

No. 19-1198

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION and UNITED STATES OF AMERICA,

Respondents,

HOLTEC DECOMMISSIONING INTERNATIONAL, LLC, *et al.*,

Intervenors.

**MEMORANDUM OF LAW FOR THE STATES OF NEW YORK,
CONNECTICUT, ILLINOIS, IOWA, MARYLAND, MICHIGAN,
MINNESOTA, NEW JERSEY, NEW MEXICO, OREGON,
PENNSYLVANIA, AND VERMONT AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER AND IN OPPOSITION TO THE MOTIONS TO
DISMISS**

On Petition for Review of Actions by the
U.S. Nuclear Regulatory Commission

BARBARA D. UNDERWOOD
Solicitor General

ANISHA S. DASGUPTA
Deputy Solicitor General

CAROLINE A. OLSEN
*Assistant Solicitor General
of Counsel*

(Counsel listing continues on signature pages.)

LETITIA JAMES
*Attorney General
State of New York*
28 Liberty Street
New York, NY 10005
(212) 416-6184

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Sammy Feldblum, <i>All Spent Nuclear Fuel in the U.S. Will Soon End Up in One Place</i> , Nat'l Geographic (July 30, 2019), https://www.nationalgeographic.com/environment/2019/07/new-mexico-nuclear-waste-storage/	13
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INTRODUCTION & INTERESTS OF AMICI

The Nuclear Regulatory Commission (NRC) is responsible for regulating nuclear power plants, including Pilgrim Nuclear Power Station in the Commonwealth of Massachusetts. In September 2019, NRC transferred Pilgrim’s license to Holtec International and Holtec Decommissioning International, LLC (collectively, “Holtec”) without affording the Commonwealth a hearing to address its significant concerns about Holtec’s ability to successfully oversee Pilgrim’s upcoming decommissioning. Amici States—New York, Connecticut, Illinois, Iowa, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, and Vermont—submit this brief to support the Commonwealth’s opposition to the motions to dismiss its petition for review.

Many of amici States contain nuclear facilities that, like Pilgrim, are or will soon be undergoing decommissioning: a long-term and costly process that poses significant public health and environmental risks, including possible exposure of workers and the public to harmful levels of radiation and other toxins. Those risks are exacerbated when investors with minimal experience in decommissioning try to oversee the

decommissioning process at a number of different plants at a profit—the circumstance presented here.¹ Given the stakes, amici States have significant interests in ensuring that NRC complies with federal laws permitting States to participate in licensing decisions, including those that directly affect the decommissioning of nuclear power plants.

The Atomic Energy Act (AEA), 42 U.S.C. § 2011 et seq., and NRC rules grant States the right to participate in NRC proceedings to represent their unique sovereign interests. In February 2019, the Commonwealth requested a hearing on the application of Entergy Nuclear Operations, Inc. (Entergy) to transfer ownership of Pilgrim to Holtec—a limited liability company with no assets. The application sought to eliminate a longstanding requirement that Pilgrim’s license holder maintain a \$50 million contingency fund; it also requested permission for Holtec to use Pilgrim’s \$1.3 billion decommissioning trust fund (DTF) for expenses unrelated to decommissioning. In August 2019, without ruling

¹ See Thomas Zambito, *Dismantling Nuclear Plants Is a Gold Mine For Some, But at What Risk to You?*, Rockland/Westchester Journal News (June 20, 2019) (internet). For sources available on the internet, full URLs appear in the table of authorities.

on the Commonwealth's hearing request, NRC approved the application effective immediately.

The Commonwealth's petition addresses issues of vital concern to amici States. NRC's refusal to hear from the Commonwealth before approving a license transfer that so significantly altered the license terms violates the AEA, NRC rules, and the Administrative Procedure Act, 5 U.S.C. § 706. Moreover, the Pilgrim license transfer exacerbates the serious risks of decommissioning by permitting an entity with no decommissioning experience and no independent assets to assume control of Pilgrim's decommissioning and immediately draw down Pilgrim's DTF.

This Court should address the merits of the Commonwealth's petition and deny the motions to dismiss. NRC's decision to approve the license is final and reviewable, because it had the significant legal effect of permitting Holtec to begin decommissioning at Pilgrim. And the Commonwealth effectively exhausted all avenues available to it before the NRC; the agency simply refused to engage.

