CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2003, I caused true and complete copies of the Reply Brief of the Petitioner to be served on the counsel of record for the Respondents, Collins et al., and Entergy Nuclear Indian Point 2 et al., by U.S. Mail, at the following addresses.

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03-4313

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 Nuclear REGULATORY COMMISSION; the UNITED STATES OF AMERICA; ENTERGY NUCLEAR INDIAN POINT 2 LLC; ENTERGY NUCLEAR INDIAN POINT 3, LLC; and ENTERGY NUCLEAR OPERATIONS, INC. Respondents.	

On Petition for Review of a Decision of the Nuclear Regulatory Commission

REPLY BRIEF OF PETITIONER

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Preliminary Statement

Petitioner, Riverkeeper, Inc., submits this brief in reply to the briefs of Respondents, Collins et al. and Entergy Nuclear Indian Point 2 et al., dated September 29, 2003.

Petitioner seeks judicial review of a decision by the Nuclear Regulatory Commission ("NRC") denying an administrative petition for temporary shutdown of Indian Point Units 2 and 3, two nuclear reactors located 25 miles north of New York City, in Buchanan, New York.

NRC argues its decision denying a petition pursuant to 10 C.F.R. § 2.206 is not reviewable. Even the cases cited by respondents acknowledge, however, that such a petition is reviewable by a Court of Appeals when the NRC's decision is so extreme as to amount to an abdication of its statutory responsibilities to protect the health and safety of the public. The underlying statutory scheme provides the "law to apply" in conducting such review. The Atomic Energy Act ("AEA") establishes the general statutory responsibilities of the Nuclear Regulatory Commission in 42 U.S.C. § 2201(i), which empowers the NRC to establish rules, regulations, or orders to "protect health and to minimize danger to life or property."

The events of September 11th have rightly changed the fundamental assumptions concerning the security of the nation's infrastructure including

its nuclear power plants. Respondents rely heavily on the assumptions, agency policies, and precedents before September 11, 2001 in arguing that NRC has not abdicated its statutory responsibilities. NRC allows Indian Point to continue to operate while waiting for other federal agencies to implement measures to prevent airborne terrorist attacks, even while other agencies have characterized the risk of such an attack as "high" and NRC acknowledges the potential "gap" in the defenses currently in place. NRC should condition Indian Point's continued operation on actual implementation of measures that would adequately protect Indian Point, and the 20 million people living within 50 miles of the plants.

Argument

I. THE PRESUMPTION OF UNREVIEWABILITY OF 2.206 PETITION DENIALS CAN BE OVERCOME WHEN NRC HAS ABDICATED ITS STATUTORY DUTY TO "PROTECT HEALTH AND TO MINIMIZE DANGER TO LIFE OR PROPERTY"

Respondents rely heavily on cases establishing a presumption of unreviewability for denials of petitions for agency action under 10 C.F.R. § 2.206 ("2.206"). This petition for review, however, is based on the exception to this presumption in the case of agency abdication of statutory responsibility. The Supreme Court itself acknowledged this exception in its seminal decision establishing the presumption of unreviewability of agency

enforcement actions, *Heckler v. Chaney*. 470 U.S. 821 (1985). Cases after *Chaney* have similarly acknowledged the application of this exception in the 2.206 petition context.

The Nuclear Regulatory Commission argues that its decision not to order interim shutdown of Indian Point in response to Riverkeeper's request is presumptively unreviewable, citing *Chaney*. *Chaney* involved the United States' Food and Drug Administration's ("FDA"'s) denial of a petition by death row inmates to take enforcement action against alleged use of drugs for execution by lethal injection in violation of the Federal Food, Drug and Cosmetic Act. *Id.* at 823. In footnote 4 of *Chaney* though, the Supreme Court stated that the case before it (which it found to be exempt from judicial review) was not "a situation where it could justifiably be 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." *Chaney,* 470 U.S. at 833 n.4, (citing *Adams v. Richardson*, 480 F.2d 1159 (1973) (en banc)). In such cases, the Court continued, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion,'" and therefore would be reviewable. *Id.* at n.4.

NRC then cites cases holding NRC denials of 2.206 petitions to be unreviewable under *Chaney*. Respondent argues *Massachusetts Public Interest Research Group, Inc. v. Nuclear Regulatory Comm'n*, 852 F. 2d 9, 19 (1st Cir. 1988); *Arnow v. Nuclear Regulatory Comm'n*, 868 F.2d 233, 236 (7th Cir. 1989), cert. denied sub. nom. *Citizens of Illinois v. Nuclear Regulatory Comm'n,* 493 U.S. 813 (1989); *Commonwealth of Massachusetts v. Nuclear Regulatory Comm'n*, 878 F.2d 1516, 1523 (1st Cir. 1989); and *Safe Energy Coalition of Michigan v. Nuclear Regulatory Comm'n*, 866 F.2d 1473, 1477 (D.C. Cir. 1989) are indistinguishable from the present case. Each of these cases, however, acknowledges the possibility of judicial review for an abdication of NRC's statutory responsibility to protect the public safety.

