



OFFICE OF THE
GENERAL COUNSEL

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

June 3, 2003

Frank Scardilli
United States Court of Appeals
For the Second Circuit
United States Court House
40 Foley Square
New York, NY 10007

RE: *Riverkeeper v. Collins*, No. 03-4313 (2d Cir., filed Feb. 11, 2003)

Dear Mr. Scardilli:

Enclosed you will find an original and four copies of the Motion To Dismiss, Declaration In Support Of Motion To Dismiss, and Motion To Suspend Schedule For The Federal Respondents in the above-captioned case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully,

A handwritten signature in black ink, appearing to read "David A. Cummings", written over a horizontal line.

David A. Cummings
Attorney
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(301) 415-3200 (fax)
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Enclosures: Motion to Dismiss.
Declaration In Support Of Motion To Dismiss
Motion To Suspend Schedule.

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 03-4313

Riverkeeper, Inc. v. Collins, et al.

Motion for: Dismissal.

Set forth below precise, complete statement of relief sought:
Dismiss Riverkeeper's amended petition for
review filed on February 12, 2002.

MOVING PARTY: U.S. NRC v. USA.
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: Riverkeeper.

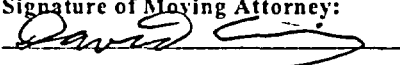
MOVING ATTORNEY: David Cummings
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Pace University School Of Law
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White Plains, NY 10603
714-422-4143 Email:KCoplan@law.pace.edu.

Court-Judge/Agency appealed from: U.S. Nuclear Regulatory Commission.

Please check appropriate boxes:
Has consent of opposing counsel:
A. been sought? Yes No
B. been obtained? Yes No
Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND
INJUNCTIONS PENDING APPEAL:
Has request for relief been made below? Yes No
Has this relief been previously sought
in this Court? Yes No
Requested return date and explanation of emergency:

Signature of Moving Attorney:  Date: June 3, 2003 Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** ~~DENIED~~.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____

By: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC.,)	
)	
Petitioner,)	
)	
v.	)	Docket No. 03-4313
)	
COLLINS, et al.)	
)	
Respondents,)	
)	

FEDERAL RESPONDENTS' MOTION TO DISMISS

Pursuant to Second Circuit Rule 27, the United States Nuclear Regulatory Commission ("Commission" or "NRC") and the United States of America move this Court to dismiss the instant petition for review.¹ The petition for review, filed by Riverkeeper, Inc., challenges the NRC's partial denial of an administrative petition filed pursuant to 10 C.F.R. § 2.206 ("2.206 petition"). Riverkeeper's 2.206 petition demanded that the NRC take various enforcement actions against the Indian Point nuclear power facility, including shutdown of the facility, to protect against the threat of terrorism. But how best to enhance security at already licensed nuclear reactors is an enforcement question committed by law to the NRC's expert discretion. The Commission's refusal to grant Riverkeeper's request for particular enforcement measures is not reviewable. Accordingly, this Court should dismiss Riverkeeper's petition for review for lack of jurisdiction.

Eighteen years ago, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court ruled that an agency decision rejecting an enforcement petition is "committed to agency discretion" and not subject to judicial review. See 5 U.S.C. § 701(a)(2). After *Chaney*, every court of appeals to consider the question has found NRC denials of 2.206 petitions

¹ Petitioner names a variety of respondents, but the only statutory parties to a lawsuit challenging NRC decisions are the United States and the NRC itself. 28 U.S.C. §§ 2344, 2348.

unreviewable. See *Safe Energy Coalition of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989); *Arnoff v. NRC*, 868 F.2d 223, 228-29 (7th Cir. 1989); *Com. of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989); *Mass. Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9 (1st Cir. 1988). *Chaney* bars Riverkeeper's present lawsuit as well.

Riverkeeper likely will invoke an exception to *Chaney's* unreviewability doctrine and argue that the NRC has "abdicated" its statutory duty to protect the public health and safety. But even the briefest examination of the NRC's 2.206 decision will confirm that there has been no agency "abdication" on the reactor security issue. See *Entergy Nuclear Operations, Inc.* (Indian Point, Units 1, 2, and 3), DD-02-6, 56 NRC 296 (2002) (attached to this motion as Exhibit A). The NRC carefully considered the issues raised by Riverkeeper and made a reasoned, and fully explained, decision not to take further action. In fact, because of various security orders already issued, the NRC determined that it had already partially granted, in effect, Riverkeeper's petition.

STATEMENT OF THE CASE

1. NRC Regulatory Scheme Regarding Requests for Enforcement Action.

In regulating the civilian uses of nuclear materials, including nuclear power reactors, the NRC uses various enforcement mechanisms to ensure the protection of public health and safety and to promote the common defense and security. One such mechanism, 10 C.F.R. § 2.206, allows any person to request that the NRC institute a proceeding to modify, suspend, or revoke a license, or take any other action the NRC deems proper.

The Director of the reviewing office to whom the petition is assigned may grant, partially grant, or deny the petition. If the Director finds that there is merit in the petition, or portion thereof, he or she will issue a Director's Decision that will explain the bases upon which the petition was granted and identify the enforcement actions that the NRC has taken, or will take,

to grant all or part of the petition. If the Director determines that the request for enforcement should be denied, he or she will issue a Director's Decision that explains the denial of the request.

The NRC's regulations provide in 10 C.F.R. § 2.206(c)(2) that "[n]o petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission." However, the Commission may undertake *sua sponte* review of a denial of a 2.206 petition to determine if a Director has abused his or her discretion within twenty-five days. 10 C.F.R. § 2.206(c)(1). If the Commission does not act to reverse or modify the Director's decision within twenty-five days, it becomes a final agency action. *Id.*

2. Riverkeeper's 2.206 Petition.

On November 8, 2001, Riverkeeper filed an administrative petition pursuant to 10 C.F.R. § 2.206, supplemented on December 20, 2001, with Dr. William Travers, the NRC's Executive Director for Operations. The 2.206 petition requested various NRC enforcement actions against the NRC licensee, Entergy Nuclear Operations, that owned and operated the Indian Point nuclear power facility in Westchester County, New York.

Specifically, Riverkeeper's petition requested the NRC to: (1) issue an order suspending operations, revoke the operating license, or adopt other measures that would result in a temporary shutdown of the Indian Point reactors; (2) order the licensee to conduct a full review of the facilities' vulnerabilities, security measures, and evacuation plans; (3) require the licensee to provide information documenting the existing and readily attainable security measures which protect the Indian Point facility against land, water, and airborne terrorist attacks; (4) immediately modify the Indian Point operating licenses to mandate certain security measures that Riverkeeper believed would further protect the facility; (5) order the revision of the licensee's emergency response plan and Westchester County's Radiological Emergency

Response Plan to account for possible terrorist attacks and prepare comprehensive response to multiple, simultaneous attacks in the region.

Furthermore, Riverkeeper requested that if the NRC, after conducting a full review of the facilities' vulnerabilities, security measures, and evacuation plans, found that it could not sufficiently ensure the security of the Indian Point facility against terrorist threats, the NRC should permanently retire the facility. The Petitioner also requested that the NRC order the licensee to convert its spent fuel storage from water-cooled to a hardened dry cask system to better protect against terrorist attack.

3. Director's Decision-02-06.

The Commission issued Director's Decision-02-06, on November 18, 2002, notifying Riverkeeper that it had, in effect, partially granted the request for an immediate security upgrade at the Indian Point facility. The NRC had previously notified Riverkeeper, by letter dated December 20, 2001, that the agency had partially granted the request for a review of vulnerabilities and security measures, based upon the extensive, ongoing review and the actions taken by the NRC following the terrorist attacks at the World Trade Center and the Pentagon on September 11, 2001. *See* 56 NRC at 298. After those attacks, the NRC promptly issued Threat and Safeguards Advisories calling for upgraded security at nuclear power reactors. Later on February 25, 2002, the NRC issued formal orders to all power reactors incorporating the threat advisories and requiring that certain additional interim compensatory security measures be implemented.² *See id.* at 302. While the specifics of these orders are

² The NRC issued further orders applicable to power reactor licensees on April 29, 2003. This new round of orders deal with access authorization requirements, fitness-for-duty enhancements, and a revision to the "design basis threat" (*i.e.*, a reasonable characterization of an adversary force against which nuclear power plant licensees must design their physical protection systems and response strategies).

considered Safeguards Information and cannot be released to the public,³ they did result in increased patrols, augmented security forces, additional physical barriers, greater vehicle check stand-off distance, greater coordination with local law enforcement and military authorities, and more restrictive site access controls. *See id.* at 302. The NRC's February 25, 2002, orders also required that licensees evaluate site vulnerabilities and develop response strategies to deal with various threats. *See id.* at 302-03.

In the Director's Decision, the NRC denied Riverkeeper's request for access to specific details of security measures. Pursuant to Section 147 of the Atomic Energy Act, the Commission determined that such security-related information could not be released to the public. *See id.* at 309; note 3, *supra*. The NRC also denied Riverkeeper's request to mandate specific security measures at Indian Point, such as a no-fly zone and the defensive capability to protect a no-fly zone. *See id.* at 309-10. The NRC indicated that it continued to conduct a comprehensive review of security, including coordination with Federal, State and local authorities. Based upon the results of this review the NRC said that it will take appropriate action to ensure security, if appropriate, but the agency indicated that it considers the current security requirements, in addition to the enhancements contained in the February 25, 2002, orders, sufficient to provide reasonable assurance of safety at nuclear power facilities. *See id.* at 311-12.