ARGUMENT

POINT I

DECOMMISSIONING A NUCLEAR ENERGY FACILITY IS A HIGH-RISK, LONG-TERM, COSTLY, AND UNPREDICTABLE PROCESS

A. Decommissioning Presents Serious Environmental and Health Risks That Can Be Unpredictable and Costly, and Can Extend Indefinitely Into the Future.

When a nuclear power plant retires, the reactor must be permanently shut down, the spent nuclear fuel—highly radioactive nuclear waste—must be removed and safely stored, the facility must be deconstructed, and the site must be restored to a condition that is safe for other purposes.² Decommissioning is the process of reducing residual radioactivity at a nuclear facility to a level that permits the release of the site for alternative use. 10 C.F.R. § 50.2. It requires the decontamination and dismantling of equipment and facilities, the demolition of buildings and structures, and the management of the resulting radioactive and other hazardous waste—among other things.³

² U.S. Energy Info. Admin., *Decommissioning Nuclear Reactors Is a Long-Term and Costly Process* (Nov. 17, 2017) (hereafter EIA) (internet).

³ Int'l Atomic Energy Agency, Safety Reports Series No. 77, *Safety Assessment for Decommissioning* 17 (2013) (hereafter IAEA) (internet).

Decommissioning is costly and entails unpredictable expenses; and depending on the method employed, it may not be completed for decades after a power plant is shut down.⁴ At Connecticut Yankee, decommissioning took approximately ten years and cost \$893 million. Wisconsin's Kewaunee Nuclear Power Plant shut down in 2013, and decommissioning is not expected to be finished until at least 2073, at a total cost of nearly \$1 billion.⁵ NRC estimates that decommissioning the nation's 104 nuclear power plants will cost from \$438 million to over \$1 billion per reactor facility.⁶

Actual costs have exceeded estimates at nearly every decommissioned facility. At Connecticut Yankee, for example, previously undiscovered radiological contamination caused decommissioning costs to be nearly

⁴ *Id.* at 1, 17-18, 21, 56, 70.

⁵ EIA, *supra*.

⁶ Office of Nuclear Reactor Regulation, NRC, *Summary Findings Resulting from the Staff Review of the 2013 Decommissioning Funding Status Reports for Operating Power Reactor Licenses*, Summary Table (Oct. 2, 2013) (internet).

double initial estimates.⁷ Other contingencies that can increase costs include a radiological incident and work-delays, including due to overhead and project management.⁸ (Addendum to Mot. to Stay (Add.) 555-564, 574-576, 582-585, 591-595.)

Decommissioning can introduce hazards that are not present when a facility is operational. Because highly toxic chemicals are frequently required to decontaminate equipment and surfaces, plants undergoing decommissioning often generate more toxic waste than operational plants, increasing the risk of soil and water contamination.⁹ Radioactive liquids and gases can be released when the facility's large structures and equipment are dismantled. Fires can be caused by the thermal cutting and decontaminating solutions needed for the decommissioning process, as well as by the storage of combustible materials. Fires can cause power loss, which can cause containment equipment or systems to fail, leading

⁷ Office of Nuclear Reactor Regulation, NRC, *Assessment of the Adequacy of 10 C.F.R. § 50.75(c) Minimum Decommissioning Fund Formula* vi, 4-23 to 4-24, 4-27 (2011) (draft) (internet).

⁸ See Christopher Maag, *Investors See Huge Profits From Old Nuclear Plants, But It Could Cost Taxpayers*, North Jersey Record (June 20, 2019) (internet).

⁹ See IAEA, *supra*, at 29, 46, 111-13.

to both on- and off-site radiation exposure.¹⁰ “At massive levels, radiation exposure can cause sudden death.” *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1258 (D.C. Cir. 2004). Even at “lower doses, radiation can have devastating health effects, including increased cancer risks and serious birth defects.” *Id.*

Substantial risks remain for as long as spent nuclear fuel is stored at a decommissioned facility.¹¹ Spent nuclear fuel remains hazardous “for time spans seemingly beyond human comprehension.” *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012) (quotation marks omitted). Spent fuel stored onsite is initially kept in swimming-pool-like structures where the fuel is submerged in cooling water. These pools are susceptible to radiological release through fires or leaks. NRC has found that a fire affecting the integrity of a spent nuclear fuel pool could have consequences comparable to those of a major reactor accident, generating a radioactive plume that causes thousands of deaths from cancer.¹²

¹⁰ *See id.* at 1, 18, 21, 25, 29, 46-47, 111-13.

