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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 16, 2004 Decided February 24, 2004

No. 03-1018

MARGENE BULLCREEK, ET AL.,
PETITIONERS

v.

NUCLEAR REGULATORY COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

PRIVATE FUEL STORAGE, L.L.C. AND
SKULL VALLEY BAND OF GOSHUTE INDIANS,
INTERVENORS

Consolidated with
No. 03-1022

On Petitions for Review of an Order of the
Nuclear Regulatory Commission

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Thomas R. Lee argued the cause for petitioners. With him on the briefs were *Mark L. Shurtleff*, Attorney General, Attorney General's Office of the State of Utah, *Monte N. Stewart*, Special Assistant Attorney General, *Denise Chancellor* and *Connie Nakahara*, Assistant Attorneys General, and *Paul C. EchoHawk*.

Grace H. Kim, Attorney, U.S. Nuclear Regulatory Commission, argued the cause for respondent U.S. Nuclear Regulatory Commission. With her on the brief were *Karen D. Cyr*, General Counsel, *John F. Cordes, Jr.*, Solicitor, and *E. Leo Slaggie*, Deputy Solicitor.

Jay E. Silberg argued the cause for intervenors. With him on the brief was *Tim Vollmann*.

Before: ROGERS and GARLAND, *Circuit Judges*, and WILLIAMS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The issue on appeal is whether § 10155(h) of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101 *et seq.*, repealed or superseded the authority of the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 *et seq.*, to license the storage of private spent nuclear fuel at privately owned away-from-reactor storage facilities. The State of Utah and others challenged the NRC's jurisdiction to grant a private license to develop and operate a private away-from-reactor storage facility on the ground that § 10155(h) barred such facilities. The NRC rejected Utah's interpretation of § 10155(h) and declined to institute a rulemaking to amend its regulations. Utah and others seek review of the order denying the petition to institute a rulemaking, contending that the NRC's interpretation is contrary to the plain language of § 10155(h) and to the structure and legislative history of the Nuclear Waste Policy Act. We hold that § 10155(h) does not repeal or supersede the NRC's authority under the Atomic Energy Act to license private away-from-reactor storage facilities, and we therefore deny the petitions for review.

I.

The Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011 *et seq.*, authorized the NRC to regulate the possession, use, and transfer of the constituent materials of spent nuclear fuel, including special nuclear material, source material, and byproduct material. *See id.* §§ 2073, 2092, 2093, 2111, 2201(b); *see also* 10 C.F.R. § 72.3 (2003). While the AEA does not specifically refer to the storage or disposal of spent nuclear fuel, it has long been recognized that the AEA confers on the NRC authority to license and regulate the storage and disposal of such fuel. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983); *Illinois v. Gen. Elec. Co.*, 683 F.2d 206, 214–15 (7th Cir. 1982); *Jersey Cent. Power & Light Co. v. Township of Lacey*, 772 F.2d 1103, 1112 (3rd Cir. 1985). Pursuant to its AEA authority, the NRC promulgated regulations in 1980 for licensing onsite and away-from-reactor spent nuclear fuel storage facilities for private nuclear generators. *See* 10 C.F.R. Part 72.

Two years later, Congress enacted the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. §§ 10101 *et seq.*, in response to "a national problem" created by the accumulation of spent nuclear fuel from private nuclear generators, as well as radioactive waste from reprocessing such fuel, activities related to medical research, diagnosis, and treatment, and other sources. *Id.* § 10131(a)(2). Finding inadequate the federal efforts in the past 30 years to devise a permanent solution, *id.* § 10131(a)(3), Congress established a schedule for siting, construction, and operation of a permanent federal repository (Subtitle A), *id.* §§ 10131–10145, and developed a federally monitored retrievable storage program in the event the permanent repository was unavailable by the specified deadline (Subtitle C). *Id.* §§ 10161–10169. Finding further that the generators and owners of high-level radioactive waste and spent nuclear fuel have "the primary responsibility to provide for, and . . . to pay the costs of, the interim storage of such waste and spent fuel," *id.* § 10131(a)(5); *see also id.* § 10151(a)(1), Congress, under Subtitle B, *id.* §§ 10151–10157, limited the federal government's obligation to assist

private nuclear generators with interim storage of spent nuclear fuel. As a precondition of federal interim storage, private generators were required to exhaust onsite options for storage. *Id.* § 10155(b)(1); *see also id.* §§ 10151(a)(1), 10152. While the NRC was responsible for the licensing of technology used at the reactor site, *id.* §§ 10153–10154, and for developing the criteria for eligibility, *id.* § 10155(g); *see also id.* § 10155(a)-(b), the Department of Energy ("DOE") was directed to provide, and authorized to enter into contracts for, interim storage of not more than 1,900 metric tons of capacity, but only until January 1, 1990. *Id.* §§ 10155(a)-(b), 10156(a)(1). That said, Congress provided:

> Notwithstanding any other provision of law, nothing in this chapter [108, Nuclear Waste Policy,] shall be construed to encourage, authorize, or require the private or Federal use, purchase, lease, or other acquisition of any storage facility located away from the site of any civilian nuclear power reactor and not owned by the Federal Government on January 7, 1983.

Id. § 10155(h).

