

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

Date: 2/24/04
Docket Number: 03-4313-ag
Short Title: Riverkeeper, Inc. v. Collins
DC Docket Number: DD-02-06
DC: Nuclear Regulatory Commission
DC Judge:

Dear Counsel:

The court has issued its opinion in the above-entitled case, and the decision of the district court has been

Dismissed for want of jurisdiction

Judgment was entered on ZZ_ 2/24/04 ZZ!, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form [is enclosed herewith,] [has been forwarded under separate cover,] and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the slip opinion are available from this office in accordance with Local Rule 0.17 (8).

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,
Roseann B. MacKechnie, Clerk

By:

Tynetta Hope
Deputy Clerk

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20 Nuclear Indian Point 3, LLC, and Entergy
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27 Blumenthal.

28 SACK, Circuit Judge:

29 In the wake of the September 11, 2001, terrorist
30 attacks on New York City and Arlington, Virginia, the petitioner,
31 Riverkeeper, Inc., ("Riverkeeper") requested that the respondent
32 United States Nuclear Regulatory Commission (the "NRC" or the
33 "Commission") condition the license of the respondent Entergy
34 Nuclear Operations, Inc., ("Entergy") to operate, through
35 respondents Entergy Nuclear Indian Point 2, LLC, and Entergy
36 Nuclear Indian Point 3, LLC, two nuclear power plants in
37 Westchester County, New York (collectively, "Indian Point"), on

1 several safety-related changes pertaining to their operation.
2 Riverkeeper's principal concern was the potential for terrorist
3 use of an airplane in a September-11-type attack on these plants.
4 Riverkeeper's request included implementation of a permanent no-
5 fly zone over Indian Point, a defense system to protect this no-
6 fly zone, and conversion of the spent-fuel storage at Indian
7 Point to a dry-cask system. The NRC issued a decision on
8 November 18, 2002, denying Riverkeeper's request in relevant
9 part, from which Riverkeeper appeals.

10 Riverkeeper raises grave concerns about the safety of
11 Indian Point in the face of the risk of airborne terror attacks.
12 We nonetheless conclude that we have no subject matter
13 jurisdiction to entertain this appeal. The Administrative
14 Procedure Act, as interpreted by the Supreme Court, creates a
15 heavy presumption against our jurisdiction over an appeal from
16 the NRC's denial of Riverkeeper's request for an enforcement
17 action. Riverkeeper fails utterly to overcome that presumption.
18 The appeal is therefore dismissed.

19 BACKGROUND

20 Riverkeeper is a nonprofit organization whose mission
21 is to protect the Hudson River and the supply of drinking water
22 for New York City and Westchester County. Less than two months
23 after the September 11, 2001, terrorist attacks, Riverkeeper
24 filed a request with the NRC pursuant to 10 C.F.R. § 2.206
25 seeking to condition Entergy's license to operate Indian Point on
26 particular safety measures that Riverkeeper was convinced were

1 necessary to safeguard the nuclear plants from similar attacks.
2 Riverkeeper sought, in relevant part, the "obtainment of a
3 permanent no-fly zone from the Federal Aviation Administration in
4 the air space within 10 nautical miles of the Indian Point
5 facility";¹ "a defense and security system sufficient to protect
6 and defend the no-fly zone"; and "the immediate conversion of the
7 current spent fuel storage technology from a water cooled system
8 to a dry cask system in a bunkered structure."² Riverkeeper,
9 Inc.'s Section 2.206 Request for Emergency Shutdown of Indian
10 Point Units 2 and 3, at 2 (Nov. 8, 2001).³

¹ An NRC regulation governs the requirement that a nuclear plant licensee protect the plant from radiological sabotage. See Requirements for Physical Protection of Licensed Activities in Nuclear Power Plant Reactors Against Radiological Sabotage, 10 C.F.R. § 73.55. To "provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety," id. § 73.55(a), a plant shall have physical security, physical barriers, access requirements, alarms, communication requirements, testing and maintenance, and a response requirement, id. §§ 73.55(b)-(h).

² An NRC regulation governs the requirements for physical protection of stored spent nuclear fuel and high-level radioactive waste. See Requirements for the Physical Protection of Stored Spent Nuclear Fuel and High-Level Radioactive Waste, 10 C.F.R. § 73.51. This regulation requires nuclear plant licensees to ensure that spent-fuel storage "do[es] not constitute an unreasonable risk to public health and safety." Id. § 73.51(b)(1). To comply with this standard, a licensee must, among other things, store waste only within a protected area and limit access to the area, none of which requires the use of dry-cask spent-fuel storage. See id. §§ 73.51(b)(2), (d). In 1998, the NRC modified its regulations to require "protection [of spent-fuel storage] against the malevolent use of a land-based vehicle," and considered but chose not to require protection from an airborne vehicle. Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955, 26,956 (May 15, 1998) (codified at 10 C.F.R. pts. 60, 72, 73, 74, and 75).

³ Riverkeeper's request, in full, was that the NRC (1) order that Indian Point be shut down temporarily to conduct a review of the facility; (2) require Entergy to provide information documenting its security measures; (3) modify the Indian Point licenses to mandate a permanent no-fly zone, defense and security of the no-fly zone, and defense and security of the entire facility; (4) order the revision of Entergy's emergency response plan and Westchester County's radiological emergency response plan to account for terrorist attacks; (5) permanently retire Indian Point if security cannot be sufficiently guaranteed; and (6) convert the spent-fuel storage to a dry-cask

1 Riverkeeper argued in its request that these and other
2 protections were necessary because nuclear power plants in
3 general and Indian Point in particular are plausible targets for
4 terrorist attacks. Riverkeeper presented reports by the media
5 and the International Atomic Energy Agency, a United Nations
6 organization, of documented threats against nuclear facilities
7 after September 11, 2001. Riverkeeper also posited that Indian
8 Point is a uniquely likely target because (1) approximately
9 twenty million people reside within fifty miles of the facility,
10 (2) major financial centers in New York City are less than fifty
11 miles away, (3) nearby reservoirs supply all of Westchester
12 County's and much of New York City's drinking water, and (4)
13 Indian Point is near major transportation systems vital to the
14 regional and national economy.