¹¹ Office of Nuclear Reactor Regulation, NRC, *Technical Study of Spent Fuel Pool Accident Risk at Decommissioning Nuclear Plants* 3-1 (Feb. 2001) (internet).

¹² *See id.* at ix, 3-28 to 3-49.

Spent fuel that has been cooled in a spent fuel pool for several years can be moved to storage casks.¹³ Dry cask storage is safer than spent fuel pools, but not all facilities are equipped for such storage. Moreover, a severe accident affecting the cask's integrity—such as the dropping of a cask or a seismic event—could result in significant radioactive release.¹⁴

Recognizing the enormous risks associated with facility retirement, NRC has issued rules to ensure that licensees possess the financial and technical qualifications to oversee the retirement process. *See, e.g.*, 10 C.F.R. §§ 50.75, 50.82, 51.53, 51.95. For example, NRC requires licensees to show they will have sufficient funds to cover the estimated costs of decommissioning. *See id.* § 50.75(e). To satisfy this requirement, nearly all licensees require decommissioning trust funds (DTFs). *See Decommissioning Trust Provisions*, 67 Fed. Reg. 78,332, 78,342 (Dec. 24, 2002).

NRC has historically regulated DTFs to ensure they are sufficient to cover the costs of decontamination. Licensees are prohibited from

¹³ *See* NRC, *Dry Cask Storage* (last updated May 6, 2019) (internet).

¹⁴ *See* Office of Nuclear Material Safety & Safeguards, NRC, *Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel: Final Report, Volume 1* 4-89 (Sept. 2014) (internet); NRC, *Special Inspection Activities Regarding Cask Loading Misalignment* (last updated Dec. 18, 2019) (internet).

using DTFs for anything but “legitimate decommissioning activities.” 10 C.F.R. § 50.82(a)(8)(i)(A). DTFs cannot be used to cover the costs of managing spent fuel. *See* General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24,018, 24,019 (June 27, 1988). NRC requires separate financial assurances to ensure licensees can cover the costs of spent fuel management from a different funding source. 10 C.F.R. §§ 50.54(bb), 50.82(a)(8)(vii).

When a licensee cannot fully cover the costs associated with facility decommissioning, States and their citizens may end up funding the work needed to prevent the facility from posing risks to public health and the environment for hundreds if not thousands of years.

B. The Pilgrim License Transfer Exacerbates the Risks Posed by Pilgrim’s Decommissioning.

Holtec has never decommissioned a nuclear facility. Nevertheless, it may soon be responsible for decommissioning six nuclear reactors, including Pilgrim. Furthermore, Holtec is a limited liability company with no independent assets that plans to rely exclusively on Pilgrim’s DTF to cover the costs of decommissioning, spent fuel management, and site

restoration.¹⁵ According to Holtec's own estimates at filing, Holtec's planned withdrawals from the Pilgrim DTF will leave the trust with only \$3.6 million by 2063 to cover the costs of spent fuel management; and it is almost certain that the Department of Energy (DOE) will not be able to take title to the spent fuel at that point. DOE's establishment of a permanent repository for spent fuel has been perpetually delayed, and the earliest possible year in which a repository will be able to accept nuclear waste is decades away.¹⁶ (*See also* Add. 625.)

Unexpected costs are almost certain to arise because Holtec's cost estimates were based on historical data and do not account for unanticipated site conditions or events. Indeed, since the August 2019 license transfer, Holtec has extended the projected timeline for site restoration by three years—a cost not included in Holtec's submissions to

¹⁵ Although Holtec asserts that it may recover some funds from the Department of Energy, Holtec has not committed to using those funds for decommissioning as opposed to its own profit, nor is there any guarantee that such funds will be sufficient to cover the costs of unexpected contingencies. (*See* Intervenor's Resp. to Mot. for Stay & Affirmative Mot. to Dismiss Pet. (Intervenor's Br.) at 21-22.)

