ORAL ARGUMENT REQUESTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC., Petitioner,	)	
v.	)	Docket No. 03-4313
COLLINS, et al. Respondents.	)	

MEMORANDUM IN OPPOSITION TO FEDERAL RESPONDENTS' MOTION TO DISMISS

Petitioner Riverkeeper, Inc. ("Riverkeeper") submits this memorandum in opposition to the Federal Respondents' Motion to Dismiss. Respondents' Motion to Dismiss confuses the applicable standard of review with subject matter jurisdiction, ignores applicable Supreme Court precedent specifically holding that courts of appeals have jurisdiction to review denials of section 2.206 petitions for Nuclear Regulatory Commission ("NRC" or "Commission") action, and seeks to short circuit this Court's review of their action by depriving the Court of full briefing or any opportunity to review the full record before the agency.

Riverkeeper petitioned NRC pursuant to 10 C.F.R. § 2.206 for an immediate, temporary shutdown of the Indian Point nuclear power station based on the obvious vulnerabilities of the plant to September 11th style coordinated terrorist attack. Indian Point facilities' containment structures, reactor vessels, spent fuel storage areas, control rooms, and electrical switching equipment are all vulnerable to a terrorist attack. Indian Point, located in Westchester County,

New York, is not currently equipped to defend itself, nor the 20 million people who reside and work within a 50 mile radius of the plant, against an attack of the scale, sophistication, and coordination demonstrated on September 11, 2001. A successful attack on these structures would have a catastrophic effect on the region's human population, environment, and economy. Although the NRC acknowledged in its proposed decision on the petition that there was a "gap" between the defense provided by the plant operator and the airborne terrorist threat revealed by the September 11th attacks (Proposed Director's Decision at 21, See Exhibit B to Affidavit of Karl S. Coplan sworn to on June 16, 2003 ("Coplan Aff.")) and a recent study by the National Research Council characterizes the likelihood of such an attack as "high" in the "near term" (National Research Council Report at 50, Coplan Aff. Ex. D), the agency refused to condition continued operation of the plants on the most obvious protective measures requested by Riverkeeper: institution of a no-fly zone and air defenses around the Indian Point facility.

The NRC issued its Director's Decision denying Riverkeeper's petition on November 18, 2002. (See Director's Decision, Coplan Aff. Ex. A.) On February 10, 2003, pursuant to 28 U.S.C. § 2343, Riverkeeper petitioned this Court for review of the NRC's final order. In its Petition for Review, Riverkeeper seeks review and reversal of the Director's Decision, on the grounds that this Decision violates the Atomic Energy Act as amended and constitutes a complete abdication of its statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize dangers to life and property."

On June 3, 2003, NRC filed its Motion to Dismiss based primarily the Supreme Court's decision in *Hecker v. Chaney*, 470 U.S. 821 (1985). Respondents allege that "an agency decision rejecting an enforcement petition is 'committed to agency discretion' and *not subject to judicial review*." (Resp't Motion to Dismiss at 1 (emphasis added).) However, *Chaney* and its progeny

have clearly established the principle that while an agency decision rejecting an enforcement action may be "presumptively unreviewable," where there is evidence that an agency has abdicated its statutory responsibility, the courts of appeals have jurisdiction to review that decision for an abuse of that agency's discretion.[1] None of the cases relied upon by NRC dismissed a petition for review of denial of a 2.206 petition on motion before full briefing and filing of the administrative record.

STATEMENT OF THE CASE

1. Riverkeeper's 2.206 Petition

On November 8, 2001, pursuant to 10 C.F.R. § 2.206,[2] Riverkeeper filed a petition[3] with Dr. William Travers, Executive Director for Operations of the NRC, identifying the threat of a terrorist attack on the Indian Point facility as a new, site-specific, hazardous condition that is larger and more dangerous than previously considered in the licensing and the design basis threat of Indian Point. Riverkeeper based its 2.206 Petition on new information currently available indicating that Indian Point is a plausible target of future terrorist actions and that it is not currently equipped to defend itself, nor the 20 million people who reside and work within a 50 mile radius of the plant,[4] against a terrorist attack. Specifically the petition included reports documenting the substantial threat of a terrorist attack on nuclear facilities in the United States

[1] *See Safe Energy Coalition of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989); *Arnow v. NRC*, 868 F.2d 223 (7th Cir. 1989); *Com. Of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989); *Mass. Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9 (1st Cir. 1988).