³ Safeguards Information is a special category of sensitive unclassified information authorized by Section 147 of the Atomic Energy Act of 1954, as amended, to be protected. *See* 42 U.S.C. 2167. Section 147 grants the Commission broad and unique authority to prohibit the unauthorized disclosure of Safeguards Information upon a determination that the unauthorized disclosure of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of theft, diversion, or sabotage of materials or facilities subject to NRC jurisdiction.

The NRC found the existing emergency response plans at Indian Point sufficiently flexible to respond to a wide variety of adverse conditions, including terrorist attacks. *See id.* at 304. The agency stated that the flexibility and broad nature of the emergency response plans alleviate Riverkeeper's concern that the emergency plans do not consider multiple attacks on infrastructure. *See id.* at 307. The NRC pointed out that the advisories and the orders issued after September 11, 2001, have required licensees to ensure continued improvement of their existing emergency response plans. *See id.* at 307. Therefore, the NRC determined that the Riverkeeper's request for revision of the on-site and off-site emergency plans had been, in part, granted. *See id.* at 313.

Finally, the NRC considered Riverkeeper's assertions regarding Indian Point's current spent fuel storage system and found that the security provisions required at the facility adequately protect the spent fuel. *See id.* at 310-11. Therefore, the NRC denied Riverkeeper's request that the NRC mandate a conversion from wet storage to dry-cask storage of spent nuclear fuel. *See id.* at 311.

The NRC Director's Decision became final on December 13, 2002, following the expiration of the 25-day period in which the Commission can review *sua sponte* Director's Decisions.

4. Petition For Review.

On February 11, 2003, Riverkeeper filed its petition for review before this Court seeking to reverse the Director's Decision denying the 2.206 Petition, "on the grounds that it violates the Atomic Energy Act as amended and constitutes an abuse of the Commission's discretion and 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.'"⁴

⁴ Riverkeeper filed an Amended Petition for Review on February 12, 2003.

ARGUMENT

1. The NRC's Refusal To Institute Discretionary Enforcement Proceedings is Presumptively Unreviewable

A. *Presumption of Unreviewability Established In Heckler v. Chaney.*

The Administrative Procedure Act ("APA") embodies a "basic presumption of judicial review." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967). However, "under [5 U.S.C.] § 701(a)(2) agency action is not subject to judicial review 'to the extent that' such action 'is committed to agency discretion by law.'" *Lincoln v. Vigil*, 508 U.S. 182, 190-91 (1993) (citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984)).

In its seminal *Heckler v. Chaney* decision the Supreme Court established a presumption that an agency's refusal to exercise its enforcement authority is not judicially reviewable, but rather is action "committed to agency discretion by law." 470 U.S. at 835. The Court determined that 5 U.S.C. § 701(a)(2) precludes judicial review if the agency's governing statute is drawn in such a way that a court is without a meaningful standard against which to judge the agency's exercise of enforcement discretion. *Id.* at 830; *see also Lincoln v. Vigil*, 508 U.S. 182, 191 (1993). The Court recognized that an agency's decision to refuse enforcement involves a complex balance of factors which are peculiarly within the agency's expertise. *Id.* at 831-32. The agency is best suited to "not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.* at 831.

B. The NRC's Denial Of A Request For Enforcement Action Is Unreviewable.

After *Heckler v. Chaney*, every court of appeals that has been asked to review an NRC denial of a 2.206 petition (*i.e.*, the First, Seventh and District of Columbia Circuits) has found the denial unreviewable.

In *Safe Energy Coalition of Mich. v. NRC*, the D.C. Circuit held that the "section 2.206 request falls squarely within the category of 'enforcement' actions held presumptively unreviewable by [*Heckler v. Chaney*]." 866 F.2d at 1477; accord *Nuclear Info. Resource Service v. NRC*, 969 F.2d at 1178.⁵ The court said that the "procedural limitations cited by petitioners do not provide any guidance to, let alone constrain, the agency in its efforts to 'protect health'..." and furthermore, "[t]hey do not supply any criteria by which a reviewing court can measure the NRC's refusal to enforce safety regulations. . . ." *Id.* at 1478. Here, too, there is no procedural or substantive legal standard against which this Court can review the NRC's 2.206 decision on security measures at Indian Point.

The First Circuit, following *Heckler v. Chaney*, has also consistently held NRC denials of 2.206 petitions unreviewable. In *Mass. Pub. Interest Research Group, v. NRC*, for example, the NRC had rejected an enforcement action proposed by the petitioner, and instead adopted its own enforcement scheme to deal with perceived problems at the Pilgrim nuclear reactor. The court noted:

The NRC has chosen one option among its available enforcement alternatives. On the one hand, it has denied petitioners' request to issue an order to show cause, while on the other hand, it has deferred the restart of the Pilgrim plant

⁵ In *NIRS* the D.C. Circuit made an important distinction in the use of 2.206 petitions. The court held that where a 2.206 petition is used as 'an integral part of the licensing process' then the presumption of unreviewability may not apply. 969 F.2d at 1178. However, in reaching this decision the court also clearly stated that when, as in the case before this Court, the 2.206 petition is used as a "vehicle for entertaining requests for enforcement actions. . . the petitions do fall within the unreviewability presumption of *Heckler v. Chaney*." *Id.*

until [the licensee] corrects identified deficiencies to the satisfaction of the agency. This choice reflects the very sort of agency decisionmaking which [*Heckler v. Chaney*] cited in support of the presumption of immunity from judicial review.

852 F.2d at 19. In the instant case, as in *Mass. PIRG*, the NRC has determined that the enforcement actions proposed by the Petitioner should be denied and instead has chosen to continue to employ its own plan of enforcement following an extensive and expansive, ongoing review to address the important issue of security at nuclear power facilities.

The Seventh Circuit has addressed the reviewability of 2.206 petitions both before and after *Heckler v. Chaney*. Prior to *Chaney*, the court held that the NRC was entitled to great deference in its enforcement activities. See *Rockford League of Women Voters v. NRC*, 679 F.2d 1218 (7th Cir. 1982). The court's subsequent decision in *Arnow v. NRC* determined that denials of 2.206 petitions fit squarely within the presumption of unreviewability established in *Heckler v. Chaney*.

In *Rockford League* the court examined the denial of a 2.206 petition to determine whether the denial should be afforded deference. The court determined that 10 C.F.R. § 2.206 "permits but does not direct the NRC to revoke a license or permit, and the implementing regulations are likewise permissive rather than mandatory. . . [t]he only thing the Director is required to do is, if he decides not to institute a revocation proceeding, to notify the requesting party in writing of his decision and of the reasons for it--which he did." *Id.* at 1222. The court pointed to the fact that "Government agencies have limited resources to perform their appointed tasks" and as such, "[t]he courts cannot tell them how to allocate those resources so as to get the most value out of them." *Id.* at 1222. The Court concluded by summing up the role of the court in analyzing a discretionary enforcement decision made by the NRC stating "[o]ur job is to assure that the Commission complies with the specific statutes and regulations applicable to its

regulatory activities.... [b]eyond that our power to review an agency's decision not to initiate a proceeding is extremely limited." *Id.* at 1223.

After *Heckler v. Chaney* the Seventh Circuit revisited the reviewability issue in *Arnov v. NRC*. There, the court expressly followed the *Chaney* rationale and determined that there is no evidence of any Congressional intent to rebut the presumption of unreviewability as it pertains to 2.206 petitions. See 868 F.2d at 228-29. The court agreed with the First Circuit's decision in *Mass. PIRG*, and stated that there is no guidance for a court to apply in reviewing the discretionary decision of the NRC to refuse enforcement action in a particular case. *Id.* at 233. The court analyzed the AEA and stated unequivocally that "[u]pon review of 'the overall structure of the [AEA],'. . . we believe it is apparent that Congress has entrusted the NRC with wide, unreviewable discretion in the area of agency enforcement. . . [a]ccordingly, the presumption against reviewability of agency nonenforcement decisions is not rebutted here." *Id.* at (citations omitted).

The 2.206 decisions of the various courts of appeals, as discussed above, establish that the NRC's denial of Riverkeeper's 2.206 request for specific enforcement relief is unreviewable. There may be enforcement-type cases where *Heckler v. Chaney's* presumption of unreviewability can be rebutted due to the existence of legal standards governing agency enforcement decisions. But NRC 2.206 decisions decidedly do not fall in that category, as three courts of appeals have held. Congress has granted the NRC broad, unreviewable discretion in the area of agency enforcement.

C. *Second Circuit Treatment Of The Presumption Of Unreviewability Of An Agency's Refusal To Exercise Its Enforcement Authority.*

This case presents this Court with its first opportunity to rule on the precise question whether the NRC's denial of a 2.206 petition should be afforded the presumption of unreviewability established in *Heckler v. Chaney*. We urge this Court to follow the other Circuits

on this issue. This Court has already recognized the broad discretion afforded the NRC in the enforcement area, and has aggressively applied *Heckler v. Chaney* in a variety of non-NRC enforcement contexts.