¹⁶ *See* U.S. Gov't Accountability Office, *Disposal of High-Level Nuclear Waste* (internet).

NRC.¹⁷ (Add. 50, 254-256, 268-270, 492, 521-522, 560.) The Commonwealth has estimated the additional costs for this delay alone may be as high as \$100 million, dwarfing the \$3.6 million surplus estimated by Holtec in its NRC filings and creating a funding deficit. Based on the submissions to date, it is unclear how Holtec will be able to cover this shortfall.

POINT II

AMICI STATES HAVE A VITAL INTEREST IN PARTICIPATING IN NRC PROCEEDINGS THAT AFFECT DECOMMISSIONING

Many amici States host or are in proximity to nuclear facilities that are currently retiring or soon will be, and thus face many of the same risks arising from Pilgrim's decommissioning. Currently, there are twenty-one power plants in twelve States with ongoing decommissioning.¹⁸ Other amici States are likely to host nuclear power plants that are decommissioned in the future, or they may become hosts to waste that is a byproduct of decommissioning.

¹⁷ Compare Add. 490 (projecting site restoration to be complete in 2024), *with* Amici's Addendum 4 (projecting site restoration to be completed in 2027).

¹⁸ NRC, *Locations of Power Reactor Sites Undergoing Decommissioning* (last updated Nov. 5, 2019) (internet).

Amici therefore share the Commonwealth's concerns about the financial and technical capabilities of the entities handling decommissioning at these facilities. Entergy, the current licensee of New York's Indian Point Power Plant, recently asked NRC to approve a license transfer to Holtec, which proposes to conduct Indian Point's three-reactor decommissioning starting in 2021.¹⁹ New York expects Holtec to request an exemption permitting it to use Indian Point's DTF to cover the costs of decommissioning, fuel management, and site restoration. Although Holtec has claimed that the \$2.1 billion currently in the trust is sufficient to cover these costs, it has not submitted the required decommissioning reports that would explain how it can oversee the entire retirement process within that budget, and the materials it has provided to the State are so incomplete and redacted that the State's experts cannot replicate Holtec's conclusion that the trust's funds are sufficient.

Connecticut hosts four nuclear reactors, two of which have been retired, and these reactors have generated several hundred tons of spent

¹⁹ See Entergy Newsroom, *Entergy Agrees to Post-Shutdown Sale of Indian Point Energy Center to Holtec International* (Apr. 16, 2019) (internet).

nuclear fuel that will need to be stored, potentially indefinitely. In Pennsylvania, Three Mile Island Nuclear Generating Station Unit 2 (TMI Unit 2) has been in “post-defueling monitored storage” after a partial meltdown of the reactor core in March 1979. The decommissioning of TMI Unit 2 poses unique challenges that will likely exceed the \$800 million decommissioning trust fund. For example, cleaning up the radiological contamination alone is estimated to cost \$1.3 billion. And although New Mexico does not host a reactor, Holtec is seeking a license from NRC to open an interim storage facility there to store up to 120,000 tons of nuclear waste from decommissioned plants across the country, potentially for decades.²⁰ As with other amici, New Mexico has a strong interest in ensuring that NRC considers the State’s sovereign interests in its licensing decision.

Congress has recognized amici’s vital interest in NRC proceedings affecting decommissioning by guaranteeing States the opportunity to participate in NRC decision-making, including licensing decisions. *See*

²⁰ *See* Sammy Feldblum, *All Spent Nuclear Fuel in the U.S. Will Soon End Up in One Place*, Nat’l Geographic (July 30, 2019) (internet).

Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 210 n. 21 (1983).

The AEA requires NRC to notify affected States when it receives a license-transfer application, and to provide States with a “reasonable opportunity” to “offer evidence, interrogate witnesses, and advise the Commission as to the application.” *See* 42 U.S.C. § 2021(*l*).²¹ The AEA also mandates that NRC consult with States when assessing whether a license amendment poses “no significant hazards consideration.” *See* 42 U.S.C. § 2239(a)(1)(A). Congress thereby sought to ensure that before making a decision, NRC would “listen to and consider any comments provided by the state official designated to consult with the NRC” regarding the potential hazards of a proposed license transfer. *See* H.R. Rep. No. 97-884, at 39 (1983) (Conf. Rep.).

