*

Pursuant to Federal Rule of Appellate Procedure 29, United States Congressman Sean Patrick Maloney of New York's 18<sup>th</sup> district respectfully submits this brief in support of the position of Plaintiff-Appellant Richard Brodsky concerning the Indian Point Energy Center ("Indian Point"), a nuclear facility that affects Congressman Maloney's district.<sup>1</sup>

Indian Point is on the Hudson River, in the town of Buchanan near Peekskill. Although Indian Point is just outside the 18<sup>th</sup> congressional district, its activities affect the entire area and any disaster at the plant would have dire environmental consequences for Congressman Maloney's district, including for the thousands of local food growers and farmers.

Without a doubt, providing energy for twenty million New Yorkers is a complex challenge. While practical realities make a near-term closure of Indian Point unlikely, if we had the chance to do it all over again, Indian Point would never have been situated where it is now, in an environmentally delicate place, dangerously close to New York City and the critically important water supply of

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<sup>1</sup> All parties have consented to the filing of this brief. Pursuant to Local Rule 29.1(b), *Amicus Curiae* makes the following disclosures: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money intended to fund the preparation or submission of this brief; and (3) no person other than *Amicus* or his counsel contributed money intended to fund the preparation or submission of this brief.

the Hudson River. Indian Point is ultimately the sum of far too many intolerable risks: a terrorist attack, an earthquake, a severe storm, aging infrastructure or myriad other threats known and unknown. And despite the best efforts of many skilled, hardworking employees of the plant, those risks are simply too great to allow for anything other than the strictest of safety standards. As the tragedy at Japan's Fukushima Daiichi nuclear plant has warned us, no amount of planning can guarantee against disaster. Were a similar catastrophe to occur at Indian Point, the consequences – which can be readily anticipated – would be all the more disastrous, in the 18<sup>th</sup> congressional district and for the nation's most populous metropolitan area. Under these circumstances, it is critical that Indian Point adhere completely to every relevant safety precaution.

Under the National Environmental Policy Act ("NEPA"), the Nuclear Regulatory Commission (the "NRC") is required to consider the "environmental impact" of its decision to issue a safety exemption to Indian Point.<sup>2</sup> Nevertheless, in its response to public comments, the NRC maintains that issues relating to terrorism and other low-probability, high-consequence events are beyond the scope

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<sup>2</sup> See 42 U.S.C. § 4332(C)(i) (2012); see also *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (noting NEPA "places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action" (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978))).

of the environmental analysis required under NEPA because such events are “inherently unpredictable and stochastic.”<sup>3</sup>

Contrary to the NRC’s assertions, a terrorist attack or major natural disaster at Indian Point would result in predictable and profound environmental consequences for the 18<sup>th</sup> congressional district and beyond. Congressman Maloney urges this Court to rule in Mr. Brodsky’s favor and to hold that the NRC acted unlawfully by failing to strictly enforce its safety standards at Indian Point when it refused to consider terrorism and its potential environmental consequences.

## ARGUMENT

### **I. THE AREA NEAR INDIAN POINT PROVIDES VITAL FOOD AND WATER TO THE DISTRICT AND BEYOND – THESE RESOURCES WOULD BE DEVASTATED BY A NUCLEAR DISASTER AT INDIAN POINT.**

The 18<sup>th</sup> district is a breadbasket for millions of people. In the lower Hudson Valley alone, there are thousands of family farms within or near a 50-mile radius of Indian Point, and there are thousands more in the extended Hudson Valley.<sup>4</sup> Many of these farms – particularly those in Orange County’s Black Dirt region – have been in the hands of the same families for generations.

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<sup>3</sup> See 78 Fed. Reg. 52,987 (Aug. 27, 2013).

<sup>4</sup> See Steve Rosenberg, Scenic Hudson, Inc., Securing Fresh, Local Food for New York City and the Hudson Valley (April 2013), at 2, 4, [http://www.scenichudson.org/sites/default/files/Foodshed\\_Conservation\\_Plan5\\_web.pdf](http://www.scenichudson.org/sites/default/files/Foodshed_Conservation_Plan5_web.pdf).

Millions of consumers in the tri-state area and well beyond depend on these farms for fresh, nutritious food. It would be nearly impossible to replace these food sources in a timely way if disaster were to befall the farms.

Not only do the farms of the lower Hudson Valley nourish our extended community but they are a major industry. They create thousands of jobs and generate hundreds of millions of dollars in economic activity.<sup>5</sup> They contribute significantly to government revenues. For every \$1 these farms contribute in tax revenue, for example, they require only 37 cents in government services,<sup>6</sup> meaning that without the farming industry, there would be insufficient revenues to support governmental services needed for the area.