15 Riverkeeper argued, moreover, that Indian Point is
16 vulnerable to a terrorist attack, especially an intentional crash
17 of an airplane into the facility similar to those successfully
18 carried out against the World Trade Center and the Pentagon on
19 September 11, 2001. In particular, Riverkeeper asserted that
20 there is a possibility of breach of, inter alia, the operating
21 reactors or the spent-fuel storage facilities. In Riverkeeper's
22 view and as the NRC has conceded, Indian Point was not designed
23 to withstand an airborne terrorist attack comparable to the
24 September 11 attacks. Riverkeeper cited a 1982 report by Argonne

system.

1 National Laboratory prepared for the Department of Energy
2 estimating the serious damage that could result from the ignition
3 of airline fuel upon impact with a nuclear reactor structure.
4 According to Riverkeeper, the spent-fuel storage facility's
5 design renders it particularly vulnerable. A successful attack
6 on that facility could, according to Riverkeeper, lead to a loss
7 of cooling water in the spent-fuel pools, which could ultimately
8 cause an exothermic reaction followed by a dangerous fire and
9 then release deadly amounts of radiological material into the
10 environment.

11 Riverkeeper also contended, in reliance on NRC studies,
12 that the impact of a terrorist attack on Indian Point could be
13 devastating, causing hundreds of immediate fatalities nearby and
14 at least 100,000 latent cancer deaths downwind. In Riverkeeper's
15 view, a meltdown at just one of the Indian Point facilities would
16 have extraordinary environmental consequences and result in at
17 least \$500 billion in property damage.

18 Riverkeeper therefore asked the NRC to exercise its
19 "broad discretionary powers to grant [Riverkeeper's] requests" in
20 the interest of "protect[ing] the public, environment, and
21 property" beyond its statutory duty to provide adequate
22 protection. Id. at 18-19.

23 On December 20, 2001, NRC Office of Nuclear Reactor
24 Regulation Director Samuel Collins declined to order an immediate
25 closure of Indian Point. On May 16, 2002, Director Collins
26 issued a proposed decision that would deny the relevant relief

1 that Riverkeeper requested. Riverkeeper commented on the
2 proposed decision, requesting reconsideration. It argued that
3 "the proposed decision would protect the operators' economic
4 interests at the expense of the safety and security of the
5 surrounding population." Comments on May 16, 2002 Proposed
6 Director's Decision on Riverkeeper's November 8th Petition 2.206
7 Request for Emergency Shutdown of Indian Point Units 2 and 3, at
8 1 (Aug. 9, 2002).

9 On November 18, 2002, Director Collins issued a
10 decision. In it, he denied the bulk of Riverkeeper's request,
11 although he deemed granted that part of the request that sought
12 an immediate security upgrade, which the NRC had already
13 implemented, and he stated that the NRC was prepared to change
14 security requirements as necessary to ensure what it thought to
15 be adequate protection of the public. He also deemed granted, in
16 part, Riverkeeper's request for a full review of the facility.
17 With respect to the remaining part of Riverkeeper's request, the
18 director determined that "Indian Point has sufficient security
19 measures in place to defend itself from a broad spectrum of
20 potential terrorist attacks." Energy Nuclear Operations, Nos.
21 50-003, 50-247, and 50-286, at 5 (Nuclear Regulatory Comm'n Nov.
22 18, 2002). He elaborated:

23 [N]uclear power plants are among the most
24 hardened and secure industrial facilities in
25 our nation. The many layers of protection
26 offered by robust plant design features,
27 sophisticated surveillance equipment,
28 physical security protective features,
29 professional security forces, access

1 authorization requirements, and NRC
2 regulatory oversight provide an effective
3 deterrence against potential terrorist
4 activities that could target equipment vital
5 to nuclear safety.

6 Id. at 6. The director conceded that the NRC's "design basis
7 threat" (NRC requirements for the defense of nuclear power
8 plants) did not consider airborne terrorist attacks like those
9 which occurred on September 11, 2001. Id. at 9. But he asserted
10 that since then the NRC had taken at least three specific actions
11 to respond to the threat of such an attack. First, the NRC is in
12 the process of reexamining the design basis threat for
13 modification as appropriate. Id. Second, the NRC implemented
14 interim security measures as "prudent to address the current
15 threat environment in a consistent manner throughout the nuclear
16 reactor industry," the full details of which would not be made
17 public for security reasons. Id. at 8. The decision nonetheless
18 generally described such measures as including:

19 increased patrols, augmented security forces
20 and capabilities, additional security posts,
21 installation of additional physical barriers,
22 vehicle checks at greater stand-off
23 distances, enhanced coordination with law
24 enforcement and military authorities and more
25 restrictive site access controls for all
26 personnel. [NRC] Orders also directed
27 licensees to evaluate and address potential
28 vulnerabilities to maintain or restore
29 cooling to the core, containment, and spent
30 fuel pool and to develop specific guidance
31 and strategies to respond to an event
32 resulting in damage to large areas of the
33 plant due to explosions or fires.

34 Id. at 8-9. The NRC also "require[d] additional security
35 measures pertaining to the owner-controlled land outside of the

1 plants' protected areas." Id. at 17. All of these measures were
2 to remain in effect until the NRC decided that other measures
3 should take their place or that the threat environment has
4 changed significantly. Id. at 9. Third, the decision outlined
5 the NRC's post-September 11 coordination with other federal
6 agencies, including "the Office of Homeland Security, the Federal
7 Bureau of Investigation . . . , the Departments of Transportation
8 and Energy, and others," in seeking to render nuclear facilities
9 secure.⁴ Id. at 8.

10 With respect specifically to Riverkeeper's request for
11 a permanent no-fly zone and defense and security of such a zone,
12 Director Collins denied the request after explaining the NRC's
13 view that security from terrorist attacks on nuclear facilities
14 was best approached by enhancing aviation security, including
15 intelligence gathering and security at airports and on
16 airplanes.⁵ Id. at 18-19. And with respect to converting to a

⁴ According to the decision:

Shortly after September 11, 2001, the NRC recognized the need to reexamine the basic assumptions underlying the current nuclear facility security and safeguards programs. . . . This is an ongoing review and as results become available, they will be evaluated and, if appropriate, incorporated into NRC's regulatory processes. The review includes consultation with the Office of Homeland Security, the Federal Bureau of Investigation (FBI), the Departments of Transportation and Energy, and others. The NRC's participation with these agencies allows the NRC to communicate its actions to other Federal agencies, ensuring an appropriate and balanced response throughout the nation's entire critical energy infrastructure.

