

1321 Cavalier Lane
San Luis Obispo, California 93405
October 22, 2015

Secretary
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: **Petition for Rulemaking: Agency Procedure for Responding to Adverse Court Rulings; Agency Procedure for Addressing Funding Shortfalls**

Dear Sirs and Mesdames:

This petition for rulemaking (PRM) is submitted pursuant to Title 10 of the U.S. Code of Federal Regulations, Sec. 2.802 (10 CFR 2.802), *Petition for Rulemaking*.

References are listed in Enclosure 1.

Background

Regarding the 8/13/13 *In re: Aiken County* ruling ([Ref. 1](#)) by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit Court"), I have commented previously ([Ref. 2](#), [Ref. 3](#), [Ref. 4](#)) that NRC should determine what went wrong, whether NRC's compliance with other statutes is similarly affected, and what corrective actions are reasonably warranted to prevent recurrence. I believe those actions are still appropriate, for several reasons (discussed below). The agency's actions in response to the ruling pose additional concerns that (1) the agency's independence has been compromised to some extent; (2) that public safety and health, protection of the environment, the common defense and security, the reputation and credibility of the NRC, and the agency's prudence related to the stewardship of the national fisc are all being compromised as a result; and (3) that all of these maladies are occurring without the benefit of public scrutiny.

This PRM proposes two new rules that will address these concerns. I hope to persuade agency staff and the Commissioners that adoption of the proposed rules is at once sensible, appropriate, warranted, and overdue.

First, however, please let me emphasize the high esteem in which I hold the agency. My experience has been that agency personnel at all levels are dedicated, forthright, and highly knowledgeable, and that their decisions and work products characteristically reflect thoughtful consideration and evenhandedness. In short, my impression of the agency is that it characteristically its vision as "[a] trusted, independent, transparent, and effective nuclear regulator" (see [Ref. 5](#), p. 7).

The 8/13/13 *In re: Aiken County* ruling ([Ref. 1](#)) stands in such stark contrast to that vision that it invites penetrating, critical review. (For the importance of a questioning attitude in matters relating to nuclear science and technology, see the NRC's *Final Safety Culture Policy Statement*, [Ref. 6](#)—search for "questioning attitude.")

First Proposed Rule

The first proposed rule would require the NRC promptly to take the following actions in response to each instance where a court of competent jurisdiction rules that NRC violated applicable law:

- (1) evaluate and determine the cause or causes for each violation;
- (2) conduct an "extent of condition" evaluation to determine whether NRC's implementation of other statutes and regulations—*i.e.*, statutes and regulations beyond those identified by the court in its ruling—are similarly affected;
- (3) implement immediate corrective actions to address any violations identified by the extent of condition evaluation;
- (4) formulate and implement robust corrective actions to prevent recurrence that are based on the cause and extent of condition evaluations; and
- (5) prepare and issue a report to the public that documents the above.

Contemporaneously with the above actions, the proposed rule would require NRC formally to request review by the U.S. Department of Justice (1) of the adequacy of NRC oversight mechanisms and whether enhancements are warranted therefor, which enhancements NRC shall promptly implement; and (2) of whether offenses proscribed by the federal criminal code—in particular, 18 U.S.C. 1505 ("Obstruction of Proceedings Before Departments, Agencies, and Committees"; [Ref. 7](#)) and 18 U.S.C. 371 ("Conspiracy to Commit Offense or to Defraud United States"; [Ref. 8](#))—formed the basis of or contributed to the adverse court ruling. (The latter requirement is warranted based on the observation in the concurring opinion in *In re: Aiken County* that "a systematic campaign of noncompliance" was being "orchestrated" within the NRC. That is, the phrase "campaign of noncompliance" is reasonably suggestive of obstruction of an administrative proceeding, especially when used to characterize actions for which a writ of mandamus is sought. Similarly, the verb "orchestrated" reasonably suggests conspiracy.)

