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

September 29, 2003

Ms. Roseann B. MacKechnie, Clerk
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 Ms. MacKechnie:

Enclosed you will find an original and ten copies of the Brief for the Federal Respondents in the above-captioned case, as well as a notice of appearance for the Nuclear Regulatory Commission. 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 "Jared K. Heck", written over a horizontal line.

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Enclosures: As stated

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03-4313

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, Inc.,
Petitioner,

v.

SAMUEL J. COLLINS, Director, Office of Nuclear Reactor Regulation,
DR. WILLIAM TRAVERS, Executive Director for Operations of the
U.S. NUCLEAR REGULATORY COMMISSION;
The UNITED STATES OF AMERICA;
Federal Respondents,

ENTERGY NUCLEAR INDIAN POINT 2, LLC,
ENTERGY NUCLEAR INDIAN POINT 3, LLC, and
ENTERGY NUCLEAR OPERATIONS, INC.
Utility Respondents.

ON A PETITION FOR REVIEW OF A FINAL DECISION OF THE
U.S. NUCLEAR REGULATORY COMMISSION

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September 29, 2003

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JURISDICTIONAL STATEMENT

Petitioner Riverkeeper, Inc., challenges a decision by the Nuclear Regulatory Commission ("NRC" or "the Commission") partially denying an administrative petition for enforcement action against Indian Point Units 2 and 3, two nuclear reactors located in Westchester County, New York (collectively, "Indian Point"). As argued in the body of this brief, this Court is without jurisdiction to review the NRC's decision. Under the doctrine set forth in *Heckler v. Chaney*, 470 U.S. 821 (1985), the NRC's denial of Riverkeeper's request for enforcement action is "committed to agency discretion" under the Atomic Energy Act of 1954, as amended, (AEA) and is not subject to judicial review.

QUESTIONS PRESENTED

1. Whether this Court should join three other Circuits in finding unreviewable the NRC's decision not to develop and impose new requirements at a nuclear power reactor in response to an administrative petition for enforcement action under 10 C.F.R. § 2.206.
2. Whether the NRC "abdicated" its statutory responsibilities when it developed and implemented numerous security enhancements for nuclear

power reactors, but did not shut down Indian Point or impose the particular security measures advocated by Riverkeeper (*i.e.*, a permanent no-fly zone, an air defense system, and a dry cask spent fuel storage system).

3. Assuming, *arguendo*, that the NRC's decision not to take enforcement action is judicially reviewable, whether the NRC acted reasonably in concluding that Indian Point can continue to operate safely in light of nationwide aviation security enhancements, inherent reactor design features, and continued NRC oversight.

STATEMENT OF THE CASE

A. *Nature of the Case*

On November 8, 2001, Petitioner Riverkeeper, Inc., filed an administrative petition for enforcement action with the NRC under 10 C.F.R. § 2.206. (JA 53) Riverkeeper's 2.206 petition, supplemented on December 20, 2001, asked the NRC to enforce several proposed security measures against Respondent Entergy Nuclear Operations, the NRC licensee that operates Indian Point. Riverkeeper's specific security demands included the implementation of a permanent no-fly zone and

other air defenses at Indian Point to deter or prevent airborne terrorist attacks. (JA 53-54) Riverkeeper also sought a “full review of the facility’s vulnerabilities, security measures, and evacuation plans.” (JA 53)

On November 18, 2002, the NRC issued Director’s Decision 02-06 in response to Riverkeeper’s 2.206 petition. (JA 24) Director’s Decision 02-06 partially granted Riverkeeper’s 2.206 petition, noting that the NRC had already undertaken a “comprehensive review” of its security requirements and imposed many security enhancements upon its power reactor licensees. (JA 28, 30-32) With respect to Riverkeeper’s specific security demands, the NRC concluded that Indian Point’s design features, together with improved aviation security and continued NRC oversight, were adequate to protect the power plant from airborne terrorist attack. (JA 41-42, 45-48) Consequently, the NRC declined to impose Riverkeeper’s proposed additional security measures. (JA 48)

Riverkeeper asks this Court to reverse the NRC’s decision and to order the NRC to impose the specific security measures proposed in Riverkeeper’s 2.206 petition. In support of this request, Riverkeeper argues that Indian Point is vulnerable to airborne terrorist attack and that the

consequences of such an attack would be disastrous. (Pet. Brief at 8-15) In Riverkeeper's view, the NRC's partial denial of its 2.206 petition reflects "a complete abdication of NRC's statutory responsibility to protect public health and safety." (Pet. Brief at 19)

As we explain in the "Argument" portion of this brief, there has been no such abdication. To the contrary, the NRC has devoted enormous effort to improving all aspects of nuclear power plant security since September 11, 2001, and has imposed many security enhancements. In this case, the NRC simply decided not to take the particular enforcement measures advocated by Riverkeeper after fully and fairly considering Riverkeeper's proposals. Under the doctrine set forth in *Heckler v. Chaney*, 470 U.S. 821 (1985), the NRC's decision not to take enforcement action in this context is not judicially reviewable.¹ Even assuming that the NRC's decision in this case is reviewable, it is entitled to a high level of deference by this Court and should be upheld as a reasonable exercise of enforcement authority under the AEA. Riverkeeper's petition for review should be denied.

¹ Invoking *Heckler v. Chaney*, we moved to dismiss Riverkeeper's petition for review. A motions panel of this Court referred our motion to the merits panel "for decision after full briefing." See Order dated Aug. 28, 2003 (2d Cir.).

B. Statutory and Regulatory Framework

1. NRC Enforcement Authority Under the Atomic Energy Act

The NRC has broad authority under the AEA to license and regulate the operation of commercial nuclear power plants. *See* AEA §§ 101-103, 161, 182, 186, 42 U.S.C. §§ 2131-2133, 2201, 2232, 2236. Discretion is the hallmark of this authority, for the AEA is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Public Service Co. of New Hampshire v. NRC*, 582 F.2d 77, 82 (1st Cir. 1978) (quoting *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968)), *cert. denied*, 439 U.S. 1046 (1978).²

The Commission’s general enforcement authority is set forth in AEA § 161, 42 U.S.C. § 2201. Section 161b authorizes the NRC to establish such standards for the possession and use of nuclear materials “as the

²*Accord Kelly v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995); *Arnow v. NRC*, 868 F.2d 223, 234 (7th Cir. 1989); *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1523 (1st Cir. 1989); *Iowa Electric Light and Power Co. v. Local Union 204 of Int’l Brotherhood of Elec. Workers*, 834 F.2d 1424, 1428 (8th Cir. 1987); *Duke Power Co. v. NRC*, 770 F.2d 386, 390 (4th Cir. 1985); *Westinghouse Electric Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979).

Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property. . .” 42 U.S.C. § 2201(b). Under AEA § 161i, which applies to nuclear power plant regulation, the Commission may “prescribe such regulations or orders as it may deem necessary. . . to protect health and to minimize danger to life or property.” 42 U.S.C. § 2201(i).

The NRC uses a wide range of enforcement tools to “protect health and to minimize danger to life or property” and to “promote the common defense and security.” These include notices of violation, civil penalties, and orders modifying, suspending, or revoking licenses. *See generally* NUREG-1600, *General Statement of Policy and Procedure for NRC Enforcement Actions*, 65 Fed. Reg. 25,368 (May 1, 2000).³ These enforcement tools are rooted in statutory provisions, whose permissive phrasing affords the NRC considerable enforcement discretion. *See, e.g.*, AEA § 161, 42 U.S.C. § 2201 (general enforcement authority); AEA § 186, 42 U.S.C. § 2236 (license

³ The NRC’s enforcement policy has been revised since its last complete publication in the Federal Register, but not in ways pertinent to this case. For a complete list of revisions to the enforcement policy, see the NRC’s public website at www.nrc.gov/what-we-do/regulatory/enforcement/enforce-pol.html.

revocation); AEA § 232, 42 U.S.C. § 2280 (injunctive orders); *see generally* *Arnow v. NRC*, 868 F.2d 223, 232-34 (7th Cir. 1989).

