

No. 20-70899

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC WATCHDOGS,
Petitioner,

v.

UNITED STATES 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

FEDERAL RESPONDENTS' ANSWERING BRIEF

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GLOSSARY

DOE	Department of Energy
EIS	Environmental Impact Statement
ER	Petitioner's Excerpts of Record
NRC	U.S. Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act of 1982
SER	Federal Respondents' Supplemental Excerpts of Record
SONGS	San Onofre Nuclear Generating Station

INTRODUCTION

This petition for review represents the latest effort by Petitioner Public Watchdogs to secure this Court's intervention in the U.S. Nuclear Regulatory Commission (NRC)'s oversight and regulation of ongoing spent fuel storage operations at the San Onofre Nuclear Generating Station (SONGS) in San Clemente, California. Public Watchdogs asserts that NRC has abdicated its obligation to preserve public health and safety because it has ignored the implications of possible long-term or indefinite spent nuclear fuel storage at SONGS. But Public Watchdogs' arguments fail both factually and legally. Over a period of decades, the agency has addressed the issue of spent fuel storage both generically and on a site-specific basis, and the agency has extensively considered the possibility of long-term, and even indefinite, storage at reactor sites, finding that safety can be maintained under either scenario. NRC's robust and continuous efforts to ensure safe storage at SONGS are thoroughly documented in extensive licensing reviews, inspections, and analyses. Here, in response to Public Watchdogs' request that the agency take enforcement action against a licensee and suspend decommissioning activities, NRC reviewed and considered its prior reviews and conclusions, along with Public Watchdogs' assertions, and it determined that no additional enforcement action was required or appropriate to ensure adequate protection of public health and safety.

NRC's Decision, which is grounded in its expertise, is committed to agency discretion by law and, under the Administrative Procedure Act, is unreviewable by this Court. And even if it were reviewable, it is the product of reasoned decisionmaking, and Public Watchdogs wholly fails to demonstrate otherwise. The petition should therefore be denied.

STATEMENT OF JURISDICTION

(a) Public Watchdogs submitted a request, per NRC regulations at 10 C.F.R § 2.206, that NRC institute a proceeding “to modify, suspend, or revoke a license, or for any other action as may be proper,” requesting that NRC order a suspension of decommissioning activities at SONGS (the 2.206 Petition). Excerpts of Record (ER) 42-66; *see also* ER 6-13 (supplement to the 2.206 Petition).

(b) The Hobbs Act grants courts of appeals exclusive jurisdiction over petitions for review of “final orders” issued in licensing proceedings before NRC, including the denial of a 2.206 petition. 28 U.S.C. §§ 2342(4), 2344; 42 U.S.C. § 2239(a)(1)(A), (b)(1); *see Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 746 (1985).

(c) NRC denied the 2.206 Petition on February 26, 2020 (the 2.206 Decision). ER 1-5. Public Watchdogs filed its petition for review in this Court on March 31, 2020. ER 66. The petition is timely under the Hobbs Act. 28 U.S.C. § 2344.

STATEMENT OF THE ISSUES

1. Whether Public Watchdogs has failed to demonstrate that NRC has consciously and expressly adopted a general policy amounting to abdication of NRC's statutory obligation to protect public health and safety, where NRC has considered, analyzed, and reached conclusions on the very issue—i.e., the implications of possible long-term or indefinite spent fuel storage at reactor sites such as SONGS—that Public Watchdogs claims NRC has ignored.

2. Whether, if the 2.206 Decision is reviewable, NRC rationally denied Public Watchdogs' request to take enforcement action, when (1) NRC has plainly considered and analyzed the possibility of long-term or indefinite spent fuel storage at reactor sites, including SONGS, as reflected in the underlying documentation referenced in the Decision; and (2) NRC declined to require a licensee to adhere to alleged policy or regulatory requirements that do not actually exist.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

STATEMENT OF THE CASE

I. Statutory and regulatory background

A. NRC's authority and oversight

NRC is an independent regulatory commission created by Congress. 42 U.S.C. § 5841. The agency licenses and regulates the Nation's civilian use of radioactive materials to protect public health and safety, promote the common defense and security, and protect the environment, pursuant to the Atomic Energy Act of 1954. *Id.* § 2133; 10 C.F.R. § 1.11(b). NRC can issue, amend, suspend, or revoke licenses to construct and operate nuclear power plants and spent fuel storage facilities, as well as issue or modify its rules and regulations, only after providing interested parties with an opportunity for a hearing. *See* 42 U.S.C. § 2239(a).

NRC conducts oversight of its licensees through periodic announced and unannounced inspections of licensed activities and enforcement of applicable requirements. *See* 10 C.F.R. § 1.11(b). NRC also has the authority to issue orders, for enforcement purposes or otherwise, that amend, suspend, or revoke licenses. 10 C.F.R. § 2.202. NRC has established a process, under 10 C.F.R. § 2.206, for the public to request that the agency take such action. The procedures guiding the agency's disposition of such requests are set forth in NRC Management Directive 8.11. SER 65-100.

B. NRC’s regulation of spent nuclear fuel and its relationship to decommissioning

Every nuclear reactor in the United States possesses fuel that is no longer useful in the production of electricity (and thus “spent”) and that reactor operators must manage and store. NRC, Safety of Spent Fuel Storage (Apr. 2017) (Spent Fuel Storage), <https://www.nrc.gov/docs/ML1710/ML17108A306.pdf> (providing general overview of spent fuel storage methods and NRC’s role). When spent fuel is removed from a nuclear reactor, it is first placed in pools of continuously circulating water for cooling, which are commonly referred to as “spent fuel pools.” SER 186. It remains there until it is transferred to “dry” storage, in either casks or canister-based systems. *See* SER 188. “Canister-based systems,” such as the one at SONGS that is the focus of Public Watchdogs’ petition for review, feature an inner cylindrical canister that contains the fuel, and the canister is surrounded by additional shielding material, such as concrete. *Id.*

NRC authorizes the onsite dry storage of spent fuel in one of two ways: (1) it grants a site-specific license for a dry storage facility; or (2) it issues a Certificate of Compliance for a specific dry storage system, which reactor licensees may then use under a so-called “general license” established by NRC regulations. SER 190;

10 C.F.R. Part 72, Subpart K; *id.* § 72.210; *see also* 42 U.S.C. § 10153 (directing NRC to establish rules for licensing technology for dry storage).¹

Before NRC grants a Certificate of Compliance for a dry storage system, it subjects the system to a rigorous approval process. In reviewing applications for dry storage systems, NRC conducts technical evaluations that include:

(1) examining materials used to construct the systems; (2) verifying confinement of radioactive material and evaluating radiation shielding; and (3) ensuring that the spent fuel will not reactivate chain reactions that occur when the fuel is used in normal reactor operations. Spent Fuel Storage at 4-11. NRC approves only those systems that meet its strict requirements for safely storing spent fuel. *Id.* at 3; *see* 10 C.F.R. § 72.236. The dry storage systems may be certified for up to 40 years, and the certificate holder or licensee using the system may seek renewal(s) of the certification for periods of up to 40 years. *See* 10 C.F.R. §§ 72.238, 72.240(a).

¹ NRC's issuance of Certificates of Compliance by notice-and-comment rulemaking comports with Congress's directive in the Nuclear Waste Policy Act of 1982 (NWPA) that NRC certify storage systems for use at reactor sites on a generic basis. In particular, Section 218(a) of the NWPA directed the Department of Energy (DOE) to develop storage technologies that would "to the maximum extent practicable" eliminate the need for the Commission to grant site-specific approvals. 42 U.S.C § 10198. Section 133 of the Act in turn directed NRC to establish procedures for licensing any technology approved under Section 218(a). 42 U.S.C § 10153. NRC's certification rules are an outgrowth of Congress's directive.

Dry storage facilities (whether under a specific NRC license or under the general license for NRC-certified designs) can be, and often are, constructed and operated by reactor licensees while the reactor is still operating, to assist in managing the spent fuel generated by, and periodically offloaded from, the reactor. *See Spent Fuel Storage* at 1; SER 185, 188, 199-200. Accordingly, NRC's regulatory scheme for ensuring the safety of dry storage facilities is not dependent upon documents a licensee must submit to NRC at the conclusion of a reactor's operating life, when the licensee is preparing to decommission the reactor. In the case of a licensee employing an NRC-certified design, the safety of these facilities is ensured through the certification of the system through notice-and-comment rulemaking and the Commission's regulations at 10 C.F.R. Part 72, including its requirements at 10 C.F.R. § 72.212, which set forth conditions under which a general licensee is permitted to operate. *See, e.g.*, 10 C.F.R. § 72.212(b)(5), (6) (requiring licensee to supply written evaluations demonstrating compliance with applicable safety requirements prior to deployment of storage system).

Nonetheless, once a reactor reaches the decommissioning stage, it still must submit various decommissioning planning documents to NRC. And these decommissioning planning documents require at least some discussion of how the licensee plans to manage any spent fuel remaining at the site during the decommissioning process. This is largely to allow NRC to ensure the licensee is

setting aside sufficient funds for the various activities it will need to conduct after permanent shutdown of the reactor, which would include, but are not limited to, managing any spent fuel at the site. Thus, a reactor licensee's decommissioning planning documents, which include a "Post-Shutdown Decommissioning Activities Report," a "Decommissioning Cost Estimate," and an "Irradiated Fuel Management Plan," will include information about the licensee's plans and anticipated timeframes for managing spent fuel at the site during the decommissioning process, including any planned reliance on dry storage of spent fuel. *See* SER 192, 199-202; 10 C.F.R. § 50.54(bb); *id.* § 50.82(a)(4); Final Rule, Decommissioning of Nuclear Power Reactors, 61 Fed. Reg. 39,278, 39,279-80 (July 29, 1996).

These decommissioning plans, which may address decades' worth of anticipated future decommissioning tasks, are not inflexibly set in stone upon submission to NRC. Rather, NRC regulations contemplate that licensees may modify their plans and schedules for decommissioning over time and require licensees to notify NRC if and when such modifications occur. *See* 10 C.F.R. §§ 50.54(bb); 50.82(a)(7); 61 Fed. Reg. at 39,280. In fact, NRC regulations require licensees engaged in decommissioning to submit a report *annually* to update NRC "on the status of its funding for managing irradiated fuel," with each annual update specifying "[t]he projected cost of managing irradiated fuel until

title to the fuel and possession of the fuel is transferred to the Secretary of Energy” pursuant to the NWPA (as discussed below) and, “[i]f the funds accumulated do not cover the projected cost, a plan to obtain additional funds to cover the cost.” 10 C.F.R. § 50.82(a)(8)(vii).

C. NRC’s reassessment of long-term storage of spent nuclear fuel

The NWPA requires DOE to apply for an NRC license to construct a repository for the ultimate disposal of spent nuclear fuel and to take title to such fuel in accordance with written contracts. 42 U.S.C. §§ 10134, 10222. Because of delays in repository availability, NRC has repeatedly considered the uncertainties regarding the timing of removal of fuel from reactor sites in connection with its licensing activities. Most recently, a decision by the D.C. Circuit in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), prompted NRC to consider the issues related to the continued storage of spent fuel at nuclear reactor sites in a more comprehensive manner than it had previously.

In response to *New York*, NRC spent two years (during which it suspended all reactor licensing) developing its “Continued Storage Rule,” 10 C.F.R. § 51.23, which was supported by a generic environmental impact statement (EIS), consistent with its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* Those documents analyzed the environmental impacts of continued storage after reactors cease power-generation operations under three

possible timeframes: short-term storage of 60 years, longer-term storage of an additional 100 years, and indefinite-duration storage to address the possibility that a repository never becomes available. *See* Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014); ER 187.²

The Continued Storage Rule and the Generic EIS documented NRC’s conclusion that spent fuel could be safely stored at reactor sites, even in the event such storage must last indefinitely, and that spent fuel could be safely repackaged from older canisters or casks to new ones through use of a dry transfer system (referred to as “DTS” in the Generic EIS) if it ever became necessary to do so—an activity predicted to occur only if and when dry storage facilities reach approximately 100 years old. *See* SER 181-83, 195-99, 207, 209, 220-21. Accordingly, NRC anticipated that a dry transfer system would be constructed at the time, and only if, repackaging of fuel becomes necessary, rather than being constructed in advance. SER 182-83 (assuming that “construction and operation of a” dry transfer system occurs during the long-term, rather than short-term, storage time frame).

In 2015, building on the technical analysis underlying the Continued Storage Rule, NRC documented its conclusion that licensing nuclear power plants with the

² The complete Generic EIS can be found at <https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr2157/>.

expectation that fuel would be placed in dry storage “w[ould] not endanger the public health and safety” and therefore would be in compliance with the agency’s obligations under the Atomic Energy Act. Relying on its technical judgment and extensive experience ensuring safe storage through use of its regulatory tools, NRC specifically concluded that “spent fuel can be safely stored until a repository is available, or indefinitely should such storage become necessary.” CLI-15-4, *DTE Electric Co.* (Fermi Nuclear Power Plant, Unit 3), 81 N.R.C. 221, 240-42 (2015) (available at SER 151-72).

Several states and environmental organizations challenged the assumptions underlying the Continued Storage Rule and Generic EIS in the D.C. Circuit. *New York v. NRC*, 824 F.3d 1012 (D.C. Cir. 2016).³ That court rejected the challenges, finding that NRC had adequately considered both the probability and consequences of failure to site a permanent repository, that the agency’s assumptions concerning the replacement of dry storage systems were reasonable, and that the agency had a basis to conclude, based on its “thorough and comprehensive” analysis, that the risks of storage it had identified were “essentially common” to all plants and thus amenable to generic analysis. *Id.* at 1019-20, 1022-23.

³ Some of these petitioners in *New York* also petitioned for review of NRC’s decision in *DTE Electric Co.*, although they did not pursue that challenge as part of the consolidated briefing in the case.

II. Factual background

The SONGS nuclear plant permanently shut down in 2013. The allegations in this case relate to the ongoing efforts of Intervenor Southern California Edison Company, pursuant to the NRC-issued licenses for SONGS Units 2 and 3, to transfer the remainder of the spent fuel currently stored in spent fuel pools at the plant into an adjacent dry storage facility. In accordance with the NRC general license permitting reactors to utilize NRC-certified dry storage systems, this SONGS dry storage facility utilizes an NRC-certified, canister-based system designed by Holtec International, Inc. (Holtec). The NRC Certificate of Compliance for this Holtec system had been issued through notice-and-comment rulemaking after a rigorous approval process, and it includes an amendment to require enhanced protections against seismic risks if the system is deployed at facilities such as SONGS. *See* Certificate of Compliance No. 1040, 80 Fed. Reg. 12,073 (Mar. 6, 2015) (final rule certifying Holtec system, codified at 10 C.F.R. § 72.214); Certificate of Compliance No. 1040, Amendment No. 1, 80 Fed. Reg. 35,829 (June 23, 2015) (direct final rule reflecting enhanced seismic analysis, effectiveness confirmed via notice published at 80 Fed. Reg. 53,691 (Sept. 8, 2015)); *see also* Certificate of Compliance No. 1040, Amendment No. 2, 81 Fed. Reg. 73,335 (Oct. 25, 2016) (direct final rule regarding amendment to the

Certificate of Compliance addressing fuel types that can be stored in the system, effectiveness confirmed via notice published at 82 Fed. Reg. 8805 (Jan. 31, 2017)).

