No. 16-1189

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FRIENDS OF THE EARTH, NUCLEAR INFORMATION AND RESOURCE SERVICE, and HUDSON RIVER SLOOP CLEARWATER,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Mandamus
to the U.S. Nuclear Regulatory Commission

REPLY TO RESPONSES OF RESPONDENTS NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA AND INTERVENORS ENTERGY NUCLEAR INDIAN POINT 2, LLC AND ENTERGY NUCLEAR OPERATIONS, INC. TO PETITIONERS' EMERGENCY PETITION FOR WRIT OF MANDAMUS

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NRC	Nuclear Regulatory Commission

INTRODUCTION

Pursuant to the Court's order of June 16, 2016, Petitioners submit this Reply in support of their Emergency Petition for Writ of Mandamus. Respondents and Intervenors mistakenly argue that the Court lacks present jurisdiction to issue the requested writ because Petitioners have failed to challenge a final agency action and because the Nuclear Regulatory Commission's (NRC) decision on Friends' now-pending petition under 10 C.F.R. § 2.206 (Emergency Petition) is presumptively unreviewable. But these arguments ignore established case law holding that the All Writs Act provides courts with authority to protect their jurisdiction to review not-yet-final agency actions, and assuring that certain categories of decisions on § 2.206 petitions are, in fact, reviewable.

Rather than demonstrating that Indian Point, Unit 2 (Unit 2) can be safely operated, the actions and analyses relied upon by the NRC and Entergy Nuclear Operations, Inc. (Entergy) reveal the lack of complete analysis by either Entergy or the NRC regarding the cause of Unit 2's baffle-former bolt degradation. These actions, as well as the NRC's glaring inaction, raise serious questions about the agency's failure to discharge its statutory responsibilities. The Court should issue the requested writ to protect its prospective jurisdiction to review the NRC's decision on the Emergency Petition.

ARGUMENT

I. The Court Should Exercise Its Extraordinary Writ Authority To Protect Its Prospective Jurisdiction

The NRC and Entergy misstate Petitioners'[1] argument that this Court has jurisdiction to issue the writ requested and, in doing so, fail to address case law establishing that this Court has jurisdiction to issue a writ to protect its future jurisdiction over a not-yet-final agency action. Despite NRC's assertions to the contrary, Petitioners do not seek review of the "mere referral of a petition for emergency relief into the agency's 2.206 process." NRC Resp. 13.

The jurisdictional basis for this Court to issue the requested writ lies on firmly established case law providing that a court of appeals has jurisdiction to issue a writ to protect its future jurisdiction over a not-yet-final agency action. *In re Bluewater Network*, 234 F.3d 1305, 1310-11 (D.C. Cir. 2000) ("Where a statute commits final agency action to review by this court, we also retain exclusive jurisdiction to hear suits seeking relief that might affect [our] future statutory power of review. This includes mandamus actions challenging an agency's unreasonable delay." (citation and quotation marks omitted)). This assertion is

[1] By email on June 22, 2016 Petitioners Nuclear Information and Resource Service (NIRS) and Hudson River Sloop Clearwater (Clearwater) notified the NRC representative overseeing the review of Friends' Emergency Petition in the 2.206 process that NIRS and Clearwater wish to join that Petition. *See* Exhibit A to this Reply. Petitioners do not concede, as NRC argues, that participation in the 2.206 proceeding below is a prerequisite for standing in this matter. *See* NRC Resp. 15 n.6.

firmly founded. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*").

Despite *TRAC* and the line of cases cited in the Petition, NRC and Entergy argue that a writ should not issue because *any* decision by the NRC on a § 2.206 petition is "unreviewable" under *Heckler v. Chaney*, 470 U.S. 821, 828-35 (1985). NRC Resp. 22; Entergy Resp. 12-15. It is beyond question that the courts of appeals have subject matter jurisdiction to review the NRC's decision on a § 2.206 petition. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985). It is equally clear that, in *Florida Power and Light*, the Supreme Court left open the question of whether the NRC's final action determining a § 2.206 petition was "agency action . . . committed to agency discretion by law" and, thus, presumptively unreviewable. *Id.* at 735 n.8. To be sure, later appellate court opinions held that decisions on *certain categories* of § 2.206 petitions are presumptively unreviewable under *Heckler*. *E.g., Safe Energy Coal. of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989). But it is not true, as Entergy and NRC assert, that agency decisions on § 2.206 petitions necessarily and in all instances fall squarely within *Heckler*.