This Court has once before considered an NRC denial of a 2.206 decision, in *Rockland County v. NRC*, 709 F.2d 766 (2nd Cir. 1983), *cert. denied*, 464 U.S. 993 (1993), but that case came prior to *Heckler v. Chaney*. In *Rockland County*, this Court upheld an NRC 2.206 decision that had refused a request to shut down or restrict operations at the Indian Point nuclear facility. The enforcement request arose out of concerns about emergency planning. Petitioners asserted that the NRC had acted arbitrarily and capriciously in refusing to take enforcement action. *See id.* at 775. This Court disagreed, stating that it could not find any violation of any statute in the AEA or the regulations promulgated by the Commission. *Id.* at 776. In determining whether the NRC's decision was reasonable this Court was guided by the premise that "[o]ur review is deferential because the Commission and its staff have special expertise and a wide range of experience in nuclear power plant operation and safety." *Id.* at 776. This Court stated that "Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety," such that this Court would not "unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process." *Id.* at 776 (citation omitted). Even though this decision preceded *Heckler v. Chaney*, it established that great deference should be given to the NRC as to whether it will take enforcement action, and if so, how.

After *Chaney* this Court expanded its *Rockland County* ruling and have applied *Chaney's* presumption of unreviewability to deny judicial review altogether when some agencies have denied enforcement petitions. *See, e.g., Lunney v. U.S.*, 319 F.3d 550, 558 (2nd Cir. 2003); *accord Christianson v. Hauptman*, 991 F.2d 59, 62-63 (2nd Cir. 1993); *Marlow v. U.S.*

Dept. of Educ., 820 F.2d 581, 582-83 (2nd Cir. 1987); *Doherty v. Meese*, 808 F.2d 938, 943-44 (2nd Cir. 1986); *Dina v. Attorney Gen. of U.S.*, 793 F.2d 473, 474-76 (2nd Cir. 1986).

In *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 330-31 (2nd Cir. 2003), this Court determined that once a statute is determined to have afforded an agency discretion in determining whether to engage its formal enforcement mechanism, the presumption of unreviewability applies. The Court pointed to the agencies' near plenary control over decisions whether to bring prosecutorial-like enforcement actions:

Allowing parties outside an agency to trigger its enforcement mechanism would invariably entangle reviewing courts in its internal operations and would involve technical and prudential judgments lying largely outside the expertise of courts. By placing the initiation of enforcement procedures within the agency, Congress left the decision of when and whether they are warranted to the institutional actor best equipped to make it.

Id. at 332.

In *Padavan v. U.S.*, 82 F.3d 23 (2nd Cir. 1996), this Court determined that decisions relating to immigration control were discretionary matters left to the Immigration and Naturalization Service ("INS"), and that the APA precluded judicial review of matters committed to agency discretion by law. *Id.* at 29. The Court also concluded that a determination of the amount of resources to be expended by an agency, and a determination of priorities for the expenditure of such resources were strictly discretionary matters, and thus the agency's decision not to pursue enforcement was a decision that was presumptively unreviewable. *Id.* at 29.

These *Chaney*-driven rulings by this Court pertain directly here. This Court ought not attempt to second guess the NRC's decision on how best to protect the nation's nuclear power reactors, including Indian Point, against terrorist attack. Deference to the NRC in the enforcement area ensures that the choice of how to allocate resources to protect public health and safety remains in the hands of the agency to which Congress assigned the task.

D. The NRC's Denial Of The Petitioner's 2.206 Petition Does Not Constitute An Abdication Of Its Statutory Responsibilities.

Attempting to invoke a possible exception to unreviewability, noted in *Heckler v.*

Chaney, 470 U.S. at 833 n.4, Riverkeeper states in its Petition for Review that the NRC's denial of Riverkeeper's 2.206 petition amounts to "a complete abdication of its statutory duty." See Amended Petition at 1. But nothing in the NRC's 2.206 decision suggests that the agency is pursuing a general policy of ignoring the threat of terrorism or nuclear emergencies. The Commission's commitment to a practical, effective response to the terrorist threat is obvious from the face of the 2.206 decision (and from the many post-9/11 security actions the NRC has taken). The Commission has devoted a tremendous amount of attention to security concerns, with particular focus on nuclear power reactor facilities. The Commission has issued numerous orders, and threat advisories, some within days of September 11, 2001.⁶ The Commission continues to review security vulnerabilities and the adequacy of security measures already implemented, and will issue further orders and threat advisories as appropriate if the Commission determines such action is necessary to ensure the protection of public health and safety.

Riverkeeper's disagreement over the terms of NRC enforcement actions hardly amounts to a valid claim of "abdication." Courts that have considered the "abdication" exception to

⁶ Following the attacks of September 11, 2001, the NRC issued numerous Threat Advisories, and issued orders on February 25, 2002, to all power reactors requiring certain interim compensatory security measures be implemented in addition to those requirements contained in the regulations. See 67 Fed. Reg. 9792. Additional Orders were issued to power reactor licensees on April 29, 2003, dealing with access authorization requirements, fitness-for-duty enhancements, and a revision to the design basis threat. See 68 Fed. Reg. 24,514; 68 Fed. Reg. 24,510; 68 Fed. Reg. 24,517. While the specifics of these orders cannot be released, they did result in increased patrols, augmented security forces, additional physical barriers, greater vehicle check stand-off distance, greater coordination with local law enforcement and military authorities, and more restrictive site access controls. The orders also required that licensees evaluate site vulnerabilities and develop response strategies to deal with various threats.

unreviewability have held that the exception cannot be invoked by a single incident, or a claim that the agency has not taken sufficient action deemed necessary by an outside party. In a case involving Securities and Exchange Commission enforcement policy, for example, the D.C. Circuit rejected the claim that the SEC had “abdicated” its statutory responsibilities merely because it took action different from what petitioners preferred:

[T]he agency has merely chosen thus far to enforce it informally rather than formally. So far, it appears, the Commission has found that sufficient to induce compliance with the law. That the petitioners prefer a different means of enforcement is irrelevant, for the very reason underlying the decision in *Chaney*: the agency alone, and neither a private party nor a court, is charged with the allocation of enforcement resources.

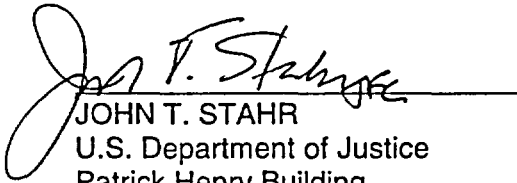
Block v. S.E.C., 50 F.3d 1078, 1084 (D.C. Cir. 1995); see also *Ass’n of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 283 F.3d 339, 344 (D.C. Cir. 2002). Likewise, the Fifth Circuit denied a claim of “abdication” of duty, stating that “[r]eal or perceived *inadequate enforcement*. . . does not constitute a reviewable abdication of duty.” *State of Texas v. U.S.*, 106 F.3d 661, 667 (5th Cir. 1997) (emphasis added). Where (as in the present case) an agency takes action following the receipt of a request for enforcement, such action belies a claim of abdication of authority. See generally *Sierra Club v. Larson*, 882 F.2d 128, 133 (4th Cir. 1989). That the actions taken by the agency do not satisfy a particular petition does not show an abdication of authority by an agency deciding not to pursue enforcement. *Id.*

Here, the many actions taken by the NRC exercising its enforcement powers to issue immediately effective enforcement orders to its licensees for the specific purpose of imposing enhanced security requirements refutes any “abdication” claim. See note 6, *supra*. As discussed above, the NRC has taken considerable action to protect against terrorism, albeit not every step advocated by Riverkeeper. The fact that the NRC declined to employ the methodology and specific type of security enhancements that Riverkeeper proposes shows

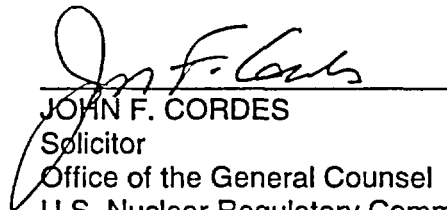
policy disagreement but not "abdication" in any meaningful sense. Disagreement is not sufficient to rebut the presumption of unreviewability established by *Heckler v. Chaney*.


CONCLUSION

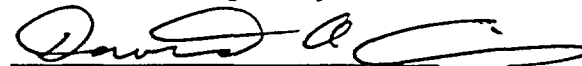
This lawsuit amounts to a dispute over the type and degree of enforcement action the NRC should take at Indian Point. As such, it reflects the classic *Heckler v. Chaney*-type case and warrants dismissal. This Court should grant our motion to dismiss Riverkeeper's petition for review.⁷


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Respectfully submitted,


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June 3, 2003


⁷ Because three Circuits have found NRC 2.206 decisions unreviewable under *Heckler v. Chaney* (there are no decisions going the other way), and because this Court's own *Heckler v. Chaney* jurisprudence shows its unwillingness to review agency rejections of enforcement petitions, we believe that full briefing of this case is unnecessary and that this Court can decide this case on the basis of a motion to dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2003, copies of the foregoing Federal Respondents' Motion To Dismiss was served by mail, postage prepaid, upon the following counsel:

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EXHIBIT A

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF NUCLEAR REACTOR REGULATION

Samuel J. Collins, Director

In the Matter of	)	Docket Nos. 50-003, 50-247,
	)	and 50-286
ENTERGY NUCLEAR OPERATIONS, INC.	)	License Nos. DPR-5, DPR-26,
	)	and DPR-64
(Indian Point Nuclear Generating Unit	)	(10 CFR 2.206)
Nos. 1, 2, and 3))	

