



has adopted a “general policy ... so extreme as to amount to an abdication of its statutory responsibilities.” *See* 470 U.S. at 833 n.4. In this case,<sup>2</sup> whether one agrees with the NRC staff’s technical analysis or not, even the briefest examination of the NRC’s fully-explained 2.206 decision shows that there is no “general policy” of NRC refusals to enforce safety requirements at ISFSIs, no ignoring of safety allegations, and hence no conceivable “abdication” of agency responsibilities. *See Nuclear Management Company, LLC (Palisades Nuclear Plant), DD-07-02, 65 NRC 365 (March 20, 2007) (Director’s Decision) (attached to this motion).*

## **BACKGROUND**

### ***A. Statutory and Regulatory Framework***

The NRC has broad authority under the Atomic Energy Act to license and regulate the operation of commercial nuclear power plants, including spent fuel storage. *See* 42 U.S.C. §§ 2131-2133, 2201, 2232, 2236. Discretion is the hallmark of this authority, for the Atomic Energy Act is “virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of

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<sup>2</sup> The 2.206 enforcement petition demanded that the NRC stop the use of two “independent spent fuel storage installation” (ISFSI) concrete pads holding spent nuclear fuel storage casks at the Palisades Nuclear Plant in Michigan. The Nuclear Management Company (NMC) was the operator of Palisades. In April 2007, NMC transferred title and the operating license of Palisades and its ISFSI to Entergy Nuclear Operations, Inc. (Entergy) and its affiliate, Entergy Nuclear Palisades, LLC. Entergy filed a motion to intervene in this lawsuit on July 16, 2007.

close prescription in its charter as to how it shall proceed in achieving the statutory objectives.” *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968); *accord Nuclear Info. Res. Serv. v. NRC*, 969 F.2d 1169, 1177 (D.C. Cir. 1992) (*en banc*).

The NRC uses a wide range of enforcement tools to “protect health” and “minimize danger to life or property” and to “promote the common defense and security.” 42 U.S.C. § 2201(b). These include notices of violation, civil penalties, and orders modifying, suspending, or revoking licenses. *See* 10 C.F.R. §§ 2.201 - 2.205. These enforcement tools are rooted in statutory provisions whose permissive phrasing affords the NRC considerable enforcement discretion. *See, e.g.*, 42 U.S.C. § 2073 (civil penalties); 42 U.S.C. § 2201 (general enforcement authority); 42 U.S.C. § 2236 (license revocation); 42 U.S.C. § 2280 (injunctive orders).

In addition to the enforcement options above, NRC regulations allow any person to request the NRC to take enforcement action, including action to modify, suspend, or revoke a license. *See* 10 C.F.R. § 2.206. These requests are referred to as “2.206 petitions.” A 2.206 petition must specify the enforcement action sought, as well as the facts upon which the request is based. *Id.*

Upon receiving a 2.206 petition, the NRC refers it to the office director who has the appropriate subject matter authority. 10 C.F.R. § 2.206(b). The NRC office director must then either institute the requested proceeding or inform the petitioner

in writing that no proceeding will be instituted and explain why. *Id.* Section 2.206 does not otherwise constrain the director's discretion. *See id.*

If the office director finds merit in the petition, or a portion thereof, he or she will issue a "Director's Decision" explaining the bases upon which the petition was granted. *See id.* Otherwise, the office director will issue a written decision denying the petition. *See id.* A Director's Decision under 10 C.F.R. § 2.206 becomes final within 25 days unless the Commission acts on its own motion to reverse or modify the decision. 10 C.F.R. § 2.206(c).

***B. The 2.206 Petition at Issue Here***<sup>3</sup>

In April 2006, Mr. Terry J. Lodge, on behalf of five organizations and thirty individuals, filed an administrative petition for enforcement action with the NRC pursuant to 10 C.F.R. § 2.206. The 2.206 petition asked the NRC to condemn and stop the use of two ISFSI concrete pads holding dry casks storing used nuclear fuel at Palisades Nuclear Plant, operated by NMC. The two pads were constructed separately, one in 1992 and the other in 2003. The enforcement petition alleged that the concrete cask storage pads do not conform to NRC regulations for earthquake stability, specifically 10 C.F.R. §§ 72.212(b)(2)(i)(B) and 72.212(b)(3), and therefore, pose a hazard in case of an earthquake.

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<sup>3</sup> Our discussion of the 2.206 petition and NRC's handling of it derives from DD-07-02, 65 NRC 365 (2007), which we have attached to this motion.

A few weeks after filing their petition, petitioners' representatives participated in a telephone conference call with NRC's Petition Review Board to discuss the petition. The NRC transcribed the teleconference and treated it as a supplement to the petition. During the conference call petitioners asked the Petition Review Board for additional time to provide supplemental information, which the Board agreed to, but petitioners never submitted additional information.

