

03-4313

UNITED STATES COURT OF APPEALS for the SECOND CIRCUIT

-----X  
Riverkeeper, Inc.,  
Petitioner,  
v.  
SAMUEL J. COLLINS, Director, Office of Nuclear  
Reactor Regulation; DR. WILLIAM TRAVERS,  
Executive Director for Operations of the Nuclear  
REGULATORY COMMISSION; the UNITED STATES  
OF AMERICA; ENTERGY NUCLEAR INDIAN  
POINT 2 LLC; ENTERGY NUCLEAR INDIAN  
POINT 3, LLC; and ENTERGY NUCLEAR  
OPERATIONS, INC.  
Respondents.  
-----X

On Petition for Review of a Decision of the Nuclear Regulatory Commission

**BRIEF OF PETITIONER**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Rules of the Court of Appeals for the Second Circuit, Petitioner, Riverkeeper, declares that it has no parent companies, subsidiaries, or affiliates which has issued shares to the public.

## **JURISDICTIONAL STATEMENT**

Riverkeeper filed a petition with the United States Nuclear Regulatory Commission (“NRC” or “the Commission”) pursuant to 10 C.F.R. § 2.206 on November 8, 2001. 10 C.F.R. § 2.206(a) states in part, “[a]ny person ... may file a request to ... suspend or revoke ... a license.” Furthermore, pursuant to the Atomic Energy Act, 42 U.S.C. § 2239 “... the [Nuclear Regulatory] Commission shall grant a hearing upon the request of any person whose interest may be affected.” Riverkeeper, a non-profit environmental organization, satisfied the statutory definition of “person” as defined in 42 U.S.C. § 2014(s)(1) as “any individual, corporation, partnership ... private institution, group...” On November 18, 2002, NRC issued a Director’s Decision denying Riverkeeper’s requested relief under its § 2.206 Petition (“2.206 Petition”). (See Director’s Decision Under 10 CFR 2.206 (SPA-6)). The NRC did not, on its own motion, review the decision within twenty-five (25) days and therefore, the decision became final on December 13, 2002, pursuant to 10 C.F.R. § 2.206(c)(1).

Pursuant to 28 U.S.C. § 2342(4), the Court of Appeals has exclusive jurisdiction over all final orders of the Nuclear Regulatory Commission made reviewable by 42 U.S.C. § 2239. This statutorily vested jurisdiction was reaffirmed in *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985), where the Supreme Court held: “[t]he legislative history and basic

congressional choice of Hobbs-Act review [28 U.S.C. § 2342] lead us to conclude that Congress intended to vest in the courts of appeals initial subject matter jurisdiction over challenges to Commission denials of § 2.206 petitions.” *Id.* at 741. Riverkeeper filed this Petition for Review of NRC’s final agency action on February 11, 2003, within 60 days of the final action, pursuant to 28 U.S.C. § 2344. Riverkeeper maintains its principal office in Garrison, New York; therefore, venue in the Second Circuit is proper pursuant to 28 U.S.C. § 2343.

## STATEMENT OF STANDING

Riverkeeper is a non-profit organization whose mission is to protect the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and to safeguard New York City’s and Westchester County’s drinking water supply. (*See Exhibit C to Karl Coplan Affidavit in Opposition to Respondents’ Motion for Dismissal, Affidavit of Alex Mathiessen*). Riverkeeper’s members submitted affidavits with Riverkeeper’s Memorandum in Opposition to NRC’s Motion to Dismiss, filed June 17, 2003, establishing that they are personally affected and aggrieved by the continued operation of Indian Point without the specific security measures and relief sought in Riverkeeper’s 2.206 Petition.<sup>1</sup> (*See Exhibit C to Coplan Affidavit in Opposition to Respondents’ Motion to Dismiss (filed June 17, 2003)*).

The members of Riverkeeper have a personal stake in the outcome of the controversy and the organization is the proper party to bring the lawsuit on their behalf since Riverkeeper

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<sup>1</sup> At least one Circuit has suggested that, where evidence of standing was not required in the agency proceedings that are being reviewed, the petitioner should submit evidence of standing directly to the Court of Appeals on a petition for review at the time of the first substantive briefing. *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Accordingly, on June 17, 2003, Petitioner submitted, with its Memorandum in Opposition to Federal Respondents’ Motion to Dismiss, affidavits establishing the interests of its members in protecting Indian Point from terrorist attack.

satisfies the three-prong test of organizational standing delineated in *Hunt v. Washington Apple*, 432 U.S. 333 (1977): (1) affidavits of individual Riverkeeper members indicate that harm to individual members would be personally and economically devastating (*See Exhibit C to Coplan Affidavit in Opposition to Respondents' Motion to Dismiss* (filed June 17, 2003)); (2) the interests that Riverkeeper seeks to protect in bringing this action – the environmental and recreational integrity of the Hudson River and its tributaries – is directly related to the organization's purpose; (3) Riverkeeper can adequately assert the legal claims and the relief requested without its members participation.

## STANDARD OF REVIEW

In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court noted that agency action otherwise unreviewable under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2), was still subject to judicial review “where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” *Id.* at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc)). Subsequent to the Supreme Court's holding in *Chaney*, Courts of Appeals have uniformly acknowledged that NRC denials of 2.206 Petitions are reviewable for an abdication of statutory responsibility. *See Mass. Pub. Interest Research Group, Inc. (Mass. PIRG) v. NRC*, 852 F. 2d 9, 19 (1st Cir. 1988); *Arnow v. NRC*, 868 F.2d 233, 236 (7th Cir. 1989); *Commonwealth of Mass. v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989); and *Safe Energy Coalition of Michigan v. NRC*, 866 F.2d 1473, 1477 (D.C. Cir. 1989).