NRC has directed the full arsenal of its regulatory tools, including licensing reviews, rulemakings, inspections, and enforcement, to ensuring that spent fuel is stored safely at SONGS in accordance with the Certificate of Compliance for the Holtec system and based on site-specific considerations at SONGS. *See, e.g.*, SER 101-39 (providing summary of six inspections performed between June 2017 and January 2018 concluding that the dry storage facility, as constructed at SONGS, accorded with the Holtec Certificate of Compliance); SER 107, 130 (confirming that “the environmental conditions” at SONGS “were bounded by the Holtec storage system’s design parameters”). At present, most, but not all, of the canisters have been loaded with spent fuel and transferred to the dry storage facility.

NRC continues to monitor the spent-fuel transfer activities to ensure compliance with regulatory requirements and has taken enforcement actions as needed, including imposing a civil monetary penalty. *See* ER 148-54; SER 58-59. NRC’s public website has a comprehensive catalog of NRC’s ongoing efforts to ensure the safety of spent fuel storage at SONGS and contains links to documents evidencing its work. *See* <https://www.nrc.gov/reactors/operating/ops-experience/songs-spec-insp-activities-cask-loading-misalignment.html>.

III. Procedural background

A. Public Watchdogs' prior lawsuits in federal court

Prior to this petition for review, Public Watchdogs has filed three other lawsuits in federal court challenging the spent fuel storage operations at SONGS:

1. *Watchdogs I*: Public Watchdogs first filed suit in district court in November 2017, raising concerns about the safety of the Holtec system. Public Watchdogs voluntarily dismissed its action while a motion to dismiss by the federal defendants was pending. *Public Watchdogs v. United States*, ECF No. 50, No. 17-cv-2323-JLS-BGS (C.D. Cal. July 3, 2019).

2. *Watchdogs II*: In August 2019, Public Watchdogs filed a second lawsuit challenging the decommissioning operations at SONGS and moved for a preliminary injunction seeking a temporary cessation of those activities. The district court dismissed Public Watchdogs' amended complaint for lack of jurisdiction and denied the motion for an injunction. Public Watchdogs' appeal of the district court's dismissal awaits decision by this Court, which heard argument in *Public Watchdogs v. NRC*, No. 19-56531 (9th Cir.), on June 3, 2020.⁴

⁴ In *Watchdogs II*, the district court dismissed the action insofar as it purported to challenge a license amendment that had been issued in 2015 or the Certificate of Compliance governing the Holtec system, reasoning that such challenges were properly raised in the courts of appeals pursuant to the Hobbs Act and were untimely. 2019 WL 6497886, at *9 (Dec. 3, 2019). Public Watchdogs did not challenge that aspect of the decision on appeal in 19-56531. But it did challenge

3. *Watchdogs III*: Fewer than thirty days after filing the 2.206 Petition at issue in the instant case, Public Watchdogs filed a mandamus action in this Court, asserting that NRC had unreasonably delayed responding to the 2.206 Petition. This Court denied mandamus. *Public Watchdogs v. NRC*, No. 19-72670 (9th Cir. Dec. 20, 2019).

B. Public Watchdogs’ present lawsuit

Currently before this Court is Public Watchdogs’ petition for review challenging NRC’s denial of the above-referenced 2.206 Petition. The 2.206 Petition and supplement raised safety concerns regarding several topics: two 2018 canister-transfer incidents; the funding set aside to support decommissioning activities; the retrievability of spent fuel after emplacement in the dry storage facility; the environmental impacts of the decommissioning activities; and flood risks. *See* ER 42-66 (petition), ER 6-13 (supplement). The 2.206 Petition also contended that the SONGS decommissioning plans relied upon false assumptions about when spent fuel would be removed from the site. *See, e.g.*, ER 59-61.

Based on these various concerns, Public Watchdogs requested that “NRC issue an

the district court’s conclusion, *id.* at *10, that certain acts that Public Watchdogs identified in its amended complaint (many of which are referenced in the 2.206 Petition) constituted a failure to take enforcement action that was presumptively unreviewable, and that Public Watchdogs had failed to rebut this presumption. *See* Appellant’s Opening Brief, No. 19-56531, Docket No. 18-1 (Feb. 10, 2020), at 38-39, 42 n.14.

order immediately suspending all decommissioning operations at SONGS, including the burial of spent nuclear fuel at the SONGS site, and requiring 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; *see also* ER 9.

After informing Public Watchdogs on October 25, 2019, that the 2.206 Petition did “not warrant immediate action” and affording Public Watchdogs an opportunity to be heard at a public meeting, NRC issued its 2.206 Decision by letter dated February 26, 2020. *See* ER 1-4. NRC declined to take the requested enforcement action. ER 1. The Decision was based on NRC’s determination that each issue raised in the 2.206 Petition had already been sufficiently addressed by previous “facility-specific” and “generic” reviews by NRC. ER 2-4.

The 2.206 Decision summarized and referenced NRC’s extensive oversight at SONGS, which included analysis of the canister-transfer incidents to which the 2.206 Petition referred and the corrective actions taken to address the identified causes. ER 2. The Decision also explained that the agency had assessed and found the SONGS decommissioning funding sufficient to meet regulatory financial assurance requirements, while also explaining that NRC reassesses annually the adequacy of such funding. ER 2-3. And the Decision summarized NRC’s basis for finding that spent fuel canisters can be safely retrieved from the dry storage

facility at SONGS and explained why Public Watchdogs' concerns regarding flooding and potential environmental impacts did not identify any risks that had not already been considered. ER 3.

Public Watchdogs has now appealed the 2.206 Decision to this Court under the Hobbs Act. In April 2020, the Court denied Public Watchdogs' motion for an injunction seeking to halt all spent fuel transfer activities at SONGS pending the Court's review. Order, Docket No. 23 (Apr. 30, 2020).⁵

SUMMARY OF ARGUMENT

1. As Public Watchdogs concedes, the discretionary enforcement determinations made by NRC in its 2.206 Decision are presumptively unreviewable actions committed to the agency's discretion by law under *Heckler v. Chaney*, 470 U.S. 821 (1985). To rebut this presumption, Public Watchdogs contends that NRC consciously and expressly adopted a general policy so extreme as to amount to an abdication of its statutory obligations. Yet, Public Watchdogs fails to meet this demanding standard. The record demonstrates NRC's extensive ongoing regulatory oversight of the SONGS spent fuel transfer activities, including

⁵ In addition, while NRC's consideration of this 2.206 Petition was still pending, Public Watchdogs filed in February 2020 a second petition under 10 C.F.R. § 2.206 requesting again that NRC "immediately suspend decommissioning operations at" SONGS. *See* <https://www.nrc.gov/docs/ML2003/ML20036E999.pdf>. NRC has not yet issued a final decision on the latest petition.

conducting detailed inspections and taking enforcement actions, to protect public health and safety.

In attempting to demonstrate nonetheless that NRC has adopted a general policy amounting to abdication of NRC's public health and safety obligations, Public Watchdogs ignores the agency's extensive regulatory oversight of spent fuel storage and consideration of the uncertainties regarding the timing of spent fuel removal from nuclear plant sites to a permanent repository. NRC has carefully considered the possibility that spent fuel could remain in dry storage at reactor sites such as SONGS for a long period, and even indefinitely, and NRC has explained why it expects safety can be maintained even under those scenarios. Even if Public Watchdogs disagrees with NRC's method of approaching the issue—a disagreement that is itself sometimes difficult to discern, given that Public Watchdogs largely *ignores* NRC's actual consideration of the issue—such a disagreement comes nowhere close to demonstrating agency “abdication” of basic statutory obligations.

Public Watchdogs additionally makes arguments describing purported site-specific implications of NRC's alleged abdication via general policy, which discuss the site's location near the Pacific Ocean, NRC's regulatory approach to the issue of spent fuel repackaging, and the funding available for spent fuel management at SONGS. But these site-specific contentions lack merit, and they

lend no support to Public Watchdogs' argument that NRC has adopted a general policy amounting to abdication of its statutory responsibilities.

Alternatively, Public Watchdogs attempts, in a footnote, to suggest that there is "law to apply" for reviewing NRC's 2.206 Decision. Even if this issue has been properly preserved for this Court's review, Public Watchdogs points only to a regulation and a purported NRC "policy," neither of which actually requires what Public Watchdogs claims they mandate. And even if they did, the requirements would be regulatory requirements imposed on licensees, not self-imposed constraints on NRC's discretion as to how to *enforce* licensee obligations.

2. Even if NRC's 2.206 Decision were reviewable, the Court should still deny the petition for review because Public Watchdogs fails to show that NRC's denial of its enforcement request was arbitrary or capricious.

First, Public Watchdogs is flatly incorrect in its assertion that NRC has failed to address what it contends are the 2.206 Petition's "primary arguments" regarding the allegedly "false assumptions" reflected in the initial decommissioning planning documents submitted to NRC by Southern California Edison. NRC plainly *has* addressed the issue of the uncertain timing of spent fuel removal from reactor sites, including at SONGS. In suggesting otherwise, Public Watchdogs simply ignores the wealth of underlying documentation of past NRC site-specific and generic analyses upon which the 2.206 Decision relies.

Second, Public Watchdogs contends that NRC failed to adhere to its own “policies” regarding long-term storage of spent nuclear fuel. Public Watchdogs’ reliance on NRC’s Continued Storage Generic EIS in support of its argument, however, is misplaced. Although the Generic EIS contemplates a regulatory scheme where repackaging of spent fuel from original dry storage canisters to new ones would occur through use of a dry transfer system, if such repackaging ever proves necessary, there is no requirement that licensees include plans for a dry transfer system in their initial decommissioning planning documents. This approach is reasonable, given that the eventual need for a dry transfer system—expected to be necessary only if a dry storage facility reaches 100 years old before the spent fuel is removed from the site—is still speculative at the time a reactor enters the decommissioning process. Moreover, NRC regulations contemplate that licensees may modify their plans and schedules for decommissioning over time and require licensees to notify NRC should such modifications occur. Licensees also must submit financial assurance reports annually to update NRC on the status of their funding and anticipated costs for managing the on-site storage of spent fuel. Thus, licensees are not irrevocably bound to the spent-fuel-removal timing projections they make at the outset of decommissioning and can (and must) adjust them as circumstances warrant.

Finally, Public Watchdogs contends that NRC failed to adhere to a regulation that it claims requires reactor licensees to demonstrate they can retrieve spent nuclear fuel stored at an onsite facility from inside a storage canister. But that regulation says nothing about *any* required demonstrations, much less the specific demonstration Public Watchdogs claims it requires. Public Watchdogs also never acknowledges, or attempts to rebut, the reasons behind NRC's regulatory approach to the retrievability issue or to explain why NRC's expert technical opinion should be cast aside.

STANDARD OF REVIEW

The petition for review challenges an NRC order denying a request to institute enforcement proceedings against an NRC licensee. Such NRC orders are “committed to agency discretion by law” and are therefore unreviewable under the Administrative Procedure Act. 5 U.S.C. § 701(a)(2); *see Heckler v. Chaney*, 470 U.S. at 838; *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 166 (2d Cir. 2004); *see also International Brotherhood of Teamsters v. U.S. Department of Transportation*, 861 F.3d 944, 955 (9th Cir. 2017) (“[A]rbitrary and capricious review does not apply in the absence of a statutory benchmark against which to measure an agency’s exercise of discretion.”).

If, however, NRC’s order were reviewable, the applicable standard of review for NRC orders challenged under the Hobbs Act is found in the Administrative

Procedure Act at 5 U.S.C. § 706(2)(A), which authorizes courts to set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Public Citizen v. NRC*, 573 F.3d 916, 923 (9th Cir. 2009). This is a “narrow” review standard, “and the reviewing court may not substitute its judgment for that of the agency.” *Id.* Further, where an agency like NRC is making predictive scientific determinations “within its area of special expertise . . . a reviewing court must generally be at its most deferential.” *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *Friends of the Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 921 (9th Cir. 2018) (deference required “to an agency’s determination in an area involving a high level of technical expertise” (internal quotation marks omitted)).

ARGUMENT

I. NRC’s denial of the 2.206 Petition is not subject to judicial review because it is committed to agency discretion by law.

A. NRC’s decisions not to take enforcement action are presumptively unreviewable.

In its 2.206 Petition, Public Watchdogs asked NRC to order suspension of licensed spent fuel transfer activities at SONGS, citing a range of concerns relating to public safety, environmental impacts, and the funding available for decommissioning. In its 2.206 Decision, NRC declined to take the requested enforcement action. Public Watchdogs has conceded that this decision is a

presumptively unreviewable exercise of NRC's enforcement discretion under *Heckler v. Chaney*. Brief at 21-22. As Public Watchdogs acknowledges, federal courts have consistently held that the courts are generally precluded from reviewing NRC decisions not to grant 2.206 petitions because they involve enforcement decisions that are committed to NRC's discretion by law. *See, e.g., Riverkeeper*, 359 F.3d at 166; *Safe Energy Coalition of Michigan v. NRC*, 866 F.2d 1473, 1477 (D.C. Cir. 1989); *see also Massachusetts Public Interest Research Group v. NRC*, 852 F.2d 9, 19 (1st Cir. 1988); *cf. Rockford League of Women Voters v. NRC*, 679 F.2d 1218, 1223 (7th Cir. 1982). Thus, to deny the petition for review, the Court need only find that Public Watchdogs has failed to rebut the presumption.⁶

⁶ Public Watchdogs asserts that a recent Supreme Court decision in *Department of Homeland Security v. Regents of University of California*, 140 S. Ct. 1891 (2020), dictates that the rule of unreviewability for decisions committed to agency discretion be construed narrowly. Brief at 22. But that Supreme Court decision expressly reiterated that “[t]his limited category of unreviewable actions includes an agency’s decision not to institute enforcement proceedings.” 140 S. Ct. at 1905. Further, the Supreme Court held that the agency action before it in that case was reviewable because it was *not* an agency decision not to institute enforcement proceedings; rather, the action “created a program for conferring affirmative immigration relief.” *Id.* at 1906. In the instant case, NRC’s decision at issue is plainly a decision not to institute enforcement proceedings against a specific NRC licensee, in response to Public Watchdogs’ 2.206 Petition asking NRC to do so, and Public Watchdogs nowhere claims otherwise. Therefore, Public Watchdogs’ reliance on this recent Supreme Court decision is misplaced.

B. Public Watchdogs has failed to rebut the presumption of unreviewability.

Public Watchdogs’ primary basis for judicial review is that “NRC ‘has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.’” Brief at 22-26 (quoting *Heckler*, 470 at 833 n.4); *see also Lorion*, 470 U.S. at 735 n.8. This standard presents an exceedingly high bar, reserved only for those decisions reflecting a general policy of willful indifference to legal obligations. *See, e.g., Riverkeeper*, 359 F.3d at 168 (“If the NRC had indisputable proof before it that nuclear power plants are not adequately secure from terrorist attack and nonetheless decided that it would do nothing to address the situation, Riverkeeper might then plausibly charge that the NRC had ‘abdicated’ its statutory responsibility”); *Massachusetts Public Interest Research Group*, 852 F.2d at 19 (review of NRC decision denying 2.206 petition only appropriate where court is “strongly convinced” that NRC is “inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents”).