In *MassPIRG*, petitioners sought review of NRC's denial of a 2.206 petition that sought to prevent the re-start of a nuclear power plant. While the First Circuit denied the petition, it stated "courts also may review NRC decisions which undermine its fundamental statutory responsibility to protect 'the health and safety of the public'" *MassPIRG*, 852 F.2d at 19 (citing 42 U.S.C. 2236(c)). *MassPIRG* also declared "an agency policy which 'is so extreme as to amount to an abdication of its statutory responsibilities' might be reviewable because 'the statute conferring

authority on the agency might indicate that such decisions were not committed to agency discretion.'" *Id.* (citing to *Chaney,* note 4.) The Court continued: "such behavior on the part of an agency would subject it to review even if the agency had failed to promulgate a specific standard to apply in its formal or informal statements." *Id.*

Similarly in *Arnow v. NRC,* although the Court affirmed the denial of a petition seeking suspension of a nuclear power plant operating license, the Court also acknowledged the possibility of review under the abdication of statutory duty standard: "courts ... may review NRC decisions which undermine its fundamental statutory responsibility to protect 'the health and safety of the public.'" *Arnow v. NRC,* 868 F.2d at 236. In *Safe Energy Coalition of Mich. v. NRC,* the D.C. Circuit also acknowledged the *Chaney* exception and reviewed a denial of a 2.206 Petition to consider whether the NRC abdicated its statutory responsibility under the Atomic Energy Act, "to ensure adequate protection of the public health and safety." *Safe Energy Coalition of Mich. v. NRC,* 866 F.2d at 1477 (quoting *Union of Concerned Scientists v. NRC,* 824 F.2d 108, 120 (D.C. Cir 1987)).

Other cases have acknowledged the same possibility of review. In *Commonwealth of Mass. v. Nuclear Regulatory Comm'n ("NRC"),* the First Circuit stated "a § 2.206 denial 'which is so extreme as to amount to an

abdication of its statutory responsibilities might be reviewable" and the Court would "overturn a § 2.206 denial 'if we were strongly convinced that the Commission was inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents." *Commonwealth of Mass. v. NRC*, 878 F.2d 1516, 1525 (1st Cir. 1989) (quoting *Rockford League of Women Voters v. Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1222 (7th Cir. 1982)).

All these cases reiterate and affirm the same exception to the presumption of unreviewability of NRC-2.206-petition denials seen in *Chaney*: that agencies are not above the law and the Court can always review the record to determine whether an agency has abdicated its statutory responsibility. These cases allow judicial review of Riverkeeper's denied 2.206 petition in this Court given that the Nuclear Regulatory Commission has adopted a policy so extreme as to abdicate its statutory responsibilities to protect health and minimize danger to life and property in refusing to shut down Indian Point until other agencies implement security measures adequate to protect from airborne terrorist attack.

II. THE "LAW TO APPLY" IN REVIEWING NRC'S DENIAL OF THE RIVERKEEPER PETITION DERIVES FROM THE AEA DIRECTIVE TO NRC TO "PROTECT HEALTH AND TO MINIMIZE DANGER TO LIFE OR PROPERTY"

Respondents argue strenuously that there is no "law to apply" in reviewing the denial of a 2.206 petition, and that under *Chaney*, this claimed absence of legal standards indicates unreviewable agency action committed to agency discretion. In reviewing agency action for abdication of statutory responsibility, however, the "law to apply" is not the presence or absence of specific standards governing the particular decision in question, but rather the underlying organic agency act creating the agency's statutory duty. In this case, the "law to apply" is the Atomic Energy Act itself, 42 U.S.C. § 2201(i).

NRC argues the Atomic Energy Act and NRC regulations provide no meaningful standard to apply to rebut the unreviewability presumption. NRC also argues Riverkeeper incorrectly equates "abdication" with the "arbitrary and capricious" standard, citing *Chaney* to say there may be review if there is a meaningful standard to apply. The present case is different since *Chaney* has already affirmed the possibility of review if there is an abdication of statutory responsibility. This "abdication of statutory responsibility" standard looks at the broader statutory mandate to the agency rather than the statutes, laws, or regulations governing the particular agency action sought.

The Administrative Procedure Act ("APA") allows a reviewing court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2003). Administrative Procedure Act section 701(a)(2) states "this chapter applies ... except to the extent that ... agency action is committed to agency discretion by law." APA, 5 U.S.C. § 701(a)(2). Interpreting this provision, *Chaney* stated:

> 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 decision making to the agency's judgment absolutely.