The farms of the lower Hudson Valley<sup>7</sup> would be devastated by a nuclear disaster at Indian Point – they would be taken out of production immediately, and their future would be entirely uncertain. After the tragedy at Japan’s Fukushima Daiichi nuclear plant in 2011, for instance, Japanese consumers understandably eschewed crops grown anywhere near the plant. Even though that land had been deemed safe for production, the farmers – who were already

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<sup>5</sup> See, e.g., Glynwood, *The State of Agriculture in the Hudson Valley* (2010), at 3, 5-6, 17-18, 21, 24-27, 32-33, <http://www.glynwood.org/wp-content/uploads/2015/02/State-of-Agriculture-2010>.

<sup>6</sup> Rosenberg, Scenic Hudson, Inc., *Securing Fresh, Local Food for New York City and the Hudson Valley*, *supra* note 4, at 3.

<sup>7</sup> *Id.* at 4.



battling enormous odds to get back on their feet – were then forced to sell their produce at a deep discount.<sup>8</sup>

An accident at Indian Point would likewise have a profound effect on the millions of Americans who rely on the Hudson Valley for clean water. The Catskill, Delaware and Croton Watersheds that provide drinking water for millions of New Yorkers would face an unacceptably high risk of contamination. Indeed, both the Catskill and Delaware aqueducts pass within 50 miles of Indian Point and collectively provide 90% of New York City's water.<sup>9</sup>

## **II. INDIAN POINT IS LOCATED IN AN AREA VULNERABLE TO EARTHQUAKES AND STORMS.**

A report by the NRC that analyzed the risk of earthquakes to nuclear power sites found that Indian Point is the highest risk site in the nation.<sup>10 11</sup>

Every year the facility is in operation, there is a 1 in 10,000 chance of an

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<sup>8</sup> See Mari Iwata, *Four Years After Fukushima Nuclear Accident, Farmers Struggle for Viability*, Wall St. J., Mar. 10, 2015, <http://www.wsj.com/articles/four-years-after-fukushima-nuclear-accident-local-farmers-struggle-for-viability-1425930543>.

<sup>9</sup> See Watershed Agricultural Council, Croton & Catskill/Delaware Watersheds, [http://www.nycwatershed.org/aw\\_watersheds.html](http://www.nycwatershed.org/aw_watersheds.html) (last visited Sept. 21, 2015).

<sup>10</sup> See Mem. from Patrick Hiland, Chairman, Safety/Risk Assessment Panel for Generic Issue 199, to Brian W. Sheron, Director, Office of Nuclear Regulatory Research (Sept. 2, 2010), at D-3, *available at* <http://msnbcmedia.msn.com/i/msnbc/Sections/NEWS/quake%20nrc%20risk%20estimates.pdf>.

<sup>11</sup> See Bill Dedman, NBC News, *What Are the Odds? US Nuke Plants Ranked by Quake Risk* (Mar. 17, 2011), [http://www.nbcnews.com/id/42103936/ns/world\\_news-asia\\_pacific/t/what-are-odds-us-nuke-plants-ranked-quake-risk/#.Vfbz2BFVhBc](http://www.nbcnews.com/id/42103936/ns/world_news-asia_pacific/t/what-are-odds-us-nuke-plants-ranked-quake-risk/#.Vfbz2BFVhBc).

earthquake damaging reactor number 3, 741% more likely than the average risk.<sup>12</sup>

The changing climate and increasingly severe weather patterns pose an additional threat to Indian Point's safe operation. In the last 10 years, the Hudson Valley has been buffeted by major storms like Hurricanes Sandy and Irene and Tropical Storm Lee. During Hurricane Sandy, elevated water levels came within just a few feet of overwhelming parts of the plant.<sup>13</sup> That near-miss is made even more unnerving by the fact that many scientists expect water levels and storm severity to increase in the years ahead – increasing the risk to Indian Point in the process.

### **III. QUICK EVACUATION WOULD BE DIFFICULT IF NOT IMPOSSIBLE.**

After the 2011 disaster at Fukushima, the U.S. federal government recommended for safety reasons that American citizens keep at least 50 miles away from the crippled plant.<sup>14</sup> Were there a similar disaster at Indian Point, quickly evacuating everyone within a 50-mile radius would be difficult if not

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<sup>12</sup> *Id.*

<sup>13</sup> See David McCumber, *Lawmakers Worry about Indian Point Dangers*, Conn. Post, Dec. 3, 2014, <http://www.ctpost.com/local/article/Lawmakers-worry-about-Indian-Point-dangers-5933587.php>.