DIRECTOR'S DECISION UNDER 10 CFR 2.206

I. Introduction

By letter dated November 8, 2001, as supplemented on December 20, 2001, Riverkeeper, Inc., et al. filed a Petition pursuant to Title 10 of the *Code of Federal Regulations*, Section 2.206 (10 CFR 2.206). The Petitioners requested that the U.S. Nuclear Regulatory Commission (NRC) take the following actions: (1) order the licensee to suspend operations, revoke the operating license, or adopt other measures resulting in a temporary shutdown of the Indian Point Nuclear Generating Unit Nos. 2 and 3 (IP2 and 3); (2) order the licensee to conduct a full review of the facility's vulnerabilities, security measures, and evacuation plans; (3) require the licensee to provide information documenting the existing and readily attainable security measures which protect the IP facility against land, water, and airborne terrorist attacks; (4) immediately modify the IP2 and 3 operating licenses to mandate certain specified security measures sufficient to protect the facility; and (5) order the revision of the licensee's emergency response plan and Westchester County's Radiological Emergency Response Plan (RERP) to account for possible terrorist attacks and prepare a comprehensive response to multiple, simultaneous attacks in the region, which could impair the efficient evacuation of the

area. In addition, the Petitioners requested that the NRC take prompt action to permanently retire the facility if, after conducting a full review of the facility's vulnerabilities, security measures, and evacuation plans, the NRC finds that the IP facility cannot be adequately protected against terrorist threats. Further, separately from the above issues, the Petitioners requested that the NRC order the licensee to undertake the immediate conversion of the current water-cooled spent fuel storage system to a dry cask system. The bases for the requests are that (1) the IP facility is a plausible target of future terrorist actions, (2) actual threats against nuclear power plants have been documented, (3) IP is currently vulnerable to a catastrophic terrorist attack, (4) a terrorist attack on IP2 and 3 would have significant public health, environmental, and economic impacts, and (5) the Westchester County's RERP is inadequate because it is based on erroneous assumptions.

In a letter dated December 20, 2001, the NRC informed the Petitioners that their request for a full review of the facility's vulnerabilities, security measures, and evacuation plans was, in effect, partially granted, because the NRC had already taken action to require licensees to enhance security and the Commission had directed the staff to undertake a comprehensive review of plant security. In light of the defense-in-depth concept incorporated into the facility's design and the heightened security measures implemented in response to the events of September 11, 2001, the NRC did not consider the immediate closure of IP2 and 3 to be necessary to provide adequate protection of the public health and safety.

In its December 20, 2001, letter, the NRC told the Petitioners that a public meeting or telephone conference with the NRR Petition Review Board was not necessary or appropriate at the time since the Petitioners' request was already being treated as a 2.206 Petition and because of the possible sensitive nature of the information. Under normal circumstances, the NRC would follow Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions," when reviewing requests for enforcement action; however, since the Petition involved

possible sensitive information, the NRC deferred application of certain public aspects of the MD 8.11 process pending further developments of the NRC's security review.

On December 20, 2001, the Petitioners provided a declaration from Dr. Gordon Thompson dated December 20, 2001, and requested that the declaration be included as a supplement to their Petition. The NRC treated the declaration as a supplement to the Petition. Although the NRC had initially withheld the Petition from public distribution pending Commission guidance about public dissemination of potential security information, the NRC has now determined that the Petition can be made publicly available. Therefore, the documents are available in the NRC's Agencywide Documents Access and Management System (ADAMS) for inspection at the Commission's Public Document Room (PDR), located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records are also accessible from the ADAMS Public Electronic Reading Room on the NRC Web site <http://www.nrc.gov/reading-rm/adams.html>. Persons who do not have access to ADAMS or have problems in accessing the documents located in ADAMS should contact the NRC PDR reference staff by telephone at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov.

Entergy Nuclear Operations, Inc. (the licensee), responded to the Petition on February 11, 2002, and the staff considered the information in reviewing the Petition.

The NRC sent a copy of the proposed Director's Decision to the Petitioners and to the licensee for comment on May 16, 2002. The Petitioners responded with comments on August 9, 2002. The licensee did not provide comments. The comments and the NRC staff's response to them are enclosed with the final Director's Decision.

II. Discussion

Full Review of Vulnerabilities and Security Measures

In the Petition, as supplemented, the Petitioners requested that the NRC order the licensee to conduct a full review of the facility's vulnerabilities and security measures. The Petitioners stated that the reactor, spent fuel, control rooms, and electrical switching were vulnerable to terrorist attack. The Petitioners' request was based on the following assertions: (1) IP2 and 3 are a plausible target because of the population density of the surrounding area and the proximity to New York City, (2) news releases have documented threats against nuclear facilities, (3) an operational plant is more vulnerable, (4) an attack could damage cooling to the spent fuel pools (SFPs) and/or drain the pools, leading to fuel cladding oxidation, fire, and release of radioactive materials, and (5) the design-basis threat did not consider a terrorist attack. The Petitioners also stated that the facility is not currently equipped to defend itself from terrorist attacks, the licensee has a poor record in security and emergency preparedness, and nuclear industry security forces have repeatedly failed to repel mock attacks. The Petitioners also believe that an attack on an operating reactor would force plant operators to face competing interests between safe operations and physical security.

Staff's Response

The Petitioners' request for a review of vulnerabilities and security measures has been partially granted based on actions initiated by the NRC following the events of September 11, 2001. The NRC concludes that Indian Point has sufficient security measures in place to defend itself from a broad spectrum of potential terrorist attacks. The basis for these conclusions is discussed below.

The NRC and its licensees have dealt with the issue of protection of licensed facilities against sabotage or attack for a number of years. Security against sabotage has been an important part of the NRC's regulatory activities, with defense-in-depth as the guiding design

and operating principle. NRC regulations ensure that nuclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

The NRC requirements for the defense of nuclear power plants are defined, in part, by the "design basis threat" (DBT). The DBT is specified in general terms in 10 CFR 73.1 and in greater detail in sensitive documents. The DBT was prepared by safeguards experts on the basis of information from the Department of Energy and the intelligence community about terrorist-related information both abroad and in the United States. The DBT is a reasonable characterization of an adversary force against which nuclear power plant licensees must design their physical protection systems and response strategies.

In 10 CFR Part 73, "Physical Protection of Plants and Materials," the NRC provides detailed requirements designed to protect nuclear power plants against acts of radiological sabotage, prevent the theft of special nuclear material, and protect safeguards information against unauthorized release. The requirements of Part 73 are summarized as follows:

1. The licensee permits only authorized activities and conditions within established protected areas, material access areas, and vital areas by using controls and procedures, defined boundaries, detection, communication and surveillance subsystems, and by establishing schedules of authorized operations.
2. The licensee prevents unauthorized access of persons, vehicles and objects into protected and vital areas by using detection and barrier systems.
3. The licensee provides for authorized access and assures detection of and response to unauthorized penetrations of the protected area.

4. The licensee permits only authorized control and movement of special nuclear material.
5. The licensee provides response capabilities to assure that NRC requirements are achieved.
6. The licensee maintains a well-equipped and highly trained security organization.
7. The licensee installs physical barriers to protect vital equipment and material.
8. The licensee installs detection, surveillance, and alarm systems capable of sensing unauthorized penetrations of isolation zones and ensuring a prompt response action.
9. The licensee provides access authorization (e.g., background checks, routine worker screening, badging, etc.) programs and procedures.
10. The licensee ensures that all guards and armed response individuals have the ability to communicate with a continuously manned alarm station.
11. The licensee establishes an effective testing and maintenance program to verify that all physical barriers, and detection and alarm systems are capable of meeting NRC requirements.

Licensees are also required to develop specific physical security plans (PSPs) and submit these plans to the NRC for approval before implementing them. The NRC conducts periodic inspections of the licensees' security programs. Performance testing of physical security has been conducted by the NRC staff through Operational Safeguards Response Evaluations. In addition, the licensees are required to establish a liaison with local law enforcement organizations for added assistance in the event of an attack.

Shortly after September 11, 2001, the NRC recognized the need to reexamine the basic assumptions underlying the current nuclear facility security and safeguards programs. Chairman Richard A. Meserve, with the full support of the Commission, directed the staff to undertake a comprehensive review of the NRC's security regulations and programs. This is an ongoing review and as results become available, they will be evaluated and, if appropriate,

incorporated into NRC's regulatory processes. The review includes consultation with the Office of Homeland Security, the Federal Bureau of Investigation (FBI), the Departments of Transportation and Energy, and others. The NRC's participation with these agencies allows the NRC to communicate its actions to other Federal agencies, ensuring an appropriate and balanced response throughout the nation's entire critical energy infrastructure.

The attacks of September 11, 2001, were unprecedented and required the NRC and its licensees to reevaluate the type of assault that might be mounted against a nuclear power plant. As a result, on February 25, 2002, the NRC issued Orders to all operating power reactor facilities to require that certain interim compensatory security measures be taken beyond those called for by current regulations. Although licensee responses to the prior NRC Threat and Safeguards Advisories provided reasonable assurance of adequate protection of public health and safety, the NRC determined that certain compensatory measures were prudent to address the current threat environment in a consistent manner throughout the nuclear reactor industry. The Orders formalized a series of steps that nuclear power plant licensees had been advised to take by the NRC in the aftermath of the terrorist attacks on September 11 and added certain security enhancements. For security reasons, the details of these interim compensatory measures cannot be made public. Some of the specific measures implemented by the licensees in response to the advisories and interim compensatory measures included increased patrols, augmented security forces and capabilities, additional security posts, installation of additional physical barriers, vehicle checks at greater stand-off distances, enhanced coordination with law enforcement and military authorities and more restrictive site access controls for all personnel. The Orders also directed licensees to evaluate and address potential vulnerabilities to maintain or restore cooling to the core, containment, and spent fuel pool and to develop specific guidance and strategies to respond to an event resulting in damage to large areas of the plant due to explosions or fires. These strategies are intended to help identify and

utilize any remaining equipment and capabilities to maintain or restore core, containment, and spent fuel pool cooling, including both onsite and offsite resources. These requirements will remain in effect until the NRC notifies licensees that the threat environment has significantly changed or until the NRC determines, as a result of the ongoing comprehensive reevaluation of current safeguards and security programs, that other changes are needed.