Chaney, 470 U.S. at 830. The instant petition is premised on the alternative avenue of review, which was first stated in *Chaney*, *id.* at 833 n.4, and was interpreted and affirmed in subsequent cases. *MassPIRG*, 852 F.2d 9 (1st Cir. 1989); *Arnow*, 868 F.2d 233 (7th Cir. 1989); *Safe Energy*, 866 F.2d 1473 (D.C. Cir. 1989); *Commonwealth of Mass.*, 878 F.2d 1516 (1st Cir. 1989); *Rockford League,* 679 F.2d 1218 (7th Cir. 1982). NRC's arguments focus on the availability of traditional review under the APA, via "arbitrary and capricious" agency action and agency "abuse of discretion," but this is not the argument given in the Petitioner's Brief. (See Brief of Petitioner, p. 18.) Here, NRC has abdicated its statutory duties.

The "law to apply" in assessing NRC's abdication of statutory duty is the Atomic Energy Act itself. 42 U.S.C. section 2201(i) provides such law, by requiring NRC "to protect health and to minimize danger to life or property."

III. AS THE RELIEF SOUGHT BY THE PETITION IN THIS CASE IS NOT PURELY "ENFORCEMENT" RELIEF, ANY PRESUMPTION OF UNREVIEWABILITY APPLIES WITH LESS FORCE

Courts have begun to recognize that not all petitions for agency action constitute traditional "enforcement" petitions subject to the presumption of unreviewability. Indeed, in his concurring opinion in the *Chaney* decision itself, Justice Marshall noted this distinction with specific reference to nuclear power plant safety:

> [R]equests for administrative enforcement typically seek to prevent concrete and future injuries that Congress has made cognizable—injuries that result, for example, from misbranded drugs ... or unsafe nuclear power plants....
> A request that a nuclear plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law.

Chaney, 470 U.S. at 847-48 (Marshall, J., concurring). Here, as in the situation noted by Justice Marshall, petitioner does not seek punitive sanctions against a plant operator (thereby invoking prosecutorial

discretion); rather, petitioner seeks only a protective order to guard against a risk deemed "high" by the federal government.

Courts have applied this distinction to the review of petitions under 10 C.F.R. § 2.206, and recognized that not every 2.206 petition seeks enforcement action subject to the highest level of agency discretion. Rather, some 2.206 petitions are more in the nature of a licensing proceeding. Most on point is *Nuclear Information Resources Service (NIRS) v. Nuclear Regulatory Comm'n*, 969 F.2d 1169 (D.C. Cir. 1992). NIRS challenged a Nuclear Regulatory Commission regulation that substantially revamped the nuclear power plant licensing process and provided for a combined construction and operating license proceeding, eliminating the opportunity for a post-construction hearing. *Id.* at 1170. Petitioners specifically raised the prospect that new information might arise after construction that would mitigate against issuance of an operating license. *Id.* at 1177. Specifically, the *NIRS* petitioners noted if an earthquake, tornado, or flood occurred after pre-approval, but before operation, raising previously unexplored questions as to the siting of the plant, these questions would go unconsidered under the Commission's scheme. *Id.*

In upholding the NRC's combined license procedure, the *NIRS* court pointed to the 10 C.F.R. § 2.206 petition procedures as the appropriate

means to raise these sorts of changed circumstances. *Id.* at 1178. In response to the petitioners' concern that such a petition for relief under § 2.206 would be deemed unreviewable, the Court specifically held that such a petition would not be subject to the *Chaney* presumption of unreviewability:

> After additional consideration, however, we think that Commission action on § 2.206 petitions authorized by Part 52 is reviewable. True, the Commission also uses § 2.206 as a vehicle for entertaining requests for enforcement actions where, of course, the petitions do fall within the unreviewability presumption of *Heckler v. Chaney*. Nonetheless, the choice to use the § 2.206 form cannot determine the reviewability question. Rather, we must look to the purpose to which the petition is put. Part 52 employs § 2.206 not as a means for requesting enforcement, but as an integral part of the licensing process itself. No court to date has ever found licensing decisions to be unreviewable, even when they involve § 2.206 petitions.

Id. at 1178.

The *NIRS* Court noted that it was not alone in holding that some kinds of 2.206 petitions fall outside the presumption of unreviewability. The Court cited *Commonwealth of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989), as an example. In *Commonwealth*, which dealt with a challenge to the restart of a nuclear reactor, the First Circuit indicated that as the reasoning set forth in the denial was the basis of the restart decisions, the substance of the denial was reviewable under 5 U.S.C. § 706(2)(A). *Id.* at 1522-23.

As emphasized by the D.C. Circuit in *NIRS*,

> the use to which a § 2.206 petition is put--not its form--governs its reviewability. Thus, even if potential new factual information might undermine the reasonableness of the Commission's reliance on its prior determinations ... a court may properly intervene to adjudicate the question.

NIRS, at 1178.