The dispute over the effect of § 10155(h) on the NRC's authority under the AEA to license private away-from-reactor storage facilities arises in connection with a lease. The Skull Valley Band of Goshute Indians ("Band") entered into a lease with Private Fuel Storage, LLC ("PFS") for the development of a private away-from-reactor spent nuclear storage facility on the Band's reservation located 50 miles west of Salt Lake City, Utah. Pursuant to NRC regulations, *see* 10 C.F.R. §§ 72.1, 72.16–72.40, PFS filed a license application, and the NRC's Atomic Safety and Licensing Board ("Board") initiated an adjudicatory licensing proceeding. *See In the Matter of Private Fuel Storage, LLC*, 47 NRC 142 (1998) (hereinafter "*Licensing Proceeding*"). After permitting the State of Utah and the Ohngo Gaudadeh Devia ("OGD"), an association consisting primarily of members of the Band, to intervene, *id.* at 169, the Board concluded that it lacked jurisdiction to decide whether § 10155(h) excluded from the nuclear waste management program the creation and use of private away-

from-reactor storage facilities because such argument constituted an attack on the NRC's regulations. *Id.* at 183–84.

Proceeding to the NRC, Utah made two filings in 2002. The first was a "Suggestion of Lack of Jurisdiction," claiming that the NRC lacked jurisdiction over PFS's license application. Utah argued that Congress had established in the NWPA a "comprehensive national nuclear waste management system for the storage of [spent nuclear fuel]," and § 10155(h) made clear that the storage of such fuel at privately owned away-from-reactor facilities was prohibited. The second filing was a "Petition to Institute Rulemaking and to Stay Licensing Proceeding" to amend 10 C.F.R. Part 72 in light of § 10155(h)'s repeal or supersession of the NRC's authority under the AEA to regulate private away-from-reactor facilities, and to suspend the licensing proceedings during the rulemaking. The OGD also submitted a brief to the NRC adopting the arguments advanced by Utah's petitions.

The NRC declined to stay the licensing proceeding. *See In the Matter of Private Fuel Storage, LLC*, 55 NRC 260, 261–62 (2002). The NRC also rejected Utah's argument that it lacked jurisdiction to issue PFS's license, and denied Utah's request for rulemaking. *See In the Matter of Private Fuel Storage, LLC*, 56 NRC 390 (2002) (hereinafter "*Rulemaking Order*"). The NRC interpreted § 10155(h) to have no effect on its licensing authority under the AEA of private away-from-reactor storage facilities. *Id.* at 396–401. Observing that § 10155(h) contains no prohibitory language and "is facially neutral on the question of the NRC's general AEA authority to license [private] away-from-reactor" facilities, *id.* at 397, the NRC opined that Congress intended § 10155(h) "to recognize and distinguish, not abrogate, existing provisions of law authorizing [away-from-reactor] spent fuel storage." *Id.* at 401. As each word has its own significance when read in the context of the whole of Subtitle B, the NRC concluded that Congress simply "limited the scope of [§ 10155(h)] to those programs created under the NWPA itself." *Id.* at 397–98. By providing that the NWPA did not "authorize" the use of a private storage facility, Congress

limited DOE's authority. *Id.* at 398. As DOE's authority to store spent nuclear fuel originated with the NWPA, § 10155(h) ensured that DOE would not take over a private facility to fulfill DOE's obligations under the NWPA. *Id.* The NRC's authority, on the other hand, to license private generators to store spent nuclear fuel, originated with the AEA, and hence the NWPA's failure to "authorize" storage at private facilities had no effect on this preexisting authority. *Id.* The NRC pointed out that Congress did not need to provide that the NWPA did not "encourage" or "require" DOE to use private facilities, but did need to use those terms in describing the NWPA's conditions on private generators' use of federal interim storage. *Id.* Subtitle B included several provisions that "encourage[d]" private generators to expand onsite storage, *see* 42 U.S.C. §§ 10152–10154, and through § 10155(h), the NRC reasoned, Congress made clear that such provisions were not also encouraging the expansion of private away-from-reactor storage. *Id.* Context and legislative background further explained why Congress would specify that the NWPA did not "require" private away-from-reactor storage: such a requirement appeared early in the legislative process and in prior bills. *Id.* at 398–99. By contrast, the NRC noted, Utah's interpretation of § 10155(h) as repealing or superseding the NRC's authority under the AEA provided no role for "encourage" and "require" to play. *Id.* at 397–98. The NRC thus concluded that neither the text of § 10155(h) nor the NWPA's structure or legislative history indicated that Congress intended to repeal or supersede the NRC's authority under the AEA to license and regulate private away-from-reactor spent fuel storage facilities. *Id.* at 396–411.

II.

Utah, the OGD, and nine individual Goshute members petition for review of the NRC's *Rulemaking Order*, renewing the arguments before the NRC in challenging the NRC's interpretation of § 10155(h). The petitioners read § 10155(h) to prohibit the creation or use of private away-from-reactor storage facilities, and thus to repeal or supersede prior

statutory authority authorizing private away-from-reactor storage facilities for spent nuclear fuel. Contending that the plain text, structure, and legislative history of the NWPA support their interpretation of § 10155(h), the petitioners seek to have the court direct the NRC to amend its 10 C.F.R. Part 72 regulations. We address two threshold issues on standing and our standard of review in Part II, and then turn to the merits in Part III.

A.

The NRC and the intervenors, PFS and the Band, challenge the standing of certain petitioners under the Hobbs Act, 28 U.S.C. § 2344. The Hobbs Act requires that a party participate in the underlying agency proceeding and meet the requirements of constitutional and prudential standing. *See Reyblatt v. NRC*, 105 F.3d 715, 720 (D.C. Cir. 1997); *see also S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 587 (D.C. Cir. 1995). It is undisputed that Utah has standing; it participated below and the administrative record reflects that it met the requirements of constitutional and prudential standing, *see Licensing Proceeding*, 47 NRC at 169. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102–04 (1998); *City of Waukesha v. EPA*, 320 F.3d 228, 233–35 (D.C. Cir. 2003). Hence, inasmuch as the petitioners have filed a joint brief, *cf. Ala. Power Co. v. FCC*, 311 F.3d 1357, 1364–65, 1366–67 (11th Cir. 2002), the court need not decide whether the other petitioners have standing to challenge the NRC's *Rulemaking Order*. *See Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 793 F.2d 1322, 1328–29 n.41 (D.C. Cir. 1986); *see also Chemehuevi Tribe of Indians v. FRC*, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973), *vacated on other grounds*, 420 U.S. 395 (1975).

