

**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

	)	
STATE OF NEW YORK, et al.,	)	
	)	
Petitioners,	)	
v.	)	
	)	
NUCLEAR REGULATORY	)	Nos. 14-1210, 14-1212,
COMMISSION, and the	)	14-1216, 14-1217
UNITED STATES OF AMERICA,	)	(consolidated)
	)	
Respondents.	)	
	)	

**ENVIRONMENTAL ORGANIZATIONS’ OPPOSITION TO  
NRC’S MOTION TO DEFER BRIEFING  
PENDING AGENCY DECISION**

Petitioner Environmental Organizations in Cases Nos. 14-1216 and 14-1217<sup>1</sup> oppose the Federal Respondents’ Motion to Defer Briefing Pending Agency Decision on Petitioners’ Request to Suspend Reactor Licensing (Jan. 9, 2015) (“Motion”), in which the U.S. Nuclear Regulatory Commission and the United States (hereinafter “NRC” or “Commission”) contend that Beyond Nuclear et al. have raised, in an administrative case

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<sup>1</sup> Petitioner Environmental Organizations are Beyond Nuclear, Blue Ridge Environmental Defense League, Missouri Coalition for the Environment, New England Coalition, Nuclear Information and Resource Service, Riverkeeper, San Luis Obispo Mothers for Peace, Southern Alliance for Clean Energy, and Sustainable Energy and Economic Development Coalition (No. 14-1216) (“Beyond Nuclear et al.”); and Natural Resources Defense Council (No. 14-1217).

before the agency, an Atomic Energy Act issue that is “identical in all material respects” to an issue raised in their Petition for Review to the Court. Motion at 5. The NRC argues that the Court should defer briefing in order to allow the NRC to provide “the agency’s most current view” on the issue and to avoid supplemental briefing that may be “confusing” and “unwieldy.” Motion at 1-2.

Contrary to the NRC’s argument, the issue before the NRC, while related, is not identical to the Atomic Energy Act issue before the Court. One of the issues before the Court – and the issue NRC incorrectly cites as identical to one currently pending before the agency – is whether the NRC violated the Atomic Energy Act by entirely eliminating Waste Confidence safety findings from its regulations. The issue pending before the agency and raised in individual NRC reactor licensing and re-licensing proceedings is whether, in the absence of generic Waste Confidence findings in NRC regulations, the NRC now must make equivalent findings in each separate reactor licensing and re-licensing proceeding. In effect, the administrative cases are “place-holders,” designed to ensure that the NRC does not escape judicial review of its decision to eliminate Waste Confidence findings from its regulations by appearing to relegate those findings to individual reactor licensing proceedings without necessarily making the findings in those

proceedings. To wait for the NRC to address that related but separate issue would not aid the Court or simplify this review process. Further, there is no question that the National Environmental Policy Act (“NEPA”) issues also before the Court are ripe and ready for review.

## **FACTUAL BACKGROUND**

In this case, Petitioners seek review of the NRC’s Continued Spent Fuel Storage Rule (79 Fed. Reg. 56,238 (Sept. 19, 2014)) and Continued Spent Fuel Storage Generic Environmental Impact Statement (“GEIS”) (79 Fed Reg. 56,263 (Sept. 19, 2014)) on the grounds that they fail to comply with the Atomic Energy Act and NEPA. The NRC issued the Continued Spent Fuel Storage Rule and GEIS in response to this Court’s decision vacating the NRC’s Waste Confidence Decision Update, in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

The Waste Confidence Decision Update, and every previous Waste Confidence Decision issued by the NRC since 1984, contained generic Atomic Energy Act-based safety findings of “reasonable assurance” that spent fuel generated by reactors during their license terms could be safely disposed of in a repository of sufficient capacity. *See, e.g.*, Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,038, 81,058, 81,060 (Dec. 23, 2010). In the proposed version of the Continued Spent Fuel

Storage Rule, the NRC eliminated these Waste Confidence safety findings entirely, without explanation. 78 Fed. Reg. 56,776 (Sept. 13, 2013).

Beyond Nuclear et al. filed comments on the proposed Continued Spent Fuel Storage Rule, explaining that safety findings regarding the feasibility and capacity of repository disposal of spent fuel are required by the Atomic Energy Act and therefore may not be eliminated from the regulations. Comments by Environmental Organizations on Draft Waste Confidence Generic Environmental Impact Statement and Proposed Waste Confidence Rule, etc. at 14-20 (Dec. 20, 2013) (Relevant excerpt attached as Exhibit A).

In the final Continued Spent Fuel Storage Rule, the NRC did not include any Waste Confidence safety findings with respect to the disposal of spent fuel; nor did it directly address the question of whether the Atomic Energy Act requires such findings. Instead, it cryptically asserted that “[Atomic Energy Act] obligations, including safety determinations, will continue to be met through the licensing process.” Continued Spent Fuel Storage GEIS at D-30 (Relevant portion of GEIS attached as Exhibit B). This statement, while vague, raised the unmistakable inference that on appeal, the NRC would defend the Continued Spent Fuel Storage Rule from Beyond Nuclear et al.’s Atomic Energy Act claims by arguing that those

claims must be raised in individual licensing proceedings instead of the rulemaking appeal.<sup>2</sup>

Given that the individual licensing proceedings lie beyond the Court's jurisdiction in this rulemaking appeal, *Beyond Nuclear et al.*, exercising an abundance of caution, filed administrative cases in each of those proceedings in order to prevent the NRC from using those proceedings to escape judicial review of its decision to eliminate Waste Confidence safety findings from the Continued Spent Fuel Storage Rule. *Beyond Nuclear et al.*'s hearing requests (which were virtually identical in each proceeding) asserted that the NRC must make Waste Confidence reasonable assurance safety findings in each pending licensing proceeding before it could approve the reactor license. *See, e.g., San Luis Obispo Mothers for Peace Motion for Leave to File a New Contention Concerning the Absence of Required Waste Confidence Safety Findings* (Sept. 29, 2014) (Exhibit C). The hearing requests relied on the same legal arguments made in *Beyond Nuclear et al.*'s

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<sup>2</sup> Because the NRC Waste Confidence findings addressed the characteristics and feasibility of spent fuel disposal in a geologic repository, the NRC chose to make them generically rather than in individual reactor licensing proceedings. As the Supreme Court held in *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 96-101 (1983), however, the NRC has discretion to choose between rulemakings and adjudications in addressing licensing issues. Under *Baltimore Gas & Elec. Co.*, the NRC could make Waste Confidence safety findings in each separate reactor licensing proceeding rather than use a single rulemaking to make one set of generic findings.

comments on the proposed rule regarding the necessity of making Waste Confidence safety findings.

In each proceeding, Beyond Nuclear et al. also petitioned the NRC to suspend reactor licensing until it had made these findings. Petition to Suspend Final Decisions in All Pending Reactor Licensing Proceedings Pending Issuance of Waste Confidence Safety Findings (Sept. 29, 2014) (Exhibit D). The briefing was completed on Nov. 7, 2014. NRC Motion at 10. The hearing requests and petition to suspend licensing are now pending before the NRC Commissioners.

## **ARGUMENT**

The NRC concedes that Beyond Nuclear et al. exhausted their administrative remedies before bringing this rulemaking appeal by commenting on the proposed rule (Motion at 4), and that “exhaustion does not strictly apply here.” Motion at 9.<sup>3</sup> Notwithstanding this admission, the NRC argues, without citation to any applicable prior decisions of this Court or any other, that the Court should still defer briefing in order to give itself “the benefits of [the NRC’s] expertise and experience” on an issue that is the “same” before the Court and the NRC. Motion at 8. Neither ground asserted by the NRC has merit.

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<sup>3</sup> By the same token, the cases cited by the NRC, which apply the exhaustion doctrine, are not applicable here. *See* Motion at 9.

First, the claims before the Court and the NRC are not the “same.” While Beyond Nuclear et al.’s appeal of the Continued Spent Fuel Storage Rule challenges the lawfulness of the Rule’s failure to include generic Waste Confidence safety findings regarding spent fuel disposal, their hearing requests before the NRC assert that the NRC must make licensing case-specific Waste Confidence findings in the *absence* of generic findings in the Continued Spent Fuel Storage Rule. As the NRC concedes, Petitioners “need not, and could not challenge, the Continued Storage Rule through the agency’s adjudicatory process.” Motion at 9. By this statement alone, the NRC thereby negates its own claim that the very same issue is before both this Court and the NRC.

Second, the NRC has already had a full opportunity to apply its expertise and experience to the question of whether the Waste Confidence safety findings that the NRC included in its Waste Confidence Decisions for 30 years could be dropped from the Continued Spent Fuel Storage Rule without violating the Atomic Energy Act. This question of statutory interpretation was fully addressed in the rulemaking comments submitted by Beyond Nuclear et al. No useful purpose would be served by delaying the briefing to consider whether the statutory interpretation should be made in a single rulemaking or in multiple separate licensing proceedings.

Furthermore, as the NRC recognizes, briefing should not be delayed by administrative cases that constitute mere “place-holders.” Motion at 5-6 n.3. By filing their administrative cases, Beyond Nuclear et al. did not seek to duplicate the rulemaking appeal. Rather, as explained above, Beyond Nuclear et al. sought to prevent the NRC from escaping judicial review of its Atomic Energy Act-based challenge to the Continued Spent Fuel Storage Rule by suggesting that individual licensing proceedings constituted the only forum in which Petitioners could raise Waste Confidence safety issues. By filing these place-holder contentions, Beyond Nuclear et al. also sought to ensure that during the period while their rulemaking appeal was before the Court, the NRC would not issue or renew reactor licenses without making Waste Confidence safety findings.

Finally, and as noted at the outset, delay in briefing would unfairly burden all of the Petitioners, who seek prompt resolution of the issues before the Court, before the NRC issues any new licenses and license renewals. The NRC concedes as much. Motion at 10. Each of these Petitioners (including the States of Connecticut, New York, and Vermont, the Prairie Island Indian Community, and the State of Massachusetts (Intervenor), who are filing a separate opposition to NRC’s Motion) has raised issues regarding NEPA that are not at issue in the administrative proceedings before the

NRC; and none of the other Petitioners joined in the administrative cases brought by Beyond Nuclear et al.

### **PROPOSED BRIEFING SCHEDULE**

The Petitioner Environmental Organizations respectfully propose a briefing schedule that would proceed without undue delay, while providing all of the Petitioners with adequate time to brief their claims and affording the NRC the “modest” amount of time it considers necessary to resolve Petitioners’ administrative cases. Motion at 10. This schedule would give the NRC fully seven months after completion of the briefing of the administrative cases to make a decision and address that decision in its responsive brief. The schedule Petitioners propose is as follows:

April 10, 2015	Petitioners’ and Intervenor-Petitioner’s briefs
April 17, 2015	Amicus curiae Sierra Club brief
June 10, 2015	NRC Brief
June 17, 2015	Intervenor-Respondents’ Brief
July 10, 2015	Petitioners’ Reply Brief
July 24, 2015	Joint Appendix
July 31, 2015	Final briefs

### **CONCLUSION**

For the foregoing reasons, the Court should deny the NRC’s motion to defer briefing of this rulemaking appeal and establish the briefing schedule proposed by the Environmental Organization Petitioners.