## **STATEMENT OF THE ISSUES**

- A. Where NRC has acknowledged that there is a “gap” between the licensee’s ability to protect the plant against airborne terrorist attack and the protections provided by the government, and given the National Research Council’s determination that “the potential for a September 11-type surprise attack in the near term [on a nuclear power plant is] ... high,” did the Nuclear Regulatory Commission abdicate its statutory duty “to protect health and to minimize dangers to life and property...” under 42 U.S.C. § 2201(i) by failing to condition continued operation of the Indian Point Units 2 & 3 nuclear power plants (“IP2 and IP3”) on the implementation of specific protective measures such as a no-fly zone?
- B. Where NRC has acknowledged that there is a “gap” between the licensee’s ability to protect against airborne terrorist attacks and the protections provided by the government, and given the National Research Council’s determination that “the potential for a September 11-type surprise attack in the near term [on a nuclear power plant is] ... high,” did the Nuclear Regulatory Commission abdicate its statutory duty “to protect health and to minimize dangers to life and property ... ” under 42 U.S.C. § 2201(i) by failing to order the licensee to convert to dry-cask storage for all of its 30 years worth of spent fuel rods currently located onsite as a measure to protect against dispersal of spent fuel rod radiation in a terrorist attack?
- C. Where NRC has acknowledged that there is a “gap” between the licensee’s ability to protect against airborne terrorist attacks and the protections provided by the government, and given the National Research Council’s determination that “the potential for a September 11-type surprise attack in the near term [on a nuclear power plant is] ... high,”



did the Nuclear Regulatory Commission abdicate its statutory duty “to protect health and to minimize dangers to life and property ... ” under 42 U.S.C. § 2201(i) by adopting a policy not to consider potential terrorist attacks by airborne vehicles in licensing spent fuel storage facilities?

## STATEMENT OF THE CASE

### 1. Riverkeeper’s 2.206 Petition

On November 8, 2001, Riverkeeper filed a petition<sup>2</sup> with Dr. William Travers, Executive Director for Operations of the NRC, pursuant to 10 C.F.R. § 2.206, identifying the threat of a terrorist attack on the Indian Point facility as a new, site-specific, hazardous condition that is larger and more dangerous than previously considered in the licensing and the design basis threat of Indian Point. Riverkeeper based its 2.206 Petition on new information currently available indicating that Indian Point is a probable target of future terrorist actions and that it is not currently equipped to defend itself, nor the 20 million people who reside and work within a 50 mile radius of the plant,<sup>3</sup> against a terrorist attack. Specifically the petition included reports documenting the substantial threat of a terrorist attack on nuclear facilities in the United States and NRC’s own studies assessing the extent of casualties from a core meltdown or spent fuel pool release at Indian Point units 2 and 3 (“IP2” and “IP3”). (*See generally* Section 2.206 Request for Emergency Shutdown of Indian Point Units 2 and 3 (November 8, 2001) (JA – 52)).

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<sup>2</sup> Riverkeeper filed a supplement to its 2.206 Petition on December 20, 2001. (*See* Declaration of 20 December 2001 By Gordon Thompson in Support of a Petition by Riverkeeper, Inc. (JA – 398)).

<sup>3</sup> According to 2000 U.S. Census Bureau data, 19,086,634 people live within the twenty-six counties that are within 50 miles of Indian Point. U.S. Census Bureau data *available at* <http://www.census.gov/index.html> (2000).

In its 2.206 Petition, Riverkeeper requested that the NRC: (1) order the licensee to suspend operations, revoke the license, or adopt other measures resulting in a temporary shutdown of IP2 and IP3; (2) order the licensee to conduct a full review of facilities' vulnerabilities, security measures and evacuation plans; (3) require the licensee to provide information documenting the existing and readily attainable security measures which protect IP2 and IP3 against land, water, and airborne terrorist attacks; (4) immediately modify the IP2 and IP3 operating licenses to mandate specified security measures sufficient to protect the facility, including the institution of a no-fly zone surrounding the plant and barriers to attack from the Hudson River; (5) order the revision of the licensee's Emergency Response Plan to account for possible terrorist attacks and prepare a comprehensive response to multiple, simultaneous attacks; (6) in the absence of available measures to ensure the security of the IP facility against terrorist attacks, take prompt action to permanently retire the facility; and (7) order the licensee to immediately convert from water-cooled to hardened dry cask system for spent fuel storage as a measure to protect spent fuel storage from terrorist attacks. (*See* Section 2.206 Request for Emergency Shutdown of Indian Point Units 2 and 3 at 1-2 (JA – 53-54)).

## **2. NRC's Response to Riverkeeper's 2.206 Petition**

NRC responded to Riverkeeper's 2.206 petition on November 18, 2002 by denying Riverkeeper's request: for specific information about the security measures; to implement security measures such as a no-fly zone; to require a revision of the licensee's Emergency Response Plan; and to replace spent fuel pools with dry-cask storage of spent fuel. NRC stated that it partially granted Riverkeeper's request for an immediate security upgrade by issuing its February 25, 2002 Orders to all nuclear power plants to review security preparedness. However, none of these "security upgrades" included the institution of no-fly zones or air defenses around

Indian Point or any other nuclear facility. (Director's Decision Under 10 CFR 2.206 at 8 (November 18, 2002) (SPA – 14)). Pursuant to 10 C.F.R. § 2.206(c), following the expiration of the 25-day period during which the Commission can review Director's Decisions *sua sponte*, the Director's Decision became final on December 13, 2002. 10 C.F.R. § 2.206(c).

### **3. Riverkeeper's Petition for Review**

On February 10, 2003, pursuant to 28 U.S.C. § 2342, Riverkeeper filed a petition to this Court for review and reversal of the Director's Decision, on the grounds that this decision violates the Atomic Energy Act as amended and constitutes a complete abdication of the Commission's statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize dangers to life and property." 42 U.S.C. § 2201 (2003) (SPA – 33).