2. Requests for Enforcement Action Under 10 C.F.R. § 2.206

In addition to the enforcement options outlined above, NRC regulations allow any person to request the NRC to take enforcement action, including action to modify, suspend, or revoke a license. *See* 10 C.F.R. § 2.206(a).⁴ These requests are referred to as “2.206 petitions.” A 2.206 petition must specify the enforcement action sought, as well as the facts upon which the request is based. *Id.*

Upon receiving a 2.206 petition, the NRC refers it to the office director who has the appropriate subject matter authority. *Id.* The NRC office director must then either institute the requested proceeding or inform the petitioner in writing that no proceeding will be instituted and explain why. 10 C.F.R. § 2.206(b). Section 2.206 does not otherwise constrain the office director’s discretion. *See id.*

⁴ We have reproduced the full text of section 2.206 in an addendum to this brief.

If the office director finds merit in the petition, or a portion thereof, he or she will issue a "Director's Decision" explaining the bases upon which the petition was granted. Otherwise, the office director will issue a written decision explaining the denial of the petition. A Director's Decision under 10 C.F.R. § 2.206 becomes final within 25 days unless the Commission acts on its own motion to reverse or modify the decision. 10 C.F.R. § 2.206(c).

C. Factual Background

1. Nuclear Power Plant Security Before September 11, 2001

As noted in Director's Decision 02-06, ensuring security against sabotage at nuclear power plants has been an important part of the NRC's regulatory activity for years. (JA 28-29) Even before September 11, the NRC regularly reviewed nuclear power plant physical security plans and design features to ensure that "nuclear power plants are the most hardened and secure industrial facilities in our nation." (JA 29) The NRC has for years required many layers of protection against terrorist attack, including sophisticated surveillance equipment, professional security forces, access authorization requirements, and robust plant design features.

(JA 29) After September 11, however, it became clear that the NRC needed to further enhance reactor security. (JA 30-31)

2. NRC Security Initiatives After September 11, 2001

After the terrorist attacks of September 11, 2001, the NRC took many steps to increase security at nuclear power plants. *See generally*, NRC Website, *Nuclear Security—Before and After September 11*; ⁵ NRC Press Release No. 01-112 (JA 112-114). The NRC has strengthened its coordination with intelligence and law enforcement communities to better assess the likelihood of terrorist attacks against NRC-licensed facilities. *See Director's Decision 02-06* (JA 42, 48); *Letter from Chairman Richard A. Meserve to Senator James Jeffords* (JA 624) (hereinafter "Jeffords Letter"); *see also* NRC Website, *Letter from Nils J. Diaz to the Hon. Tom Ridge* at 3 (Aug. 29, 2003)⁶ (hereinafter "Ridge Letter"). The NRC has sponsored research into the terrorism-related risks to reactors, spent fuel pools and the ability of

⁵ www.nrc.gov/what-we-do/safeguards/response-911.html

⁶ www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2003/082903-ridge-letter.pdf

concrete structures to withstand an aircraft attack.⁷ The NRC also has coordinated its new security initiatives with those of other federal agencies to ensure an appropriate and balanced response throughout the nation's entire critical energy infrastructure. *Director's Decision 02-06* (JA 31).

The NRC's efforts have produced many new security requirements for power reactors. On February 25, 2002, the NRC ordered all power reactor licensees to implement interim compensatory measures to increase reactor security. *All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately)*, 67 Fed. Reg. 9,792 (March 4, 2002). These orders formalized a series of information notices and advisories previously sent to NRC licensees immediately after September 11. *See id.* More recently, the NRC issued further orders to power reactor licensees establishing new facility access authorization requirements, guard force qualifications, and an enhanced "design basis threat."⁸ *See* 68 Fed. Reg. 1,643 (January 13,

⁷ The details of these studies are classified, but a general description of their focus is available on the NRC's public website. *See* NRC Website, *Fact Sheet on NRC Review of Paper on Reducing Hazards From Stored Spent Nuclear Fuel* at paragraph 11, www.nrc.gov/reading-rm/doc-collections/fact-sheets/reducing-hazards-spent-fuel.html

⁸ The "design basis threat" characterizes the acts of radiological sabotage
(continued...)

2003); 68 Fed. Reg. 24,510 (May 7, 2003); 68 Fed. Reg. 24,514 (May 7, 2003); 68 Fed. Reg. 24,517 (May 7, 2003).

In response to these advisories and orders, reactor licensees have augmented their security forces, increased patrols, added security posts, installed physical barriers, restricted facility access to authorized personnel, and enhanced coordination with law enforcement and military authorities. *Director's Decision 02-06* (JA 31-32); *NRC Press Release No. 01-112* (JA 112); *Jeffords Letter* (JA 626). Reactor licensees have also identified strategies to cool the reactor core, containment, and spent fuel pool in the event the plant is damaged by explosions or fires, regardless of their cause. *Director's Decision 02-06* (JA 32, 46). As for airborne attacks, "[t]he NRC has been in regular touch with other federal agencies, specifically the [Federal Aviation Administration] and [Department of Defense], which have acted more than once to protect airspace above nuclear power plants." *In the*

⁸(...continued)

that power reactors' physical security plans and systems must protect against. For security reasons, the details of the "design basis threat" are "safeguards information" under AEA § 147, 42 U.S.C. § 2167, and may not be publicly disclosed.

Matter of all Nuclear Power Reactor Licensees, DD-02-04, 56 NRC 274, 282 (November 1, 2002).

3. Security Proposals in Riverkeeper's 2.206 Petition

In its 2.206 petition, Riverkeeper stated that Indian Point "is not currently equipped to defend itself. . . against an attack of the scale, sophistication, and coordination demonstrated on September 11, 2001." (JA 54) Riverkeeper thus sought a full review of Indian Point's vulnerabilities and security measures, and an immediate shutdown of Indian Point until a permanent no-fly zone around Indian Point could be implemented. (JA 53-54) Riverkeeper additionally proposed "a defense and security system sufficient to protect and defend the no-fly zone," and an NRC order requiring Indian Point to convert its spent fuel storage technology from wet storage in a spent fuel pool to dry storage in concrete casks. (JA 54, 61-62, 76)

Riverkeeper's 2.206 petition did not focus solely on airborne terrorist attack scenarios. Riverkeeper also challenged Indian Point's emergency response plan and Westchester County's Radiological Emergency Response Plan. Riverkeeper in addition sought information disclosures

from Indian Point regarding its security plans. (JA 53-54, 69-70, 73-75) The NRC denied these challenges, and Riverkeeper has not pursued them in the instant petition for review. Instead, Riverkeeper argues against Director's Decision 02-06 only insofar as it denies implementation of a permanent no-fly zone, an air defense system, and dry cask spent fuel storage.⁹

4. NRC Director's Decision 02-06

In Director's Decision 02-06, the NRC acknowledged that Indian Point was not specifically designed to withstand a terrorist attack of the magnitude that occurred on September 11, 2001. (JA 32) The NRC agreed

⁹ The Attorney General of Connecticut filed an *amicus curiae* brief in this case alleging deficiencies in emergency planning at Indian Point. But Riverkeeper has not challenged the reasonable conclusion in Director's Decision 02-06 that Indian Point's "emergency preparedness plans. . . are appropriate to use in response to a radiological emergency, including a release caused by a terrorist attack." (JA 39) The *amicus* brief attempts to impermissibly expand the issues in the case, and is irrelevant to the resolution of the instant petition for review. See *Bano v. Union Carbide Corp.*, 273 F.3d 120, 127 n. 5 (2d Cir. 2001). However, we note that the Attorney General has raised virtually identical emergency planning allegations in a 2.206 petition currently pending before the NRC. See *Entergy Nuclear Operations, Inc., Receipt of Request for Action Under 10 C.F.R. 2.206*, 68 Fed. Reg. 41,187 (July 10, 2003). The NRC is considering and will address the Attorney General's emergency planning allegations under the agency's normal 2.206 process.

that “[t]he 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.” (JA 31) Director’s Decision 02-06 noted that the NRC had already undertaken a “comprehensive review of the NRC’s security regulations and programs,” the results of which would “be evaluated and, if appropriate, incorporated into the NRC’s regulatory processes.” (JA 31) Director’s Decision 02-06 therefore partially granted Riverkeeper’s request for a “full review of [Indian Point’s] vulnerabilities and security measures.” (JA 28)

Director’s Decision 02-06 also addressed Riverkeeper’s request that the NRC impose additional specific security measures at Indian Point. (JA 41-45) The NRC concluded that Indian Point’s inherent design features, in combination with improved intelligence gathering, aviation security, and continued NRC oversight “provide adequate protection of public health and safety” from airborne terrorist attack. (JA 32-33, 38, 42, 48) Consequently, the NRC denied enforcement of Riverkeeper’s proposed no-fly zone, air defense system, and dry cask spent fuel storage system. (JA 48)