Respectfully submitted,

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January 20, 2015

## **EXHIBIT A**

Comments by Environmental Organizations on Draft Waste Confidence

Generic Environmental Impact Statement and

Proposed Waste Confidence Rule (Dec. 20, 2013)

(excerpt pages 1; 14 - 20)

December 20, 2013

**UNITED STATES OF AMERICA  
BEFORE THE NUCLEAR REGULATORY COMMISSION**

_____	)	
In the Matter of	)	
	)	
Proposed Rule: Waste Confidence –	)	
Continued Storage of Spent Nuclear Fuel	)	Docket No. 2012-0246
10 C.F.R. Part 51	)	
	)	
Draft Waste Confidence Generic	)	
Environmental Impact Statement	)	
_____	)	

**Comments by Environmental Organizations  
on Draft Waste Confidence Generic Environmental  
Impact Statement and Proposed Waste Confidence Rule**

**And**

**Petition to Revise and Integrate All Safety and Environmental Regulations  
Related to Spent Fuel Storage and Disposal**

**I. INTRODUCTION**

The following Organizations hereby submit comments on the Draft Waste Confidence Generic Environmental Impact Statement (“DGEIS”) and proposed revisions to NRC’s regulations for implementation of the National Environmental Policy Act (“NEPA”) regarding environmental impacts of spent fuel storage, 78 Fed. Reg. 56,776 (Sept. 13, 2013) (“proposed rule”): Alliance to Halt Fermi 3, Beyond Nuclear, Blue Ridge Environmental Defense League, Center for a Sustainable Coast, Citizens Allied for Safe Energy, Citizens’ Environmental Coalition, Don’t Waste Michigan, Ecology Party of Florida, Friends of the Coast, Friends of the Earth, Georgia Women’s Action for New Directions, Green State Solutions, Hudson River Sloop Clearwater, Missouri Coalition for the Environment, NC WARN, Nevada Nuclear Waste Task Force, New England Coalition, No Nukes Pennsylvania, Northwest Environmental Advocates, Nuclear Energy Information Service, Nuclear Information and Resource Service, Nuclear Watch South, Physicians for Social Responsibility, Public Citizen, Promoting Health and Sustainable Energy, Radiation and Public Health Project, Riverkeeper, SEED Coalition, San Clemente Green, San Luis Obispo Mothers for Peace, Snake River Alliance, Southern Alliance for Clean Energy, and Vista 360.

DGEIS at 1-9.

## COMMENTS

### **IV. THE PROPOSED RULE FAILS TO SATISFY ATOMIC ENERGY ACT REQUIREMENTS FOR LICENSING AND RE-LICENSING REACTORS**

#### **A. The Proposed Rule Violates the Atomic Energy Act by Eliminating Previous Safety Findings That Are Essential to Atomic Energy Act Compliance**

As the NRC conceded in its first waste confidence decision (Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391 (July 5, 1977)) and as affirmed by the U.S. Court of Appeals in *Natural Resources Defense Council v. NRC*, 582 F.2d 166 (2nd Cir. 1978), in order to satisfy the Atomic Energy Act, NRC reactor licensing decisions must include predictive reasonable assurance findings regarding (a) the availability of sufficient and safe spent fuel disposal capacity when it is necessary and (b) the safety of spent fuel storage in the meantime. *See also Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). As the NRC explained in 1977, in its first pronouncement on the issue:

The Commission would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely. The accumulating evidence as discussed below continues to support the Commission's implicit findings of reasonable assurance that methods of safe permanent disposal of high-level wastes can be available when they are needed. Given this, and the fact that at present safe storage methods are presently available and highly likely to remain so until a permanent disposal system can be demonstrated and licensed, the Commission sees no reason to cease licensing reactors.

42 Fed. Reg. at 34,393. While these reasonable assurance findings do not need to be as rigorous as other safety findings because they predict events far in the future, they must demonstrate a technical basis for a reasonable level of "confidence" that reactor fuel will be isolated from humans and the environment as long as it remains radioactive. 44 Fed. Reg. at 34,393.

Until the instant proposed rule, all NRC "waste confidence" decisions, since the first decision in 1984, have included "reasonable assurance" findings. For instance, Findings 2 and 4 of the 1984 waste confidence decision contained "reasonable assurance" findings regarding the same issues:

(2) The Commission finds *reasonable assurance* that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09, and that sufficient repository capacity will be available within 30 years beyond expiration of any reactor operating license to

dispose of existing commercial high level radioactive waste and spent fuel originating in such reactor and generated up to that time.

(4) The Commission finds *reasonable assurance* that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating license at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.

49 Fed. Reg. 34,660 (Aug. 31, 1984) (emphasis added). Similarly, Findings 2 and 4 of the 1990 waste confidence decision contained "reasonable assurance" findings regarding the same issues:

(2) The Commission finds *reasonable assurance* that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial HLW and SNF originating in such reactor and generated up to that time.

(4) The Commission finds *reasonable assurance* that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite ISFSIs.

55 Fed. Reg. 38,474 (Sept. 18, 1990) (emphasis added). Findings 2 and 4 of the 2010 waste confidence decision (subsequently vacated by the Court of Appeals on other grounds) also stated:

(2) The Commission finds *reasonable assurance* that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent nuclear fuel generated by any reactor when necessary.

(4) The Commission finds *reasonable assurance* that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor in a combination of storage in its spent fuel storage basin and either onsite or offsite ISFSIs.

75 Fed. Reg. 81,037, 81,040 (Dec. 23, 2010) (emphasis added).

The proposed rule violates the Atomic Energy Act by completely eliminating any "reasonable assurance" safety findings regarding the safety of spent fuel storage or the availability of spent fuel disposal capacity. The only safety finding made in the proposed rule is a statement in the preamble that the NRC *lacks* confidence to make a reasonable assurance finding regarding the

availability of a “disposal solution” at “the end of a reactor’s licensed life for operation.” 78 Fed. Reg. at 56,784.

While admitting in a footnote that “reasonable assurance” findings regarding an “offsite storage solution” and interim storage are required by law (78 Fed. Reg. at 56,778 n. 1 (citing *Minnesota*, 602 F.2d at 418)), the NRC asserts that the proposed rule’s only purpose is to codify the results of a NEPA analysis:

*B. Waste Confidence Rulemaking*

B1. What is the purpose of this Waste Confidence rulemaking? The NRC’s use of a rule to generically satisfy its NEPA obligations with respect to continued storage will enhance efficiency in individual licensing reviews by analyzing the environmental impacts of continued storage, which are the same or largely similar at each nuclear power reactor or storage site, and codifying the results of that analysis. Part of the environmental analysis for a nuclear power reactor or storage facility license includes a review of the impacts caused by the spent nuclear fuel generated in the reactor. That analysis must assess the impacts of the spent nuclear fuel from generation through disposal. If the Commission lacks reasonable assurance that a disposal solution will be available at the end of a reactor’s licensed life for operation, NEPA requires that the Commission assess the impacts of continued storage of the spent nuclear fuel pending disposal at a repository.

78 Fed Reg. 56,783-84. But the NRC’s complete substitution of NEPA findings for safety findings is unlawful. The NRC must comply with *both* the Atomic Energy Act *and* NEPA. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729 (3d Cir. 1989). The two statutes are independent and distinct in their requirements. The Atomic Energy Act establishes a minimum level of protection of public health and safety against radiological hazards. NEPA, on the other hand, requires disclosure and weighing of risks posed by licensing actions that are authorized by the NRC under the Atomic Energy Act; but it does not establish minimum standards. The two statutes do overlap. For example, NEPA requires the NRC to consider the reasonably foreseeable risk that siting sufficient repository capacity will not be feasible, and what would be the impacts if it is not feasible. But compliance with one statute does not excuse compliance with the other. *Limerick Ecology Action*, 869 F.2d at 729-30 (noting that case law “do[es] not suggest that NEPA can never require consideration of additional alternatives simply because there is some overlap in the considerations required by both statutes”). Moreover, while the Court of Appeals in *New York* focused on the NRC’s noncompliance with NEPA in promulgating the 2010 Waste Confidence Decision, nothing in the Court’s opinion could be read to reverse *Natural Resources Defense Council* or *Minnesota*’s holdings that the NRC must make waste confidence safety findings that comply with the Atomic Energy Act. In the absence of such reasonable assurance findings, the NRC has no lawful basis for issuing or re-issuing reactor licenses. 42 Fed. Reg. at 34,393; *Natural Resources Defense Council*, 582 F.2d at 170; *Minnesota v. NRC*, 602 F.2d at 418.

**B. The Proposed Rule Violates the Atomic Energy Act by Removing the Previous Finding Regarding Sufficiency of Repository Capacity**

As discussed above, until the instant proposed rule, all NRC “waste confidence” decisions have included “reasonable assurance” findings. In addition, until the proposed rule, all “waste confidence” decisions have specifically addressed the question of whether the NRC has reasonable assurance that sufficient repository capacity will be available to accommodate spent reactor fuel when it is needed. This change can be seen by comparing the proposed rule with all of the quotations from Findings 2 and 4 in Section A above.

In contrast to these previous findings, the proposed rule finds only that it is “feasible” to “safely store spent nuclear fuel following the licensed life for operation of a reactor” and that it is “feasible” to “have a mined geologic repository within 60 years following the licensed life for operation of a reactor.” 78 Fed. Reg. at 56,804.<sup>1</sup> The NRC’s previous reasonable assurance finding regarding the availability of sufficient repository capacity for disposal of spent fuel *has completely disappeared from the NRC’s regulations*. Its disappearance is not explained. Neither the proposed rule nor the accompanying DGEIS gives any explanation as to why the proposed rule now fails to address the question of whether the NRC has a reasonable basis for confidence in the availability of sufficient repository capacity when it is needed. The closest the NRC comes to addressing the issue is by entitling a section in Appendix B “Repository Capacity will be Available to Dispose of Spent Fuel.” *Id.* at B-2. But the heading makes no reference to reasonable assurance or the sufficiency of capacity, and the text that accompanies that heading makes no assertion that the NRC has a technical basis for a finding of reasonable assurance that sufficient repository capacity will be available when it is necessary. Nor does the DGEIS contain any analysis of the risk that sufficient repository capacity will not become available when it is needed.

Instead, the DGEIS analyzes “scenarios” which assume the unavailability of repository capacity. That is a far cry from analyzing the question of whether the NRC has a technical basis for a reasonable assurance finding regarding the availability of sufficient repository capacity or an environmental risk analysis of the uncertainty surrounding such a prediction. As the Court ruled in *New York*, the NRC must evaluate the “likelihood of nonavailability” of repository capacity unless it is “remote and speculative.” 681 F.3d at 479. And a finding of technical feasibility is a far cry from a finding that sufficient repository capacity will actually be available.

The sufficiency of repository capacity is a crucially important consideration in determining whether it is safe for the NRC to continue to allow the generation of spent fuel in licensing decisions. Spent fuel is a highly radioactive substance that must be isolated for many thousands of years in order to protect public health and the environment. Generalizations about the technical feasibility of “a” repository do not answer the question of whether repository capacity will be sufficient to accommodate the spent fuel that will be generated in the future by reactors that have not yet been licensed or re-licensed. As discussed in the attached Makhijani

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<sup>1</sup> In previous waste confidence decisions, the NRC used the term “feasible” in reasonable assurance findings regarding high-level waste disposal. *See, e.g.*, Finding 1 of the 1990 waste confidence decision: “The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.” 55 Fed. Reg. at 38,475 (1990).