A finding of “abdication” cannot be based on a disagreement with a particular regulatory decision. Indeed, this Court has recognized that NRC does not abdicate its statutory responsibility merely because it has declined to take a specific enforcement action, *see Public Citizen*, 573 F.3d at 925, or because it has adopted a different approach to a problem than that proposed by a petitioner, *see*

Riverkeeper, 359 F.3d at 169 (cited in *Public Citizen*, 573 F.3d at 925-26). Rather, as long as NRC has reached a considered judgment about an issue involving the exercise of its enforcement discretion—and *regardless of whether that judgment is “right or wrong”*—its decisionmaking “cannot amount to an ‘abdication’ of its statutory duty under the [Atomic Energy Act] to insure that the public health and safety is adequately protected.” *Id.* at 170 (quoted in *Public Citizen*, 573 F.3d at 926). Were the rule otherwise, the Supreme Court in *Heckler* would have “created jurisdiction on an ‘abdication’ basis every time an administrative agency declines to order demanded action on an asserted discrete, perceived problem within its area of statutory responsibility.” *Id.* at 169. As the Second Circuit explained in *Riverkeeper*, “the strict limitations on the judicial power to review administrative agency decisions” do not “permit[] federal courts to assert jurisdiction whenever a specific problem is brought to an agency's attention and the agency decides not to order demanded curative steps with respect to it.” *Id.*

1. NRC has acted consistently with its statutory obligation to protect the public health and safety.

As an initial matter, both NRC’s regulatory oversight of spent fuel storage at SONGS and NRC’s response to specific claims made by Public Watchdogs demonstrate that the agency has not “abdicated” its statutory obligations to protect public health and safety with respect to the storage of spent fuel. Rather, the record makes clear that NRC has actively monitored and overseen spent fuel

storage at SONGS, taken enforcement action where necessary, and engaged thoughtfully with the issues that Public Watchdogs raised in its petition. Indeed, NRC declined to take enforcement action in response to Public Watchdogs' 2.206 Petition "because the issues raised in the petition have been the subject of a facility-specific or generic NRC staff review," and the petition did not present any issues, facts, or significant new information to which these previous NRC site-specific and generic analyses did not apply. ER 4 (internal quotation marks omitted); *see* SER 82-83; *see also* ER 2 (summarizing initial determination by an NRC petition review board that the 2.206 Petition did "not raise concerns that the NRC staff has not previously considered and resolved").

Addressing public health and safety protection, NRC's 2.206 Decision referenced NRC's review of the dry storage system at SONGS, which "NRC approved in 2017 through a public rulemaking," and it also explained that the "NRC staff continually performs oversight to ensure that the storage of spent nuclear fuel at SONGS does not pose a threat to public health and safety." ER 2. The 2.206 Decision then pointed to examples of inspection reports documenting NRC's extensive and continuing oversight of SONGS decommissioning activities. *Id.* The 2.206 Decision also specifically addressed "the events described in the [2.206 Petition] regarding the licensee's fuel loading operations and potential scratching of the fuel canisters." *Id.* On that topic, the 2.206 Decision identified

NRC's finding that the canister scratching is "not a safety concern," based on evaluations conducted of the canisters and applicable engineering standards. *Id.*

The 2.206 Decision went on to address the 2.206 Petition's concerns about decommissioning funding levels, environmental impacts, retrievability of spent fuel from the dry storage system, and flooding. On the funding issue, NRC explained that the funds currently set aside for SONGS decommissioning activities meet applicable requirements under NRC regulations and are in line with funding levels at "similar decommissioning reactors," while also explaining that funding levels are "reviewed annually by the NRC staff to ensure continued compliance" with NRC regulatory requirements. ER 2-3. On environmental impacts, NRC found that the concerns raised by the 2.206 Petition were within the bounds of the impacts already analyzed by NRC in pertinent generic and site-specific EISs. ER 3. On spent fuel retrievability, NRC explained that the licensee had already successfully demonstrated retrievability of fuel canisters from the SONGS dry storage facility and implemented certain corrective actions that NRC found to be acceptable, which was sufficient under pertinent NRC regulations and guidance. *Id.* And on flooding, NRC explained that the dry storage system is designed to withstand the levels of flood risk associated with the SONGS site, as identified in the licensee's own analyses and as verified by NRC through inspections. *Id.*

Simply stated, NRC's past and ongoing regulatory oversight of spent-fuel transfer activities during the SONGS decommissioning, as reflected in the 2.206 Decision and documented in the numerous prior inspections, analyses, and reviews upon which it relies, belies any assertion that the agency has abdicated its statutory safety mission with respect to the safe storage of spent fuel. Because the agency has not turned a blind eye to "indisputable proof" of a safety hazard, its decision not to take enforcement action in this particular case and to rely on its existing processes and already-completed reviews is committed to agency discretion by law and not reviewable. *See Riverkeeper*, 359 F.3d at 168.

2. NRC has extensively considered the safety implications of long-term and indefinite on-site storage of spent fuel.

Ignoring the agency's consideration of the numerous arguments that it raised in the 2.206 Petition and focusing instead on the length of time that fuel is projected to be stored, Public Watchdogs contends that NRC has a "general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans" that is "so extreme as to amount to an abdication" of NRC's "statutory responsibility to protect the public from nuclear accidents." Brief at 17, 22-24. That is, "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.” *Id.* at 23. Public Watchdogs argues that, by permitting licensees to *plan* for the removal of spent fuel from dry storage by 2049 (nearly thirty years from now), “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.” *Id.* at 23-24.

As discussed below, Public Watchdogs’ abdication argument lacks merit, both because it focuses on a single aspect of the agency’s decisionmaking and because it ignores the agency’s comprehensive efforts, reflected most notably in NRC’s Continued Storage Rule and the associated Generic EIS, to address issues pertaining to the potential long-term or indefinite storage of spent fuel at reactor sites.

First, Public Watchdogs’ myopic focus on the issue of the timing of spent fuel removal does not demonstrate that NRC has established an express “general policy” not to protect public health and safety. As discussed above, both NRC’s regulatory oversight of the plant and the agency’s response to claims made by Public Watchdogs demonstrate the agency’s commitment to ensuring that spent fuel will be stored safely at SONGS. Given the demonstration Public Watchdogs is required to make here—that NRC has adopted an “extreme” general policy

amounting to “abdication” of statutory obligations—challenging one particular timing projection associated with NRC’s decisionmaking is clearly insufficient. *See Riverkeeper*, 359 F.3d at 168-69; *Massachusetts Public Interest Research Group*, 852 F.2d at 19; *cf. Public Citizen*, 573 F.3d at 925.

Second, Public Watchdogs fails to demonstrate that this fuel-removal-timing assumption the licensee employed in its decommissioning plans—that is, that spent fuel will eventually be removed from reactor sites within the next few decades—reflects a failure by NRC to confront an issue altogether, such that agency “abdication” could even plausibly be found. At most, Public Watchdogs provides reasons for arguing against the *reasonableness* of the assumption in these decommissioning plans. *See* Brief at 4, 9 (referring to the efforts, thus far unsuccessful, to establish a permanent repository for final disposal of spent nuclear fuel).

In any event, Public Watchdogs fails to explain why it is unreasonable—much less an abdication—when NRC permits licensees to plan on the removal of spent fuel from reactor sites over the next *thirty* years. Among other reasons why this assumption is reasonable (both as to the commencement date of fuel delivery and, much more importantly, the date by which fuel removal will be complete), there are currently pending before NRC two applications by private companies to construct “Consolidated Interim Storage Facilities” that would accept spent fuel

from reactor sites around the country and store it in a consolidated location until a permanent repository becomes available. *See* 83 Fed. Reg. 32,919 (July 16, 2018) (noticing receipt of application for NRC license to construct and operate a consolidated interim storage facility in New Mexico); 83 Fed. Reg. 44,070 (Aug. 29, 2018) (addressing status of application for NRC license for a consolidated interim storage facility in Texas). And it is not unreasonable for NRC to expect for current planning purposes—subject to future revision if necessary—that another federal agency such as DOE will carry out its statutory obligations in due course. *Cf. Riverkeeper*, 359 F.3d at 170 (no “abdication” where NRC relies on other federal agencies to protect against potential terrorist threats to nuclear plants). Again, however, a challenge to one particular assumption’s reasonableness would not support finding “abdication” anyway. *See id.*

Third, contrary to Public Watchdogs’ contention that NRC has ignored the possibility, NRC has *extensively considered* the safety implications for spent fuel storage due to a delay in repository availability, including the safety implications if spent fuel is not removed from reactor sites within the next several decades, and it has affirmatively determined that this outcome would *not* pose the public health and safety threat that Public Watchdogs postulates. As documented in NRC’s Continued Storage Rule and the associated Generic EIS, NRC has extensively considered the potential consequences if spent fuel is not removed in the near

term—an issue that is hardly unique to SONGS, as it affects nuclear power plants nationwide. *See supra* pp. 9-11; *see also infra* p. 50 n.10. In this generic analysis, NRC found that long-term, and even indefinite, on-site dry storage of spent fuel could be accomplished safely, and NRC mapped out a process for doing so through the use of a dry transfer system. SER 181-83, 195-99, 207, 209, 220-21. This NRC generic analysis was upheld on judicial review. *New York v. NRC*, 824 F.3d 1012 (denying legal challenge to Continued Storage Rule and Generic EIS). NRC has also recognized that it has sufficient regulatory tools and flexibilities to require licensees to take actions (e.g., construction of a dry transfer system) that could prove necessary should longer-term on-site storage be required. *See DTE Electric Co.*, CLI-15-4, 81 N.R.C. at 240-42 (explaining NRC’s determination that it can issue reactor licenses in the absence of a repository in light of licensees’ ability to store spent fuel safely under regulatory oversight).

In arguing that NRC has “abdicated” its basic statutory obligations, Public Watchdogs ignores these NRC generic analyses regarding the safety of potential long-term and indefinite on-site spent fuel storage. Brief at 17, 21-27. Public Watchdogs’ assertion of NRC’s “willful ignorance” about this possible eventuality is thus wholly inconsistent with the record.

Finally, we note that Public Watchdogs’ “abdication” arguments focus on licensee *plans* related to decommissioning, which include the spent-fuel-removal

timing projections that Public Watchdogs characterizes as “knowingly false assumptions.” *See, e.g.*, Brief at 6-8, 23-30; *see also* Brief at 23 (citing decommissioning planning documents from Pilgrim Nuclear Power Station, Palisades Nuclear Plant, and SONGS). Yet these plans expressly acknowledge that the projections in those documents are current assumptions, to be used for planning purposes, that may ultimately require revision. *See* ER 77 (“Shipping dates are assumed based on the previously documented positions of the DOE, which indicates that shipments from the industry could begin as early as 2024 and SONGS place in the current queue. *Both are subject to changes.*” (emphasis added)); ER 99 (“SCE is continuing to review available information from the DOE to determine if the DOE start date assumption of 2024 requires updating. The [Decommissioning Cost Estimate] will be revised accordingly as new information becomes available.”); *see also* ER 56-57 (recognizing that licensee has updated original timing projections concerning spent fuel removal). Moreover, as explained previously, *see supra* pp. 8-9, 27, licensees must annually update NRC to ensure that the licensee is maintaining sufficient reserve to fund decommissioning and spent fuel management activities even if circumstances change over time.

In sum, even if Public Watchdogs’ allegations were sufficient to support an “abdication” finding and thereby permit review of the 2.206 Decision on the

merits, the record does not support its allegations. NRC has affirmatively found, based on extensive generic analysis, that spent fuel can be safely managed at reactor sites indefinitely should it prove necessary. To be sure, NRC does not require reactor licensees to provide specific contingency plans at the outset of the decommissioning process to address the possibility of longer-than-anticipated on-site storage. But Public Watchdogs nowhere explains why requiring licensees to perform such contingency planning so far in advance is essential to fulfill NRC's basic public health and safety mission. NRC's current approach—finding through generic analysis that long-term on-site storage can be accomplished safely, and concluding that NRC has sufficient regulatory tools to require licensees to take proper steps if and when necessary—represents NRC's considered judgment with respect to this issue and does not even approach the level of an “extreme” policy demonstrating an “abdication” of NRC's statutory obligation to protect public health and safety. *See Riverkeeper*, 359 F.3d at 168-69.

3. Public Watchdogs' SONGS-specific arguments supporting its general “abdication” theory also lack merit.

In addition to its central argument for “abdication,” Public Watchdogs makes a series of SONGS-specific arguments in support of its theory. These arguments likewise fail to demonstrate that NRC has ignored its basic statutory obligation to protect the public health and safety.

Public Watchdogs first raises concerns about the dry storage facility's proximity to the Pacific Ocean, describing its location as "within a tsunami inundation zone surrounded by active fault lines, and little more than a foot above mean high-tide level" and "near one of California's most populated beaches." Brief at 24. Citing "the inexorable rise of sea levels due to climate change," Public Watchdogs claims "it is inconceivable to think that this location will remain viable for much longer." *Id.* Even if these concerns had merit, they are plainly site-specific concerns about a particular NRC-licensed facility based on specific features of the site in question, and they cannot demonstrate that NRC has adopted a "general" agency policy amounting to abdication of statutory responsibilities.

And Public Watchdogs does not demonstrate that these site-specific concerns have any merit to begin with, let alone that they evidence abdication. Importantly, in responding to Public Watchdogs' flooding-related concerns regarding the SONGS dry storage facility site, the 2.206 Decision pointed to a comprehensive NRC inspection report regarding use of the Holtec system at the SONGS site. ER 3. That inspection report explained that the evaluations conducted for site-related hazards specific to SONGS, including "tornados/high winds, flood, seismic events, tsunamis, hurricanes, lightning, burial of the [dry storage facility] under debris, normal and abnormal temperatures, collapse of nearby facilities, and fires/explosions," found that "[t]he site environmental

conditions at SONGS were bounded by the Holtec storage system's design parameters," SER 132, meaning that the dry storage system was *designed to withstand* the very hazards Public Watchdogs suggests render the site problematic, including tsunamis, flooding, and earthquakes. Simply pointing to site-related hazards that an NRC-regulated facility is specifically designed to withstand does not demonstrate NRC abdication of statutory responsibilities, let alone a "general policy" amounting to such abdication.

Next, Public Watchdogs claims that because NRC "falsely assumes that spent nuclear fuel will only be stored in these canisters temporarily," NRC 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." Brief at 25. In doing so, Public Watchdogs also levels criticisms at the Holtec canister design. *See* Brief at 24-25. However, such criticism of the Holtec design constitutes a time-barred challenge to the Certificate of Compliance. Indeed, any such challenge should have been raised in a court of appeals exclusively under the Hobbs Act within 60 days after entry of the pertinent NRC rulemaking order. *See Michigan v. United States*, 994 F.2d 1197, 1204 (6th Cir. 1993).

Moreover, Public Watchdogs' assertions essentially just repeat its central "abdication" argument. As explained above, NRC reasonably does not require

licensees to demonstrate decades in advance that they would be capable of accomplishing a speculative future action (on-site repackaging of spent fuel using a dry transfer system) that NRC has already determined, in an extensive generic analysis, can be accomplished if and when needed. And to the extent Public Watchdogs is claiming that later repackaging from the SONGS canisters would be precluded as a consequence of canister scratching during the loading of canisters into the facility, *see* Brief at 10-11, 24-25, Public Watchdogs never acknowledges, let alone rebuts, NRC's explanation in the 2.206 Decision as to why the identified canister scratching does not represent a safety concern. *See* ER 2.⁷

Finally, Public Watchdogs contends that NRC has abdicated its statutory responsibility because it “falsely assumes that spent nuclear fuel will only be stored at SONGS temporarily” and therefore has not required the licensees “to provide assurance that they will have sufficient financial resources to pay for the

⁷ We also note that Public Watchdogs' only cited support for its underlying safety concern appears to be a newspaper article (ER 141-43) and an NRC Notice of Violation letter indicating that corrective actions would be required at SONGS related to the canister scratching issue (ER 149). Public Watchdogs makes no attempt to explain how either of these documents shows an error in NRC's determination that the SONGS licensee implemented sufficient corrective actions to address the canister scratching issues. *See* ER 2; *see also* SER 8-9, 12, 14-15, 41-46 (inspection report cited in 2.206 Decision documenting NRC's review of the issue in detail). In any event, a technical dispute with NRC about the condition of the spent fuel storage canisters at one specific nuclear plant is not a basis to demonstrate an NRC “general policy” amounting to “abdication” of NRC statutory obligations.

cost of storage and management of spent nuclear fuel at SONGS beyond 2049,” supposedly in conflict with NRC regulatory requirements at 10 C.F.R. §§ 50.75 and 50.82. Brief at 25. Public Watchdogs does not, however, attempt to demonstrate any actual funding problem resulting from NRC’s purportedly “false” assumption, whether at SONGS specifically or at decommissioning reactors generally.

