UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC. Petitioner v.	:	DOCKET NO. 03-4313
COLLINS, ET AL. Respondents	:	July 30, 2003

AMICUS CURIAE'S MEMORANDUM IN OPPOSITION TO NRC'S MOTION TO DISMISS

Richard Blumenthal, Attorney General of the State of Connecticut, hereby submits this memorandum in opposition to the Respondents' Motion to Dismiss and in support of this Court's jurisdiction over Riverkeeper, Inc's Petition for Review.

CONNECTICUT'S INTEREST

As the chief legal officer of the State of Connecticut, representing the legal interests of over 3 million residents, Attorney General Blumenthal has a unique interest in the outcome of Riverkeeper's Petition for Review. Specifically, the Petition involves a challenge to the adequacy of the existing security arrangements at the Indian Point Energy Center, a nuclear power station in Buchanan, New York ("Indian Point"). The interests of the State of Connecticut are particularly implicated by this matter because the emergency planning area for Indian Point includes both a 10-mile radius emergency planning zone ("EPZ") and a separate

50-mile radius ingestion pathway EPZ. The 50-mile radius EPZ includes substantial portions of the State of Connecticut, including its largest city, Bridgeport, and its most populous county, Fairfield. Specifically, the emergency evacuation plan for Indian Point, which governs a response to either a terrorist attack or an accident at the facility, involves relocating as many as 10 million people, many of whom are Connecticut residents or New York residents who will be evacuated to Connecticut, while at the same time protecting these people from the effects of escaped radiation.

It is the position of Riverkeeper, Inc., supported by Attorney General Blumenthal, that the Nuclear Regulatory Commission's (NRC's) emergency evacuation plan for Indian Point is so woefully inadequate that it constitutes a "complete abdication of its statutory duty under 42 U.S.C. § 2201(i)." (Riverkeeper's Amended Petition for Review, 2/12/03) Specifically, from Attorney General Blumenthal's point of view, the plan is inadequate in its preparation for a terrorist attack, but also in its failure to address and come to grips with the severe transportation constraints of Interstates 95 and 84 in Connecticut, even though they are two of the critical proposed escape routes for both Connecticut and New York residents. Both of these highways are currently

inadequate to handle normal daily traffic to and from the metropolitan area, let alone the emergency evacuation of such large number of residents.[1]

It is for these reasons that Attorney General Blumenthal, Connecticut's chief legal officer, filed an amicus curiae brief on the merits in this case pursuant to F.R.A.P. Rule 29(a). In light of NRC's motion to dismiss, he also wishes to share some particular insights on the jurisdictional issue raised.

THIS COURT PLAINLY HAS JURISDICTION OVER RIVERKEEPER'S PETITION AND SHOULD THEREFORE DENY NRC'S MOTION TO DISMISS AND HEAR THE PETITION ON ITS MERITS.

The premise of the NRC's motion to dismiss the instant Petition for Review is that it has unlimited discretion to rule on administrative petitions such as Riverkeeper's, and that, under the holding of *Heckler v. Chaney*, 470 U.S. 821 (1985), its action on such petitions is not subject to judicial review). As discussed persuasively in Riverkeeper's opposition to this motion, the law is to the contrary, and the NRC confuses the question of subject matter jurisdiction with the level of

[1] The NRC has never considered evidence of endemic congestion on Connecticut highways, which would dramatically undermine its plan. "Congestion is endemic throughout the Coastal Corridor [area]. It is acute on the primary highways, Interstate Routes I-95 and 84, and U.S. Route 1 and CT Route 15, and particularly acute on the [Connecticut] westerly portion of Interstate Route 95." *Coastal Corridor Transportation Investment Area Twenty Year Strategic Plan For Transportation Investment Area*, Nov. 7, 2001, p.6, prepared for the Connecticut Transportation Strategy Board (attached to amicus curiae's appendix to brief on the merits in this case). This report continues: "When they can reach their destinations only by road, people are trapped in the congested conditions found there and can only contribute to that congestion when traveling." *Id.* at 7.

deference that a merits panel of this Court would afford the agency decision when the matter is fully briefed.