In the instant case, the events of September 11, 2001, have changed the fundamental assumptions underlying the safe operation of nuclear power plants in densely populated areas every bit as much as an unanticipated flood, earthquake, or hurricane. As the NRC itself has noted in another context, "[t]he extraordinary events of September 11 may have changed what can be said to be 'reasonably foreseeable.'" *In re Matter of Private Fuel Storage, LLC,* 56 N.R.C. 340, 346, 2002 NRC LEXIS 205 (2002) (SPA – 40). Given this fundamental change in the assumptions underlying the Indian Point nuclear plants' licenses, NRC's refusal to implement basic protective measures against aerial attack is reviewable by this Court under the standard articulated in *NIRS.*

IV. NRC's DENIAL OF RIVERKEEPER'S 2.206 PETITION ABDICATES ITS STATUTORY RESPONSIBILITY TO PROTECT HEALTH AND MINIMIZE DANGER TO LIFE AND PROPERTY

NRC is charged with the responsibility to "protect health and to minimize danger to life or property." 42 U.S.C. § 2201(i). The federal

government, through the National Research Council of the National Science Foundation, has assessed a "high" risk of airborne terrorist attack against civilian nuclear power plants. Respondent NRC acknowledges the potential "gap" between the defense afforded by the Indian Point plant operator and the nature of the airborne terrorist threat. NRC acknowledges that an attack may well occur before this "gap" is filled, yet NRC meanwhile allows Indian Point to continue to operate. NRC's allowing Indian Point to operate in light of the knowledge of threats to American's health, life and property is an abdication of NRC's statutory responsibility.

NRC argues Riverkeeper is challenging NRC's failure to act in a manner Riverkeeper considers reasonable. In fact, NRC's failure to respond to a specific risk characterized by other government agencies as "high" far surpasses unreasonableness and is an abdication of its statutory responsibilities.

The National Research Council performed a detailed assessment of the likelihood of various radiological attacks by terrorists, and concluded that "the potential for a September 11-type surprise attack in the near term using U.S. assets such as airplanes appears to be high." National Research Council, *Making the Nation Safer: Role of Science and Technology in Countering Terrorism* at 50 (2002) (JA – 989). The Nuclear Regulatory

Commission itself acknowledges that it "cannot rule out the possibility of future terrorist activity directed at a [nuclear power plant] licensee's site before implementing any further enhancements to its safeguard programs." Proposed Director's Decision Under 10 CFR 2.206 at 9 (JA – 934). NRC admits "any gap between licensee capability and the assumed threat must be assumed by the government, and the government must prepare for this." *Id.* at 19 (JA – 944).[1]

Yet, despite this likely threat, NRC adheres to its previously adopted specific policy not to consider potential terrorist attacks by airborne vehicles in licensing nuclear facilities:

> [P]rotection against [airborne vehicle] threat has not yet been determined appropriate at sites with greater potential consequences than spent fuel storage installations. Therefore, this type of requirement is not included within the protection goal for this final rule.

Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955-56 (May 15, 1998). NRC similarly refuses to consider site specific population-related meltdown impacts of nuclear

[1] Respondents have pointed out that Petitioner incorrectly treated a paraphrase of this language as a quote in its opening brief. The exact quote, cited accurately herein, was inadvertently misquoted in the Petitioner's brief. The language properly quoted here still makes petitioner's point, that NRC has acknowledged a potential "gap" in the protection afforded to Indian Point from airborne terrorist attack.

facilities in licensing proceedings. *See In re Duke Energy Corp.*, 56 N.R.C. 358; 2002 NRC LEXIS 206 (2002). Reflecting this policy, NRC has refused to consider a temporary shutdown of the Indian Point reactors to allow implementation of adequate defensive measures for attacks by airborne terrorist vehicles.

One's interpretation of a 2.206 petition denial has no relation to the fact of NRC's abdication of statutory responsibility. NRC's refusal to temporarily shut down Indian Point until proven measures have been implemented by other agencies, which NRC has the power to do, results in ineffective means for the protection of American lives that reveals NRC's abdication of statutory responsibility.[2]

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[2] Threats of a September 11th-type attack and inadequate protective measures from such an attack still exist. The World Markets Research Center released a report on August 18th, 2003, compiling an index assessing risk to 186 countries of another September 11th-style terrorism attack, and ranked the United States fourth, stating such an attack is "highly likely" in the United States. Associated Press, *9/11-Style Attack Predicted in Next Year, at* http://www.abcnews4.com/news/stories/0903/101262.html (last visited Oct. 12, 2003). A Department of Homeland Security advisory warned that al-Qaeda was working on plans to hijack airliners flying between international points that pass near or over the continental United States. Flights originating in Canada most fit these plans. Jeanne Meserve & Kelli Arena, *Advisory: Al Qaeda planning new U.S. attacks,* (Sept. 5, 2003) *at* http://www.cnn.com/2003/US/09/04/homeland.advisory (last visited Oct. 12, 2003). Inadequate security threats still exist from Canada for example with the Senate Committee on National Security and Defense stating "huge security gaps still exist at Canada's airports, despite security changes after the attacks of September 11, 2001." *Senate report says air security full of*

NRC argues that the "abdication" standard should be viewed as a safety valve for an agency's acting in a lawless manner, citing *Eastern Bridge, LLC v. Chao*, 320 F.3d 84 (1st Cir. 2003). *Eastern Bridge* has no application to this case, however, as the petitioners there were challenging the Occupational Safety and Health Administration's procedures followed in conducting an employer survey, not the fundamental question of whether an agency has been derelict in its basic statutory function to protect public safety from a known threat.