Declaration (pars. 8.4 – 8.13), “[t]he proposed rule’s assertion of the feasibility of a repository does not guarantee that there will be a repository with sufficient capacity to accommodate all the spent fuel envisioned.”

In addition, the proposed rule’s failure to address the sufficiency of repository capacity is inconsistent with Congressional policy that disposal of spent fuel in a repository is the only safe means of protecting public health and the environment from spent fuel in the long run. *See* Section 11 of the Nuclear Waste Policy Act (“NWP”), which establishes a national policy of disposing of spent nuclear fuel in a deep geologic repository. 42 U.S.C. § 10131 (1982).<sup>2</sup> In the proposed rule, the NRC appears to assume that no reasonable assurance finding regarding repository capacity is needed because of its opinion that spent fuel can be stored safely for the long-term or perhaps indefinitely at reactor sites or away-from reactor storage facilities. Aside from the fact that NRC’s opinion is essentially unsupported (*see* discussion in Section VI.A below), that assumption cannot be squared with the NWP.

### C. Lack of Sufficient Technical Support for Reasonable Assurance Findings

Even if the NRC were to attempt to make “reasonable assurance” findings about the availability of sufficient repository capacity or the safety of extended interim storage of spent fuel as required by the Atomic Energy Act, NRC has demonstrated by its own actions that it lacks sufficient information to support such findings. The question of feasibility of spent fuel disposal cannot be evaluated without considering the probability that a repository will safely contain radioactivity for the hundreds of thousands of years required. In order to evaluate that probability, it is necessary to evaluate the environmental impacts of disposing of spent fuel in a range of geologic media. NRC cannot simply presume that a repository is feasible. Disposal impacts are relevant because they are part of the waste confidence finding that a mined geologic repository is feasible. By definition, a “feasible” repository must meet reasonable health and safety standards. Further, sufficient capacity at one or more such sites meeting safety criteria must be available to accommodate spent fuel from any and all commercial light water reactors that may be built. The Draft GEIS sets no upper limit on the amount of spent fuel to be disposed of. By failing to evaluate spent fuel disposal impacts and the sufficiency of repository capacity (if necessary at more than one site), the NRC has excluded a major part of the picture regarding the feasibility of spent fuel disposal. *See* Makhijani Declaration, pars. 8.2-8.24.

Nor does the NRC have a sufficient technical understanding of the risks of extended spent fuel storage to support a reasonable assurance finding. As discussed in the Organizations’ comments on the scope of the DGEIS, NRC’s own documents show that existing information is grossly inadequate to support any reasonable predictive findings about the safety of such long-term spent

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<sup>2</sup> The NWP also clearly distinguishes between storage and disposal. Storage is the “retention of . . . spent nuclear fuel . . . with the intent to recover such waste or fuel for subsequent use, processing, or disposal.” Section 2(25). Disposal is the “emplacement in a [deep geologic] repository . . . with no foreseeable intent of recovery, whether or not such emplacement permits the recovery of such waste.” Section 2(9), (18).

fuel storage.<sup>3</sup> There is no existing environmental or other study that has even attempted to predict the environmental impacts of storing spent fuel on site for hundreds of years, or perhaps indefinitely. Indeed, all other studies have been premised on the opposite conclusion – that a repository will be available in the relatively near future. NRC has commenced a study of the issue: the “Long-Term Waste Confidence Update Project,” in which the NRC proposes to assess the environmental impacts of storing spent fuel for 200 years after cessation of licensing. *See* 75 Fed. Reg. at 81,040.<sup>4</sup> But work on the Long-Term Waste Confidence Update Project had only just begun at the time of the D.C. Circuit’s decision, and it is far from complete.

The NRC Staff has estimated that the Long-Term Waste Confidence Update Project EIS will take until 2019 to finish. COMSECY-12-0016, Memorandum from R.W. Borchardt to NRC Commissioners re: Approach for Addressing Policy Issues Resulting from Court Decision to Vacate Waste Confidence Decision and Rule at 3 (July 9, 2012) (“COMSECY-12-0016”). Two preliminary studies issued as part of the Project support the Staff’s seven-year time estimate by demonstrating (a) the complexity of the issues raised by long-term and indefinite spent fuel storage and (b) the Commission’s lack of knowledge on the subject. The first study, issued for comment in December 2011, sets forth a series of topics that must be addressed in the Long-Term Waste Confidence Update Project EIS, including the degree to which nuclear power will be used in the future, the nature of future dry cask storage and transportation technology, prospects for long-term maintenance of institutional and regulatory control, and accidents to be considered. Draft Report for Comment: Background and Preliminary Assumptions for an Environmental Impact Statement – Long-Term Waste Confidence Update (Dec. 2011) (the “Preliminary Assumptions Document”). While the NRC proposed, as a preliminary matter, to make assumptions about many of these topics, comments show that they may not be assumed and instead should be the *subject* of the EIS for the Long-Term Waste Confidence Update Project. *See* comments by Institute for Energy and Environmental Research, Blue Ridge Environmental Defense League, Natural Resources Defense Council, Riverkeeper, and Southern Alliance for Clean Energy on NRC Report Updating Preliminary Assumptions for an EIS on Long-Term Spent Fuel Storage Impacts (Feb. 17, 2012) (copy attached as Exhibit G).

The second study, issued for comment in May 2012, identifies an array of technical issues regarding dry storage and transportation impacts on which the NRC must collect additional data before it can evaluate dry cask long-term integrity and cask vulnerability to degradation and accidents. Draft Report for Comment: Identification and Prioritization of the Technical Information Needs Affecting Potential Regulation of Extended Storage and Transportation of Spent Nuclear Fuel (May 2012) (“Technical Needs Document”).

Therefore, the NRC has years of research to do in order to gather sufficient data regarding spent fuel degradation and transportation and handling risks. It will take a long time, potentially well over a decade, to collect the data needed to make scientifically valid impact analyses for high

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<sup>3</sup> The Organizations’ scoping comments and supporting declaration of Dr. Arjun Makhijani (“Makhijani Scoping Declaration”) are attached to these comments as Exhibits E and F, respectively.

<sup>4</sup> As the Court observed in *State of New York*, that rulemaking may address “some or all of the problems” that it remanded to the agency. 681 F.3d at 483.

burnup fuel stored for long periods. Necessary research tasks include development of a sound database for a scientifically valid evaluation of the environmental impacts of prolonged storage of spent fuel, including high burnup spent fuel up to 62.5 GWd/MTU and MOX spent fuel. In addition, there are essentially no data available for high burnup spent fuel that has been stored in dry casks for extended periods of time. The deficiencies in the NRC's understanding of spent fuel characteristics and behavior under long-term storage conditions are further addressed in the attached Declaration of Dr. Arjun Makhijani, pars. 4.1-4.35.

The NRC attempts to rationalize its lack of support for a reasonable assurance finding about the safety of interim spent fuel storage by characterizing the finding as a "policy statement." 78 Fed. Reg. at 56,799. The characterization is fallacious and evasive of the NRC's responsibilities under the Atomic Energy Act. The Atomic Energy Act requires that safety must be assured by factual predictions that are based on technical evidence, not by policy statements. *Limerick Ecology Act*, 869 F.2d at 734-35.

Thus, the lack of reasonable assurance findings in the proposed rule renders them invalid as a matter of law for supporting the issuance of new reactor licenses or the re-issuance of existing licenses. The NRC cannot cure this fatal deficiency by inserting the "magic words" of "reasonable assurance." Instead, it must have a technical basis for such findings. As discussed above, it has no such basis. In light of the fatal deficiencies in the proposed rule, the NRC lacks lawful grounds for issuing or re-issuing any reactor licenses. *Calvert Cliffs Nuclear Project, L.L.C. and Unistar Nuclear Operating Services, L.L.C.* (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-12-16, 76 NRC 63, 66 ("Waste confidence undergirds certain agency licensing decisions, in particular new reactor licensing and license renewal.")

## **V. THE DGEIS VIOLATES NEPA BY MISSTATING THE PURPOSE AND NEED FOR THE PROPOSED RULE AND THEREBY PROVIDING A MEANINGLESS ALTERNATIVES AND COST-BENEFIT ANALYSIS**

In the DGEIS, the NRC purports to fulfill the key preliminary requirements for structuring the DGEIS and ensuring the completion of a meaningful analysis: defining the proposed action, describing the purpose and need of the proposed action, and identifying a range of alternatives to the proposed action. But the NRC taints the process by beginning it with the same legally erroneous premise rejected by the Court of Appeals in *New York v. NRC*: that proposed 10 C.F.R. § 51.23 is not a licensing action.

Leading from this faulty premise, the DGEIS makes the absurdly circular assertion that the purpose and need for the DGEIS is to decide whether to address the environmental impacts of spent fuel storage generically or on a site-specific basis. The NRC then compounds its legal error to an even more absurd effect, by identifying a range of alternatives for *thinking about* the environmental impacts of spent fuel storage. The NRC conducts a comically detailed comparison of the costs and benefits of these alternative methods for analyzing environmental impacts of spent fuel storage, and finds that although none of these modes of thought have any adverse physical impacts on the environment, the generic mode of analysis is the "preferred alternative" for reasons of administrative efficiency. Thus, based on the NRC's grossly erroneous structuring of the DGEIS, the DGEIS de-couples the environmental impacts of spent

## **EXHIBIT B**

Continued Spent Fuel Storage Generic Environmental Impact Statement

(Sept. 19, 2014)

(excerpt cover page; D-28 - D-32)



United States Nuclear Regulatory Commission

*Protecting People and the Environment*

NUREG-2157  
Volume 2

# **Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel**

Final Report  
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“unavailability of waste disposal capacity” is one of the factors to be considered, the Commission will only approve the request when necessary to protect public health and safety. Therefore, a time limit on storage is unnecessary in the Rule. Accordingly, the NRC disagrees that the GEIS should include an analysis of spent fuel pool storage beyond the short-term timeframe because the NRC has provided a reasonable basis for its analytical assumption that the spent fuel will be moved from the pools by the end of the short-term timeframe. See Section D.2.16.10 of this appendix for additional information on the assumption that all spent fuel will be removed from the spent fuel pools within 60 years of the cessation of reactor operations. No changes were made to the GEIS or Rule as a result of these comments.

(897-6-12) (897-4-22) (897-6-9)

**D.2.3.9 – COMMENT:** One commenter stated that the NRC has no valid analysis on which it can rely for an evaluation of spent fuel disposal impacts. The commenter stated that 10 CFR Part 51, Subpart A, Appendix B, Table B-1 “Summary of Findings on NEPA Issues for License Renewal of Nuclear Power Plants” depends on the U.S. Environmental Protection Agency (EPA) standard for Yucca Mountain and an actual analysis and the review of the Yucca Mountain application is not complete so it is not clear that Yucca Mountain would meet the required standard. The commenter expressed the view that the existence of a standard does not provide any assurance or indication of the actual performance of a site. The commenter also pointed out the EPA standard only applies to Yucca Mountain and that the status for Yucca Mountain is uncertain.

**RESPONSE:** The NRC agrees in part and disagrees in part. The comment is correct that the NRC has not completed its analysis of the Yucca Mountain repository application and that the status of Yucca Mountain remains uncertain. The NRC disagrees that no reliance can be placed on the existence of the EPA standard. The DOE developed and submitted a license application that purports to demonstrate that the proposed facility meets NRC requirements, including the requirements that implement the EPA standards. The NRC would not license a repository that did not meet the applicable NRC regulatory requirements. As for the EPA standard only applying to Yucca Mountain, while that is correct, it is reasonable to believe that a comparable standard would be issued for other repository sites, if needed. No changes were made to the GEIS or Rule as a result of these comments.