The Petitioners are correct that the DBT did not consider a terrorist attack such as occurred on September 11, 2001. As part of the comprehensive review of safeguards vulnerabilities, the NRC will reexamine the DBT and modify it as appropriate. As in the past, the NRC will coordinate its evaluation with various other Government agencies and discuss resource commitments with the military, the States, and local law enforcement. If a credible vulnerability is identified that is not addressed by another Federal agency, the NRC staff will consider additional physical protection, material control, and other appropriate requirements.

Although the NRC cannot rule out the possibility of future terrorist activity directed at a licensee's site before implementing any further enhancements to its safeguards programs, the NRC believes that these facilities can continue to operate safely.

The staff also recognizes that design and construction of commercial nuclear power plants could contribute to their survivability in the event of an attack not considered by the current design-basis threat, such as an aircraft impact. Nuclear power plant design is based on defense-in-depth principles, and includes many features to protect public health and safety. For example, reinforced containment buildings and redundant safety systems would help trained operators prevent or limit the release of radioactive material in the event of a terrorist attack. In addition, NRC requirements for coping with fires and station blackout (loss of offsite and onsite power) provide added capability to bring the plant to safe shutdown conditions assuming such aspects as loss of the control room or failure of the emergency diesel generators.

The NRC requires careful background checks (to minimize the risk of insider assistance) and facility access controls, delay barriers, and intrusion detection systems (to detect potential attackers). The NRC also requires licensees to be able to respond with force to a group of armed attackers, using protective strategies involving layers of defense. Therefore, the NRC believes that the facilities are adequate to withstand many of the challenges from safety or safeguards events, such as armed assaults.

In summary, a robust security program existed at IP prior to the events of September 11, 2001. Since September 11, the NRC has initiated a review of nuclear facility security and safeguards programs, and has taken action to enhance security in the interim.

Full Review of Radiological Emergency Preparedness and Evacuation Planning

In its December 20 supplement, the Petitioners cited a prior NRC study prepared by Sandia National Laboratory that discussed source terms and potential radiological consequences of an attack on IP. The Petitioners were concerned about the economic and environmental consequences of an attack causing a massive release of radioactive materials.

Regarding emergency preparedness planning, the Petitioners believe that the IP onsite and offsite emergency plans did not envision an act of terrorism of the magnitude seen on September 11, 2001. Additionally, the Petitioners stated that the Westchester County RERP is inadequate and does not consider the possibility of multiple simultaneous attacks on vital infrastructure relied on in the current plan.

Staff's Response

The NRC finds that the emergency preparedness plans and evacuation planning at IP2 and 3 are appropriate to use in response to a radiological emergency, including a release caused by a terrorist attack. The basis for this conclusion is discussed below.

The overall objective of emergency response planning is to minimize the dose to the public for a spectrum of accidents that could produce offsite doses in excess of protective

action guidelines. No single accident sequence should be isolated as the one for which to plan because each accident could have different consequences, both in nature and degree.

Emergency plans are intended to be broad and flexible enough to respond to a wide spectrum of situations, including various initiating events, sources of release, types of nuclides released, and magnitude, timing, or duration of release.

The NRC and the Federal Emergency Management Agency (FEMA) are the two Federal agencies responsible for evaluating emergency preparedness at and around nuclear power plants. The NRC is responsible for evaluating the adequacy of onsite emergency plans developed by the utility, while FEMA is responsible for assessing the adequacy of offsite (State and local) radiological emergency planning and preparedness activities. The NRC requires licensees to have detailed procedures for responding to events, making timely notifications to appropriate authorities, and providing accurate radiological information. For the offsite plans, the NRC relies on FEMA's findings in determining whether there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The licensee, local and county emergency response officials, and State emergency management officials discuss and agree on the facility's emergency response plan.

NRC regulations require the establishment of a plume exposure pathway emergency planning zone (EPZ) about 10 miles in radius and an ingestion exposure pathway EPZ about 50 miles in radius around each nuclear power plant site.

In the unlikely event of a severe reactor accident with offsite consequences, NRC guidance calls for the prompt evacuation of the population within a 2-mile radius of the plant and about 5 miles in the downwind direction. The guidance states that these protective actions would be expanded, as necessary, based on further assessment of plant conditions, dose assessment, and field monitoring information. At longer distances, shelter is usually the appropriate protective action, followed by relocation of segments of the population, if warranted

by the results and analysis of radiological measurements taken in the field. The main protective action planned for the 50-mile EPZ is protection of the public from the ingestion of contaminated food and water. It is considered extremely unlikely that evacuation would be required at a distance of 50 miles even after the most severe accident. The planning established for the 10-mile and 50-mile EPZs, the decreasing consequences and increasing time available for taking protective actions as the distance from the plant increases, and the availability of monitoring data on which to base protective action decisions provide assurance that appropriate protective actions would be taken to protect the population within 50 miles of a site.

NRC regulations also require that the applicant for a nuclear power reactor operating license provide an analysis of the time required to evacuate and take other protective actions within the plume exposure pathway EPZ. This analysis is referred to as the "evacuation time estimate" (ETE). There are no preset minimum evacuation times that a nuclear power plant site must meet. However, the NRC expects that the ETEs for a site are a reasonably accurate reflection of the time it would take to evacuate the site environs under normal and adverse conditions. ETEs are mostly used to identify potential traffic bottlenecks so that appropriate traffic control plans can be developed. Nuclear power reactor licensees are expected to review and revise their ETEs for their sites. The revisions must take into account changes in population, road capacities, potential traffic impediments, and other factors affecting the ETEs. The ETEs are assessment tools used by decision makers for determining whether evacuation is the preferred protective action option for the general public under specific accident and offsite conditions.

On August 1, 2001, the NRC issued Regulatory Issues Summary (RIS) 2001-16, "Update of Evacuation Time Estimates," to all holders of operating licenses for nuclear power

plants. In this RIS, the NRC alerted licensees of the possible need to update ETEs as a result of the 2000 Census. The licensee is currently preparing a new ETE report for IP2 and 3.

FEMA has established the Radiological Emergency Preparedness Program to (1) ensure that the health and safety of citizens living around commercial nuclear power plants can be adequately protected in the event of a nuclear power plant accident, (2) inform and educate the public about radiological emergency preparedness, and (3) make findings and determinations as to the adequacy of State and local plans and the capability of State and local governments to effectively implement these plans and preparedness measures. Federal agencies also have plans in place to coordinate their response activities and share their resources in support of State and local officials during an emergency. Coordination of activities includes joint planning and training sessions and exercise participation. Emergency plans are continually improved based on experience gained through plan implementation and as a result of exercises, drills, and actual events.

In late January 2002, the State of New York issued its annual letter of certification to FEMA. By this letter, the State informed FEMA that specific preparedness activities have been completed including training and the updating of State and local plans. However, the updating of State and local plans is an ongoing activity. The NRC staff understands that the State and counties have addressed the adequacy of evacuation plans through their required review process in preparation for the exercise conducted in September 2002 and, in doing so, continue to review evacuation-related procedures in light of changes in demographics and conditions. FEMA's specific findings on the exercise will be issued later this year, but the preliminary assessment indicates that the offsite emergency plans are adequate to protect public health and safety.

The Petitioners refer to the 1982 Sandia National Laboratory (SNL) Report, "Calculation of Reactor Accident Consequences" (CRAC-2 Report), and cite this report as a basis for

concern that a terrorist attack could result in a massive release of radioactive materials. The reactor siting studies in the CRAC-2 Report were performed as part of research on the sensitivity of various plant siting parameters. The studies used generic postulated releases of radioactivity from a spectrum of severe (core melt) accidents, independent of the probabilities of the event occurring or the impact of mitigation mechanisms. The studies were never intended to be realistic assessments of accident consequences. The estimated deaths and injuries resulted from assuming the most adverse condition for each parameter in the analytical code. In the cited studies, the number of resulting deaths and injuries also reflected the assumption that no protective actions were taken for the first 24 hours. The studies did not, and were never intended to, reflect reality or serve as a basis for emergency planning. The CRAC-2 Report analyses used more simplistic models than current technologies. The two basic conclusions from the SNL siting studies were that the mean estimated number of health effects from the assumed releases for all reactor sites varied by up to more than 4 orders of magnitude and that the financial costs of the releases were dominated by clean-up costs and replacement power costs. The SNL studies provided a useful measure to compare sites, not to analyze plant-specific accident consequences.