Energy Nuclear Operations, Nos. 50-003, 50-247, and 50-286, at 7-8 (Nuclear Regulatory Comm'n Nov. 18, 2002).

⁵ According to the decision:

In the aftermath of September 11, 2001, the Federal

1 dry-cask spent-fuel storage system, the director denied

government took a number of steps to improve aviation security and minimize the threat of terrorists using airplanes to damage facilities critical to our nation's infrastructure. The Commission views that the efforts associated with protecting our nation from terrorist attacks by air should be directed toward enhancing security at airports and on airplanes. Thus, the Commission endorses the prompt response by Congress to strengthen aviation security under the Aviation and Transportation Security Act of 2001, because this legislation provides for improved protection against air attacks on all industrial facilities, both nuclear and non-nuclear. The NRC further supports the steps taken by the [Federal Aviation Administration ("FAA")] to improve aircraft security, including enhanced passenger and baggage screening, strengthening of cockpit doors, and the Air Marshal program. The U.S. intelligence community and various Federal law enforcement agencies have also increased efforts to identify potential terrorists and prevent potential attacks before they occur. For example, the FAA and Department of Defense have acted more than once to protect airspace above nuclear power plants from what were thought to be credible threats against certain specific sites. These potential threats were later judged to be non-credible.

The NRC is also reviewing measures to bolster defense and to establish new antiterrorism strategies in a thorough and systematic manner. The NRC is taking a realistic and prudent approach toward assessing the magnitude of the potential threat and the strength of licensee defenses.

NRC licensees must defend nuclear power plants against the [design basis threat]. September 11 showed that the NRC and its licensees must reevaluate the scope of potential assaults of all types. However, there are limits to what can be expected from a private guard force, even assisted by local law enforcement. Even if it is determined that nuclear power plants should be defended against aircraft attack, the NRC cannot expect licensees to acquire and operate anti-aircraft weaponry. Protection against this type of threat may be provided by other means within the Federal government.

In summary, [Riverkeeper's] request is denied because the NRC considers that the collective measures taken since September 11, 2001, provide adequate protection of public health and safety.

Id. at 18-19.

1 Riverkeeper's request, asserting that the present system is
2 safe.⁶ Id. at 20-22.

3 The director's decision automatically became final
4 after twenty-five days of inaction by the NRC.⁷ See 10 C.F.R.

⁶ According to the decision:

The NRC staff presently concludes that spent fuel can be safely stored at the [Indian Point] reactor site in the current system Although the spent fuel storage buildings at [Indian Point] are not as hardened as the reactor containment structures, the [spent-fuel pools] themselves are robust, and relatively small structures, that are partially below ground level. . . . The pools are designed to prevent a rapid loss of water with the structure intact, and the pool water level and cooling system are monitored and alarmed in the control rooms. Thus, the response time for events involving the [spent-fuel pool] is significantly longer than for other event scenarios. It is also easier to add water to the [spent-fuel pool] from various sources because it is an open pool. The robust design and small size of the pools minimize the likelihood that a terrorist attack would cause damage of a magnitude sufficient to result in an offsite release of radioactive material. Further, offsite resources can be brought onsite to assist the response to an event.

When the NRC staff completes its reevaluation of the physical security requirements, the NRC will be able to judge whether modifications to the [spent-fuel pool] structures and enclosures are warranted and whether additional safeguards measures should be established. If so, the NRC will act accordingly. In the meantime, the NRC has issued Orders to all nuclear power plants requiring certain interim compensatory measures to augment security and strengthen mitigation strategies. The [spent-fuel pools] are within the protected area of the facility and therefore protected from certain external threats under the security provisions identified in the [physical security plans].

During the NRC review of the transfer of the licenses for [Indian Point], [Entergy] indicated that it was evaluating the possible construction of an independent spent fuel storage facility. In a public meeting on March 14, 2002, [Entergy] stated that it was expediting its engineering review for this facility.

Id. at 20-22.

⁷ We therefore refer to it hereafter as either the "director's decision" or the "NRC's decision."

1 § 2.206(c)(1). Riverkeeper appealed the NRC's decision thus
2 rendered final to this Court.

3 On June 4, 2003, the respondents moved to dismiss the
4 appeal on jurisdictional grounds. On August 28, 2003, this Court
5 referred the motion to a merits panel of the Court for decision
6 after full briefing and oral argument. Order Dated Aug. 28,
7 2003, Riverkeeper, Inc. v. Collins, No. 03-4313 (2d Cir. 2003).
8 After such briefing and argument, we now dismiss the appeal for
9 lack of jurisdiction.

10 DISCUSSION

11 Riverkeeper appeals the NRC's decision to deny
12 Riverkeeper's request to the extent that the NRC did not
13 implement a permanent no-fly zone over Indian Point, did not
14 require defense or security of such a no-fly zone, and did not
15 order Entergy to change Indian Point's spent-fuel storage to a
16 dry-cask system.⁸ Riverkeeper asserts that we have jurisdiction
17 to review the NRC's decision because it constituted an abdication
18 of the NRC's statutory duty to protect and ensure the health and
19 safety of the public. The respondents reply that the NRC did not
20 abdicate its statutory duties in refusing to implement

⁸ The Attorney General of Connecticut submitted a brief amicus curiae in support of Riverkeeper's petition. The brief argues that Indian Point's radiological emergency preparedness plan is inadequate. Although Riverkeeper made similar arguments in its section 2.206 request, it has not pursued them on appeal. We therefore do not consider them now. See Bano v. Union Carbide Corp., 273 F.3d 120, 127 n.5 (2d Cir. 2001) ("[B]ecause [an issue] was raised by amici, not by the appellants themselves, . . . we do not reach the question [raised by amici]." (citing, inter alia, 16A Wright, Miller & Cooper, Federal Practice & Procedure § 3975.1 (3d ed. 1999))). We note, moreover, that this question is now before the NRC in a section 2.206 request filed by the amicus. 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).