## **STATEMENT OF THE FACTS**

### **A. The Acknowledged Gap Between the Present Terrorist Threat and the Indian Point Nuclear Power Facility's Security Measures**

In 2002, the National Research Council, an arm of the National Academy of Science, released a detailed report into the vulnerabilities of the nation's infrastructure to further terrorist attacks. The report specifically considered the likelihood of an attack on nuclear power facilities, and concluded that "the potential for a September 11-style surprise attack in the near term using U.S. assets such as airplanes appears to be high ... [such plants] may present a tempting, high visibility target for terrorist attack...such attacks could potentially have severe consequences." National Research Council, *Making the Nation Safer: Role of Science and Technology in Countering Terrorism* at 50 (2002) (JA – 989). The NRC, in its proposed decision

acknowledges a “gap between the licensee’s capability to protect against air attacks and the protection afforded by the government. (Proposed Director’s Decision Under 10 CFR 2.206 at 19 (JA – 944)). The NRC also acknowledged that “the NRC cannot rule out the possibility of future terrorist activity directed at a [nuclear power plant] licensee’s site before implementing any further enhancements to its safeguard programs.” (Director’s Proposed Decision Under 10 CFR 2.206 at 9) (JA – 934)).

## **B. Indian Point Is Vulnerable To Airborne Terrorism**

### **1. Indian Point’s Metropolitan Location and Population Make It A Tempting Target**

No other potential terrorist target in the country poses as great a risk to as great a number of people as the Indian Point nuclear power plant. Among the factors making Indian Point facility a likely target for a terrorist attack is the facility’s proximity to:

- A population density of approximately 20 million people within 50 miles of the facility. See U.S. Census Bureau, *2000 United States Census*, available at <http://www.census.gov/index.html> (last visited June 1, 2003);
- Major financial centers in New York that are essential to the functioning of the U.S. economy, (greater New York City metropolitan area has the 14<sup>th</sup> largest economy in the world and the greatest economy of any metropolitan region in the nation). See The United States Conference of Mayors, *If U.S. City/County Metro Economies Were Nations*, at [http://www.usmayors.org/citiesdriveetheconomy/chart2\\_decade.pdf](http://www.usmayors.org/citiesdriveetheconomy/chart2_decade.pdf) (last visited Nov. 7, 2001) (rankings based on gross domestic and metropolitan product 2000) (JA - 80));

- The Croton, West Branch and Kensico reservoirs which supply and store nearly all of Westchester County's and most of New York City's drinking water;
- Major air, sea, rail, and highway transportation systems that are vital to the regional and national economy.

## 2. Indian Point Is Unlikely to Withstand An Airborne Terrorist Attack

Shortly after the September 11<sup>th</sup> attacks on the United States, NRC spokesman Neil Sheehan stated, "[w]e have not done the analysis, so we are not going to guarantee that a plane couldn't breach the containment [at Indian Point]." Roger Witherspoon, *Indian Point Chief: Plant Safe From Possible Attack*, The Journal News (October 20, 2001), available at [www.thejournalnews.com/newsroom/102001/20entergy.html](http://www.thejournalnews.com/newsroom/102001/20entergy.html) (last visited October 20, 2001) (JA – 360). The NRC conceded that nuclear power plants are not designed to withstand crashes by large aircrafts. See Press Release No. 01-112, NRC News, *NRC Reacts to Terrorist Attacks* (September 21, 2001) (JA – 112). Only 4 U.S. reactors include any design features calculated to withstand the impact of an airplane and only one of those, Three Mile Island, was designed with the impact of a large airliner in mind. U.S. Congressional Rep. Edward Markey, *Security Gap: A Hard Look at the Soft Spots in our Civilian Nuclear Reactor Security* at 6 (March 25, 2001) (JA – 1023). "1 of 2 aircrafts are (sic) large enough to penetrate a five foot thick reinforced concrete wall." NRC Report, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* at 3-23 (October 2000) (JA – 152). According to the Energy Department, if just one percent of a jetliner's fuel ignited after impact, an explosion inside the already damaged reactor building would occur generating a force equivalent to 1,000 pounds of dynamite. The ignition of fuel "could lead to a rather violent explosion and impose upon the

primary containment relatively severe loads.” Argonne National Laboratory, *Evaluation of Aircraft Crash Hazards Analysis for Nuclear Power Plants*, NUREG/CR-2859 (1982) (JA – 921 - 922). NRC acknowledges in letters to Representative Markey that there are buildings other than the hardened reactor core that could lead to core meltdown if destroyed by the impact of a commercial aircraft. U.S. Congressional Rep. Edward Markey, *Security Gap: A Hard Look at the Soft Spots in our Civilian Nuclear Reactor Security* at 7 (March 25, 2002) (JA – 1025).

For example, if all electrical power to reactor is cut off, damage to the reactor core would begin about two hours later (per NRC to Representative Markey). *Id.* Also, support systems for the reactor, such as the cooling system, are not located within the buildings that are hardened and “are not designed to withstand the direct impact of a large commercial aircraft.” *Id.* The destruction of some of these non-hardened facilities could lead to core damage. *Id.* The Nuclear Regulatory Commission has acknowledged that, as currently situated and operated, Indian Point Units 2 and 3 are not defended against a September 11-type aircraft attack. (Proposed Director’s Decision Under 10 CFR 2.206 at 9 (JA – 934)).