<sup>14</sup> See Gretchen Gavett, PBS, Frontline, *The Battle Over Indian Point, One Year After the Fukushima Meltdown* (Mar. 9, 2012), <http://www.pbs.org/wgbh/pages/frontline/health-science-technology/nuclear-aftershocks/the-battle-over-indian-point-one-year-after-the-fukushima-meltdown/>.

impossible.<sup>15</sup> There are roughly 17 million people within that area.<sup>16</sup> Mass transit options in the wake of a disaster would be limited. The Metropolitan Transportation Authority's Metro-North Railroad system – which is one of the busiest rail systems in the country, carrying roughly 85,000,000 riders annually<sup>17</sup> – would likely be shut down, either entirely or at least in part.

Evacuating all citizens by car would hardly be a feasible solution. Critical infrastructure like the Tappan Zee Bridge and the Bear Mountain Bridge could also be taken out of service or simply jammed beyond movement. Likewise, the roads, rarely traffic-free even under ordinary circumstances, would not be sufficient to move everyone to safety promptly.

In fact, perhaps in tacit recognition of reality, there is no evacuation plan for the 50-mile radius.<sup>18 19</sup> The federally designated “Emergency Planning Zone”

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<sup>15</sup> See Peter Applebome, *Fukushima, Indian Point and Fantasy*, N.Y. Times, Mar. 20, 2011, [http://www.nytimes.com/2011/03/21/nyregion/21towns.html?\\_r=0](http://www.nytimes.com/2011/03/21/nyregion/21towns.html?_r=0).

<sup>16</sup> Bill Dedman, NBC News, Nuclear Neighbors: Population Rises Near US Reactors (April 14, 2011), [http://www.nbcnews.com/id/42555888/ns/us\\_news-life/t/nuclear-neighbors-population-rises-near-us-reactors/#.VfNjLBFVhBc](http://www.nbcnews.com/id/42555888/ns/us_news-life/t/nuclear-neighbors-population-rises-near-us-reactors/#.VfNjLBFVhBc).

<sup>17</sup> The MTA Network: Public Transportation for the New York Region, <http://web.mta.info/mta/network.htm> (last visited Sept. 21, 2015).

<sup>18</sup> See Applebome, *Fukushima, Indian Point and Fantasy*, *supra* note 15.

<sup>19</sup> See Entergy Corp., Indian Point Energy Center, Emergency Planning Zone, <http://www.safesecurevital.com/emergency-preparedness/emergency-planning.html> (last visited Sept. 21, 2015).

around Indian Point extends only 10 miles.<sup>20</sup> While it is important to ensure that those closest to any potential disaster are well-prepared, it is entirely unrealistic to assume that the consequences of an accident would be limited to a 10-mile radius.<sup>21</sup>

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In short, a disaster at Indian Point would result in a harrowing and hectic scene and the effects of such a catastrophe would be extreme, far-reaching and long term. The environmental consequences are quantifiable and predictable. In light of their significance, as well as the existence of known terrorist threats, the NRC cannot plausibly assert that the environmental impact of a nuclear disaster at Indian Point is too uncertain to merit consideration under NEPA. Given the scope and seriousness of these known risks, the Court should hold the NRC and Entergy to the absolute highest standard for safety. Laws like NEPA were enacted with the intent of ensuring U.S. government agencies take into account the impact of their decision-making on the environment.<sup>22</sup> Any shortcut or unilateral decision on the part of the NRC to lower safety standards is an unacceptable move that would

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<sup>20</sup> *See id.*

<sup>21</sup> *See* U.S. Government Accountability Office, *Emergency Preparedness: NRC Needs to Better Understand Likely Public Response to Radiological Incidents at Nuclear Power Plants* (Mar. 11, 2013), <http://www.gao.gov/products/GAO-13-243>.

<sup>22</sup> *See* U.S. Environmental Protection Agency, *What is the National Environmental Policy Act?* (2015), <http://www2.epa.gov/nepa/what-national-environmental-policy-act>.

contravene the intent of the law and jeopardize the environment and economy of the Hudson and the health of its citizens.

### CONCLUSION

Because of the importance of this issue to New York's 18<sup>th</sup> congressional district and hundreds of other similarly situated communities, we urge the Court to reverse the District Court's decision and remand with instructions requiring that the NRC engage in a meaningful comment and response period considering issues concerning terrorism.

Date: New York, New York  
September 22, 2015

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF  
APPELLATE PROCEDURE 29 AND 32(a)**

This brief contains 1,906 words, in compliance with the type-volume limitations of Fed. R. App. P. 29 and 32(a)(7)(B), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: New York, New York  
September 22, 2015

*/s/ Susan E. Brune*

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