

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC.,

Petitioner,

v.

COLLINS, et al.,

Respondents.

Docket No. 03-4313

**PETITIONER'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION
TO SUSPEND BRIEFING SCHEDULE PENDING CONSIDERATION OF MOTION TO
DISMISS**

Petitioner Riverkeeper, Inc. ("Riverkeeper") submits this memorandum in opposition to respondents' Motion to Suspend Briefing Schedule Pending Consideration of Motion to Dismiss. Respondents' Motion to Dismiss, based on their claim that this Court lacks jurisdiction, is without merit and does not warrant the suspension of the briefing schedule. The jurisdiction of this Court to review the final decisions of the U.S. Nuclear Regulatory Commission ("NRC" or "the Commission") is clearly established under federal statute and Supreme Court precedent.¹ Furthermore, the present briefing schedule entered on May 8, 2003 provides ample time for this Court to consider respondents' Motion to Dismiss and subsequently for respondents to prepare their full brief on this case.

¹ Pursuant to the Hobbs Act, 42 U.S.C. § 2342(4), the courts of appeals have exclusive jurisdiction over petitions for review of "all final orders" of the Nuclear Regulatory Commission "made reviewable by" 42 U.S.C. § 2239. In *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985), the Supreme Court stated, "[w]e therefore hold that 42 U.S.C. § 2239 vests in the court of appeals initial subject-matter jurisdiction over Commission orders denying § 2.206 citizen petitions." *Id.* at 746.

Respondents' Motion to Dismiss does not warrant a postponement of the briefing schedule because it is unlikely to succeed. Decided concurrently and with consideration for each other, *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985), were both seminal cases with regard to the judicial review of administrative decisions. While *Chaney* outlined standards for the judicial review of administrative decisions, *Lorion* established the principle that "42 U.S.C. § 2239 vests in the court of appeals initial subject-matter jurisdiction over Commission orders denying § 2.206 citizen petitions." *Id.* at 746. Riverkeeper's petition to this Court, for the review of the Commission's denial of Riverkeeper's § 2.206 petition, is analogous to the proceeding which the Supreme Court in *Lorion* decided that the courts of appeals have jurisdiction over. Therefore, there is no reason why this case should be dismissed for lack of jurisdiction. Furthermore, the primary cases that respondents rely upon to exemplify decisions from other courts of appeals are cases that are distinguishable from the present case.² The cases relied upon by the respondents in support of their Motion to Dismiss were cases which went to full briefing before the court of appeals; none were dismissed on motion before full briefing and filing of the administrative record. There, the various courts of appeals, after they had the full record in front of them, were able to make their decisions based on all of the facts. Here, we respectfully ask this Court to do the same.

Temporary postponement of the present briefing schedule, pending consideration of respondents' Motion to Dismiss is an unnecessary delay of the proceedings and therefore, not in the interest of judicial efficiency. Petitioner is now preparing its brief in response to

² Brief for Respondent at 2, see *Safe Energy Coalition of Mich v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989); *Arnow v. NRC*, 868 F.2d 223 (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).

respondents' June 3, 2003 Motion to Dismiss. This brief will be filed on June 13, 2003. Under the present briefing schedule, petitioner's opening brief is due on June 20, 2003 and respondents' reply brief is due on July 22, 2003. These dates provide ample time for this Court to review respondents' Motion to Dismiss and subsequently, for respondents to prepare their full brief.

Indian Point nuclear power plant, located in Westchester County, New York, is not currently equipped to protect itself, or the 20 million people who reside and work within a 50 mile radius of the plant, against an attack of the scale, sophistication, and coordination demonstrated on September 11, 2001. A successful attack on these structures would have a catastrophic effect on the region's human population, environment, and economy. The National Research Council has stated that an attack on a plant like Indian Point is "probable in the near term,"³ therefore, it is urgent that this matter be resolved as expeditiously as possible. Since respondents' Motion to Dismiss is without merit and the present briefing schedule provides ample time for this court to consider respondents' Motion to Dismiss and subsequently for respondents to prepare their brief in full on the case, suspending the briefing schedule would unnecessarily delay the resolution of this case. Every day of delay in this proceeding puts the entire metropolitan area at risk.

³National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* (Washington: National Academies Press, 2002) at 50, available at <http://books.nap.edu/html/stct/index.html>.

Conclusion

For all the foregoing reasons, petitioner respectfully requests that this Court deny respondents' June 3rd Motion to Suspend the Scheduling Order.

Respectfully submitted,

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

By: 

Karl S. Coplan
Nicolette Witcher, Legal Intern
78 North Broadway
White Plains, New York, 10603
(914) 422-4343
(914) 422-4437 (fax)

June 11, 2003