As NRC explained, the funds held in trust to complete radiological decommissioning of SONGS—in excess of \$3.2 billion—satisfy NRC’s applicable regulatory funding assurance requirements. ER 2-3; *see also* SER 7 (listing decommissioning funding levels for SONGS Units 2 and 3). Moreover, these cost projections are “reviewed annually by the NRC staff to ensure continued compliance with the decommissioning financial assurance requirements.” ER 3; *see* 10 C.F.R. § 50.82(a)(8)(v)-(vi) (requiring licensees to update financial assurance reports annually and to provide additional financial assurance in the event of a shortfall). Thus, NRC’s process, featuring annual funding review “to ensure continued compliance,” already provides for funding changes over time should circumstances dictate. NRC’s reliance on its regulatory process to ensure compliance does not constitute an abdication; rather, it is proof of good governance.

And as to Public Watchdogs’ concerns about the costs of longer-term storage, Public Watchdogs fails to establish that the licensee would not be able to cure a shortfall if one existed and ignores court decisions holding that generators of spent fuel are entitled to seek compensation from the United States for any costs resulting from DOE’s failure to accept spent fuel in accordance with its contractual obligations. *See, e.g., Southern California Edison Co. v. United States*, 655 F.3d 1319 (Fed. Cir. 2011) (affirming judgment of \$142 million for spent fuel storage expenditures incurred through 2005 and permitting recoveries covering expenditures in subsequent periods). Why NRC must require licensees to demonstrate *now* that they have sufficient resources to cover the costs for activities that would occur after 2049, or perhaps not at all, and whose costs would likely be borne in large part by the federal government anyway, is left unexplained. Certainly, no “abdication” by NRC of basic statutory obligations is demonstrated here.

C. Public Watchdogs does not identify any law limiting NRC’s enforcement discretion.

In a bare-bones footnote, Public Watchdogs contends that it has rebutted the presumption against unreviewability because NRC “regulations and policies” provide a “meaningful standard against which to judge the agency’s exercise of discretion.” Brief at 27 n.4 (quoting *Perez Perez v. Wolf*, 943 F.3d 853, 861 (9th Cir. 2019)). Yet Public Watchdogs indirectly refers to only one substantive NRC

regulation, 10 C.F.R. § 72.122, that Public Watchdogs claims has not been satisfied at SONGS, and it fails to provide any explanation supporting its blanket assertion here that the presumption against reviewability should not apply.

Even if its argument somehow properly preserved the issue for this Court’s review, Public Watchdogs has not identified an NRC regulation that purports to limit NRC’s *enforcement discretion* or otherwise provide any “guidelines for the agency to follow in exercising its enforcement powers.” *Chaney*, 470 U.S. at 833. Nor does Public Watchdogs identify any NRC “policy” that limits NRC’s enforcement discretion (let alone explain how a mere “policy” would serve as “law to apply”). *See* Brief at 30-35 (suggesting—incorrectly, as discussed *infra* at pp. 46-50—that NRC’s Continued Storage Generic EIS somehow requires a reactor licensee’s initial decommissioning plans to include plans for a dry transfer system).

If a regulated party’s alleged violation of some substantive agency regulatory requirement were sufficient to rebut the presumption of unreviewability applicable to agency exercise of enforcement discretion, that exception would swallow the rule. That is because *any* instance of an agency considering whether to take enforcement action—which is where the unreviewability presumption applies—necessarily involves some suggestion that the prospective target of the enforcement action violated some requirement. To be sure, NRC disagrees that this particular regulation on spent fuel retrievability was violated at SONGS, as

explained in the 2.206 Decision. ER 3; *see also infra* pp. 50-55. Similarly, NRC disagrees that any NRC policy associated with the Continued Storage Generic EIS has been violated at SONGS. *See infra* pp. 46-50. But even if NRC did consider the regulation or the (alleged) agency policy to have been violated, that mere fact would not eliminate NRC's discretion to determine whether or in what manner to take enforcement action in response to that violation or serve as a basis for reviewing the agency's decision. Accordingly, to the extent it even constitutes a developed argument, Public Watchdogs' footnote also fails to demonstrate that the 2.206 Decision is reviewable.

II. Even if NRC's 2.206 Decision were reviewable, it reflects reasoned decisionmaking by the agency.

If the Court were to review NRC's 2.206 Decision, despite the general rule in *Heckler v. Chaney* and the numerous court of appeals decisions finding similar NRC decisions unreviewable, the Court should nonetheless deny the petition for review. Public Watchdogs has failed to show that the agency's decision was arbitrary and capricious, particularly in light of the high degree of deference courts afford to NRC regulatory determinations on technical issues that are, as the Supreme Court has explained, "at the frontiers of science." *Baltimore Gas*, 462 U.S. at 103.

A. NRC considered Public Watchdogs’ arguments and based its decision on the agency’s extensive analyses of spent fuel storage and a lengthy administrative record.

Public Watchdogs contends that NRC’s 2.206 Decision was arbitrary and capricious because it failed to consider what it contends are its “primary arguments” related to allegedly “false assumptions” in SONGS decommissioning plans. Brief at 28-30. But this argument by Public Watchdogs is meritless.

Indeed, Public Watchdogs *admits* that NRC’s decision letter addressed the “false assumptions” issue. Brief at 29. Public Watchdogs, however, claims that the letter responded to the issue “perfunctorily and only in the context of” the Decommissioning Cost Estimate at SONGS, where the letter summarized NRC’s cost-related findings in NRC’s evaluation of the SONGS Irradiated Fuel Management Plan. *Id.* But NRC’s stated rationale in declining to institute the requested enforcement proceedings was that each issue presented in the petition raised concerns that NRC had “previously considered and resolved,” ER 2, and that the issues had already been “the subject of a facility-specific or generic NRC staff review.” ER 4.

Consistent with this rationale, the 2.206 Decision identified various NRC documents that already reflect NRC’s consideration of, and findings regarding, the issues raised in the petition. ER 1-3. The 2.206 Decision did not attempt to reinvent the wheel by chronicling all of NRC’s relevant prior work in detail in the

letter itself. This agency style choice as to how to draft the decision letter is hardly a basis to set aside the agency's considered decision. *See Lorion v. NRC*, 785 F.2d 1038, 1042 (D.C. Cir. 1986) (requiring "NRC to mention [in its decision] and analyze every document relevant to a hearing request would completely clog an agency's decisional process"); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (an agency decision is upholdable "if the agency's path may reasonably be discerned"); *Public Citizen*, 573 F.3d at 923.

As Public Watchdogs recognizes, a key document relied upon by the 2.206 Decision in response to the claims about decommissioning plan "assumptions" is NRC's safety evaluation of the SONGS Irradiated Fuel Management Plan. *See* Brief at 29; ER 3. That NRC safety evaluation, in turn, specifically references and discusses the Continued Storage Generic EIS's findings, and it reviews the SONGS Irradiated Fuel Management Plan against those findings. SER 144, 146-47. As discussed previously, the Continued Storage Generic EIS directly and extensively addresses the uncertainty regarding when spent fuel will be removed from reactor sites and the potential consequences if fuel remains at reactor sites over the long term or even indefinitely. *See supra* p. 9-11, 31-32. In doing so, the Generic EIS found the "most likely" scenario to be that spent fuel will be removed from reactor sites within 60 years after permanent reactor shutdown and explained

the basis for this view (including DOE's plan for a repository before 2048), and it also acknowledged that this outcome is "not certain" and therefore went on to analyze the longer-term and indefinite on-site storage scenarios as well. *See* SER 179-80, 212-19. And the Generic EIS extensively analyzed the health and safety issues associated with potential longer-term and indefinite storage of spent fuel at reactor sites, finding that safety can be maintained under both scenarios. *See supra* p. 32; *see also DTE Electric Co.*, CLI-15-4, 81 N.R.C. at 240-42.

Thus, NRC specifically evaluated the SONGS spent fuel management projections against NRC's extensive generic analysis regarding the uncertain timing of spent fuel removal from reactor sites, and this is reflected in the 2.206 Decision and the underlying documentation upon which it relies. Accordingly, Public Watchdogs is simply incorrect that the 2.206 Decision failed to respond to its "primary arguments."

Finally, the fact that the 2.206 Decision addressed the "false assumption" issue most directly in its section on decommissioning costs, rather than in its section on public health and safety, stems from how Public Watchdogs framed its 2.206 Petition. Specifically, Public Watchdogs' 2.206 Petition focuses its arguments regarding the "assumptions" issue on the SONGS "decommissioning plans," including the Decommissioning Cost Estimate and the Irradiated Fuel Management Plan. *See* ER 10 ("Licensees' entire decommissioning plan,

including their decommissioning cost estimate and irradiated fuel management plan, is predicated on the assumption that spent nuclear fuel will be removed from SONGS by 2049.”); *see also* Brief at 28-30; ER 7-9; ER 45-46.⁸ As is apparent from reviewing these decommissioning planning documents, they are focused on the anticipated *costs* of dry storage and associated funding issues, not on the specifics of public health and safety issues regarding dry storage. *See* SER 222-61; ER 80-91; *see also supra* p. 7 (explaining that decommissioning plans are not central to NRC’s health and safety regulation of spent fuel dry storage facilities). The public health and safety issues regarding the dry storage facility at SONGS, including the safety implications related to long-term storage, are addressed most comprehensively in the 2015 and 2017 rulemakings that certified, and then amended the certification of, the Holtec UMAX design, *see supra* pp. 12-13; in NRC’s extensive inspections and analyses demonstrating that the SONGS dry storage facility accorded with the Holtec Certificate of Compliance and confirming the conclusion that “the environmental conditions [at the site] were bounded by the

⁸ The 2.206 Petition also identifies the SONGS Post-Shutdown Decommissioning Activities Report as one of the SONGS “decommissioning plans” at issue, *see* ER 45, but that report’s primary focus is on aspects of decommissioning other than dry storage of spent fuel. *See generally* SER 262-97. In that report’s brief section on dry storage, it provides only basic timeline-related information in line with the more detailed discussions in the Decommissioning Cost Estimate and Irradiated Fuel Management Plan. SER 274-75.

Holtec storage system’s design parameters,” *see supra* p. 13; and in the Continued Storage Generic EIS, *see supra* pp. 9-11, all of which were either referenced in the 2.206 Decision or in the documents upon which the Decision relied. Thus, contrary to Public Watchdogs’ assertions, the agency has comprehensively addressed these issues, and its informed decision not to take enforcement action is supported by the record.

B. NRC’s approach to decommissioning is consistent with the Continued Storage Generic EIS.

Public Watchdogs next contends that NRC’s decision was arbitrary and capricious because the agency failed to adhere to its own “policies” on long-term storage of spent nuclear fuel. Brief at 31-35. But as explained below, the Generic EIS does not contain any requirement (whether via “policy” or otherwise) for licensees to provide, at the outset of decommissioning, specific plans to develop a dry transfer system that, as Public Watchdogs contends, may be required 100 years after a dry storage facility commences operation. Its argument therefore lacks merit.

To be sure, the Continued Storage Rule and Generic EIS contemplate that spent nuclear fuel can be stored safely at reactor sites over a long period or even indefinitely, and that if it ever becomes necessary to do so—when dry storage facilities reach about 100 years old—spent fuel can be safely repackaged into new containers through a dry transfer system. *See supra* p. 10; *see also* Brief at 32-33.

But the Generic EIS nowhere requires or even contemplates that licensees must develop plans for a dry transfer system, or for any other aspects of dry storage facility replacement, decades in advance. And Public Watchdogs does not identify a specific source of such an NRC requirement, whether in the Generic EIS or elsewhere (because, in fact, there is none).

Indeed, given what the Continued Storage Generic EIS actually says, requiring licensees to plan for a dry storage facility decades in advance would be an unjustified burden. As explained in the Generic EIS, dry transfer systems would be small-footprint facilities, “based on well-understood technology,” requiring only a year or two to construct, and likely located at the former reactor site where the spent fuel is being stored (which limits the potential for problems with siting the facility). *See* SER 181, 207, 209. Constructing such a facility is thus not a momentous task, and NRC accordingly does not require such extreme advance planning by licensees.

Thus, with the SONGS decommissioning plans projecting spent-fuel removal from the site by 2049, and with the dry storage facility at issue in this case just now commencing operations, it makes sense that SONGS’ current decommissioning plans do not, as Public Watchdogs indicates (Brief at 11, 33), include plans for constructing a dry transfer system. Based on the 100-year estimate for replacing dry storage facilities, the current 2049 projection would not

only need to be wrong, but would need to be wrong by 70 years, for a dry transfer system to eventually become necessary for the dry storage facility at SONGS.

NRC's expectation is that dry transfer systems will be developed if and when they are actually needed, and it is reasonable for NRC not to insist upon plans for one at this time, decades before a dry transfer system may be necessary at SONGS.⁹

Public Watchdogs also does not explain why NRC must insist that the SONGS decommissioning funding levels—roughly \$3.2 billion at last check—must specifically account *now* for a possible \$100 million expenditure 100 years from now, *see* Brief at 33, particularly where, as mentioned previously, NRC's decommissioning funding requirements provide for continued monitoring of funding and updating as necessary if circumstances change. *See supra* p. 38. As also mentioned previously, and as Public Watchdogs nowhere acknowledges, courts have held that the Federal government remains responsible for certain spent fuel management costs attributable to DOE delays in removing fuel from reactor sites, including SONGS. *See supra* p. 39. This fact further lessens the practical

⁹ Public Watchdogs relies on the first *New York v. NRC* case—*New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)—to criticize the conclusions in the Generic EIS concerning the feasibility of a dry transfer system. Brief at 34. But NRC is not “reverting” to a faulty premise and simply “hop[ing] for the best.” It is relying on its analysis in its Generic EIS, prepared in response to the D.C. Circuit's 2012 decision and upheld by that court on appeal, concerning the feasibility of such a system. *See New York v. NRC*, 824 F.3d 1012, 1023-24 (D.C. Cir. 2016).

need for the licensee to specifically allocate funds so far in advance for this speculative task.

Lastly, Public Watchdogs, in a footnote, attempts to suggest that at-reactor spent fuel storage is not susceptible to generic analysis, because of varying conditions from site to site. Brief at 32 n.5. This is a curious claim, given its location in the midst of Public Watchdogs' argument that a *generic* NRC document establishes an NRC policy applicable to SONGS and that NRC acted arbitrarily and capriciously in not applying that purported generic policy to SONGS.