B.

The court typically defers under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to an agency's interpretation of its own jurisdiction under a statute that it implements. *See Okla. Natural Gas Co. v. FERC*, 28 F.3d 1281, 1283–84 (D.C. Cir. 1994). But such deference may be inappropriate where

more than one agency implements the same statute. *See Collins v. NTSB*, 351 F.3d 1246, 1252–53 (D.C. Cir. 2003); *Rapaport v. Dep't of Treasury*, 59 F.3d 212, 216–17 (D.C. Cir. 1995). On occasion, the court has viewed the NWPA as the type of statutory scheme where *Chevron* deference is due. *See Ind. Mich. Power Co. v. DOE*, 88 F.3d 1272, 1274 (D.C. Cir. 1996); *Gen. Elec. Uranium Mgmt. Corp. v. DOE*, 764 F.2d 896, 907 (D.C. Cir. 1985); *see also Public Citizen v. NRC*, 901 F.2d 147, 153–54 (D.C. Cir. 1990). Both the NRC and DOE, however, are responsible for implementing the federal interim storage program under Subtitle B of the NWPA. *See* 42 U.S.C. §§ 10151–10157; *see also id.* § 10101. The question of whether *Chevron* deference applies to the NRC's interpretation of § 10155(h) is moot here because the result is the same whether the court applies *de novo* review, deference under *Skidmore v. Swift & Co.*, 232 U.S. 134 (1944), or *Chevron* deference, *see Collins*, 351 F.3d at 1254; *Bd. of Trade of City of Chicago v. SEC*, 187 F.3d 713, 719 (7th Cir. 1999) (citing *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 479 n.14 (1997)); *Rapaport*, 59 F.3d at 220 (Rogers, J., concurring in part and concurring in the judgment); the text of § 10155(h) as well as the statutory structure and legislative history of Subtitle B of the NWPA support the NRC's interpretation.

III.

Essentially, Utah's interpretation of § 10155(h) hinges on its view that this provision "expressly disavows" any intent to encourage or authorize private away-from-reactor storage facilities, Petitioners' Br. at 13, and that in order to give meaning to the "notwithstanding" clause it must be read as eliminating prior authority to allow such storage. Utah also looks to the NWPA's structure, noting the protections included for state and local governments where such federal storage is permitted and contends that it would make no sense for Congress to eliminate those protections when storage is private rather than federal. Finally, Utah contends that its interpretation is consistent with congressional concerns about the location of private storage facilities and assurances that

§ 10155(h) was designed to eliminate any basis for those concerns.

In addressing Utah's challenge to the NRC's interpretation of § 10155(h), the court looks first to the language of the statute. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002); *Toibb v. Radloff*, 501 U.S. 157, 162 (1991). The structure of the statute is also relevant in understanding Congress's intent. "[I]f the statutory language is unambiguous and the statutory scheme is coherent and consistent," the court's inquiry ceases. *See Barnhart*, 534 U.S. at 450 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)) (internal quotation marks omitted). The legislative history can assist the court in identifying legislative intent where the statute is unclear, *see Blum v. Stenson*, 465 U.S. 886, 896 (1984), and, on rare occasions, it may suffice to overcome a result of the plain language of the statute that is "demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enterp., Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); *see also Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1088–89 (D.C. Cir. 1996).

The text of § 10155(h), read in light of Subtitle B of the NWPA, demonstrates that Congress did not intend to repeal or supersede the NRC's authority under the AEA to license and regulate private use of private away-from-reactor spent fuel storage facilities. Section 10155(h) itself contains no prohibitory language, and, as Utah conceded at oral argument, the NRC had authority under the AEA to regulate private away-from-reactor storage facilities. In providing that "nothing *in this chapter* shall be construed to ... authorize" private storage facilities, 42 U.S.C. §§ 10155(h) (emphasis added), Congress limited the scope of the NWPA, but left untouched prior and subsequent statutes that authorized such facilities. As the NRC rests its authority to regulate and authorize private away-from-reactor facilities on the AEA, a provision limiting the effects of "this chapter" could not undermine that authority, if at all, without some fairly unusual accompanying language or context. Section 10155(h) makes no mention of either the AEA, although that

statute is mentioned elsewhere in the NWPA, *see, e.g.*, 42 U.S.C. §§ 10153(a), (b)(3), 10155(a)(1)(A)(i), or the NRC's regulations at 10 C.F.R. Part 72, of which Congress was aware. *See* S. Rep. No. 97–282, at 44 (1981); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 729 (1989). Given that Congress was aware of the NRC's regulations for licensing private away-from-reactor storage facilities, the plain language of § 10155(h) provides no support for Utah's conclusion that Congress "expressly disavow[ed]" use of private away-from-reactor storage facilities or silently meant to repeal or supersede the NRC's authority under the AEA. *See Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). It is a "cardinal rule [of statutory construction] that repeals by implication are not favored." *Id.* at 549 (internal quotation marks omitted). This canon is no less applicable when the original grant of authority is implicit rather than express.

