NO. 20-70899

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Public Watchdogs,

Petitioner,

v.

U.S. Nuclear Regulatory Commission and United States of America,

Respondents,

Southern California Edison Company,

Intervenor.

On Petition for Review of an Order of
the U.S. Nuclear Regulatory Commission

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Public Watchdogs states that it is a non-stock, nonprofit California corporation with tax exempt status pursuant to IRS Code § 501(c)(3). As of the date of this filing, Public Watchdogs does not have a parent corporation and no person or entity owns any part of it.

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JURISDICTIONAL STATEMENT

This case concerns Respondent United States Nuclear Regulatory Commission's ("NRC") arbitrary and capricious denial of Petitioner Public Watchdogs' Petition to Immediately Suspend Decommissioning Operations at San Onofre Nuclear Generating Station ("SONGS") Units 2 and 3, which Public Watchdogs filed pursuant to 10 C.F.R. § 2.206 (the "2.206 Petition").

Public Watchdogs filed the 2.206 Petition with the NRC on September 24, 2019, and properly supplemented the 2.206 Petition on January 21, 2020. [ER 1.][1] The NRC had subject matter jurisdiction over the 2.206 Petition pursuant to 42 U.S.C. § 2201 and 10 C.F.R. § 2.206, which provides: "Any person may file a request to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper."

The NRC issued its decision denying the 2.206 Petition on February 26, 2020. [ER 1-5.] The NRC's decision on the 2.206

[1] Citations to "ER" refer to Petitioner's Excerpts of Record, which are being filed contemporaneously with this Brief in accordance with Ninth Circuit Rule 17-1.3.

Petition became final on March 23, 2020. *See* 10 C.F.R. § 2.206(c)(1); *see also Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 164 (2d Cir. 2004) (holding that NRC director's decision on 2.206 petition "became final and therefore the decision of the NRC twenty-five days after its issuance"). On March 31, 2020, Public Watchdogs timely filed a Petition for Judicial Review in this Court. [Dkt. 1.][2]

This Court has jurisdiction under 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239. Together, these statutes provide that the United States Courts of Appeals have exclusive jurisdiction to review all final orders of the NRC concerning the granting, suspending, revoking, or amending of any license. *See* 28 U.S.C. § 2342(4); 42 U.S.C. § 2239; *see also Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). This initial subject-matter jurisdiction extends to the NRC's final orders denying 2.206 petitions. *See Riverkeeper, Inc.*, 359 F.3d at 164.

[2] "Dkt." refers to the Docket Entries in this case.

STATEMENT OF ISSUES

(1) Whether the NRC has abdicated its statutory responsibilities by adopting a general policy of allowing nuclear power plant licensees to implement decommissioning plans predicated on the knowingly false assumption that all spent nuclear fuel stored at on-site facilities will be transferred to a non-existent permanent repository in the relatively near future.

(2) Whether the NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC entirely failed to consider or address Public Watchdogs' primary argument concerning the false assumptions underlying the SONGS decommissioning plan.

(3) Whether the NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own policies regarding long-term and indefinite storage of spent nuclear fuel.

(4) Whether the NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own regulations, which require spent nuclear fuel in on-site storage facilities to be readily retrievable for further processing or disposal.

STATEMENT OF THE CASE

I. The Intractable Problem: Long-term Storage and Management of Spent Nuclear Fuel

Spent nuclear fuel "poses a dangerous, long-term health and environmental risk. It will remain dangerous for time spans seemingly beyond human comprehension." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012). Despite the incalculable hazards posed by spent nuclear fuel, long-term storage and management of spent nuclear fuel has proven to be an intractable, Sisyphean task in the United States. Decades-long efforts by Congress, federal agencies, and numerous stakeholders to construct a deep geological permanent repository for the country's ever-growing stockpile of spent nuclear fuel have been unsuccessful, and no viable plan currently exists for a permanent storage solution.

Due to the lack of a centralized permanent repository, millions of pounds of deadly spent nuclear fuel are currently stored on-site at nuclear power plants across the country. Although it is well known in government and the nuclear power industry that there is no permanent storage solution on the horizon, the NRC routinely permits nuclear power plant licensees to store spent

nuclear fuel in "temporary" on-site storage installations based on the arbitrary and plainly false assumption that this hazardous waste will be transferred to a permanent repository in the relatively near future. [ER 19, 21, 25, 77, 82, 99.] Indeed, the NRC has adopted a feckless general policy of allowing licensees to store spent nuclear fuel indefinitely at locations throughout the United States without any plan or strategy for managing or funding such indefinite storage operations. *Id.*

II. The Long History of Operational Failures at SONGS

SONGS began Operating as a nuclear electric generating station in the 1960s. [ER 44.] Throughout its time as an operational nuclear power plant, SONGS was marred by numerous instances of poor safety and regulatory compliance, which ultimately contributed to the cessation of operations at the site. The SONGS compliance debacles included the backward installation of a 420-ton nuclear reactor vessel, and the unlicensed replacement of steam generators with defective substitutes. [ER 45.] These failures were not mere technical violations—the unlicensed steam generators ultimately malfunctioned and leaked

deadly radioactive steam into the environment. As a result of these and other operational errors, in June 2013, Intervenor Southern California Edison and the other SONGS licensees ("Licensees") submitted written certification to the NRC that they were permanently ceasing operations and intended to commence decommissioning of the site. [ER 67.]