[2] 10 C.F.R. § 2.206(a) states: "[a]ny 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."

[3] Riverkeeper filed a supplement to its 2.206 petition on December 21, 2001.

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

and NRC's own studies assessing the extent of casualties from a core meltdown or spent fuel pool release at Indian Point units 2 and 3 ("IP2" and "IP3").

In its 2.206 Petition, Riverkeeper requested that the NRC: (1) order the licensee to suspend operations, revoke the license, or adopt other measures resulting in a temporary shutdown of IP2 and IP3; (2) order the licensee to conduct a full review of facilities' vulnerabilities, security measures and evacuation plans; (3) require the licensee to provide information documenting the existing and readily attainable security measures which protect IP2 and IP3 against land, water, and airborne terrorist attacks; (4) immediately modify the IP2 and IP3 operating licenses to mandate specified security measures sufficient to protect the facility, including the institution of a no-fly zone surrounding the plan and barriers to attack from the Hudson River; (5) order the revision of the licensee's Emergency Response Plan to account for possible terrorist attacks and prepare a comprehensive response to multiple, simultaneous attacks; (6) in the absence of available measures to ensure the security of the IP facility against terrorist attacks, take prompt action to permanently retire the facility; and (7) order the licensee to immediately convert from water-cooled to hardened dry cask system for spent fuel storage as a measure to protect spent fuel storage from terrorist attacks.

2. NRC's Response to Riverkeeper's 2.206 Petition

NRC responded to Riverkeeper's 2.206 petition on November 18, 2002 by denying Riverkeeper's request: for specific information about the security measures; to implement security measures such as a no-fly zone; to require a revision of the licensee's Emergency Response Plan; and to replace spent fuel pools with dry-cask storage of spent fuel. NRC stated that it partially granted Riverkeeper's request for an immediate security upgrade by issuing its February 25, 2002 Orders to all nuclear power plants to review security preparedness. However,

none of these security upgrades included the institution of no-fly zones or air defenses around Indian Point or any other nuclear facility (See Director's Decision, Coplan Aff. Ex. A). Pursuant to 10 C.F.R. § 2.206(c), following the expiration of the 25-day period during which the Commission can review *sua sponte* Director's Decisions, the Director's Decision became final on December 13, 2002.

3. Riverkeeper's Petition for Review

On February 10, 2003, pursuant to 28 U.S.C. § 2343, Riverkeeper filed a petition to this Court for review and reversal of the Director's Decision, on the grounds that this decision violates the Atomic Energy Act as amended and constitutes a complete abdication of the Commission's statutory duty under 42 U.S.C. § 2201(i) "to protect health and to minimize dangers to life and property."

4. The Second Circuit's Jurisdiction over Riverkeeper's Petition for Review

Riverkeeper is a not-for-profit organization whose mission is to protect the environmental, recreational, and commercial integrity of the Hudson River and its tributaries, and to safeguard New York City's and Westchester County's drinking water supply. Petitioner's members have submitted affidavits with this response to Federal Respondents' jurisdictional motion establishing that they are personally affected and aggrieved by the continued operation of Indian Point without the specific security measures and relief sought in Riverkeeper's 2.206 Petition.[5] (See Affidavits of Riverkeeper Members, Coplan Aff. Ex. C.) Riverkeeper's Petition for Review satisfies both individual and constitutional requirements for

[5] At least one Circuit has suggested that, where evidence of standing was not required in the agency proceedings that are being reviewed, the petitioner should submit evidence of standing directly to the Court of Appeals on a petition for review at the time of the first substantive briefing. *See Sierra Club v. EPA, 292 F.3d 895, 898* (D.C. Cir. 2002). Accordingly, Petitioner has submitted with this response, affidavits establishing the interests of its members in protecting Indian Point from terrorist attack.

standing. First, Riverkeeper and its members are threatened with injury by the final decision of the NRC. The Supreme Court, in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978), concluded that future harm of radiation is sufficiently concrete to establish standing where plaintiffs live near a nuclear reactor site. Furthermore, the future harm to members if anything should come from the plant continuing to remain in its vulnerable state would be redressed by the relief requested in Riverkeeper's 2.206 Petition, which relief was denied in the NRC Director's Decision.

