ORAL ARGUMENT SCHEDULED FOR MARCH 16, 2012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

D.C. Cir. No. 11-1045 (consolidated with D.C. Cir. Nos. 11-1051, 11-1056, 11-1057)

STATE OF NEW YORK, *et al.*,
Petitioners,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,
Respondents

STATE OF NEW JERSEY, *et al.*,
Intervenors.

Petition for Review of Final Administrative Action of the United States Nuclear Regulatory Commission

FINAL REPLY BRIEF FOR PETITIONERS NATURAL RESOURCES DEFENSE COUNCIL, INC., BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, RIVERKEEPER, INC., AND SOUTHERN ALLIANCE FOR CLEAN ENERGY, INC.

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GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

AEA	Atomic Energy Act
BG&E	*Baltimore Gas & Elec. v. NRDC,* 462 U.S. 91 (1983)
EA	Environmental assessment
EIS	Environmental impact statement
FONSI	Finding of no significant impact
NEPA	National Environmental Policy Act
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act
SNF	Spent nuclear fuel
WCD	Waste Confidence Decision

STATUTES, RULES AND REGULATIONS

All relevant statutes, rules and regulations are included in the first addendum to Petitioners' Initial Brief.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Waste Confidence Decision ("WCD") contains the Nuclear Regulatory Commission's ("NRC's" or "Commission's") generic decision under the Atomic Energy Act ("AEA") that it may license nuclear reactors to generate highly radioactive spent nuclear fuel ("SNF") because it has "confidence" that SNF can be disposed of safely at some unspecified time in the future. The WCD has enormous environmental impacts because it will allow the generation of thousands of additional tons of SNF by new and re-licensed reactors, despite the fact that NRC has yet to identify a safe and feasible means of disposing of SNF. However, NRC has refused to prepare an environmental impact statement ("EIS") as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f.

NRC concedes that NEPA applies to the WCD, NRC Br. 22, but argues that the WCD has no significant environmental impacts that would require an EIS because it does not constitute a generic licensing decision. NRC Br. 57. Instead, NRC states that the WCD is a "rulemaking" with no environmental impacts. *Id.* at 22. NRC thus claims to have fulfilled NEPA's procedural requirements by preparing an environmental assessment ("EA") in support of the WCD. *Id.* at 58-59. According to NRC, a full EIS

will not be required until a future time when it licenses a repository. *Id.* at 61.

None of these arguments is consistent with NEPA. The WCD is a generic licensing decision with significant environmental impacts because it permits the production of SNF by reactors and precludes any challenges to the safety, feasibility or timeliness of SNF disposal in individual reactor licensing cases. The impacts of SNF disposal therefore must be addressed in an EIS. The only existing analysis of SNF disposal impacts—the finding of no significant impact ("FONSI") in Table S-3, 10 C.F.R. § 51.51—is fatally undermined by the WCD's rejection of bedded salt as an appropriate medium for SNF disposal.

Moreover, NRC's claim that the WCD serves as an EA for SNF disposal-related impacts is unfounded. Nowhere does the WCD claim to be an EA for SNF disposal; nor does it contain any discussion of the environmental impacts of SNF disposal or a FONSI for those impacts.

NRC's rationales for refusing to consider the environmental implications of the social, political and institutional barriers to SNF disposal are also inconsistent with NEPA. The Commission's claim that these impediments will disappear before the environmental impacts of SNF disposal become significant is no excuse for its failure to comply with

NEPA; rather, this prediction must be subject to careful analysis in an EIS. And NRC's argument that Congress has excused it from NEPA compliance has no support in any law or court decision.

Finally, NRC's attenuated review schedule for the WCD may permit reactors to continue generating SNF for decades or longer without reconsideration of the impacts of SNF disposal. This violates NEPA and the AEA.

Thus, this Court should exercise *de novo* review and find that NRC has violated NEPA by issuing the WCD without an EIS that analyzes the environmental impacts of SNF disposal. *Citizens Against Rails-to-Trails v. Surface Transp. Bd.,* 267 F.3d 1144, 1150-51 (D.C. Cir. 2001) (courts owe no deference to an agency's legal determination that NEPA does not apply to a given action).