III. The Falsely Predicated SONGS Decommissioning Plan

On September 23, 2014, Licensees submitted their decommissioning plan to the NRC, including a Post-Shutdown Decommissioning Activities Report ("PSDAR"), an Irradiated Fuel Management Plan ("IFMP"), and a Site Specific Decommissioning Cost Estimate ("DCE"). [ER 67-105.] The PSDAR provided a general overview of the timetable for the decommissioning, decontamination, restoration, and license termination activities at the SONGS site. [ER 67-77.] The PSDAR specified that Licensees would begin transferring spent nuclear fuel from wet pools to dry storage in the SONGS Independent Spent Fuel Storage Installation ("ISFSI") in 2014, and complete the transfer by June 2019. [ER 77.] Thereafter, Licensees proposed to store the spent nuclear fuel in the

SONGS ISFSI during decommissioning from June 2019 until December 2031. *Id.* Finally, Licensees proposed to store the spent nuclear fuel in the SONGS ISFSI during a post-decommissioning period from December 2031 until December 2049. *Id.* This timeline was based on the false assumptions that the U.S. Department of Energy will begin accepting spent nuclear fuel from the industry in 2024, that all spent nuclear fuel will be permanently removed from the SONGS ISFSI and transferred to an off-site permanent repository by 2049, and that the SONGS site will be restored to a condition acceptable for unrestricted use by 2051. *Id.* Indeed, the PSDAR does not contain any analysis or discussion regarding Licensees' plan to store and manage the spent nuclear fuel buried at SONGS beyond 2049. *Id.*

The IFMP provides additional details regarding Licensees' strategy for storing, monitoring, and managing the spent nuclear fuel buried at SONGS during and after the decommissioning period. [ER 78-91.] Like the PSDAR, the IFMP is expressly based on the false assumptions that the Department of Energy would begin accepting spent nuclear fuel from the industry in 2024 and

that all spent nuclear fuel would be permanently removed from SONGS by 2049. [ER 82.] Again, the IFMP does not contain any analysis or discussion regarding Licensees' plan to store and manage the spent nuclear fuel buried at SONGS beyond 2049. [ER 78-91.]

Finally, the DCE provided a detailed estimate of the anticipated costs of the decommissioning and spent fuel management activities at SONGS. [ER 92-105.] Licensees projected that the total cost of decommissioning and restoring the SONGS site would exceed $4 billion, of which approximately $1.3 billion was allocated for spent fuel management at the SONGS site through 2049. [ER 100.] Once again, the DCE was based on the false assumptions that the Department of Energy will begin accepting spent nuclear fuel from the industry in 2024 and that all spent nuclear fuel will be removed from SONGS by 2049. *Id.* Indeed, like the PSDAR and the IFMP, the DCE does not contain any analysis or discussion regarding Licensees' plan or ability to pay for the cost of storing and managing the spent nuclear fuel buried at SONGS beyond 2049. [ER 92-105.]

At the time Licensees submitted the PSDAR, IFMP, and DCE, there was, in fact, no viable plan or intention for the Department of Energy to begin accepting spent nuclear fuel in 2024, or any other time. Indeed, Licensees submitted their decommissioning plan approximately four years after the Department of Energy withdrew its application for a license to construct a permanent repository for spent nuclear fuel at Yucca Mountain in Nevada, and approximately three years after the NRC suspended its adjudicatory proceeding regarding the withdrawal of the Department of Energy's license application. [ER 106-20.] Nevertheless, on July 17, 2015, the NRC granted a license amendment that allowed Licensees to commence the decommissioning of SONGS according to Licensees' falsely predicated decommissioning plan. [ER 139-40.]

IV. The Selection of a Perilous Storage Location, Defective Storage System, and Irretrievable Storage Canisters

At the time Licensees submitted their decommissioning plan to the NRC, they had not yet identified a location for expanding the SONGS ISFSI, nor had they selected storage equipment or vendors for the build out of the ISFSI. [ER 78.] In December 2014,

Licensees selected a location for the expanded ISFSI and selected Holtec International's ("Holtec") HI-STORM UMAX storage system for the "temporary" on-site storage of spent nuclear fuel. [ER 121.] The location selected for the expanded ISFSI is a mere 108 feet from the Pacific Ocean, within a tsunami inundation zone surrounded by active fault lines, and little more than a foot above the mean high tide level, making it especially susceptible to flooding as sea levels rise. [ER 124-25.] Moreover, though Licensees' decommissioning plan falsely claimed that spent nuclear fuel would be stored at the SONGS ISFSI for approximately 30 years, Holtec warranted its storage system for only 10 years. [ER 135.] What's more, after the NRC approved Holtec's thin-walled canisters to store the spent nuclear fuel, Holtec surreptitiously redesigned them. [ER 18, 137; Dkt. 19-3, at 153-58]. Not only are these canisters unsuitable for indefinite storage of spent nuclear fuel, but every single canister that is downloaded into the SONGS ISFSI incurs contact deformities, which can eventually grow into cracks, rendering them

susceptible to leaking and preventing their safe removal.[3] [ER 141-43, 149.] Making matters worse, Licensees have admitted that technology does not currently exist that would enable them to remove and repackage spent nuclear fuel from a canister once it has been welded and downloaded into the ISFSI, and that any technology that might be developed in the future would require either a spent fuel pool or a dry transfer station. [ER 146-47.] Remarkably, however, the SONGS decommissioning plan expressly disavows the need for a dry transfer facility at SONGS, and Licensees have repeatedly stated their intent to demolish the spent fuel pools at SONGS as soon as this summer. [Dkt. 19-1, at 8; *see*