### **3. Indian Point’s Spent Fuel Pools Are Particularly Vulnerable to Airborne Terrorism**

The spent fuel storage buildings at Indian Point are not as hardened as the reactor containment structures. (Director’s Decision Under 10 C.F.R. 2.206 at 20 (SPA – 26)). In its Proposed Decision, NRC stated that the cooling pools in the spent fuel storage facility “are designed to prevent a rapid loss of water *with the structure intact.*” (Proposed Director’s Decision Under 10 CFR 2.206 at 22 (emphasis added) (JA – 947)). In its response to Riverkeeper’s Petition, the licensee states that the pools at Indian Point are “partially embedded in the ground,” (Licensee’s Response to Riverkeeper’s Section 2.206 Request for Emergency

Shutdown of Indian Point Units 2 and 3 at 35 (JA – 476)) thus revealing the vulnerability of the cooling water in these pools to rapid loss if the portion of the walls that are above ground is breached. The NRC’s report on spent fuel pool accident risks examined the potential hazards of spent fuel pools concluded that “[a]n aircraft crashing into the spent fuel storage area could seriously affect the structural integrity of the spent fuel pool or the availability of nearby support systems, such as power supplies, heat exchanges, or water makeup sources, and may also affect recovery actions.” NRC Report, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* at 3-23 (October 2000) (JA - 153). With catastrophic damage to the spent fuel pool, “the pool is so damaged that it rapidly drains and cannot be refilled from either onsite or offsite resources.” *Id.* A reduction of cooling water in the spent fuel pools could expose the zirconium cladding which surrounds the spent fuel rods to oxygen and steam, resulting in an exothermic reaction that will lead to a spent fuel rod assembly fire. The NRC October 2000 report stated, “[t]he zirconium fire would result in a significant release of the spent fuel fission products which would be dispersed from the reactor site in the thermal plume from the zirconium fire.” Consequence assessments have shown that a zirconium fire could have significant latent health effects and resulted (sic) in number of early fatalities.” *Id.* at 3-1 (internal citation omitted) (JA – 130). “If the fuel handler fails to respond to the alarm or is unsuccessful in extinguishing the fire within the first 20 minutes, the staff assumes that the SSP cooling system will be significantly damaged and cannot be repaired.” *Id.* at 3-16 (JA – 145).

An alternative is available that would greatly reduce, or even eliminate, the risk of a pool fire. The fuel could be stored dry, in steel casks that are cooled by natural circulation of air, and each cask could be surrounded by an earth-and-gravel berm, with substantial spacing between

the casks. This storage arrangement would withstand a wide variety of determined acts of malice.

#### **4. Actual Threats Against Nuclear Power Plants Have Been Documented**

Since September 11, news reports and government releases have documented continuing specific threats of terrorist attacks on nuclear facilities such as Indian Point. On November 3, 2001, Daniel Rubin reported in his article, *Nuclear Terrorism Threat Growing*: “[t]he vulnerability of power plants moved to center stage after last Sunday, when Canadian authorities monitored a phone call from an alleged al-Qaida member to Afghanistan. Two targets, he said, would be attacked this week ‘down south,’ including an unnamed nuclear facility.” Daniel Rubin, *Nuclear Terrorism Threat Growing*, November 3, 2001, Knight Ridder Foreign Service available at [www.nci.org/01/11f/3-5.htm](http://www.nci.org/01/11f/3-5.htm) (last visited November 7, 2001) (JA – 81). Shortly following the attacks on September 11, 2001, the Three Mile Island nuclear power plant received a “credible threat” on October 17, 2001, prompting officials to shut down two nearby airports and dispatch military aircrafts to protect the facility. CNN, *Threat at Three Mile Island Closes Airports*, October 18, 2001, available at [www.cnn.com/2001/us/10/18/gen.three.mile.island/index.htm](http://www.cnn.com/2001/us/10/18/gen.three.mile.island/index.htm) (last visited November 2, 2001) (JA – 84).

On November 1, 2001, Mohamed ElBaradei, Director of the International Atomic Energy Agency (IAEA) warned of the “potential of terrorist targeting nuclear facilities.” International Atomic Energy Agency, *Calculating the New Global Nuclear Terrorism Threat*, November 1, 2001, available at [www.iaea.org/worldatom/PressP\\_release/2001/nt\\_Pressrelease.shtml](http://www.iaea.org/worldatom/PressP_release/2001/nt_Pressrelease.shtml) (last visited November 2, 2001) (JA – 85). Mr. ElBaradei also stated that the “safety and security of nuclear material is a legitimate concern of all States” and that “[t]he willingness of terrorists to



commit suicide to achieve their evil makes the nuclear terrorism threat far more likely than it was before September 11.” *Id.* On November 1, 2001, the Washington Post reported: “Nancy Savage, an FBI agent in Eugene, Ore., who is president of the FBI Agents Association, said the biggest concerns for investigators included airports, power plants and other key infrastructure points.” Eric Pianin and Dan Eggen, *Preparations Stepped Up for Possible New Attacks*, Washington Post, November 1, 2001, available at [www.nci.org/01/11f/2.htm](http://www.nci.org/01/11f/2.htm) (last visited November 2, 2001) (JA – 92). On July 4, 2001, the New York Times reported that an Algerian man, Ahmed Ressam, convicted of attempting to carry out a terrorist attack in Los Angeles, testified that he was trained in an Afghanistan camp run by Osama bin Laden and received training in how to blow up “the infrastructure of a country.” Lara Mansnerus and Judith Miller, *Terrorist Details His Training in Afghanistan*, N.Y. Times, July 4, 2001, available at [www.nci.org/01/07/04-nyt-terrorist\\_afg.htm](http://www.nci.org/01/07/04-nyt-terrorist_afg.htm) (last visited November 7, 2001) (JA – 94). Ressam described how he was among 50 to 100 men at the camp who were being trained in “urban warfare.” *Id.* (JA – 96). Ressam stated that power plants were targets as they were labeled “enemies’ installations.” *Id.* On October 21, 2001, the Sunday London Times reported that the FBI is studying a report that the four terrorists who seized Flight 93, which crashed near Pittsburgh, may have been targeting a nuclear power plant. Nicholas Rufford, David Leppard and Paul Eddy, *Nuclear Mystery: Crashed Plane’s Target May Have Been Reactor*, Sunday Times (London, UK), October 21, 2001, available at [www.sundaytimes.co.uk/news/pages/sti/2001/10/21/stiusausa02018.html](http://www.sundaytimes.co.uk/news/pages/sti/2001/10/21/stiusausa02018.html) (last visited June 19, 2003) (JA – 98). On October 30, 2001, the Washington Post reported on an interview with a jailed disciple of Osama bin Laden who said there are “more important places, like atomic plants and reactors” that may have been more appropriate targets than the World Trade Center. William Branigin, *In Afghan Jail, A Terrorist*