ARGUMENT

I. THE WASTE CONFIDENCE DECISION IS A MAJOR FEDERAL ACTION WITH SIGNIFICANT ENVIRONMENTAL IMPACTS REQUIRING AN EIS.

A. The WCD Has Significant Environmental Impacts Because it Is a Generic Licensing Decision.

NRC's brief demonstrates that the WCD is a generic licensing decision because it resolves—for *all* reactor licensing decisions—the question of whether SNF disposal will be safe, feasible, and timely.

Otherwise, the AEA would not permit NRC to license reactors and allow them to generate SNF. As NRC acknowledges, the WCD is a rulemaking. NRC Br. 22. NRC also concedes that a positive WCD is a prerequisite to the licensing of *every* reactor: NRC will not issue a reactor license unless "it can be reasonably confident that permanent disposal [of SNF] . . . can be accomplished safely when it is likely to become necessary." *Id.* at 8; *accord id.* at 6, 20 (the WCD "enable[s]" and "supports" individual reactor licensing decisions).[1] Equally important, NRC does not deny that it relies on the WCD to preclude the public from challenging the operation of a proposed reactor based on concerns about the safety and feasibility of SNF disposal to be generated by the reactor. Pet. Br. 21.

Thus, the WCD constitutes a generic licensing decision that approves the generation of highly radioactive SNF through reactor operation. As such, it is a major federal action significantly affecting the human environment and requiring an EIS. *Calvert Cliffs' Coordinating Comm. v. AEC*, 449 F.2d 1109, 1119 (D.C. Cir. 1971) (NRC must "consider[] environmental values at every distinctive and comprehensive stage" of

[1] Contrary to NRC's argument, NRC Br. 60-61, the safety findings that accompany NRC licensing decisions have binding substantive effects. *See* 10 C.F.R. § 50.50 (basing license issuance on a determination of compliance with the AEA and NRC regulations and imposition of "appropriate and necessary" conditions).

decisionmaking). The EIS must evaluate the environmental impacts of SNF disposal, including the probability that any federal agency can locate and license a disposal site that will meet federal standards for containment of radiation for hundreds of thousands of years, and the impacts to human health and the environment if safe SNF disposal is not achieved. Pet. Br. 23.[2]

B. The WCD Has Repudiated the Only Existing Environmental Analysis of SNF Disposal Impacts.

NRC asserts that Petitioners "overlook" the existence of an already-existing FONSI regarding the environmental impacts of SNF disposal contained in the Table S-3 rule. NRC Br. 60.[3] But the WCD repudiates the central assumption underlying Table S-3—that disposed SNF will release no radioactivity into the environment because it will be placed in a bedded salt repository or its equivalent. *See* J.A. 165, 170 (stating that salt formations have been ruled out for SNF disposal because the heat generated by SNF may cause them to "deform").

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[2] NRC erroneously characterizes the scope of the EIS demanded by Petitioners as limited to Finding 2's conclusions regarding timing of SNF disposal. NRC Br. 55-56. The EIS must also encompass Finding 1, regarding safety and feasibility of SNF disposal.

[3] NRC also contends, inconsistently, that Table S-3 is "irrelevant to Waste Confidence," NRC Br. 64, and that Petitioners inappropriately "belabor" its deficiencies. *Id*. But the relevance of Table S-3 to the WCD is clear, as both decisions make determinations about SNF disposal.

NRC asserts that Table S-3 remains valid because that rule contemplates burial of SNF not only in bedded salt, but also in material "equivalent" to bedded salt. NRC Br. 65. This argument misrepresents the history of Table S-3. During that rulemaking, NRC analyzed *only* the environmental impacts of SNF burial in bedded salt, reasoning that this geologic medium "has the greatest amount of substantive information available from which to summarize environmental impacts and would be reasonably representative of impacts that would result from any appropriately designed geological emplacement." J.A. 8, 14 (internal quotation marks omitted). Bedded salt is *not* representative of all geologic media because it is the *only* proposed medium that NRC ever claimed had the capacity to prevent releases of any radioactive contamination. Pet. Br. 14, 16, 22. NRC has now rejected bedded salt as a disposal medium, and NRC has never suggested there exist "equivalent" media that could prevent all releases of radioactive contamination.

Accordingly, NRC no longer has a basis to assert the zero-release assumption. The Commission failed to conduct any evaluation of the environmental impacts of SNF disposal in the WCD, and thus violates NEPA's requirement to take a "hard look" at the environmental impacts of its actions. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 185

(4th Cir. 2005) (a "hard look" must "encompass[] a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgement of the risks that those impacts entail").