All of the foregoing actions would be triggered only after all rehearing and appeal opportunities for the matter have been forgone or exhausted, and would be in addition to any actions mandated by order of the court. Decisions on whether to pursue rehearing and appeal opportunities shall be guided by the principles established in the American Bar Association (ABA) Model Rules of Professional Conduct—including, for example, that a lawyer "is ... guided by personal conscience" (see [Ref. 9](#), paragraph 7); "should strive to ... exemplify the legal profession's ideals of public service" ([Ref. 9](#), also paragraph 7); "should use the law's procedures only for legitimate purposes" ([Ref. 9](#), paragraph 5); and "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so *that is not frivolous*" (see [Ref. 10](#), emphasis added).

The rule would be effective retroactively, beginning with the 8/13/13 *In re: Aiken County* ruling—because of the extraordinary significance of that ruling. (Validation that the ruling was extraordinary is found in the text of the Court's opinion itself—see [Ref. 1](#); search for "extraordinary.")

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Enclosure 2 provides suggested text for the new rule, which is proposed to reside in a new 10 CFR Section 2.1601, "Agency Procedure for Responding to Adverse Court Rulings."

Second Proposed Rule

The second proposed rule is intended to ensure that public safety and health, protection of the environment, the common defense and security, the reputation and credibility of the NRC as a "trusted, independent, transparent, and effective nuclear regulator," and prudent stewardship of the national fisc all receive due consideration when the agency does not receive sufficient funding to implement its statutory mandates; and that both that consideration and the circumstances that require it are appropriately brought into the light.

On the one hand, the D.C. Circuit Court concluded in an earlier, 7/1/11 ruling, also styled as *In re: Aiken County* ([Ref. 11](#)), that NRC has the ball with respect to implementation of the Nuclear Waste Policy Act (NWPA) (the concurring opinion used that exact terminology: "the ball in this case rests ... with the Nuclear Regulatory Commission"). [Ref. 1](#) reaffirmed that conclusion. Further, it is beyond doubt that implementation of the NWPA is important with respect to public safety and health, and protection of the environment. This is made clear by the stated purpose of the act (see [Ref. 12](#); search for "provide a reasonable assurance that the public and the environment will be adequately protected") and by its codification in Title 42 of the U.S. Code (Title 42 is entitled "The Public Health and Welfare"). And NRC itself has underscored the safety importance of NWPA implementation in multiple Information Notices (see [Ref. 13](#), [Ref. 14](#), [Ref. 15](#)) and notably in a recent NRC Office of the Inspector General (OIG) report ([Ref. 16](#)).

It is also clear that implementation of the NWPA is important relative to the common defense and security. The 6/2/06 ruling of the U.S. Court of Appeals for the Ninth Circuit in *San Luis Obispo Mothers v. NRC* ([Ref. 17](#)) validated the proposition that onsite dry cask storage of spent nuclear fuel—as has been the consequence of protracted delay in NWPA implementation—might lead to or increase the risk of a terrorist attack because (1) the presence of the casks would increase the probability of a terrorist attack on the plant, and/or (2) the casks themselves would be a primary target for a terrorist attack. The Ninth Circuit observed that NRC itself acknowledges the risk: "We find it difficult to reconcile the Commission's conclusion that, as a matter of law, the possibility of a terrorist attack on a nuclear facility is 'remote and speculative,' with its stated efforts to undertake a 'top to bottom' security review [which NRC then had in progress] against this same threat."

The D.C. Circuit Court's characterization of NRC's compliance with the NWPA also negatively affects NRC's reputation and credibility as a "trusted, independent, transparent, and effective nuclear regulator." (See [Ref. 1](#); search for "defying" and "flouting".)

In addition, delay in NWPA implementation is costing the Treasury Department's Judgment Fund approximately \$739,000 per calendar day based on the latest audited financial report for the Nuclear Waste Fund ([Ref. 18](#), p. 19, under the heading "Spent Nuclear Fuel Litigation"; see details of calculation in [Ref. 19](#), Footnote 14, and below). Again, as discussed above, the NRC currently has the onus to act under the NWPA ([Ref. 11](#), [Ref. 1](#)).

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On the other hand, since the 8/13/13 *In re: Aiken County* ruling, successive editions of the agency's annual Congressional budget justification report (NUREG-1100) indicate that NRC has not requested sufficient additional funding to move the Yucca Mountain proceeding forward—see [Ref. 20](#) for Fiscal Year (FY) 2015, and [Ref. 21](#) for FY 2016.