²¹ *See also* NRC, *Public Involvement in Decommissioning* (Aug. 24, 2018) (internet) (describing “public involvement in decommissioning activities” as “a cornerstone of strong, fair regulation of decommissioning”).

POINT III

NRC UNLAWFULLY DEPRIVED THE COMMONWEALTH OF ITS RIGHT TO A HEARING

Given the substantial risks posed by decommissioning, amici States have a substantial interest in NRC's compliance with the federal laws granting States a meaningful role in NRC proceedings. NRC's actions here violated those requirements and must therefore be set aside. *See* 5 U.S.C. § 706(2)(A); *Shieldalloy Metallurgical Corp. v. NRC*, 624 F.3d 489, 492-93 (D.C. Cir. 2010).

In any proceeding to amend or transfer a license to operate a nuclear power facility, NRC must “grant a hearing upon the request of any person whose interest may be affected by the proceeding.” 42 U.S.C. § 2239(a)(1)(A). NRC generally must hold this hearing prior to making a decision, unless NRC first determines that a proposed “amendment involves no significant hazards consideration.” *Id.* § 2239(a)(2)(A). When Congress promulgated this provision, it cautioned NRC to use its pre-hearing authority “carefully.” *See* H.R. Rep. No. 97-884, at 37.

NRC has generically determined that an amendment to the license of an energy facility involves “no significant hazards consideration” when it “does no more than conform the license to reflect the transfer.”

10 C.F.R. § 2.1315(a). A conforming license amendment, however, simply changes references in the license “to entities or persons that no longer are accurate following [an] approved transfer.” Streamlined Hearing Process for NRC Approval of License Transfers, 63 Fed. Reg. 66,721, 66,727 (Dec. 3, 1998). When license amendments substantively alter the license terms, the generic “no significant hazards” determination is inapplicable.²² *Id.* at 66,727-28; *see also* 10 C.F.R. § 2.1315(b).

The license amendments here go beyond merely conforming the license to reflect a corporate name change. In particular, the amendment eliminates the requirement that Pilgrim’s licensee maintain a \$50 million contingency fund for unexpected costs. (Add. 14, 200-201, 517-519.) Because NRC improperly invoked the generic “no hazards determination” and deprived the Commonwealth of its right to a pre-transfer hearing, NRC’s decision to approve the license amendment must be set aside. *See*

²² Holtec suggests (Intervenors’ Br. at 26) that a license amendment poses “no significant hazards” so long as the amendment does not affect the operation of the facility. It cannot be correct that no license amendment during decommissioning—i.e., after the plant is no longer operational—could ever pose a “significant hazard,” no matter how unqualified the licensee.

National Env'tl. Dev. Ass'n's Clean Air Project v. EPA, 752 F.3d 999, 1009 (D.C. Cir. 2014).

POINT IV

NRC'S ACTIONS ARE REVIEWABLE NOW

There is no merit to NRC's and intervenors' various arguments for delaying judicial review of the merits of the Commonwealth's petition.

A. The Challenged NRC Actions Are Final.

The Hobbs Act authorizes appellate courts to review “final orders” issued by the NRC. 28 U.S.C. § 2342(4); 42 U.S.C. § 2239(b). An order is final for Hobbs Act purposes “if it imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.” *Natural Res. Def. Council, Inc. v. NRC*, 680 F.2d 810, 815 (D.C. Cir. 1982) (quotation marks omitted).

NRC's August 2019 approval of the Pilgrim license transfer and associated amendments gave Holtec immediate control over Pilgrim's operations and DTF—and authority to spend some \$53 million in 2019 and an additional \$84 million in 2020. In similar cases, courts have found NRC orders to be final. *See, e.g., Massachusetts v. NRC*, 878 F.2d 1516,

1520 (1st Cir. 1989); *County of Rockland v. NRC*, 709 F.2d 766, 775 (2d Cir. 1983). (See also Massachusetts's Opp. to Resp'ts' & Intervenor-Resp'ts' Mots. to Dismiss (Mass. Opp.) at 9-11.)