In further support of Riverkeeper's position and this Court's jurisdiction over this Petition, Attorney General Blumenthal offers the following observations and arguments.

1. Pursuant to 28 U.S.C. § 2343, Riverkeeper filed its petition for review with this Court of Appeals. No one argues that this is the wrong Circuit Court of appeals in which to have filed the Petition, or that such a Petition should have been filed in a District Court rather than in the Court of Appeals.[2] This is important because resort to this Court would be the first (and likely the only) judicial review available to provide a check on this agency and this type of administrative decision.

Thus, Riverkeeper's Petition for Review to this Court is the functional equivalent of a complaint or of an administrative appeal filed in the District Court. As such, this Court should construe the Petition for Review liberally, as it would a complaint or an administrative appeal invoking a court's jurisdiction. *See*, *Kirchbaum v. United States Forest Service*, 17 F. Supp. 2d 549, 559 (W.D. Va. 1998). Such a liberal construction is consistent with the strong presumption that

[2] The Hobbs Act gives the courts of appeals exclusive jurisdiction over petitions seeking review of all final orders of the NRC. *See* 28 U.S.C. § 2344. The Act requires a party seeking judicial

Congress intends there to be judicial review of agency action under the federal Administrative Procedures Act ("APA"), and this presumption may be defeated only upon a showing of "clear and convincing evidence" that the courts should restrict access to judicial review. *See, Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 670, 106 S. Ct. 2133, 2135 (1986); *Abbott Labs. v. Gardner,* 387 U.S. 136, 141, 87 S. Ct. 1507, 1511 (1967). It is also consistent with the maxim that "federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716, 116 S.Ct. 1712 (1996).

2. "A separate indication of congressional intent to make agency action reviewable under the APA is not necessary; instead, the rule is that the cause of action for review of such action is available absent some clear and convincing evidence of *legislative* intention to preclude review." *Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1986). The APA provides two exceptions to the strong presumption favoring judicial review. Section § 701(a) provides that judicial review shall not apply to the extent that "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(1)-(2).

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review of an NRC order to file a petition for review within 60 days of the entry of the agency's final order. *Id.*

In interpreting the distinction between these two "narrow" exceptions, the United States Supreme Court has explained that the "former applies when Congress has expressed an intent to preclude judicial review." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649 (1985). NRC does not rely on this former exception to preclude this Court from reviewing its action. "The latter [exception] applies in different circumstances; even where Congress has not affirmatively precluded review, review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. In such a case, the statute ("law") can be taken to have 'committed' the decisionmaking to the agency's judgment absolutely." *Id.* (emphasis supplied) *See also Webster v. Doe*, 486 U.S. 592, 599-600, 108 S. Ct. 2047 (1988). The NRC argues that the §701(a)(2) exception ("agency action is committed to agency discretion by law") divests this Court of jurisdiction.

In its motion to dismiss, however, the "law" that NRC relies on to support its unfettered discretion, and deprive this Court of subject matter jurisdiction, is not a "statute" – as in *Chaney* and *Webster* -- but a federal regulation: 10 C.F.R. § 2.206. Although validly-enacted federal regulations carry the force of law, and bind the agency and those that appear before it, it is another thing altogether to maintain that a regulation can divest this Court and the entire federal judiciary of jurisdiction to review agency action that is otherwise presumptively reviewable under federal

statute (the APA) and well-established case law. *Chaney* is clear that Congress can commit an action to the discretion of an agency and render such a decision unreviewable. Nowhere does *Chaney*, or any other case, suggest that an agency itself can do what Congress has not done and decide on its own to move some or all of its decisionmaking authority beyond the scrutiny of the courts simply by regulation. Indeed, such a rule would have profound separation-of-powers implications.

3. NRC describes *Chaney* as establishing a "jurisdictional bar" to 2.206 proceedings. *Chaney*, however, does not address the question of jurisdiction versus standard of review. Indeed, NRC clearly does not appreciate the difference between jurisdiction and standard of review when it argues to this Court at the beginning of its motion to dismiss that "even the briefest examination of the NRC's 2.206 decision will confirm that there has been no agency 'abdication.'" (NRC's Motion to Dismiss, at 2.) This is clearly a merits inquiry. Once the Court must go beyond the governing statutes and the pleading invoking the jurisdiction of the Court to look at the decision itself (which, as an aside, is more important for what it doesn't consider or address than for what it does), it has engaged in a merits-inquiry that ought properly to await full briefing and examination of the record.