To the extent that the words of § 10155(h) derive contextual meaning, the statutory structure demonstrates that the more reasonable reading of § 10155(h) is that it sets forth the limits of the NWPA. As the NRC explained, when viewed in light of the whole of Subtitle B, each word of § 10155(h) has its own significance. *See Rulemaking Order*, 56 NRC at 397–99. In not "authoriz[ing]" private storage facilities, Congress intended to limit the scope of the NWPA. DOE's authority originated with the NWPA, and therefore, the NWPA's failure to "authorize" storage at private facilities resulted in restricting DOE's powers to take over a private facility to fulfill its NWPA obligations. The NRC's authority, however, originated with the AEA, and nothing in the text of § 10155(h) suggests that Congress intended to repeal this authority. Although it may have been unnecessary for Congress to add that the NWPA does not "encourage" or "require" DOE to use private facilities, it was necessary for Congress to use such terms in describing the preconditions on private generators for obtaining federal interim storage; provisions in Subtitle B "encourage" private onsite storage, and inclusion in § 10155(h)'s introductory clause of the phrase "[n]otwithstanding any other provision of law" eliminated

reliance on a prior draft of § 10155 that "require[d]" private generators to exhaust private away-from-reactor options before requesting federal interim storage. Once each word of § 10155(h) is given a role in Subtitle B, it reasonably follows, as the NRC pointed out, that § 10155(h) is "facially neutral: neither prohibiting nor promoting the use of private [away-from-reactor] storage facilities." *Id.* at 407.

Contrary to Utah's position, the NRC's interpretation of § 10155(h) does, in fact, give full meaning to Congress's use of the word "authorize." In light of the role of that word in Subtitle B, there is no reason to conclude that Congress intended in relatively obscure terms for the NWPA's failure to "authorize" such storage to repeal or supersede the NRC's preexisting authority under the AEA to license storage of spent fuel at private away-from-reactor facilities. The NRC's interpretation also gives full meaning to the other words of § 10155(h) in light of Subtitle B. To the extent that Utah maintains that the NRC's interpretation creates a "big anomaly" between the NWPA's system of allowing federal away-from-reactor facilities that are capacity-limited and subject to numerous restrictions and the AEA's regulatory system of permitting private away-from-reactor facilities of unlimited size and without any of the restrictions imposed on federal facilities, *see* Petitioners' Br. at 31–36, Utah ignores that private away-from-reactor storage was already regulated by the NRC under the AEA prior to the NWPA. It was not an anomaly for the NWPA to focus on regulating those "supplements" that the NWPA itself added, namely federal storage programs, and to leave the pre-existing regulatory scheme as it found it. *See* 42 U.S.C. §§ 10131, 10151; S. Rep. No. 97–282, at 1 (1981). In the absence of irreconcilability between the AEA and the NWPA, there is no basis to conclude that in enacting the NWPA Congress implicitly repealed or superseded the NRC's authority. *See Morton*, 417 U.S. at 550–51 (1974); *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001).

The legislative history of the NWPA on which Utah relies does not reflect, contrary to the text of § 10155(h), an "express[ ] disavow[al]" of the NRC's authority under the AEA

to license private away-from-reactor storage facilities. The congressional reports and debates referred to by the parties indicate that § 10155(h) represented a compromise of three contested issues: (1) the level of federal involvement in interim storage; (2) federal use for interim storage of private away-from-reactor storage facilities, of which there were three; and (3) political and social limitations on private generators to develop away-from-reactor solutions to spent fuel storage problems. *See* S. Rep. No. 97–282 (1981); H.R. Rep. No. 97–491, pt. 1 (1982); 128 Cong. Rec. 28,032 (1982); *see also* 42 U.S.C. § 10131. Section 10155(h) thus ensured that DOE would not take over private facilities to fulfill its NWPA obligations, and clarified that private generators were not obligated under the NWPA to exhaust all away-from-reactor options prior to receiving federal assistance. Nothing in those reports and debates suggests that Congress intended to prohibit private use of private away-from-reactor facilities.

For these reasons we hold that the NRC's interpretation is more in conformance with the language of § 10155(h) viewed in the context of Subtitle B than that offered by Utah. Accordingly, we deny the petitions for review of the NRC's *Rulemaking Order* and the motion to dismiss as to certain petitioners for lack of standing.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2003

(Argued: January 9, 2004 Decided: February 24, 2004)

Docket No. 03-4313

RIVERKEEPER, INC.,

Petitioner,

- v -

SAMUEL J. COLLINS, Director, Office of Nuclear Reactor Regulation, DR. WILLIAM TRAVERS, UNITED STATES NUCLEAR REGULATORY COMMISSION, ENTERGY NUCLEAR INDIAN POINT 2, LLC, ENTERGY NUCLEAR INDIAN POINT 3, LLC, and ENTERGY NUCLEAR OPERATIONS, INC.,

Respondents.

Before: VAN GRAAFEILAND, SACK, and RAGGI, Circuit Judges.

Appeal from that part of a decision of the Director of the United States Nuclear Regulatory Commission, Office of Nuclear Reactor Regulation, denying the petitioner's request that the license of the respondent Entergy Nuclear Operations, Inc., to operate two nuclear power plants in Westchester County, New York, be conditioned on implementation of a permanent no-fly zone over the plants, a defense system to protect this no-fly zone, and conversion of the spent-fuel storage at the plants to a dry-cask system.

Appeal dismissed.

KARL S. COPLAN, Pace Environmental Litigation Clinic, Inc. (Nicolette Witcher, Paula Butler, and Jason C. D'Ambrosio, on the brief), White Plains, NY, for Petitioner.