NRC wrongly argues that its actions were not final because the Commission remains free to rescind or modify the terms of the transfer. (See Federal Resp'ts' Combined Mot. to Dismiss & Resp. to Pet'r's Stay Mot. (NRC Br.) at 12-13.) An agency order “may be final even if it is not the last that may be entered.” *Natural Res. Def. Council*, 680 F.2d at 815-16 (quoting *Ecology Action v. Atomic Energy Comm'n*, 492 F.2d 998, 1000 (2d Cir. 1974)). If NRC were correct that the possibility of further NRC review vitiates finality, most of NRC's decision-making would be unreviewable. “Given the nature of [NRC]'s statutory mandate, every order is subject to reexamination as new findings are reported and exercises conducted.” *County of Rockland*, 709 F.2d at 775 n.12. (See also Mass. Opp. at 17-18.)

NRC is likewise wrong when it argues (NRC Br. at 13-14) that its actions are unreviewable because the arguments in the Commonwealth's outstanding hearing request overlap with the Commonwealth's petition to this Court. This is the only forum where the Commonwealth may

obtain review of NRC's admittedly final determination that the license amendments pose "no significant hazards consideration" and can thus go into effect immediately, *see City of Benton v. NRC*, 136 F.3d 824, 825-26 (D.C. Cir. 1998) (per curiam); *Massachusetts v. NRC*, 924 F.2d 311, 323 (D.C. Cir. 1991). (*See also* Addendum to Mass. Opp. at 91.)

B. The Commonwealth's Claims Should Not Be Dismissed for Failure to Exhaust.

Whether claims should be dismissed on exhaustion grounds is a question of judicial discretion. *See Leonard v. McKenzie*, 869 F.2d 1558, 1563 n.4 (D.C. Cir. 1989). Exercising that discretion to bar the Commonwealth's action would be both unfair and inconsistent with Congress's intent to ensure State participation in NRC proceedings. (*See also* Mass. Opp. 18-20.)

The Commonwealth exhausted every available avenue for participating in NRC's proceeding—NRC simply refused to engage. When Massachusetts learned of the proposed license transfer and requested exemptions, it promptly requested a hearing to present its concerns. Having received no ruling from NRC for nearly eight months, Massachusetts asked NRC to stay the proposed transfer for ninety days

to permit the Commonwealth, Entergy, and Holtec to complete settlement negotiations that could have obviated the need for a hearing. NRC denied the stay but did not act on the Commonwealth's outstanding petition for a hearing. (Add. 43, 69-71, 500-552.)

On August 13, 2019, NRC informed the Commonwealth that it intended to approve the license transfer and requested exemptions on August 21, 2019. The Commonwealth submitted objections five business days later. On August 22, without addressing the Commonwealth's objections or its outstanding hearing request, NRC approved the license transfer and allowed the transfer to take effect immediately. (See Add. 8-9, 12, 634-635 & n.2.) Although NRC has now ruled on the Commonwealth's request for a stay from the agency, NRC has still not acted on the Commonwealth's request for a hearing, which has been pending for nearly a year. In similar circumstances, courts have excused parties from exhaustion requirements, noting that they did everything possible and the agency simply failed to act. See, e.g., *League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 827 (9th Cir. 2018), *reh'g en banc granted*, 914 F.3d 1189 (9th Cir. 2019).

Applying the exhaustion doctrine in this case would also be inconsistent with the AEA's requirement that NRC consult with States about whether a proposed license amendment raises "no significant hazards consideration." 42 U.S.C. § 2239(a)(1)(A). Although NRC offered to consult with the Commonwealth, the Commonwealth learned before the agreed-upon call that NRC had already decided to approve the transfer and amendments. (Add. 69-71, 635.) NRC's conduct prevented Massachusetts from participating in NRC's decision-making, contrary to the goals of the AEA and the States' historic responsibility for the health and safety of their residents. NRC's failures should not be a basis for denying judicial review.

CONCLUSION

The Court should deny the motions to dismiss.

Dated: New York, New York
January 17, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

By: /s/ Caroline A. Olsen
CAROLINE A. OLSEN
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
ANISHA S. DASGUPTA
Deputy Solicitor General
CAROLINE A. OLSEN
Assistant Solicitor General
LISA M. BURIANEK
Deputy Bureau Chief,
Environmental Protection
Bureau
JOSHUA TALLENT
Assistant Attorney General
CHANNING JONES
Assistant Attorney General
of Counsel

28 Liberty Street
New York, NY 10005
(212) 416-6184

(Counsel listing continues on the next page.)