In any event, Public Watchdogs provides no support for its suggestion that the Generic EIS is inapplicable to SONGS beyond invoking the wisdom of "a layperson." Notably, a much more developed and detailed version of this Public Watchdogs argument was expressly considered and rejected by the D.C. Circuit Court of Appeals on direct review of the Continued Storage Rule and Generic EIS. The D.C. Circuit upheld as reasonable NRC's rationale for applying the Continued Storage Generic EIS's findings on a generic basis, even as the agency acknowledged that different sites have differing characteristics. *See New York*, 824 F.3d at 1019-20. By simply positing what "a layperson" would conclude, Public Watchdogs raises no meaningful challenge here to the generic applicability of the EIS analysis, and it fails to demonstrate why it would somehow be unreasonable for NRC to conclude, as an exercise of its technical judgment, that a dry transfer

system could be constructed at SONGS, like it could be at other sites, if and when the need arises.¹⁰

C. NRC has adhered to its regulation on spent fuel retrievability.

Finally, Public Watchdogs contends that the 2.206 Decision was arbitrary and capricious because NRC failed to adhere to the alleged requirements of a regulation related to spent fuel when it required the SONGS licensee to demonstrate only the retrievability from dry storage of the steel canisters containing the spent fuel, rather than the retrievability of the spent fuel from the canisters themselves. Brief at 35-40. Public Watchdogs claims this NRC approach conflicts with the “plain meaning” of an NRC regulation and that NRC’s guidance addressing this issue is contrary to that meaning. This argument lacks merit.

The pertinent NRC regulation states that “[s]torage systems must be designed to allow ready retrieval of spent fuel . . . for further processing or

¹⁰ We observe in this regard that SONGS is specifically identified in the Generic EIS as a site featuring at-reactor dry storage of spent fuel. *See, e.g.*, SER 191 (listing SONGS as one of four dry storage facility sites in California). And the fact that SONGS is located adjacent to the Pacific Ocean (*see* Brief at 24) does not somehow render the Generic EIS’s analysis inapplicable to SONGS. Indeed, as the Generic EIS explains, “*most* nuclear plant sites are located near reliable sources of water . . . such as rivers, lakes, *oceans*, bays,” or man-made water sources. SER 203 (emphasis added); *see also* SER 205 (“At-reactor [dry storage facilities] are generally located near nuclear power plants, and nuclear power plant sites are usually located near marine and estuarine coastal areas, on the Great Lakes, or along major rivers or reservoirs.”).

disposal.” 10 C.F.R. § 72.122(l). In its 2.206 Decision, NRC explained that “a licensee can demonstrate the ability for ready retrieval” by showing that it can remove from dry storage a canister loaded with spent fuel. ER 3. Because NRC inspectors observed and determined that Southern California Edison was successful in downloading and retrieving a canister at the SONGS facility, NRC concluded there is not a safety concern regarding retrievability at SONGS. ER 3.

On its face, the regulation Public Watchdogs cites (10 C.F.R. § 72.122(l)) nowhere specifies what a reactor licensee must demonstrate in order for NRC to conclude that the regulatory requirement is met. Indeed, the regulation’s express focus is on how the system is “designed,” not on any required demonstrations by the reactor licensee that is using the system. Therefore, Public Watchdogs’ “plain meaning” assertion is incorrect.¹¹

Moreover, Public Watchdogs has failed to establish that NRC has acted arbitrarily and capriciously in declining to require more of a demonstration than the licensee has provided. To the extent NRC does require reactor licensees to make demonstrations related to the ready retrieval concept, NRC has provided

¹¹ To the extent that Public Watchdogs asserts that the system, as designed, is flawed because it is inconsistent with NRC regulations, its arguments constitute a back-door challenge to the Certificate of Compliance notice-and-comment rulemaking for the Holtec design and are time-barred by the Hobbs Act. *See Michigan*, 994 F.2d at 1204.

licensees three options, one of which is to demonstrate that the licensee can “remove a canister loaded with spent fuel assemblies from a storage cask/overpack.” ER 167. And the agency has specified the reasons why, in the exercise of its technical judgment, no more is required; as the agency has explained, “[o]pening a storage system is labor intensive, but more importantly, it exposes workers to additional [radiation] dose, and particularly for welded canisters, may require breaching and reestablishing the confinement boundary with no additional safety benefit.” ER 171. Further, the agency has noted that “in the interest of decreasing radiation exposures,” storage systems should utilize containers that can also be used as-is for transporting spent fuel to another site (e.g., by DOE), which further reduces the chances that a licensee would ever have occasion to open a canister to remove the spent fuel inside. ER 170. Indeed, the canisters used in the Holtec dry storage system at SONGS are “multi-purpose” canisters specifically designed to be usable for transportation in addition to storage.¹²

¹² Although formal NRC regulatory certification of the multi-purpose aspect of a canister design would need to await a specific program for actually transferring spent fuel away from reactor sites, facilitating such transportation without requiring canister replacement is the intent behind the so-called “multi-purpose” canister design used in the dry storage system at SONGS. *See* SER 190 (summarizing the multi-purpose design concept in the context of NRC’s regulatory program for cask and canister certification); 80 Fed. Reg. at 12,074 (explaining

Thus, NRC’s decision to allow the licensee to demonstrate it can retrieve a canister from the facility, rather than requiring the licensee to demonstrate the ability to retrieve spent fuel from the interior of the canister, is consistent with the language of NRC’s regulation on “ready retrieval”—which speaks only to “design” requirements, not licensee demonstrations—and is based on reasoned decisionmaking involving a highly technical issue. Public Watchdogs is silent regarding NRC’s stated justifications for its regulatory approach, and it provides no basis for the Court to conclude that NRC’s 2.206 Decision was in conflict with 10 C.F.R. § 72.122(l) or otherwise arbitrary and capricious.

Public Watchdogs also suggests that the absence of specific plans for a dry transfer system within the current SONGS decommissioning planning documents somehow demonstrates that NRC is acting contrary to 10 C.F.R. § 72.122(l). Brief at 37-38. But, as Public Watchdogs also acknowledges, NRC expects a dry transfer system to be necessary for dry storage facility replacement only once every 100 years. Brief at 32. Public Watchdogs fails to identify any language in an NRC regulation stating that reactor licensees must include in their initial decommissioning planning documents specific plans for a dry transfer system, and it cannot do so because none exists. *See also supra* pp. 46-48.

that Holtec’s UMAX system is designed to “provide long-term underground storage of loaded multi-purpose canisters”).

Relatedly, Public Watchdogs notes that canister-repackaging technology is not currently in place and cites to pages of a transcript where a SONGS official “readily admitted” this fact. Brief at 37 (citing ER 146-47). Yet the reason for this is evident from that transcript: no one has needed the technology yet. *See* ER 146 (“[N]obody has unloaded a commercial canister.”). Further, the same SONGS official identified in that transcript excerpt that each necessary task involved in eventual repackaging from one canister to another (i.e., through use of a dry transfer system) will be possible to accomplish, with the most significant “challenge” involved expected to be surmountable after “a two-to three-year project to develop the techniques.” *See* ER 146-47. This squares with NRC’s conclusion in the Continued Storage Generic EIS that dry transfer systems are “based on well-understood technology” and would eventually be developed, if needed, to allow for repackaging of spent fuel from old canisters to new ones. *See* SER 181-85; *see also* SER 195-99 (detailing NRC’s expectations regarding dry transfer system technology).

Public Watchdogs does suggest that a dry transfer system for the SONGS dry storage facility may actually be needed sooner than 100 years into the dry storage facility’s lifespan. Specifically, Public Watchdogs cites the Continued Storage Generic EIS’s discussion of the potential need for a dry transfer system “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).” Brief at 37 (citing ER 194-95). Public Watchdogs then refers to the allegations in its 2.206 Petition about the scratching of canisters during emplacement into the dry storage facility. *Id.* Yet, the Continued Storage Generic EIS excerpt to which Public Watchdogs refers was clearly focused on the need to address damage to the fuel stored inside the canisters, not damage to the exterior of the canisters such as the “scratching” mentioned by Public Watchdogs. *See* ER 194-95. Moreover, NRC already considered and rejected Public Watchdogs’ claims that the identified canister scratches presented a safety issue, ER 2, a point Public Watchdogs simply ignores and never attempts to rebut. Thus, the suggestion by Public Watchdogs that the repackaging of spent fuel and the associated construction of a dry transfer system would need to occur sooner rather than later because of canister scratching—and that, as a result, NRC must insist that the SONGS initial decommissioning planning documents specifically address dry transfer system construction—is not supported by the record.

Simply put, Public Watchdogs fails to identify any actual conflict between NRC’s regulatory approach at SONGS and NRC’s regulation at 10 C.F.R. § 72.122(l). Thus, even if NRC’s 2.206 Decision were reviewable, there would be no basis to disturb NRC’s decision not to take enforcement action with respect to this issue.

III. If this Court determines that NRC's decision was arbitrary and capricious, the matter should be remanded to NRC to reconsider Public Watchdogs' request.

In the conclusion of its opening brief, Public Watchdogs requests not only that the Court set aside NRC's 2.206 Decision, but also that it enter a remedial order requiring NRC to suspend specific decommissioning activities at SONGS pending NRC's reconsideration of its enforcement request. Brief at 40. Public Watchdogs does not provide any argument in support of its request except to refer to its previous motion for temporary injunctive relief pending review, which this Court has denied. *See supra* p. 17. In any event, Public Watchdogs' request to this Court for such mandatory injunctive relief is unwarranted.

In an action governed by the Administrative Procedure Act, “[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.” *Lorion*, 470 U.S. at 744; *see also INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) (“Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.”). Accordingly, if this Court were to disagree with the Federal Respondents as to the 2.206 Decision's reviewability and its reasonableness, the

proper remedy would be a remand to NRC to reconsider the 2.206 Petition, not an injunction directing NRC to order suspension of fuel transfer operations at SONGS. *Cf. North Carolina Fisheries Association, Inc. v. Gutierrez*, 550 F.3d 16, 20 (D.C. Cir. 2008) (“Only in extraordinary circumstances do we issue detailed remedial orders.”).

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This case is related to *Public Watchdogs v. NRC*, No. 19-72670. In that case, Public Watchdogs filed a complaint in district court relating to the safety of spent fuel storage operations at SONGS, raising many of the safety-related issues that are the subject of the 2.206 Petition and resulting 2.206 Decision under review in this case. The district court dismissed the action for lack of jurisdiction, concluding that Public Watchdogs' claims were either properly brought before the Court of Appeals pursuant to the Hobbs Act or were committed to agency discretion by law and therefore unreviewable. This Court held oral argument on Public Watchdogs' appeal of that decision on June 3, 2020.

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 20-70899

I am the attorney or self-represented party.

This brief contains 13,058 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

☒ [X] complies with the word limit of Cir. R. 32-1.

☐ [] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

☐ [] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

☐ [] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

☐ [] complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

☐ [] it is a joint brief submitted by separately represented parties;

☐ [] a party or parties are filing a single brief in response to multiple briefs; or

☐ [] a party or parties are filing a single brief in response to a longer joint brief.

☐ [] complies with the length limit designated by court order dated _____.

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Signature s/ Andrew P. Averbach

Date July 20, 2020

ADDENDUM

Administrative Orders Review Act (Hobbs Act)

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28 U.S.C. § 2344.....	2a

Administrative Procedure Act

5 U.S.C. § 701.....	2a
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28 U.S.C. § 2342

Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of--

- (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;
 - (2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;
 - (3) all rules, regulations, or final orders of--
 - (A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101-56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and
 - (B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;
 - (4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;
 - (5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;
 - (6) all final orders under section 812 of the Fair Housing Act; and
 - (7) all final agency actions described in section 20114(c) of title 49.
- Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

28 U.S.C. § 2344

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

- (1) the nature of the proceedings as to which review is sought;
- (2) the facts on which venue is based;
- (3) the grounds on which relief is sought; and
- (4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

5 U.S.C. § 701

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) “agency” means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;1 and

(2) “person”, “rule”, “order”, “license”, “sanction”, “relief”, and “agency action” have the meanings given them by section 551 of this title.

5 U.S.C. § 706

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

42 U.S.C. § 2239

Hearings and Judicial Review

(a)(1)(A) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 2235(b) of this title, the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28 and chapter 7 of title 5:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.].

(4) Any final determination under section 2297f© of this title relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act [42 U.S.C. 2297h et seq.], are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.

42 U.S.C. § 5841

Establishment and transfers

(a) Composition; Chairman; Acting Chairman; quorum; official spokesman; seal; functions of Chairman and Commission

(1) There is established an independent regulatory commission to be known as the Nuclear Regulatory Commission which shall be composed of five members, each of whom shall be a citizen of the United States. The President shall designate one member of the Commission as Chairman thereof to serve as such during the pleasure of the President. The Chairman may from time to time designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all meetings of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have equal responsibility and authority in all decisions and actions of the Commission, shall have full access to all information relating to the performance of his duties or responsibilities, and shall have one vote. Action of the Commission shall be determined by a majority vote of the members present. The Chairman (or Acting Chairman in the absence of the Chairman) shall be the official spokesman of the Commission in its relations with the Congress, Government agencies, persons, or the public, and, on behalf of the Commission, shall see to the faithful execution of the policies and decisions of the Commission, and shall report thereon to the Commission from time to time or as the Commission may direct. The Commission shall have an official seal which shall be judicially noticed.

(2) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (a) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman, and except as otherwise provided in this chapter), (b) the distribution of business among such personnel and among administrative units of the Commission, and (c) the use and expenditure of funds.

(3) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(4) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(5) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

(b) Appointment of members

(1) Members of the Commission shall be appointed by the President, by and with the advice and consent of the Senate.

(2) Appointments of members pursuant to this subsection shall be made in such a manner that not more than three members of the Commission shall be members of the same political party.

(c) Term of office

Each member shall serve for a term of five years, each such term to commence on July 1, except that of the five members first appointed to the Commission, one shall serve for one year, one for two years, one for three years, one for four years, and one for five years, to be designated by the President at the time of appointment; and except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed, shall be appointed for the remainder of such term. For the purpose of determining the expiration date of the terms of

office of the five members first appointed to the Nuclear Regulatory Commission, each such term shall be deemed to have begun July 1, 1975.

(d) Submission of appointments to Senate

Such initial appointments shall be submitted to the Senate within sixty days of October 11, 1974. Any individual who is serving as a member of the Atomic Energy Commission on October 11, 1974, and who may be appointed by the President to the Commission, shall be appointed for a term designated by the President, but which term shall terminate not later than the end of his present term as a member of the Atomic Energy Commission, without regard to the requirements of subsection (b)(2) of this section. Any subsequent appointment of such individuals shall be subject to the provisions of this section.

(e) Removal of members; prohibition against engagement in business or other employment

Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. No member of the Commission shall engage in any business, vocation, or employment other than that of serving as a member of the Commission.

(f) Transfer of licensing and regulatory functions of Atomic Energy Commission

There are hereby transferred to the Commission all the licensing and related regulatory functions of the Atomic Energy Commission, the Chairman and members of the Commission, the General Counsel, and other officers and components of the Commission—which functions officers, components, and personnel are excepted from the transfer to the Administrator by section 5814(c) of this title.

(g) Additional transfers

In addition to other functions and personnel transferred to the Commission, there are also transferred to the Commission—

(1) the functions of the Atomic Safety and Licensing Board Panel and the Atomic Safety and Licensing Appeal Board;

(2) such personnel as the Director of the Office of Management and Budget determines are necessary for exercising responsibilities under section 5845 of this title, relating to, research, for the purpose of confirmatory assessment relating to licensing and other regulation under the provisions of the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], and of this chapter.

42 U.S.C. § 10134

Site approval and construction authorization

(a) Hearings and Presidential recommendation

(1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared for the Yucca Mountain site pursuant to subsection (f) and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site;

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada.

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

(3)(A) The President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to [1] require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(b) Submission of application

If the President recommends to the Congress the Yucca Mountain site under subsection (a) and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada a copy of such application.