1 Riverkeeper's particular request, and thus jurisdiction cannot
2 arise on that basis. Furthermore, they contend, we have no
3 jurisdiction because neither the Atomic Energy Act of 1954, as
4 amended, 42 U.S.C. § 2011 et seq. (the "AEA"), nor NRC
5 regulations contain any standard against which we can
6 meaningfully judge the director's decision and which could give
7 rise to appellate jurisdiction. They conclude that we therefore
8 do not have jurisdiction to review the NRC's decision.

9 I. Basis for Jurisdiction

10 The AEA requires that the NRC ensure that "the
11 utilization or production of special nuclear material . . . will
12 provide adequate protection to the health and safety of the
13 public." 42 U.S.C. § 2232(a). The statute grants the NRC the
14 power to:

15 [E]stablish by rule, regulation, or order,
16 such standards and instructions to govern the
17 possession and use of special nuclear
18 material, source material, and byproduct
19 material as the Commission may deem necessary
20 or desirable to promote the common defense
21 and security or to protect health or to
22 minimize danger to life or property.

23 42 U.S.C. § 2201(b). Under the NRC's regulations, the Commission
24 "may institute a proceeding to modify, suspend, or revoke a
25 license or to take such other action as may be proper." 10
26 C.F.R. § 2.202(a). "Any person may file a request to institute a
27 proceeding pursuant to § 2.202 to modify, suspend, or revoke a
28 license, or for any other action as may be proper." Id.
29 § 2.206(a). In response to this request, "the Director of the

1 NRC office with responsibility for the subject matter of the
2 request shall either institute the requested proceeding in
3 accordance with this subpart or shall advise the person who made
4 the request in writing that no proceeding will be instituted in
5 whole or in part, with respect to the request, and the reasons
6 for the decision." Id. § 2.206(b). Within twenty-five days of
7 the denial of a request, the NRC "may on its own motion review
8 that decision, in whole or in part, to determine if the Director
9 has abused his discretion." Id. § 2.206(c)(1).

10 The federal courts of appeals have exclusive
11 jurisdiction to adjudicate appeals from "all final orders of the
12 Atomic Energy Commission made reviewable by section 2239 of title
13 42." 28 U.S.C. § 2342(4).⁹ 42 U.S.C. § 2239, in turn, makes
14 "[a]ny final order entered in any proceeding of the kind
15 specified in subsection (a)," reviewable under the Administrative
16 Procedure Act, 5 U.S.C. § 701 et seq. (the "APA"). 42 U.S.C.
17 § 2239(b)(1). The Supreme Court has construed 42 U.S.C.
18 §§ 2239(a)¹⁰ and (b)(1) to "provide for initial court of appeals

⁹ In 1974, Congress abolished the Atomic Energy Commission and established in its place (1) the Energy Research and Development Administration, 42 U.S.C. § 5811, whose functions were later transferred to the Department of Energy, id. § 7151, and (2) the NRC, id. § 5841. Section 2342(4) therefore applies to "all final orders" of the NRC "made reviewable by section 2239 of title 42."

¹⁰ Section 2239(a) provides, in pertinent part, that:

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the

1 review of all final orders in licensing proceedings whether or
2 not a hearing before the Commission occurred or could have
3 occurred." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737
4 (1985). Such final orders include an NRC denial of a request
5 under 10 C.F.R. § 2.206, such as the denial in the instant case.
6 Id. at 734-35, 737. Therefore, if this Court has subject matter
7 jurisdiction under the APA of the appeal of the NRC's decision on
8 Riverkeeper's section 2.206 request, the question to which we now
9 turn, Riverkeeper's appeal of the director's decision, which
10 became final and therefore the decision of the NRC twenty-five
11 days after its issuance, is properly before this Court.

12 II. Jurisdiction To Review the NRC's Decision

13 A. Presumption Against Jurisdiction

14 The APA permits judicial review for "[a] person
15 suffering legal wrong because of agency action," 5 U.S.C. § 702,
16 but explicitly excludes any such review "to the extent that --
17 (1) statutes preclude judicial review; or (2) agency action is
18 committed to agency discretion by law," id. § 701(a). In Heckler
19 v. Chaney, 470 U.S. 821 (1985), the Supreme Court discussed and
20 distinguished between the operation of sections 701(a)(1) and
21 701(a)(2).

22 The Chaney Court observed that section 701(a)(1)
23 forecloses judicial review "when Congress has expressed an intent

proceeding, and shall admit any such person as a party
to such proceeding.

42 U.S.C. § 2239(a)(1)(A).

1 to preclude judicial review." Id. at 830. "[E]ven where
2 Congress has not affirmatively precluded review," section
3 701(a)(2) forecloses review "if the statute [governing the
4 agency's actions] is drawn so that a court would have no
5 meaningful standard against which to judge the agency's exercise
6 of discretion. In such a case, the statute ('law') can be taken
7 to have 'committed' the decisionmaking to the agency's judgment
8 absolutely." Id.

9 Chaney included among those agency actions
10 presumptively exempted from judicial review by section 701(a)(2)
11 agency decisions not to institute a particular enforcement
12 action. Id. at 838. The Chaney Court explained:

13 First, an agency decision not to enforce
14 often involves a complicated balancing of a
15 number of factors which are peculiarly within
16 its expertise. Thus, the agency must not
17 only assess whether a violation has occurred,
18 but whether agency resources are best spent
19 on this violation or another, whether the
20 agency is likely to succeed if it acts,
21 whether the particular enforcement action
22 requested best fits the agency's overall
23 policies, and, indeed, whether the agency has
24 enough resources to undertake the action at
25 all. . . . The agency is far better equipped
26 than the courts to deal with the many
27 variables involved in the proper ordering of
28 its priorities. . . .

29 [Second], . . . when an agency refuses to act
30 it generally does not exercise its coercive
31 power over an individual's liberty or
32 property rights, and thus does not infringe
33 upon areas that courts often are called upon
34 to protect. . . . Finally, we recognize that
35 an agency's refusal to institute proceedings
36 shares to some extent the characteristics of
37 the decision of a prosecutor in the Executive
38 Branch not to indict -- a decision which has

1 long been regarded as the special province of
2 the Executive Branch.