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph St.
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

BRIAN E. FROSH
Attorney General
State of Maryland
200 St. Paul Pl.
Baltimore, MD 21202

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

GURBIR S. GREWAL
Attorney General
State of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR H. BALDERAS
Attorney General
State of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Fl.
Harrisburg, PA 17120

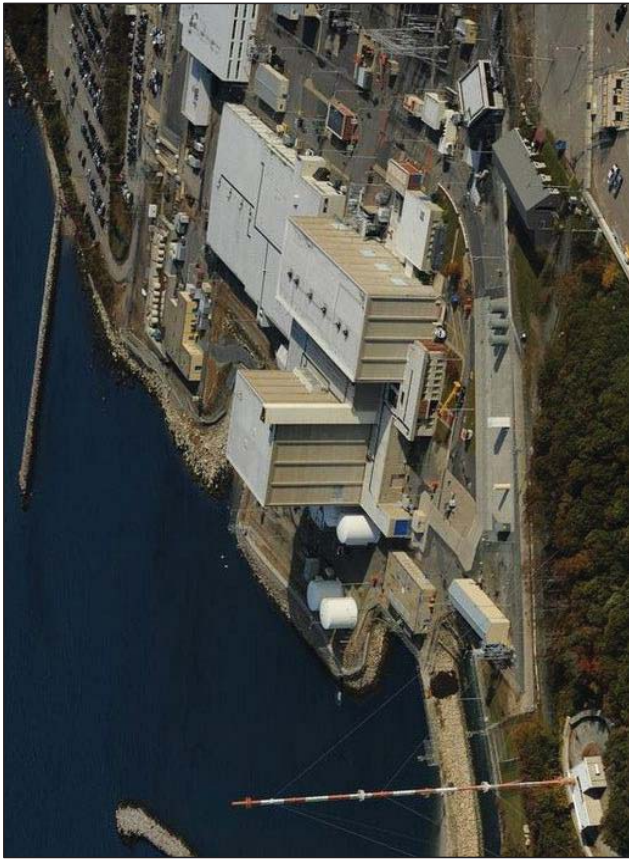
THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, William P. Ford, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 3,799 words, constituting one half of the word limit under Rule 29(a)(5) and Circuit Rule 27(c), and otherwise complies with the typeface requirements of Rules 27(d) and 32(a)(5)-(6).

/s/ William P. Ford

Addendum



Add1

Pilgrim Nuclear Decommissioning Citizens Advisory Panel

November 14, 2019





Add2

Welcome

Patrick O'Brien
Communications
and Government
Affairs Manager

John Moylan
Site Vice-President
(Acting)



Agenda

Project Overview

EPZ Update

Questions?





Project Overview



PILGRIM PROJECT – CURRENT WATERFALL SCHEDULE for PLANNING PURPOSES Only

Task	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028 +
1. ISFSI	ENGINEER/ PERMITTING	PAD CONSTRUCTION FUEL CAMPAIGN								
2. SITE CHARACTERIZATION		SITE CHARACTERIZATION								
3. PREPARATION FOR DEMOLITION		UTILITY REDUCTIONS + SITE MODIFICATIONS			MODIFICATIONS FOR DEMOLITION					
4. REACTOR VESSEL SEGMENTATION		RFF CLEARANCE	RVI SEGMENTATION	FINAL INTERNALS & RPV SEGMENTATION						
5. DEMOLITION				DEMOLITION OF OUT BUILDINGS		WASTE ABATEMENT	DEMOLITION OF REACTOR AND TURBINE BUILDINGS			
6. WASTE MANAGEMENT				MIXED WASTE / RADIOLOGICAL WASTE			DEMO WASTE			
7. SITE RESTORATION								FINAL STATUS SURVEY EARTHWORK	RESTORATION	ISFSI ONLY





Project Overview - ISFSI



Time Frame: 2019 - 2022, 2027-Fuel Removal from Site

- Design, Engineering, Permitting: 2019
- Pad Construction: Fall 2019 - Summer 2020
- Fuel Movement: Spring 2020 - Early 2022
- Begin ISFSI Only Operation: Late 2027