Indeed, this Court, sitting *en banc*, has already rejected the broad argument advanced by Entergy and NRC that *all* decisions that dispose of a § 2.206 petition are unreviewable under *Heckler*. *Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169

(D.C. Cir. 1992) (*en banc*). The *en banc* Court found that "the choice to use the § 2.206 form cannot determine the reviewability question" and instead, "the use to which a § 2.206 petition is put—not its form—governs its reviewability." *Id.* at 1178. The Court, characterizing the petition under consideration in that case as a "licensing" matter rather than merely an enforcement matter, found that petitions in this category fell outside the *Heckler* presumption. *Id*. (Here, NRC characterizes Friends' agency petition as one seeking "suspension" of Unit 2's license, indicating that the Emergency Petition falls outside the unreviewability presumption. NRC Resp. 1, 21.) The *Nuclear Information* Court relied in part on *Massachusetts v. NRC*, 878 F.2d 1516, 1522 (1st Cir. 1989), in which the First Circuit reviewed the substance of a denial of a § 2.206 petition. 969 F.2d at 1178; *see also Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942) ("the particular label placed upon [its action] by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive").

Even if Friends' pending Emergency Petition fell under *Heckler*, the presumption of unreviewability announced in that case is just that—a presumption, far from an ironclad declaration that § 2.206 decisions are unreviewable. Thus, *Heckler* does not preclude this Court's jurisdiction to issue the requested writ. The *Heckler* Court "emphasize[d]" that the presumption can be rebutted in a number of

instances, including where "the substantive statute has provided guidelines for the agency to follow," 470 U.S. at 833, or where the agency "consciously and expressly" adopts a policy that is so extreme that it represents an abdication of statutory responsibilities, *id.* at 833 n.4.

It is presumptuous in the extreme to argue, as Entergy and NRC do, that the agency's decision on the Emergency Petition, when it is issued, will be unreviewable by this Court. Petitioners are not yet in a position to argue, and this Court does not yet have the information to determine, whether a *future* decision by the NRC on the Emergency Petition is unreviewable, or whether that decision falls within one of the exceptions to *Heckler*. The agency has not yet ruled on the Emergency Petition, let alone provided any rationale that this Court could rely on to determine the reviewability of that decision. In short, the NRC and Entergy place the cart well before the horse by arguing that this Court will, with certainty, find the agency's decision on Friends' agency petition to be unreviewable.

Entergy's and NRC's reliance on *Moms Against Mercury v. FDA*, 483 F.3d 824 (D.C. Cir. 2007) ("*MAM*"), is misplaced. In *MAM*, the petitioners filed a petition for review—not a petition for mandamus—of the FDA's failure to regulate a medical device. *Id.* at 824. As the basis for jurisdiction, the petitioners relied on 21 U.S.C. § 360g, which provided that persons adversely affected by specified FDA regulations or orders may seek review of those actions in the courts of

appeals by filing a petition for review. *Id.* at 826. Petitioners conceded, however, that the FDA had not engaged in *any* of the actions specified in § 360g and had no plans to do so. *Id.* The Court dismissed the petition for lack of jurisdiction, reasoning that it would not assert present jurisdiction where there was no reason at all to believe that it would have "prospective jurisdiction." *Id.* at 827.

In this case, by contrast, the Court *will* have jurisdiction to review the NRC's decision on the Emergency Petition, once that decision is issued. *Fla. Power & Light*, 470 U.S. at 746. And, although Entergy emphasizes the *MAM* Court's statement that it would not find present jurisdiction over an FDA final action that "may or may not be reviewable in this Court," it is clear from a reading of that case that the Court was concerned with determining whether subject matter jurisdiction lay with the district court or, instead, with the court of appeals. *See* 483 F.3d at 827. The *MAM* Court did not cite *Heckler* or discuss the presumption of unreviewability announced in that case, let alone make any finding as to the effect of the unreviewability presumption on its ability to assert present jurisdiction over a not-yet-final agency action. Ultimately, the court held that jurisdiction did not lie with the *appellate* court on the basis that the petitioners had conceded that they had not challenged any of the actions specified in § 360g. *Id.* at 827-28. *MAM* has no application to the present matter.