(898-4-18) (898-5-21) (898-1-8)

## **D.2.4 Comments Concerning Miscellaneous Issues**

**D.2.4.1 – COMMENT:** Several commenters argued that the NRC is required under the AEA to make reasonable assurance “safety” findings that spent fuel can be safely stored after the licensed life of the reactor and the availability of a permanent repository for spent fuel disposal. Another commenter disagreed and argued, as found in *NRDC v. NRC*, that safety findings about repository availability are not required under the AEA. One commenter noted that the

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NRC acknowledged that these reasonable assurance findings are required by law, citing 78 FR 56778 n. 1. Further, the commenter argued that the NRC does not have sufficient technical understanding of the risks of continued storage to support these AEA safety findings and no study has attempted to predict the environmental impacts of indefinite or long-term continued storage. The commenter also noted that the NRC had started a long-term waste confidence project, but the commenter contended that this project is not yet ready to support the NRC's required AEA safety findings. The commenter requested that the NRC withdraw the proposed Rule until it has a basis for the reasonable assurance safety findings regarding continued storage.

Another commenter argued that without these safety findings, which cannot be part of the GEIS, the NRC has no authority to issue licenses or license renewals. Another commenter argued that compliance with *NRDC v. NRC* requires the NRC to assess (a) the availability of sufficient and safe spent fuel disposal capacity when it is necessary and (b) the safety of spent fuel storage in the meantime. This commenter also argued that the safety findings must demonstrate a technical basis for a reasonable level of "confidence" that reactor fuel will be isolated from humans and the environment as long as it remains radioactive, citing 44 FR at 34393. Finally, the commenter argues that nothing in *New York v. NRC*, can be read to eliminate the NRC's obligations to make AEA safety findings under *NRDC v. NRC* and *Minnesota v. NRC*.

Another commenter stated that AEA reasonable assurance safety findings must be supported by factual predictions based on technical evidence, and cannot be simple policy statements.

Several commenters stated that the NRC has acknowledged that it has no confidence that a facility will be available by any specific date, if ever.

One commenter asserted that the GEIS and *Federal Register* Notice provide ample support for the NRC to make reasonable assurance findings and requested that findings be included in the rule.

RESPONSE: The NRC agrees in part and disagrees in part with the comments. The NRC agrees that any decision to issue a license must be predicated on a Commission determination that the licensed activity can be performed in a manner adequate to protect public health and safety. This determination is based on technical analyses and judgment. However, this determination is made in accordance with the specific licensing process and is not part of the Commission's NEPA obligations.

The comments conflate reasonable assurance findings made in past waste confidence proceedings with AEA safety determinations made in the licensing process. The NRC typically refers to these safety findings as "reasonable assurance" findings (see Section 185 of the AEA), but for the purposes of this discussion they will be referred to as safety determinations that the

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Commission makes in licensing facilities and activities. These AEA safety determinations should not be confused with environmental analysis under NEPA. While specific reasonable assurance findings were historically included in the waste confidence proceeding, those findings are not appropriate for this GEIS and are not necessary. Circumstances have evolved considerably since the inception of the waste confidence proceeding in the early 1980s. Since then, decades-long experience with the storage of spent fuel either in spent fuel pools or ISFSIs has demonstrated that spent fuel can be safely stored beyond the operating life of a reactor so long as that storage remains under the licensing and inspection processes currently in place.

### ***Minnesota v. NRC***

As noted in the comments, the *Federal Register* Notice associated with the proposed Rule and draft GEIS (78 FR 56776) contains a footnote referencing *Minnesota v. NRC*, in which the Court of Appeals held that the NRC must consider:

whether there is reasonable assurance that an offsite storage solution will be available by the years 2007-09, the expiration of the plants' operating licenses, and if not, whether there is reasonable assurance that the fuel can be stored safely at the sites beyond those dates.

As *Minnesota v. NRC* explained, this remand was intended to “inquir[e] into the basis of those assurances of confidence” (Id. at 419). In the context of the 1984 waste confidence proceeding that responded to the Court of Appeals inquiry, the term “confidence” referred to the Commission’s policy that it would not continue to issue licenses if it did “not have reasonable confidence that wastes can and will in due course be disposed of safely” (Id. at 415). The NRC then updated the Waste Confidence Rule in 1990 (55 FR 38474) and 2010 (75 FR 81037), the latter resulting in the Court of Appeals’ remand in *New York v. NRC*. The actions taken by NRC in response to the remand conform to the AEA, NEPA, and other applicable legal requirements. The NRC is meeting its NEPA obligations with respect to continued storage with a GEIS. AEA obligations, including safety determinations, will continue to be met through the licensing process. As explained below, the AEA and the NRC’s regulatory regime ensure that stored waste will continue to be governed under the license and regulatory controls after the end of a facility’s current license, relying on the experience gained over the past 30 years and the current regulatory framework to ensure adequate protection of public health and safety. Further, the technical feasibility of continued storage over the three timeframes analyzed in the GEIS, and the conclusion regarding technical feasibility and timeframe of availability of a repository, undergirds the NRC’s evaluation of the environmental impacts of continued storage activities.

Appendix B of the GEIS analyzes the technical feasibility of a geologic repository and the availability of sufficient repository capacity. It does so by evaluating both international and domestic progress on siting a geologic repository and the development of the scientific and technological tools necessary to the determination that a geologic repository is technically

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feasible (see Sections B.2.1 and B.2.2 of the GEIS). This analysis provides the basis for the NRC's determination of technical feasibility; however, as stated by the Commission in the *Federal Register* Notice associated with the 2010 revision to the Rule: "[b]ecause the Commission cannot predict when [the necessary] societal and political acceptance will occur, it is unable to express reasonable assurance in a specific target date for the availability of a repository." In the GEIS, the NRC conducted an evaluation of the technical and scientific possibility of siting, developing, and operating a geologic repository. However, the determination of technical feasibility is distinct from the more-difficult-to-quantify effects that societal or political factors may have on the progress toward (and exact timing of) availability of a repository. As stated in the GEIS, although the prediction of a particular date when a geologic repository will become available is uncertain, the NRC believes that the timeframe needed to develop a repository is approximately 25 to 35 years and that a repository is likely to become available by the end of the short-term timeframe (see Section B.2.2 of the GEIS).

The GEIS also analyzes the technical feasibility of both wet and dry storage in spent fuel pools and casks, respectively for continued storage. The analysis considers proven storage methodologies, practical operating experience and the regulatory oversight provided by the current regulatory framework, allowing the NRC to determine that it is technically feasible to safely store spent fuel in either wet or dry storage for the short-term timeframe with only routine maintenance (see Section B.3 of the GEIS). For dry cask storage in the long-term and indefinite timeframes, the analysis considers the same factors analyzed in the short-term timeframe, along with aging management techniques, ISFSI construction, and cask replacement.

**AEA safety determinations**

The NRC regulations that govern licensing of storage facilities and those that govern licensing a geologic repository set criteria and standards by which these facilities must be designed, constructed, and operated. Implicit in these regulations is the confidence that they will be complied with and that sufficient enforcement tools will be available to prevent and address noncompliance. No person may store or possess special nuclear material, including spent fuel, without an NRC license (see Section 57 of the AEA). For instance, the regulations in 10 CFR Parts 50, 52, and 72 that apply to construction and operation of reactor spent fuel pools and ISFSIs establish stringent safety requirements for these facilities. The source of the NRC's determination that the licensed activity, once the license is granted, will not endanger public health is the fact that these facilities will remain under license after the end of the facility's period of operation, and therefore will still need to meet these safety standards, which are found in 10 CFR Part 50 or 52 for reactors and their spent fuel pools and 10 CFR Part 72 for ISFSIs. Some of the provisions for reactor safety bear directly upon the safe storage of spent fuel after licensed life for operation (see, for example, 10 CFR 50.54(bb); and 10 CFR Part 50, Appendix A, Criterion 61, which requires that spent fuel storage systems be designed to assure adequate safety under normal and postulated accident conditions). In addition, the Commission recently

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declined to restrict the number of times a specific ISFSI license may be renewed (see 76 FR 8872). ISFSI renewal applications will be subject to all applicable regulatory requirements to justify safe operation during the requested license term, including appropriate aging management activities. Based on the expectation that the current, or even a more stringent, regulatory framework will continue to exist, and on the decades-long experience resulting in substantial technical knowledge about storage of spent fuel, the NRC concludes that spent fuel can be stored safely for the short-term, long-term, and indefinite timeframes (see Appendix B of the GEIS).

### Comments regarding delay of other NRC projects and disposal

With respect to the long-term project on the regulatory basis for extended storage and transportation of spent fuel, see “Plan for the Long-Term Update to the Waste Confidence Rule and Integration with the Extended Storage and Transportation Initiative” (NRC 2011a). However, the comment is also correct that the NRC started that project, but it has since been deferred to allow the agency to address the remand from *New York v. NRC*. The NRC does not have to wait for the completion of that long-term project, or any other technical study, to issue the GEIS. NEPA requires that an agency conduct its environmental review based on the currently available scientific and technical information. NEPA does not require that the NRC wait until undeveloped information matures into something that later might affect the review (see *Marsh v. Oregon Natural Res. Council*). Finally, the NRC disagrees with the comment’s suggestion that NRC must demonstrate a technical basis for confidence that spent fuel will be isolated from humans and the environment as long as it remains radioactive. Isolation of the spent fuel occurs with permanent disposal; in contrast, the Rule codifies the environmental impacts of continued storage of spent fuel, not its permanent disposal. No changes were made to the GEIS or Rule as a result of these comments.

(1-14) (473-5-1) (646-19) (693-1-7) (706-1-10) (706-1-13) (706-1-8) (706-1-9) (820-2) (827-6-1) (827-7-1) (827-5-10) (827-5-11) (827-5-2) (827-5-3) (827-6-6) (827-6-7) (827-5-9) (897-1-1) (897-2-10) (897-2-11) (897-2-12) (897-2-13) (897-2-18) (897-4-18) (897-7-18) (897-1-2) (897-2-21) (897-7-21) (897-1-3) (897-1-4) (897-1-5) (897-2-7) (897-2-8) (897-7-8) (897-2-9) (897-4-9) (898-1-1) (898-1-12) (898-5-24) (898-1-9)

**D.2.4.2 – COMMENT:** One commenter suggested that the NRC consider explaining that it currently cannot provide “assurance that SNF can be managed safely into the indefinite future,” but that this is a problem that must be solved by Congress and other Federal agencies.