JARED K. HECK, Attorney, U.S. Nuclear Regulatory Commission (Karen D. Cyr, General Counsel, John F. Cordes, Jr., Solicitor, E. Leo Slaggie, Deputy Solicitor, Thomas L. Sansonetti, Assistant Attorney General, U.S. Department of Justice, and John T. Stahr, Attorney, U.S. Department of Justice, on the brief), Washington, DC, for Respondents Samuel J. Collins, Dr. William Travers, and United States Nuclear Regulatory Commission.

JAY E. SILBERG, Shaw Pittman LLP (Matias F. Travieso-Diaz, Blake J. Nelson, and John M. Fulton, on the brief), Washington, DC, for Respondents Entergy Nuclear Indian Point 2, LLC, Entergy Nuclear Indian Point 3, LLC, and Entergy Nuclear Operations, Inc.

Robert D. Snook, Assistant Attorney General of Connecticut (Richard Blumenthal, Attorney General of Connecticut, on the brief), Hartford, CT, for Amicus Curiae Richard Blumenthal.

SACK, Circuit Judge:

In the wake of the September 11, 2001, terrorist attacks on New York City and Arlington, Virginia, the petitioner, Riverkeeper, Inc., ("Riverkeeper") requested that the respondent United States Nuclear Regulatory Commission (the "NRC" or the "Commission") condition the license of the respondent Entergy Nuclear Operations, Inc., ("Entergy") to operate, through respondents Entergy Nuclear Indian Point 2, LLC, and Entergy Nuclear Indian Point 3, LLC, two nuclear power plants in Westchester County, New York (collectively, "Indian Point"), on several safety-related changes pertaining to their operation. Riverkeeper's principal concern was the potential for terrorist use of an airplane in a September-11-type attack on these plants.

1 Riverkeeper's request included implementation of a permanent no-
2 fly zone over Indian Point, a defense system to protect this no-
3 fly zone, and conversion of the spent-fuel storage at Indian
4 Point to a dry-cask system. The NRC issued a decision on
5 November 18, 2002, denying Riverkeeper's request in relevant
6 part, from which Riverkeeper appeals.

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

16 **BACKGROUND**

17 Riverkeeper is a nonprofit organization whose mission
18 is to protect the Hudson River and the supply of drinking water
19 for New York City and Westchester County. Less than two months
20 after the September 11, 2001, terrorist attacks, Riverkeeper
21 filed a request with the NRC pursuant to 10 C.F.R. § 2.206
22 seeking to condition Entergy's license to operate Indian Point on
23 particular safety measures that Riverkeeper was convinced were
24 necessary to safeguard the nuclear plants from similar attacks.
25 Riverkeeper sought, in relevant part, the "obtainment of a
26 permanent no-fly zone from the Federal Aviation Administration in
27 the air space within 10 nautical miles of the Indian Point

1 facility";[1] "a defense and security system sufficient to protect
2 and defend the no-fly zone"; and "the immediate conversion of the
3 current spent fuel storage technology from a water cooled system
4 to a dry cask system in a bunkered structure."[2] Riverkeeper,
5 Inc.'s Section 2.206 Request for Emergency Shutdown of Indian
6 Point Units 2 and 3, at 2 (Nov. 8, 2001).[3]
7 Riverkeeper argued in its request that these and other
8 protections were necessary because nuclear power plants in
9 general and Indian Point in particular are plausible targets for
10 terrorist attacks. Riverkeeper presented reports by the media
11 and the International Atomic Energy Agency, a United Nations

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[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 system.

organization, of documented threats against nuclear facilities after September 11, 2001. Riverkeeper also posited that Indian Point is a uniquely likely target because (1) approximately twenty million people reside within fifty miles of the facility, (2) major financial centers in New York City are less than fifty miles away, (3) nearby reservoirs supply all of Westchester County's and much of New York City's drinking water, and (4) Indian Point is near major transportation systems vital to the regional and national economy.

Riverkeeper argued, moreover, that Indian Point is vulnerable to a terrorist attack, especially an intentional crash of an airplane into the facility similar to those successfully carried out against the World Trade Center and the Pentagon on September 11, 2001. In particular, Riverkeeper asserted that there is a possibility of breach of, inter alia, the operating reactors or the spent-fuel storage facilities. In Riverkeeper's view and as the NRC has conceded, Indian Point was not designed to withstand an airborne terrorist attack comparable to the September 11 attacks. Riverkeeper cited a 1982 report by Argonne National Laboratory prepared for the Department of Energy estimating the serious damage that could result from the ignition of airline fuel upon impact with a nuclear reactor structure. According to Riverkeeper, the spent-fuel storage facility's design renders it particularly vulnerable. A successful attack on that facility could, according to Riverkeeper, lead to a loss of cooling water in the spent-fuel pools, which could ultimately cause an exothermic reaction followed by a dangerous fire and

then release deadly amounts of radiological material into the environment.

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

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

On December 20, 2001, NRC Office of Nuclear Reactor Regulation Director Samuel Collins declined to order an immediate closure of Indian Point. On May 16, 2002, Director Collins issued a proposed decision that would deny the relevant relief that Riverkeeper requested. Riverkeeper commented on the proposed decision, requesting reconsideration. It argued that "the proposed decision would protect the operators' economic interests at the expense of the safety and security of the surrounding population." Comments on May 16, 2002 Proposed Director's Decision on Riverkeeper's November 8th Petition 2.206 Request for Emergency Shutdown of Indian Point Units 2 and 3, at 1 (Aug. 9, 2002).