*Who Won't Surrender*, Washington Post, October 30, 2001, available at [www.washingtonpost.com/wp-dyn/articles/A8758-2001\\_Oct.29.html](http://www.washingtonpost.com/wp-dyn/articles/A8758-2001_Oct.29.html) (last visited June 19, 2003) (JA – 107).

## **B. The Devastating Impacts of a Terrorist Attack on Indian Point**

A successful attack on either of Indian Point's reactors or spent fuel storage facilities would likely result in a massive release of radioactive materials into the surrounding towns and counties, quite possibly reaching into and contaminating New York City. Such a release would cause thousands of immediate fatalities close to the site and thousands of additional latent cancer deaths farther downwind of the plant. Sandia Labs, NRC, *Calculation of Reactor Accident Consequences* (1982) ("CRAC-2 Report") (JA – 384). Further, a major release would probably contaminate the drinking water supply for New York City and Westchester County, devastating the area's ecology, and rendering portions of the New York metropolitan area uninhabitable.

### **1. Illness and Fatality Data**

A 1982 study performed by NRC estimates that a terrorist attack on the Indian Point Unit 2 reactor that leads to a meltdown would cause "46,000 Peak Early Fatalities, 141,000 Peak Early Injuries, [and] 13,000 Peak Deaths from cancer." *Id.*

### **2. Economic Loss Data**

This same NRC study reveals that a terrorist attack on the Indian Point Unit 2 and 3 reactors that leads to a meltdown would cause \$274 billion (1982 dollars) in property damage, *Id.* and \$314 billion (1982 dollars) in property damage, respectively *Id.* In terms of 2000 dollars, property damage from a Unit 2 meltdown would be estimated conservatively at \$500.5 billion, and property damage from Unit 3 meltdown would be estimated conservatively at \$573.5 billion

– figures base solely on inflation without factoring the substantial rise in metropolitan real estate values. See The Inflation Calculator, available at <http://www.westegg.com.inflation> (last visited Nov. 7, 2001) (based on increases in the Consumer Price Index). Data from the New York State Office of Real Property Services show that property values in Westchester County, and NY state in general, have increased four-fold since 1982. See New York State Office of Real Property Services, *Exemptions From Real Property Taxation in New York State* (1982 & 1999 reports), available at <http://www.orps.state.ny.us/> (last visited June 19, 2003).

### 3. Environmental Consequences

The potential dispersal of radiological contaminants into the water, atmosphere, and on land, would cause extensive and irreversible environmental damage. The dispersal of radiological contaminants is dependent on their physical and chemical properties. Some particles would be suspended or dissolved in water, contaminating drinking water supplies. The consumption of these suspended particles would adversely affect the health of aquatic life. Some radioactive isotopes are known to bio-accumulate in the tissues and organs of wildlife, thereby leading to systematic contamination of the food chain and further injury to humans. As some of the radioactive particles fall out of suspension and settle, river and reservoir beds would become contaminated. Furthermore, a radioactively contaminated Hudson River would lose its recreational and commercial value as it would be unnavigable, unswimmable, and unfishable. Particles that remain airborne would be respirable by humans and wildlife causing latent carcinogenic, mutagenic and teratogenic effects. Particles that settle out of the air would contaminate plant life and lands, causing lasting damage to entire ecosystems.

#### **D. NRC Statutory Responsibility Under The Atomic Energy Act**

The Atomic Energy Act establishes the general statutory responsibilities of the Nuclear Regulatory Commission in 42 U.S.C. § 2201(i), which empowers the NRC to “establish rule[s], regulation[s], or order[s]” to “protect health or to minimize danger to life or property.” 42 U.S.C. § 2201 (SPA – 33). Also, the Atomic Energy Act, 42 U.S.C. § 2012 (d) states an additional statutory duty of the NRC specifically regarding spent fuel, “[t]he processing and utilization of source, byproduct, and special nuclear material *must* be regulated ...to protect the health and safety of the public.” (emphasis added).

Additionally, 10 C.F.R. § 73.51(b)(1) expressly requires each licensee to establish and maintain a physical protection system that provides high assurance that activities involving spent nuclear fuel do not constitute an unreasonable risk to public health and safety. 10 C.F.R. § 73.51(b)(3) states that the physical protection system must be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in 10 C.F.R. § 72.106.

### **SUMMARY OF THE ARGUMENT**

Indian Point facilities’ containment structures, reactor vessels, spent fuel storage areas, control rooms, and electrical switching equipment are all vulnerable to a terrorist attack. Riverkeeper petitioned NRC pursuant to 10 C.F.R. § 2.206 for an immediate, temporary shutdown of the Indian Point nuclear power station based on the obvious vulnerabilities of the plant to September 11<sup>th</sup> style coordinated terrorist attack. Indian Point, located in Westchester County, New York, is not currently equipped to defend itself, nor the 20 million people who reside and work within a 50 mile radius of the plant, against an airborne attack of the scale,

sophistication, and coordination demonstrated on September 11, 2001. A successful attack on these structures would have a catastrophic effect on the region's human population, environment, and economy.