3 Id. at 831-32 (emphasis in original).

4 In Chaney, prison inmates who had been sentenced to
5 death by lethal injection petitioned the Food and Drug
6 Administration ("FDA") for enforcement of the Federal Food, Drug,
7 and Cosmetic Act ("FDCA"). Id. at 823. The inmates alleged that
8 the drugs used to carry out the death penalty were "misbranded,"
9 in violation of the FDCA, because the drugs' use for human
10 execution was an "unapproved use of an approved drug." Id. at
11 823-24, 824 n.1 (quoting 21 U.S.C. § 352(f)). The FDA denied the
12 inmates' petition. Id. at 824-25. The Supreme Court, applying
13 the reasoning rehearsed above, decided that federal courts
14 presumptively had no subject matter jurisdiction to review the
15 FDA's denial of the inmates' petition for enforcement. Id. at
16 837-38.

17 The Chaney Court decided, however, that the presumption
18 against reviewability under section 701(a)(2) would be rebutted
19 by a showing that "the substantive statute has provided
20 guidelines for the agency to follow in exercising its enforcement
21 powers." Id. at 832-33. In such a case, the reviewing court has
22 the power to decide whether the agency's action is contrary to
23 the statute or applied the statute in a manner that was arbitrary
24 or capricious. See id. at 833-35.

25 The Chaney Court applied these principles to the case
26 before it, holding that the FDCA did not cabin the FDA's

1 discretion to refuse to institute enforcement proceedings. Id.
2 at 835-37. The Court therefore dismissed the inmates' appeal for
3 lack of subject matter jurisdiction.

4 In a footnote, the Court posited the possibility that
5 section 701(a)(2)'s presumption against federal judicial
6 jurisdiction in those cases in which the substantive statute did
7 not provide "[a] meaningful standard against which to judge the
8 agency's exercise of discretion," id. at 830, might, at least
9 hypothetically, be overcome on a showing that the agency in
10 question "has 'consciously and expressly adopted a general
11 policy' that is so extreme as to amount to an abdication of its
12 statutory responsibilities," id. at 833 n.4 (quoting Adams v.
13 Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)). The
14 Court noted that in such a situation, "the statute conferring
15 authority on the agency might indicate that such decisions were
16 not 'committed to agency discretion.'" Id. (quoting 8 U.S.C.
17 § 701(a)(2)). The Court had no occasion in deciding Chaney,
18 however, nor has it had occasion since, to apply this
19 hypothetical "abdication" principle to the presumption of non-
20 reviewability.

21 The present petition challenges a different agency and
22 a different statute. It raises, however, a similar issue:
23 whether we have jurisdiction to review the NRC's decision not to
24 enforce what Riverkeeper asserts are applicable AEA provisions
25 and NRC regulations with respect to Entergy and Indian Point.
26 Because the NRC is an agency thus declining to enforce, its

1 decision is presumptively not reviewable unless the presumption
2 is overcome by one of the means recognized by Chaney.¹¹

3 B. Rebutting the Presumption Against Non-Reviewability

4 1. Meaningful Statutory Standard? Section 701(a)(2)

5 forecloses review when "agency action is committed to agency
6 discretion by law." As we have seen, the Chaney Court read the
7 section to prevent judicial review "even where Congress has not
8 affirmatively precluded review . . . if the statute is drawn so
9 that a court would have no meaningful standard against which to
10 judge the agency's exercise of discretion." Chaney, 470 U.S. at
11 830. Riverkeeper does not, however, attempt to demonstrate that
12 the NRC's denial of its section 2.206 request was reviewable on
13 this ground -- that "the substantive statute has provided
14 guidelines for the agency to follow in exercising its enforcement
15 powers." Id. at 833.¹²

¹¹ Riverkeeper argues in its reply brief that we have jurisdiction because the relief sought from the NRC was not purely enforcement relief, and therefore Chaney need not be strictly applied. We need not consider this issue because it was raised for the first time in Riverkeeper's reply brief. See Knipe v. Skinner, 999 F.2d 708, 710-11 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief."). In any event, because the thrust of Riverkeeper's section 2.206 petition was to convince the NRC to enforce the statutes and regulations under its authority against licensees in the manner in which Riverkeeper thought they should be enforced, we conclude that the case before us is properly construed under Chaney as an appeal from the denial of an enforcement action.

¹² While we are therefore not called upon to address the issue, it is worth noting that other circuits that have done so have determined that neither the AEA nor the NRC regulations concerning section 2.206 requests limit agency discretion sufficiently to enable meaningful judicial review. See Safe Energy Coalition v. U.S. Nuclear Regulatory Comm'n, 866 F.2d 1473, 1477-78 (D.C. Cir. 1989); Arnow v. U.S. Nuclear Regulatory Comm'n, 868 F.2d 223, 234-36 (7th Cir.), cert. denied sub nom. Citizens of Illinois v. U.S. Nuclear Regulatory Comm'n, 493 U.S. 813 (1989); Mass. Pub. Interest Research Group, Inc. v. U.S. Nuclear Regulatory Comm'n, 852 F.2d 9, 16 (1st Cir. 1989).

1 2. Express Abdication of Statutory Responsibility?

2 Riverkeeper relies instead upon the hypothetical basis for
3 jurisdiction reserved in Chaney's footnote 4 for cases in which
4 the agency in question "has consciously and expressly adopted a
5 general policy that is so extreme as to amount to an abdication
6 of its statutory responsibilities." Chaney, 470 U.S. at 833 n.4
7 (internal quotation marks omitted). But Riverkeeper does not
8 direct us to an NRC policy expressly abdicating any relevant
9 statutory responsibility. Rather, Riverkeeper asks us to
10 identify the existence of an NRC policy not to consider
11 "potential terrorist attacks by airborne vehicles" on nuclear
12 facilities based on a pre-September 11 NRC rule and two NRC
13 decisions about environmental impact review under a governing
14 statute other than the AEA. Petitioner's Br. at 25 (citing
15 Physical Protection for Spent Nuclear Fuel and High-Level
16 Radioactive Waste, 63 Fed. Reg. 26,955 (May 15, 1998) (codified
17 at 10 C.F.R. pts. 60, 72, 73, 74, and 75); In the Matter of
18 Private Fuel Storage, L.L.C., 56 N.R.C. 340 (2002); In the Matter
19 of Duke Energy Corp., 56 N.R.C. 358 (2002)). We do not think
20 that these NRC actions with respect to matters unrelated either
21 to a September-11-type attack or the AEA are relevant to the
22 denial of Riverkeeper's section 2.206 request under the AEA in
23 the wake of September 11. Riverkeeper has thus not identified an
24 express agency policy for us to measure against the AEA to
25 determine whether an NRC policy is consistent with or an
26 abdication of its responsibility under the AEA's commands.