Regarding FY 2016, the following was reported in the *Radwaste Monitor*, Volume 8, Number 6, dated 2/6/15:

NRC Won't Say Why No Yucca Funding Was Requested

The Nuclear Regulatory Commission, meanwhile, did not include any funding to complete the Yucca licensing review in its Fiscal Year 2016 budget request released this week. Following the completion of the Safety Evaluation Report, which found that the Yucca Mountain design met most regulatory requirements for safety, the NRC has approximately \$4 million remaining of appropriated Nuclear Waste Fund money that needs to be expended, as required by a federal court. That \$4 million, though, is not expected to be enough to complete the adjudication process needed before the Commission could grant a construction authorization. The NRC this week, though, declined to comment on why it did not include the funding needed to complete the review. "Unfortunately, I can't discuss what went into the formulation of the budget," [an] NRC spokesman ... said in an email. "All I can do is reiterate that we have money to continue working on the issue as we follow the court's direction."

In view of (1) the purpose of the NWPA to safeguard the public safety and health and protect the environment, (2) the relative hazard of continuing accumulation of spent nuclear fuel at the nation's nuclear plant sites as identified by the NRC itself in multiple Information Notices and a recent OIG report, (3) the increased vulnerability of the nation to terrorist attack that derives from the attractiveness—for terrorist purposes—of large accumulations of spent nuclear fuel on the surface and near population centers and fresh water resources, (4) the significant ongoing cost to the taxpayer that follows from protracted delay in NWPA implementation, (5) the NRC's judicially determined and uncontested record of "defying" and "flouting" the NWPA, and (6) the fact that NRC has "the ball" with respect to NWPA implementation, it would seem NRC should well explain why no Yucca funding was requested for FY 2016, including all particulars.

More broadly, it is apparent that there is a tension between (1) the agency's mission "to protect public health and safety, promote the common defense and security, and protect the environment" (see [Ref. 5](#), p. 7), and (2) the sway in which the agency's independence is held by external influence. The second proposed rule is intended to reveal that tension, and ensure the agency appropriately and openly considers how it is resolved.

Specifically, the second proposed rule would require NRC annually to report to the public each instance where it does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates, including for each such instance:

- a discussion of whether NRC (1) was directed to request either no or insufficient funds, and complied with that direction; (2) did request sufficient funds, which were withheld by Congress; or (3) did not request sufficient funds; and

- a discussion of the consequences of each instance with respect to (1) public safety and health; (2) environmental protection; (3) the common defense and security; (4) the reputation/credibility of the agency as a "trusted, independent, transparent, and effective nuclear regulator," and (5) collateral fiscal impacts (e.g., the ongoing Judgment Fund disbursements to the nation's nuclear utilities flowing from the government's breach of the NWPA "standard contracts").

The use of the phrase "in good faith" is intended to prevent a particular potential for mischief—namely, that the Commission could conclude that, because some, albeit limited, money is available to make headway toward implementation of a certain statutory mandate, perhaps combined with the fact that any deadlines associated with such implementation have long since passed, it need not recognize a budget shortfall and therefore need not implement the new rule. For example, the progress NRC continues to make toward NWPA implementation using its limited available unobligated carryover funds appropriated from the Nuclear Waste Fund (see latest report, [Ref. 22](#), [Ref. 22-Enclosure](#)) would *not* constitute implementation *in good faith* of the NWPA under the new rule.

Enclosure 3 provides suggested text for the new rule, which is proposed to reside in a new 10 CFR Section 2.1602, "Agency Procedure for Addressing Funding Shortfalls."

Benefits to NRC and the Nation

The proposed rules will thus:

- Enhance public safety and health, because the corrective actions to prevent recurrence that NRC will formulate and implement, based both on the *In re: Aiken County* ruling and on any future court-identified violations, will help prevent further violations. Prevention of future violations will help facilitate effective (*i.e.*, violation-free) agency implementation of all the statutes that govern its activities, which will in turn help confer to the public the safety and health benefits—as well as the environmental protections—that those statutes were enacted to provide.