Add5





Project Overview – Site Characterization



Time Frame: 2019 - 2020

- Bid in Process
- Site Characterization Study: December 2019 - December 2020

Add6





Project Overview – Site Modifications



Time Frame: 2019 - 2025

- Reduce electrical loads, remove hazards like oil, abandon systems as they are no longer needed: 2019 - 2022
- Prepare modifications for demolition activities including cold and dark mods, radiological area reduction, ventilation, power, fire, and lighting modifications: 2022 - 2025

Add7





Project Overview – Reactor Segmentation



Time Frame: 2019 - 2023

- Procure and secure tooling: 2019 - 2020
- Prepare refuel floor for work: 2020
- Initial reactor vessel internals segmentation: 2020 - 2021
- Additional reactor vessel internal and reactor pressure vessel segmentation: 2022 - 2024

Add8





Project Overview – Demolition



Time Frame: 2020 - late 2026

- Demolition of out buildings: 2020 - 2026
- Waste abatement: 2024
- Demolition of reactor and turbine building: 2025 - 2026

Add9





Project Overview – Demolition Waste Generation & Shipment



Time Frame: 2020 - 2026

Add10

- Demolition Waste: 2024 - 2026
- Radiological Waste: 2020 - 2026





Project Overview – Site Restoration



Time Frame: 2026 - 2027*

- Final Survey: 2026 - 2027
- Earthwork: mid-2026 - mid-2027
- Final restoration: 2027

*Final site restoration standards yet to be finalized





Add12

EPZ Update





EPZ Update

- NRC issued exemption to reduce EPZ to site boundary on Nov. 4
- Continue to work on agreements for 2020 with communities
- Plymouth agreement finalized in Sept 2019
- Agreed with Taunton on Nov. 13 for final e-plan grant
- Have met with Bridgewater, Kingston, Marshfield
- Meeting next week with Carver, Duxbury, Braintree to be scheduled
- Successful final EPZ Siren Test conducted today

Add13



CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to D.C. Circuit Rules 18 and 28, amici curiae—the States of New York, Connecticut, Illinois, Iowa, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Pennsylvania, and Vermont, certify that:

A. Parties and Amici

Except for the above-listed amici curiae, all parties and intervenors appearing before this Court are listed in the Commonwealth of Massachusetts's Motion for a Stay Pending Appellate Review (Doc. No. 1812979). Amici are not aware of other amici intending to file.

B. Ruling Under Review

Reference to the rulings under review in this proceeding appear in the Commonwealth of Massachusetts's Motion for a Stay Pending Appellate Review (Doc. No. 1812979).

C. Related Cases

The final agency actions at issue in this proceeding have not been previously reviewed by this or any other court. Counsel for amici curiae are not aware of any related case within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Dated: January 17, 2020

Respectfully submitted,

LETITIA JAMES

Attorney General

State of New York

By: /s/ Caroline A. Olsen

CAROLINE A. OLSEN

Assistant Solicitor General

BARBARA D. UNDERWOOD

Solicitor General

ANISHA S. DASGUPTA

Deputy Solicitor General

CAROLINE A. OLSEN

Assistant Solicitor General

LISA M. BURIANEK

Deputy Bureau Chief,

Environmental Protection

Bureau

JOSHUA TALLENT

Assistant Attorney General

CHANNING JONES

Assistant Attorney General

of Counsel

28 Liberty Street

New York, NY 10005

(212) 416-6184

(Counsel listing continues on the next page.)

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm St.
Hartford, CT 06106

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph St.
Chicago, IL 60601

THOMAS J. MILLER
Attorney General
State of Iowa
1305 E. Walnut Street
Des Moines, IA 50319

BRIAN E. FROSH
Attorney General
State of Maryland
200 St. Paul Pl.
Baltimore, MD 21202

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

GURBIR S. GREWAL
Attorney General
State of New Jersey
Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

HECTOR H. BALDERAS
Attorney General
State of New Mexico
408 Galisteo St.
Santa Fe, NM 87501

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Fl.
Harrisburg, PA 17120

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609-1001

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Court's CM/ECF system on January 17, 2020. I certify that all parties and counsel of record in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 17, 2020
New York, NY

/s/ Caroline A. Olsen