**RESPONSE:** The NRC agrees in part and disagrees in part with the comment. The NRC agrees with the comment that nuclear waste policy is the province of the Congress and the President, and that that policy responsibility has been delegated to the DOE, not the NRC. However, the NRC does not agree that spent fuel cannot be safely stored and managed for the indefinite future. The GEIS presents the NRC’s analysis of how safe storage would likely be

## **EXHIBIT C**

San Luis Obispo Mothers for Peace Motion for  
Leave to File a New Contention Concerning the Absence of  
Required Waste Confidence Safety Findings (Sept. 29, 2014)

September 29, 2014

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE ATOMIC SAFETY AND LICENSING BOARD**

In the matter of

Pacific Gas and Electric Company  
Diablo Canyon Nuclear Power Plant  
Units 1 and 2

Docket Nos. 50-275-LR  
50-323-LR

**SAN LUIS OBISPO MOTHERS FOR PEACE MOTION FOR LEAVE  
TO FILE A NEW CONTENTION CONCERNING THE ABSENCE OF REQUIRED  
WASTE CONFIDENCE SAFETY FINDINGS**

**I. INTRODUCTION**

Pursuant to 10 C.F.R. §§ 2.309(c), 2.309(f)(1), and 2.309(f)(2), San Luis Obispo Mothers for Peace (“SLOMFP”) seeks leave to file a new contention that challenges the failure of the Nuclear Regulatory Commission (the “NRC”) to include Atomic Energy Act (“AEA”) required safety findings regarding the feasibility and capacity for spent fuel disposal in the license renewal proceeding for the Diablo Canyon nuclear power plant. The contention is based on the NRC’s removal of AEA required safety findings in its recently issued rule titled, “Continued Storage of Spent Nuclear Fuel” (“Continued Storage Rule”) and accompanying “Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel” (Continued Storage GEIS”).<sup>1</sup> Because the NRC no longer makes generic safety findings concerning the feasibility and capacity of spent fuel disposal in the Continued Storage Rule (previously, the Waste Confidence Decision), the NRC must now make these findings in each licensing proceeding. At this time, no such safety findings have been made in the license renewal proceeding for this reactor. Therefore SLOMFP seeks leave to bring this contention.

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<sup>1</sup> 79 Fed. Reg. 56,238 (Sept. 19, 2014) and 79 Fed. Reg. 56,263 (Sept. 19, 2014).

## II. FACTUAL BACKGROUND

The NRC has consistently interpreted the AEA to require the agency make waste confidence safety findings regarding the safety of ultimate spent fuel disposal before issuing a reactor license. As the NRC stated in 1977, it “would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”<sup>2</sup> Since 1984, the NRC also has repeatedly issued technical safety findings regarding the feasibility and capacity of spent fuel repositories.<sup>3</sup> These findings were supported by a technical analysis of the feasibility and capacity of a repository, including geologic characteristics, waste packaging, and engineered safety barriers.<sup>4</sup> In compliance with a U.S. Court of Appeals ruling in *Minnesota v. NRC*, 602 F.2d 412, 418-19 (D.C. Cir. 1979), the NRC used notice and comment rulemaking procedures to promulgate the Waste Confidence Decision (“WCD”) and its revisions.

As stated most recently in the 2010 WCD Update, the NRC’s relevant safety findings were as follows:

Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.<sup>5</sup>

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.<sup>6</sup>

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<sup>2</sup> Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977).

<sup>3</sup> Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984) (“1984 WCD”); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990) (“1990 Revised WCD”); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) (“2010 WCD Update”). The 2010 WCD Update was vacated by the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

<sup>4</sup> See, e.g., 2010 WCD, 75 Fed. Reg. at 81,058-59.

<sup>5</sup> Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,058 (Dec. 23, 2010) (vacated, *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)).

<sup>6</sup> *Id.*, 75 Fed. Reg. at 81,037. The 2010 WCD Update also contained three other Findings related to the safety of spent fuel storage pending disposal (as opposed to the safety of spent fuel disposal itself). Without conceding the validity of these storage-related findings, they are not challenged in the attached Contention or this Petition to Suspend.

The 2010 WCD Update, however, was vacated by the U.S. Court of Appeals in *New York* for failure to comply with the National Environmental Policy Act (“NEPA”).<sup>7</sup>

In the Continued Storage Rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings, stating instead that such findings are not necessary for the licensing of reactors.<sup>8</sup>

### **III. CONTENTION**

#### **A. Statement of Contention**

The NRC lacks a lawful basis under the Atomic Energy Act (“AEA”)<sup>9</sup> for issuing or renewing an operating license in this proceeding because it has not made currently valid findings of confidence or reasonable assurance that the hundreds of tons of highly radioactive spent fuel that will be generated during any reactor’s 40-year license term or 20-year license renewal term can be safely disposed of in a repository.<sup>10</sup> The NRC must make these predictive safety findings in every reactor licensing decision in order to fulfill its statutory obligation under the AEA to protect public health and safety from the risks posed by irradiated reactor fuel generated during the reactor’s license term.<sup>11</sup>

#### **B. Statement of Basis for the Contention**

The following explains the legal and factual bases for the contention:

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<sup>7</sup> 42 U.S.C. §§ 4321-4370h.

<sup>8</sup> 79 Fed. Reg. at 56,254. *See also* NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel Rule at D-30 (Sept. 2014).

<sup>9</sup> 42 U.S.C. § 2011, et seq.

<sup>10</sup> This contention is being filed in both initial licensing and license renewal cases. Therefore it refers to both types of license.

<sup>11</sup> *See* Atomic Energy Act Section 182, 42 U.S.C. § 2232; *Union of Concerned Scientists v. NRC*, 824 F.2d 108 (D.C. Cir. 1987); and other authorities cited in Section B.1 below.

The NRC historically made generic findings regarding the safety of spent fuel disposal in its 1984 Waste Confidence Decision (“WCD”), as updated in 1990 and 2010.<sup>12</sup> As stated most recently in the 2010 WCD Update, the relevant findings were as follows:

Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.<sup>13</sup>

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.<sup>14</sup>

The 2010 WCD Update, however, was vacated by the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), for failure to comply with the National Environmental Policy Act (“NEPA”).<sup>15</sup> In the final rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings.<sup>16</sup>

The Commission’s conclusion is incorrect. In the absence of generic Waste Confidence safety findings, the NRC can no longer claim to satisfy the AEA’s requirement to provide adequate protection of public health and safety from the significant health and safety risks posed by this reactor’s generation of spent fuel. The NRC therefore must either deny this initial or

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<sup>12</sup> Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010). The 2010 WCD Update was vacated by the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

<sup>13</sup> 2010 WCD Update, 75 Fed. Reg. at 81,058 (capitalization of some words omitted).

<sup>14</sup> *Id.*, 75 Fed. Reg. at 81,038. The 2010 WCD Update also contained three other Findings related to the safety of spent fuel storage pending disposal (as opposed to the safety of spent fuel disposal itself). Without conceding the validity of these storage-related findings, this contention does not challenge those findings.

<sup>15</sup> 42 U.S.C. § 4321 et seq.

<sup>16</sup> Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238, 56,243-44 (Sept. 19, 2014) (“Continued Storage Rule”). See also NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel Rule at D-9 (Sept. 2014) (“Continued Storage GEIS”).

renewed license application or make the findings on a case-specific basis in this proceeding.<sup>17</sup>

**1. The Atomic Energy Act requires the NRC to make findings regarding the safety of spent fuel disposal in its reactor licensing decisions.**

Under the plain language of the AEA, the NRC's longstanding interpretation of the AEA, and judicial precedents, the NRC is required to provide reasonable assurance that the spent fuel generated by a reactor will not pose an unreasonable risk to public health and safety *i.e.*, that its radioactivity can be safely contained as long as it exists. While the courts have upheld the NRC's discretion to forecast the safety of future repository disposal in predictive terms of "confidence" rather than the more rigorous findings it makes for operation of the reactor itself,<sup>18</sup> there is no question that the AEA requires the NRC, before licensing a reactor, to have reasonable confidence that public health and safety will be protected from the hazards posed by spent reactor fuel.

Section 182 of the AEA, for instance, "requires the Commission to ensure that 'the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public.'"<sup>19</sup> The "utilization . . . of special nuclear material" (*i.e.*, uranium fuel) results in the generation of undisputedly dangerous material: highly radioactive "spent fuel" that will pose an extreme hazard to public health and safety for thousands of years if it is unprotected.<sup>20</sup> Congress has established a federal policy of disposing of this hazardous spent

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<sup>17</sup> 42 U.S.C. §§ 2133(d), 2232(a) (requiring the NRC to protect public health and safety in licensing decisions); *Minnesota*, 602 F.2d at 416 (finding that the NRC has discretion to choose between making generic and site-specific safety findings); Continued Storage GEIS at D-9 (explaining that AEA safety determinations "would be made as part of individual licensing actions").

<sup>18</sup> See note 26 below.

<sup>19</sup> See also *Union of Concerned Scientists*, 824 F.2d at 109 (interpreting 42 U.S.C. § 2232(a)).

<sup>20</sup> Spent nuclear reactor fuel "poses a dangerous, long-term health and environmental risk. It will remain dangerous 'for time spans seemingly beyond human comprehension.'" *New York*, 681 F.3d at 474 (quoting Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* at 10-

reactor fuel in a repository to be licensed by the NRC.<sup>21</sup> But Congress has made no determination that safe repository disposal of spent fuel is, in fact, feasible or that there is sufficient repository capacity in the United States to accommodate all of the spent fuel that will be generated by licensed reactors.<sup>22</sup> That function is left to the NRC. Thus, before allowing the creation of highly radioactive nuclear waste through the “utilization” of reactor fuel in a reactor, the NRC must have some basis for confidence that the spent fuel can be safely disposed of when it is necessary.

Similarly, Section 103(d) of the AEA prohibits the NRC from licensing a reactor “if, in the opinion of the Commission, the issuance of a license to such a person would be inimical to . . . the health and safety of the public.”<sup>23</sup> Given that the issuance of a reactor license is for the very purpose of using reactor fuel to produce electricity, the NRC is both authorized and required to deny the issuance of a license if the use of reactor fuel would create a permanent and uncontainable public health hazard.<sup>24</sup>

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11 (2012)). *See also* 40 C.F.R. § 197 (2008) (EPA citing risks of radioactive material at times after 10,000 years and up to 1 million years after disposal).

<sup>21</sup> *See* Nuclear Waste Policy Act (“NWPA”) of 1982, as amended, 42 U.S.C. § 10101 et seq. (1992).

<sup>22</sup> While Congress has directed the U.S. Environmental Protection Agency (“EPA”) and the NRC to establish standards for a single repository at Yucca Mountain, it has not made any preclusive determination as to whether such a repository should be licensed; nor has it made any determination that the capacity of Yucca Mountain (in metric tons) is sufficient to accommodate all of the spent fuel to be generated by U.S. licensed reactors. The NWPA states only that a repository will provide a reasonable assurance of adequate protection if it is sited, built, and operated: “The purposes of this part are – to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and such spent nuclear fuel as may be disposed of in a repository.” 42 U.S.C. § 10131(b)(1).

<sup>23</sup> 42 U.S.C. § 2133.

<sup>24</sup> The NRC has argued that Section 103(d) applies only to the activities described in the reactor license application, *i.e.*, activities to be performed by the licensee itself rather than disposal of spent fuel by the federal government. Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,391. But the plain language of Section 103(d) contains no such limitation. Instead, the NRC must refuse a license if its issuance

Finally, Section 161(b) empowers the NRC to “prescribe such regulations or orders as may be necessary . . . to govern the possession and use of special nuclear materials . . . in order to protect health and to minimize danger to life or property.”<sup>25</sup> Thus the AEA both authorizes and requires the NRC to take regulatory actions needed to protect public health and safety whenever the NRC becomes aware of such a need.