Shortly thereafter, the NRC sent petitioners a letter accepting the petition for further review (in part), insofar as it raised concerns about the slope stability analysis for the concrete pad constructed in 2003. That issue was already under NRC review at the time the petition was submitted, since the NRC had identified it as an unresolved item in an NRC inspection report in 2004. The NRC did not accept for further review the other issues petitioners raised because the NRC staff had already evaluated and resolved those issues.

### **C. Director's Decision 07-02**

As part of its review, the NRC staff instructed NMC to complete a revised slope analysis for the 2003 concrete pad. NMC's analysis addressed the unresolved slope stability issue as well as confirmed the stability of the 2003 pad for the possible use of a cask design heavier than that which was in use.

The NRC staff reviewed NMC's evaluation and concluded that: (1) the soil

properties in the vicinity of the 2003 ISFSI storage pad are adequate for the use in the design of the pad; (2) NMC's revised evaluation appropriately considered the weight of the storage pad, the weight of a possible heavier cask system, and the *in situ* soil properties, in response to an earthquake; and (3) the analysis, results, and conclusions in the new NMC evaluation demonstrate that the slope stability analysis for the 2003 ISFSI pad is adequate to support the placement of existing casks and additional casks of heavier design.

Upon completing its analysis, the NRC issued Director's Decision 07-02 addressing the 2.206 petition. The Director's Decision found that the concerns raised in the 2.206 petition had been resolved in the course of NMC's and NRC's re-evaluation, so that no further action was needed. Accordingly, the Director's Decision 07-02 denied the 2.206 request for enforcement action halting Palisades' use of the two ISFSI concrete pads. The Commission did not act on the Director's Decision, so after 25 days it became final agency action. *See* 10 C.F.R. § 2.206(c)(1).

## **ARGUMENT**

### ***The NRC's Refusal to Institute Discretionary Enforcement Is Unreviewable***

#### ***A. Heckler v. Chaney Establishes a Presumption of Unreviewability***

In *Heckler v. Chaney*, the Supreme Court established a presumption that an agency's refusal to exercise its enforcement authority is action "committed to agency discretion by law" and hence not reviewable under the Administrative Procedure Act. 470 U.S. at 834-35, 838; *see* 5 U.S.C. § 701(a)(2). An agency's decision not to enforce is presumptively unreviewable because it involves "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Chaney*, 470 U.S. at 831. These factors include allocation of resources, likelihood of successful enforcement, and "whether the enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Id.*

The Court analogized regulatory non-enforcement to traditional prosecutorial discretion:

we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed."

*Id.* at 832 (quoting U.S. Const., Art. III, § 3).

***B. NRC 2.206 Denials Are Unreviewable Under Heckler v. Chaney***

After *Heckler v. Chaney*, every court of appeals, including this Court, that

has considered an NRC denial of a 2.206 enforcement petition has found the denial unreviewable.<sup>4</sup>

In *Safe Energy*, this Court said that a “section 2.206 request falls squarely within the category of ‘enforcement’ actions held presumptively unreviewable by [*Heckler v. Chaney*].” 866 F.2d at 1477; accord *Nuclear Info. Res. Serv.*, 969 F.2d at 1178.<sup>5</sup> This is because Congress has not “provided guidelines for the agency to follow in exercising its enforcement powers.” See *Chaney*, 470 U.S. at 832-33. Rather, as the Seventh Circuit noted in *Arnow*, “Congress has entrusted the NRC with wide, unreviewable discretion in the area of agency enforcement.” 868 F.2d at 234. The NRC’s general statutory mandate to protect health and safety does not make NRC denials of 2.206 enforcement petitions reviewable, and neither do substantive requirements in the NRC’s own regulations. See *Arnow*, 868 F.2d at

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<sup>4</sup> See cases cited on page 1, *supra*. This Court has also found unreviewable an array of non-enforcement decisions by other government agencies. See, e.g., *Ass’n of Irrigated Residents v. EPA*, No. 05-1177, etc., 2007 WL 2033262 (D.C. Cir., July 17, 2007); *Drake v. FAA*, 291 F.3d 59, 69-72 (D.C. Cir. 2002); *Block v. SEC*, 50 F.3d 1078, 1081-85 (D.C. Cir. 1995).

<sup>5</sup> In *Nuclear Information Resource Service*, this Court indicated that when the NRC considers a 2.206 petition as “part of the licensing process” the presumption of the unreviewability may not apply. 969 F.2d at 1178. But the Court reiterated that denials of 2.206 *enforcement* petitions remain unreviewable: “[T]he Commission ... uses § 2.206 as a vehicle for entertaining requests for enforcement actions where, of course, the petitions do fall within the unreviewability presumption of *Heckler v. Chaney*.” *Id.*



233, 235-36; *Safe Energy*, 866 F.2d at 1478-79; *Mass. Pub. Interest Research Group*, 852 F.2d at 17-18.

Neither the Atomic Energy Act nor any NRC regulation “defines *how* the NRC’s [enforcement] decision must be reached or mandates which action the NRC must take.” *Arnow*, 868 F.2d at 235. The Atomic Energy Act gives the NRC itself, not reviewing courts, discretion to decide whether to issue orders, seek injunctions, impose civil penalties, or take other action. *See, e.g.*, 42 U.S.C. §§ 2073, 2201, 2236, 2280.