Since September 11, the fundamental assumptions about the safety of nuclear power plants and the nature and likelihood of an assault on such plants have changed. According to a recent National Research Council report, "the potential for a September 11-type surprise attack in the near term using U.S. assets such as airplanes appears to be high." National Research Council, *Making the Nation Safer: Role of Science and Technology in Countering Terrorism* at 50 (2002) (JA – 989). The Commission in its proposed decision acknowledges a "gap between the licensee's capability to protect against air attacks and the protection afforded by the government." (Proposed Director's Decision Under 10 CFR 2.206 at 19 (JA – 944)). Yet, despite this gap, in its Decision, the Commission essentially proposes to do nothing to protect the public from the very threat of aircraft attack that the National Research Council has ranked "high." This failure of the Commission to act can only be characterized as a complete abdication of the Commission's statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize dangers to life and property." 42 U.S.C. § 2201 (2003) (SPA – 33). Combined with NRC's specific regulatory policy of not requiring nuclear facilities to protect themselves against aerial attack, NRC's decision also reflects an agency policy that is an abdication of its statutory responsibility to protect the public health and safety.

## ARGUMENT

### I.

**IN LIGHT OF THE ACKNOWLEDGED GAP BETWEEN THE DEFENSE AGAINST AIRBORNE TERRORIST ATTACK AND THE "HIGH" PROBABILITY OF SUCH AN ATTACK AS DETERMINED BY THE NATIONAL RESEARCH COUNCIL, NRC'S FAILURE TO CONDITION CONTINUED OPERATION OF INDIAN POINT REACTORS 2 AND 3 ON SUFFICIENT AIR DEFENSES IS AN ABDICATION OF ITS STATUTORY DUTY TO PROTECT THE PUBLIC HEALTH AND SAFETY**

The September 11<sup>th</sup> attacks challenged the fundamental assumptions about the security of this nation's infrastructure, including its nuclear infrastructure. It has become clear that a plant such as Indian Point, located within a 50-mile radius of over 20 million Americans, including the population of Manhattan, poses an unacceptable terrorism risk. Riverkeeper duly petitioned NRC to take immediate specific measures to protect Indian Point from aerial attack, all of which NRC has refused. Riverkeeper's petition relied heavily on NRC's own statements that plants such as Indian Point were not designed to withstand a direct impact by a jumbo jet, and NRC's own studies concerning the impacts of a radiation release from the Indian Point Nuclear Power Plants or their spent fuel pools.

The Nuclear Regulatory Commission even acknowledged that "the NRC cannot rule out the possibility of future terrorist activity directed at a [nuclear power plant] licensee's site before implementing any further enhancements to its safeguard programs, the NRC believes that these facilities can continue to operate safely." (Proposed Director's Decision Under 10 CFR 2.206 at 9 (JA - 934)). The Commission further acknowledges that "[a]ny gap between the licensee capability and the assumed threat must be assumed by the government, and the government must prepare for this." (Proposed Director's Decision Under 10 CFR 2.206 at 21 (JA - 946)).

In other words, while the NRC acknowledges that a gap in the security of the Indian Point facility exists, NRC is still willing, at least for the immediate future, to live with this gap that leaves the 20 million people residing in the Hudson River Valley and New York City vulnerable to nuclear catastrophe. Refusing to address this gap in air defense of nuclear facilities, in light of the conclusion of another branch of the same government that the possibility of such an aerial attack is "high" can only be characterized as a complete abdication of NRC's statutory responsibility to protect public health and safety.

Several Courts of Appeals have confirmed that NRC denials of 2.206 Petitions are subject to review and reversal where such decisions constitute a complete abdication of the Agency's responsibility to protect public health and safety. In *Mass. PIRG v. NRC*, the First Circuit noted that Courts may review NRC decisions which undermine its fundamental statutory responsibility to protect "the health and safety of the public." *Mass. PIRG*, 852 F.2d at 19 (citing 42 U.S.C. § 2236 (c)). In *Arnow v. NRC*, the Seventh Circuit noted that "[t]he courts...may review NRC decisions which undermine its fundamental statutory responsibility to protect 'the health and safety of the public.' " *Arnow*, 868 F.2d at 236 (quoting *Mass. PIRG*, 852 F.2d at 19). Similarly, in *Safe Energy Coalition of Michigan v. NRC*, the D.C. Circuit reviewed a denial of a 2.206 Petition to consider whether the NRC abdicated its statutory responsibility under the Atomic Energy Act, "to ensure adequate protection of the public health and safety" *Safe Energy*, 866 F.2d at 1477 (quoting *Union of Concerned Scientists v. NRC*, 824 F. 2d 108,120 (D.C. Cir 1987)).

Here, NRC has concluded that it is not its responsibility to account for the inherent risk of another airborne terrorist attack. Instead, the NRC would rely on present commercial airport security measures (Director's Decision Under 10 CFR 2.206 at 18-19 (SPA – 41-42)) and a

Notice to Airmen (NOTAM) issued by the FAA on September 26, 2001 (Proposed Director's Decision Under 10 CFR 2.206 at 18 (JA – 943)). However, both of these protection measures have proved blatantly inadequate and therefore hardly suffice to minimize any degree of risk of a potential risk of an airborne attack.