In support of its conclusion, the NRC explained that “[n]uclear power plant design is based on defense-in-depth principles, and includes many features to protect public health and safety.” (JA 32) For example, the reactor itself is housed in a steel-reinforced concrete containment structure. (JA 33) The reactor and other plant components have redundant safety systems specifically designed to safely shut down the plant in the case of fire, loss of offsite power, or loss of the control room. (JA 32-33, 38) Reactor licensees also have strategies for mitigating the impact of fires and explosions, regardless of their cause. (JA 32) In the NRC’s view, these operational and design features could help Indian Point withstand an aircraft impact, even if the plant was not specifically designed with such an impact in mind. (JA 32-33)

In addition to reactor design features, the NRC cited improvements in aviation security to support its decision not to enforce Riverkeeper’s security proposals. For example, the Federal Aviation Administration (FAA) has enhanced passenger and baggage screening, strengthened cockpit doors, and implemented an Air Marshals program. *Director’s*

*Decision 02-06 (JA 42).*¹⁰ Federal law enforcement and intelligence agencies have increased efforts to identify potential threats before they can be carried out. *Director's Decision 02-06 (JA 45, 48).* In more than one case, the Department of Defense and the FAA have acted to protect airspace above nuclear power plants in response to threats at the time thought to be credible, but which were later determined to be non-credible. *Director's Decision 02-06 (JA 41-42); Jeffords Letter (JA 635-36); CNN.com Article, Threat at Three Mile Island Closes Airports (JA 84).* In the NRC's view, these and other government-wide efforts have improved protection against air attacks on all industrial facilities, both nuclear and non-nuclear. *Director's Decision 02-06 (JA 41).*

Finally, the NRC responded to Riverkeeper's call for conversion of Indian Point's spent fuel storage system from spent fuel pools to dry concrete casks. The NRC noted that spent fuel pools, while not as hardened as reactor containments, are relatively small structures that are partially below ground level, minimizing the likelihood of successful

¹⁰*See also* Transportation Security Administration Website, *TSA Fact Sheet*, www.tsa.gov/public/display?theme=44&content=680

terrorist attack. (JA 43-44) The NRC further noted that spent fuel pools are monitored, alarmed, and designed to prevent a rapid loss of cooling water, allowing significant time for both onsite and offsite response in the event of an attack. (JA 43) Lastly, the NRC reiterated that it was reevaluating physical security requirements for reactors and spent fuel pools, and that this review could lead to further security enhancements. (JA 45)

STANDARD OF REVIEW

As an initial matter, this Court must determine whether the jurisdictional bar of *Heckler v. Chaney* applies. This Court decides questions of its own jurisdiction as a *de novo* legal matter. *See, e.g., Soto v. U.S.*, 185 F.3d 48, 51 (2d Cir. 1999). If this Court concludes that *Heckler v. Chaney* does not preclude judicial review of Director's Decision 02-06, then review is "highly deferential" and limited to determining whether the NRC acted arbitrarily or capriciously in declining to enforce Riverkeeper's specific security proposals. *See Rockland County v. NRC*, 709 F.2d 766, 776 (2d Cir. 1983).

SUMMARY OF THE ARGUMENT

Under the doctrine set forth in *Heckler v. Chaney*, the NRC's denial of Riverkeeper's administrative petition for enforcement action under 10 C.F.R. § 2.206 is presumptively unreviewable. The presumption of unreviewability cannot be rebutted in this case because the AEA and the NRC's own regulations give the agency wide discretion to decide whether additional safety and security measures are necessary or whether plant shutdown is necessary. Congress has established no "meaningful standard" against which this Court may review the NRC's decision not to take enforcement action.

As argued previously in our motion to dismiss, every United States Court of Appeals to consider the issue has agreed that NRC denials of 2.206 petitions are unreviewable under *Chaney*. Accordingly, this Court is without jurisdiction to review Director's Decision 02-06.

Nor may this Court review the reasonableness of Director's Decision 02-06 on the grounds that the NRC "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n. 4. Contrary to

Riverkeeper's view, this language from footnote 4 of *Chaney* does not graft an ordinary "arbitrary and capricious" standard of review onto agency decisions not to bring enforcement actions. The so-called "abdication exception" to the presumption of unreviewability is best viewed as a judicial safety valve that enables reviewing courts to prevent an agency from behaving in a blatantly lawless manner, in utter disregard of a clear statutory directive. Here, the NRC's many efforts to increase nuclear power plant security easily show that the NRC has in no sense "abdicated" its statutory responsibility to protect the public health and safety and to ensure the common defense and security under the AEA.

Even if this Court concludes that Director's Decision 02-06 is reviewable, precedent in this Court holds that such review is limited to determining whether the NRC acted arbitrarily or capriciously, giving great deference to the NRC's technical and policy judgments. In the present case, after careful consideration, the NRC set forth a detailed, well-reasoned explanation to support its denial of Riverkeeper's 2.206 petition. This Court should defer to the NRC's reasoning and uphold its decision not to enforce Riverkeeper's security proposals.

ARGUMENT

A. *The Commission's Decision Not to Initiate Discretionary Enforcement Proceedings at Petitioners' Request is not Judicially Reviewable*

In *Heckler v. Chaney*, the Supreme Court established a presumption that an agency's refusal to exercise its enforcement authority is action "committed to agency discretion by law" and hence not reviewable under the Administrative Procedure Act. 470 U.S. at 834-35, 838; *see* 5 U.S.C. § 701(a)(2). An agency's decision not to enforce is presumptively unreviewable because it involves "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831. These factors include allocation of resources, likelihood of successful enforcement, and "whether the enforcement action requested best fits the agency's overall policies. . ." *Id.*

Given the complexity of enforcement decisions, courts should avoid entangling themselves "in a calculus involving variables better appreciated by the agency charged with enforcing the statute" and instead leave the decision of when and whether to take enforcement action to "the institutional actor best equipped to make it." *New York Pub. Int. Research Group v. Whitman*, 321 F.3d 316, 331, 332 (2d Cir. 2003) (hereinafter NY

PIRG). A court may review an agency's decision not to enforce only if "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Chaney* at 832-33. But if the agency's governing statute is drawn in such a broad fashion that a court is without a "meaningful standard" against which to judge the an agency's denial of a petition for enforcement, then the agency action remains unreviewable. *Id.* at 830.

1. *Unanimous Legal Authority Holds NRC Denials of 2.206 Petitions Unreviewable Under Chaney*

After *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 D.C. Circuits) has found the denial unreviewable. This Court, too, has applied *Chaney's* presumption of unreviewability to deny challenges to the adequacy of agency enforcement. The sound reasoning of these decisions precludes review of Director's Decision 02-06 in this case.

In *Massachusetts Public Interest Research Group v. NRC* (hereinafter *Mass PIRG*), several parties filed a 2.206 petition requesting the NRC to prevent the restart of Pilgrim Nuclear Power Station, which was shut down at the time. 852 F.2d 9, 10-11 (1st Cir. 1988). The 2.206 petition alleged that the

plant could not operate safely because of deficiencies in plant management, inadequacies in emergency planning, and design flaws in the plant's containment structure. *See id.* The NRC denied the petition in part for failure to present sufficient evidence of design flaws. *See id.* at 12. As in the present case, the NRC also relied in part on actions by another federal agency, the Federal Emergency Management Agency, to conclude that the 2.206 petition failed to sustain its contentions regarding emergency planning. *See id.* The NRC granted the petition to the extent it requested correction of management deficiencies prior to restarting the reactor. *See id.* at 11-12.

On judicial review, the First Circuit concluded that both the AEA and 10 C.F.R. § 2.206 are phrased permissively and afford the NRC maximum enforcement discretion. *See id.* at 15-16. Thus, the court could find no "meaningful standard" against which to judge the NRC's denial of the 2.206 petition at issue. *See id.* at 19. Ultimately, the First Circuit declined to review the NRC's decision not to grant enforcement of the 2.206 petition, noting that the NRC's decision "reflects the very sort of agency

decisionmaking which *Chaney* cited in support of the presumption of immunity from judicial review." *See id.* at 19, citing *Chaney*, 470 U.S. at 821.