To the extent NRC and Entergy argue that the Court's present jurisdiction cannot rest on a final agency action for which reviewability is speculative, that reasoning has been specifically rejected by this Court in *In re Tennant*, 359 F.3d 523 (D.C. Cir. 2004). There, the Court determined that "[o]nce there has been a proceeding of *some* kind instituted before an agency or court that might lead to an appeal, it makes sense to speak of the matter as being within [our] appellate jurisdiction—*however prospective or potential that jurisdiction might be*," thus providing the Court with present jurisdiction to act. *Id.* at 529 (second emphasis added) (quotation marks omitted).

Accordingly, this Court has not required a showing that its prospective jurisdiction to review the not-yet-final agency action is incontrovertible and certain. *TRAC*, 750 F.2d at 79 ("[T]here is no doubt that this court has present jurisdiction to hear claims concerning nonfinal agency action (or inaction) that *might* affect our future statutory review of final agency action." (emphasis added)).

Despite obfuscation on this point from the NRC and Entergy, the question here is whether the Court has jurisdiction *now* to issue a writ to protect its jurisdiction to review a future agency action. The Court will have jurisdiction to review the agency's decision on the Emergency Petition, and therefore has jurisdiction to, and should, exercise its extraordinary writ authority "to protect its prospective jurisdiction." *Id.* at 76. A writ of mandamus is necessary to preserve

the Court's opportunity to review the NRC's final determination of whether Unit 2 is safe to operate, in response to the Emergency Petition.

II. Unit 2 Should Not be Permitted to Operate Until the NRC Has Demonstrated That Unit 2 Can Be Safely Operated, Which it Has Not.

Entergy and the NRC provide a list of actions that have been taken or will be taken to address Unit 2's bolt degradation, and assert that these actions demonstrate that Unit 2 can safely operate. Entergy Resp. 7-9; NRC Resp. 28-30. But, as Friends argues in the Emergency Petition, the public cannot be assured of Unit 2's safe operation without completion of, and repairs on the basis of, a root cause analysis. This Court should halt operation of Unit 2 until the NRC provides a reasoned response to the Emergency Petition, including assurance that the unit can be safely operated to protect the Court's jurisdiction over the NRC's future final decision on the Emergency Petition.

As support for its argument that the plant is safe to restart, the NRC points to a number of events, none of which were cited in the agency's emailed determination declining to grant immediate relief and, as such, must be disregarded as post-hoc rationalization. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50 (1983). These events include: (1) unenforceable commitments by Entergy to take certain future actions (NRC Resp. 29); (2) a publicly available six-page event report from Entergy to the NRC that references Entergy's non-public root cause analysis (NRC Resp. 8); and (3) a two-

page letter from NRC Chairman Stephen Burns to U.S. Senator Kirsten Gillibrand (Entergy Resp. 2-3). These actions cannot substitute for a reasoned, technical, substantiated decision on the Emergency Petition charging that Unit 2 is unsafe to operate in its current condition.

A. *Entergy's Commitments to Take Corrective Actions Are Not Legally Enforceable.*

NRC and Entergy justify operation of Unit 2 largely on the fact that the degraded bolts have been replaced and that Entergy has committed to take future actions to (1) use monitoring systems that will alert the operator of further bolt degradation that would warrant shut down (Entergy Resp. 2-3); (2) perform a re-inspection of the bolts after 20 months of operation (NRC Resp. 29); and (3) modify the configuration of the reactor flow to reduce stress on the bolts 20 months from now (NRC Resp. 29).

These commitments are not enforceable regulatory commitments, and the NRC has recognized that the agency generally cannot take formal enforcement action based on a licensee's failure to fulfill commitments, "as failure to meet a commitment in itself does not constitute a violation of a legally binding requirement." Letter from J.E. Dyer, Director, NRC Office of Nuclear Reactor Regulation to James P. Riccio, Nuclear Policy Analyst, Greenpeace (Apr. 22, 2004), http://pbadupws.nrc.gov/docs/ML0409/ML040980367.pdf. Entergy's promises to monitor the reactor coolant system and loose parts in the reactor

vessel, re-inspect the bolts, and reconfigure the reactor flow, are not enforceable by the NRC and therefore provide the public with no assurance that Unit 2 will be safely operated. Moreover, as the NRC has recognized that a "downflow" reactor configuration accelerates bolt degradation, the decision to postpone conversion of the reactor to a safer configuration—while in the meantime allowing the plant to restart—defies logic and safe operational practices. *See* Attachment D to Emergency Petition for Writ of Mandamus at 4.