### **1. Indian Point is Not Secure from Breaches in Airport Security**

In refusing Riverkeeper's request for no-fly zone protection around Indian Point, the NRC stated: "efforts associated with protecting our nation for terrorist attacks by air should be directed toward enhancing security at airports and on airplanes." (Director's Decision Under 10 CFR 2.206 at 18 (SPA – 24)). Furthermore, in its Proposed Decision, the NRC went so far as to say "in light of the difficulty in protecting the numerous specific potential targets of an air attack, the NRC believes that the nation's resources devoted to protection against terrorist attacks by air should be primarily directed towards enhancing security at airports and within airplanes in flight." (Proposed Director's Decision Under 10 CFR 2.206 at 7 (JA – 957)). However, recent efforts to improve airport security have been slow-going and have proved gravely inadequate. Therefore, the NRC has essentially deflected its responsibility to protect the health and safety of the public to security measures that are essentially ineffective. Since the NRC has a statutory duty "to protect health and to minimize dangers to life and property..." under 42 U.S.C. § 2201(i), by deflecting its responsibility to another arm of the federal government whose security measures have proven ineffective, NRC has abdicated its essential underlying duty to "minimize dangers to life and property." 42 U.S.C. § 2201 (2003) (SPA – 33).

Additionally, this reliance on airport security will not enhance the safety of Indian Point in any way from civilian-owned planes that take off and land at smaller airports. While the



Office of Homeland Security concentrates on commercial airliners and major airports, very little oversight has been put on civilian aircrafts. There is nothing to prevent a terrorist from purchasing or renting a small single-engine plane, taking off from a small airport and taking a direct course to the Indian Point facility. The NRC said that a small plane would be unlikely to breach the Indian Point containment dome. This is still in dispute, but even if it was not, there are other ways in which a small plane could cause catastrophic damage to Indian Point, such as a small plane loaded with explosives. Such examples include merely driving the small plane into the spent fuel storage facility or even the control room. NRC has made no mention of how it intends to protect the Indian Point facility from such an attack.

Reliance on airport security at the Nation's major airports to protect against a suicide attack in a commercial airliner is similarly problematic. In March 2002, the Transportation Department inspector general released a report that found airport security screeners on several dozen occasions failed to catch guns and simulated explosives, even after the September 2001 terrorist attacks. Inspector General Kenneth Mead's report found screeners missed knives 70 percent of the time, guns 30 percent of the time and simulated explosives 60 percent of the time. CBS News, *Airport Security Gets an 'F,'* March 25, 2002, available at [www.cbsnews.com/stories/2002/03/25/attack/main504553.shtml](http://www.cbsnews.com/stories/2002/03/25/attack/main504553.shtml) (last visited March 27, 2002) (JA – 1014). Also, according to the Federal Aviation Administration, security breaches caused the government to evacuate 59 airport concourses or terminals between October 30, 2001 and March 7, 2002, forcing 2,456 flights to be delayed or canceled. Passengers on another 734 flights had to leave their seats and go through security a second time. *Id.* (JA – 1015).

This huge failure rate exposes the fallacy of relying on airport security to protect nuclear power plants. With this sort of ease of smuggling weapons through the airports, terrorists could

effortlessly hijack an airliner and use it as a weapon against any nuclear facility, including Indian Point.

## **2. Airspace Around Indian Point is Not Secure**

The NRC states that a NOTAM issued by the FAA on September 26, 2001 is an adequate security measure for protecting Indian Point. (Proposed Director's Decision Under 2.206 Petition at 18 (JA – 943)). The NOTAM “advised pilots to avoid the airspace above or in the proximity to...nuclear power plants.” *Id.* However, while this NOTAM advises or urges pilots to avoid flying over nuclear power plants – the NOTAM is not legally binding; unlike a no-fly zone, pilots are not required to obey. In addition, this NOTAM has proved sufficiently ineffective.

The airspace in the United States remains insecure. According to an Associated Press news article, despite military patrols and tighter security, pilots had intruded into America's protected airspace at least 567 times in the seven months after Sept. 11, highlighting the continued challenges of thwarting a terrorist air attack. Associated Press, *Planes Often Enter Prohibited Air*, April 5, 2002 available at [www.aviationnow.com/avnow/news/channel](http://www.aviationnow.com/avnow/news/channel) (last visited April 10, 2002) (JA – 1004). The Associated Press reported, “[i]n each case, a pilot wrongly flew into one of the country's six prohibited flight zones, where no planes are allowed, or into one of many restricted zones where air traffic is limited because of sensitive military or nuclear operations or special events.” *Id.* As of this filing, more violations of protected airspace have no doubt occurred.

The NRC's reliance on present methods of securing airspace is woefully insufficient to protect the Indian Point facility from an attack from the air. Since the nation is unable to prevent

aircraft from entering *restricted* airspace, the unrestricted airspace above the Indian Point nuclear power plant is clearly vulnerable.

### **3. NRC Cannot Rely on the Lack of a Specific Threat of a Terrorist Attack on Indian Point, as the National Research Council has Ranked the "Near Term" Risk of a Terrorist Attack on a Nuclear Power Plant as "High."**

Despite acknowledging the real risk of catastrophic results of an aerial terrorist attack on Indian Point and the gap between air defense provided by the plant operator and that needed for an effective defense, the Commission, in denying Riverkeeper's petition, is nonetheless willing to accept the risk of a terrorist attack occurring before this gap can be filled. Apparently, the Commission would take comfort in imposing this risk on the population around Indian Point because "since September 11, there have been no specific credible threats of a terrorist attack on a nuclear power plant." (Proposed Director's Decision Under 10 CFR 2.206 at 18 (JA - 943)). The Commission's decision thus ignores the nature of terrorist attacks (which are not usually preceded by a "specific credible threat"). This premise is also directly contradicted by the report of the National Research Council, which ranks the "near term" threat of a terrorist surprise air attack on a nuclear power plant as "high." National Research Council, *Making the Nation Safer:*

*Role of Science and Technology in Countering Terrorism* at 50 (2002) (JA - 989).