**a. The NRC interpreted the AEA to require Waste Confidence findings for reactor licensing.**

For over 35 years, between 1977 and 2014, the NRC consistently interpreted the AEA to require Waste Confidence safety findings. In 1977, the NRC asserted that it “would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”<sup>26</sup> Thus, in 1984 the NRC issued Waste Confidence findings regarding the ultimate safety of spent fuel disposal, and revised them at periodic intervals.<sup>27</sup> Before finalizing the Waste Confidence findings, the NRC issued the findings and their supporting technical analyses in draft form for public comment, as required by *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979). As the NRC acknowledged, the Waste Confidence findings “fulfill[ed] NRC’s important responsibilities under the AEA . . . .”<sup>28</sup>

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would lead to result that is “inimical” to public health and safety. *See also Minnesota*, 602 F.2d at 419 (concurring opinion of Judge Tamm that Section 103(d) of the AEA and Section 102(2)(C) of NEPA (42 U.S.C. § 4332(C)) “mandate” the NRC’s Waste Confidence findings). Issuance of a reactor license to any person would necessarily be “inimical” to public health and safety if it led to the production of highly radioactive material from which the public could not be adequately protected.

<sup>25</sup> 42 U.S.C. § 2201(b).

<sup>26</sup> Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977) (pet. for rev. dismissed sub nom. *Natural Resources Defense Council v. NRC*, 582 F.2d 166 (2d Cir. 1978)). *See also* Continued Storage Rule, 79 Fed. Reg. at 56,240.

<sup>27</sup> 1984 WCD, 49 Fed. Reg. 34,658; 1990 WCD Revision, 55 Fed. Reg. 38,474; 2010 WCD Update, 75 Fed. Reg. 81,037.

<sup>28</sup> Brief for Respondents at 20, *New York v. NRC*, Docket No. 11-1045 etc. An excerpt of the NRC’s brief is attached to this contention.

With respect to the safety of spent fuel disposal, the Waste Confidence findings address both the technical feasibility of siting a repository and the sufficiency of repository capacity. For instance, the 1984 Waste Confidence findings stated:

“(1) The Commission finds reasonable assurance that safe disposal of high level radioactive waste and spent fuel in a mined geologic repository is technically feasible.

(2) The Commission finds reasonable assurance that . . . sufficient repository capacity will be available within 30 years beyond expiration of any reactor operating license to dispose of existing commercial high level radioactive waste and spent fuel originating in such reactor and generated up to that time.”<sup>29</sup>

These findings were supported by a technical analysis of the feasibility and capacity of a repository, including geologic characteristics, waste packaging, and engineered safety barriers.<sup>30</sup>

The NRC explained the role of this technical analysis in the WCD as follows:

“The conclusion that safe radioactive waste disposal is technically feasible is based on consideration of the basic features of repository design and the problems to be solved in developing the final design. A mined geologic repository for disposal of high-level radioactive waste, as developed during the past three decades, will be based on application of the multi-barrier approach for isolation of radionuclides. The high-level radioactive waste or spent fuel is to be contained in a sealed package and any leakage from the package is to be retarded from migrating to the biosphere by engineered barriers. These engineered barriers include backfilling and sealing of the drifts and shafts of the mined repository. We believe that the isolation capability and long-term stability of the geologic setting provide a final barrier to migration to the biosphere.”<sup>31</sup>

In each revision to the WCD, the NRC updated the technical analysis underlying Findings 1 and 2. In the 1990 WCD Revision, for example, the NRC updated its supporting technical analysis in light of Congress’ passage of amendments to the Nuclear Waste Policy Act

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<sup>29</sup> 1984 WCD, 49 Fed. Reg. at 34,660.

<sup>30</sup> See, e.g., *id.* at 34,667-79; 1990 WCD Revision, 55 Fed. Reg. at 38,475-79; 2010 WCD Update, 75 Fed. Reg. at 81,059-67.

<sup>31</sup> 1984 WCD, 49 Fed. Reg. at 34,667.

and the U.S. Environmental Protection Agency's ("EPA's") promulgation of repository standards.<sup>32</sup> In the 2010 WCD Update, the NRC revised its technical analysis to assert, for the first time, that bedded salt – which was previously assumed to be an ideal geologic medium for spent fuel disposal – is not suitable.<sup>33</sup> The 2010 WCD Update also revised other aspects of the technical analysis, including reporting on the progress of the Yucca Mountain repository and repository development in other countries. In addition, the 2010 WCD Update discussed the effects of changing fuel characteristics on repository feasibility.<sup>34</sup>

Thus, the Waste Confidence findings issued between 1977 and 2010 included both general safety findings and supporting technical analyses.

**b. The Courts interpreted the AEA to require Waste Confidence findings for reactor licensing.**

Federal courts have long upheld the AEA's requirement for Waste Confidence safety findings. In *Natural Resources Defense Council*, the U.S. Court of Appeals for the Second Circuit concluded that:

“[T]he NRC's long-continued regulatory practice of issuing operating licenses, with an implied finding of reasonable assurance that safe permanent disposal of [spent reactor fuel] can be available when needed, is in accord with the intent of Congress underlying the AEA and the [Energy Reorganization Act].”<sup>35</sup>

While the Court also upheld the NRC's decision to postpone more definitive findings about the safety of repository disposal of spent fuel until the time of repository licensing, this holding was conditioned on the NRC's promise that in the meantime, it “would not continue to

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<sup>32</sup> 1990 WCD Revision, 55 Fed. Reg. at 38,475-77, 38,477-79, respectively.

<sup>33</sup> 2010 WCD Update, 75 Fed. Reg. at 81,059.

<sup>34</sup> *Id.* at 81,058-60.

<sup>35</sup> 582 F. 2d at 170. *See also, id.* at 174n. 13 (“Clearly, the Congress has, to date, shared [the NRC's] confidence.”)

license reactors if it did not have reasonable assurance that the wastes can and will in due course be disposed of safely.”<sup>36</sup>

In *Minnesota*, the U.S. Court of Appeals for the D.C. Circuit affirmed the NRC’s reliance for reactor licensing on duly promulgated technical findings of “‘reasonable confidence’ that solutions [regarding spent fuel disposal] would be available when needed.”<sup>37</sup> Looking back to the Second Circuit’s decision in *Natural Resources Defense Council*, the Court observed:

“The Second Circuit found that Congress was well-informed that disposal solutions were not currently feasible, yet it permitted continued licensing of nuclear plants. We do not read that opinion, however, to hold as a matter of law that storage and disposal concerns are never relevant to the licensing of nuclear plants. Rather, as the NRC itself recognized, Congress has chosen to rely on the NRC’s (and its predecessor’s) assurances of confidence that a solution will be reached.”<sup>38</sup>

Recently, in *New York*, the D.C. Circuit summed up the *Minnesota* decision as a “mandate . . . to ensure that plants are only licensed while the NRC has reasonable assurance that permanent disposal of the resulting waste will be available.”<sup>39</sup> In *New York*, the D.C. Circuit also held that the WCD constitutes a licensing decision because it enables reactor licensing and because the NRC relies on its conclusions as uncontestable in any individual reactor licensing proceeding.<sup>40</sup>

Accordingly, under the plain language of the AEA and the NRC’s longstanding regulatory practice as affirmed by multiple court decisions, predictive findings regarding the ultimate safety of spent fuel disposal constitute a prerequisite to reactor licensing under the AEA.

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<sup>36</sup> *Id.*, 582 F.2d at 174 n. 13.

<sup>37</sup> *Minnesota*, 602 F.2d at 417.

<sup>38</sup> *Id.*, 602 F.2d at 418-419.

<sup>39</sup> *New York*, 681 F.3d at 476.

<sup>40</sup> *Id.*, 681 F.3d at 476-77.

By failing to promulgate new Waste Confidence findings after the Court of Appeals vacated the 2010 WCD Update, the NRC has eliminated a necessary element of its AEA- required safety determination for this reactor.

**2. The NRC's rationale for eliminating Waste Confidence findings ignores the separate and independent roles of the AEA and NEPA.**

In the Continued Storage GEIS, the NRC asserts that it is “no longer necessary” to make Waste Confidence findings regarding the safety of spent fuel disposal, because the same technical findings are now included in the GEIS as assumptions underlying the NRC’s analysis of continued spent fuel storage impacts.<sup>41</sup> In presenting this rationale, the NRC ignores the independent role in reactor licensing played by AEA findings and environmental analysis under NEPA. While the concerns of these statutes overlap, they impose distinct and independent obligations.<sup>42</sup>

The difference between the statutes is significant. The AEA sets definite limits on reactor licensing: the NRC may not license a reactor if issuance of the license would be “inimical” to public health and safety.<sup>43</sup> In contrast, the purpose of NEPA is to evaluate environmental risks, not to limit them: even if environmental risks are significant, the agency may go ahead with its proposed action.<sup>44</sup> Thus, as the Court noted in *Minnesota*, the AEA is “more rigorous in certain aspects” than NEPA.<sup>45</sup>

The NRC claims to recognize the distinction between AEA safety findings and NEPA

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<sup>41</sup> Continued Storage GEIS at D-33 – D-34. *See also* Continued Storage Rule, 79 Fed. Reg. at 56,251.

<sup>42</sup> *Citizens for Safe Power v. NRC*, 524 F.2d 1291, 1299 (D.C. Cir. 1975); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 729-31 (3rd Cir. 1989).

<sup>43</sup> 42 U.S.C. § 2133(d).

<sup>44</sup> *New York*, 589 F.3d at 476.

<sup>45</sup> *Id.*, 602 F.2d at 418 n. 8.

analyses. For instance, the NRC cautions in the Continued Storage GEIS that: “AEA safety determinations should not be confused with environmental analysis under NEPA.”<sup>46</sup> But no AEA safety determinations regarding spent fuel disposal can be found in either the Continued Storage Rule or the GEIS. The “reasonable assurance” language that appeared in all three iterations of Findings 1 and 2 does not appear in the final rule or the GEIS. Instead, the Continued Storage Rule and the GEIS assert, without any level of assurance, that spent fuel disposal is “technically feasible.”<sup>47</sup>

Thus, the NRC has not fulfilled its statutory responsibility to make findings of “confidence” or “reasonable assurance” that spent nuclear fuel can, in due course, be disposed of safely. In the absence of such findings, the NRC lacks a legal basis to license or re-license any reactor.

**3. Technical findings regarding feasibility of spent fuel disposal and repository capacity must be supported by a NEPA analysis.**

The assertions in the Continued Storage GEIS regarding technical feasibility and repository capacity are also inadequate to satisfy the AEA, NEPA, and the Court’s decision in *New York* because they themselves are not supported by an environmental impact statement (“EIS”) or environmental assessment (“EA”). As the Court held in *New York*, the WCD constitutes a licensing decision and therefore is a “major federal action requiring either a FONSI [finding of no significant impact] or an EIS.”<sup>48</sup> In fact, the NRC does not identify any EIS or FONSI that would support the conclusions presented in the Continued Storage Rule and the Continued Storage GEIS regarding the technical feasibility of spent fuel disposal. And, to the

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<sup>46</sup> Continued Storage GEIS at D-30.

<sup>47</sup> Continued Storage GEIS at B-2; Continued Storage Rule, 79 Fed. Reg. at 56,240, 56,251.

<sup>48</sup> 681 F.3d at 476-77.

best of our knowledge, none exists.