(c) Status report on application

Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b), and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of—

- (1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;
- (2) any matters of contention regarding such application; and
- (3) any Commission actions regarding the granting or denial of such authorization.

(d) Commission action

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements

established in subsection (e)(2). The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to part C of this subchapter, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

(e) Project decision schedule

(1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) Environmental impact statement

(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this chapter shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and this section, the Secretary need not consider alternate sites to the Yucca Mountain site for the repository to be developed under this part.

(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this chapter shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the repository to be constructed under this part, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

42 U.S.C. § 10153

Interim at-reactor storage

The Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under section 10198(a) [1] of this title for use at the site of any civilian nuclear power reactor. The establishment of such procedures shall not preclude the licensing, under any applicable procedures or rules of the Commission in effect prior to such establishment, of any technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

42 U.S.C. § 10198

Research and development on spent nuclear fuel

(a) Demonstration and cooperative programs

The Secretary shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission. Not later than 1 year after January 7, 1983, the Secretary shall select at least 1, but not more than 3, sites evaluated under section 10194 of this title at such power reactors. In selecting such site or sites, the Secretary shall give preference to civilian nuclear power reactors that will soon have a shortage of interim storage capacity for spent nuclear fuel. Subject to reaching agreement as provided in subsection (b), the Secretary shall undertake activities to assist such power reactors with demonstration projects at such sites, which may use one of the following types of alternate storage technologies: spent nuclear fuel storage casks, caissons, or silos. The Secretary shall also undertake a cooperative program with civilian nuclear power reactors to encourage the development of the technology for spent nuclear fuel rod consolidation in existing power reactor water storage basins.

(b) Cooperative agreements

To carry out the programs described in subsection (a), the Secretary shall enter into a cooperative agreement with each utility involved that specifies, at a minimum, that--

(1) such utility shall select the alternate storage technique to be used, make the land and spent nuclear fuel available for the dry storage demonstration, submit and provide site-specific documentation for a license application to the Commission, obtain a license relating to the facility involved, construct such facility, operate such facility after licensing, pay the costs required to construct such facility, and pay all costs associated with the operation and maintenance of such facility;

(2) the Secretary shall provide, on a cost-sharing basis, consultative and technical assistance, including design support and generic licensing documentation, to assist such utility in obtaining the construction authorization and appropriate license from the Commission; and

(3) the Secretary shall provide generic research and development of alternative spent nuclear fuel storage techniques to enhance utility-provided, at-reactor storage capabilities, if authorized in any other provision of this chapter or in any other provision of law.

(c) Dry storage research and development

(1) The consultative and technical assistance referred to in subsection (b)(2) may include, but shall not be limited to, the establishment of a research and development program for the dry storage of not more than 300 metric tons of spent nuclear fuel at facilities owned by the Federal Government on January 7, 1983. The purpose of such program shall be to collect necessary data to assist the utilities involved in the licensing process.

(2) To the extent available, and consistent with the provisions of section 10155 of this title, the Secretary shall provide spent nuclear fuel for the research and development program authorized in this subsection from spent nuclear fuel received by the Secretary for storage under section 10155 of this title. Such spent nuclear fuel shall not be subject to the provisions of section 10155(e) of this title.

(d) Funding

The total contribution from the Secretary from Federal funds and the use of Federal facilities or services shall not exceed 25 percent of the total costs of the demonstration program authorized in subsection (a), as estimated by the Secretary. All remaining costs of such program shall be paid by the utilities involved or shall be provided by the Secretary from the Interim Storage Fund established in section 10156 of this title.

(e) Relation to spent nuclear fuel storage program

The spent nuclear fuel storage program authorized in section 10155 of this title shall not be construed to authorize the use of research development or demonstration facilities owned by the Department unless--

(1) a period of 30 calendar days (not including any day in which either House of Congress is not in session because of adjournment of more than 3 calendar days to a day certain) has passed after the Secretary has transmitted to the Committee on Science, Space, and Technology of the House of Representatives and the Committee on Energy and Natural Resources of the Senate a written report containing a full and complete statement concerning (A) the facility involved; (B) any necessary modifications; (C) the cost thereof; and (D) the impact on the authorized research and development program; or

(2) each such committee, before the expiration of such period, has transmitted to the Secretary a written notice to the effect that such committee has no objection to the proposed use of such facility.

42 U.S.C. § 10222

Nuclear Waste Fund

(a) Contracts

(1) In the performance of his functions under this chapter, the Secretary is authorized to enter into contracts with any person who generates or holds title to high-level radioactive waste, or spent nuclear fuel, of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel. Such contracts shall provide for payment to the Secretary of fees pursuant to paragraphs (2) and (3) sufficient to offset expenditures described in subsection (d).

(2) For electricity generated by a civilian nuclear power reactor and sold on or after the date 90 days after January 7, 1983, the fee under paragraph (1) shall be equal to 1.0 mil per kilowatt-hour.

(3) For spent nuclear fuel, or solidified high-level radioactive waste derived from spent nuclear fuel, which fuel was used to generate electricity in a civilian nuclear power reactor prior to the application of the fee under paragraph (2) to such reactor, the Secretary shall, not later than 90 days after January 7, 1983, establish a 1 time fee per kilogram of heavy metal in spent nuclear fuel, or in solidified high-level radioactive waste. Such fee shall be in an amount equivalent to an average charge of 1.0 mil per kilowatt-hour for electricity generated by such spent nuclear fuel, or such solidified high-level waste derived therefrom, to be collected from any person delivering such spent nuclear fuel or high-level waste, pursuant to section 10143 of this title, to the Federal Government. Such fee shall be paid to the Treasury of the United States and shall be deposited in the separate fund established by subsection (c). In paying such a fee, the person delivering spent fuel, or solidified high-level radioactive wastes derived therefrom, to the Federal Government shall have no further financial obligation to the Federal Government for the long-term storage and permanent disposal of such spent fuel, or the solidified high-level radioactive waste derived therefrom.

(4) Not later than 180 days after January 7, 1983, the Secretary shall establish procedures for the collection and payment of the fees established by paragraph (2) and paragraph (3). The Secretary shall annually review the amount of the fees established by paragraphs (2) and (3) above to evaluate whether collection of the fee will provide sufficient revenues to offset the costs as defined in subsection (d) herein. In the event the Secretary determines that either insufficient or excess revenues are being collected, in order to recover the costs incurred by the Federal Government that are specified in subsection (d), the Secretary shall propose an adjustment to the fee to insure full cost recovery. The Secretary shall immediately transmit this proposal for such an adjustment to Congress. The adjusted fee proposed by the Secretary shall be effective after a period of 90 days of continuous session have elapsed following the receipt of such transmittal unless during such 90-day period either House of Congress adopts a resolution disapproving the Secretary's proposed adjustment in accordance with the procedures set forth for congressional review of an energy action under section 6421 of this title.

(5) Contracts entered into under this section shall provide that--

(A) following commencement of operation of a repository, the Secretary shall take title to the high-level radioactive waste or spent nuclear fuel involved as expeditiously as practicable upon the request of the generator or owner of such waste or spent fuel; and

(B) in return for the payment of fees established by this section, the Secretary, beginning not later than January 31, 1998, will dispose of the high-level radioactive waste or spent nuclear fuel involved as provided in this subchapter.

(6) The Secretary shall establish in writing criteria setting forth the terms and conditions under which such disposal services shall be made available.

(b) Advance contracting requirement

(1)(A) The Commission shall not issue or renew a license to any person to use a utilization or production facility under the authority of section 2133 or 2134 of this title unless--

(i) such person has entered into a contract with the Secretary under this section; or

(ii) the Secretary affirms in writing that such person is actively and in good faith negotiating with the Secretary for a contract under this section.

(B) The Commission, as it deems necessary or appropriate, may require as a precondition to the issuance or renewal of a license under section 2133 or 2134 of this title that the applicant for such license shall have entered into an agreement with the Secretary for the disposal of high-level radioactive waste and spent nuclear fuel that may result from the use of such license.

(2) Except as provided in paragraph (1), no spent nuclear fuel or high-level radioactive waste generated or owned by any person (other than a department of the United States referred to in section 101 or 102 of Title 5) may be disposed of by the Secretary in any repository constructed under this chapter unless the generator or owner of such spent fuel or waste has entered into a contract with the Secretary under this section by not later than--

(A) June 30, 1983; or

(B) the date on which such generator or owner commences generation of, or takes title to, such spent fuel or waste;

whichever occurs later.

(3) The rights and duties of a party to a contract entered into under this section may be assignable with transfer of title to the spent nuclear fuel or high-level radioactive waste involved.

(4) No high-level radioactive waste or spent nuclear fuel generated or owned by any department of the United States referred to in section 101 or 102 of Title 5 may be disposed of by the Secretary in any repository constructed under this chapter unless such department transfers to the Secretary, for deposit in the Nuclear Waste Fund, amounts equivalent to the fees that would be paid to the Secretary under the contracts referred to in this section if such waste or spent fuel were generated by any other person.

(c) Establishment of Nuclear Waste Fund

There hereby is established in the Treasury of the United States a separate fund, to be known as the Nuclear Waste Fund. The Waste Fund shall consist of--

(1) all receipts, proceeds, and recoveries realized by the Secretary under subsections (a), (b), and (e), which shall be deposited in the Waste Fund immediately upon their realization;

(2) any appropriations made by the Congress to the Waste Fund; and

(3) any unexpended balances available on January 7, 1983, for functions or activities necessary or incident to the disposal of civilian high-level radioactive waste or civilian spent nuclear fuel, which shall automatically be transferred to the Waste Fund on such date.

(d) Use of Waste Fund

The Secretary may make expenditures from the Waste Fund, subject to subsection (e), only for purposes of radioactive waste disposal activities under subchapters I and II, including--

- (1) the identification, development, licensing, construction, operation, decommissioning, and post-decommissioning maintenance and monitoring of any repository, monitored,¹ retrievable storage facility² or test and evaluation facility constructed under this chapter;
- (2) the conducting of nongeneric research, development, and demonstration activities under this chapter;
- (3) the administrative cost of the radioactive waste disposal program;
- (4) any costs that may be incurred by the Secretary in connection with the transportation, treating, or packaging of spent nuclear fuel or high-level radioactive waste to be disposed of in a repository, to be stored in a monitored,¹ retrievable storage site² or to be used in a test and evaluation facility;
- (5) the costs associated with acquisition, design, modification, replacement, operation, and construction of facilities at a repository site, a monitored,¹ retrievable storage site² or a test and evaluation facility site and necessary or incident to such repository, monitored,¹ retrievable storage facility² or test and evaluation facility; and
- (6) the provision of assistance to States, units of general local government, and Indian tribes under sections 10136, 10138, and 10199 of this title.

No amount may be expended by the Secretary under this subchapter for the construction or expansion of any facility unless such construction or expansion is expressly authorized by this or subsequent legislation. The Secretary hereby is authorized to construct one repository and one test and evaluation facility.

(e) Administration of Waste Fund

- (1) The Secretary of the Treasury shall hold the Waste Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Waste Fund during the preceding fiscal year.

(2) The Secretary shall submit the budget of the Waste Fund to the Office of Management and Budget triennially along with the budget of the Department of Energy submitted at such time in accordance with chapter 11 of Title 31. The budget of the Waste Fund shall consist of the estimates made by the Secretary of expenditures from the Waste Fund and other relevant financial matters for the succeeding 3 fiscal years, and shall be included in the Budget of the United States Government. The Secretary may make expenditures from the Waste Fund, subject to appropriations which shall remain available until expended. Appropriations shall be subject to triennial authorization.

(3) If the Secretary determines that the Waste Fund contains at any time amounts in excess of current needs, the Secretary may request the Secretary of the Treasury to invest such amounts, or any portion of such amounts as the Secretary determines to be appropriate, in obligations of the United States--

(A) having maturities determined by the Secretary of the Treasury to be appropriate to the needs of the Waste Fund; and

(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturities of such investments, except that the interest rate on such investments shall not exceed the average interest rate applicable to existing borrowings.

(4) Receipts, proceeds, and recoveries realized by the Secretary under this section, and expenditures of amounts from the Waste Fund, shall be exempt from annual apportionment under the provisions of subchapter II of chapter 15 of Title 31.

(5) If at any time the moneys available in the Waste Fund are insufficient to enable the Secretary to discharge his responsibilities under this subchapter, the Secretary shall issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Secretary and the Secretary of the Treasury. The total of such obligations shall not exceed amounts provided in appropriation Acts. Redemption of such obligations shall be made by the Secretary from moneys available in the Waste Fund. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury, which shall be not less than a rate determined by taking into consideration the average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of Title 31, and the purposes for which securities may be issued under such Act are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by him under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(6) Any appropriations made available to the Waste Fund for any purpose described in subsection (d) shall be repaid into the general fund of the Treasury, together with interest from the date of availability of the appropriations until the date of repayment. Such interest shall be paid on the cumulative amount of appropriations available to the Waste Fund, less the average undisbursed cash balance in the Waste Fund account during the fiscal year involved. The rate of such interest shall be determined by the Secretary of the Treasury taking into consideration the average market yield during the month preceding each fiscal year on outstanding marketable obligations of the United States of comparable maturity. Interest payments may be deferred with the approval of the Secretary of the Treasury, but any interest payments so deferred shall themselves bear interest.

10 C.F.R. § 1.11

The Commission.

(a) The Nuclear Regulatory Commission, composed of five members, one of whom is designated by the President as Chairman, is established pursuant to section 201 of the Energy Reorganization Act of 1974, as amended. The Chairman is the principal executive officer of the Commission, and is responsible for the executive and administrative functions with respect to appointment and supervision of personnel, except as otherwise provided by the Energy Reorganization Act of 1974, as amended, and Reorganization Plan No. 1 of 1980 (45 FR 40561); distribution of business; use and expenditures of funds (except that the function of revising budget estimates and purposes is reserved to the Commission); and appointment, subject to approval of the Commission, of heads of major administrative units under the Commission. The Chairman is the official spokesman, as mandated by the Reorganization Plan No. 1 of 1980. The Chairman has ultimate authority for all NRC functions pertaining to an emergency involving an NRC Licensee. The Chairman's actions are governed by the general policies of the Commission.

(b) The Commission is responsible for licensing and regulating nuclear facilities and materials and for conducting research in support of the licensing and regulatory process, as mandated by the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and the Nuclear Nonproliferation Act of 1978; and in accordance with the National Environmental Policy Act of 1969, as amended, and other applicable statutes. These responsibilities include protecting public health and safety, protecting the environment, protecting and safeguarding nuclear materials and nuclear power plants in the interest of national security, and assuring conformity with antitrust laws. Agency functions are performed through standards setting and rulemaking; technical reviews and studies; conduct of public hearings; issuance of authorizations, permits, and licenses; inspection, investigation, and enforcement; evaluation of operating experience; and confirmatory research. The Commission is composed of five members, appointed by the President and confirmed by the Senate.

(c) The following staff units and officials report directly to the Commission: Atomic Safety and Licensing Board Panel, Office of the General Counsel, Office of the Secretary, Office of Commission Appellate Adjudication, Office of International Programs, and other committees and boards that are authorized or established specifically by the Act. The Advisory Committee

on Reactor Safeguards and the Advisory Committee on Nuclear Waste also report directly to the Commission.

(d) The Offices of Congressional Affairs and Public Affairs report directly to the Chairman.

10 C.F.R. § 2.202

Orders.