[3] The NRC is apparently still conducting an investigation regarding the Holtec canisters. Indeed, on March 18, 2020, the NRC sent a letter to Holtec regarding its "failure to conduct an adequate evaluation in accordance with 10 CFR 72.48 prior to making proposed design changes" to its canisters. *See* ADAMS Doc. ML 19330F234, available at http://www.nrc.gov/reading-rm/adams.html. In the letter, the NRC found that Holtec's response to the notice of violation was "inadequate" and "did not fully address the violation." *Id.* In addition, the NRC explained that "allowing the [multipurpose canister] to scratch, or suffer mechanical wear up to a wall thickness of 0.216 presents a potential impact to the surface of the multipurpose canister and affects the confinement design function as specified in the Holtec Certificate of Compliance." *Id.*

also Public Watchdogs v. NRC, Case No. 19-72670 (9th Cir.), Dkt. Entry 16-1, at 4, n.3.] Like all other aspects of the SONGS decommissioning plan, the decision not to construct a dry transfer facility and the decision to demolish the spent fuel pools as soon as possible are predicated on the knowingly false assumption that all spent nuclear fuel being buried at SONGS will be transferred to a non-existent permanent repository in the relatively near future.

V. The Decommissioning Disasters and Temporary Suspension of Fuel Transfer Operations at SONGS

On July 22, 2018, Licensees were attempting to insert a 49-ton canister full of radioactive spent nuclear fuel into the SONGS ISFSI. Because of their negligent design and oversight, Licensees did not notice when the canister became stuck on a ¼-inch thick steel guide ring near the top of the chamber. [ER 141-43, 148-64.] Although the canister had halted its descent, Licensees continued to unwind the safety cables that were designed to secure the canister, leaving the canister caught on a thin piece of metal and unprotected from a fall of more than 18 feet to the concrete floor below. *Id.* In contravention of NRC regulations, Licensees failed to disclose this near catastrophe to the NRC. [ER 148-64.]

Ten days later, on August 3, 2019, Licensees once again lost control of a 49-ton canister full of deadly spent nuclear fuel, leaving it perched on a narrow metal flange more than 18 feet above the concrete floor of the SONGS ISFSI for almost an hour. *Id.* As before, Licensees did not timely disclose this incident. *Id.*

Both of these incidents might have been concealed from the public forever if not for a courageous whistleblower who spoke out during a SONGS public engagement panel meeting. Following the disclosure of these incidents, the NRC conducted an investigation and ultimately imposed a fine of $116,000. *Id.* Although the NRC did not order Licensees to cease operations, Licensees "voluntarily agreed" to suspend fuel transfer operations at SONGS for 11 months. At no time during this extended suspension of fuel transfer operations did the NRC or Licensees suggest that continued wet storage of spent nuclear fuel posed a danger to the public.

In July 2019, with the NRC's blessing, Licensees resumed fuel transfer operations at SONGS, with a goal of completing the burial of all spent nuclear fuel at SONGS as quickly as possible. [ER 165.] Indeed, according to Licensees, all spent nuclear fuel will be

removed from the relative safety of the wet storage pools by July or August 2020, and the wet storage pools will be demolished shortly thereafter. [Dkt. 19-1, at 8; *see also Public Watchdogs v. NRC*, Case No. 19-72670 (9th Cir.), Dkt. Entry 16-1, at 4, n.3.] Thus, by the end of this summer, all spent nuclear fuel at SONGS is expected to be buried in the defective and precariously located SONGS ISFSI, and there will be no alternative storage location at SONGS or any means for repackaging the spent nuclear when that inevitably becomes necessary.

VI. The Arbitrary and Capricious Denial of the Petition

On September 24, 2019, Public Watchdogs filed the 2.206 Petition wherein it asked the NRC to immediately suspend all decommissioning operations at SONGS and require Licensees to submit a new decommissioning plan that accounts for the reality that spent nuclear fuel will likely be stored at SONGS indefinitely. [ER 42-66.] The NRC failed even to acknowledge the 2.206 Petition until October 25, 2019, after Public Watchdogs had filed a Petition for Writ of Mandamus in this Court. [*In re Public Watchdogs*, Case No. 19-72670 (9th Cir.), Dkt. Entry 1.] On December 18, 2019, the

NRC's Petition Review Board preliminarily rejected the 2.206 Petition, but granted Public Watchdogs an opportunity to clarify or supplement the 2.206 Petition at a public meeting. [ER 2.] On January 21, 2020, Public Watchdogs participated in a public meeting in which it clarified the issues raised in the 2.206 Petition and provided supplemental information in support. *Id.* On February 26, 2020, the NRC formally rejected the 2.206 Petition, and provided Public Watchdogs with a letter explaining the reasons for the rejection. [ER 1-5.] Significantly, the NRC entirely failed to consider, much less address, the primary issue raised by Public Watchdogs—namely, the various hazards to public health and safety caused by the NRC continuing to allow Licensees to implement their falsely predicated decommissioning plan. *Id.* The NRC's decision on the 2.206 Petition became final on March 23, 2020, and Public Watchdogs subsequently filed its Petition for Judicial Review in this Court.