- By its own terms, the Continued Storage GEIS addresses only the environmental impacts of spent fuel *storage*, not disposal.<sup>49</sup> The NRC's technical findings regarding feasibility and capacity of repository disposal are incorporated as assumptions, and therefore are not analyzed.<sup>50</sup>
- The U.S. Department of Energy's ("DOE's") EIS for the proposed Yucca Mountain repository is not sufficient to support general findings regarding the technical feasibility or capacity of repositories because it addresses only the impacts of a single repository. In addition, the Yucca Mountain EIS is unfinished.<sup>51</sup> Therefore, the environmental impacts of disposal of spent fuel at Yucca Mountain have not been established.
- Finally, the 1974 "Environmental Survey" relied on by the NRC in initial reactor licensing proceedings for the conclusion that the environmental impacts of repository disposal are insignificant<sup>52</sup> does not, by its own terms, constitute an EIS or an EA.<sup>53</sup>

Thus, no EA or EIS exists that could support the NRC's findings regarding the feasibility and capacity of repository disposal of spent fuel as required by the Court of Appeals in *New*

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<sup>49</sup> Continued Storage GEIS at xxvi.

<sup>50</sup> Continued Storage GEIS at D-33-D-34; Continued Storage Rule, 79 Fed. Reg. at 56,251.

<sup>51</sup> See Continued Storage GEIS at D-28.

<sup>52</sup> See 10 C.F.R. § 51.75, which provides that draft EISs in construction permit, early site permit, and combined license proceedings should incorporate the values of Table S-3 regarding the environmental effects of the uranium fuel cycle. This regulation was re-published in the Final Continued Storage Rule, 79 Fed. Reg. at 56,261.

<sup>53</sup> See WASH-1248, "Environmental Survey of the Uranium Fuel Cycle" at iv-v (April 1974) (stating that the Environmental Survey is not "intended to be a detailed environmental statement as defined in the National Environmental Policy Act of 1969"). In addition, the Environmental Survey's central assumption, *i.e.*, that salt deposits constitute safe geologic media for spent fuel disposal, has been repudiated by the most recent WCD Update. Compare 2010 WCD Update, 75 Fed. Reg. at 81,059, with Environmental Survey at G-6 – G-7.

*York.*

**C. Demonstration that the Contention is Within the Scope of the Proceeding**

The contention is within the scope of the proceeding because it challenges the absence of safety findings required by the AEA for licensing of this reactor. In addition, the NRC has stated that henceforth, it will make all AEA-based safety findings in individual licensing proceedings.<sup>54</sup>

There is no longer any currently valid WCD or update that could generically preclude the admission of this contention. In addition, to the extent that this contention applies to a license renewal proceeding, the contention is not limited by 10 C.F.R. Part 54. Part 54 applies to the operation of a reactor's "systems, structures, and components during a license renewal term."<sup>55</sup> Only issues related to aging and degradation of certain passive systems, structures, and components may be considered.<sup>56</sup> As the Commission has recognized, the hazards posed by this equipment become "fully mature" during the operation of the reactor.<sup>57</sup> Therefore, the NRC makes "definitive" safety findings before approving their operation.<sup>58</sup> In contrast, "[t]he hazards associated with permanent disposal will become acute only at some relatively distant time when it might be no longer feasible to store radioactive wastes in facilities subject to surveillance."<sup>59</sup> Thus, the findings made by the NRC with respect to the safety components in a reactor are more "definitive" than the "implicit finding of reasonable assurance that methods of safe permanent

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<sup>54</sup> Continued Storage GEIS at D-9 ("It is important to note that in this GEIS and Rule, the NRC is not making a safety determination under the Atomic Energy Act (AEA) to allow for the continued storage of spent fuel. AEA safety determinations would be made as part of individual licensing actions.").

<sup>55</sup> See 10 C.F.R. § 54.4.

<sup>56</sup> *Id.*

<sup>57</sup> Denial of Petition for Rulemaking, 42 Fed. Reg. at 34,393.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

disposal can be available when they are needed.”<sup>60</sup> Accordingly, Waste Confidence findings fall into a different regulatory category than safety findings under 10 C.F.R. Part 54.

**D. Demonstration that the Contention is Material to the Findings the NRC Must Make to License This Reactor**

The contention is material to the findings that the NRC must make in order to license this reactor because it asserts that safety findings required by the AEA for licensing of this reactor have not been made.

To the extent that this contention addresses re-licensing, the findings are material because this reactor, under a renewed license, will generate an additional quantity of spent fuel that was not contemplated in the original NRC licensing decision. Thus, the NRC must address the questions of (a) whether it is feasible to dispose of the spent fuel to be generated during the license renewal term, and (b) whether there will be sufficient repository capacity to accommodate that spent fuel.

**E. Concise Statement of the Facts or Expert Opinion Supporting the Contention, Along with Appropriate Citations to Supporting Scientific or Factual Materials**

This contention primarily makes legal arguments rather than factual arguments. Factual assertions regarding the hazards posed by unprotected spent fuel are well-established and therefore not in dispute.<sup>61</sup>

**F. A Genuine Dispute Exists with the Applicant on a Material Issue of Law or Fact**

This contention raises a genuine dispute with the applicant regarding whether a license should be granted in this proceeding. Unless or until the NRC cures the deficiencies caused by

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<sup>60</sup> *Id.*

<sup>61</sup> *See* note 20 and accompanying text.

the failure to include AEA required safety findings or the applicant withdraws its application, this dispute will remain alive.

**IV. THE CONTENTION IS TIMELY PURSUANT TO 10 C.F.R. §§ 2.309(c) and 2.309(f)(2)**

The contention meets the timeliness requirements of 10 C.F.R. § 2.309(c) and § 2.309(f)(2), which call for a showing that:

- (i) The information upon which the amended or new contention is based was not previously available;
- (ii) The information upon which the amended or new contention is based is materially different than information previously available; and
- (iii) The amended or new contention has been submitted in a timely fashion based on the availability of the subsequent information.

First, the information on which the contention is based – i.e., the issuance of the Continued Storage Rule – was not publicly available until September 19, 2014.

Second, the information in the Continued Storage Rule is materially different than previously available information because the Continued Storage Rule does not include the safety findings that were included in all the prior versions of the Waste Confidence Decision and on which the NRC previously relied for licensing of reactors. *See New York v. NRC*, 681 F.2d 471, 476-77 (D.C. Cir. 2012).

Third, the Contention is timely because it has been submitted within 30 days of September 19, 2014, the date the NRC issued the Continued Storage Rule and GEIS. *See Shaw AREVA MOX Services* (Mixed Oxide Fuel Fabrication Facility), LBP-08-11, 67 NRC 460, 493 (2008) (“Many times, boards have selected 30 days as [the] specific presumptive time period” for timeliness of contentions filed after the initial deadline).

**V. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)**

SLOMFP certifies that on September 26, 2014, we contacted counsel for the applicant and the NRC staff in an attempt to obtain their consent to this motion. Counsel for Pacific Gas and Electric Co. stated that the applicant would take no position at this time, and will respond to the motion in due course. Counsel for the NRC staff stated that the Staff did not have enough information to take a position and would respond to the motion when filed.

**VI. CONCLUSION**

For the reasons stated, SLOMFP respectfully requests that the Atomic Safety and Licensing Board grant leave to file their contention.

Respectfully submitted,

*[Electronically signed by]*

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September 29, 2014

**No. 11-1045 (consolidated with Nos. 11-1051, 11-1056, 11-1057)**

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**ORAL ARGUMENT HAS NOT BEEN SCHEDULED**

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

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**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.***

**On Petition for Review of Orders by the  
United States Nuclear Regulatory Commission**

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**BRIEF FOR RESPONDENTS**

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*Television*, 129 S. Ct. at 1810. See also *Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 919 (D.C. Cir. 2008).

### ***SUMMARY OF THE ARGUMENT***

The Waste Confidence decision and related environmental rule in 10 C.F.R. § 51.23(a), like those that preceded it since 1984, faithfully adhere to the instructions in this Court's remand in *Minnesota v. NRC*, 602 F.2d 412 (D.C. Cir. 1979), and also fulfill NRC's important responsibilities under the AEA and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* Based on a full record, NRC reasonably found that safe disposal of HLW in a geologic repository will be available when necessary, and that spent nuclear fuel can be stored safely and without significant environmental impacts until ultimate disposal.

Contrary to petitioners' views, the Waste Confidence decision on its face is *not* a licensing decision. Rather, the Waste Confidence decision supports NRC reactor licensing decisions with generic findings that can be utilized to determine environmental impacts associated with spent fuel generated by licensed reactors. Hence, the Waste Confidence decision carries out this Court's directive in *Minnesota*, which created the framework for the Waste Confidence rulemaking.

## **EXHIBIT D**

Petition to Suspend Final Decisions in All Pending  
Reactor Licensing Proceedings Pending Issuance of  
Waste Confidence Safety Findings (Sept. 29, 2014)





risks posed by irradiated reactor fuel. Therefore, pursuant to the AEA, Petitioners respectfully request the Commission to suspend final licensing decisions in all current NRC licensing and relicensing proceedings pending completion of the required safety findings regarding spent fuel disposal.

Petitioners recognize that historically, the Commission has addressed the issue of waste confidence generically. Given that spent fuel disposal safety issues are common to all reactors, Petitioners believe that generic approach was appropriate. In the Continued Storage rulemaking, however, the Commission distinguished between generic findings under the National Environmental Policy Act (“NEPA”) and site-specific findings under the AEA, and stated that it would make AEA safety findings in individual reactor licensing proceedings.<sup>3</sup> Therefore, while Petitioners’ concerns are generic in nature, they are raising those concerns by filing a contention in individual reactor licensing and re-licensing proceedings. The filing of contentions in individual proceedings is also consistent with the U.S. Court of Appeals’ holding in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012), that waste confidence findings apply to every reactor licensing decisions and indeed “enable” those decisions. *Id.* at 477.

## **II. DESCRIPTION OF PETITIONERS**

Petitioners are individuals and organizations dedicated to the protection of the environment. All of the Petitioners are concerned about the environmental and public health risks posed by the storage and ultimate disposal of spent fuel. Some organizations and individuals have been admitted as intervenors in the above-captioned pending NRC proceedings for the review of applications for combined licenses (“COLs”), operating licenses, and license renewals. All are neighbors of proposed reactors or existing reactors with license applications under review

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<sup>3</sup> 79 Fed. Reg. at 56,243-44; Continued Storage GEIS at D-9.

by the NRC. Additionally, many of these Petitioners have tried, without success, to raise their concerns about spent fuel in NRC licensing proceedings and rulemakings.

All Petitioners now seek to protect their health, the health of future generations, and the health of the environment, by ensuring that the NRC does not make any final licensing decisions unless and until the requisite safety findings regarding the technical feasibility of spent fuel disposal and repository capacity have been made.

