

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2003

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

5
6 Docket No. 03-4313

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8 RIVERKEEPER, INC.,

9 Petitioner,

10 - v -

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

15 Respondents.

16 -----
17 Before: VAN GRAAFEILAND, SACK, and RAGGI, Circuit Judges.

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

27 Appeal dismissed.

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

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

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

20 Robert D. Snook, Assistant Attorney
21 General of Connecticut (Richard
22 Blumenthal, Attorney General of
23 Connecticut, on the brief), Hartford,
24 CT, for Amicus Curiae Richard
25 Blumenthal.

26 SACK, Circuit Judge:

27 In the wake of the September 11, 2001, terrorist
28 attacks on New York City and Arlington, Virginia, the petitioner,
29 Riverkeeper, Inc., ("Riverkeeper") requested that the respondent
30 United States Nuclear Regulatory Commission (the "NRC" or the
31 "Commission") condition the license of the respondent Entergy
32 Nuclear Operations, Inc., ("Entergy") to operate, through
33 respondents Entergy Nuclear Indian Point 2, LLC, and Entergy
34 Nuclear Indian Point 3, LLC, two nuclear power plants in
35 Westchester County, New York (collectively, "Indian Point"), on
36 several safety-related changes pertaining to their operation.
37 Riverkeeper's principal concern was the potential for terrorist
38 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

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.

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

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

1 then release deadly amounts of radiological material into the
2 environment.

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

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

15 On December 20, 2001, NRC Office of Nuclear Reactor
16 Regulation Director Samuel Collins declined to order an immediate
17 closure of Indian Point. On May 16, 2002, Director Collins
18 issued a proposed decision that would deny the relevant relief
19 that Riverkeeper requested. Riverkeeper commented on the
20 proposed decision, requesting reconsideration. It argued that
21 "the proposed decision would protect the operators' economic
22 interests at the expense of the safety and security of the
23 surrounding population." Comments on May 16, 2002 Proposed
24 Director's Decision on Riverkeeper's November 8th Petition 2.206
25 Request for Emergency Shutdown of Indian Point Units 2 and 3, at
26 1 (Aug. 9, 2002).

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

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

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

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

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

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

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

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

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

⁵ According to the decision:

In the aftermath of September 11, 2001, the Federal 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 anti-aircraft weaponry. Protection against this type of threat may be provided by other means within the Federal government.

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

Id. at 18-19.

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

13 I. Basis for Jurisdiction

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

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

by amici, not by the appellants themselves, . . . we do not reach the question [raised by amici]." (citing, inter alia, 16A Wright, Miller & Cooper, Federal Practice & Procedure § 3975.1 (3d ed. 1999)). We note, moreover, that this question is now before the NRC in a section 2.206 request filed by the amicus. See Entergy Nuclear Operations, Inc.; Receipt of Request for Action Under 10 C.F.R. 2.206, 68 Fed. Reg. 41,187 (July 10, 2003).

1 42 U.S.C. § 2201(b). Under the NRC's regulations, the Commission
2 "may institute a proceeding to modify, suspend, or revoke a
3 license or to take such other action as may be proper." 10
4 C.F.R. § 2.202(a). "Any person may file a request to institute a
5 proceeding pursuant to § 2.202 to modify, suspend, or revoke a
6 license, or for any other action as may be proper." Id.
7 § 2.206(a). In response to this request, "the Director of the
8 NRC office with responsibility for the subject matter of the
9 request shall either institute the requested proceeding in
10 accordance with this subpart or shall advise the person who made
11 the request in writing that no proceeding will be instituted in
12 whole or in part, with respect to the request, and the reasons
13 for the decision." Id. § 2.206(b). Within twenty-five days of
14 the denial of a request, the NRC "may on its own motion review
15 that decision, in whole or in part, to determine if the Director
16 has abused his discretion." Id. § 2.206(c)(1).

17 The federal courts of appeals have exclusive
18 jurisdiction to adjudicate appeals from "all final orders of the
19 Atomic Energy Commission made reviewable by section 2239 of title
20 42." 28 U.S.C. § 2342(4).⁹ 42 U.S.C. § 2239, in turn, makes
21 "[a]ny final order entered in any proceeding of the kind
22 specified in subsection (a)," reviewable under the Administrative
23 Procedure Act, 5 U.S.C. § 701 et seq. (the "APA"). 42 U.S.C.
24 § 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

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).

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

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

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

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

33 [Second], . . . when an agency refuses to act
34 it generally does not exercise its coercive
35 power over an individual's liberty or
36 property rights, and thus does not infringe
37 upon areas that courts often are called upon

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

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

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

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

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

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

23 The present petition challenges a different agency and
24 a different statute. It raises, however, a similar issue:
25 whether we have jurisdiction to review the NRC's decision not to
26 enforce what Riverkeeper asserts are applicable AEA provisions
27 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

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

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

1 2. Express Abdication of Statutory Responsibility?