1 3. Inference of Abdication of Statutory

2 Responsibility. Riverkeeper also asks us to infer a general NRC
3 policy of abdication from the NRC's act of denying Riverkeeper's
4 request with respect to Indian Point. As the District of
5 Columbia Circuit has pointed out,

6 By definition, expressions of broad
7 enforcement policies are abstracted from the
8 particular combinations of facts the agency
9 would encounter in individual enforcement
10 proceedings. As general statements, they are
11 more likely to be direct interpretations of
12 the commands of the substantive statute
13 rather than the sort of mingled assessments
14 of fact, policy, and law that drive an
15 individual enforcement decision and that are,
16 as Chaney recognizes, peculiarly within the
17 agency's expertise and discretion.

18 [Moreover], an agency's pronouncement of a
19 broad policy against enforcement poses
20 special risks that it "has consciously and
21 expressly adopted a general policy that is so
22 extreme as to amount to an abdication of its
23 statutory responsibilities," Chaney, 470 U.S.
24 at 833 n.4 (internal quotation marks
25 omitted), a situation in which the normal
26 presumption of non-reviewability may be
27 inappropriate. Finally, an agency will
28 generally present a clearer (and more easily
29 reviewable) statement of its reasons for
30 acting when formally articulating a broadly
31 applicable enforcement policy, whereas such
32 statements in the context of individual
33 decisions to forego enforcement tend to be
34 cursory, ad hoc, or post hoc.

35 Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C.
36 Cir. 1994). Nonetheless, in the absence of such an "expression[]
37 of broad enforcement polic[y]," we review the actions of the NRC
38 here to determine whether we can discern from them an abdication
39 of responsibilities conferred upon the NRC by the AEA.

1 The NRC must, under the AEA, ensure that "the
2 utilization or production of special nuclear material . . . will
3 provide adequate protection to the health and safety of the
4 public." 42 U.S.C. § 2232(a).¹³ The AEA further authorizes the
5 NRC to regulate in various formats as it "may deem necessary or
6 desirable . . . to protect health or to minimize danger to life
7 or property." 42 U.S.C. § 2201(b); see also id. § 2201(i)(3)
8 (granting authority to the NRC to regulate as it finds necessary
9 "to govern any activity authorized pursuant to this chapter,
10 including standards and restrictions governing the design,
11 location, and operation of facilities used in the conduct of such
12 activity, in order to protect health and to minimize danger to
13 life or property"); County of Rockland v. U.S. Nuclear Regulatory
14 Comm'n, 709 F.2d 766, 769 (2d Cir.) ("The NRC is charged under
15 the AEA . . . with primary responsibility to ensure, through its
16 licensing and regulatory functions, that the generation and
17 transmission of nuclear power does not unreasonably threaten the
18 public welfare. Consistent with its administrative mandate, the
19 NRC is empowered to promulgate rules and regulations governing
20 the construction and operation of nuclear power plants."), cert.
21 denied, 464 U.S. 993 (1983). As the District of Columbia Circuit
22 observed, the first cited statutory section requires the NRC to
23 ensure "adequate protection" of public health and safety, not

¹³ Congress also made a specific finding that "[t]he processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public." 42 U.S.C. § 2012(d).

1 "absolute protection." Union of Concerned Scientists v. U.S.
2 Nuclear Regulatory Comm'n, 824 F.2d 108, 114 (D.C. Cir. 1987);
3 see also id. at 118 ("The level of adequate protection need not,
4 and almost certainly will not, be the level of 'zero risk.' This
5 court long has held that the adequate-protection standard permits
6 the acceptance of some level of risk."). The latter statutory
7 sections go further and "empower[] (but do[] not require) the
8 Commission to establish safety requirements that are not
9 necessary for adequate protection and to order holders of or
10 applicants for operating licenses to comply with these
11 requirements." Id. at 114. Taken together, these statutory
12 provisions require that the NRC insure adequate protection of
13 public health and safety from risks associated with nuclear
14 plants.¹⁴ The NRC can be viewed as abdicating its statutory
15 duties, then, only if it has established a policy not to protect
16 adequately public health and safety with respect to nuclear
17 plants.

18 If the NRC had indisputable proof before it that
19 nuclear power plants are not adequately secure from terrorist
20 attack and nonetheless decided that it would do nothing to
21 address the situation, Riverkeeper might then plausibly charge

¹⁴ Circumstances today are sufficiently different from those of a generation ago that we do not find ourselves compelled to follow the District of Columbia Circuit's 1969 conclusion that the Atomic Energy Commission, "in licensing the construction of nuclear reactors for peaceful civilian use," need not "take into account, and require a showing of effective protection against, the possibilities of attack or sabotage by foreign enemies." Siegel v. Atomic Energy Comm'n, 400 F.2d 778, 779, 784 (D.C. Cir. 1968).