Allowing parties outside an agency to determine when an agency must bring an enforcement action would inevitably entangle reviewing courts in the agency’s internal operations and resource allocations and would involve technical and prudential judgments lying largely outside the expertise of courts. By placing initiation of enforcement procedures within the agency, Congress left the decision of when and whether they are warranted to the institutional actor best equipped to make it – here, the NRC – based on the agency’s resources and priorities. *See Chaney*, 470 U.S. at 831.

The present case is indistinguishable in principle from *Safe Energy*, *Arnow*,

and other similar cases.<sup>6</sup> In those cases, as here, petitioners filed unsuccessful 2.206 petitions demanding NRC enforcement action against alleged violators of NRC safety regulations. The reviewing courts invoked *Chaney*, declined to undertake a full-scale merits inquiry into the NRC's 2.206 decision, and dismissed the petitions for review. The same result should obtain here.

### ***C. The NRC Did Not “Abdicate” Its Statutory Responsibilities***

Pointing to a footnote in *Chaney*, this Court in *Safe Energy* suggested that it might undertake judicial review of an NRC denial of a 2.206 petition if the denial amounted to a complete “abdication” of the agency’s statutory duty “to ensure adequate protection of the public health and safety.” *Safe Energy Coal.*, 866 F.2d at 1477 (citing *Chaney*, 470 U.S. at 833 n.4; *Union of Concerned Scientists v. NRC*, 824 F.2d 108, 120 (D.C. Cir. 1987)). The *Chaney* footnote stated that judicial review of an agency’s decision not to take enforcement action “might” be available where 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.* (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973)(*en banc*)).

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<sup>6</sup> See also *Riverkeeper*, 359 F.3d 156; *Mass. Pub. Interest Research Group*, 852 F.2d 9.

Nothing in the NRC's 2.206 decision here remotely suggests that the agency is pursuing a "general policy" of ignoring the threat of earthquakes to ISFSIs. On the contrary, it is apparent from the face of the 2.206 decision that the NRC listened to petitioners' concerns about earthquakes at the Palisades ISFSI, directed its regulated licensee to re-evaluate possible problem areas, and reached a reasoned safety judgment. *See* DD-07-02, 65 NRC at 366-69.

Petitioners' mere disagreement with the NRC's ultimate safety findings is not the type of "extreme" circumstance contemplated by the *Chaney* footnote. "Real or perceived inadequate enforcement...does not constitute a reviewable abdication of duty." *Texas v. U.S.*, 106 F.3d 661, 667 (5<sup>th</sup> Cir. 1997). If it did, *Chaney*'s "abdication" footnote would "devour" the non-reviewability rule. *See Riverkeeper*, 359 F.3d at 169. No court of appeals has ever found an agency to have "abdicated" its responsibilities within the meaning of the *Chaney* footnote. *See Riverkeeper*, 359 F.3d at 170 n.17. This case surely should not be the first.<sup>7</sup>

#### ***D. Summary Disposition is Warranted in this Case***

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<sup>7</sup> Claims of NRC "abdication" are routinely made in 2.206-based lawsuits against the NRC – and routinely rejected. *See Riverkeeper*, 359 F.3d at 166-71; *Arnow*, 868 F.2d at 236; *Safe Energy*, 866 F.2d at 1477; *Mass. Pub. Interest Research Group*, 852 F.2d at 19.

Overwhelming precedent makes clear that NRC denials of 2.206 petitions are not judicially reviewable.<sup>8</sup> Courts have left no doubt about the matter. Therefore, this Court need not await full merits briefs and oral argument, but rather should grant our motion to dismiss at the threshold - - as this Court has regularly done in other enforcement denial cases governed by *Heckler v. Chaney*. See, e.g., *Parents Television Council, Inc. v. FCC*, No. 04-1263, 2004 WL 2931357 (D.C. Cir. Dec. 17, 2004); *Hassig v. EPA*, No. 02-1001, 2002 WL 1364297 (D.C. Cir. May 24, 2002).

### CONCLUSION

This petition for review seeks to overturn the NRC's denial of a 2.206 petition -- a discretionary enforcement decision unreviewable under controlling precedent of this Court and the Supreme Court. This Court should dismiss the petition for review.

Respectfully submitted,

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LISA JONES  
Attorney, Appellate Section  
Environment & Nat. Res. Div.  
P.O. Box 23795

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JOHN F. CORDES  
Solicitor

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<sup>8</sup> *Safe Energy*, 866 F.2d 1473; *Riverkeeper*, 359 F.3d 156; *Arnow*, 868 F.2d 223; *Mass. Pub. Interest Research Group*, 852 F.2d 9.

U.S. Department of Justice  
Washington, DC 20026-3795

E. LEO SLAGGIE  
Deputy Solicitor

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

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