SUMMARY OF ARGUMENT

It cannot be disputed that the NRC has adopted a general policy of allowing nuclear power plant licensees to implement

decommissioning plans predicated on the knowingly false assumption that all spent nuclear fuel stored at on-site facilities will be transferred to a non-existent permanent repository in the relatively near future. This arbitrary and dangerous policy poses serious public health and safety risks at all decommissioned nuclear facilities across the United States, but it poses unique, particularly acute, and wholly unreasonable public health and safety hazards at SONGS.

Situated only 108 feet from the Pacific Ocean, near one of California's most populated beaches, within a tsunami inundation zone, and surrounded by active fault lines, the SONGS ISFSI is in perhaps the most perilous location possible. Moreover, Licensees are burying spent nuclear fuel in the SONGS ISFSI in welded thin-walled canisters that have a limited useful lifespan and cannot be safely opened when the spent nuclear fuel inside inevitably needs to be repackaged. What's more, Licensees have proven to be negligent, if not reckless, in transferring spent nuclear fuel from the relative safety of the SONGS wet pools to the SONGS ISFSI. Finally, with the NRC's blessing, Licensees are planning to destroy

the SONGS wet pools by the end of this summer, which will leave SONGS without an alternative storage option or any means to repackage the spent nuclear fuel being buried at SONGS when that inevitably becomes necessary.

The Court should set aside the NRC's denial of the 2.206 Petition for several reasons. First, although courts generally presume that NRC decisions on 2.206 petitions are unreviewable because they concern matters committed to the agency's discretion, this presumption against reviewability does not apply in this case. Indeed, the NRC's general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans is so extreme as to amount to an abdication of the NRC's primary statutory responsibility to protect the public from nuclear accidents. The Supreme Court has long held that the presumption against reviewability does not apply under such circumstances. *See Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

Second, the NRC's denial of the 2.206 Petition is arbitrary and capricious because the NRC entirely failed to consider an important aspect of the problem presented. Specifically, the NRC completely

failed to consider, much less address, Public Watchdogs' primary argument concerning the false assumptions underlying the SONGS decommissioning plan. These false assumptions taint every aspect of the SONGS decommissioning plan, and the NRC's failure to even consider the core arguments presented in the 2.206 Petition is a paradigmatic example of an arbitrary and capricious agency decision.

Third, the NRC's denial of the 2.206 Petition is also arbitrary and capricious because the NRC failed to adhere to its own policies regarding long-term storage and management of spent nuclear fuel. Specifically, the NRC's decision denying the 2.206 Petition and allowing Licensees to continue implementing their falsely predicated decommissioning plan contravenes the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, NUREG-2157 (the "Continued Storage GEIS"). The Continued Storage GEIS concludes that long-term and indefinite storage of spent nuclear fuel at on-site storage facilities would require construction of a dry transfer facility to repackage the spent nuclear fuel and replacement of the ISFSI after a certain amount

of time. However, because the SONGS decommissioning plan is predicated on the false assumption that all spent nuclear fuel will be transferred to a non-existent permanent repository by 2049, it does not provide any analysis or discussion of these necessary requirements for safe long-term or indefinite storage of spent nuclear fuel at SONGS, nor any assurance that Licensees will be able to cover the costs of long-term or indefinite storage of spent nuclear fuel at SONGS. As such, the NRC failed to adhere to its own established policies by allowing Licensees to continue implementing the falsely predicated decommissioning plan.

Fourth, the NRC's denial of the 2.206 Petition is also arbitrary and capricious because the NRC failed to adhere to its own regulations, which require spent nuclear fuel stored at an on-site facility to be readily retrievable for further processing and disposal. There is no dispute that Licensees currently lack the ability to retrieve and repackage the spent nuclear fuel buried at SONGS when that inevitably becomes necessary. There is also no dispute that any technology that might be developed in the future for repackaging of the spent nuclear fuel buried at SONGS would

require either a wet pool or a dry transfer station. Nevertheless, the NRC is allowing Licensees to continue burying spent nuclear fuel at SONGS pursuant to a decommissioning plan that calls for the destruction of the SONGS wet pools and expressly states that a dry transfer facility will not be constructed at SONGS. The NRC's failure to adhere to its own regulations regarding retrievability of spent nuclear fuel is arbitrary and capricious, and its denial of the 2.206 Petition should be set aside for this additional reason.