Note that this public safety and health enhancement is broad-based in that it will help assure effective future implementation not only of the NWPA and other nuclear waste-related statutes, but also of *all* statutes that govern NRC's activities.

- Reduce costs. NRC's adjudged violation of the NWPA has resulted in collateral disbursements, which as discussed above are on the order of \$739,000 per calendar day on average, from the Treasury Department's Judgment Fund. See [Ref. 18](#), p. 19, under the heading "Spent Nuclear Fuel Litigation" for the most recent formal accounting. See [Ref. 19](#) also, at Footnote 14. (The arithmetic is straightforward. [Ref. 18](#) identifies that the Judgment Fund has paid out \$3.2 billion plus \$1.3 billion, as of September 30, 2014, in settlements and damages, respectively. Those amounts add up to \$4.5 billion. The breach commenced on February 1, 1998—see [Ref. 12](#); search for "January 31, 1998"—and had not been cured by September 30, 2014, which is the "as of" date in [Ref. 18](#). The duration between those dates is 200 months. The total of \$4.5 billion

divided by 200 months is \$0.0225 billion per month, which is the same as \$22.5 million per month, or \$739 thousand per calendar day [based on a leap-year-recognizing 30.4375 days per month]. The breach is still continuing because the NRC, which is the entity that has the onus to act under the NWPA in accordance with [Ref. 11](#), as reaffirmed by [Ref. 1](#), still has not completed its actions under NWPA Sec. 114(d). See [Ref. 12](#); search for "The Commission shall consider an application". Since those Judgment Fund disbursements are funding utilities' spent fuel management costs, and since the quantity of spent nuclear fuel is increasing every day, one would expect the \$739 thousand per calendar day amount to increase also. Note that the Judgment Fund is not the same as the Nuclear Waste Fund; the former is taxpayer supplied while the latter is waste-generator supplied in accordance with the NWPA.)

By preventing future similar violations, which the first proposed rule is intended to facilitate, future similar collateral fiscal impacts would be averted. The second proposed rule, by increasing the transparency of NRC's budgeting process, is also expected to prevent future similar adverse fiscal impacts.

- Align NRC's practices with its principles; *i.e.*, that corrective actions to prevent recurrence are warranted when significant, unacceptable conditions are identified. This principle animates NRC's regulations; see, for example, 10 CFR Sections 20.1101(d), 20.2201(b)(1)(vi), 20.2203(b)(1)(iv), 26.41(f), 26.167(f)(1), 34.101(b)(6), 35.3045(d)(1)(vi), 35.3047(d)(1)(vi), 36.63(a), 37.33(b), 37.55(b), 37.81(g)(5), 50.36(c)(1)(i)(A), 50.36(c)(1)(i)(B), 50.36(c)(1)(ii)(A), 50.36(c)(1)(ii)(B), 50.36(c)(2)(i), 50.69(d)(2)(ii), 50.73(b)(1), 63.142(q), 71.95(c)(1), 71.133, 72.75(g)(1), 72.172, 72.242(d)(1), 73.38(a)(2)(iv), 73.55(b)(10), 73.56(n)(6), 76.87(d)(1)(ii), 76.87(d)(2)(ii), and 76.87(d)(3)(i), as well as in 10 CFR Part 50, Appendix B, Criterion XVI ("Corrective Action"). (The above are readily identified by searching through the two volumes of NRC's chapter of the CFR [see [Ref. 23](#), [Ref. 24](#)] successively for the words "recurrence" and "repetition.")

It is important to mention *moral authority* here. Moral authority is a critical contributor to the effectiveness of a regulatory agency. It derives from the agency upholding its principles when that is not the easy path. NRC rightly believes that corrective actions to prevent recurrence are warranted when significant, unacceptable conditions are identified. It appropriately weaves that principle into its regulations. It must now reject a "do as I say, not as I do" stance relative to that same principle when the significant, unacceptable condition is in its own house. That is how moral authority is exhibited and sustained.