Intervenors contend that Petitioners' case amounts to a collateral challenge to Table S-3, Int. Br. 32 (citing *Baltimore Gas & Elec. Co. v. NRDC,* 462 U.S. 87 (1983) ("*BG&E*") and the Hobbs Act, 28 U.S.C. § 2344), but this claim misconceives the gravamen of Petitioners' argument. Petitioners assert that NRC has no basis to conclude that an EIS is unnecessary for the WCD. Because Table S-3 is the only existing generic analysis of the environmental impacts of SNF disposal, it is a legitimate subject of this appeal. In any event, nothing in *BG&E* or the Hobbs Act suggests that Congress or the Supreme Court intended to allow federal agencies to permanently enshrine environmental decisions by promulgating them as regulations. To the contrary, the Supreme Court explicitly acknowledged that future reliance on Table S-3 might be disallowed if it were proven "seriously wrong." *BG&E,* 462 U.S. at 98. And as the Court recognized in *Marsh v. Oregon Natural Res. Council,* 490 U.S. 360, 370-71(1989), NEPA requires agencies to re-examine and update their environmental decisions in light of new information.

C. NEPA Does Not Permit NRC to Postpone an EIS on SNF Disposal Impacts Until Some Undetermined Point in the Future.

In the alternative, NRC concedes that NEPA *does* require a complete environmental analysis of SNF disposal impacts, but not until the Commission licenses a repository at some unknown point in the future. NRC Br. 61. This argument contradicts NRC's prior statements, approved by the Supreme Court, that environmental impacts of SNF disposal must be addressed at the time of reactor licensing. *Vt. Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 538 (1978) (discussing NRC's acknowledgement that it must address impacts from the back-end of the fuel cycle—including SNF disposal—during licensing). The impacts related to SNF disposal actually begin when waste is generated, not when it is buried in repository. Therefore, to postpone consideration of those impacts until the time of repository licensing would constitute just the kind of backward-looking decision-making that NEPA seeks to avoid. *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989) ("NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."); *Andrus v. Sierra Club,* 442 U.S. 347, 350 (1979) ("The thrust of [NEPA] is . . . that

environmental concerns be integrated into the very process of agency decision-making.").

D. Even if an EIS Were Not Required, the WCD Would Still Violate NEPA Because it Contains no EA or FONSI Regarding SNF Disposal Impacts.

While NRC denies that the WCD is a licensing decision, it does acknowledge that the WCD is an agency rule. NRC Br. 22. Thus, the WCD must comply with NRC regulations requiring an EA or EIS for all "regulatory actions" that are not specifically excluded. 10 C.F.R. § 51.21. In addition, for any regulatory action without significant environmental impacts, NRC must issue a FONSI explaining why it has decided not to prepare an EIS. *Id.* §§ 51.31(a), 51.32(a).

NRC argues that the WCD rulemaking has "no significant environmental impacts" and therefore "constitutes" an EA. NRC Br. 58-59. As discussed previously and in Section II, SNF disposal entails significant impacts, necessitating an EIS. However, even if it did not, the WCD would *still* violate NEPA because it discusses SNF *storage* impacts only; it includes not a single word addressing environmental impacts of SNF *disposal*. Pet. Br. 23. Nor does the WCD include a FONSI regarding SNF disposal. NRC's claim that the WCD is an EA/FONSI is merely a post-hoc rationalization that this court should reject. *Am. Textile Mfrs. Inst., Inc. v.*

Donovan, 452 U.S. 490, 539 (1981) ("[T]he post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action.").

II. NRC MUST ANALYZE IN AN EIS THE INSTITUTIONAL BARRIERS TO PERMANENT SNF DISPOSAL AND THEIR ENVIRONMENTAL IMPACTS.

To satisfy NEPA, NRC must prepare an EIS that addresses the environmental implications of the social, political, and institutional barriers to SNF disposal. *See* Pet. Br. 25-28. NRC concedes that these barriers are formidable, NRC Br. 46-47, but asserts that it was not required to consider their environmental implications in the WCD for two reasons: first, it alleges, these barriers will be removed "well before" the environmental impacts of SNF disposal become significant, *id.* at 53; and second, repository siting decisions are the responsibility of Congress. *Id.* at 47-48. Neither of these rationales constitutes a "valid exercise of agency expertise." *Id.* at 54. Instead, they are invalid legal defenses that should be reviewed *de novo* by this Court and rejected. *Citizens Against Rails-to-Trails,* 267 F.3d at 1151.