1 that the NRC had "abdicated" its statutory responsibility.¹⁵ But
2 that is not what the NRC did. After September 11, 2001, the NRC
3 issued multiple orders modifying licenses (albeit mostly in ways
4 that, for reasons relating to security, have not been disclosed)
5 "to strengthen licensees' capabilities and readiness to respond
6 to a potential attack on a nuclear facility" by requiring
7 "certain compensatory measures . . . as prudent, interim
8 measures, to address the generalized high-level threat
9 environment in a consistent manner throughout the nuclear reactor
10 community." All Operating Power Reactor Licensees; Order
11 Modifying Licenses (Effective Immediately), 67 Fed. Reg. 9792,
12 9792 (Mar. 4, 2002); see also All Operating Power Reactor
13 Licensees; Order Modifying Licenses (Effective Immediately), 68
14 Fed. Reg. 24,510, 24,511 (May 7, 2003); All Operating Power
15 Reactor Licensees; Order Modifying Licenses (Effective
16 Immediately), 68 Fed. Reg. 24,514, 24,514 (May 7, 2003); All
17 Operating Power Reactor Licensees; Order Modifying Licenses
18 (Effective Immediately), 68 Fed. Reg. 1643, 1643 (Jan. 13, 2003).
19 The NRC also modified the design basis threat, requiring power
20 plant licensees to "revise their physical security plans,
21 safeguards contingency plans, and guard training and

¹⁵ Cf. Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997) ("We reject out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty. The State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty.").

1 qualification plans" in an undisclosed fashion. All Operating
2 Power Reactor Licensees; Order Modifying Licenses (Effective
3 Immediately), 68 Fed. Reg. 24,517, 24,517-18 (May 7, 2003).

4 To be sure, none of the NRC's disclosed actions appears
5 to be directed specifically toward Riverkeeper's express concern:
6 the possibility of an airborne terrorist attack on Indian Point.
7 But this does not constitute an abdication.

8 First, the NRC has an overall statutory mandate to
9 provide adequate protection to nuclear plants. It has not
10 abdicated that responsibility solely because it has failed to
11 enact the specific licensing requirements requested by
12 Riverkeeper after consulting with military and security agencies
13 and because it has implemented various undisclosed protective
14 measures to address the heightened concerns of terrorist attacks.
15 Were it otherwise, we would be reading the Chaney footnote to
16 have created jurisdiction on an "abdication" basis every time an
17 administrative agency declines to order demanded action on an
18 asserted discrete, perceived problem within its area of statutory
19 responsibility. The Chaney Court made clear the strict
20 limitations on the judicial power to review administrative agency
21 decisions. We are confident that in thus shutting the front door
22 to federal courts, it did not mean to open a back door by
23 permitting federal courts to assert jurisdiction whenever a
24 specific problem is brought to an agency's attention and the
25 agency decides not to order demanded curative steps with respect
26 to it. Such an exception to the rule that failure to institute

1 an enforcement action is generally not reviewable would threaten
2 to devour the rule.

3 Second, the NRC has stated that:

4 In the aftermath of September 11, 2001, the
5 Federal government took a number of steps to
6 improve aviation security and minimize the
7 threat of terrorists using airplanes to
8 damage facilities critical to our nation's
9 infrastructure. The Commission views that
10 the efforts associated with protecting our
11 nation from terrorist attacks by air should
12 be directed toward enhancing security at
13 airports and on airplanes. Thus, the
14 Commission endorses the prompt response by
15 Congress to strengthen aviation security
16 under the Aviation and Transportation
17 Security Act of 2001, because this
18 legislation provides for improved protection
19 against air attacks on all industrial
20 facilities, both nuclear and non-nuclear.
21 The NRC further supports the steps taken by
22 the FAA to improve aircraft security,
23 including enhanced passenger and baggage
24 screening, strengthening of cockpit doors,
25 and the Air Marshal program. The U.S.
26 intelligence community and various Federal
27 law enforcement agencies have also increased
28 efforts to identify potential terrorists and
29 prevent potential attacks before they occur.
30 For example, the FAA and Department of
31 Defense have acted more than once to protect
32 airspace above nuclear power plants from what
33 were thought to be credible threats against
34 certain specific sites. These potential
35 threats were later judged to be non-credible.

36 Entergy Nuclear Operations, Nos. 50-003, 50-247, and 50-286, at
37 18-19 (Nuclear Regulatory Comm'n Nov. 18, 2002).¹⁶ It is on this

¹⁶ We are aware that the NRC has asserted this same reasoning in other contexts. See, e.g., SECURITY GAP: A Hard Look at the Soft Spots in Our Civilian Nuclear Reactor Security, Staff Summary of Responses by the Nuclear Regulatory Commission to Correspondence from Rep. Edward J. Markey, at 8 (Mar. 25, 2002); Letter from NRC Chairman Richard A. Meserve to Sen. James M. Jeffords, at 10-11 (Dec. 17, 2001). Whether multiple uses of this reasoning rise to the level of an "express" policy does not alter our conclusion.

1 basis, at least in part, that the NRC declined to commence
2 enforcement proceedings as urged in the section 2.206 request
3 before us.

4 We think that the NRC's considered conclusion -- right
5 or wrong -- that the problem before it was being adequately
6 addressed by other agencies of government and its consequent
7 decision to leave the matter to those agencies cannot amount to
8 an "abdication" of its statutory duty under the AEA to insure
9 that the public health and safety is adequately protected.
10 Relying on other governmental bodies to address a risk is not
11 equivalent to ignoring the risk. See N.Y. Pub. Interest Research
12 Group v. Whitman, 321 F.3d 316, 331 (2d Cir. 2003) ("The [Chaney]
13 presumption against judicial review of [agency] refusal [to
14 pursue enforcement action] avoids entangling courts in a calculus
15 involving variables better appreciated by the agency charged with
16 enforcing the statute and respects the deference often due to an
17 agency's construction of its governing statutes."); cf. Kelley v.
18 Selin, 42 F.3d 1501, 1511 (6th Cir.) ("As the Supreme Court has
19 stated, 'the [Nuclear Regulatory] Commission is making
20 predictions . . . at the frontiers of science. When examining
21 this kind of scientific determination, as opposed to simple
22 findings of fact, a reviewing court must generally be at its most
23 deferential.' Baltimore Gas & Elec. Co. v. Natural Resources
24 Defense Council, Inc., 462 U.S. 87, 103 (1983) (citations
25 omitted). After all, judges are neither scientists nor
26 technicians." (alterations in original; some internal quotation

1 marks and alterations omitted)), cert. denied, 515 U.S. 1159
2 (1995).