The members of Riverkeeper have a personal stake in the outcome of the controversy and the organization is the proper party to bring the lawsuit on their behalf since Riverkeeper satisfies the three-prong test of organizational standing delineated in *Hunt v. Washington Apple*, 432 U.S. 333, (1977): (1) affidavits of individual Riverkeeper members indicate that harm to individual members would be personally and economically devastating (See Affidavits of Riverkeeper Members, Coplan Aff. Ex. C); (2) the interests that Riverkeeper seeks to protect in bringing this action – the environmental and recreational integrity of the Hudson River and its tributaries – is directly related to the organization's purpose; (3) Riverkeeper can adequately assert the legal claims and the relief requested without its members participation.

ARGUMENT

I.

THE HOBBS ACT GRANTS THE COURTS OF APPEALS JURISDICTION TO REVIEW NRC'S DENIAL OF A PETITION PURSUANT TO 10 C.F.R. § 2.206

The Hobbs Act, 28 U.S.C. § 2342(4)[6], and the Atomic Energy Act of 1954, 42 U.S.C. § 2239[7] specifically grant jurisdiction to the courts of appeals to review decisions of the NRC. Accordingly, the courts of appeals may review all final orders of the NRC, "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Administrative Procedure Act (APA), 5 U.S.C. § 701(a).

The Supreme Court has specifically applied this jurisdictional grant to review of denial of a 10 C.F.R. § 2.206 petition in *Florida Power & Light Company v. Lorion*, 470 U.S. 729 (1985). In that case, after conducting an extensive review of the legislative history, the Court concluded that "[t]he legislative history and basic congressional choice of Hobbs Act review lead us to conclude that Congress intended to vest in the courts of appeals initial subject matter jurisdiction over challenges to Commission denials of § 2.206 petitions." *Id.* at 741. Respondents argue that the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985), renders NRC's action denying a 2.206 petition "unreviewable." In *Chaney*, decided contemporaneously with *Lorion*, the Court held that under the Food, Drug and Cosmetic Act, the Food and Drug Administration's decision not to investigate a petition from death-row inmates challenging the safety of a drug

[6] 28 U.S.C. § 2342 states: "The court of appeals...has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--...(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;"

[7] 42 U.S.C. § 2239(b) states: "The following Commission actions shall be subject to judicial review ... (1) Any final order entered in any proceeding of the kind specified in subsection (a) of this section."
42 U.S.C. § 2239(a)(1)(A) states: " In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license ... , 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 proceedings."

used for human executions, did not overcome the presumption of unreviewability under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2), and was therefore not subject to judicial review. *Id.* at 837-838. The *Chaney* Court concluded that "[t]he general exception to reviewability provided by § 701(a)(2) for action 'committed to agency discretion' remains a narrow one, see *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), but within that exception are included agency refusals to institute investigative and enforcement proceedings, unless Congress has indicated otherwise." *Id.* at 838. However, the Court noted that agency action otherwise unreviewable was still subject to judicial review "where it could justifiably be found that the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (citing *Adams v. Richardson*, 156 U.S. App. D.C. 267, 480 F.2d 1159 (1973) (en banc)).