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holes, (Jan. 21, 2003) *at* http://www.cbc.ca/stories/2003/01/21/airsecurity_030121 (last visited Oct. 12, 2003). Inadequate security threats still exist in the U.S. as shown by Senator Schumer's stating "the Transportation Security Administration still has a long way to go before the aviation system can be declared completely safe" since "[i]n late April, the TSA announced [plans] to reduce its national army of screeners from 55,600 to 49,600, cutting at least 38 screeners from Buffalo Niagra International Airport, 48 from Hancock International Airport in Syracuse, 25-30 from the Westchester County Airport, and 25 from Albany International Airport." Press Release, Senator Schumer, New Schumer Homeland Security Report Card Gives Feds "C-" On Upstate New York, *at* http://www.senate.gov/~schumer/SchumerWebsite/pressroom/press_releases/PR02070.html (last visited Oct. 12, 2003).

V. UNTIL OTHER AGENCIES IMPLEMENT PROTECTIVE MEASURES PROVEN ADEQUATE TO PREVENT AIRBORNE TERRORIST ATTACK, PERMITTING CONTINUED OPERATION OF INDIAN POINT IS AN ABDICATION OF NRC'S STATUTORY RESPONSIBILITY TO PROTECT HEALTH AND MINIMIZE DANGER TO LIFE AND PROPERTY

NRC argues that because it lacks the authority independently to carry out the essential protective measures necessary to protect Indian Point from airborne terrorist attack it is helpless to grant the relief sought by the petition. NRC misperceives the nature of the relief petitioner seeks. Petitioner seeks an order conditioning continued operation of the Indian Point nuclear power plants on implementation of the appropriate defensive and protective measures by the appropriate agencies. Such an order is completely within NRC's authority, and indeed is demanded by the agency's charge to adopt orders sufficient to "protect public safety."

NRC seeks to evade responsibility for safety of Indian Point from airborne attack by deferring to other agencies it claims have more direct responsibility for defending the nation's skies -- the FAA, Transportation Safety Administration and Department of Homeland Security to prevent attack. But NRC cannot avoid its responsibility to ensure safe operation of civilian nuclear reactors in the face of airborne terrorist threats on the grounds that such threats are within the purview of the FAA or the

Department of Defense. To do so would be equivalent to ignoring the threats of hurricanes on the grounds that hurricanes are the responsibility of the National Hurricane Center, or to ignore the threat of earthquakes by saying that the United States Geological Survey is responsible for geophysical matters. The threat of airborne terrorist attack is real; the risk is "high" and until some federal agency takes responsibility for protecting against that threat, NRC cannot responsibly allow the nuclear power plants in the most densely populated section of the nation to operate.[3]

NRC's deference to other federal agencies to ensure against airborne terrorist attack is inadequate. Airport security enhancements implemented by the FAA continue to prove ineffective. In March 2002, the Transportation Department inspector general released a report finding airport security screeners on several dozen occasions failed to catch guns and simulated explosives, even after the September 2001 terrorist attacks. Inspector General Kenneth Mead's report found screeners missed knives 70 percent of the time, guns 30 percent of the time and simulated explosives 60

[3] In fact, Nuclear Power plants are routinely required to suspend or reduce operations during hurricane events, even though NRC has no "authority" to stop a hurricane. See http://www.nrc.gov/reading-rm/doc-collections/event-status/event/2003/20030922en.html (last visited Oct. 10, 2003) (event 40168; Surry, Va. Reactors in "hot shutdown" mode due to Hurricane Isabel).

percent of the time. CBS News, *Airport Security Gets an 'F,'* March 25, 2002 (JA – 1014). Also, according to the Federal Aviation Administration, security breaches caused the government to evacuate 59 airport concourses or terminals between October 30, 2001 and March 7, 2002, forcing 2,456 flights to be delayed or canceled. Passengers on another 734 flights had to leave their seats and go through security a second time. *Id.* (JA – 1015).

The Notices to Airmen (NOTAMs) issued by FAA similarly do nothing to provide any real security against airborne terrorist attack. These NOTAMS, which " advised pilots to avoid the airspace above or in the proximity to ... nuclear power plants," Proposed Director's Decision Under 2.206 Petition at 18 (JA – 943), have proven ineffective. According to an Associated Press news article, despite military patrols and tighter security, pilots had intruded into America's protected airspace at least 567 times in the seven months after Sept. 11. Associated Press, *Planes Often Enter Prohibited Air,* April 5, 2002, *available at* www.aviationnow.com/ avnow/news/channel (last visited Apr. 10, 2002) (JA-1004).[4]

[4] The present NOTAM covers all the nation's power plants and dams. Marek Fuchs, *The Case for a No-Fly Zone,* N.Y. TIMES, Apr. 20, 2003 at 14WC. Pilots are merely "advised" to avoid airspace in the "proximity" of the structure. *Id.* These advisory restrictions over nuclear plants "are also looser than the restrictions in place for Disneyland and Disney World, which direct pilots to stay three nautical miles or 3,000 feet away" from the parks. *Id.*

Here, the probability of an airborne terrorist attack is "high," and until other agencies implement adequate, proven security measures, NRC should shut down Indian Point. Until NRC does so, it abdicates its statutory responsibility to protect health and minimize danger to life and property.