By their very nature, terrorist attacks are not preceded by "specific credible threats" identified by United States intelligence agencies. Certainly, the World Trade Center attack was not the subject of such a "specific credible threat," nor was the bombing of the U.S.S. Cole in Yemen. The mere lack of advance intelligence warning does not make an attack on a U.S. nuclear plant unlikely, or excuse the Commission from taking immediate measures to protect public safety from the effects of an attack that now appears likely, if unpredictable.

In fact, the National Research Council has performed a recent, detailed assessment of the likelihood of various radiological attacks by terrorists, and has concluded that “the potential for a September 11-type surprise attack in the near term using U.S. assets such as airplanes appears to be high.” *Id.* The report notes that such plants “may present a tempting, high visibility target for terrorist attack.” *Id.* There is no more highly visible and tempting nuclear power plant target in the country than the Indian Point nuclear power generating station. And, as the National Research Council Report notes, “such attacks could potentially have severe consequences.” *Id.*

Petitioners have thus identified a potential incident – airborne terrorist attack – for which there is a “high risk” as assessed by the National Research Council, and for which the Indian Point plants have no protection. This is not a case where the Commission is being asked to take extraordinary measures to respond to a miniscule risk; rather, the Commission is being asked to take immediate measures to respond to a risk that is “high” in the “near term.” Ignoring this risk is an abdication of the Commission’s duty to protect the public.

## II.

### **NRC'S REFUSAL TO PROTECT INDIAN POINT FROM AERIAL TERRORIST ATTACK IS PART OF AN AGENCY POLICY TO IGNORE THE POSSIBILITY OF AIRBORNE TERRORIST ATTACKS IN AGENCY DECISIONMAKING.**

The Court of Appeals cases discussing the standard of review of NRC denials of 2.206 Petitions for abdication of statutory responsibility suggest that such review may be had of individual agency decisions. Nevertheless, even if an agency "policy" is required (as suggested by the *Chaney* dicta), NRC in fact has adopted a policy of refusing to consider the possibility of airborne terrorist attacks in plant-specific agency proceedings.

For example, NRC has adopted specific policy not to consider potential terrorist attacks by airborne vehicles in licensing spent fuel storage facilities. See Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955-56 (May 15, 1998). NRC has most recently reaffirmed this policy in a series of decisions issued in December, 2002, where NRC refused to consider the possibility of terrorist attacks on nuclear facilities in conducting environmental impact review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 1332. (See *In the Matter of Private Fuel Storage L.L.C.*, 56 N.R.C. 340; 2002 NRC LEXIS 205 (2002) (SPA – 40); *In the Matter of Duke Energy Corp.*, 56 N.R.C. 358; 2002 NRC LEXIS 206 (2002) (SPA – 55). NRC itself explains this policy as follows, dismissing the possibility of an airborne terrorist attack as too speculative to warrant consideration:

The horrors of September 11 notwithstanding, it remains true that the likelihood of a terrorist attack being directed at a particular nuclear facility is not quantifiable. Any attempt at quantification or even qualitative assessment would be highly speculative. In fact, the likelihood of attack cannot be ascertained with confidence by any state-of-the-art methodology.

*Private Fuel Storage*, 2002 NRC LEXIS 206 at \*19 (SPA – 47).

This “hear no evil, speak no evil, see no evil” policy is simply no longer justifiable. To call the possibility of a terrorist attack on a nuclear facility “too speculative to worry about” is simply no longer acceptable after the September 11<sup>th</sup> attacks. To justify this policy, NRC relies on two cases decided decades ago, which upheld NRC's refusal to consider the possibility of terrorist attacks on nuclear facilities on the grounds that the possibility of such an attack was “speculative” and not susceptible to mathematical probabilistic analysis. See *Limerick Ecology Action v. NRC*, 869 F.2d 719 (3d Cir. 1989); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983). What NRC ignores is that we now know that a terrorist attack on a nuclear facility is not a “speculative” possibility, but rather, according to the National Research Council, a highly probable event. National Research Council, *Making the Nation Safer: Role of Science and Technology in Countering Terrorism* at 50 (2002) (JA – 989). NRC's refusal to acknowledge the fundamental change in the nature and likelihood of terrorist attack on nuclear facilities in light of September 11 is embodied in agency policy, and this policy is an abdication of NRC's statutory responsibility to protect public health and safety against identified threats.

Petitioners have thus identified a potential incident – airborne terrorist attack – for which there is a “high risk” as assessed by the National Research Council, and for which the Indian Point plants have no protection. *Id.* Ignoring this risk is an abdication of the Commissions' duty to protect the public.

## CONCLUSION

NRC's denial of Riverkeeper's 2.206 petition is yet another manifestation of its stated policy of not considering the possibility of airborne terrorist attacks in licensing decisions. NRC ignores significant evidence that there is a high potential for a September 11-style airborne terrorist attack on a nuclear power plant like Indian Point in the near term. NRC ignores its own evidence that Indian Point will not withstand a deliberate aircraft crash. And NRC ignores its own evidence that such an attack would cause horrific devastation to life and property. By refusing to acknowledge airborne terrorism as a real and imminent threat and by refusing to implement needed protection against airborne terrorism, such as a no-fly zone and military measures to enforce a no-fly zone, NRC's actions constitute a complete abdication of its statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize dangers to life and property." For the foregoing reasons, NRC's Director's Decision should be annulled and the matter remanded to the NRC with directions to grant Riverkeeper's 2.206 Petition.

Dated: White Plains, New York  
June 20, 2003

Respectfully Submitted,

PACE ENVIRONMENTAL LITIGATION CLINIC

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