B. *Even if Entergy Implements the Commitments it Has Made, They Are Insufficient to Ensure Unit 2 Is Safe to Operate.*

The NRC has not performed its own root cause analysis, nor has it completed its review of Entergy's root cause analysis, which has not been made public and does not itself appear to be complete. In its response, the NRC points to Entergy's Licensee Event Report, which refers to a root cause analysis as the basis for their conclusion that Unit 2 is safe to operate. NRC Resp. 8. But the supposed root cause analysis is not contained within the Report. In that Report, Entergy concludes in one paragraph that the root cause of the unprecedented bolt degradation is "irradiation assisted stress corrosion cracking" and "increased fatigue loading resulting from loss of preload." Attach. D to Writ Petition at 3. But this tersely stated conclusion could not fairly be characterized as a complete root cause analysis.

In this case, the number of degraded bolts is more than an order of magnitude greater than the average number of degraded bolts found at similar plants over the past few decades. Petition for Writ at 15. Simply referring to the proximate cause of radiation stress does not answer the question of why this reactor has so many more degraded bolts than any reactor of similar design and age. Until that question is answered, there is no reason to assume that simply doing what has been done before—replacing the bolts—will be sufficient to protect the public health and safety.

Moreover, it appears that even the proximate cause analysis undertaken by Entergy has not been completed. In the next paragraph of its six-page report to the NRC, Entergy states that "[f]ailure analyses of selected removed bolts will be performed to confirm [that irradiation assisted corrosion cracking]" was the primary cause of the bolt failures. Attach. D to Writ Petition at 3. Despite this promised future assessment, the NRC nevertheless blithely concluded that the root cause had been identified and addressed.

NRC's determination of appropriate corrective action is based on an incomplete root cause analysis. Nonetheless, the NRC appears satisfied with Entergy's unenforceable commitments to take action, such as re-inspection of "accessible" bolts and reconfiguration of the reactor flow from a "down flow" design to an "up flow" configuration "to reduce load on the bolts," after 20 months

of operation. NRC Resp. 29. In the absence of a root cause analysis, whether the plant can be operated safely with such band-aids is unknown. For this reason, such analysis and corrective action should be taken *before* the unit is allowed to continue operating.

The NRC is rushing to judgment in its casual treatment of this significant safety issue. Indeed, in the letter from Chairman Stephen Burns to Senator Kirsten Gillibrand, cited by Entergy, NRC takes the position that "completion of our review of the root-cause analysis is not a pre-condition to restart" Unit 2. It is telling that the company is forced to claim this mere political letter as its evidence that the agency has made a reasoned determination that Unit 2 is safe to restart.[2] Entergy Resp. 2. Such a letter—entirely disconnected from the agency proceeding at issue here—cannot satisfy the Administrative Procedure Act's requirement that the agency "cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs.*, 463 U.S. at 48-49.

The NRC has authorized restart of Unit 2 without so much as attempting to understand the root cause of the unique degradation of bolts at Unit 2 or even requiring the company to complete analysis of the degraded bolts. Without this

[2] Senator Gillibrand's concerns are shared by U.S. Congressman Sean Patrick Maloney (NY-18th), who called for Unit 2 to be taken offline until the cause of the bolt degradation was fully understood. Holly Kellum, *Maloney Calls for Halt to Indian Point Plant Till Problems Understood,* Epoch Times, June 22, 2016, http://www.theepochtimes.com/n3/2097820-maloney-calls-for-halt-to-indian-point-plant-till-problems-understood/.

knowledge, the NRC cannot reasonably determine whether the corrective actions Entergy has taken (e.g., bolt replacement) and promised to take (e.g., monitoring for further degradation, re-inspection of the bolts, and reconfiguration of the reactor flow) will be sufficient to operate the plant with adequate safety margin.

Despite the lack of determination of the actual root cause of the degradation, in a unit containing the "highest [number of degraded bolts] seen to date at a U.S. reactor," NRC Resp. 7, the NRC sees fit to allow continued operation of Unit 2 with no formal NRC investigation of the root cause of the degradation at a reactor located within 50 miles of 17 million people who could not escape from the impact of a serious event at Indian Point. This Court should not allow it. As charged by Friends in the Emergency Petition, Unit 2 should be powered down while the root cause analysis is completed so that the NRC can make a reasoned and meaningful determination whether the unit is safe to operate. The Court should issue the writ to protect its jurisdiction to review the NRC's forthcoming final decision.