A. Delay in Repository Licensing and the Resulting Environmental Impacts Must Be the Subject of an EIS, Not an Excuse for Avoiding an EIS.

NRC argues that it need not address lengthy and potentially indefinite delays in repository licensing because it has "confidence" that a solution will

be found "well before" a repository becomes "necessary." NRC Br. 53. However, NRC's expression of confidence (*i.e.*, WCD Finding 2) has the effect of a rule and a generic licensing decision: it resolves for good the question of whether any reactor license should be denied on the basis of a lengthy or indefinite delay in repository availability. *See supra,* Section I.A. Thus, it must be accompanied by an EIS that addresses potential environmental impacts resulting from such a delay, including impacts that may occur if and when centuries-long SNF storage becomes *de facto* permanent disposal due to the loss of institutional controls such as monitoring, custodial care and record-keeping. 40 C.F.R. § 1502.22(b)(3), (4); *San Luis Obispo Mothers for Peace v. NRC,* 449 F.3d 1016, 1033 (9th Cir. 2006); *see also* Pet. Br. 26.

Likewise, this EIS must address the "substantial uncertainty" associated with siting and licensing a SNF repository. *Robertson,* 490 U.S. at 355 (NEPA requires agencies "to describe environmental impacts [of a proposed action] even in the face of substantial uncertainty"); *Found. on Economic Trends v. Heckler*, 756 F.2d 143, 155 (D.C. Cir. 1985) ("[O]ne of the specific criteria for determining whether an EIS is necessary is '[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.'") (quoting 40 C.F.R.

§ 1508.27(b)(5)). These uncertainties and associated environmental impacts must be the *subject* of an EIS, not an excuse for *avoiding* one.

As NRC concedes, the social, political and institutional barriers to final SNF disposal are significant. NRC Br. 47. In fact, these difficulties have proven so intractable that the Commission has removed any target date for the establishment of a repository. *See* J.A. 248, 252, n.3 ("Finding 2 also reflects the Commission's belief that it cannot have confidence in a target date because it cannot predict when the societal and political obstacles to a successful repository program will be overcome."). Furthermore, NRC recently announced plans to initiate a rulemaking to address the environmental impacts of SNF storage for as long as 300 years. NRC, Doc. No. ML11340A141, *Draft Report for Comments: Background and Preliminary Assumptions for an Environmental Impact Statement—Long-Term Waste Confidence Update* 6-7 (2011), *available at* http://pbadupws.nrc.gov/docs/ML1134/ML11340A141.pdf. This is hundreds of years beyond the time any federal regulations presume existence of institutional memory regarding radioactive waste disposal management. *See* 10 C.F.R. § 61.59(b); 40 C.F.R. § 191.14.

Contrary to the arguments at NRC Br. 47-55, these uncertainties are no less relevant simply because the Nuclear Waste Policy Act ("NWPA")

calls for the establishment of a deep geologic repository for SNF disposal, or because the President's Blue Ribbon Commission on America's Nuclear Future has been given responsibility to study the issue. The fallacy of such reasoning is illustrated by the failure of the proposed Yucca Mountain repository. Although Congress amended the NWPA twenty-five years ago to single out this site for SNF disposal, *see* 42 U.S.C. §10133, political, social and institutional realities have since forced the federal government to abandon Yucca as a repository site. *See* J.A.151-52. As Yucca demonstrates, Congressional legislation requiring a repository provides no guarantee that it will ever be sited, constructed, licensed or opened for operations. Pet. Br. 25-28.

NRC's assertion that it is the responsibility of Congress to resolve the social, political and institutional hurdles to final waste disposal may be true, but it is a red herring: NRC need not *solve* those problems in an EIS, but it must *address* them and fully evaluate the environmental impacts they may cause. In fact, by acknowledging Congress's responsibility, NRC implicitly admits that these problems are political in nature and thus outside its own

domain of technical expertise. Thus, NRC merits no deference in concluding that these barriers will vanish by the time a repository is needed.[4]