(a) The Commission may institute a proceeding to modify, suspend, or revoke a license or to take such other action as may be proper by serving on the licensee or other person subject to the jurisdiction of the Commission an order that will:

(1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing; and

(5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

(b) A licensee or other person to whom the Commission has issued an order under this section must respond to the order by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order, and shall set forth the matters of fact and law on which the licensee or other person relies, and, if the order is not consented to, the reasons as to why the order should not have been issued.

Except as provided in paragraph (d) of this section, the answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(1) If the answer demands a hearing with respect to an immediately effective order, the hearing will be conducted expeditiously, giving due consideration to the rights of the parties.

(2)(i) The licensee or other person to whom the Commission has issued an immediately effective order in accordance with paragraph (a)(5) of this section, may, in addition to demanding a hearing, at the time the answer is filed or sooner, file a motion with the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.

(ii) Any party may file a motion with the presiding officer requesting that the presiding officer order live testimony. Any motion for live testimony must be made in conjunction with the motion to set aside the immediate effectiveness of the order or any party's response thereto. The presiding officer may, on its own motion, order live testimony. The presiding officer's basis for approving any motion for, or ordering on its own motion, live testimony shall be that taking live testimony would assist in its decision on the motion to set aside the immediate effectiveness of the order.

(iii) The NRC staff shall respond in writing within 5 days of the receipt of either a motion to set aside the immediate effectiveness of the order or the presiding officer's order denying a motion for live testimony. In cases in which the presiding officer orders live testimony, the staff may present its response through live testimony rather than a written response.

(iv) The presiding officer shall conduct any live testimony pursuant to its powers in § 2.319 of this part, except that no subpoenas, discovery, or referred rulings or certified questions to the Commission shall be permitted for this purpose.

(v) The presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee or other person and other affected parties.

(vi) The licensee or other person challenging the immediate effectiveness of an order bears the burden of going forward with evidence that the immediately effective order is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error. The NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.

(vii) The presiding officer shall issue a decision on the motion to set aside the immediate effectiveness of the order expeditiously. During the pendency of the motion to set aside the immediate effectiveness of the order or at any other time, the presiding officer may not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person.

(viii) The presiding officer shall uphold the immediate effectiveness of the order if it finds that there is adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. The presiding officer will promptly refer an order setting aside immediate effectiveness to the Commission and such order setting aside immediate effectiveness will not be effective pending further order of the Commission.

(d) An answer may consent to the entry of an order in substantially the form proposed in the order with respect to all or some of the actions proposed in the order. The consent, in the answer or other written document, of the licensee or other person to whom the order has been issued to the entry of an order shall constitute a waiver by the licensee or other person of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum as to those matters which have been consented to or agreed to or on which a hearing has not been requested. An order that has been consented to shall have the same force and effect as an order made after hearing by a presiding officer or the Commission, and shall be effective as provided in the order.

(e)(1) If the order involves the modification of a part 50 license and is a backfit, the requirements of § 50.109 of this chapter shall be followed, unless the licensee has consented to the action required.

(2) If the order involves the modification of combined license under subpart C of part 52 of this chapter, the requirements of § 52.98 of this chapter shall be followed unless the licensee has consented to the action required.

(3) If the order involves a change to an early site permit under subpart A of part 52 of this chapter, the requirements of § 52.39 of this chapter must be followed, unless the applicant or licensee has consented to the action required.

(4) If the order involves a change to a standard design certification rule referenced by that plant's application, the requirements, if any, in the referenced design certification rule with respect to changes must be followed, or, in the absence of these requirements, the requirements of § 52.63 of this chapter must be followed, unless the applicant or licensee has consented to follow the action required.

(5) If the order involves a change to a standard design approval referenced by that plant's application, the requirements of § 52.145 of this chapter must be followed unless the applicant or licensee has consented to follow the action required.

(6) If the order involves a modification of a manufacturing license under subpart F of part 52, the requirements of § 52.171 of this chapter must be followed, unless the applicant or licensee has consented to the action required.

10 C.F.R. § 2.206

Requests for action under this subpart.

(a) 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. Requests must be addressed to the Executive Director for Operations and must be filed either by hand delivery to the NRC's Offices at 11555 Rockville Pike, Rockville, Maryland; by mail or telegram addressed to the Executive Director for Operations, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001; or by electronic submissions, for example, via facsimile, Electronic Information Exchange, e-mail, or CD-

ROM. Electronic submissions must be made in a manner that enables the NRC to receive, read, authenticate, distribute, and archive the submission, and process and retrieve it a single page at a time. Detailed guidance on making electronic submissions can be obtained by visiting the NRC's Web site at <http://www.nrc.gov/site-help/e-submittals.html>; by e-mail to MSHD.Resource@nrc.gov; or by writing the Office of the Chief Information Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. The request must specify the action requested and set forth the facts that constitute the basis for the request. The Executive Director for Operations will refer the request to the Director of the NRC office with responsibility for the subject matter of the request for appropriate action in accordance with paragraph (b) of this section.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of the NRC office with responsibility for the subject matter of the request shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to the request, and the reasons for the decision.

(c)(1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

(3) The Secretary is authorized to extend the time for Commission review on its own motion of a Director's denial under paragraph (c) of this section.

10 C.F.R. § 50.54 (excerpted)

Conditions of licenses.

The following paragraphs of this section, with the exception of paragraphs (r) and (gg), and the applicable requirements of 10 CFR 50.55a, are conditions in every nuclear power reactor operating license issued under this part. The following paragraphs with the exception of paragraph (r), (s), and (u) of this section are conditions in every combined license issued under part 52 of this chapter, provided, however, that paragraphs (i) introductory text, (i)(1), (j), (k), (l), (m), (n), (w), (x), (y), (z), and (hh) of this section are only applicable after the Commission makes the finding under § 52.103(g) of this chapter.

...

(bb) For nuclear power reactors licensed by the NRC, the licensee shall, within 2 years following permanent cessation of operation of the reactor or 5 years before expiration of the reactor operating license, whichever occurs first, submit written notification to the Commission for its review and preliminary approval of the program by which the licensee intends to manage and provide funding for the management of all irradiated fuel at the reactor following permanent cessation of operation of the reactor until title to the irradiated fuel and possession of the fuel is transferred to the Secretary of Energy for its ultimate disposal in a repository. Licensees of nuclear power reactors that have permanently ceased operation by April 4, 1994 are required to submit such written notification by April 4, 1996. Final Commission review will be undertaken as part of any proceeding for continued licensing under part 50 or part 72 of this chapter. The licensee must demonstrate to NRC that the elected actions will be consistent with NRC requirements for licensed possession of irradiated nuclear fuel and that the actions will be implemented on a timely basis. Where implementation of such actions requires NRC authorizations, the licensee shall verify in the notification that submittals for such actions have been or will be made to NRC and shall identify them. A copy of the notification shall be retained by the licensee as a record until expiration of the reactor operating license. The licensee shall notify the NRC of any significant changes in the proposed waste management program as described in the initial notification.

10 C.F.R. § 50.82 (excerpted)

Termination of license.

For power reactor licensees who, before the effective date of this rule, either submitted a decommissioning plan for approval or possess an approved decommissioning plan, the plan is considered to be the PSDAR submittal required under paragraph (a)(4) of this section and the provisions of this section apply accordingly. For power reactor licensees whose decommissioning plan approval activities have been relegated to notice of opportunity for a hearing under subpart G of 10 CFR part 2, the public meeting convened and 90-day delay of major decommissioning activities required in paragraphs (a)(4)(ii) and (a)(5) of this section shall not apply, and any orders arising from proceedings under subpart G of 10 CFR part 2 shall continue and remain in effect absent any orders from the Commission.

(a) For power reactor licensees—

...

(4) (i) Prior to or within 2 years following permanent cessation of operations, the licensee shall submit a post-shutdown decommissioning activities report (PSDAR) to the NRC, and a copy to the affected State(s). The PSDAR must contain a description of the planned decommissioning activities along with a schedule for their accomplishment, a discussion that provides the reasons for concluding that the environmental impacts associated with site-specific decommissioning activities will be bounded by appropriate previously issued environmental impact statements, and a site-specific DCE, including the projected cost of managing irradiated fuel.

(ii) The NRC shall notice receipt of the PSDAR and make the PSDAR available for public comment. The NRC shall also schedule a public meeting in the vicinity of the licensee's facility upon receipt of the PSDAR. The NRC shall publish a notice in the Federal Register and in a forum, such as local newspapers, that is readily accessible to individuals in the vicinity of the site, announcing the date, time and location of the meeting, along with a brief description of the purpose of the meeting.

...

(8)(i) Decommissioning trust funds may be used by licensees if—

(A) The withdrawals are for expenses for legitimate decommissioning activities consistent with the definition of decommissioning in § 50.2;

(B) The expenditure would not reduce the value of the decommissioning trust below an amount necessary to place and maintain the reactor in a safe storage condition if unforeseen conditions or expenses arise and;

(C) The withdrawals would not inhibit the ability of the licensee to complete funding of any shortfalls in the decommissioning trust needed to ensure the availability of funds to ultimately release the site and terminate the license.

(ii) Initially, 3 percent of the generic amount specified in § 50.75 may be used for decommissioning planning. For licensees that have submitted the certifications required under § 50.82(a)(1) and commencing 90 days after the NRC has received the PSDAR, an additional 20 percent may be used. A site-specific decommissioning cost estimate must be submitted to the NRC prior to the licensee using any funding in excess of these amounts.

(iii) Within 2 years following permanent cessation of operations, if not already submitted, the licensee shall submit a site-specific decommissioning cost estimate.

(iv) For decommissioning activities that delay completion of decommissioning by including a period of storage or surveillance, the licensee shall provide a means of adjusting cost estimates and associated funding levels over the storage or surveillance period.

(v) After submitting its site-specific DCE required by paragraph (a)(4)(i) of this section, and until the licensee has completed its final radiation survey and demonstrated that residual radioactivity has been reduced to a level that permits termination of its license, the licensee must annually submit to the NRC, by March 31, a financial assurance status report. The report must include the following information, current through the end of the previous calendar year:

(A) The amount spent on decommissioning, both cumulative and over the previous calendar year, the remaining balance of any decommissioning funds, and the amount provided by other financial assurance methods being

relied upon;

(B) An estimate of the costs to complete decommissioning, reflecting any difference between actual and estimated costs for work performed during the year, and the decommissioning criteria upon which the estimate is based;

(C) Any modifications occurring to a licensee's current method of providing financial assurance since the last submitted report; and

(D) Any material changes to trust agreements or financial assurance contracts.

(vi) If the sum of the balance of any remaining decommissioning funds, plus earnings on such funds calculated at not greater than a 2 percent real rate of return, together with the amount provided by other financial assurance methods being relied upon, does not cover the estimated cost to complete the decommissioning, the financial assurance status report must include additional financial assurance to cover the estimated cost of completion.

(vii) After submitting its site-specific DCE required by paragraph (a)(4)(i) of this section, the licensee must annually submit to the NRC, by March 31, a report on the status of its funding for managing irradiated fuel. The report must include the following information, current through the end of the previous calendar year:

(A) The amount of funds accumulated to cover the cost of managing the irradiated fuel;

(B) The projected cost of managing irradiated fuel until title to the fuel and possession of the fuel is transferred to the Secretary of Energy; and

(C) If the funds accumulated do not cover the projected cost, a plan to obtain additional funds to cover the cost.

10 C.F.R. § 51.23

Environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor.

- (a) The Commission has generically determined that the environmental impacts of continued storage of spent nuclear fuel beyond the licensed life for operation of a reactor are those impacts identified in NUREG–2157, "Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel."
- (b) The environmental reports described in §§ 51.50, 51.53, and 51.61 are not required to discuss the environmental impacts of spent nuclear fuel storage in a reactor facility storage pool or an ISFSI for the period following the term of the reactor operating license, reactor combined license, or ISFSI license. The impact determinations in NUREG–2157 regarding continued storage shall be deemed incorporated into the environmental impact statements described in §§ 51.75, 51.80(b), 51.95, and 51.97(a). The impact determinations in NUREG–2157 regarding continued storage shall be considered in the environmental assessments described in §§ 51.30(b) and 51.95(d), if the impacts of continued storage of spent fuel are relevant to the proposed action.
- (c) This section does not alter any requirements to consider the environmental impacts of spent fuel storage during the term of a reactor operating license or combined license, or a license for an ISFSI in a licensing proceeding.

10 C.F.R. § 72.122

Overall requirements.

(a) Quality Standards. Structures, systems, and components important to safety must be designed, fabricated, erected, and tested to quality standards commensurate with the importance to safety of the function to be performed.

(b) Protection against environmental conditions and natural phenomena.

(1) Structures, systems, and components important to safety must be designed to accommodate the effects of, and to be compatible with, site characteristics and environmental conditions associated with normal operation, maintenance, and testing of the ISFSI or MRS and to withstand postulated accidents.

(2)(i) Structures, systems, and components important to safety must be designed to withstand the effects of natural phenomena such as earthquakes, tornadoes, lightning, hurricanes, floods, tsunamis, and seiches, without impairing their capability to perform their intended design functions. The design bases for these structures, systems, and components must reflect:

(A) Appropriate consideration of the most severe of the natural phenomena reported for the site and surrounding area, with appropriate margins to take into account the limitations of the data and the period of time in which the data have accumulated, and

(B) Appropriate combinations of the effects of normal and accident conditions and the effects of natural phenomena.

(ii) The ISFSI or MRS also should be designed to prevent massive collapse of building structures or the dropping of heavy objects as a result of building structural failure on the spent fuel, high-level radioactive waste, or reactor-related GTCC waste or on to structures, systems, and components important to safety.

(3) Capability must be provided for determining the intensity of natural phenomena that may occur for comparison with design bases of structures, systems, and components important to safety.

(4) If the ISFSI or MRS is located over an aquifer which is a major water resource, measures must be taken to preclude the transport of radioactive materials to the environment through this potential pathway.

(c) Protection against fires and explosions. Structures, systems, and components important to safety must be designed and located so that they can continue to perform their safety functions effectively under credible fire and explosion exposure conditions. Noncombustible and heat-resistant materials must be used wherever practical throughout the ISFSI or MRS, particularly in locations vital to the control of radioactive materials and to the maintenance of safety control functions. Explosion and fire detection, alarm, and suppression systems shall be designed and provided with sufficient capacity and capability to minimize the adverse effects of fires and explosions on structures, systems, and components important to safety. The design of the ISFSI or MRS must include provisions to protect against adverse effects that might result from either the operation or the failure of the fire suppression system.

(d) Sharing of structures, systems, and components. Structures, systems, and components important to safety must not be shared between an ISFSI or MRS and other facilities unless it is shown that such sharing will not impair the capability of either facility to perform its safety functions, including the ability to return to a safe condition in the event of an accident.

(e) Proximity of sites. An ISFSI or MRS located near other nuclear facilities must be designed and operated to ensure that the cumulative effects of their combined operations will not constitute an unreasonable risk to the health and safety of the public.

(f) Testing and maintenance of systems and components. Systems and components that are important to safety must be designed to permit inspection, maintenance, and testing.

(g) Emergency capability. Structures, systems, and components important to safety must be designed for emergencies. The design must provide for accessibility to the equipment of onsite and available offsite emergency facilities and services such as hospitals, fire and police departments, ambulance service, and other emergency agencies.

(h) Confinement barriers and systems.

(1) The spent fuel cladding must be protected during storage against degradation that leads to gross ruptures or the fuel must be otherwise confined such that degradation of the fuel during storage will not pose operational safety problems with respect to its removal from storage. This may be accomplished by canning of consolidated fuel rods or unconsolidated assemblies or other means as appropriate.