Regarding the Petitioners' assertion that the emergency plans do not contemplate multiple attacks on the infrastructure (i.e., roads, bridges, transportation, communications, etc.), the NRC finds that the existing emergency response plans allow considerable flexibility to respond to a wide variety of adverse conditions, including the results of a terrorist attack. As previously discussed in this Director's Decision, the NRC considers that commercial nuclear power plants have sufficient security measures in place to defend against a broad spectrum of potential terrorist threats, thereby precluding the release of radioactive material to the environment. If a terrorist attack inflicted damage on a nuclear plant, the redundant design features inherent in the plant, and the high level of training accorded the plant staff, would likely

result in actions being taken by the plant staff to prevent or minimize the release of radioactive material. In the unlikely event of a significant release of radioactive material, for whatever reason, the emergency response plans provide for protective actions for the surrounding population. While the emergency response plans provide alternative actions in the event of some failures of the local infrastructure, there are limits to the degree to which it is reasonable to assume that infrastructure components are unavailable. The responsibility to preclude the large scale and resource intensive effort that would be required for a successful terrorist attack on multiple targets, rests with agencies of the Federal government. The NRC considers the actions of various intelligence and law enforcement agencies, combined with the actions of the Department of Defense, to provide assurance that a successful large scale terrorist attack is unlikely. Additionally, the NRC advisories and the Orders issued since September 11, 2001, directed licensees to take specific actions to improve existing emergency response plans, including heightened coordination with local, State, and Federal authorities. In summary, the NRC concludes that emergency preparedness plans and evacuation planning are routinely revised and updated, and are appropriate to use in response to a radiological emergency, including a release caused by a terrorist attack.

Information about Security Measures to Protect Against Terrorist Attacks

The Petitioners requested that the NRC require the licensee to provide information documenting the existing and readily attainable security measures which provide IP with protection against land, water, and airborne terrorist attacks. This information should provide sufficient basis for the NRC to determine that physical barriers, intrusion alarms, and other measures are in place or constructed and are sufficient to meet realistically expected threats.

Staff's Response

As previously discussed, the NRC and its licensees have taken a number of steps since September 11, 2001, to increase security at NRC-licensed facilities, including safeguards advisories. At IP, the licensee's security force was augmented by the New York State Police and the National Guard (including Hudson River patrols) and local law enforcement personnel.

The NRC issued Orders on February 25, 2002, to all commercial nuclear power plants to implement interim compensatory security measures for the current threat environment. Some of the requirements made mandatory by the Orders formalized the security measures that NRC licensees had taken in response to advisories issued by the NRC in the aftermath of the September 11 terrorist attacks. The Orders also imposed additional security enhancements, which have emerged based on the NRC's assessment of the current threat environment and its ongoing security review. The requirements will remain in effect until the NRC determines that the level of threat has diminished, or that other security changes are needed. The specific actions are sensitive, but include increased patrols, augmented security forces and capabilities, additional security posts, installation of additional physical barriers, vehicle checks at greater stand-off distances, enhanced coordination with law enforcement and military authorities and more restrictive site access controls for all personnel. The Orders also require additional security measures pertaining to the owner-controlled land outside of the plants' protected areas. Currently, the New York State Naval Militia provides security measures to detect and deter watercraft access from entering the exclusion area around the IP plants.

In its report on security, the State of New York Office of Public Security (OPS) provided recommendations to enhance security at IP. Many of the measures suggested have been implemented by the licensee and others are currently under advisement. The measures are recommendations by OPS to further enhance security and are not requirements in current NRC regulations. In response to the NRC Orders of February 25, 2002, the licensee provided

information, that taken in conjunction with other sources of security information, resulted in the NRC finding the licensee's security posture to be appropriate under the current circumstances.

The Petitioners additionally seek specific details of security measures in place to respond to the potential for terrorist attacks. The NRC's policy is to withhold safeguards information from the public. Therefore, this request is denied.

Mandate Security Measures Sufficient to Protect the Facility

The Petitioners requested the NRC to mandate, at a minimum, the following security measures sufficient to protect the facility:

1. Obtainment of a permanent no-fly zone from the Federal Aviation Administration (FAA) in the air space within 10-nautical miles of the IP facility.
2. A defense and security system sufficient to protect and defend the no-fly zone.
3. A defense and security system sufficient to protect the entire facility, including the containment and spent fuel storage buildings, control room and electrical equipment.

Staff's Response

In the aftermath of September 11, 2001, the Federal government took a number of steps to improve aviation security and minimize the threat of terrorists using airplanes to damage facilities critical to our nation's infrastructure. The Commission views that the efforts associated with protecting our nation from terrorist attacks by air should be directed toward enhancing security at airports and on airplanes. Thus, the Commission endorses the prompt response by Congress to strengthen aviation security under the Aviation and Transportation Security Act of 2001, because this legislation provides for improved protection against air attacks on all industrial facilities, both nuclear and non-nuclear. The NRC further supports the steps taken by the FAA to improve aircraft security, including enhanced passenger and baggage screening, strengthening of cockpit doors, and the Air Marshal program. The U.S. intelligence community and various Federal law enforcement agencies have also increased

efforts to identify potential terrorists and prevent potential attacks before they occur. For example, the FAA and Department of Defense have acted more than once to protect airspace above nuclear power plants from what were thought to be credible threats against certain specific sites. These potential threats were later judged to be non-credible.

The NRC is also reviewing measures to bolster defenses and to establish new antiterrorism strategies in a thorough and systematic manner. The NRC is taking a realistic and prudent approach toward assessing the magnitude of the potential threat and the strength of licensee defenses.

NRC licensees must defend nuclear power plants against the DBT. September 11 showed that the NRC and its licensees must reevaluate the scope of potential assaults of all types. However, there are limits to what can be expected from a private guard force, even assisted by local law enforcement. Even if it is determined that nuclear power plants should be defended against aircraft attack, the NRC cannot expect licensees to acquire and operate anti-aircraft weaponry. Protection against this type of threat may be provided by other means within the Federal government.

In summary, the Petitioner's request is denied because the NRC considers that the collective measures taken since September 11, 2001, provide adequate protection of public health and safety.

Dry-Cask Spent Fuel Storage System

The Petitioners requested that the NRC order the licensee to immediately convert the current spent fuel storage from water-cooled SFPs to a dry-cask storage system in a bunkered structure. As the basis for the request, the Petitioners state that this action would reduce the long-term risk of potential exothermic oxidation in the existing fuel storage facility. The Petitioners state that the NRC has never established that the spent fuel storage facility at IP is secure against foreseeable attacks nor can the NRC be certain that the spent fuel storage

facility is sufficiently sound to preclude the possibility of a spent fuel fire in the event of an airborne, land, or water-based assault. The Petitioners' concerns were based, in part, on information in an NRC report, "Final Technical Study of Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants," dated October 2000, and on the Petitioners' evaluation of the consequences of a terrorist attack on the spent fuel pool buildings. In their December 20, 2001, supplement, the Petitioners state that the NRC has not performed an environmental impact statement or probabilistic risk analysis assuming all modes of water loss from the SFPs, including terrorist attack, and the Petitioners further discuss the probability and consequences of exothermic oxidation of the spent fuel cladding.

Staff's Response

The NRC staff presently concludes that spent fuel can be safely stored at the IP reactor site in the current system of SFPs and therefore, the Petitioners' requests are denied. Although the spent fuel storage buildings at IP are not as hardened as the reactor containment structures, the SFPs themselves are robust, and relatively small structures, that are partially below ground level. The spent fuel is stored in racks resting on the floor of the pools and is covered by more than 20 feet of water. The pools are designed to prevent a rapid loss of water with the structure intact, and the pool water level and cooling system are monitored and alarmed in the control rooms. Thus, the response time for events involving the SFP is significantly longer than for other event scenarios. It is also easier to add water to the SFP from various sources because it is an open pool. The robust design and small size of the pools minimize the likelihood that a terrorist attack would cause damage of a magnitude sufficient to result in an offsite release of radioactive material. Further, offsite resources can be brought onsite to assist the response to an event.

When the NRC staff completes its reevaluation of the physical security requirements, the NRC will be able to judge whether modifications to the SFP structures and enclosures are warranted and whether additional safeguards measures should be established. If so, the NRC will act accordingly. In the meantime, the NRC has issued Orders to all nuclear power plants requiring certain interim compensatory measures to augment security and strengthen mitigation strategies. The SFPs are within the protected area of the facility and therefore protected from certain external threats under the security provisions identified in the PSPs.

During the NRC review of the transfer of the licenses for IP1 and 2, the licensee indicated that it was evaluating the possible construction of an independent spent fuel storage facility. In a public meeting on March 14, 2002, the licensee stated that it was expediting its engineering review for this facility.

III. Conclusion

As stated in its letter to the Petitioners on December 20, 2001, the NRC has, in effect, partially granted the Petitioners' request for an immediate security upgrade at IP2 and 3. On September 11, 2001, the NRC took action to enhance security at all nuclear facilities, including IP2 and 3. Immediately after the attacks, the NRC advised all nuclear power plants to go to the highest level of security, which they promptly did. These facilities have remained at a heightened security level since. The NRC continues to work with other Federal agencies and is monitoring relevant information it receives on security matters at nuclear facilities. The NRC is prepared to make immediate adjustments as necessary to ensure adequate protection of the public.

