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 FEDERAL RESPONDENTS' MOTION TO DISMISS

As demonstrated in our motion to dismiss, this Court lacks jurisdiction to consider the petition for review filed by Riverkeeper, Inc. The petition for review asks this Court to overturn an NRC decision to grant portions, but not the entirety, of Riverkeeper's request for NRC enforcement action to either improve security at the Indian Point nuclear power reactors or shut them down. After the September 11, 2001, terrorist attacks, Riverkeeper had petitioned the NRC under 10 C.F.R. § 2.206, an agency rule that establishes a procedure for members of the public to seek enforcement action. But NRC denials of 2.206 requests do not trigger a right to judicial review. Following the Supreme Court's landmark decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), every court of appeals to consider the question has barred such review as an impermissible infringement of NRC enforcement discretion.[1] Riverkeeper's response to our motion to dismiss fails to overcome the *Chaney* jurisdictional bar.

1. In *Heckler v. Chaney,* the Supreme Court indicated in a footnote that judicial review "might" be available, even in agency enforcement settings, where an "agency has consciously

[1] *See* Federal Respondents' Motion to Dismiss at 2-3, 8-10, *citing Safe Energy Coalition of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989); *Arnow 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).

and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (internal quotation marks omitted). Riverkeeper, as expected, has seized upon this "abdication" exception to argue that the NRC's refusal to require a no-fly zone and air defenses at Indian Point or, alternatively, to shut down the plant was an "abdication" of the NRC's statutory responsibilities and therefore judicially reviewable.[2] This argument gets things precisely backwards.

In denying Riverkeeper's 2.206 petition, the NRC explicitly acknowledged its statutory responsibility to impose security measures on nuclear plants within the limit of its statutory authority. *See Entergy Nuclear Operations, Inc.,* DD-02-6, 56 NRC 296, 297, 300-04, 311-13 (2002). At the same time the NRC recognized that the statutory responsibility for air defense and the safe operation of the nation's air transportation system rests with other agencies and the national defense establishment. *See id.* at 309-10. Rather than abdicating its responsibility, the NRC performed a reasonable assessment of the extent and limits of its authority and acted accordingly. It seems fair to say that an "extreme" general policy would be what Riverkeeper is demanding -- that the NRC shut down Indian Point (and, by logical extension of Riverkeeper's reasoning, shut down the entire nuclear industry), pending the creation of impenetrable air defenses.

We anticipated and rebutted Riverkeeper's "abdication" argument in our motion to dismiss (at pp. 13-15). So did Entergy Nuclear Operations, Inc., the private respondent in this case, which has filed a response explaining why *Chaney* bars Riverkeeper's suit and why any "abdication" claim is untenable. Below we explain, briefly, why various arguments offered in Riverkeeper's opposition are unpersuasive.

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[2] It should be noted that in *Heckler v Chaney* the Supreme Court did not say that an "abdication" would in fact be reviewable. The Court merely noted that the case before it did not involve an abdication. "[W]e express no opinion on whether such decisions would be unreviewable under Section 701(a)(2)." *Id*.

2. Riverkeeper's opposition focuses on the consequences of worst-case scenarios, *i.e.,* the possibly catastrophic results if a terrorist attack were successful, while ignoring the NRC's expansive review and extensive security requirements imposed after the September 11 attacks.[3] As the NRC's 2.206 decision stated, "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." DD-02-6, 56 NRC at 309. Protection against terrorist attacks by air, the 2.206 decision reasoned, should focus on enhancing security at airports and airplanes through enhanced passenger and baggage screening, strengthened cockpit doors, and the Air Marshal program. *See id*. The 2.206 decision stressed that the American intelligence community and various federal law enforcement agencies have also acted to identify potential terrorists and prevent potential attacks. *See id.* These actions have even included protecting airspace over specific nuclear power plants that were thought to be the subject of credible threats (later judged to be non-credible). *See id.* at 309-10.

In its discussion of the aerial threat, the 2.206 decision rested, at bottom, on the common sense proposition that the NRC and its private licensees cannot be expected to defend against aircraft attacks. *See id.* at 310. Decades ago, the District of Columbia Circuit