In *Arnow v. NRC*, various residents of Illinois sought to shut down several nuclear power plants owned and operated by Commonwealth Edison Company. 868 F.2d 223, 225 (7th Cir. 1989). The residents' 2.206 petition claimed that the reactors were unsafe because the containment structures might not be strong enough to prevent the spread of radioactive material during a nuclear accident. *See id.* The 2.206 petition in *Arnow* called for suspension of the reactors' operating licenses and retesting of the strength of their containments. *See id.* at 225-26. The NRC denied the 2.206 petition, reasoning that Commonwealth Edison had adequately tested the strength of its containment structures and that the NRC had independently verified the strength of those structures. *See id.* at 227-28.

As in the present case, the NRC concluded in *Arnow* that the allegedly dangerous reactors could continue to operate safely without having to implement the proposals of the residents' 2.206 petition. The Seventh Circuit refused to second guess this conclusion. The Court applied *Chaney* and *Mass PIRG* to find the NRC's denial of the 2.206 petition unreviewable.

The Court said, "Congress has entrusted the NRC with wide, unreviewable discretion in the area of agency enforcement," and "the Atomic Energy Act and the regulations promulgated thereunder provide 'no law to apply'" in reviewing NRC denials of 2.206 petitions. *Id.* at 234, 236.

On the same day that the Seventh Circuit decided *Arnow*, the D.C. Circuit also concluded that NRC denials of 2.206 petitions are unreviewable under *Chaney*. In *Safe Energy Coalition of Michigan v. NRC*, two groups requested the NRC to take enforcement action against a licensee that had established a voluntary "employee concern" program called "SAFETEAM." 866 F.2d 1473, 1475 (D.C. Cir. 1989). The 2.206 petition argued that SAFETEAM, which was designed to elicit safety concerns from persons involved in plant construction and operation, was being used to identify whistleblowers for retaliation by utility management. *See id.* The 2.206 petition sought an NRC order requiring the licensee to operate the SAFETEAM program in accordance with certain quality assurance regulations found in 10 C.F.R. Part 50, Appendix B. *See id.*

As in the present case, the NRC declined to grant the relief requested, in part because it found that the licensee could continue to operate safely without implementing the proposals contained in the 2.206 petition. *See id.* at 1475-76. Applying a *Chaney* analysis, the D.C. Circuit refused to review the NRC's conclusions, reasoning that nothing in the AEA or NRC regulations constrained the agency in its efforts to "protect health." *See id.* at 1478.

These three cases—*Arnow*, *Mass PIRG*, and *Safe Energy*—are indistinguishable in principle from the present case. In those cases, as here, petitioners asked the NRC under 10 C.F.R. § 2.206 to impose on power reactor licensees additional requirements allegedly necessitated by safety. The reviewing courts invoked *Chaney* and declined to undertake a merits inquiry into the NRC 2.206 decision denying such relief. This Court should take the same path as its sister Circuits and rule that it lacks jurisdiction to decide whether the NRC should have taken the enforcement measures demanded in Riverkeeper's 2.206 petition.

It is true that this Court has not itself had occasion to consider the application of *Chaney* to an NRC denial of a 2.206 petition. But this Court

has followed the *Chaney* unreviewability principle in other, analogous settings. In *NY PIRG*, for example, 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. *See* 321 F.3d at 330-31. This Court pointed to the agencies' near plenary control over decisions whether to bring 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.*, this Court refused to review an allegation that the Immigration and Naturalization Service (INS) had failed to adequately control illegal immigration. 82 F.3d 23, 26 (2d Cir. 1996). This Court held that it was without jurisdiction to review the merits of the petitioners' claim:

In the present case, in determining the merits of the plaintiffs' claim, we would have to consider whether the INS adequately has controlled

immigration into New York State, and whether revenues should have been directed to that problem rather than at other projects considered priorities by the INS. Because this is strictly a discretionary matter, the plaintiffs' claim is not reviewable by this court. See 8 U.S.C. § 1103(a) ("[The Attorney General] shall have the power and duty to control and guard the boundaries and borders of the United States against illegal entry of aliens and shall, in [her] discretion, appoint for that purpose such number of employees of the Service as to [her] shall appear necessary and proper.").

82 F.3d at 29-30.

Here, too, as in *NY PIRG* and *Padavan*, this Court should decline to involve itself in "technical and prudential judgments lying largely outside the expertise of courts," 321 F.3d at 332, and refuse review of how the NRC assesses "priorities," 82 F.3d at 29, in nuclear power plant security.

2. *The AEA Contains No "Meaningful Standard" Against Which to Judge the NRC's Decision Not to Take Enforcement Action*

Under *Chaney*, this Court may review the NRC's denial of Riverkeeper's 2.206 petition only if there is a "meaningful standard" against which to judge the NRC's decision not to enforce. 470 U.S. at 830, 832-33. To determine whether a "meaningful standard" sufficient to rebut the presumption of unreviewability exists requires "careful examination of the statute on which the claim of agency illegality is based." *Lunney v. U.S.*, 319 F.3d 550, 558 (2d Cir. 2003), quoting *Webster v. Doe*, 486 U.S. 592,

600 (1988). Nothing in the AEA rebuts the presumption of unreviewability established in *Chaney*.

A careful examination of the general enforcement provisions of the AEA quickly reveals that "Congress has entrusted the NRC with wide, unreviewable discretion in the area of agency enforcement." *Arnow*, 868 F.2d at 234. For example, AEA § 161i is phrased in permissive language, authorizing the Commission to "prescribe such regulations or orders *as it may deem necessary*. . . to govern any activity authorized pursuant to this Act. . . in order to protect health and to minimize danger to life or property." 42 U.S.C. 2201(i) (emphasis added). AEA § 161b authorizes the Commission to establish such standards for the use and possession of certain nuclear materials "*as the Commission may deem necessary or desirable* to promote the common defense and security or to protect health or to minimize danger to life or property. . ." 42 U.S.C. 2201(b) (emphasis added). Section 161c "*authorizes*" the NRC to "make such studies and investigations. . . as the *Commission may deem necessary or proper* to assist it in. . . [the] enforcement of this Act, or any regulations or orders issued

thereunder.”¹¹ 42 U.S.C. § 2201(c) (emphasis added). Such language is strictly discretionary, and cannot provide a basis for judicial review in this case. *Cf. Padavan*, 82 F.3d at 29-30 (phrase “as shall appear necessary and proper” imputes unreviewable discretion); *NY PIRG*, 321 F.3d at 330 (phrase “Whenever the Administrator makes a determination” imputes unreviewable discretion).

As is obvious from these provisions, Congress deliberately worded the AEA to afford the Commission wide enforcement discretion on whether to issue an order or regulation.¹² *See Siegel*, 400 F.2d at 783; *Arnow*, 868 F.2d at 234. Nothing in the AEA mandates the implementation of a permanent no-fly zone, air defenses, or dry cask spent fuel storage at Indian Point. The

¹¹*See also* AEA § 232, 42 U.S.C. § 2280 (whenever “*in the judgment of the Commission*” any person has violated or will violate the AEA, the Attorney General “*may*” seek an injunction on the Commission’s behalf) (emphasis added); AEA § 186a, 42 U.S.C. § 2236(a) (“Any license *may* be revoked for any material false statement in the application. . . which would warrant the Commission to refuse to grant a license on an original application. . .”) (emphasis added).

¹² Of course, if the Commission actually issues an order or regulation, the AEA makes that form of agency decision reviewable. *See* AEA § 189b, 42 U.S.C. § 2239(b). “The point of *Chaney*, however, is to distinguish enforcement decisions from those other forms of agency action for purposes of judicial review.” *Safe Energy*, 866 F.2d at 1478.

NRC's decision not to take enforcement action in this case is entirely consistent with its discretionary AEA enforcement authority, and is presumptively unreviewable under *Chaney*. See *Arnow*, 868 F.2d at 233; *Safe Energy*, 866 F.2d at 1478; *Mass PIRG*, 852 F.2d at 15.

3. *The NRC's Regulations Contain No "Meaningful Standard" Against Which to Judge the NRC's Decision Not to Take Enforcement Action*

Agency regulations may also provide standards against which to judge an agency's refusal to enforce. See *Lunney*, 319 F.3d at 558; *Mass PIRG*, 852 F.2d at 16. Riverkeeper cites an NRC regulation in its brief, 10 C.F.R. § 73.51(b), but does not even attempt to explain how the cited regulation supports its case. (Pet. Brief at 16) In any event, this Court cannot apply 10 C.F.R. § 73.51(b) to review the merits of Director's Decision 02-06.