ARGUMENT

I. Standard of Review

The Administrative Procedures Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. A reviewing court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). In determining whether an agency decision is arbitrary and capricious, the Court generally considers whether the agency "examined the relevant data and articulated a satisfactory explanation for its action

including a rational connection between the facts found and the choice made." *Sierra Club v. U.S. Envtl. Prot. Agency*, 671 F.3d 955, 963 (9th Cir. 2012). An agency decision is subject to reversal under the arbitrary and capricious standard when the agency "entirely failed to consider an important aspect of the problem," *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010), or when the agency failed to adhere to its own regulations. *See Nat'l Assoc. of Home Builders v. Norton*, 340 F.3d 835, 851 (9th Cir. 2003) ("Having chosen to promulgate the DPS Policy, the FWS must follow that policy"); *Nat'l. Envtl. Dev. Assoc.'s Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("an agency action may be set aside as arbitrary and capricious if the agency fails to comply with its own regulations").

II. The NRC has abdicated its statutory responsibilities by adopting a general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans.

Under the APA, courts are generally precluded from reviewing agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a)(2). This presumption against reviewability is grounded in the rationale that, when a statute

commits a matter to an agency's unfettered discretion, "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler*, 470 U.S. at 830. However, as the Supreme Court reaffirmed just today, this exception to the APA is to be narrowly construed. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, No. 18-587, __ S. Ct. __, 2020 WL 3271746, at *7 (June 18, 2020) ("To honor the presumption of review, we have read the exception in §701(a)(2) quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion.") (quotations, alternations, and citations omitted).

Although courts of appeals have initial subject-matter jurisdiction over the NRC's final orders denying 2.206 petitions, various courts have held that such orders may be presumptively unreviewable because they involve enforcement decisions that are committed to the NRC's discretion by law. *Riverkeeper, Inc.*, 359 F.3d at 166; *see also Safe Energy Coalition of Michigan v. NRC*, 866 F.2d 1473, 1477 (D.C. Cir. 1989). Notably, however, this presumption against reviewability may be overcome when the NRC "has consciously and expressly adopted a general policy that is so

extreme as to amount to an abdication of its statutory responsibilities." *Heckler*, 470 U.S. at 833, n.4; *see also Commonwealth of Mass. v. NRC*, 878 F.2d 1516, 1525 (1st Cir. 1989). Indeed, the presumption against reviewability "does not place the agency above the law," and the denial of a 2.206 petition may be reviewed and set aside if a court concludes that the NRC is "inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents." *Commonwealth of Mass.*, 878 F.2d at 1525.

Here, there can be no dispute that the NRC has adopted a general policy of allowing nuclear power plant licensees to implement decommissioning plans predicated on the knowingly false assumption that spent nuclear fuel will be transferred from "temporary" on-site storage installations to a non-existent permanent repository in the relatively near future. [ER 19, 21, 25, 77, 82, 99.] By routinely allowing licensees to implement such falsely predicated decommissioning plans, the NRC is effectively permitting licensees to store spent nuclear fuel indefinitely at numerous locations across the United States, without any plan or

strategy for monitoring, managing, or funding such indefinite on-site storage.

The NRC's general policy of willful ignorance taints various aspects of the NRC's regulatory mandate related to long-term storage and management of spent nuclear fuel and poses a dire threat to public health and safety throughout the country. For instance, at SONGS, the NRC has permitted Licensees to bury millions of pounds of spent nuclear fuel next to the Pacific Ocean, near one of California's most populated beaches, within a tsunami inundation zone surrounded by active fault lines, and little more than a foot above the mean high-tide level. Because the NRC falsely assumes that the spent nuclear fuel will only be stored at this precarious location temporarily, it has not analyzed or required Licensees to demonstrate that this location will remain suitable for storage of spent nuclear fuel indefinitely. Given the inexorable rise of sea levels due to climate change, it is inconceivable to think that this location will remain viable for much longer.

Further, the NRC is permitting Licensees to store spent nuclear fuel at SONGS in welded thin-walled canisters that have a

limited useful lifespan and cannot be safely opened when the spent nuclear fuel inside inevitably needs to be repackaged. NRC regulations expressly require that "storage systems must be designed to allow ready retrieval of spent fuel . . . for further processing or disposal." 10 C.F.R. § 72.122(l). But because the NRC falsely assumes that spent nuclear fuel will only be stored in these canisters temporarily, it has not analyzed or required Licensees to demonstrate their ability to repackage the spent nuclear fuel when the canisters' useful lifespan expires or some other event occurs that threatens the viability of the canisters.

Finally, NRC regulations expressly require Licensees to provide assurance that they will have sufficient financial resources to pay for the full cost of decommissioning and spent fuel management. 10 C.F.R. §§ 50.75, 50.82. However, because the NRC falsely assumes that spent nuclear fuel will only be stored at SONGS temporarily, it has not required Licensees to provide assurance that they will have sufficient financial resources to pay for the cost of storage and management of spent nuclear fuel at SONGS beyond 2049.