Although Respondents argue that *Chaney* stands for the unreviewability of agency enforcement actions such as NRC's denial of Riverkeeper's 2.206 petition, the Supreme Court did not so hold. Rather, the Court expressly reserved the question whether *Chaney* applied to review of the NRC's declination to act on a section 2.206 request in *Lorion*, decided the same day as *Chaney*. *Florida Power & Light Co. v. Lorion*, 470 U.S. at 735 n.8. Indeed, the Court implicitly declined to treat this question as jurisdictional, as the Supreme Court could not avoid an issue of subject matter jurisdiction of the court. Essentially, Respondents here confuse subject matter jurisdiction with standard of review. *Lorion* treated the question of 2.206 "unreviewability" essentially as a question of standard of review, not jurisdiction; while *Chaney*, decided the same day, specifically acknowledged the exception to agency unreviewability for agency policies that completely abdicate the agency's statutory responsibility. Far from establishing the propriety of a procedural, jurisdictional dismissal, each of the cases cited by Respondents for the

unreviewability of 2.206 petitions proceeded to full briefing before the court of appeals; none were dismissed on motion before full briefing and filing of the administrative record.[8] There, the various courts of appeals, after they had the full record in front of them, were able to make their decisions based upon all of the facts.

II.

COURTS OF APPEALS HAVE UNIFORMLY ACKNOWLEDGED THAT NRC DENIALS OF § 2.206 PETITIONS ARE REVIEWABLE FOR AN ABDICATION OF STATUTORY RESPONSIBILITY

Respondents rely heavily on a series of cases which have held NRC denials of 2.206 petitions to be unreviewable actions committed to agency discretion under *Chaney*. As noted, these cases were uniformly decided after full briefing on the merits, not on a motion to dismiss as Respondents seek here. While various courts of appeals have found § 2.206 petitions generally unreviewable, each of these Courts has established the residual judicial review for agency abdication of its statutory responsibility.

In *Mass. Pub. Interest Research Group, Inc. (Mass. PIRG) v. NRC*, 852 F.2d 9 (1st Cir. 1998), the First Circuit was the first court of appeals case to address the reviewability of NRC decisions in light of *Chaney*. Mass. PIRG filed a § 2.206 petition requesting that the Commission issue an order to Boston Edison Company to show cause why Pilgrim Nuclear Power Station should not remain closed or have its operating license suspended until it remedied certain deficiencies which allegedly threatened the public health and safety. *Id.* at 10. The NRC

[8] Brief for Respondent at 2, see *Safe Energy Coalition of Mich. v. NRC*, 866 F.2d 1473 (D.C. Cir 1989); *Arnow v. NRC*, 868 F.2d 223 (7th Cir. 1989); *Com. of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989); *Mass. Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9 (1st Cir. 1988).

director denied petitioner's requests and subsequently, pursuant to the Hobbs Act, 42 U.S.C. § 2342, petitioner filed for review in the First Circuit. There, the First Circuit held that "given the lack of a meaningful standard of review in either the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, or NRC regulations, the refusal of the NRC to issue a show cause order against Edison is not subject to judicial review." *Id.* However, the court further concluded, "the absence of a meaningful standard which limits the discretion of the NRC in enforcement actions and subjects it to judicial review does not place the agency above the law." *Id.* at 19. Courts "may review NRC decisions which undermine its fundamental statutory responsibility to protect 'the health and safety of the public.' *See, e.g.*, 42 U.S.C. § 2236(c)." *Id.*

The next year, the First Circuit was faced with another opportunity to address judicial review of final agency decisions of the NRC. Similar to the facts in *Mass PIRG,* in *Commonwealth of Mass. v. NRC*, 878 F.2d 1516 (1st Cir. 1989), the Commonwealth sought review of a final agency decision arising out of a 2.206 petition regarding the operation of Pilgrim Nuclear Power Station. NRC moved the court to dismiss the petition of jurisdictional grounds. While the court later dismissed the case after its review on the merits, the court clearly stated that "we do not dismiss it on jurisdictional grounds." *Id.* at 1518. There, the First Circuit reasoned that "[d]enials of § 2.206 petitions are reviewable by courts of appeals." *Id.* at 1525 (citing *Lorion,* 470 U.S. 729). Furthermore, the court reasoned that while under *Chaney* the scope of review may be limited, it quoted the Third Circuit in saying that "[o]ur 'limited, albeit important, task' is to review 'agency action to determine whether the agency conformed with controlling statues.' " *Id.* at 1523 (quoting *In re Three Mile Island Alert, Inc.* 771 F.2d 720, 728 (3rd. Cir. 1985) quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983)).