Section 73.51(b) establishes performance objectives for physical security at certain spent fuel storage facilities. But 10 C.F.R. § 73.51(b) is not properly viewed as an enforcement regulation. Rather, it sets forth standards against which the NRC judges license applications. Such regulations "provide no guidelines for the agency to follow in exercising its enforcement powers" and thus provides nothing for this Court to "look to

in adjudicating the NRC's decision not to take enforcement action."

Arnow, 868 F.2d at 235. "Nothing in the regulations cited. . . defines *how* the NRC's decision must be reached or mandates which action the NRC must take." *Id.*

The only NRC regulation relevant to the Court's inquiry in this case is 10 C.F.R. § 2.206. Section 2.206 outlines how a member of the public may request the NRC to take enforcement action and provides rules that the NRC must follow in responding to such requests. However, the NRC's only legal duty under 10 C.F.R. § 2.206 is to either initiate a proceeding or issue a written response to a request for enforcement action within a reasonable time. *See* 10 C.F.R. § 2.206(b). Here, the NRC met its obligations under section 2.206 when it issued Director's Decision 02-06.

Ultimately, Riverkeeper does not even attempt to argue that the AEA or NRC regulations contain a "meaningful standard" that would restrain the NRC's discretion to act on 2.206 petitions. (Pet. Brief at 3-5) Instead, Riverkeeper argues only that NRC's decision not to initiate a discretionary enforcement action in this case constitutes "an abdication of its statutory

responsibility to protect the public health and safety.” (Pet. Brief at 17) We turn now to that claim.

B. *The NRC Has Not Abdicated Its Statutory Responsibility to Protect the Public Health and Safety and to Ensure the Common Defense and Security*

Riverkeeper’s abdication argument grows out of a footnote in *Heckler v. Chaney* suggesting that judicial review of an agency’s decision not to take enforcement action might be available where the agency “has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.” *Chaney*, 470 U.S. at 833 n. 4, quoting *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973). Specifically, Riverkeeper argues that “NRC in fact has adopted a policy of refusing to consider the possibility of airborne terrorist attacks in plant-specific agency proceedings,” and that ignoring the risk of airborne terrorist attack “is an abdication of the Commission’s duty to protect the public.” (Pet. Brief at 17, 25, 26) Riverkeeper’s argument is factually wrong and incorrectly views the “abdication” inquiry as synonymous with ordinary “arbitrary and capricious” review of agency action.

1. *Riverkeeper Incorrectly Equates “Abdication” With an “Arbitrary and Capricious” Refusal to Take Enforcement Action*

Riverkeeper acknowledges that the NRC has accounted for the risk of aircraft attack at Indian Point in part by relying on nationwide aviation security improvements to enhance reactor security. Riverkeeper argues, however, that this reliance amounts to an abdication of the NRC’s responsibilities because “present methods of securing airspace [are] woefully insufficient to protect the Indian Point facility from an attack from the air.” (Pet. Brief at 19, 22) Thus, by challenging the *sufficiency* of aviation security, Riverkeeper challenges the *reasonableness* of NRC’s reliance upon it. Riverkeeper then styles its challenge as a claim that the NRC has abdicated its statutory responsibility under the Atomic Energy Act, essentially urging this Court to equate “abdication” with something akin to an “arbitrary and capricious” standard of review.

That Riverkeeper considers “abdication” to be just another standard of review is obvious on the face of its brief, which directly cites footnote 4 of *Chaney* as a standard of review (Pet. Brief at 3), and from the thrust of its argument, which directly attacks the *reasons* supporting Director’s Decision 02-06. For example, where Director’s Decision 02-06 reasoned that

improvements in passenger and baggage screening would prevent terrorists from getting on planes in the first place, Riverkeeper responds that screening measures “have proved gravely inadequate.” (Pet. Brief at 20) Where Director’s Decision 02-06 found that federal security forces can and will immediately respond to specific, credible airborne threats against nuclear power plants, Riverkeeper responds that intelligence cannot always predict the timing of an attack. (Pet. Brief at 23) Strangely, Riverkeeper even argues that a no-fly zone, the very security measure it seeks to have permanently enforced, would be ineffective. (Pet. Brief at 22-23)

As these arguments make clear, Riverkeeper is not really challenging the NRC for a complete failure to act—*i.e.*, an abdication—but rather for an alleged failure to act in a manner that Riverkeeper considers *reasonable*. But if abdication means anything at all, it must mean something other than what Riverkeeper advocates. To conclude otherwise would eviscerate the core holding of *Heckler v. Chaney* by rendering the reasonableness of virtually any agency refusal to bring enforcement action reviewable upon a

simple claim that the exercise of discretion amounts to an “abdication of [the agency’s] statutory responsibilities.” *Chaney*, 470 U.S. at 833 n. 4.

Properly viewed, the “abdication” exception suggested in footnote 4 of *Chaney* creates a judicial safety valve leaving room for judicial review of agency refusals to enforce where an agency has acted in a “blatantly lawless manner.” Cf. *Eastern Bridge, LLC v. Chao*, 320 F.3d 84, 91 (1st Cir. 2003), quoting *Oestereich v. Selective Service System Local Bd. No. 11*, 393 U.S. 233, 237-39 (1968). This interpretation is consistent with the language of footnote 4 itself, which suggests review for abdication is only available in “extreme” circumstances. *Chaney*, 470 U.S. at 833 n. 4. Riverkeeper’s dissatisfaction with the reasoned conclusions in Director’s Decision 02-06 is simply not the type of extreme circumstance contemplated by footnote 4 of *Chaney*. “Real 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).

Riverkeeper cites decisions of the First, Seventh, and D.C. Circuits for the proposition that “NRC denials of 2.206 Petitions are subject to review and reversal where such decisions constitute a complete abdication of the

Agency's responsibility to protect public health and safety." Pet. Brief at 19, citing *Safe Energy*, 866 F.2d at 1477; *Arnow*, 868 F.2d at 236; *Mass PIRG*, 852 F.2d at 19. But none of these cases held that a simple claim of "abdication" such as Riverkeeper's triggers a merits review of an NRC decision not to enforce. Nor did any of these cases actually find an instance of agency action so "extreme" that it amounted to an "abdication." In fact, as discussed at pages 21-27, *supra*, each of these cases held that NRC denials of 2.206 petitions are unreviewable under *Chaney*. See *Safe Energy*, 866 F.2d at 1477; *Arnow*, 868 F.2d at 228-229; *Mass. PIRG*, 852 F.2d at 19. To our knowledge, no case, involving the NRC or otherwise, has ever found an agency "abdication" within the meaning of *Chaney's* footnote 4.

This Court should not allow Riverkeeper to do an end-run around *Chaney* in this case simply because Riverkeeper has recast its arguments against the reasonableness of Director's Decision 02-06 as claims of "abdication." In any event, the record in this case belies a claim of abdication—the NRC has worked vigorously to meet its responsibility to

protect the public health and safety and to ensure the common defense and security under the AEA.

2. *The NRC Has Neither Ignored Aviation Security Risks nor Adopted a General Policy Precluding Consideration of Such Risks*

Assuming, *arguendo*, that this Court may review Director's Decision 02-06 for an abdication of statutory responsibilities, that review is initially limited to determining whether the NRC "has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Chaney*, 470 U.S. at 833 n. 4. The NRC has never adopted such a policy, and Riverkeeper's claims to the contrary are baseless.

Immediately after September 11, 2001, the NRC began reevaluating the risk of airborne terrorist attack and what to do about it. *See, e.g., NRC Press Release No. 01-112 (JA 112-113); NRC Website, Statement of Chairman Richard A. Meserve to the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives at 7-8 (April 11, 2002) (hereinafter "Statement of Chairman Meserve").*¹³ Director's Decision 02-

¹³ www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

06 explicitly considered airborne terrorist risks and offered a reasoned judgment against the need for permanent no-fly zones and air defenses at Indian Point while partially granting Riverkeeper's request for a "full review of the facility's vulnerabilities and security measures." (JA 28, 41-42) This reasoned response belies Riverkeeper's claim that "NRC in fact has adopted a policy of refusing to consider the possibility of airborne terrorist attacks in plant-specific agency proceedings." (Pet. Brief at 19)

Riverkeeper tries in vain to identify an NRC policy totally ignoring the risk of terrorism. Riverkeeper first points to a 1998 NRC rule on physical protection of radioactive waste. Final Rule, *Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste* (JA 724). This rule supposedly exemplifies the NRC's "specific policy not to consider potential terrorist attacks by airborne vehicles. . . ." (Pet. Brief at 25) In fact, the rule simply states that due to the greater risks associated with nuclear power reactors, security at reactors should be greater than that required for spent fuel storage installations. (JA 725-26). The Commission reasonably concluded that the same protective measures required for nuclear power plants are not necessary to ensure protection of spent fuel. *See id.* This

reasoning hardly evinces NRC indifference to terrorist threats, airborne or otherwise.