In the 2.206 Petition, Public Watchdogs plainly raised the dire public health and safety hazards posed by the NRC allowing Licensees to continue implementing their falsely predicated decommissioning plan. In fact, Public Watchdogs expressly requested that the NRC suspend all decommissioning operations at SONGS and require "Licensees to submit an amended decommissioning plan that properly accounts for the reality that the spent nuclear fuel being buried at SONGS will remain there indefinitely." [ER 44.] Thus, the 2.206 Petition directly challenges the NRC's general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans. Because the NRC's general policy, which has been applied at decommissioned nuclear power plants throughout the country, amounts to an abdication of the NRC's paramount statutory

responsibility to protect the public from nuclear accidents, the general presumption against reviewability does not apply.[4]

III. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC entirely failed to consider Public Watchdogs' primary arguments regarding the false assumptions underlying the SONGS decommissioning plan.

As discussed above, an agency decision is subject to reversal under the arbitrary and capricious standard when the agency "entirely failed to consider an important aspect of the problem." *Greater Yellowstone Coalition*, 628 F.3d at 1148; *see also Environmental Defense Cntr., Inc. v. E.P.A.*, 344 F.3d 832, 858, n. 36 (9th Cir. 2003); *Brower v. Evans*, 257 F.3d 1059, 1065 (9th Cir. 2001). This Court's review of an agency decision under the

[4] In addition, the presumption against reviewability is inapplicable in this case because, as discussed *infra*, in denying the 2.206 Petition, the NRC failed to adhere to its own regulations and policies. "As long as there is a meaningful standard against which to judge the agency's exercise of discretion, judicial review is available." *Perez Perez v. Wolf*, 943 F.3d 853, 861 (9th Cir. 2019). "Only where there is truly no law to apply have we found an absence of meaningful standards." *Id.* Significantly, this Court has held that agency regulations and policies may provide sufficient standards against which to judge an agency's exercise of discretion. *Id.* at 856; *see also Mass. Pub. Interest Research Group, Inc. v. NRC*, 852 F.2d 9, 14 (1st Cir. 1988).

arbitrary and capricious standard is strictly confined to the reasoning articulated by the agency. *See Cal. Energy Com'n. v. Dep't of Energy*, 585 F.3d 1143, 1150 (9th Cir. 2009) ("we will uphold an agency decision only on the basis of the reasoning articulated therein"); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1212 (9th Cir. 2008) ("An agency's decision can be upheld only on the basis of the reasoning in that decision").

Here, the primary issue raised by the 2.206 Petition is the unreasonable public health and safety hazards posed by the NRC allowing Licensees to continue implementing their falsely predicated decommissioning plan. [ER 42-66.] Indeed, Public Watchdogs expressly requested that the NRC suspend all decommissioning operations at SONGS and "require Licensees to submit an amended decommissioning plan that properly accounts for the reality that the spent nuclear fuel being buried at SONGS will remain there indefinitely." [ER 44.] Remarkably, however, the NRC failed to consider, much less address, the issue of Licensees' falsely predicated decommissioning plan in its decision denying the 2.206 Petition. [ER 1-5.] In characterizing the relief requested by

Public Watchdogs, the NRC even failed to mention Public Watchdogs' request that the NRC require Licensees to submit an amended decommissioning plan that accounts for the indefinite storage of spent nuclear fuel at SONGS, stating instead that Public Watchdogs merely requested "an amended decommissioning plan to account for spent nuclear fuel being placed in storage at SONGS." [ER 1.] To the extent the NRC mentioned the false predicates underlying the SONGS decommissioning plan, it did so perfunctorily and only in the context of describing Public Watchdogs' arguments regarding the false assumptions underlying the SONGS DCE. *See id.* ("As the basis of the request you stated . . . the licensee's estimated cost of decommissioning SONGS is based on unreasonable and fundamentally flawed assumptions"). Even then the agency did not actually address the falsely predicated cost estimates, but simply reiterated its prior determination that "the NRC staff finds the SONGS IFMP estimates to be reasonable, based on a cost comparison with similar decommissioning reactors." [ER 3.] Thus, the NRC did not simply fail to consider an important aspect of the problem, it failed to

consider the *most* important aspect of the problem. In so doing, the NRC acted arbitrarily and capriciously. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, No. 18-587, __ S. Ct. __, 2020 WL 3271746, at *14 (June 18, 2020) ("But the rescission memorandum contains no discussion of forbearance or the option of retaining forbearance without benefits. [DHS] 'entirely failed to consider [that] important aspect of the problem.'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Accordingly, the Court should set aside the NRC's decision and order the agency to consider and address the serious public health and safety hazards posed by allowing Licensees to continue implementing their falsely predicated decommissioning plan.

IV. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own policies regarding long-term and indefinite storage of spent nuclear fuel.