NRC has previously demonstrated its ability to deny licenses and operation to nuclear power plants due to the threat of aircraft crash. The NRC's Atomic Safety and Licensing Board, in its partial initial decision of *Private Fuel Storage, LLC,* Docket No. 72-22-ISFSI (March 10, 2003), 2003 NRC LEXIS 43, denied a private fuel storage license when it considered "the chance that military aircraft operations in Utah's West Desert might pose a risk to the facility" and found "that probability to be too high when measured against the applicable NRC safety criterion governing protection against the risk of accidents at a regulated facility." *Id.* at 1, 2. The Board concluded "there is enough likelihood of an F-16 crash into the proposed facility that such an accident must be deemed 'credible,'" resulting in the PFS facility not being licensed without addressing that safety issue. *Id.* at 2. The NRC reached this conclusion even though the measures necessary to reduce the risk of such an accident were within the purview of another agency, the Department of Defense.

NRC argues there are limits to the expectation of guarding against every attack, citing *Siegel v. AEC. Siegel v. AEC,* 400 F.2d 778 (D.C. Cir. 1968). *Siegel* addressed the Atomic Energy Commission's (now NRC) refusal to consider the possibilities of attack or sabotage by foreign enemies in licensing the construction of nuclear reactors. However, the events of September 11, 2001 make clear the irresponsibility of relying on the unlikelihood of terrorist attack as the *Siegel* Court did in 1968. The *Siegel* Court postulated that an appropriate response to nuclear power plant safety risk was increased airport security. Thirty-five years of increased airport security though was not enough to prevent the events of September 11th.

NRC's response today to threats of airborne terrorist attack, calling for more airport security, rings hollow. Given licensees cannot be expected "to acquire and operate antiaircraft weaponry," Director's Decision-02-06, (SPA-25), and Indian Point would make a "tempting, high visibility target for terrorist attack[s]," National Research Council, *Making the Nation Safer: The Role of Science and Technology in Countering Terrorism* 50 (2002) (JA – 989),[5] NRC should condition Indian Point's operation on other agencies'

[5] *In re Private Fuel Storage,* 56 N.R.C. at 351, has stated "terrorists seeking to cause havoc and destruction would find many targets far more inviting than the proposed ... facility, [which is] located in a remote, desert location far from population centers....Given this setting, a terrorist attack seemingly

implementation of adequate safety measures such as a no-fly zone over Indian Point to protect Indian Point and the almost 20 million citizens[6] residing around it. Because NRC has not acted, this Court should find such agency inaction an abdication of its statutory responsibility to protect health and minimize danger to life and property.

VI. NEITHER INDIAN POINT'S DESIGN NOR INCREASED SECURITY MEASURES PROVIDE ANY REAL PROTECTION TO INDIAN POINT FROM AIRBORNE TERRORIST ATTACK

Indian Point is vulnerable to airborne terrorist attack. NRC has admitted that the Indian Point facility was not designed to withstand the impact of a jumbo jet, and that its actual ability to withstand such an impact is untested. Impact fire tests on nuclear power plants have not been performed. Independent government reports conclude security at nuclear power plants needs to be strengthened. Allowing Indian Point to continue operations in light of these known problems is an abdication of NRC's statutory responsibility.

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would be quite unlikely to result in a high-consequence release of radioactivity."

[6] According to 2000 U.S. Census Bureau data, 19,086,634 people live within the twenty-six counties that are within 50 miles of Indian Point. U.S. Census Bureau data *available at* http://www.census.gov/index.html (2000).

NRC says the government's focus should be on improving airport security, and the federal government has taken steps to reduce aircraft attack risks. NRC also argues Indian Point's design features protect against attack, and NRC's own efforts have contributed to reactor safety.

Those recent efforts to improve airport security have been slow-going and have been gravely inadequate. Nor is the Indian Point plant design adequate to withstand a September 11th style attack. NRC spokesman Neil Sheehan stated, "[w]e have not done the analysis, so we are not going to guarantee that a plane of that nature couldn't breach the containment [at Indian Point]." Roger Witherspoon, *Indian Point chief: Plant safe from possible attack,* The Journal News, Oct. 20, 2001, *available at* www.thejournalnews.com/newsroom/102001/20entergy.html (last visited Oct. 20, 2001) (JA – 361).