On February 25, 2002, the NRC issued Orders to IP2 and 3 and all other operating commercial nuclear power plants to implement interim compensatory security measures for the high-level threat environment. Some of the requirements formalized a series of security measures that NRC licensees had taken in response to advisories issued by the NRC, and

others are security enhancements that have emerged from the Commission's ongoing comprehensive security review. The Commission issued the Orders, which incorporated the threat advisories and added additional requirements, to formalize the security enhancements at commercial nuclear power plants. Because the threat environment had persisted longer than expected, it is appropriate to maintain these security measures within the established regulatory framework. The details of these security requirements are sensitive and will not be provided to the public. Some of the specific measures implemented by the licensees in response to the advisories and interim compensatory measures included increased patrols, augmented security forces and capabilities, additional security posts, installation of additional physical barriers, vehicle checks at greater stand-off distances, enhanced coordination with law enforcement and military authorities and more restrictive site access controls for all personnel. Therefore, the Petitioners' request that the licensee conduct a full review of the facility's vulnerabilities, security measures, and evacuation plans has been, in effect, partially granted. Regarding the Petitioners' request for specific information about the security measures, the NRC believes that it is inappropriate to discuss perceived vulnerabilities and current or planned security measures in the public domain. Thus, this request is denied.

The NRC in its February 25, 2002, Orders also directed licensees to evaluate and address potential vulnerabilities to maintain or restore cooling to the core, containment, and SFP and to develop specific guidance and strategies to respond to an event that damages large areas of the plant due to explosions or fires. These strategies are intended to help licensees to identify and utilize any remaining onsite or offsite equipment and capabilities. If NRC's ongoing security review recommends any other security measures, the NRC will take appropriate action.

The NRC denies the Petitioners' request to mandate certain security measures, as specified by the Petitioners, for the protection of the facility, such as systems to defend a no-fly zone. As part of its ongoing comprehensive security review, the NRC is examining the threat environment in coordination with the new Office of Homeland Security, the FBI, FEMA, the FAA, the military, the intelligence community, and the Department of Energy, among others. The NRC will take appropriate action based on the results of this review. The NRC considers that the current security requirements, along with the enhancements in the February 25 Orders, provide reasonable assurance of the protection of the facility.

The NRC finds that the existing emergency response plans are flexible enough to respond to a wide variety of adverse conditions, including a terrorist attack. The NRC advisories and the Orders issued since September 11, 2001, directed licensees to take specific actions deemed appropriate to ensure continued improvements to existing emergency response plans. The Petitioners' concern that the emergency plans do not contemplate multiple attacks on the infrastructure is alleviated by the fact that the emergency plans are intended to be broad and flexible enough to respond to a wide spectrum of events. Thus, the Petitioners' request that the onsite and offsite emergency plans be revised to account for possible terrorist attacks has been, in part, granted.


The NRC finds that the current spent fuel storage system and the security provisions at IP adequately protect the spent fuel. However, the licensee has stated its intention to install an Independent Spent Fuel Storage Installation. The Petitioners' request to order the installation is denied.

As provided in 10 CFR 2.206(c), a copy of this Director's Decision will be filed with the Secretary of the Commission for the Commission to review. As provided for by this regulation, the Decision will constitute the final action of the Commission 25 days after the date of the

Decision unless the Commission, on its own motion, institutes a review of the Decision within that time.

Dated at Rockville, Maryland, this 18th day of November 2002.

FOR THE NUCLEAR REGULATORY COMMISSION


Samuel J. Collins, Director
Office of Nuclear Reactor Regulation

on this issue. This Court has already recognized the broad discretion afforded the NRC in the enforcement area, and has aggressively applied *Heckler v. Chaney* in a variety of non-NRC enforcement contexts.

This Court has once before considered an NRC denial of a 2.206 decision, in *Rockland County v. NRC*, 709 F.2d 766 (2nd Cir. 1983), *cert. denied*, 464 U.S. 993 (1993), but that case came prior to *Heckler v. Chaney*. In *Rockland County*, this Court upheld an NRC 2.206 decision that had refused a request to shut down or restrict operations at the Indian Point nuclear facility. The enforcement request arose out of concerns about emergency planning. Petitioners asserted that the NRC had acted arbitrarily and capriciously in refusing to take enforcement action. *See id.* at 775. This Court disagreed, stating that it could not find any violation of any statute in the AEA or the regulations promulgated by the Commission. *Id.* at 776. In determining whether the NRC's decision was reasonable this Court was guided by the premise that “[o]ur review is deferential because the Commission and its staff have special expertise and a wide range of experience in nuclear power plant operation and safety.” *Id.* at 776. This Court stated that “Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety,” such that this Court would not “unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process.” *Id.* at 776 (citation omitted). Even though this decision preceded *Heckler v. Chaney*, it established that great deference should be given to the NRC as to whether it will take enforcement action, and if so, how.

After *Chaney* this Court expanded its *Rockland County* ruling and have applied *Chaney's* presumption of unreviewability to deny judicial review altogether when some agencies have denied enforcement petitions. *See, e.g., Lunney v. U.S.*, 319 F.3d 550, 558 (2nd Cir. 2003); *accord Christianson v. Hauptman*, 991 F.2d 59, 62-63 (2nd Cir. 1993); *Marlow v. U.S.*

Dept. of Educ., 820 F.2d 581, 582-83 (2nd Cir. 1987); *Doherty v. Meese*, 808 F.2d 938, 943-44 (2nd Cir. 1986); *Dina v. Attorney Gen. of U.S.*, 793 F.2d 473, 474-76 (2nd Cir. 1986).

In *N.Y. Pub. Interest Research Group v. Whitman*, 321 F.3d 316, 330-31 (2nd Cir. 2003), this Court determined that once a statute is determined to have afforded an agency discretion in determining whether to engage its formal enforcement mechanism, the presumption of unreviewability applies. The Court pointed to the agencies' near plenary control over decisions whether to bring prosecutorial-like enforcement actions:

Allowing parties outside an agency to trigger its enforcement mechanism would invariably entangle reviewing courts in its internal operations and would involve technical and prudential judgments lying largely outside the expertise of courts. By placing the initiation of enforcement procedures within the agency, Congress left the decision of when and whether they are warranted to the institutional actor best equipped to make it.

Id. at 332.

In *Padavan v. U.S.*, 82 F.3d 23 (2nd Cir. 1996), this Court determined that decisions relating to immigration control were discretionary matters left to the Immigration and Naturalization Service ("INS"), and that the APA precluded judicial review of matters committed to agency discretion by law. *Id.* at 29. The Court also concluded that a determination of the amount of resources to be expended by an agency, and a determination of priorities for the expenditure of such resources were strictly discretionary matters, and thus the agency's decision not to pursue enforcement was a decision that was presumptively unreviewable. *Id.* at 29.

These *Chaney*-driven rulings by this Court pertain directly here. This Court ought not attempt to second guess the NRC's decision on how best to protect the nation's nuclear power reactors, including Indian Point, against terrorist attack. Deference to the NRC in the enforcement area ensures that the choice of how to allocate resources to protect public health and safety remains in the hands of the agency to which Congress assigned the task.

D. The NRC's Denial Of The Petitioner's 2.206 Petition Does Not Constitute An Abdication Of Its Statutory Responsibilities.

Attempting to invoke a possible exception to unreviewability, noted in *Heckler v. Chaney*, 470 U.S. at 833 n.4, Riverkeeper states in its Petition for Review that the NRC's denial of Riverkeeper's 2.206 petition amounts to "a complete abdication of its statutory duty." See Amended Petition at 1. But nothing in the NRC's 2.206 decision suggests that the agency is pursuing a general policy of ignoring the threat of terrorism or nuclear emergencies. The Commission's commitment to a practical, effective response to the terrorist threat is obvious from the face of the 2.206 decision (and from the many post-9/11 security actions the NRC has taken). The Commission has devoted a tremendous amount of attention to security concerns, with particular focus on nuclear power reactor facilities. The Commission has issued numerous orders, and threat advisories, some within days of September 11, 2001.⁶ The Commission continues to review security vulnerabilities and the adequacy of security measures already implemented, and will issue further orders and threat advisories as appropriate if the Commission determines such action is necessary to ensure the protection of public health and safety.

Riverkeeper's disagreement over the terms of NRC enforcement actions hardly amounts to a valid claim of "abdication." Courts that have considered the "abdication" exception to

⁶ Following the attacks of September 11, 2001, the NRC issued numerous Threat Advisories, and issued orders on February 25, 2002, to all power reactors requiring certain interim compensatory security measures be implemented in addition to those requirements contained in the regulations. See 67 Fed. Reg. 9792. Additional Orders were issued to power reactor licensees on April 29, 2003, dealing with access authorization requirements, fitness-for-duty enhancements, and a revision to the design basis threat. See 68 Fed. Reg. 24,514; 68 Fed. Reg. 24,510; 68 Fed. Reg. 24,517. While the specifics of these orders cannot be released, they did result in increased patrols, augmented security forces, additional physical barriers, greater vehicle check stand-off distance, greater coordination with local law enforcement and military authorities, and more restrictive site access controls. The orders also required that licensees evaluate site vulnerabilities and develop response strategies to deal with various threats.

unreviewability have held that the exception cannot be invoked by a single incident, or a claim that the agency has not taken sufficient action deemed necessary by an outside party. In a case involving Securities and Exchange Commission enforcement policy, for example, the D.C. Circuit rejected the claim that the SEC had “abdicated” its statutory responsibilities merely because it took action different from what petitioners preferred:

[T]he agency has merely chosen thus far to enforce it informally rather than formally. So far, it appears, the Commission has found that sufficient to induce compliance with the law. That the petitioners prefer a different means of enforcement is irrelevant, for the very reason underlying the decision in *Chaney*: the agency alone, and neither a private party nor a court, is charged with the allocation of enforcement resources.