C. *Temporary Shut Down of Unit 2 Will Not Adversely Impact Reliability.*

Until Unit 2 restarted operations on June 16, the reactor was offline for over two months without any adverse impact to the region's electricity reliability. Entergy claims that "approximately 500 MW in compensatory MW" would be required to service Southeastern New York if *both* units at Indian Point were removed from service. Entergy Resp. 4. (Each unit is rated at a capacity of

approximately 1,000 megawatts. Entergy Corp., Indian Point Energy Center, http://www.entergy-nuclear.com/plant_information/indian_point.aspx.) Besides the fact that Friends request this Court to remove only Unit 2 from operation, Entergy's estimation is based on an outdated prediction of electricity demand. The most recent load forecast for the summer has decreased by about the same amount that Entergy claims would be needed to compensate for the loss of *both* units at Indian Point (500 MW).[3] In other words, the region would have enough electricity even if Units 2 *and* 3 were taken offline. Taking Unit 2 offline while the NRC adjudicates Friends' petition would therefore not threaten the reliability of electricity in southern New York as Entergy claims.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court issue a writ directing the NRC to power down Unit 2 until the agency issues a full and

[3] *See* NYISO Summer 2016 Capacity Assessment, Presentation to NYISO Operating Committee Meeting (May 19, 2016), slide 2, http://www.nyiso.com/public/webdocs/media_room/publications_presentations/NYISO_Presentations/NYISO_Presentations/04_2016_Summer_Capacity_Assessment_Final.pdf; *see also* Paul Gallay & Michael Shank, *Indian Point: Past Its Expiration Date*, N.Y. Times, March 7, 2016, http://www.nytimes.com/2016/03/07/opinion/indian-point-past-its-expiration-date.html?_r=0 ("The New York Independent System Operator, a nonprofit agency charged with managing the state's electricity market, indicated in a report last year that there would be a net reliability 'need' of 500 megawatts if [both units at] Indian Point [were] to shut down before this summer. Since that study, though, downstate load forecasts for this summer have dropped by about 500 megawatts . . . .").

reasoned decision on Friends' Emergency Petition and, to avoid further undue delay, to issue such a decision on an expedited basis.

Respectfully submitted,

/s/ Richard Ayres

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Counsel for Petitioners

Dated: June 23, 2016

EXHIBIT A

From: **Tim Judson** timj@nirs.org
Subject: Mary 24, 2016 Petition submitted by Friends of the Earth
Date: June 22, 2016 at 5:00 PM
To: Guzman, Richard Richard.Guzman@nrc.gov
Cc: John Bernetich bernetichj@ayreslawgroup.com, Richard E. Ayres ayresr@ayreslawgroup.com, Jessica L. Olson olsonj@ayreslawgroup.com, Keever, Marcie mkeever@foe.org, Damon Moglen DMoglen@foe.org

TJ

Dear Mr. Guzman,

Nuclear Information and Resource Service writes to inform you that our organization wishes to join as a petitioner in Friends of the Earth's May 24, 2016 petition, which has been referred to your office for consideration under the process established by 10 C.F.R. § 2.206. Please include us in all correspondence related to the NRC's review of this petition.

Sincerely,
Timothy Judson

Timothy Judson
Executive Director
Nuclear Information & Resource Service
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Subject: Clearwater's request to join as a petitioner in Friends of the Earth's May 24, 2016 petition

From: Manna Jo Greene - To: richard.guzman@nrc.gov - Date: June 22, 2016 at 11:13 PM

Dear Mr. Guzman,

Hudson River Sloop Clearwater, Inc is writing to inform you that our organization wishes to join as a petitioner in Friends of the Earth's May 24, 2016 petition, which has been referred to your office for consideration under the process established by 10 C.F.R. § 2.206. Please include us in all correspondence related to the NRC's review of this petition.

Thank you.

Sincerely,

Manna Jo Greene, Environmental Director
Dave Conover, Interim Executive Director
Hudson River Sloop Clearwater, Inc.
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Friends of the Earth, Nuclear Information and Resource Service, and Hudson River Sloop Clearwater, *Petitioners*, v. United States Nuclear Regulatory Commission and United States of America, *Respondents*.	)	No. 16-1189

CERTIFICATE OF SERVICE

I certify that on this 23rd day of June, 2016, copies of the foregoing have been served in the above-captioned proceeding on all registered counsel via the Court's electronic case filing (ECF) system.

Respectfully submitted,

/s/ John Bernetich
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