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

> [N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

Id. at 6. The director conceded that the NRC's "design basis threat" (NRC requirements for the defense of nuclear power plants) did not consider airborne terrorist attacks like those which occurred on September 11, 2001. Id. at 9. But he asserted that since then the NRC had taken at least three specific actions to respond to the threat of such an attack. First, the NRC is in the process of reexamining the design basis threat for

modification as appropriate. Id. Second, the NRC implemented interim security measures as "prudent to address the current threat environment in a consistent manner throughout the nuclear reactor industry," the full details of which would not be made public for security reasons. Id. at 8. The decision nonetheless generally described such measures as including:

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

Id. at 8-9. The NRC also "require[d] additional security measures pertaining to the owner-controlled land outside of the plants' protected areas." Id. at 17. All of these measures were to remain in effect until the NRC decided that other measures should take their place or that the threat environment has changed significantly. Id. at 9. Third, the decision outlined the NRC's post-September 11 coordination with other federal agencies, including "the Office of Homeland Security, the Federal Bureau of Investigation . . . , the Departments of Transportation and Energy, and others," in seeking to render nuclear facilities secure.[4] Id. at 8.

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[4] According to the decision:

> Shortly after September 11, 2001, the NRC recognized the need to reexamine the basic assumptions underlying

1 With respect specifically to Riverkeeper's request for
2 a permanent no-fly zone and defense and security of such a zone,
3 Director Collins denied the request after explaining the NRC's
4 view that security from terrorist attacks on nuclear facilities
5 was best approached by enhancing aviation security, including
6 intelligence gathering and security at airports and on
7 airplanes.[5] Id. at 18-19. And with respect to converting to a

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> 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.

Entergy 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 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

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

2 Riverkeeper's request, asserting that the present system is

3 safe.[6] Id. at 20-22.

> 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 antiaircraft 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.

[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

1 The director's decision automatically became final
2 after twenty-five days of inaction by the NRC.[7] See 10 C.F.R.
3 § 2.206(c)(1). Riverkeeper appealed the NRC's decision thus
4 rendered final to this Court.

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

12 **DISCUSSION**

13 Riverkeeper appeals the NRC's decision to deny
14 Riverkeeper's request to the extent that the NRC did not
15 implement a permanent no-fly zone over Indian Point, did not
16 require defense or security of such a no-fly zone, and did not
17 order Entergy to change Indian Point's spent-fuel storage to a
18 dry-cask system.[8] Riverkeeper asserts that we have jurisdiction

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> 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."

[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

to review the NRC's decision because it constituted an abdication of the NRC's statutory duty to protect and ensure the health and safety of the public. The respondents reply that the NRC did not abdicate its statutory duties in refusing to implement Riverkeeper's particular request, and thus jurisdiction cannot arise on that basis. Furthermore, they contend, we have no jurisdiction because neither the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq. (the "AEA"), nor NRC regulations contain any standard against which we can meaningfully judge the director's decision and which could give rise to appellate jurisdiction. They conclude that we therefore do not have jurisdiction to review the NRC's decision.

I. Basis for Jurisdiction

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

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

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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).

42 U.S.C. § 2201(b). Under the NRC's regulations, the Commission "may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper." 10 C.F.R. § 2.202(a). "Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." Id. § 2.206(a). In response to this request, "the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision." Id. § 2.206(b). Within twenty-five days of the denial of a request, the NRC "may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion." Id. § 2.206(c)(1).

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

[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."

1 §§ 2239(a)[10] and (b)(1) to "provide for initial court of appeals
2 review of all final orders in licensing proceedings whether or
3 not a hearing before the Commission occurred or could have
4 occurred." Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 737
5 (1985). Such final orders include an NRC denial of a request
6 under 10 C.F.R. § 2.206, such as the denial in the instant case.
7 Id. at 734-35, 737. Therefore, if this Court has subject matter
8 jurisdiction under the APA of the appeal of the NRC's decision on
9 Riverkeeper's section 2.206 request, the question to which we now
10 turn, Riverkeeper's appeal of the director's decision, which
11 became final and therefore the decision of the NRC twenty-five
12 days after its issuance, is properly before this Court.

13 II. Jurisdiction To Review the NRC's Decision

14 A. Presumption Against Jurisdiction

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

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

42 U.S.C. § 2239(a)(1)(A).

distinguished between the operation of sections 701(a)(1) and 701(a)(2).

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

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

> First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. . . . The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. . . .
>
> [Second], . . . when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon

> to protect. . . . Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict -- a decision which has long been regarded as the special province of the Executive Branch.

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

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

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

The Chaney Court applied these principles to the case before it, holding that the FDCA did not cabin the FDA's discretion to refuse to institute enforcement proceedings. Id. at 835-37. The Court therefore dismissed the inmates' appeal for lack of subject matter jurisdiction.

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

The present petition challenges a different agency and a different statute. It raises, however, a similar issue: whether we have jurisdiction to review the NRC's decision not to enforce what Riverkeeper asserts are applicable AEA provisions and NRC regulations with respect to Entergy and Indian Point.

1 Because the NRC is an agency thus declining to enforce, its
2 decision is presumptively not reviewable unless the presumption
3 is overcome by one of the means recognized by Chaney.[11]
4 B. Rebutting the Presumption Against Non-Reviewability
5 1. Meaningful Statutory Standard? Section 701(a)(2)
6 forecloses review when "agency action is committed to agency
7 discretion by law." As we have seen, the Chaney Court read the
8 section to prevent judicial review "even where Congress has not
9 affirmatively precluded review . . . if the statute is drawn so
10 that a court would have no meaningful standard against which to
11 judge the agency's exercise of discretion." Chaney, 470 U.S. at
12 830. Riverkeeper does not, however, attempt to demonstrate that
13 the NRC's denial of its section 2.206 request was reviewable on
14 this ground -- that "the substantive statute has provided
15 guidelines for the agency to follow in exercising its enforcement
16 powers." Id. at 833.[12]

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[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).