- Align NRC's practices with the tenets it has set out of a positive safety culture (see [Ref. 6](#)), which include—as relevant here—demonstration of safety values by organization leadership personnel through their decisions and behaviors, prompt and thorough problem identification and resolution, pursuit of continuous improvement, and establishment of a questioning attitude.

- Align NRC's practices with its mission statement, vision, and organizational values (see [Ref. 5](#), p. 7). With respect to NRC's *mission*, the proposed rules would promote future violation-free implementation of its statutory mandates, thereby enhancing the following mission elements: protection of the public health and safety, promotion of the common defense and security, and protection of the environment.

Relative to the NRC's *vision*, the proposed rules support the agency's:

- (1) *Trustworthiness* – The agency would be seen to acknowledge and address its own violations of the law, practice what it preaches relative to establishing corrective actions to prevent recurrence for significant, unacceptable conditions, "walk the talk" relative to its safety culture pronouncements, and open wide its budgeting process, all of which are trust-building.
- (2) *Independence* – Implementation of the first proposed rule should determine whether any co-opting of NRC's independence contributed to the violation documented in [Ref. 1](#) and establish corrective actions to prevent recurrence of such co-opting going forward. More broadly, the first proposed rule would ensure that the extent of independence co-opting that leads to future court-adjudged violations would similarly be determined and addressed in a manner that would prevent recurrence of those future, unanticipated failure modes. The second proposed rule would have a deterrent effect that would give pause to would-be external influencers—they would know that the fact, extent, and consequences of their desired influence would be brought fully into the light.
- (3) *Transparency* – Both proposed rules promote transparency—the second directly so, and the first by fully opening the processes the agency will use to determine the extent and causes of its own violations, and to formulate appropriate corrective actions to prevent their recurrence.
- (4) *Effectiveness* – The agency's effectiveness would be improved not only through the continuous improvement facilitated by the first proposed rule, but also by the enhanced trustworthiness, independence, and transparency afforded by adoption of both proposed rules.

The proposed rules would also promote and enhance the following *organizational values* of the agency: integrity; openness in communications and decision-making; commitment to public health and safety, security, and the environment; and excellence.

- Align NRC's actions with the gravity of the 8/13/13 D.C. Circuit Court ruling. The Court ruled that "the Commission is simply defying a law enacted by Congress" and, of particular note, that "the Commission is simply *flouting* the law" (emphasis added). Note that "to flout" means "to mock or scoff at; show scorn or contempt for" or "to openly disregard, as by rejecting, defying, or ignoring," in accordance with Collins American English Dictionary (see [Ref. 25](#)); or "to treat with contemptuous disregard," in accordance with Merriam-Webster ([Ref. 26](#)). By using this word, the Court clearly

emphasized the seriousness of the violation. The Court additionally noted that NRC had been forewarned twice—once in 2011 and again (described as a "clear warning") in 2012. Finally, the Court's remedy was mandamus, which the U.S. Supreme Court describes as a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted). All of these indicators underscore the seriousness of NRC's violation.

The gravity of the Court's ruling is also reflected in the importance of the law that was at the heart of the matter—the NWPA. Frustration of the NWPA—aside from being wrongful *per se*, serving to deny the public the safety and health benefits the act was enacted to convey, and proving very costly to the taxpayer—also adversely impacts energy security; national security; protection of the environment; continuation of research, medical, and humanitarian programs; and national anti-terrorism efforts at home. See generally the *Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982*, February 2002 ([Ref 27](#)), and especially Sections 8.2, "Energy Security"; 8.3, "National Security"; 8.4, "Protecting the Environment"; 8.5, "Facilitating Continuation of Research, Medical, and Humanitarian Programs"; and 8.6, "Assisting Anti-Terrorism at Home."