3 Thus, even if we were to assume that the Chaney Court
4 established by way of footnote 4 federal court jurisdiction over
5 appeals from agency action when the agency "has 'consciously and
6 expressly adopted a general policy' that is so extreme as to
7 amount to an abdication of its statutory responsibilities,"
8 Chaney, 470 U.S. at 833 n.4,¹⁷ the only basis for jurisdiction
9 urged by Riverkeeper, we would have no jurisdiction to review the
10 NRC's decision here.

11 * * *

12 The issues Riverkeeper raises are plainly serious and
13 of pressing concern. But as a court established by Congress
14 under Article III of the Constitution, we have jurisdiction to
15 decide only those disputes that the Constitution or Congress
16 gives us the power to decide. "[T]he decision as to whether an

¹⁷ No party has directed us to, nor can we locate, a single decision by a court of appeals that has found, in performing the Chaney analysis, a federal agency to have abdicated its statutory duties. Cf. Safe Energy Coalition, 866 F.2d at 1477 (concluding that there is no subject matter jurisdiction under Chaney to review the NRC's denial of a section 2.206 request that the NRC act on an "employee concern" program established by a power plant licensee, and that the NRC did not abdicate its statutory responsibilities in its denial); Arnow, 868 F.2d at 236 (dismissing for lack of subject matter jurisdiction under Chaney the petitioners' appeal from the NRC's denial of a section 2.206 request for an order to show cause why certain nuclear plants should not be suspended from operation and retested because of inadequate containment in the event of a nuclear accident, but indicating that had there been evidence that "the NRC abdicated its statutory responsibilities," there could be judicial review); Mass. Pub. Interest Research Group, Inc., 852 F.2d at 19 (holding that although it had no jurisdiction under Chaney to review the NRC's denial of a section 2.206 request based on alleged inadequacies in offsite emergency response plans and design flaws in a nuclear plant's containment structure, "courts . . . may review NRC decisions which undermine its fundamental statutory responsibility to protect the health and safety of the public" (citation and internal quotation marks omitted)).

1 agency's refusal to institute proceedings should be judicially
2 reviewable" is "essentially [left] to Congress, and not to the
3 courts." Chaney, 470 U.S. at 838. It is clear under the
4 Administrative Procedure Act, and its interpretation by the
5 Supreme Court in Chaney, that we have been given no such power
6 here.

7 As we observed under not altogether dissimilar
8 circumstances more than two decades ago:

9 One of the most emotional issues confronting
10 our society today is the adequacy of safety
11 measures at nuclear power facilities. Fueled
12 by the Three Mile Island incident, the debate
13 over nuclear safety persists as public
14 interest groups charge that serious problems
15 remain and operator-utilities seek to assure
16 the public that all reasonable measures have
17 been taken to protect surrounding populations
18 in the event of a major nuclear accident.
19 But it is the United States Nuclear
20 Regulatory Commission . . . which must decide
21 the difficult questions concerning nuclear
22 power safety.

23 County of Rockland, 709 F.2d at 768.

24 **CONCLUSION**

25 For the foregoing reasons, Riverkeeper's appeal is
26 dismissed for want of jurisdiction.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

Date: 2/24/04
Docket Number: 03-4313-ag
Short Title: Riverkeeper, Inc. v. Collins
DC Docket Number: DD-02-06
DC: Nuclear Regulatory Commission
DC Judge:

Dear Counsel

If you desire to file a bill of costs, enclosed is a form which you should use. Your bill of costs must be:

1. Served
2. Filed within 14 days after entry of judgment with proof of service
3. Verified
4. Clear as to the number of copies which comprise the printer's unit
5. Accompanied by printer's bills, which must include minimum charge for printer's unit
 - a) of a page
 - b) of a cover
 - c) of footlines by the line
 - d) of an index and table of cases by the page
6. Only for the number of necessary copies inserted in enclosed form
7. For actual costs at rates not higher than those generally charged such work in area where the Clerk's Office is located, otherwise subject to reduction. is located, otherwise subject to reduction.
- 8.. Devoid of such items as postage, delivery charges, service charge, overtime and author's alterations.
9. One copy shall be filed with the original.

Very truly yours,
Roseann B. MacKechnie, Clerk

By:

Tynetta Hope
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
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DC Judge:

ITEMIZED AND VERIFIED BILL OF COSTS

Counsel for _____
respectfully submits, pursuant to Rule 39 (c) of the Federal Rules of Appellate Procedure the within bill of
costs and requests the Clerk to prepare and itemized statement of costs taxed against the
_____ and in favor of _____
for insertion in the mandate.

Docketing Action _____
Costs of printing appendix (necessary copies _____) _____
Costs of printing brief (necessary copies _____) _____
Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

Signature

NOTICE

Local Rule effective July 1, 1992

0.40 Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding \$250 against petitioner in favor of his adversary, to be collected with the costs in the case.

July 1, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHINIE
CLERK

RULE 40
PETITION FOR REHEARING

(a) **Time for Filing; Content; Answer; Action by Court if GRANTED.** A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. However, in all civil cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. The petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

(b) **Form of Petition; Length.** The petition shall be in a form prescribed by Rule 32(a); and copies shall be served and filed as prescribed by Rule 31(b) for the service and filing of briefs. Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages. (As amended Apr. 30, 1979, eff. Aug. 1, 1979, Apr. 29, 1994, eff. Dec. 1, 1994.)

Local Rule 40. Petitions for Rehearing

Each petition for rehearing shall include a copy of the opinion or summary order to which the petition relates.

If a petition for rehearing be found to be wholly without merit, vexatious and for delay, the court may tax a sum not exceeding \$250 against petitioner in favor of the petitioner's adversary, to be collected with the costs in the case.

YOU MUST SUBMIT 10 COPIES OF THE PETITION FOR REHEARING. YOU MUST FILE A MOTION IF YOU WISH TO ATTACH OR ADD AN APPENDIX OR ADDENDUM TO YOUR PETITION. YOU MUST SUBMIT PROOF OF SERVICE.

NOTICE

To file a petition for a writ of certiorari contact:

Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Telephone Number: 202-479-3000

Jared K. Heck Esq.

Nuclear Regulatory Commission Office of the General Counsel

Mail Stop-O-15 D21

Washington, DC 20555