2. Express Abdication of Statutory Responsibility?

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

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

> By definition, expressions of broad enforcement policies are abstracted from the particular combinations of facts the agency would encounter in individual enforcement proceedings. As general statements, they are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as Chaney recognizes, peculiarly within the agency's expertise and discretion. [Moreover], an agency's pronouncement of a broad policy against enforcement poses special risks that it "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 (internal quotation marks omitted), a situation in which the normal presumption of non-reviewability may be inappropriate. Finally, an agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc.

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

The NRC must, under the AEA, ensure that "the utilization or production of special nuclear material . . . will

provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a).[13] The AEA further authorizes the NRC to regulate in various formats as it "may deem necessary or desirable . . . to protect health or to minimize danger to life or property." 42 U.S.C. § 2201(b); see also id. § 2201(i)(3) (granting authority to the NRC to regulate as it finds necessary "to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property"); County of Rockland v. U.S. Nuclear Regulatory Comm'n, 709 F.2d 766, 769 (2d Cir.) ("The NRC is charged under the AEA . . . with primary responsibility to ensure, through its licensing and regulatory functions, that the generation and transmission of nuclear power does not unreasonably threaten the public welfare. Consistent with its administrative mandate, the NRC is empowered to promulgate rules and regulations governing the construction and operation of nuclear power plants."), cert. denied, 464 U.S. 993 (1983). As the District of Columbia Circuit observed, the first cited statutory section requires the NRC to ensure "adequate protection" of public health and safety, not "absolute protection." Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 824 F.2d 108, 114 (D.C. Cir. 1987); see also id. at 118 ("The level of adequate protection need 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 and almost certainly will not, be the level of 'zero risk.' This
2 court long has held that the adequate-protection standard permits
3 the acceptance of some level of risk."). The latter statutory
4 sections go further and "empower[] (but do[] not require) the
5 Commission to establish safety requirements that are not
6 necessary for adequate protection and to order holders of or
7 applicants for operating licenses to comply with these
8 requirements." Id. at 114. Taken together, these statutory
9 provisions require that the NRC insure adequate protection of
10 public health and safety from risks associated with nuclear
11 plants.[14] The NRC can be viewed as abdicating its statutory
12 duties, then, only if it has established a policy not to protect
13 adequately public health and safety with respect to nuclear
14 plants.

15 If the NRC had indisputable proof before it that
16 nuclear power plants are not adequately secure from terrorist
17 attack and nonetheless decided that it would do nothing to
18 address the situation, Riverkeeper might then plausibly charge
19 that the NRC had "abdicated" its statutory responsibility.[15] But

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[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).

[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.").

that is not what the NRC did. After September 11, 2001, the NRC issued multiple orders modifying licenses (albeit mostly in ways that, for reasons relating to security, have not been disclosed) "to strengthen licensees' capabilities and readiness to respond to a potential attack on a nuclear facility" by requiring "certain compensatory measures . . . as prudent, interim measures, to address the generalized high-level threat environment in a consistent manner throughout the nuclear reactor community." All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 67 Fed. Reg. 9792, 9792 (Mar. 4, 2002); see also All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,510, 24,511 (May 7, 2003); All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,514, 24,514 (May 7, 2003); All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 1643, 1643 (Jan. 13, 2003). The NRC also modified the design basis threat, requiring power plant licensees to "revise their physical security plans, safeguards contingency plans, and guard training and qualification plans" in an undisclosed fashion. All Operating Power Reactor Licensees; Order Modifying Licenses (Effective Immediately), 68 Fed. Reg. 24,517, 24,517-18 (May 7, 2003).

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

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

22 Second, the NRC has stated that:

23 In the aftermath of September 11, 2001, the
24 Federal government took a number of steps to
25 improve aviation security and minimize the
26 threat of terrorists using airplanes to
27 damage facilities critical to our nation's
28 infrastructure. The Commission views that
29 the efforts associated with protecting our
30 nation from terrorist attacks by air should
31 be directed toward enhancing security at
32 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 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.

Entergy Nuclear Operations, Nos. 50-003, 50-247, and 50-286, at 18-19 (Nuclear Regulatory Comm'n Nov. 18, 2002).[16] It is on this basis, at least in part, that the NRC declined to commence enforcement proceedings as urged in the section 2.206 request before us.

We think that the NRC's considered conclusion -- right or wrong -- that the problem before it was being adequately addressed by other agencies of government and its consequent decision to leave the matter to those agencies cannot amount to an "abdication" of its statutory duty under the AEA to insure that the public health and safety is adequately protected. Relying on other governmental bodies to address a risk is not

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[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.

equivalent to ignoring the risk. See N.Y. Pub. Interest Research Group v. Whitman, 321 F.3d 316, 331 (2d Cir. 2003) ("The [Chaney] presumption against judicial review of [agency] refusal [to pursue enforcement action] avoids entangling courts in a calculus involving variables better appreciated by the agency charged with enforcing the statute and respects the deference often due to an agency's construction of its governing statutes."); cf. Kelley v. Selin, 42 F.3d 1501, 1511 (6th Cir.) ("As the Supreme Court has stated, 'the [Nuclear Regulatory] Commission is making predictions . . . at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.' Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 103 (1983) (citations omitted). After all, judges are neither scientists nor technicians." (alterations in original; some internal quotation marks and alterations omitted)), cert. denied, 515 U.S. 1159 (1995).

