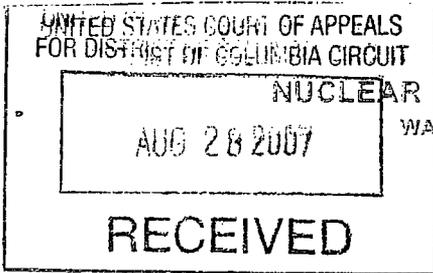




OFFICE OF THE
GENERAL COUNSEL



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
August 27, 2007

Mark J. Langer, Clerk
U. S. Court of Appeals
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

RE: *Nuclear Information and Resource Service, et al. v. Nuclear Regulatory Commission and United States of America,*
No. 07-1212

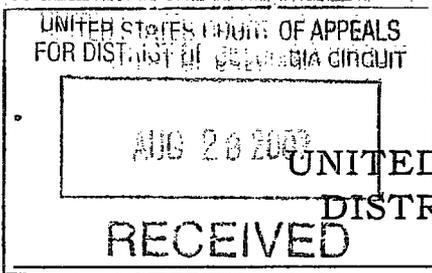
Dear Mr. Langer:

Enclosed you will find an original and four copies of the Federal Respondents' Reply to Petitioners' Response to Motion to Dismiss in the above-referenced case. Please date stamp the enclosed copy of this letter to indicate date of receipt, and return the copy to me in the enclosed envelope, postage pre-paid, at your convenience.

Respectfully submitted,

Molly L. Barkman
Attorney
Office of the General Counsel

Enclosures: As stated
cc: service list



UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nuclear Information and Resource)
Service, *et al.*)
)
v.)
)
United States Nuclear Regulatory)
Commission and United States)
of America)
)

No. 07-1212

**FEDERAL RESPONDENTS’ REPLY TO PETITIONERS’
RESPONSE TO MOTION TO DISMISS**

Pursuant to D.C. Circuit Rule 27(a)(4), the Nuclear Regulatory Commission (NRC) and the United States herein reply to Petitioners’ response to Federal Respondents’ motion to dismiss (Response). Petitioners have not rebutted the presumption of unreviewability established by *Heckler v. Chaney*, 470 U.S. 821 (1985), and *Safe Energy Coalition v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989), and therefore, this Court should dismiss their petition.

***Petitioners Have Not Rebutted the Presumption of Unreviewability
of an NRC Non-Enforcement Decision***

A. The NRC Did Not “Abdicate” Its Statutory Responsibilities

Petitioners claim in their response that the NRC has abdicated its duty “to ensure adequate protection of the public health and safety.” Response at

12. Assertions that in this particular case the NRC ignored its regulations, even if true, would not meet the “abdication” standard laid out in *Chaney*, which requires a “situation where the agency... has consciously and expressly adopted a general policy of [non-enforcement] that is so extreme as to amount to an abdication of its statutory responsibilities.” *Safe Energy Coal.*, 866 F.2d at 1477 (citing *Chaney*, 470 U.S. at 833 n.4) (internal quotations omitted) (emphasis added). An abdication claim requires a petitioner to show that the NRC has failed entirely to exercise its regulatory duties, not merely that the NRC reached a conclusion different from the Petitioners preferred result, which is essentially what Petitioners claim in this case.

Petitioners want this Court to infer a “general” NRC policy from “anecdotal regulatory failures...and failure to sanction Palisades’ owner...,” Response at 14. To support their position, Petitioners cite *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671 (D.C. Cir. 1994), a case where this Court stated in dicta that it would review an “agency’s statement of a *general enforcement policy*. . .where the agency has expressed the policy as a formal regulation. . . or otherwise articulated it in some form of universal policy statement,” but held unreviewable a non-enforcement action in an ordinary “context-bound non-enforcement pronouncement.” 37 F.3d at 676-

677. *Crowley* supports the NRC’s position, not Petitioners’. As in *Crowley*, Petitioners point to no “formal” or “universal” agency policy. On the contrary, at issue here is just one discrete enforcement action involving earthquake protection at one nuclear spent fuel storage facility (Palisades) – in other words, a “context-bound non-enforcement pronouncement.” See *id.* The NRC’s non-enforcement decision reflects no general agency policy incorporated in a regulation, agency guidance, or even an informal document. See *id.*

The fact that the NRC declined to employ the enforcement action that Petitioners proposed shows a policy or factual disagreement, not an “abdication” in any meaningful sense.