Indian Point's inherent design is unproven to withstand an airborne terrorist attack. The Director's Decision itself states Indian Point was not specifically designed with aircraft impacts in mind. "[T]he [design-basis threat] did not consider a terrorist attack such as occurred on September 11, 2001." Director's Decision-02-06, (SPA-15). NRC's own reports show airline impacts can penetrate concrete structures. "1 of 2 aircrafts are (sic) large enough to penetrate a five foot thick reinforced concrete wall."

Nuclear Regulatory Commission Report, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* 3-23 (Oct. 2000) (JA – 152).

NRC's own studies state that the effect of an aircraft impact and explosion on nuclear power plants have not been considered. "[F]ire and explosion hazards have been treated with much less care than direct aircraft impact and the resulting structural response. Therefore, the claim that these fire/explosion effects do not represent a threat to nuclear power plant facilities has not been clearly demonstrated." Argonne National Laboratory, Evaluation of Aircraft Crash Hazards Analysis for Nuclear Power Plants, NUREG/CR-2859, 78 (1982) (JA – 924). "Detailed engineering analysis of a large airliner crash have not yet been performed." Press Release No. 01-112, NRC News, NRC Reacts to Terrorist Attacks (Sept. 21, 2001) (JA – 112). The World Trade Center was in fact designed to withstand the impact of a large airliner and remain standing, yet failed to stand when such an impact tragically occurred. NRC's claim that Indian Point – which was never designed for an aircraft impact – needs no further protection from airborne attack is simply reckless.

The spent fuel pools at Indian Point are even more vulnerable to airborne attack than the reactor domes themselves. The spent fuel storage

buildings at Indian Point are not as hardened as the reactor containment structures. Director's Decision Under 10 C.F.R 2.206 at 20 (SPA – 26). In its Proposed Decision, NRC stated that the cooling pools in the spent fuel storage facility "are designed to prevent a rapid loss of water with the structure intact." Proposed Director's Decision Under 10 CFR 2.206 at 21 (JA – 946). In its response to Riverkeeper's Petition, the licensee states that the pools at Indian Point are "partially embedded in the ground," (Licensees' Response to Riverkeeper, Inc.'s Section 2.206 Request for Emergency Shutdown of Indian Point Units 2 and 3 at 35 (JA – 476)), thus revealing the vulnerability of the cooling water in these pools to rapid loss if the portion of the walls that are above ground is breached. The NRC's report on spent fuel pool accident risks examined the potential hazards of spent fuel pools and concluded that an aircraft crashing into the spent fuel storage area could seriously "affect the structural integrity of the spent fuel pool or the availability of nearby support systems, such as power supplies, heat exchangers, or water makeup sources, and may also affect recovery actions." Nuclear Regulatory Commission Report, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants* 3-23 (Oct. 2000) (JA - 152).

Since the record shows relevant tests of Indian Point's ability to withstand airborne attack have not been performed in this case, NRC's refusal to implement Riverkeeper's requests that would help prevent airborne terrorist attacks from happening is an abdication of its statutory responsibilities to protect health and minimize danger to life and property. NRC argues it has neither ignored aviation security risks nor adopted policy precluding consideration of such risks. The record indicates a lack of security by NRC for nuclear power plants against airborne terrorist attacks.[7]

NRC argues Riverkeeper exaggerates vulnerabilities, describes unrealistic scenarios, misuses NRC studies, and misquotes the NRC. Government reports conclude the risk of airborne terrorist attack is realistic and measures taken to prevent them are lacking. NRC also relies heavily on its claim of upgrading nuclear plant security. This claim is undermined by independent government reports. A report, released in September of 2003 by the General Accounting Office, analyzing oversight of security at commercial nuclear power plants found "NRC inspectors often used a process that minimized the significance of security problems found in annual

[7] It should be noted NRC supports its arguments here with citations (websites) not included in the record and Riverkeeper has not received any requests to include new material in the record. (*See* Respondent's Brief, footnotes 13, 16-20, and 22-25.)

inspections by classifying them as "non-cited violations." U.S. GENERAL ACCOUNTING OFFICE, NUCLEAR REGULATORY COMMISSION: OVERSIGHT OF SECURITY AT COMMERCIAL NUCLEAR POWER PLANTS NEEDS TO BE STRENGTHENED, at What GAO Found (Sept. 2003) *available at*: www.gao.gov/new.items/d03752.pdf (last visited Oct. 12, 2003). Such non-cited violations included the finding of:

> "a security guard sleeping on duty for more than a half hour. This incident was treated as a non-cited violation because no actual attack occurred during that time, and because neither he nor any other guard at the plant had been found sleeping more than twice during the past year....[A] security officer falsified logs to show that he had checked vital area doors and barriers when he was actually in another part of the plant....[G]uards who failed to physically search several individuals for metal objects after ... detect[ing] metal objects ... then allow[ing] unescorted access throughout the plant's protected area."