Thus, even if we were to assume that the Chaney Court established by way of footnote 4 federal court jurisdiction over appeals from agency action when 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,[17] the only basis for jurisdiction

[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

urged by Riverkeeper, we would have no jurisdiction to review the NRC's decision here.

* * *

The issues Riverkeeper raises are plainly serious and of pressing concern. But as a court established by Congress under Article III of the Constitution, we have jurisdiction to decide only those disputes that the Constitution or Congress gives us the power to decide. "[T]he decision as to whether an agency's refusal to institute proceedings should be judicially reviewable" is "essentially [left] to Congress, and not to the courts." Chaney, 470 U.S. at 838. It is clear under the Administrative Procedure Act, and its interpretation by the Supreme Court in Chaney, that we have been given no such power here.

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

> One of the most emotional issues confronting our society today is the adequacy of safety measures at nuclear power facilities. Fueled by the Three Mile Island incident, the debate over nuclear safety persists as public interest groups charge that serious problems remain and operator-utilities seek to assure the public that all reasonable measures have

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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)).

> been taken to protect surrounding populations in the event of a major nuclear accident. But it is the United States Nuclear Regulatory Commission . . . which must decide the difficult questions concerning nuclear power safety.

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

CONCLUSION

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

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UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of Oklahoma,	)	
	)	
Petitioner,	)	**Case File No.** 04-9523
	)	
v.	)	
	)	
United States Nuclear Regulatory Commission and the United States of America,	)	
	)	
Respondents.	)	

PETITION FOR REVIEW

The above-named Petitioner hereby petitions for review by this Court of the final order denying the State of Oklahoma's Request for Hearing on the matter of Sequoyah Fuels Corporation's ("SFC") request to amend Source Material License No. SUB 1010 to authorize possession of byproduct material and decommission its facility in Gore, Oklahoma pursuant to that authorization was entered by the United States Nuclear Regulatory Commission ("NRC") on January 8, 2004. A copy of the decision is attached.

To date, no court has upheld the validity of the order.

Jurisdiction is asserted pursuant to 28 U.S.C.A. §2342(4) (1994 & Supp. I 2003).

Venue is asserted pursuant to 28 U.S.C.A. §2343 (1994) because Petitioner has its principal offices located in Oklahoma City, Oklahoma which is within the

The license amendment request will convert the entire SFC facility to a uranium mill tailings site with an onsite disposal cell and grant SFC a new license under 10 C.F.R. §40.31. The fact that the NRC determined a portion of SFC's waste could legally be classified as mill tailings does not mean that SFC has satisfied all the requirements for obtaining a mill tailings license nor does it mean that the entire SFC site should be decommissioned as a mill tailings site under 10 C.F.R. Part 40, Appendix A. Further, it does not relieve the NRC of their obligation to evaluate the impacts of issuing this license in a Safety Evaluation Report and Environmental Assessment. In addition to the legality of reclassifying SFC's waste as 11e(2) byproduct material, the State of Oklahoma raised the following issues with regard to SFC's license amendment in its Request for Hearing on which it is entitled to be heard.

(1) SFC's failure to identify the waste to be reclassified;

(2) SFC's proposal to decommission the entire site under 10 C.F.R. Part 40, Appendix A and terminate the license upon compliance with those regulations;

(3) Removal of the condition requiring decommissioning for unrestricted release and pollutant discharge reporting;

(4) SFC's failure to comply with the requirements for issuance of a uranium mill tailings license in 10 C.F.R. Part 40;

Further, all of these areas of concern are germane to the proceeding and constitute adequate grounds for denying or conditioning SFC's license because they relate directly to SFC's compliance with the statutes and regulations governing issuance of licenses and license amendments under the AEA, as well as the impact of the amendment on public health, safety and the environment.

Therefore, Petitioner prays for a reversal of the decision issued by Respondent and for the grant of Petitioner's Request for Hearing to address the stated concerns.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

PUBLIC CITIZEN CRITICAL MASS ENERGY AND ENVIRONMENT PROGRAM, and NUCLEAR INFORMATION AND RESOURCE SERVICE,	)	
Petitioners,	)	
v.	)	No. 04-1059
UNITED STATES NUCLEAR REGULATORY COMMISSION, and THE UNITED STATES,	)	04-1359 (1st Cir.)
Respondents.	)	

PETITION FOR REVIEW

Pursuant to 28 U.S.C. §§ 2342, 2344; 42 U.S.C. § 2239; and Fed. R. App. P. 15, petitioners PUBLIC CITIZEN CRITICAL MASS ENERGY AND ENVIRONMENT PROGRAM and NUCLEAR INFORMATION AND RESOURCE SERVICE hereby petition this Court for review of the final rule issued by respondent UNITED STATES NUCLEAR REGULATORY COMMISSION governing Changes to Adjudicatory Process, which was published in the Federal Register on January 14, 2004 at 69 Fed. Reg. 2182, and is appended hereto.

Venue for this petition is initially proper in this Court. 28 U.S.C. § 2343. However, a petition for review of this same order was filed in the United States Court of Appeals for the First Circuit on January 27, 2004. *See Citizens Awareness Network, Inc. et al. v. United States,* No. 04-1145 (1st Cir.). Therefore, pursuant to 28 U.S.C. § 2112(a)(5), this Court is required to transfer proceedings on the instant petition for review to the First Circuit.

Respectfully submitted,

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Dated: February 20, 2004

CERTIFICATE OF SERVICE

The undersigned counsel certifies that on this 20th day of February, 2004, she caused one copy of the foregoing Petition for Review to be served by first-class U.S. mail, postage prepaid, on the following:

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