

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’ REPLY TO PETITIONER’S MEMORANDUM IN OPPOSITION
TO MOTION TO SUSPEND BRIEFING SCHEDULE**

The federal respondents, the U.S. Nuclear Regulatory Commission (“NRC” or “Commission”) and the United States of America, have moved to suspend full merits briefing in this case to give this Court time to consider our motion to dismiss the petition for review for lack of jurisdiction. We continue to maintain that prudent case management calls for a suspension of the briefing schedule for the short time it will take for this Court to pass on our dispositive motion. With briefing set to begin on June 20, **we request prompt action on our motion to suspend the briefing schedule.** Riverkeeper’s opposition to suspending the briefing schedule is unpersuasive on a number of levels.

1. Riverkeeper states that our motion to dismiss is “unlikely to succeed” (Opp., at 2). In reality, though, our motion to dismiss rests on a controlling Supreme Court decision, *Heckler v. Chaney*, 470 U.S. 821 (1985), and on court of appeals decisions from three Circuits applying *Chaney* to dismiss lawsuits against the NRC in cases indistinguishable from this one; *i.e.*, in cases where the NRC has turned down a request for agency enforcement action under 10 C.F.R. § 2.206. See Federal Respondents’ Motion to Dismiss, at 2. Rather than “unlikely to succeed,” our dispositive motion seems to us all but certain to succeed.

2. Riverkeeper points out that the Supreme Court, on the same day it issued its decision in *Heckler v. Chaney*, issued another decision indicating that courts of appeals have subject matter jurisdiction in lawsuits involving petitions filed pursuant to 10 C.F.R. § 2.206. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985). Riverkeeper mischaracterizes *Lorion*. There, the Supreme Court held only that jurisdiction to review denials of requests for NRC enforcement action, *if reviewable at all*, lay in the appropriate United States Court of Appeals, and not in a United States District Court. *Id.* at 746 (1985). *Lorion* expressly held open the then-undecided question whether NRC denials of § 2.206 petitions are reviewable at all:

[N]o party has argued that under the APA, 5 U.S.C. § 701(a)(2), Commission denials of § 2.206 petitions are instances of presumptively unreviewable “agency action. . . committed to agency discretion by law” because they involve the exercise of enforcement discretion. *Heckler v. Chaney*, 470 US 821, 828-835 (1985). Because the question has been neither briefed nor argued and is unnecessary to the decision on the issue presented in this case, we express no opinion as to its proper resolution.

Id. at 735.

3. As noted above, three Circuits have now considered the question left open in *Lorion* and all have found NRC 2.206 denials unreviewable under *Heckler v. Chaney*. As this Court has recognized, nonreviewability under *Chaney* goes to the judiciary’s very power -- *i.e.*, its jurisdiction -- to undertake merits review. See *Lunney v. United States*, 319 F.3d 550, 558 (2d Cir. 2003). *Chaney* turns on an APA provision, 5 U.S.C. § 701(a)(2), prohibiting judicial review of agency actions “committed to agency discretion by law.” See *Heckler v. Chaney*, 470 U.S. at 828-32. “Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Ex parte McCardle*, 74 US 506, 514 (1868).

This Court should not demand merits briefs, or attempt to resolve this case on the merits, in the face of great doubt about its jurisdiction. The Supreme Court has held that addressing merits questions, despite jurisdictional objections, would be to “carr[y] the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.” *Steel Co. v. Citizens for a Better Environment*, 523 US 83, 93-94 (1998). “The requirement that jurisdiction be established as a threshold matter ‘spring[s] from the nature and limits of the judicial power of the United States’ and is ‘inflexible and without exception.’” *Id.* at 94-95 (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379 (1884)). In the past this Court has used motions to dismiss, filed prior to briefing, as a procedural vehicle to resolve jurisdictional questions, particularly where (as here) other Circuits have already spoken to the same question and found no jurisdiction. See *Hamzi v. Minnesota Mutual Life Ins. Co.*, 196 F.3d 372 (2d Cir. 1999). That’s the course we have taken here.

4. A temporary postponement of merits briefing, pending consideration of our motion to dismiss, is in the interest of judicial efficiency. Contrary to Riverkeeper’s assertion, the present briefing schedule does not provide “ample time” for this Court to consider our motion to dismiss prior to full merits briefing. We are on the eve of briefing, but we have not yet received Riverkeeper’s opposition to our motion to dismiss, and (of course) have not yet replied to it. And this Court’s practice is to set substantive motions for oral argument. This does not leave enough time to resolve our threshold objection to this Court’s jurisdiction. Under this Court’s current briefing schedule, Riverkeeper’s opening brief is due on June 20 and the answering briefs, both ours as well as the private respondent’s (Entergy Nuclear Operations), are due on July 22.

/RA/

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June 16, 2003