4. Further, as Riverkeeper points out in its opposition, the United States Supreme Court in *Chaney v. Heckler*, at 833 n.4, noted that even agency action that might arguably be "unreviewable" was still subject to judicial review if it could be "justifiably found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." In its Petition for Review – construed in the most favorable light -- Riverkeeper has alleged just such an "abdication" of statutory responsibility, and therefore has successfully and appropriately invoked this Court's jurisdiction. It should be permitted to attempt to make this showing by a full briefing and examination of the merits.

5. Several courts, including the United States Supreme Court, have likened an administrative appeal to a common law mandamus action. *See Japan Whaling Assoc. v. American Cetacean Society*, 478 U.S. 221, 228, 230 n.4 (1986); *Stehney v. Perry*, 101 F.3d 925, 934 (3d Cir. 1996). Therefore, it is not surprising that the law regarding mandamus is similar to the law described above. Particularly, it is black letter law that a writ of mandamus "will not issue to compel the performance of discretionary acts . . . ." 52 Am. Jur. 2d *Mandamus* § 49, p. 316. However, the "discretion must be exercised under the law and not contrary thereto. . . ." *Id.* at § 51, p. 319.

> Mandamus is a proper remedy if, in the attempted performance of discretionary acts, the official abuses the discretion so as to amount to

> a failure to do the act as the law requires, or if by a mistaken view of the law there has been no actual exercise of good faith of the judgment or discretion vested in the officer, or if an official acts so arbitrarily or capriciously that the court is justified in holding that no discretion was exercised at all.

Id. at § 51, p. 319-20. Thus, if the plaintiff to a mandamus action alleges and demonstrates that an officer has abused his or her discretion, has failed to act as the law requires, has mistaken view of the law, or has acted arbitrarily or capriciously, the court will issue a writ of mandamus to compel a proper exercise of the officer's discretion. At any rate, discretion on behalf of the officer does not divest the Court of jurisdiction to address and rule on the action. In its Petition for Review to this Court – construed in the most favorable light -- Riverkeeper has made such an allegation.

6. Important policy reasons, grounded in this government's system of checks and balances, strongly militate against this Court embracing the NRC's argument that its decisions are entirely insulated from judicial scrutiny. Although NRC might see some entanglement or interference flowing from judicial review of its administrative decisions, such is neither the purpose nor the necessary result of this Court assuming jurisdiction over Riverkeeper's Petition. As the District of Columbia Court of Appeals stated well:

> The central point is the combination of the court's "supervisory" function, to review agency decisions and assure that there has been conformance with pertinent requirements of law, and its responsibility of restraint, to avoid intrusion into the area of discretion, and choice of

policy, vested by Congress in the agency.

> The conjunction of supervision and restraint yields a collaborative partnership between agency and court in furtherance of Congressional purpose and the interest of justice.
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> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.

Greater Boston Television Corp. v. FCC, 463 F.2d 268, 281 (D.C. Cir. 1971).

Regardless of whether the Court ultimately undertakes a deferential standard of review on the merits, there is great virtue in the Court assuming jurisdiction over the Petition for Review, both with regard to this administrative action and future actions by this agency and others. With the availability of judicial review to ensure compliance with the law – both in construction and application – executive agencies are the most apt to operate in a manner most consistent with legislative directive. The harmonious functioning of all three branches of government – undertaking their respective roles while at the same time affording appropriate deference to each other – best assures the protection of legal rights of the citizenry.

Respectfully submitted,

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Certificate of Service

Pursuant to Rule 25(d)(2) of the Federal Rules of Appellate Procedure, I hereby certify that on this 30th day of July, 2003, the original and 9 copies of the foregoing were filed in accordance with Rule 25(a)(2)(B(ii) to Roseann B. MacKechnie, Clerk, Second Circuit Court of Appeals, 40 Foley Square, New York, New York 10007.

I further certify that seven copies of the foregoing were delivered to the following counsel of record:

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