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[3] The potential consequences of a terrorist-caused accident at a nuclear plant are unquestionably serious, but Riverkeeper exaggerates them beyond reasonable bounds. As it did in its 2.206 petition, Riverkeeper cites to this Court a 1982 Sandia National Laboratory Report, "Calculation of Reactor Accident Consequences" ("CRAC-2 Report"). (Opp. at 14.) Riverkeeper uses the CRAC-2 Report as the basis for its calculations of fatalities resulting from radioactive release in the event of a successful aerial attack on a nuclear power plant resulting in a core meltdown. However, as discussed in the NRC's 2.206 decision, the CRAC-2 Report studies were never intended to be realistic assessments of accident consequences. *See* DD-02-6, 56 NRC at 306. The results in the report used simplistic models, and assumed the most adverse conditions, and assumed that no protective actions were taken for the first 24 hours. *Id.* at 306-7. The Sandia studies contained in the CRAC-2 Report provided a useful measure to compare sites, but are improperly employed in the analysis of plant-specific accident consequences, which is precisely what Riverkeeper has attempted. *Id.* at 307.

endorsed this approach, in the context of threatened air attacks against nuclear plants. *See Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968). As the court noted in *Siegel*, such threats apply to virtually all facilities vital to our complex industrial economy. *See id.* As terrible experience has shown, the threat of a terrorist attack utilizing aircraft is not unique to nuclear power plants. The NRC's 2.206 decision recognized that this issue must be addressed by those agencies with an appropriate mandate, including the Federal Aviation Administration and national defense forces.

3. Riverkeeper claims that the NRC has acknowledged a "gap" between a licensee's capability to protect against aircraft attacks and the protection provided by the government. (Opp. At 12-13.) To support this claim, Riverkeeper misquotes a proposed NRC 2.206 decision.[4] The real NRC position, set out in the final 2.206 decision, is quite the opposite of Riverkeeper's charge of an acknowledged "gap." The final 2.206 decision mentions no gap -- it does not even use the word -- and says instead that the NRC "considers that the collective measures taken since September 11, 2001, provide adequate protection of public health and safety." DD-02-6, 56 NRC at 310.

4. Riverkeeper also asserts that the "NRC has in fact adopted a policy of refusing to consider terrorism in decisionmaking concerning nuclear power plants." (Opp. at 15.) Given the public record of NRC actions to combat the terrorist threat, this claim is, frankly,

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[4] Riverkeeper purports to quote page 21 of the *proposed* Director's Decision. *See* Exhibit B filed with the Affidavit of Karl Coplan. That page, according to Riverkeeper (Opp. at 12-13), states that there is a "gap between the licensee's capability to protect against air attacks and the protection afforded by the government." We have examined that page, however, and cannot locate (there or anywhere else) the quoted passage. The proposed decision does say that "[a]ny gap between licensee capability and the assumed threat must be assumed by the government, and the government must prepare for this." *See* Proposed Director's Decision at 21, Coplan Aff. Ex. B. But this says something quite different from the "acknowledgment" that Riverkeeper attributes to the Commission. The actual passage (which is not repeated in the same terms in the final version of the 2.206 decision) means only that the government "must" fill in "gaps" that licensees themselves cannot fill. This is a far cry from saying that the NRC recognizes an existing "gap" in protection.

preposterous. The NRC rule and adjudicatory decisions that Riverkeeper views as emblematic of an NRC "do nothing" policy show nothing of the kind.

Riverkeeper first points to a 1998 NRC rule on physical protection of radioactive waste. *See* Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955 (May 15, 1998) ("Final Rule"). This rule supposedly exemplifies the NRC's "specific policy not to consider potential terrorist attacks by airborne vehicles. . . ." (Opp. at 16.) In fact, in the Final Rule amending regulations clarifying physical protection requirements for spent fuel at various storage sites, the Commission stated that due to the greater risks posed by nuclear power reactors, the protection against radiological sabotage at nuclear power reactors should be greater than that required for protection of spent fuel storage installations, and the same protective measures are not necessary to ensure protection of spent fuel. *See* Final Rule, 63 Fed. Reg. at 26,955. The rule hardly evinces NRC indifference to terrorist threats, airborne or otherwise.

Second, Riverkeeper cites (Opp. 16) but apparently misunderstands a recent Commission adjudicatory decision construing the National Environmental Policy Act ("NEPA") not to require an inquiry into terrorism in environmental impact statements. *See Private Fuel Storage, L.L.C.*, (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002). In that case, and in a series of follow-up cases, the Commission decided only "that an environmental impact statement is not the appropriate format in which to address the challenges of terrorism." *Pacific Gas and Electric Co.*, (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-1, 57 NRC 1, 6 (2003).[5] The Commission

[5] *See also Duke Cogema Stone & Webster* (Savannah River Mixed Oxide Fuel Fabrication Facility), CLI-02-24, 56 NRC 335 (2002); *Duke Energy Corp.*, (McGuire Nuclear Station, Units 1 & 2, and Catawba Nuclear Station, Units 1 & 2), CLI-02-26, 56 NRC 358 (2002); *Dominion Nuclear Conn.*, (Millstone Nuclear Power Station, Unit No. 3), CLI-02-27, 56 NRC 367 (2002).