In *Arnow v. NRC*, 868 F.2d 223 (7th Cir. 1989), the Seventh Circuit also addressed the reviewability of the court of appeals to review final agency actions of the NRC under a § 2.206 petition. There, the court concluded that after reviewing the record for evidence that the NRC had abdicated its statutory responsibilities, it found that petitioners claims lacked the necessary evidence to uphold that standard of review and therefore, after full analysis of the facts, the court denied the petition for review. However in doing so, it made sure to state "we do not hold that every decision of the NRC is insulated from judicial review." *Arnow v. NRC*, 868 F.2d at 236. Relying on *Mass. PIRG*, that Court also noted that " '[t]he courts ... may review NRC decisions which undermine its fundamental statutory responsibility to protect 'the health and safety of the public.' " *Id.* (quoting *Mass. PRIG*, 852 F.2d at 19).

In *Safe Energy Coalition of Michigan v. NRC*, 866 F.2d 1473 (D.C. Cir. 1989), the D.C. Circuit reviewed denial of a 2.206 petition to consider whether the NRC abdicated its statutory responsibility under the Atomic Energy Act, " 'to ensure adequate protection of the public health and safety.' " *Safe Energy Coalition of Mich. v. NRC*, 866 F.2d at 1477 (quoting *Union of Concerned Scientists v. NRC*, 824 F. 2d 108 (D.C. Cir 1987)). There, the court conducted a full review of the record and of the parties' full briefs, before concluding that the evidence that NRC refused to extend its quality assurance regulations to a voluntary employee concern program was not enough to indicate that the NRC had abdicated its statutory responsibilities to protect the health and safety of the public. *Id.* at 1477.

The above four cases establish two important propositions. First, all four cases affirmed the exception to the *Chaney* Rule – agencies are not above the law and the Court will always review the record to determine whether an agency has abdicated its statutory responsibility.

Second, in all four cases, the courts of appeals were able to make this determination only after they had reviewed the record in full.

Whether couched as "jurisdiction" or "standard of review," it is clear that this Court of Appeals has jurisdiction to consider Riverkeeper's claim that NRC has abdicated its statutory duty to protect public safety by leaving Indian Point in operation, without protection from an aerial terrorist attack of the sort that the National Research Council (another arm of the federal government) has characterized as probable "in the near term." (National Research Council Report at 50 (available at http://books.nap.edu/html/stct/index.html), Coplan Aff. Ex. D.) Even if this inquiry might be characterized as "jurisdictional," "it is axiomatic that this court always has jurisdiction to determine its own jurisdiction." *In re McBryde*, 120 F.3d 519, 522 (5th Cir. 1997), cert. denied, 141 L. Ed. 2d 712, 118 S. Ct. 2340 (1998); *accord Gelman v. Ashcroft*, 298 F.3d 150, 151 (2nd Cir. 2002).

III.

CONSIDERATION OF THE FULL RECORD WOULD SHOW THAT RIVERKEEPER HAS ESTABLISHED A PRIMA FACIE CASE THAT NRC HAS ABDICATED ITS STATUTORY RESPONSIBILITY TO ASSURE PUBLIC HEALTH AND SAFETY

Since September 11, the fundamental assumptions about the safety of nuclear power plants and the nature and likelihood of an assault on such plants have changed. According to a recent National Research Council report, "the potential for a September 11-type surprise attack in the near term is using U.S. assets such as airplanes appears to be high." (National Research Council Report at 50, Coplan Aff. Ex. D.) The Commission in its proposed decision acknowledges a "gap between the licensee's capability to protect against air attacks and the

protection afforded by the government." (Proposed Director's Decision at 21, Coplan Aff. Ex. B.) Yet, despite this gap, in its Decision, the Commission essentially proposes to do nothing to protect the public from the very threat of aircraft attack that the National Research Council has ranked "high." This failure of the Commission to act can only be characterized as a complete abdication of the Commission's statutory duty under 42 U.S.C. § 2201(i) to protect the public health and safety.

A. NRC's Refusal to Plug the Acknowledged "Gap" Between the Identified Threat of Aerial Attack and the Indian Point Defenses By Itself Constitutes an Abdication of Its Statutory Responsibilities.