B. Petitioners Have Not Demonstrated a “Meaningful Standard” Against Which this Court May Judge the NRC’s Decision Not to Take Enforcement Action

Petitioners may rebut the presumption against review of an agency non-enforcement decision where the “substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers,” *Safe Energy*, 866 F.2d at 1477-78, which would give this Court a “meaningful standard” against which to judge the NRC’s decision not to enforce. See *Chaney*, 470 U.S. at 832-33. But all of the courts faced with

the question “have determined that neither the [Atomic Energy Act] AEA nor the NRC regulations concerning section 2.206 requests limit agency discretion sufficiently to enable meaningful judicial review.”¹

Petitioners point to some of the general enforcement provisions of the AEA as setting a standard of review for the court. Response at 13. However, this Court has ruled that the same provisions Petitioners cite give the NRC discretion such that there is no meaningful standard by which the court can review its decision not to enforce. *Safe Energy*, 866 F.2d at 1478. In *Safe Energy* the Court held that the “procedural limitations cited by petitioners do not provide any guidance to, let alone constrain, the agency in its efforts to ‘protect health[,]’” and furthermore, “[t]hey do not supply any criteria by which a reviewing court can measure the NRC’s refusal to enforce safety regulations...” *Id.* (holding that 42 U.S.C. §§ 2201(b), 2232, and 2239(a)(1) do not provide the court guidance to measure NRC’s decision not to enforce).

¹ *Riverkeeper v. Collins*, 359 F.3d 156, 166 n.12 (2d Cir. 2004) (citing *Safe Energy Coal.*, 866 F.2d at 1477-78; *Arnow v. NRC*, 868 F.2d 223, 234-36 (7th Cir. 1989); *Mass. Pub. Interest Group, Inc. v. NRC*, 852 F.2d 9, 16 (1st Cir. 1988)).

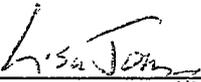
C. Petitioners Cannot Separately Challenge NRC's Specific Factual Findings Leading to Its Final Decision on the 2.206 Petition

Petitioners appear to want to challenge the NRC's factual determinations on which its Director's Decision was based. The ten pages of factual allegations in the Response are essentially a reiteration of the allegations Petitioners included in their initial 2.206 petition and comments on the Proposed Director's decision. Response at 2-11. NRC considered Petitioners' allegations, but came to a different conclusion. The NRC's factual findings are "inextricably intertwined," and thus, "inseparable" from its decision not to take the requested enforcement action. *See Drake v. FAA*, 291 F.3d 59, 71 (D.C. Cir. 2002). Petitioners cannot single out the NRC's underlying factual findings as "arbitrary and capricious" and demand judicial review. The NRC's enforcement decision is unreviewable as a whole.

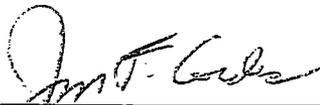
CONCLUSION

Petitioners have not overcome the presumption of unreviewability of NRC's non-enforcement decision. Therefore, this Court should dismiss the petition for review.

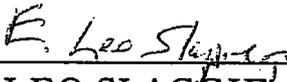
Respectfully submitted,



LISA JONES
Attorney, Appellate Section
Environment & Nat. Res. Div.
P.O. Box 23795
U.S. Department of Justice
Washington, DC 20026-3795



JOHN F. CORDES
Solicitor



E. LEO SLAGGIE
Deputy Solicitor



MOLLY L. BARKMAN
Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Comm'n
Washington, D.C. 20555
(301) 415-1600

August 27, 2007

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nuclear Information and Resource)
Service, *et al.*)
)
v.)
)
United States Nuclear Regulatory)
Commission and United States)
of America)
)

No. 07-1212

CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2007, copies of the Federal Respondents' Reply to Petitioners' Response to Motion to Dismiss were served by first class mail upon the following counsel:

Terry J. Lodge
316 North Michigan Street
Suite 520
Toledo, OH 43604

Brad Fagg
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004


Molly L. Barkman