An agency decision will be set aside as arbitrary and capricious if the agency fails to adhere to its own regulations and policies. *See Norton*, 340 F.3d at 851; *see also Nat'l. Envtl. Dev. Assoc.'s Clean Air Project*, 752 F.3d at 1009. Although the NRC

completely eschewed any consideration of the false predicates underlying the SONGS decommissioning plan in its decision denying the 2.206 Petition, the agency did generically consider the intractable problem of long-term and indefinite storage of spent nuclear fuel back in 2014. In *New York v. NRC*, the United States Court of Appeals for the District of Columbia Circuit set aside the NRC's "Waste Confidence Decision" because it "failed to examine the environmental consequences of failing to establish a [permanent] repository when one is needed." 681 F.3d at 479. In reaching this decision, the court explained: "The Commission apparently has no long-term plan other than hoping for a geologic repository. If the government continues to fail in its quest to establish one, then [spent nuclear fuel] will seemingly be stored on site at nuclear plants on a permanent basis." *Id.*

In response to this decision, the NRC issued the Continued Storage GEIS, which generically "analyzes the environmental impacts of continued storage of spent nuclear fuel." [ER 183.] The Continued Storage GEIS concludes that it is technically feasible for spent nuclear fuel to be safely stored in on-site ISFSIs for an

indefinite duration, but only under certain conditions.[5] For instance, the Continued Storage GEIS notes: "Although there are no dry transfer systems (DTSs) at U.S. nuclear power plant sites today, the potential need for a DTS, or facility with equivalent capability, to enable retrieval of spent fuel from dry casks for inspection or repackaging will increase as the duration and quantity of fuel in dry storage increases." [ER 193.] Accordingly, the Continued Storage GEIS expressly "assumes that the licensee uses a DTS during long-term and indefinite storage timeframes to move the spent fuel to a new dry cask every 100 years." [ER 189.]

Similarly, the Continued Storage GEIS notes: "Construction of a replacement at-reactor ISFSI is a continued storage activity in

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[5] Although undeniably dense and facially thorough, the Continued Storage GEIS contains at least one glaring flaw. Specifically, it "considers the continued storage of spent fuel an activity that is similar for all commercial nuclear power plants and storage facilities." [ER 162.] In reaching this conclusion, however, the NRC did not appear to consider that nuclear power plants and storage facilities are littered across the United States in manifestly different natural environments that pose unique challenges for the safe long-term storage of spent nuclear fuel. To be sure, even a layperson can understand that underground storage of spent nuclear fuel at the precarious SONGS location will present unique problems that would not be present at an underground storage facility in Brownville, Nebraska.

the long-term and indefinite timeframes." [ER 190.] Accordingly, the Continued Storage GEIS expressly "assumes that the DTS and ISFSI pad are replaced every 100 years," at an estimated cost exceeding $100 million. [ER 189-90.]

Here, the SONGS decommissioning plan falsely assumes that *all* spent nuclear fuel will be removed from SONGS and transferred to a non-existent permanent repository by 2049. Because the NRC followed its general policy of allowing nuclear power plant licensees to implement such falsely predicated decommissioning plans, it did not require Licensees to perform any analysis or set forth any plan for managing, monitoring, and paying for the storage of spent nuclear fuel at SONGS beyond 2049. In fact, the falsely predicated SONGS DCE expressly states that "[a] dry transfer facility will not be necessary for transfer of SNF canisters for transport." [ER 100.] Thus, the NRC has conducted no analysis regarding the feasibility or cost of building or replacing a dry transfer station or ISFSI. Thus, in denying the 2.206 Petition and rejecting Public Watchdogs' request that Licensees be required to submit an amended decommissioning plan that accounts for the reality that spent

nuclear fuel will likely remain buried at SONGS indefinitely, the NRC failed to follow its own policies as expressed in the Continued Storage GEIS. Instead, the NRC simply accepted the false assumption that spent nuclear fuel will be removed from SONGS by 2049, and did not require Licensees to set forth any plan for satisfying the conditions for long-term and indefinite storage clearly articulated in the Continued Storage GEIS.

In this way, the NRC has reverted to the same faulty analytical processes that the D.C. Circuit found unacceptable in *New York v. NRC*. Namely, in allowing nuclear power plant licensees to implement falsely predicated decommissioning plans, the NRC has revealed that it "has no long-term plan other than hoping for a geologic repository." *New York v. NRC*, 681 F.3d at 479. This "hope for the best" policy is feckless, and endangers the lives of millions of Southern California residents who live within the vicinity of SONGS. Accordingly, the Court should set aside the NRC's denial of the 2.206 Petition and order the NRC to require Licensees to submit an amended decommissioning plan that

comports with the NRC's own policies regarding long-term and indefinite storage of spent nuclear fuel.

V. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own regulations, which require spent nuclear fuel stored at on-site facilities to be readily retrievable for further processing or disposal.

In reviewing an agency decision, this Court generally defers to the agency's interpretation of its own regulations unless the agency's interpretation is plainly erroneous or inconsistent with the regulations. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002); *Forest Guardians v. U.S. Forest Svc.*, 329 F.3d 1089, 1097 (9th Cir. 2003). In some instances, however, little or no deference is owed to an agency's interpretation of its own regulations. *United States v. Mead Corp.*, 553 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances . . . The approach has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other"). As the Supreme Court explained nearly 80 years ago: "The weight [accorded to an agency's

interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

This Court has held that agency interpretations "contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law," are entitled only to so-called *Skidmore* deference. *Sierra Club. v. EPA*, 671 F.3d 955, 962 (9th Cir. 2012). This means that "the weight that we are to give an administrative interpretation not intended by an agency to carry the general force of law is a function of that interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements." *Id.* Significantly, no deference is afforded to an agency interpretation "if the administrative construction is clearly contrary to the plain and sensible meaning of the regulation." *Santamaria-Ames v. I.N.S.*, 104 F.3d 1127, 1132, n.7 (9th Cir. 1996).