The September 11 attacks challenged the fundamental assumptions about the security of this nation's infrastructure, including its nuclear infrastructure. It has become clear that a plant such as Indian Point, located within a 50-mile radius of over 20 million Americans, including the population of Manhattan, poses an unacceptable terrorism risk. Riverkeeper duly petitioned NRC to take immediate specific measures to protect Indian Point from aerial attack, all of which NRC has refused. Riverkeeper's petition relied heavily on NRC's own statements that plants such as Indian Point were not designed to withstand a direct impact by a jumbo jet, and NRC's own studies concerning the impacts of a radiation release from the Indian Point Nuclear Power Plants or their spent fuel pools.

For example, Riverkeeper's petition cited a 2000 NRC study which evaluated the consequences of an airliner crash into spent fuel storage structures. (NRC Report: Technical Study of Spend Fuel Pool Accident Risk at Decommissioning Nuclear Power Plants (October

2000) ("Spent Fuel Pool Accident Risk Report"), Coplan Aff. Ex. E.) This report estimates that "1 of 2 aircrafts are large enough to penetrate a five foot thick reinforced concrete wall," causing a loss of cooling water and a spent fuel fire. (Spent Fuel Pool Accident Risk Report at 3-23, Coplan Aff. Ex. E.) The study concludes that the impacts of such a fire would be horrific; the report estimates that a worse case scenario radiation release from a spent fuel rod fire will cause a 4.43 percent increase in early fatalities among those who are late to evacuate the one mile perimeter. The individual risk of latent cancer fatalities from a worse case scenario release would be 8.24 percent or higher. (Spent Fuel Pool Accident Risk Report at 3-29, Coplan Aff. Ex. E.)

The results of a core meltdown caused by terrorist attack would be just as horrific, again according to NRC's own studies. A study performed by NRC estimates that a terrorist attack on the Indian Point Unit 2 reactor that leads to a meltdown would cause "46,000 Peak Early Fatalities, 141,000 Peak Early Injuries, [and] 13,000 Peak Deaths from cancer," while a meltdown of the Indian Point Unit 3 reactors would cause "50,000 Peak Early Fatalities, 167,000 Peak Early Injuries, [and] 14,000 Peak Deaths from cancer." (Sandia Labs, NRC Report: Calculation of Reactor Accident Consequences (1982) ("CRAC –2 Report"), Coplan Aff. Ex. F.) These studies likely underestimate the actual consequences of a radiation release from Indian Point, as they fail to take into account the population growth since 1982.

Unfortunately, these risks can no longer be considered remote. The National Research Council (an arm of the National Academy of Science) has analyzed the various risks of terrorist attacks on the nation's infrastructure, and specifically concluded with respect to nuclear power facilities that "the potential for a September 11-type surprise attack in the near term using U.S. assets such as airplanes appears to be high." (National Research Council Report at 50, Coplan Aff. Ex. D.) The report notes that such plants "may present tempting, high visibility target for

terrorist attack." *Id.* There is no more highly visible and tempting nuclear power plant target in the country than the Indian Point power plant. And, as the National Research Council Report notes, "such attacks could potentially have severe consequences." *Id.*

Nevertheless, despite this specifically identified threat with a "high" potential, the NRC has refused to require any measures specifically to defend Indian Point against a September 11 style aerial attack. Indeed, it acknowledged in its proposed decision that there is a "gap" in the aerial defense of Indian Point that has yet to be filled. The Nuclear Regulatory Commission is taking a huge risk with the lives and health of a huge number of citizens, pleading only that "although the NRC cannot rule out the possibility of future terrorist activity directed at a [nuclear power plant] licensee's site before implementing any further enhancements to its safeguard programs, the NRC believes that these facilities can continue to operate safely." (Proposed Director's Decision at 9, Coplan Aff. Ex. B).

This refusal to order protective action, in light of a threat with horrific consequences and a "high" probability, is on its face an abdication of NRC's duty to protect human health and safety.