Riverkeeper next cites a recent Commission adjudicatory decision construing the National Environmental Policy Act (NEPA). *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).¹⁴ The Commission certainly did not decide that the NRC should not consider terrorism at all, as Riverkeeper would have this Court believe. In fact, the Commission took some trouble to state that it takes the risk of terrorism very seriously:

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,

¹⁴ *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).

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 clearly fails.

Not surprisingly, Riverkeeper ignores the NRC's enormous efforts to improve reactor security. The NRC has added to the protective framework for nuclear power reactors by ordering enhanced access authorization and fitness-for-duty requirements, and by enhancing the "design basis threat."¹⁵ See 68 Fed. Reg. 1,643 (January 13, 2003); 68 Fed. Reg. 24,510 (May 7, 2003); 68 Fed. Reg. 24,514 (May 7, 2003); 68 Fed. Reg. 24,517 (May 7,

¹⁵ The "design basis threat" was prepared by security experts, based on information from the intelligence community and the 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. *Director's Decision 02-06* (JA 29).

2003). The NRC continues to sponsor research into the effects of aircraft attacks on reactor containments and essential auxiliary facilities. *See Ridge Letter* at 1;¹⁶ National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* at 60-61 (hereinafter "NAS Study") (JA 999-1000); NRC Website, *Fact Sheet on NRC Review of Paper on Reducing Hazards From Stored Spent Nuclear Fuel* at paragraph 11.¹⁷ The NRC regularly reviews intelligence information to identify potential threats against nuclear power plants before they occur. *See Director's Decision 02-06* (JA 31, 42, 45); *Ridge Letter* at 3.¹⁸ It cannot be responsibly found, on this public record, that the NRC has followed a "conscious and express" general policy of inaction so "extreme" that it amounts to an "abdication of statutory responsibilities." *See Chaney*, 470 U.S. at 833 n. 4.

¹⁶ www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2003/082903-ridge-letter.pdf

¹⁷ www.nrc.gov/reading-rm/doc-collections/fact-sheets/reducing-hazards-spent-fuel.html

¹⁸ www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2003/082903-ridge-letter.pdf

C. *Assuming This Court Has Jurisdiction to Undertake an "Arbitrary or Capricious" Review of the NRC's Decision Not to Take Enforcement Action, That Decision Should Be Upheld as a Reasonable Exercise of Enforcement Discretion*

Prior to *Heckler v. Chaney*, this Court reviewed an NRC denial of a 2.206 petition in *Rockland County v. NRC* to determine whether the NRC had acted arbitrarily or capriciously. See 709 F.2d 766, 775 (2nd Cir. 1983), *cert. denied*, 464 U.S. 993 (1983). This Court noted that the NRC's refusal to take enforcement action was entitled to deference because "Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety," and this Court should not "unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process." *Id.* at 776 (citation omitted). Applying these principles, Director's Decision 02-06 should be upheld as a reasonable exercise of enforcement discretion.

As noted at pages 32-34, *supra*, Riverkeeper argues that the NRC acted unreasonably in this case by relying in part on nationwide aviation security improvements to deny Riverkeeper's 2.206 petition. Of course, Riverkeeper can cite no legal authority to support its view that the NRC must develop policy in a vacuum without considering the efforts of other

parts of the government. It is entirely legitimate, as the First Circuit held in a 2.206 case, for one federal agency to rely on actions of another. *See Mass PIRG*, 852 F.2d at 12 (upholding NRC reliance on FEMA emergency planning findings). In this era of increased coordination and cooperation, the NRC would be remiss if it did not consider the entire national legal framework for dealing with terrorism and security threats. To ignore the effort and expertise of other agencies and the security improvements they have wrought would be to ignore reality itself.

In reality, the NRC's private licensees cannot be expected to defend against every conceivable terrorist attack scenario. "There are limits to what can be expected from a private guard force, even assisted by local law enforcement." *Director's Decision 02-06* (JA 42); *see also Statement of Chairman Meserve* at 7-8.¹⁹ The D.C. Circuit endorsed this common sense view decades ago in *Siegel v. AEC*. In *Siegel*, the D.C. Circuit upheld the NRC's refusal to consider aircraft attack at a Florida nuclear power plant during the plant's licensing proceedings. *See* 400 F.2d at 779-80, 782-84. In doing so, the D.C. Circuit implicitly endorsed the NRC's view that "[t]he

¹⁹ www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

protection of the United States against hostile enemy acts is a responsibility of the nation's defense establishment and of the various agencies having internal security functions." *Id.* at 783. The *Siegel* case also noted that "[t]he risk of enemy attack or sabotage against [industrial structures], like the risk of all other hostile attacks which might be directed against this country, is a risk that is shared by the nation as a whole." *Id.*

As the Court in *Siegel* recognized, and as terrible experience has shown, the threat of a terrorist attack utilizing aircraft is not unique to nuclear power plants. This threat exists for all facilities across the nation's complex industrial economy. See *Director's Decision 02-06* (JA 41); *Jeffords Letter* (JA 636); *Statement of Chairman Meserve* at 8.²⁰ Accordingly, the federal government's proper focus should be on improving security at airports and on airplanes to the benefit of the entire nation. See *id.* *Director's Decision 02-06* rightly reflects this notion and the NRC reasonably considered government-wide aviation security measures in refusing to enforce Riverkeeper's security proposals.

²⁰ www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

As Director's Decision 02-06 notes, the federal government as a whole has taken several steps to reduce the risk of aircraft attacks nationwide. (JA 41-42) Improved communications between law enforcement and intelligence agencies will help identify threats before they can be carried out. (JA 42) Enhanced passenger and baggage screening will help prevent terrorists from getting on board commercial aircraft. (JA 41-42)²¹ Strengthened cockpit doors and Air Marshals will help prevent those who may get on board from taking control of the plane. (JA 42) In the worst-case scenario, national defense forces are available to prevent the plane from being used as a weapon. (JA 42); *see also* CNN.com Article, *Threat at Three Mile Island Closes Airports* (JA 84). The NRC reasonably concluded that "the collective measures taken since September 11, 2001, provide adequate protection of the public health and safety." *Director's Decision 02-06* (JA 42).

²¹ *See also* FAA Website, *Statement of the Honorable Marion C. Blakey, Administrator, Federal Aviation Administration Before the House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Independent Agencies* (April 9, 2003), www2.faa.gov/index.cfm/apa/1068/49FF03E7-4628-4C50-B8C20280E1902C3A.

The NRC also reasonably concluded that Indian Point's design features can help protect against terrorist attack. Nuclear power reactors are housed in hardened concrete and steel containment buildings that are designed to withstand extreme pressures, hurricane force winds, and earthquakes. *See Director's Decision 02-06 (JA 32-33); NRC Press Release No. 01-112 (JA 112).* The plant also has several redundant safety features designed to shut down the reactor automatically in the event of blackout, fire, or loss of the control room. *Director's Decision 02-06 (JA 32-33); Statement of Chairman Meserve at 7-8.*²² These safety systems and design features could help mitigate the consequences of an aircraft impact, even though Indian Point was not specifically designed with aircraft impacts in mind. *See id.*

In addition to reactor design features, the NRC's own efforts and oversight have contributed to reactor security. For example, the NRC is sponsoring research into the ability of power plant structures to withstand aircraft impacts and stands ready to further enhance security if necessary.