Id. at 12. Addressing these violations the report stated "[b]y making extensive use of non-cited violations for serious problems, NRC may overstate the level of security at a power plant and reduce the likelihood that needed improvements are made." *Id.* at What GAO Found.

The report also detailed "several weaknesses in how NRC conducted" force-on-force exercises which "demonstrate how well a nuclear plant might defend against a real-life threat." *Id.* These weaknesses limited the usefulness of the exercises. The report stated these exercises:

> "were conducted infrequently, against plant security that was enhanced by additional guards and/or security barriers, by simulated terrorists who were not trained to operate like terrorists, and with unrealistic weapons....[T]he exercises did not test the maximum limits of the design basis threat ... [and] did not provide complete and accurate information on a power plant's ability to defend against the maximum limits of the design basis threat....NRC has made only limited use of some available administrative and technological improvements that would make force-on-force exercises more realistic and provide a more useful learning experience."

Id. at 13-14. The GAO made recommendations to the NRC Commissioners to:

> restore and strengthen NRC's oversight of security at commercial nuclear power plants-specifically, NRC's annual inspection program and force-on-force exercises.... [M]ost of [the] actions relat[ing] to enhancing security at the plants ... did not relate to NRC's oversight efforts. In fact, since September 11, NRC has suspended the two major elements of its oversight program, baseline inspections and force-on-force exercises.

Id. at 4. GAO believed:

> the issues cited in this report, such as improperly screening individuals entering the plant, are not minor, and that promptly restoring the annual security inspections and force-on-force exercises will improve NRC's oversight responsibilities.

Id.

Other government agencies have reported that the risk of a September 11th-like attack happening again was "high" and NRC itself acknowledged

the possible "gap" between licensee capability and the assumed threat, but since then has done nothing to condition further operation of the plant on adequate protection against airborne terrorist attacks. Three separate reports, including one of NRC's own, state problems with securing nuclear power plants against airborne terrorist attack. With these deficiencies known throughout the government, NRC is abdicating its statutory duty to protect health and minimize danger to life and property by refusing to condition the operation of Indian Point on protection from airborne terrorist attack.

Conclusion

The Director of International Atomic Energy Agency said "[c]ountries must demonstrate, not only to their own populations, but to their neighbors and the world that strong security systems are in place. The willingness of terrorists to commit suicide to achieve their evil aims makes the nuclear terrorism threat far more likely than it was before September 11". International Atomic Energy Agency, *Calculating the New Global Nuclear Terrorism Threat* (Nov. 1, 2001) *at* www.iaea.org/worldatom/Press/P_release/2001/nt_Pressrelease.shtml (last visited Nov. 2, 2001) (JA-85).

Government agencies exist because of "the reality that governmental refusal to act could have just as devastating an effect upon life, liberty and

the pursuit of happiness as coercive governmental action." *Chaney*, at 851 (Marshall, J. concurring). Review of an agency's inaction should be allowed when "inaction allegedly deprives citizens of statutory benefits or exposes them to harms against which Congress has sought to provide protection, [therefore] review must be on the merits to ensure that the agency is exercising its discretion within permissible bounds." *Id.* at 854. The federal government has specifically sought to prevent acts of terrorism through deliberate restructuring of the Executive Branch and the creation of the Office of Homeland Security. The problems and dangers of agency inaction "are too important, too prevalent, and too multifaceted to admit of a single facile solution under which 'enforcement' decisions are 'presumptively unreviewable.'" *Id.*

Riverkeeper should be allowed judicial review in this case since NRC ignores evidence of a high risk of a September 11th-like airborne terrorist attack on a nuclear power plant like Indian Point in the near term. NRC ignores its own evidence that Indian Point will not withstand a deliberate aircraft crash. NRC ignores its own evidence that such an attack would cause horrific devastation to life and property. By refusing to shut down Indian Point until adequate protective measures against airborne terrorist attack are implemented by other agencies, NRC has abdicated its

statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize danger to life or property." For the foregoing reasons, NRC's Director's Decision should be annulled and the matter remanded to the NRC with directions to grant the petition.

Dated: White Plains, New York
October 14, 2003

Respectfully Submitted,

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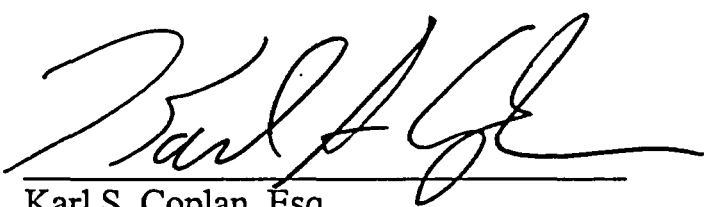
Certificate of Compliance

I hereby certify that the foregoing brief of Petitioner, Riverkeeper, Inc., with a word count of 6,621 words, complies with the type-volume limitation of the Fed. R. App. P. 32(a)(7)(B) because this brief contains words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared using Microsoft Word version 2000 proportionally spaced 14-point Times New Roman font.



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