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

1 3. Inference of Abdication of Statutory

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

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

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

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

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

1 provide adequate protection to the health and safety of the
2 public." 42 U.S.C. § 2232(a).¹³ The AEA further authorizes the
3 NRC to regulate in various formats as it "may deem necessary or
4 desirable . . . to protect health or to minimize danger to life
5 or property." 42 U.S.C. § 2201(b); see also id. § 2201(i)(3)
6 (granting authority to the NRC to regulate as it finds necessary
7 "to govern any activity authorized pursuant to this chapter,
8 including standards and restrictions governing the design,
9 location, and operation of facilities used in the conduct of such
10 activity, in order to protect health and to minimize danger to
11 life or property"); County of Rockland v. U.S. Nuclear Regulatory
12 Comm'n, 709 F.2d 766, 769 (2d Cir.) ("The NRC is charged under
13 the AEA . . . with primary responsibility to ensure, through its
14 licensing and regulatory functions, that the generation and
15 transmission of nuclear power does not unreasonably threaten the
16 public welfare. Consistent with its administrative mandate, the
17 NRC is empowered to promulgate rules and regulations governing
18 the construction and operation of nuclear power plants."), cert.
19 denied, 464 U.S. 993 (1983). As the District of Columbia Circuit
20 observed, the first cited statutory section requires the NRC to
21 ensure "adequate protection" of public health and safety, not
22 "absolute protection." Union of Concerned Scientists v. U.S.
23 Nuclear Regulatory Comm'n, 824 F.2d 108, 114 (D.C. Cir. 1987);
24 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

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.").

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

24 To be sure, none of the NRC's disclosed actions appears
25 to be directed specifically toward Riverkeeper's express concern:
26 the possibility of an airborne terrorist attack on Indian Point.
27 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

1 Commission endorses the prompt response by
2 Congress to strengthen aviation security
3 under the Aviation and Transportation
4 Security Act of 2001, because this
5 legislation provides for improved protection
6 against air attacks on all industrial
7 facilities, both nuclear and non-nuclear.
8 The NRC further supports the steps taken by
9 the FAA to improve aircraft security,
10 including enhanced passenger and baggage
11 screening, strengthening of cockpit doors,
12 and the Air Marshal program. The U.S.
13 intelligence community and various Federal
14 law enforcement agencies have also increased
15 efforts to identify potential terrorists and
16 prevent potential attacks before they occur.
17 For example, the FAA and Department of
18 Defense have acted more than once to protect
19 airspace above nuclear power plants from what
20 were thought to be credible threats against
21 certain specific sites. These potential
22 threats were later judged to be non-credible.

23 Entergy Nuclear Operations, Nos. 50-003, 50-247, and 50-286, at
24 18-19 (Nuclear Regulatory Comm'n Nov. 18, 2002).¹⁶ It is on this
25 basis, at least in part, that the NRC declined to commence
26 enforcement proceedings as urged in the section 2.206 request
27 before us.

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

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

1 equivalent to ignoring the risk. See N.Y. Pub. Interest Research
2 Group v. Whitman, 321 F.3d 316, 331 (2d Cir. 2003) ("The [Chaney]
3 presumption against judicial review of [agency] refusal [to
4 pursue enforcement action] avoids entangling courts in a calculus
5 involving variables better appreciated by the agency charged with
6 enforcing the statute and respects the deference often due to an
7 agency's construction of its governing statutes."); cf. Kelley v.
8 Selin, 42 F.3d 1501, 1511 (6th Cir.) ("As the Supreme Court has
9 stated, 'the [Nuclear Regulatory] Commission is making
10 predictions . . . at the frontiers of science. When examining
11 this kind of scientific determination, as opposed to simple
12 findings of fact, a reviewing court must generally be at its most
13 deferential.' Baltimore Gas & Elec. Co. v. Natural Resources
14 Defense Council, Inc., 462 U.S. 87, 103 (1983) (citations
15 omitted). After all, judges are neither scientists nor
16 technicians." (alterations in original; some internal quotation
17 marks and alterations omitted)), cert. denied, 515 U.S. 1159
18 (1995).

19 Thus, even if we were to assume that the Chaney Court
20 established by way of footnote 4 federal court jurisdiction over
21 appeals from agency action when the agency "has 'consciously and
22 expressly adopted a general policy' that is so extreme as to
23 amount to an abdication of its statutory responsibilities,"
24 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

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

3 * * *

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

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

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

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)).