²² www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

See Ridge Letter at 1;²³ *Statement of Chairman Meserve* at 8;²⁴ NAS Study at 60-61 (JA 999-1000). The NRC has required its licensees to identify vulnerabilities and analyze strategies for mitigating fires and explosions at nuclear power plants, regardless of their cause. *See Director's Decision 02-06* (JA 32). The NRC also maintains regular and close contact with the intelligence and law enforcement communities to identify potential threats to NRC-licensed facilities. *See Director's Decision 02-06* (JA 31, 40, 41-42, 48); *Statement of Chairman Meserve* at 2, 14.²⁵

Riverkeeper has no persuasive rejoinder to the NRC's reasoning. Riverkeeper instead attempts to gloss over reason by exaggerating vulnerabilities,²⁶ describing unrealistic accident scenarios, and by misusing

²³ www.nrc.gov/reading-rm/doc-collections/congress-docs/correspondence/2003/082903-ridge-letter.pdf

²⁴ www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

²⁵ www.nrc.gov/reading-rm/doc-collections/congress-docs/congress-testimony/2002/04-11-02SecTestimony.pdf

²⁶ Riverkeeper relies heavily on a report by the National Research Council to characterize the risk of airborne attack at Indian Point as "high." But that report did not address risks specific to Indian Point. In fact, the report recognized that nuclear power plants have robust construction and

(continued...)

NRC-sponsored studies.²⁷ At times, Riverkeeper even misquotes the NRC to wrongly suggest that the NRC has acknowledged a “gap” in reactor security.²⁸

²⁶(...continued)

security features that may make them less vulnerable than other large industrial facilities. *See* NAS Study at 43 (JA 982). The report also concluded that the severity of aircraft impacts at specific plants “is highly dependent on the specific design configuration. . . including details such as the location of specific safety equipment.” *Id.*

²⁷ For example, Riverkeeper cites to this Court a 1982 Sandia National Laboratory Report, “Calculation of Reactor Accident Consequences” (“CRAC-2 Report”). (Pet. Brief at 14) Riverkeeper uses the CRAC-2 Report to calculate fatalities resulting from radioactive release in the event of a successful aerial attack on a nuclear power plant. However, as discussed in Director’s Decision 02-06, the CRAC-2 Report studies were never intended to be realistic assessments of accident consequences. (JA 37) The studies used simplistic models, assumed the most adverse conditions, and assumed that no protective actions were taken for the first 24 hours. (JA 37) While the CRAC-2 Report provides a useful way to compare sites, it is not properly employed as an analysis of plant-specific accident consequences, which is precisely what Riverkeeper has attempted. (JA 38)

²⁸ Riverkeeper purports to quote page 19 of the *proposed* Director’s Decision. (Pet. Brief at 17) That page, according to Riverkeeper, 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.” (JA 944) But this says something quite different from the “acknowledgment” that
(continued...)

Despite the tone of Riverkeeper's rhetoric, its arguments amount to little more than bluster. As Director's Decision 02-06 concludes, improved intelligence and information sharing, government-wide aviation security improvements, reactor design features, and continued NRC oversight combine to provide reasonable assurance that Indian Point can continue to operate safely. (JA 41-42, 48) In accordance with the principles set forth in *Rockland County*, this Court should defer to the NRC's expert judgment in this case and uphold Director's Decision 02-06 as a reasonable exercise of enforcement discretion.

²⁸(...continued)

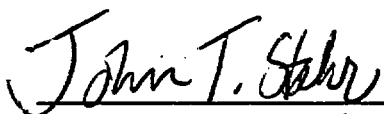
Riverkeeper attributes to the Commission. The actual passage (which is not repeated in the same terms in the final version of the 2.206 decision) means only that the government "must" fill in "gaps" that licensees themselves cannot fill. This is a far cry from saying that the NRC recognizes an existing "gap" in protection.

CONCLUSION

For the foregoing reasons, this Court should dismiss or deny
Riverkeeper's petition for review.

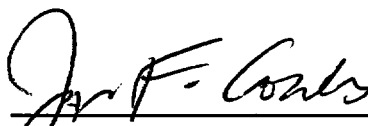
Respectfully Submitted,

THOMAS L. SANSONETTI
Assistant Attorney General

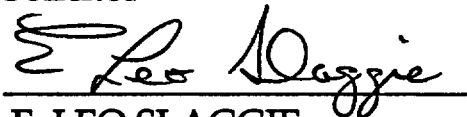


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Dated: September 29, 2003

CERTIFICATE OF COMPLIANCE UNDER FRAP 32(a)(7)(C)

I hereby certify that the number of words in the Brief for the Federal Respondents, excluding the Table of Contents, Table of Authorities, and Addendum, is 9,606, as counted by the Corel WORDPERFECT 8 program.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jared K. Heck", written over a horizontal line.

Jared K. Heck
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission

Dated: September 29, 2003

CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2003, copies of the foregoing Brief for the Federal Respondents were served by mail, postage prepaid, upon the following counsel:

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STATUTORY AND REGULATORY ADDENDUM

Statutes

5 U.S.C. § 701(a)(2)	A-1
AEA § 161b, 42 U.S.C. § 2201(b)	A-2
AEA § 161c, 42 U.S.C. § 2201(c)	A-2
AEA § 161i, 42 U.S.C. § 2201(i)	A-3
AEA § 182, 42 U.S.C. § 2232	A-4 to A-5
AEA § 186, 42 U.S.C. § 2236	A-6
AEA § 232, 42 U.S.C. § 2280	A-6

Regulations

10 C.F.R. § 2.206	A-7
10 C.F.R. § 73.51(b)	A-8

UNITED STATES CODE ANNOTATED
TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 7--JUDICIAL REVIEW

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 23--DEVELOPMENT AND CONTROL OF ATOMIC ENERGY
DIVISION A--ATOMIC ENERGY
SUBCHAPTER XIII--GENERAL AUTHORITY OF COMMISSION

§ 2201. General duties of Commission

In the performance of its functions the Commission is authorized to--

(b) Standards governing use and possession of material

establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security or to protect health or to minimize danger to life or property; in addition, the Commission shall prescribe such regulations or orders as may be necessary or desirable to promote the Nation's common defense and security with regard to control, ownership, or possession of any equipment or device, or important component part especially designed for such equipment or device, capable of separating the isotopes of uranium or enriching uranium in the isotope 235;

(c) Studies and investigations

make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this chapter, or in the administration or enforcement of this chapter, or any regulations or orders issued thereunder. For such purposes the Commission is authorized to administer oaths and affirmations, and by subpoena to require any person to appear and testify, or to appear and produce documents, or both, at any designated place. Witnesses subpoenaed under this subsection shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States;

(i) Regulations governing Restricted Data

prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this chapter, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 2073 of this title or produced by any person in connection with any activity authorized pursuant to this chapter, to prevent

any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, including regulations or orders designating activities, involving quantities of special nuclear material which in the opinion of the Commission are important to the common defense and security, that may be conducted only by persons whose character, associations, and loyalty shall have been investigated under standards and specifications established by the Commission and as to whom the Commission shall have determined that permitting each such person to conduct the activity will not be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

§ 2232. License applications

(a) Contents and form

Each application for a license hereunder shall be in writing and shall specifically state such information as the Commission, by rule or regulation, may determine to be necessary to decide such of the technical and financial qualifications of the applicant, the character of the applicant, the citizenship of the applicant, or any other qualifications of the applicant as the Commission may deem appropriate for the license. In connection with applications for licenses to operate production or utilization facilities, the applicant shall state such technical specifications, including information of the amount, kind, and source of special nuclear material required, the place of the use, the specific characteristics of the facility, and such other information as the Commission may, by rule or regulation, deem necessary in order to enable it to find that the utilization or production of special nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public. Such technical specifications shall be a part of any license issued. The Commission may at any time after the filing of the original application, and before the expiration of the license, require further written statements in order to enable the Commission to determine whether the application should be granted or denied or whether a license should be modified or revoked. All applications and statements shall be signed by the applicant or licensee. Applications for, and statements made in connection with, licenses under sections 2133 and 2134 of this title shall be made under oath or affirmation. The Commission may require any other applications or statements to be made under oath or affirmation.

(b) Review of applications by Advisory Committee on Reactor Safeguards; report

The Advisory Committee on Reactor Safeguards shall review each application under section 2133 or section 2134(b) of this title for a construction permit or an operating license for a facility, any application under section 2134(c) of this title for a construction permit or an operating license for a testing facility, any application under subsection (a) or (c) of section 2134 of this title specifically referred to it by the Commission, and any application for an amendment to a construction permit or an amendment to an operating license under section 2133 or 2134(a), (b), or (c) of this title specifically referred to it by the Commission, and shall submit a report thereon which shall be made part of the record of the application and available to the public except to the extent that security classification prevents disclosure.