Block v. S.E.C., 50 F.3d 1078, 1084 (D.C. Cir. 1995); see also *Ass’n of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 283 F.3d 339, 344 (D.C. Cir. 2002). Likewise, the Fifth Circuit denied a claim of “abdication” of duty, stating that “[r]eal or perceived *inadequate enforcement*. . . does not constitute a reviewable abdication of duty.” *State of Texas v. U.S.*, 106 F.3d 661, 667 (5th Cir. 1997) (emphasis added). Where (as in the present case) an agency takes action following the receipt of a request for enforcement, such action belies a claim of abdication of authority. See generally *Sierra Club v. Larson*, 882 F.2d 128, 133 (4th Cir. 1989). That the actions taken by the agency do not satisfy a particular petition does not show an abdication of authority by an agency deciding not to pursue enforcement. *Id.*

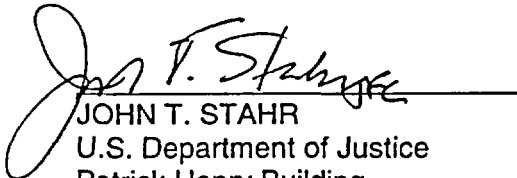
Here, the many actions taken by the NRC exercising its enforcement powers to issue immediately effective enforcement orders to its licensees for the specific purpose of imposing enhanced security requirements refutes any “abdication” claim. See note 6, *supra*. As discussed above, the NRC has taken considerable action to protect against terrorism, albeit not every step advocated by Riverkeeper. The fact that the NRC declined to employ the methodology and specific type of security enhancements that Riverkeeper proposes shows

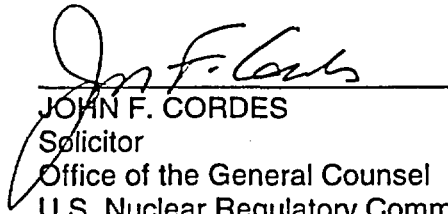
policy disagreement but not "abdication" in any meaningful sense. Disagreement is not sufficient to rebut the presumption of unreviewability established by *Heckler v. Chaney*.

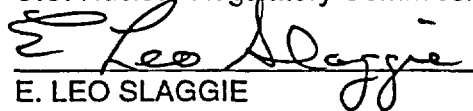
CONCLUSION

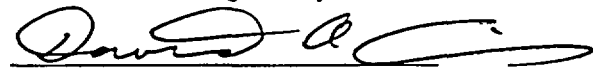
This lawsuit amounts to a dispute over the type and degree of enforcement action the NRC should take at Indian Point. As such, it reflects the classic *Heckler v. Chaney*-type case and warrants dismissal. This Court should grant our motion to dismiss Riverkeeper's petition for review.⁷

Respectfully submitted,


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301-415-1520

June 3, 2003

⁷ Because three Circuits have found NRC 2.206 decisions unreviewable under *Heckler v. Chaney* (there are no decisions going the other way), and because this Court's own *Heckler v. Chaney* jurisprudence shows its unwillingness to review agency rejections of enforcement petitions, we believe that full briefing of this case is unnecessary and that this Court can decide this case on the basis of a motion to dismiss.

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2003, copies of the foregoing Federal Respondents' Motion To Dismiss was served by mail, postage prepaid, upon the following counsel:

Jay E. Silberg, Esq.
David J. Cynamon, Esq.
Matias F. Travieso-Diaz, Esq.
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Karl Coplan
Pace Environmental Litigation Clinic, Inc.
78 N. Broadway
White Plains, NY 10603


David A. Cummings

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC.,)	
)	
	)	Petitioner,
)	
v.)	
	)	Docket No. 03-4313
COLLINS, et al.)	
)	
	)	Respondents,
)	
)	

**DECLARATION OF DAVID CUMMINGS IN SUPPORT OF FEDERAL
RESPONDENTS' MOTION TO DISMISS**

I, David Cummings, declare as follows:

1. I am an attorney with the Office of the General Counsel (OGC), U.S. Nuclear Regulatory Commission.

2. On November 8, 2001, Riverkeeper filed an administrative petition pursuant to 10 C.F.R. § 2.206, supplemented on December 20, 2001, with Dr. William Travers, the NRC's Executive Director for Operations.

3. Subsequently, the Commission issued Director's Decision-02-06 on the Riverkeeper petition on November 18, 2002. Director's Decision-02-06 notified petitioner that the NRC had granted some of its requests, in effect; but denied others. The Director's Decision became final on December 13, 2002, following the expiration of the twenty-five day period in which the Commission can review *sua sponte* Director's Decisions. See 10 C.F.R. § 2.206(c).

4. On February 11, 2003, Riverkeeper filed its petition for review before this Court seeking to reverse Director's Decision-02-06.

5. Director's Decision-02-06, reported at 56 NRC 296, is the source of nearly all the statements of fact and background contained in Federal Respondents' Motion to Dismiss.

I declare, under penalty of perjury, that the foregoing facts are true and correct to the best of my knowledge and belief.

Executed on this 3rd day of June, 2003.



DAVID A. CUMMINGS
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
301-415-1520

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2003, copies of the foregoing Declaration Of David Cummings In Support Of Federal Respondents' Motion to Dismiss was served by mail, postage prepaid, upon the following counsel:

Jay E. Silberg, Esq.
David J. Cynamon, Esq.
Matias F. Travieso-Diaz, Esq.
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David A. Cummings

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 03-4313

Riverkeeper, Inc. v. Collins, et al.

Motion for: Suspension Of Briefing Schedule

Set forth below precise, complete statement of relief sought:
Suspend the briefing schedule entered on May
8, 2003, to allow consideration of Federal

Respondents Motion to Dismiss.

MOVING PARTY: U.S. NRC and USA.

Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

OPPOSING PARTY: Riverkeeper.

MOVING ATTORNEY: David Cummings

[name of attorney, with firm, address, phone number and e-mail]
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OPPOSING ATTORNEY [Name]: Karl Coplan

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Pace University School Of Law
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714-422-4143 Email:KCoplan@law.pace.edu.

Court-Judge/Agency appealed from: U.S. Nuclear Regulatory Commission.

Please check appropriate boxes:

Has consent of opposing counsel:

A. been sought? Yes No
B. been obtained? Yes No

Is oral argument requested? Yes No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No
If yes, enter date _____

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

Has request for relief been made below? Yes No

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

Requested return date and explanation of emergency:

Signature of Moving Attorney:



Date: June 3, 2003

Has service been effected? Yes No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** ~~DENIED~~.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____

By: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

<hr/>)	
RIVERKEEPER, INC.,)	
	Petitioner,)	
)	
v.		)	Docket No. 03-4313
)	
COLLINS, et al.)	
	Respondents,)	
)	
<hr/>)	

**FEDERAL RESPONDENTS' MOTION TO SUSPEND BRIEFING SCHEDULE PENDING
CONSIDERATION OF MOTION TO DISMISS**

The U.S. Nuclear Regulatory Commission ("NRC" or "Commission") and the United States of America, federal respondents in this case,¹ move this Court to suspend the briefing schedule entered on May 8, 2003, pending this Court's consideration of a dispositive motion that we also are filing today. Under the current briefing schedule, petitioner's opening brief is due on June 22, 2002, and the government's brief is due on July 22, 2003.

After reviewing applicable Supreme Court precedent, federal respondents reasonably believe that this Court lacks jurisdiction over this case. Accordingly, we have today filed a Motion to Dismiss. Neither this Court's Local Rules nor the Docketing Statement issued by the Clerk's Office contains a schedule for filing dispositive motions. The federal respondents respectfully ask this Court to suspend the briefing schedule, pending a decision on the Motion to Dismiss. Temporary postponement, pending consideration of the Motion to Dismiss, is in the interest of judicial efficiency. If the Motion to Dismiss is granted, the parties need not prepare, and this Court need not consider, full briefs on this case. If this Court denies the Motion, the Court may then re-issue a briefing schedule.

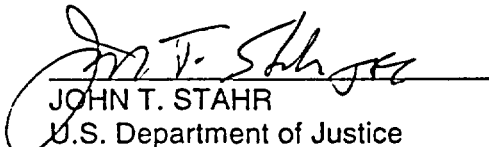
¹ Petitioner names a variety of respondents, but the only statutory parties to a lawsuit challenging NRC decisions are the United States and the NRC itself. 28 U.S.C. §§ 2344, 2348.

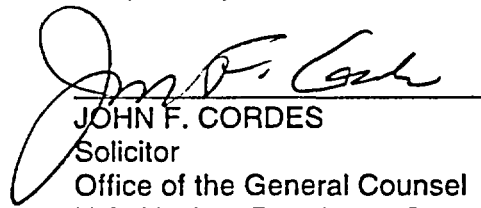
We have contacted Karl Coplan, counsel for the petitioner, who notified the NRC that the petitioner does not consent to this Motion. We also contacted Jay Silberg, counsel for the licensee, who notified the NRC that the Entergy Nuclear Operations, also a respondent in this case, does not oppose this Motion.

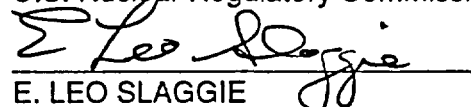
CONCLUSION


For the foregoing reasons, this Court should suspend the briefing schedule issued on May 8, 2003, and entertain the accompanying Motion to Dismiss.

Respectfully submitted,


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DAVID A. CUMMINGS
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301-415-1520

June 3, 2003

CERTIFICATE OF SERVICE

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