certainly did not decide that terrorism issues need not be considered at all. In fact the Commission took some trouble to list the security actions it was taking:

> At the outset, however, we stress our determination, in the wake of the horrific September 11th terrorist attacks, to strengthen security at facilities we regulate. We currently are engaged in a comprehensive review of our security regulations and programs, acting under our AEA-rooted duty to protect 'public health and safety' and the 'common defense and security.' We are reexamining, and in many cases have already improved, security and safeguards matters such as guard force size, physical barriers, access control, detection systems, alarm stations, response strategies, security exercises, clearance requirements and background investigations for key employees, and fitness-for-duty requirements. More broadly, we are rethinking the NRC's threat assessment framework and design basis threat. We also are reviewing our own infrastructure, resources, and communications.

Private Fuel Storage, L.L.C., CLI-02-25, 56 NRC at 343.

Riverkeeper's attempt to equate the Commission's narrow legal ruling on NEPA with a general policy of abdication is patently false. Not only did the NRC take numerous anti-terrorist steps in the immediate aftermath of the September 11 attacks, but it also has continued to add to the protective framework in a series of important actions, including significant agency orders issued just last month. These orders impose access authorization requirements and fitness-for-duty enhancements, and revised the "design basis threat."[6] *See* 68 Fed. Reg. 24,514 (May 7, 2003); 68 Fed. Reg 24,510 (May 7, 2003); 68 Fed. Reg. 24,517 (May 7, 2003). It is impossible to conclude, on this public record, that the NRC has followed a "conscious and express" general policy of inaction, within the meaning of *Heckler v. Chaney*, so "extreme" that it amounts to an "abdication of statutory responsibilities."[7]

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[6] The "design basis threat" is stated in general terms in 10 C.F.R. § 73.1, and in greater detail in sensitive documents. The design basis threat was prepared by safeguards experts, based on information from the intelligence community and Department of Energy, and is a reasonable characterization of an adversary force against which nuclear power plant licensees must design their physical protection systems and response strategies.

[7] In addition to industry-wide enhancements ordered by the NRC, the New York State Naval Militia, as the NRC's 2.206 decision pointed out, provides security measures to detect and deter watercraft access to the exclusion area around the Indian Point facility. See *D-02-6,*

5. Riverkeeper's "abdication" claims are, in short, obviously insubstantial. Thus, the *Heckler v. Chaney* jurisdictional bar against judicial review of agency nonenforcement decisions applies with full force to this case. Riverkeeper offers a desultory argument that the *Chaney* bar does not apply to NRC 2.206 decisions because the Supreme Court, on the same day it issued its decision in *Heckler v. Chaney*, issued another decision holding 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). (Opp. at 7-8.) According to Riverkeeper, this shows a willingness by the Supreme Court to review NRC 2.206 decisions on the merits. But Riverkeeper grossly mischaracterizes *Lorion*. That case held only that the Hobbs Act established 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. *Lorion* expressly held open the then-undecided question of 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.

As stated above, three Circuits have now considered the question left open in *Lorion* and all have found Section 2.206 denials unreviewable under *Heckler v. Chaney. See* note 1, *supra.* These three courts of appeals all undertook thoughtful analysis of what was, at the time,

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56 NRC at 308. Furthermore, the State of New York Office of Public Security provided recommendations to enhance security at the facility. *Id.* The recommendations, not required by the NRC, were considered and implemented in part by the licensee. *Id.* In response to the Orders issued by the NRC, the licensee provided information that allowed the NRC to determine that the security measures in place at Indian Point are appropriate to deal with the current threat environment. *Id.* at 308-09.

an unsettled question left open in *Lorion*. All three courts held that Congress never intended NRC's denials of enforcement petitions to be reviewable, as no standard was established by which any court could analyze such a decision not to enforce. The unanimous view of the courts of appeals is that the denial of section 2.206 petitions are unreviewable, in accordance with the standards established in *Heckler v. Chaney*. This Court should reach the same result.

6. Finally, Riverkeeper attempts to confuse the applicability of the *Chaney* nonreviewability doctrine by characterizing it as a standard of review principle rather than a jurisdictional bar. (Opp. at 8.) But, 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 U.S. 506, 514 (1868).

For the foregoing reasons, and for the reasons given in our motion to dismiss, we ask that this Court grant our motion and dismiss Riverkeeper's petition for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2003, copies of the foregoing Federal Respondents' Reply to Petitioner's Memorandum in Opposition to Federal Respondent's Motion to Dismiss was served by mail, postage prepaid, upon the following counsel:

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