(c) Commercial power; publication

The Commission shall not issue any license under section 2133 of this title for a utilization or production facility for the generation of commercial power until it has given notice in writing to such regulatory agency as may have jurisdiction over the rates and services incident to the proposed activity; until it has published notice of the application in such trade or news publications as the Commission deems appropriate to give reasonable notice to municipalities, private utilities, public bodies, and cooperatives which might have a potential interest in such utilization or production facility; and until it has published notice of such application once each week for four consecutive weeks in the Federal Register, and until four weeks after the last notice.

(d) Preferred consideration

The Commission, in issuing any license for a utilization or production facility for the generation of commercial power under section 2133 of this title, shall give preferred consideration to applications for such facilities which will be located in high cost power areas in the United States if there are conflicting applications for a limited opportunity for such license. Where such conflicting applications resulting from limited opportunity for such license include those submitted by public or cooperative bodies such applications shall be given preferred consideration.

§ 2236. Revocation of licenses

(a) False applications; failure of performance

Any license may be revoked for any material false statement in the application or any statement of fact required under section 2232 of this title, or because of conditions revealed by such application or statement of fact or any report, record, or inspection or other means which would warrant the Commission to refuse to grant a license on an original application, or for failure to construct or operate a facility in accordance with the terms of the construction permit or license or the technical specifications in the application, or for violation of, or failure to observe any of the terms and provisions of this chapter or of any regulation of the Commission.

(b) Procedure

The Commission shall follow the provisions of section 558(c) of Title 5 in revoking any license.

(c) Repossession of material

Upon revocation of the license, the Commission may immediately retake possession of all special nuclear material held by the licensee. In cases found by the Commission to be of extreme importance to the national defense and security or to the health and safety of the public, the Commission may recapture any special nuclear material held by the licensee or may enter upon and operate the facility prior to any of the procedures provided under subchapter II of chapter 5 and chapter 7 of Title 5. Just compensation shall be paid for the use of the facility.

§ 2280. Injunction proceedings

Whenever in the judgment of the Commission any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this chapter, or any regulation or order issued thereunder, the Attorney General on behalf of the United States may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Commission that such person has engaged or is about to engage in any such acts or practices, a permanent or temporary injunction, restraining order, or other order may be granted.

CODE OF FEDERAL REGULATIONS

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 2--RULES OF PRACTICE FOR DOMESTIC LICENSING PROCEEDINGS AND
ISSUANCE OF ORDERS

SUBPART B--PROCEDURE FOR IMPOSING REQUIREMENTS BY ORDER, OR FOR
MODIFICATION, SUSPENSION, OR REVOCATION OF A LICENSE, OR FOR
IMPOSING CIVIL PENALTIES

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request to institute a proceeding pursuant to §§ 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper. Requests must be addressed to the Executive Director for Operations and must be filed either by delivery to the NRC Public Document Room at 2120 L Street, NW, Washington, DC, or by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

CODE OF FEDERAL REGULATIONS

TITLE 10--ENERGY

CHAPTER I--NUCLEAR REGULATORY COMMISSION

PART 73--PHYSICAL PROTECTION OF PLANTS AND MATERIALS

PHYSICAL PROTECTION REQUIREMENTS AT FIXED SITES

§ 73.51 Requirements for the physical protection of stored spent nuclear fuel and high-level radioactive waste.

(b) General performance objectives.

(1) Each licensee subject to this section shall establish and maintain a physical protection system with the objective of providing high assurance that activities involving spent nuclear fuel and high-level radioactive waste do not constitute an unreasonable risk to public health and safety.

(2) To meet the general objective of paragraph (b)(1) of this section, each licensee subject to this section shall meet the following performance capabilities.

(i) Store spent nuclear fuel and high-level radioactive waste only within a protected area;

(ii) Grant access to the protected area only to individuals who are authorized to enter the protected area;

(iii) Detect and assess unauthorized penetration of, or activities within, the protected area;

(iv) Provide timely communication to a designated response force whenever necessary; and

(v) Manage the physical protection organization in a manner that maintains its effectiveness.

(3) The physical protection system must be designed to protect against loss of control of the facility that could be sufficient to cause a radiation exposure exceeding the dose as described in § 72.106 of this chapter.

Second Circuit Miscellaneous Forms
Notice of Appearance

Short Title: Riverkeeper v. Collins

Docket No. 03-4313

NOTICE OF APPEARANCE

Appearance for (provide name of party): U.S. Nuclear Regulatory Commission

Status of Party:

- ☐ Appellant/Petitioner ☐ Cross-Appellee/Cross Respondent
☒ Appellee/Respondent ☐ Intervenor
☐ Cross-Appellant/Cross-Petitioner ☐ Amicus Curiae
☐ Other (Specify): _____

☒ An attorney will argue this appeal.

- Name of attorney who will argue appeal, if other than counsel of record: _____
▪ Date of arguing attorney's admission to this Court (month, day, year): Application for Admission to Follow
▪ Other Federal/State Bar admissions: (month, day, year): _____

- ☐ I am a *pro se* litigant who is not an attorney.
☐ I am an incarcerated *pro se* litigant.

TIME REQUEST

- ☐ Oral argument is not desired.
☒ Oral argument is desired. Party requests _____ minutes or multi-co-parties request a total of 15 minutes to be apportioned as follows:
10 minutes - U.S. Nuclear Regulatory Commission; 5 minutes - Entergy Nuclear
If more than 20 minutes per side is requested, set forth reasons: _____

AVAILABILITY OF COUNSEL/PRO SE LITIGANT

I understand that the person who will argue the appeal must be ready at any time during or after the week of argument which appears on the scheduling order.

- ☒ I know of no dates which would be inconvenient.
☐ I request that the argument of this appeal not be calendared for the following dates, which are inconvenient. I have included religious holidays.

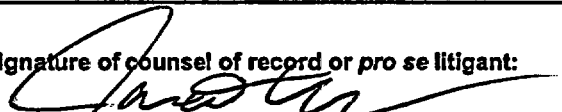
COUNSEL OR PRO SE LITIGANT MUST ADVISE THE COURT IN WRITING OF ANY CHANGE IN AVAILABILITY. FAILURE TO DO SO MAY BE CONSIDERED BY THE COURT IN DECIDING MOTIONS FOR ADJOURNMENT BASED ON UNAVAILABILITY.

RELATED CASES

- ☒ This case has not been before this Court previously.
☐ This case has been before this Court previously. The short title, docket number and citation are: _____

- ☐ Matters related to this appeal or involving the same issue have been or presently are before this Court. The short titles, docket numbers and citations are: _____

Signature of counsel of record or pro se litigant:



Type or Print Name Jared K. Heck
Name of Firm: U.S. Nuclear Regulatory Commission
Address: Office of the General Counsel
M.S. 0-15021, Washington, D.C. 20555
Telephone: 301-415-1623 Date: 9-29-2003

Signature of counsel who will argue the appeal, if different:

Type or Print Name _____

Date: _____

United States Court of Appeals
FOR THE
SECOND CIRCUIT

NOTICE OF APPEARANCE INFORMATION AND FORM

The form on the reverse side containing appearance, time request, availability, and related case information must be completed by all parties and returned to this office when appellant's brief is due.

**FAILURE TO SUBMIT THIS FORM ON TIME WILL BE CONSIDERED
IN DECIDING ANY MOTIONS FOR ADJOURNMENT
BASED ON UNAVAILABILITY.**

Each counsel of record or individual appearing *pro se* must complete this form. If an attorney other than counsel of record will argue the appeal, counsel of record must provide that attorney's name and date of admission to the bar of this Court in the space provided and indicate the dates, if any, when that attorney will be unavailable to argue the appeal.

Counsel of record and counsel who will argue the appeal must be admitted to the bar of this Court or be otherwise eligible to argue an appeal. The Court encourages and prefers written *pro hac vice* motions, filed as early as possible. Admission *pro hac vice* will be extended as a matter of course to a member of the bar of a district court within the circuit who has represented a criminal defendant at trial and continues representation on an appeal taken pursuant to the Criminal Justice Act. See Local Rule 46. However, counsel are encouraged to apply for general admission to this Court as soon as they meet the qualifications.

For information concerning admissions and admission applications, contact the Clerk's Office at 212-857-8603.