B. NRC's Refusal to Protect Indian Point from Aerial Terrorist Attack is Part of an Agency Policy to Ignore the Threat of Terrorism in Agency Decisionmaking

NRC asserts that the cases establishing the residual "abdication of statutory responsibility" standard requires more than one agency decision to rebut the presumption of unreviewability. The cases cited by NRC do not in fact so hold. However, even if such a general agency "policy" were required, NRC has in fact adopted a policy of refusing to consider terrorism in its decisionmaking concerning nuclear power plants.

For example, NRC has a specific policy not to consider potential terrorist attacks by airborne vehicles in licensing spent fuel storage facilities. See Final Rule, Physical Protection for Spent Nuclear Fuel and High-Level Radioactive Waste, 63 Fed. Reg. 26,955-56 (May 15, 1998). NRC has most recently reaffirmed this policy in a series of decisions issued in December, 2002, where NRC refused to consider the possibility of terrorist attacks on nuclear facilities in conducting environmental impact review under the National Environmental Policy Act (NEPA), 42 U.S.C. § 1332. (See *In the Matter of Private Fuel Storage L.L.C.*, 56 N.R.C. 340; 2002 NRC LEXIS 205 (2002), Coplan Aff. Ex. G); *See also In the Matter of Duke Energy Corp.*, 56 N.R.C. 358; 2002 NRC LEXIS 206 (2002), Coplan Aff. Ex. H.)

To justify this policy, NRC relies on two cases decided decades ago, which upheld NRC's refusal to consider the possibility of terrorist attacks on nuclear facilities on the grounds that the possibility of such an attack was "speculative" and not susceptible to mathematical probabilistic analysis. *See Limerick Ecology Action v. NRC*, 869 F.2d 719 (3d Cir. 1989); *City of New York v. United States Dep't of Transp.*, 715 F.2d 732 (2d Cir. 1983). What NRC ignores is that we now know that a terrorist attack on a nuclear facility is not a "speculative" possibility, but rather, according to the National Research Council, a highly probable event. NRC's refusal to acknowledge the fundamental change in the nature and likelihood of terrorist attack on nuclear facilities in light of September 11 is embodied in agency policy, and this policy is an abdication of NRC's statutory responsibility to protect public health and safety against identified threats.

Petitioners have thus identified a potential incident – airborne terrorist attack – for which there is a "high risk" as assessed by the National Research Council, and for which the Indian Point plants have no protection. Ignoring this risk is an abdication of the Commissions' duty to

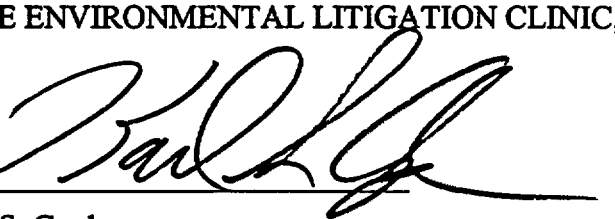
protect the public. NRC's motion to dismiss this petition on jurisdictional grounds should be rejected.

CONCLUSION

NRC's purported motion to dismiss for lack of jurisdiction is nothing less than an attempt to avoid thorough judicial review of its refusal to protect the public based on the full record before the agency. As this Court clearly has jurisdiction to consider petitioner's claim that NRC has abdicated its statutory duty, the motion to dismiss should be denied.

Respectfully submitted,

PACE ENVIRONMENTAL LITIGATION CLINIC, INC.

By: 

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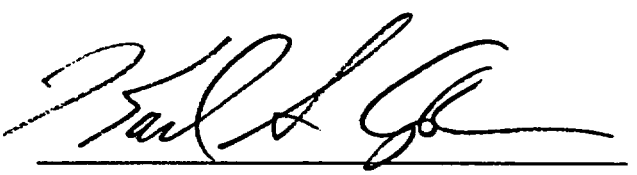
June 16, 2003

RULE 26.1 STATEMENT

Pursuant to Rule 26.1 of the Rules of the Court of Appeals for the Second Circuit, Petitioner, Riverkeeper, declares that it has no parent companies, subsidiaries, or affiliates which has issued shares to the public.



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June 16, 2003