As already noted, NRC regulations expressly require that "storage systems must be designed to allow ready retrieval of spent fuel . . . for further processing or disposal." 10 C.F.R. § 72.122. As Public Watchdogs explained in the 2.206 Petition, Licensees have readily admitted that they currently lack the technological capability to retrieve and repackage the canisters being buried in the SONGS ISFSI, and that any technology that might be developed in the future would require wet pools or a dry transfer station. [ER 146-47.] To Licensees' credit, this candid admission squares with the Continued Storage GEIS, which explains: "one reason DTSs may be needed in the future is to reduce risks associated with unplanned events (e.g., the need to repackage spent fuel that becomes damaged or that becomes susceptible to damage while in dry cask storage)." [ER 194-95.] Because of the negligent design of the Holtec storage system being used at SONGS, every canister that is entombed in the SONGS ISFSI is damaged during its burial. As discussed above, however, Licensees have no intention of constructing a dry transfer station at SONGS, and they have readily admitted that they intend to destroy the wet pools as

soon as this summer. *See* Dkt. 19-1, at 8; *see also Public Watchdogs v. NRC*, Case No. 19-72670, Dkt. Entry 16-1, at 4, n.3. Thus, once the wet pools are destroyed, there will be no alternative storage mechanism at SONGS, and more important, no means for retrieving and repackaging the spent nuclear fuel buried at SONGS when that inevitably becomes necessary.

In the 2.206 Petition, Public Watchdogs expressly argued that these undisputed facts rendered the SONGS ISFSI in violation of the NRC's regulations requiring ready retrievability of spent nuclear fuel. [ER 12.] In rejecting this argument, the NRC relied on Interim Staff Guidance No. 2, Revision 2, "Fuel Retrievability in Spent Fuel Storage Applications," explaining that "[a] licensee can demonstrate the ability for ready retrieval by demonstrating that it can remove a canister loaded with spent fuel assemblies from a storage cask/overpack." [ER 3.] The NRC's decision on this point was arbitrary and capricious.

To begin with, the NRC's interpretation of the retrievability regulation in the Interim Staff Guidance is entitled to little or no deference because it does not have the force of law. Indeed, the

Interim Staff Guidance expressly states that it "is not a regulation or requirement." [ER 166.] Furthermore, the interpretation in the Interim Staff Guidance is clearly contrary to the plain meaning of the retrievability regulation. Both the applicable regulation (10 C.F.R. § 72.122(l)) and the NRC's Interim Staff Guidance address the ability to safely retrieve "spent fuel" from storage. [ER 167 ("ISG-2, Rev.2 defines ready retrieval as 'the ability to safely remove *the spent fuel* from storage for further processing or disposal.") (emphasis added).] Thus, the mere fact that Licensees were "fully successful in downloading and retrieving *the canister*" during simulated exercises says nothing whatsoever about whether Licensees can retrieve the *spent fuel* inside the canister. On that point, Licensees have acknowledged that they cannot perform that task, and the NRC has offered no reason to believe otherwise. Because it is undisputed that Licensees lack the ability to retrieve the spent fuel buried in the SONGS ISFSI, the NRC's denial of the 2.206 Petition on this point was arbitrary and capricious. As such, the Court should order the agency to follow its own regulations

requiring Licensees to demonstrate the ability to retrieve *spent fuel* at SONGS for further processing or disposal.

CONCLUSION

For the foregoing reasons, Public Watchdogs respectfully requests that the Court set aside the NRC's arbitrary and capricious denial of the 2.206 Petition, order the NRC to consider Public Watchdogs' arguments concerning the false assumptions underlying the SONGS decommissioning plan, and direct the NRC to adhere to its own regulations in resolving the 2.206 Petition. In addition, for the reasons discussed in Public Watchdogs' Motion for Temporary Injunctive Relief Pending Judicial Review of Agency Action, which was previously denied by this Court, Public Watchdogs respectfully requests that the Court order the NRC to temporarily suspend all fuel transfer operations at SONGS, including the planned destruction of the SONGS wet pools, pending the NRC's reconsideration of the arguments raised in the 2.206 Petition in accordance with its own regulations and policies.

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Respectfully submitted,

By /S/ *Charles G. La Bella*

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Public Watchdogs hereby identifies the following related case pending before this Court: *Public Watchdogs v. Southern California Edison Company, et al.*, Case No. 19-56531 (9th Cir.), which was argued on June 3, 2020 in Pasadena, California, and has been submitted.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief in Support of Petition for Judicial Review complies with Ninth Circuit Rule 32-1 and the requirements of Federal Rule of Civil Procedure 32(a)(5) and (6) because it is proportionately spaced, has a typeface of 14 points, and has 7,422 words, excluding the items exempted by Fed. R. App. P. 32(f).

/s/ Charles G. La Bella
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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020, I electronically filed the foregoing **Petitioner's Brief in Support of Petition for Judicial Review** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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