(2) For underwater storage of spent fuel, high-level radioactive waste, or reactor-related GTCC waste in which the pool water serves as a shield and a confinement medium for radioactive materials, systems for maintaining water purity and the pool water level must be designed so that any abnormal operations or failure in those systems from any cause will not cause the water level to fall below safe limits. The design must preclude installations of drains, permanently connected systems, and other features that could, by abnormal operations or failure, cause a significant loss of water. Pool water level equipment must be provided to alarm in a continuously manned location if the water level in the storage pools falls below a predetermined level.

(3) Ventilation systems and off-gas systems must be provided where necessary to ensure the confinement of airborne radioactive particulate materials during normal or off-normal conditions.

(4) Storage confinement systems must have the capability for continuous monitoring in a manner such that the licensee will be able to determine when corrective action needs to be taken to maintain safe storage conditions. For dry spent fuel storage, periodic monitoring is sufficient provided that periodic monitoring is consistent with the dry spent fuel storage cask design requirements. The monitoring period must be based upon the spent fuel storage cask design requirements.

(5) The high-level radioactive waste and reactor-related GTCC waste must be packaged in a manner that allows handling and retrievability without the release of radioactive materials to the environment or radiation exposures in excess of part 20 limits. The package must be designed to confine the high-level radioactive waste for the duration of the license.

(i) Instrumentation and control systems. Instrumentation and control systems for wet spent fuel and reactor-related GTCC waste storage must be provided to monitor systems that are important to safety over anticipated ranges for normal operation and off-normal operation. Those instruments and control systems that must remain operational under accident conditions must be identified in the Safety Analysis Report. Instrumentation systems for dry storage casks must be provided in accordance with cask design requirements to monitor conditions that are important to safety over anticipated ranges for normal conditions and off-normal conditions. Systems that are required under accident conditions must be identified in the Safety Analysis Report.

(j) Control room or control area. A control room or control area, if appropriate for the ISFSI or MRS design, must be designed to permit occupancy and actions to be taken to monitor the ISFSI or MRS safely under normal conditions, and to provide safe control of the ISFSI or MRS under off-normal or accident conditions.

(k) Utility or other services.

(1) Each utility service system must be designed to meet emergency conditions. The design of utility services and distribution systems that are important to safety must include redundant systems to the extent necessary to maintain, with adequate capacity, the ability to perform safety functions assuming a single failure.

(2) Emergency utility services must be designed to permit testing of the functional operability and capacity, including the full operational sequence, of each system for transfer between normal and emergency supply sources; and to permit the operation of associated safety systems.

(3) Provisions must be made so that, in the event of a loss of the primary electric power source or circuit, reliable and timely emergency power will be provided to instruments, utility service systems, the central security alarm station, and operating systems, in amounts sufficient to allow safe storage conditions to be maintained and to permit continued functioning of all systems essential to safe storage.

(4) An ISFSI or MRS which is located on the site of another facility may share common utilities and services with such a facility and be physically connected with the other facility; however, the sharing of utilities and services or the physical connection must not significantly:

- (i) Increase the probability or consequences of an accident or malfunction of components, structures, or systems that are important to safety; or
- (ii) Reduce the margin of safety as defined in the basis for any technical specifications of either facility.
- (l) Retrieval. Storage systems must be designed to allow ready retrieval of spent fuel, high-level radioactive waste, and reactor-related GTCC waste for further processing or disposal.

10 C.F.R. pt. 72, subpart K (excerpted)

10 C.F.R. § 72.210

General license issued.

A general license is hereby issued for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50 or 10 CFR part 52.

10 C.F.R. § 72.212

Conditions of general license issued under § 72.210.

- (a)(1) The general license is limited to that spent fuel which the general licensee is authorized to possess at the site under the specific license for the site.
- (2) This general license is limited to storage of spent fuel in casks approved under the provisions of this part.
- (3) The general license for the storage of spent fuel in each cask fabricated under a Certificate of Compliance shall commence upon the date that the particular cask is first used by the general licensee to store spent fuel, shall continue through any renewals of the Certificate of Compliance, unless otherwise specified in the Certificate of Compliance, and shall terminate when the cask's Certificate of Compliance expires. For any cask placed into service during the final renewal term of a Certificate of Compliance, or during the term of a Certificate of Compliance that was not renewed, the general license for that cask shall terminate after a storage period not to exceed the length of the term certified by the cask's Certificate of Compliance. Upon expiration of the general license, all casks subject to that general license must be removed from service.

(b) The general licensee must:

(1) Notify the Nuclear Regulatory Commission using instructions in § 72.4 at least 90 days before first storage of spent fuel under this general license. The notice may be in the form of a letter, but must contain the licensee's name, address, reactor license and docket numbers, and the name and means of contacting a person responsible for providing additional information concerning spent fuel under this general license. A copy of the submittal must be sent to the administrator of the appropriate Nuclear Regulatory Commission regional office listed in appendix D to part 20 of this chapter.

(2) Register use of each cask with the Nuclear Regulatory Commission no later than 30 days after using that cask to store spent fuel. This registration may be accomplished by submitting a letter using instructions in § 72.4 containing the following information: the licensee's name and address, the licensee's reactor license and docket numbers, the name and title of a person responsible for providing additional information concerning spent fuel storage under this general license, the cask certificate number, the CoC amendment number to which the cask conforms, unless loaded under the initial certificate, cask model number, and the cask identification number. A copy of each submittal must be sent to the administrator of the appropriate Nuclear Regulatory Commission regional office listed in appendix D to part 20 of this chapter.

(3) Ensure that each cask used by the general licensee conforms to the terms, conditions, and specifications of a CoC or an amended CoC listed in § 72.214.

(4) In applying the changes authorized by an amended CoC to a cask loaded under the initial CoC or an earlier amended CoC, register each such cask with the Nuclear Regulatory Commission no later than 30 days after applying the changes authorized by the amended CoC. This registration may be accomplished by submitting a letter using instructions in § 72.4 containing the following information: the licensee's name and address, the licensee's reactor license and docket numbers, the name and title of a person responsible for providing additional information concerning spent fuel storage under this general license, the cask certificate number, the CoC amendment number to which the cask conforms, cask model number, and the cask identification number. A copy of each submittal must be sent to the

administrator of the appropriate Nuclear Regulatory Commission regional office listed in appendix D to part 20 of this chapter.

(5) Perform written evaluations, before use and before applying the changes authorized by an amended CoC to a cask loaded under the initial CoC or an earlier amended CoC, which establish that:

(i) The cask, once loaded with spent fuel or once the changes authorized by an amended CoC have been applied, will conform to the terms, conditions, and specifications of a CoC or an amended CoC listed in § 72.214;

(ii) Cask storage pads and areas have been designed to adequately support the static and dynamic loads of the stored casks, considering potential amplification of earthquakes through soil-structure interaction, and soil liquefaction potential or other soil instability due to vibratory ground motion; and

(iii) The requirements of § 72.104 have been met. A copy of this record shall be retained until spent fuel is no longer stored under the general license issued under § 72.210.

(6) Review the Safety Analysis Report referenced in the CoC or amended CoC and the related NRC Safety Evaluation Report, prior to use of the general license, to determine whether or not the reactor site parameters, including analyses of earthquake intensity and tornado missiles, are enveloped by the cask design bases considered in these reports. The results of this review must be documented in the evaluation made in paragraph (b)(5) of this section.

(7) Evaluate any changes to the written evaluations required by paragraphs (b)(5) and (b)(6) of this section using the requirements of § 72.48(c). A copy of this record shall be retained until spent fuel is no longer stored under the general license issued under § 72.210.

(8) Before use of the general license, determine whether activities related to storage of spent fuel under this general license involve a change in the facility Technical Specifications or require a license amendment for the facility pursuant to § 50.59(c) of this chapter. Results of this determination must be documented in the evaluations made in paragraph (b)(5) of this section.

(9) Protect the spent fuel against the design basis threat of radiological sabotage in accordance with the same provisions and requirements as are set forth in the licensee's physical security plan pursuant to § 73.55 of this chapter with the following additional conditions and exceptions:

(i) The physical security organization and program for the facility must be modified as necessary to assure that activities conducted under this general license do not decrease the effectiveness of the protection of vital equipment in accordance with § 73.55 of this chapter;

(ii) Storage of spent fuel must be within a protected area, in accordance with § 73.55(e) of this chapter, but need not be within a separate vital area. Existing protected areas may be expanded or new protected areas added for the purpose of storage of spent fuel in accordance with this general license;

(iii) For the purpose of this general license, personnel searches required by § 73.55(h) of this chapter before admission to a new protected area may be performed by physical pat-down searches of persons in lieu of firearms and explosives detection equipment;

(iv) The observational capability required by § 73.55(i)(3) of this chapter as applied to a new protected area may be provided by a guard or watchman on patrol in lieu of video surveillance technology;

(v) For the purpose of this general license, the licensee is exempt from requirements to interdict and neutralize threats in § 73.55 of this chapter; and

(vi) Each general licensee that receives and possesses power reactor spent fuel and other radioactive materials associated with spent fuel storage shall protect Safeguards Information against unauthorized disclosure in accordance with the requirements of § 73.21 and the requirements of § 73.22 or § 73.23 of this chapter, as applicable.

(10) Review the reactor emergency plan, quality assurance program, training program, and radiation protection program to determine if their effectiveness is decreased and, if so, prepare the necessary changes and seek and obtain the necessary approvals.

(11) Maintain a copy of the CoC and, for those casks to which the licensee has applied the changes of an amended CoC, the amended CoC, and the documents referenced in such Certificates, for each cask model used for storage of spent fuel, until use of the cask model is discontinued. The licensee shall comply with the terms, conditions, and specifications of the CoC and, for those casks to which the licensee has applied the changes of an amended CoC, the terms, conditions, and specifications of the amended CoC, including but not limited to, the requirements of any AMP put into effect as a condition of the NRC approval of a CoC renewal application in accordance with § 72.240.

(12) Accurately maintain the record provided by the CoC holder for each cask that shows, in addition to the information provided by the CoC holder, the following:

(i) The name and address of the CoC holder or lessor;

(ii) The listing of spent fuel stored in the cask; and

(iii) Any maintenance performed on the cask.

(13) Conduct activities related to storage of spent fuel under this general license only in accordance with written procedures.

(14) Make records and casks available to the Commission for inspection.

(c) The record described in paragraph (b)(12) of this section must include sufficient information to furnish documentary evidence that any testing and maintenance of the cask has been conducted under an NRC-approved quality assurance program.

(d) In the event that a cask is sold, leased, loaned, or otherwise transferred to another registered user, the record described in paragraph (b)(12) of this section must also be transferred to and must be accurately maintained by the new registered user. This record must be maintained by the current cask user during the period that the cask is used for storage of spent fuel and retained by the last user until decommissioning of the cask is complete.

(e) Fees for inspections related to spent fuel storage under this general license are those shown in § 170.31 of this chapter.

10 C.F.R. § 72.214 (excerpted)

List of approved spent fuel storage casks.

The following casks are approved for storage of spent fuel under the conditions specified in their Certificates of Compliance.

...

Certificate Number: 1040.

Initial Certificate Effective Date: April 6, 2015.

Amendment Number 1 Effective Date: September 8, 2015.

Amendment Number 2, Effective Date: January 9, 2017.

SAR Submitted by: Holtec International, Inc.

SAR Title: Final Safety Analysis Report for the Holtec International HI-STORM UMAX Canister Storage System.

Docket Number: 72-1040.

Certificate Expiration Date: April 6, 2035.

Model Number: MPC-37, MPC-89.

10 C.F.R. § 72.236

Specific requirements for spent fuel storage cask approval and fabrication.

The certificate holder and applicant for a CoC shall ensure that the requirements of this section are met.

(a) Specifications must be provided for the spent fuel to be stored in the spent fuel storage cask, such as, but not limited to, type of spent fuel (*i.e.*, BWR, PWR, both), maximum allowable enrichment of the fuel prior to any irradiation, burn-up (*i.e.*, megawatt-days/MTU), minimum acceptable cooling time of the spent fuel prior to storage in the spent fuel storage cask, maximum heat designed to be dissipated, maximum spent fuel loading limit, condition of the spent fuel (*i.e.*, intact assembly or consolidated fuel rods), the inerting atmosphere requirements.

(b) Design bases and design criteria must be provided for structures, systems, and components important to safety.

- (c) The spent fuel storage cask must be designed and fabricated so that the spent fuel is maintained in a subcritical condition under credible conditions.
- (d) Radiation shielding and confinement features must be provided sufficient to meet the requirements in §§ 72.104 and 72.106.
- (e) The spent fuel storage cask must be designed to provide redundant sealing of confinement systems.
- (f) The spent fuel storage cask must be designed to provide adequate heat removal capacity without active cooling systems.
- (g) The spent fuel storage cask must be designed to store the spent fuel safely for the term proposed in the application, and permit maintenance as required.
- (h) The spent fuel storage cask must be compatible with wet or dry spent fuel loading and unloading facilities.
- (i) The spent fuel storage cask must be designed to facilitate decontamination to the extent practicable.
- (j) The spent fuel storage cask must be inspected to ascertain that there are no cracks, pinholes, uncontrolled voids, or other defects that could significantly reduce its confinement effectiveness.
- (k) The spent fuel storage cask must be conspicuously and durably marked with--
 - (1) A model number;
 - (2) A unique identification number; and
 - (3) An empty weight.
- (l) The spent fuel storage cask and its systems important to safety must be evaluated, by appropriate tests or by other means acceptable to the NRC, to demonstrate that they will reasonably maintain confinement of radioactive material under normal, off-normal, and credible accident conditions.

(m) To the extent practicable in the design of spent fuel storage casks, consideration should be given to compatibility with removal of the stored spent fuel from a reactor site, transportation, and ultimate disposition by the Department of Energy.

(n) Safeguards Information shall be protected against unauthorized disclosure in accordance with the requirements of § 73.21 and the requirements of § 73.22 or § 73.23 of this chapter, as applicable.

10 C.F.R. § 72.238

Issuance of an NRC Certificate of Compliance.

Certificate of Compliance for a cask model will be issued by NRC for a term not to exceed 40 years on a finding that the requirements in § 72.236(a) through (i) are met.

10 C.F.R. § 72.240

Conditions for spent fuel storage cask renewal.

(a) The certificate holder may apply for renewal of the design of a spent fuel storage cask for a term not to exceed 40 years. In the event that the certificate holder does not apply for a cask design renewal, any licensee using a spent fuel storage cask, a representative of such licensee, or another certificate holder may apply for a renewal of that cask design for a term not to exceed 40 years.

(b) The application for renewal of the design of a spent fuel storage cask must be submitted not less than 30 days before the expiration date of the CoC. When the applicant has submitted a timely application for renewal, the existing CoC will not expire until the application for renewal has been determined by the NRC.

(c) The application must be accompanied by a safety analysis report (SAR). The SAR must include the following:

(1) Design bases information as documented in the most recently updated final safety analysis report (FSAR) as required by § 72.248;

(2) Time-limited aging analyses that demonstrate that structures, systems, and components important to safety will continue to perform their intended function for the requested period of extended operation; and

(3) A description of the AMP for management of issues associated with aging that could adversely affect structures, systems, and components important to safety.

(d) The design of a spent fuel storage cask will be renewed if the conditions in subpart G of this part and § 72.238 are met, and the application includes a demonstration that the storage of spent fuel has not, in a significant manner, adversely affected structures, systems, and components important to safety.

(e) In approving the renewal of the design of a spent fuel storage cask, the NRC may revise the CoC to include terms, conditions, and specifications that will ensure the safe operation of the cask during the renewal term, including but not limited to, terms, conditions, and specifications that will require the implementation of an AMP.