Many of the Petitioners have already established their standing to bring this Petition by gaining admission as intervenors in some of the above-captioned NRC licensing proceedings. Other Petitioners are organizations whose members live within 50 miles of a nuclear reactor and who have included standing declarations with the Contention.<sup>4</sup>

A list of the Petitioners follows:

- Beyond Nuclear (Intervenor in Fermi Unit 3 COL proceeding and Davis-Besse license renewal proceeding; intervention petition pending in Fermi Unit 2 license renewal proceeding)
- Blue Ridge Environmental Defense League, Inc. and chapters (“BREDL”) (Intervenor in Bellefonte Units 3 and 4 COL proceeding and Sequoyah Units 1 and 2 license renewal proceeding; Petitioner in W.S. Lee COL proceeding and North Anna Unit 3 COL proceeding); Former Intervenor (now Petitioner) in North Anna Unit 3 COL proceeding)

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<sup>4</sup> All Petitioners have presumptive standing because they live within 50 miles of reactors that are proposed for initial and renewed licensing. *See, e.g., Florida Power & Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), LBP-01-6, 53 NRC 138, 146, *aff’d*, CLI-01-17, 54 NRC 3 (2001); *Entergy Nuclear Operations, Inc.* (Indian Point Nuclear Generating Units 2 & 3), LBP-08-13, 68 NRC 43, 60 (2008); and Calvert Cliffs 3 Nuclear Project, LLC and Unistar Nuclear Operating Services, LLC (Combined License Application for Calvert Cliffs, Unit 3), CLI-09-20, 70 NRC 911 (October 13, 2009) (slip op. at 6-7). They also have standing because the requested relief could result in the denial of the application for initial licensing or renewal. *See Sequoyah Fuels Corp.* (Gore, Oklahoma, Site Decommissioning), CLI-01-2, 53 NRC 2, 14 (2001) (party must show that the claimed injury could be cured by an action of the tribunal).

- Citizens Allied for Safe Energy, Inc. (Former Intervenor in Turkey Point Units 6 and 7 COL proceeding)
- Citizens Environment Alliance of Southwestern Ontario (Intervenor in Fermi Unit 3 COL proceeding; intervention petition pending in Fermi Unit 2 license renewal proceeding; intervenor in Davis-Besse Unit 1 license renewal proceeding)
- Citizens for Alternatives to Chemical Contamination (Intervenor in Fermi Unit 3 COL proceeding)
- Don't Waste Michigan (Intervenor in Davis-Besse Unit 1 license renewal proceeding and Fermi Unit 3 COL proceeding; intervention petition pending in Fermi Unit 2 license renewal proceeding)
- Ecology Party of Florida (Former Intervenor (now Petitioner) in Levy County Units 1 and 2 COL proceeding)
- Friends of the Coast, Inc. (Former Intervenor (now Petitioner) in Seabrook Unit 1 license renewal proceeding)
- Green Party of Ohio (Intervenor in Davis-Besse Unit 1 license renewal proceeding)
- Missouri Coalition for the Environment, Inc. (Petitioner in Callaway Unit 1 license renewal proceeding)
- National Parks Conservation Association (Intervenor in Turkey Point Units 6 and 7 COL proceeding)
- New England Coalition (Former Intervenor (now Petitioner) in Seabrook Unit 1 license renewal proceeding)
- Nuclear Information and Resource Service, Inc. (Former Intervenor (now Petitioner) in Levy Units 1 and 2 COL proceeding)

- Riverkeeper (Intervenor in Indian Point Units 2 and 3 license renewal proceeding)
- San Luis Obispo Mothers for Peace (Intervenor in Diablo Canyon Units 1 and 2 license renewal proceeding)
- Sierra Club Michigan Chapter (Intervenor in Fermi 3 COL proceeding)
- Southern Alliance for Clean Energy (Former Intervenor (now Petitioner) in Watts Bar Unit 2 operating license proceeding )
- Sustainable Energy and Economic Development (“SEED”) Coalition, Inc. (Intervenor in South Texas Units 3 and 4 COL proceeding; Former Intervenor (now Petitioner) in Comanche Peak Units 3 and 4 COL proceeding; potential intervenor in South Texas license renewal proceeding)

### III. FACTUAL BACKGROUND

As discussed in greater detail in the accompanying Contention, the NRC has consistently interpreted the AEA to require that at the time of reactor licensing, the NRC must make Waste Confidence safety findings regarding the safety of ultimate spent fuel disposal. As the NRC stated in 1977, it “would not continue to license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”<sup>5</sup> Since 1984, the NRC also has repeatedly issued technical safety findings regarding the feasibility and capacity of spent fuel repositories.<sup>6</sup> These findings were supported by a technical analysis of the feasibility and capacity of a repository, including geologic characteristics, waste packaging, and engineered

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<sup>5</sup> Denial of Petition for Rulemaking, 42 Fed. Reg. 34,391, 34,393 (July 5, 1977).

<sup>6</sup> Waste Confidence Decision, 49 Fed. Reg. 34,658 (Aug. 31, 1984); Waste Confidence Decision Review, 55 Fed. Reg. 38,474 (Sept. 18, 1990); Waste Confidence Decision Update, 75 Fed. Reg. 81,037 (Dec. 23, 2010) (“2010 WCD Update”). The 2010 WCD Update was vacated by the U.S. Court of Appeals in *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012).

safety barriers.<sup>7</sup> In compliance with a U.S. Court of Appeals ruling in *Minnesota v. NRC*, 602 F.2d 412, 418-19 (D.C. Cir. 1979), the NRC used notice and comment rulemaking procedures to promulgate the Waste Confidence Decision (“WCD”) and its revisions.

As stated most recently in the 2010 WCD Update, the NRC’s relevant safety findings were as follows:

Finding 1: The Commission finds reasonable assurance that safe disposal of high-level radioactive waste and spent fuel in a mined geologic repository is technically feasible.<sup>8</sup>

Finding 2: The Commission finds reasonable assurance that sufficient mined geologic repository capacity will be available to dispose of the commercial high-level radioactive waste and spent fuel generated in any reactor when necessary.<sup>9</sup>

The 2010 WCD Update, however, was vacated by the U.S. Court of Appeals in *New York* for failure to comply with the National Environmental Policy Act (“NEPA”).<sup>10</sup> In the final Rule recently issued by the NRC on remand from the Court’s decision, the NRC chose not to replace the vacated Waste Confidence findings.<sup>11</sup>

#### **IV. ARGUMENT: THE COMMISSION MUST SUSPEND ALL LICENSING DECISIONS PENDING COMPLETION OF AEA-REQUIRED WASTE CONFIDENCE SAFETY FINDINGS.**

As set forth in detail in the attached Contention and summarized below, under the plain language of the AEA, the NRC’s own precedents, and applicable case law, the AEA requires the Commission to issue predictive safety findings regarding the safety of disposing of spent nuclear

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<sup>7</sup> See, e.g., 2010 WCD, 75 Fed. Reg. at 81,058-59.

<sup>8</sup> Waste Confidence Decision Update, 75 Fed. Reg. 81,037, 81,058 (Dec. 23, 2010) (“2010 WCD Update”) (vacated, *New York v. NRC*, 681 F.3d 471 (D.C. Cir. 2012)).

<sup>9</sup> *Id.*, 75 Fed. Reg. at 81,037. The 2010 WCD Update also contained three other Findings related to the safety of spent fuel storage pending disposal (as opposed to the safety of spent fuel disposal itself). Without conceding the validity of these storage-related findings, they are not challenged in the attached Contention or this Petition to Suspend.

<sup>10</sup> 42 U.S.C. §§ 4321-4370h.

<sup>11</sup> 79 Fed. Reg. at 56,254. See also NUREG-2157, Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel Rule at D-30 (Sept. 2014).

fuel prior to issuing any reactor licensing decision. By failing to re-promulgate generic Waste Confidence safety findings or to make them in individual reactor licensing and re-licensing proceedings, the NRC now lacks any legal basis for licensing or re-licensing any reactor. Therefore it must suspend making final licensing decisions until it completes such findings.

First, the plain language of the AEA requires the NRC to provide reasonable assurances that the public's health and safety will not be unreasonably endangered by spent nuclear fuel. Section 182 of the AEA compels the Commission to ensure that "the utilization or production of special nuclear material will . . . provide adequate protection to the health and safety of the public." 42 U.S.C. § 2232(a). Furthermore, the statute requires the NRC to demonstrate this reasonable assurance prior to issuing reactor licenses. The Commission is explicitly prohibited from licensing a reactor if "the issuance of a license . . . would be inimical to . . . the health and safety of the public." 42 U.S.C. § 2133(d). The Act thus mandates that NRC condition the issuance of reactor licenses or license renewals on a predictive finding of confidence that spent fuel will not endanger public health and safety. Having omitted these required safety findings from the Rule and having failed to make them in any individual licensing proceeding, the NRC has no lawful basis under the AEA to issue licensing decisions.

The NRC's failure to make Waste Confidence safety findings is also inconsistent with the Commission's own precedents. As discussed above, historically, the NRC interpreted the AEA to mandate such safety findings, and assured the public that it would not issue reactor licenses unless it were confident that spent fuel could be safely disposed of. After the U.S. Court of Appeals for the D.C. Circuit vacated the Waste Confidence findings for failure to comply with NEPA, however, the NRC dropped the generic Waste Confidence findings. Petitioners

respectfully submit that the agency's prior interpretation requiring safety findings more accurately complies with the statutory mandate of the AEA.

Judicial opinions have also interpreted the AEA as mandating predictive safety findings prior to reactor licensing. In vacating the 2010 WCD, the D.C. Circuit cited approvingly to the NRC's historical reliance on generalized findings of reasonable confidence prior to reactor licensing. *New York*, 681 F.3d at 474. The *New York* decision quoted language from the court's 1979 opinion in *Minnesota v. NRC*, which directed the Commission to consider the reasonable assurance of safety of spent fuel storage. *Id.* ("In *Minnesota*, we directed the Commission to consider whether 'there is reasonable assurance . . . that fuel can be stored safely.'") (citing *Minnesota v. NRC*, 602 F.2d 412, 418 (D.C. Cir. 1979)).

Accordingly, the NRC's failure to make safety findings regarding the technical feasibility of spent fuel disposal and the adequacy of future repository capacity violates the AEA's mandate, the agency's own historical interpretations of the AEA, and judicial precedent. The NRC must either issue new generic Waste Confidence safety findings or it must address the same issues in individual reactor licensing proceedings. New Waste Confidence findings must be subject to a hearing or promulgated with notice and comment, as required by *Minnesota*. And they must be supported by an environmental impact statement or environmental assessment, as required in *New York*. 681 F.3d at 476.

#### **V. CONSULTATION CERTIFICATION PURSUANT TO 10 C.F.R. § 2.323(b)**

SACE certifies that on September 26, 2014, we contacted counsel for the Tennessee Valley Authority ("TVA") and the NRC staff in an attempt to obtain their consent to this petition. Counsel for TVA stated that TVA does not support the petition. Counsel for the NRC

staff stated that the Staff did not have enough information to take a position and would respond to the petition when it is filed.

## VI. CONCLUSION

For the foregoing reasons, this Petition should be granted. The Commission should issue an order that suspends all final nuclear licensing decisions pending completion of AEA-required safety findings regarding spent fuel disposal.

Respectfully submitted,

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September 29, 2014

**UNITED STATES COURT OF APPEALS  
DISTRICT OF COLUMBIA CIRCUIT**

_____	)	
STATE OF NEW YORK, et al.,	)	
	)	
Petitioners,	)	
v.	)	
	)	
NUCLEAR REGULATORY	)	Nos. 14-1210, 14-1212
COMMISSION, and the	)	14-1216, 14,1217
UNITED STATES OF AMERICA,	)	(consolidated)
	)	
Respondents.	)	
_____	)	

**CERTIFICATE OF SERVICE**

I, Diane Curran, certify that on January 20 2015, I served the foregoing ENVIRONMENTAL ORGANIZATIONS’ OPPOSITION TO NRC’S MOTION TO DEFER BRIEFING PENDING AGENCY DECISION on the following by posting it on the Court’s Electronic Case Filing system:

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