B. Neither the Courts nor Congress Have Excused NRC From Preparing an EIS Regarding SNF Disposal.

NRC also suggests that the courts or Congress have excused it from addressing environmental impacts of SNF disposal, including impacts that may result from the social, political and institutional barriers preventing final disposal. First, NRC asserts that the AEA and the court's decision in *NRDC v. NRC,* 582 F.2d 166, 175 n.13 (2nd Cir. 1978), absolve it of its NEPA responsibilities so long as it expresses "confidence" in the availability of a repository when needed. NRC Br. 48. But as *Limerick Ecology Action v. NRC,* 869 F.2d 719, 729-31 (3d Cir. 1989) holds, NRC may not avoid its NEPA responsibilities simply by complying with the AEA.[5] And *NRDC v. NRC* contains no language exempting NRC from NEPA; in fact, the court

[4] By contrast, *Nuvio Corp. v. FCC*, 473 F.3d 302, 305-307 (D.C. Cir. 2006), which NRC cites at NRC Br. 55, involved a purely technical question: whether 120 days was enough time for internet telephone service providers to develop capacity to transmit 911 calls to local emergency authorities. It entailed none of the social or institutional considerations of the kind at issue here.

[5] NRC argues that "the ultimate determination [of permanent disposal availability] can never rise above a prediction." NRC Br. 52. This proposition is uncontested, yet NEPA requires an agency to address the uncertainty surrounding the prediction, including environmental impacts that may result if the prediction proves incorrect. *See supra* at 11.

recognized the distinction between those two statutes' requirements. 582 F.2d at 172.

NRC also implies that Congress has excused it of its NEPA obligations by enacting the NWPA, which "still mandates by law a national repository program." NRC Br. 50. But this is irrelevant—compliance with NEPA "is required unless specifically excluded by statute or existing law makes compliance impossible." *Limerick Ecology Action,* 869 F.2d at 729. Nothing in the NWPA suggests that Congress intended to permit NRC to avoid evaluating the impacts of SNF disposal in an EIS, or to limit the scope of the analysis to a degree short of NEPA's "rule of reason." *Transmission Access Policy Study Grp. v. F.E.R.C.*, 225 F.3d 667, 736 (D.C. Cir. 2000) (describing the "rule of reason" standard).

III. NRC'S ATTENUATED SCHEDULE FOR REVIEWING THE WCD FINDINGS VIOLATES THE AEA AND NEPA.

In the current iteration of the WCD, NRC abandons any schedule for revisiting this rule in the future. Petitioners have explained how this attenuated review process violates both AEA and NEPA. Pet. Br. 28-29. In response, NRC protests that it will review the WCD findings "if significant and pertinent unexpected events occurred that raise substantial doubt about [their] continuing validity." NRC Br. 62-63 (citing J.A. 250). NRC ignores

the fact that for older reactors whose licenses were recently renewed, the next WCD review could be eighty years from now; and for new reactors, the review may be a century distant. Through all that time, NRC would continue licensing reactors without an EIS to support its WCD. These periods are at the very edge of what NRC considers acceptable for maintaining institutional management or memory. *See* 10 C.F.R. § 61.59(b); 40 C.F.R. § 191.14. Thus, NRC's lack of any schedule for reconsideration of the WCD violates AEA.

In addition, NEPA requires agencies to continue examining the environmental impacts of their decisions even after initial approval. *Marsh,* 490 U.S. at 374. Nothing in the current WCD has altered NRC's original reason for setting a schedule for regular review of the WCD: that the WCD is "unavoidably in the nature of a prediction." Pet. Br. 10-11 (citing J.A. 29). NRC's removal of any target date from the current WCD for the siting of a repository underscores the fundamentally predictive nature of the WCD. Unless NRC commits to a regular review of the WCD as it has in previous WCDs, it stands in violation of NEPA and AEA.

CONCLUSION

For the aforementioned reasons, the WCD should be reversed and remanded to NRC for further proceedings.

Dated: January 17, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a)(2)(C), I certify that the attached final brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 3,462 words. This figure includes footnotes and citations, but excludes the Cover Page, Table of Contents, Table of Authorities, Glossary, Statutes, Rules and Regulations, Certificate of Compliance, Certificate of Service, and attorney signature blocks. I have relied on Microsoft Word's calculation feature for this figure.

Dated: February 7, 2012

/s/ Geoffrey H. Fettus
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing final brief, along with addenda, was submitted on February 7, 2012 via the D.C. Circuit CM/ECF electronic filing system. Paper copies of the documents were also sent to the following parties via U.S. First Class mail:

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