- Align NRC's practices with the policy established in President Obama's Executive Order 13576, "Delivering an Efficient, Effective, and Accountable Government" ([Ref. 28](#)), that the "Administration is committed to ensuring that the Federal Government serves the American people with the utmost effectiveness and efficiency." The word "utmost" suggests a high bar and that agencies should therefore be both especially diligent in determining the extent and causes of significant, unacceptable conditions, and especially thorough in establishing robust corrective actions to prevent their recurrence.
- Align NRC's practices with accepted, time-tested management principles. The management principle that significant, unacceptable conditions are studied, understood, and prevented in future through action is axiomatic, and is applicable to both the private and public sectors. In addition, because the principle is taught in the MBA (Master of Business Administration) and MPA (Master of Public Administration) Programs at the nation's finest universities, the proposed rulemaking would have broad support in academia.
- Improve transparency in NRC's budgeting process. The second proposed rule would improve the transparency of the NRC's budgeting process in two respects. First, the proposed rule would air the extent to which the agency's independence is affected by external influences, since NRC's stakeholders would be apprised of the circumstances associated with each instance where the agency receives insufficient funds reasonably needed to fulfill its statutory mandates. Second, the proposed rule would assure that stakeholders are apprised of the full range of consequences of each such instance of insufficient funding, regardless of whether external influence played any role in the shortfall.

- Address NRC's urgent need to restore the confidence of its stakeholders (the public, licensees, employees, and international regulatory counterparts) following the extraordinary *In re: Aiken County* ruling.

Final Thoughts

Here are a few thoughts in closing. First, we should resist the temptation to dismiss the 8/13/13 *In re: Aiken County* ruling as the result of political hijinks, shenanigans, tomfoolery, monkey business, *etc.* Review of the text of the Court's opinion makes clear that NRC violated federal law. NRC did not contest that conclusion (see [Ref. 29](#), Enclosure, pp. 1-2).

Second, we must also resist the temptation to dismiss the ruling as either acceptable or insignificant. The ruling was neither. The nation's second highest court issued a writ of mandamus—a "drastic and extraordinary remedy reserved for really extraordinary causes"—for NRC's "defying" and "flouting" a federal statute enacted to protect the health and welfare of the public, and safeguard their environment, after two warnings were disregarded. Arguing that NRC's violation was nevertheless somehow acceptable or of *de minimis* concern is not plausible.

Note that searches of the D.C. Circuit Court's online opinions archive—for the combination of "Nuclear Regulatory Commission" and "mandamus"—confirmed that the NRC rarely receives a writ of mandamus. The Court has only issued the one ([Ref. 1](#)) to the NRC since late 1997 (when the Court began populating its archive). This rarity underscores the significance of the writ.

Third, we also must not minimize the importance of NRC's independence in fulfilling its mission. This is a widely held opinion; see, for example, [Rev. 30](#) (NRC Chairman Burns: "[I]t is my belief that maintaining confidence in the NRC as a competent, *independent* regulator is critical"; emphasis added); [Ref. 31](#) (NRC Commissioner Baran: "[I]ndependence ... is essential to accomplishing our safety and security mission"; emphasis added); [Ref. 32](#) (NRC Commissioner Ostendorff: "Rejecting improper outside influence, from any source, is *crucial to our safety mission*"; emphasis added); and [Ref. 33](#) (NRC Chairman [now former Chairman] Macfarlane: "To be effective, a regulator must be *independent* of any political, economic, or other policy interest whose outside influence could coerce the regulatory body to make decisions that aren't in safety's best interest"; emphasis added). To the extent that the two proposed rules reduce the potential for future adverse commandeering of the agency's independence, the nation would be well served.

Fourth, we must additionally resist the temptation to view the 8/13/13 *In re: Aiken County* ruling ([Ref. 1](#)) as "ancient history" or that the U.S. Department of Energy's (DOE's) actions have changed its standing as the applicant for a construction permit at Yucca Mountain. The ongoing potency of the NWPAs as U.S. law, the NRC's own recent significant pronouncements regarding the safety and the safe management of mounting accumulations of spent nuclear fuel at the reactor plant sites ([Ref. 13](#), [Ref. 14](#), [Ref. 15](#), and [Ref. 16](#)), and the continuing substantial disbursements from the Judgment Fund (see [Ref. 18](#), p. 19, under the heading "Spent Nuclear Fuel Litigation") that are continuing because of ball-carrier NRC's slow progress at (at best) or

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continuing frustration of (at worst) the NWPA all put paid to the former notion. (It is fair to admit of the possibility that the NRC continues to frustrate the NWPA since, in the absence of implementation of the first proposed rule, nobody knows what caused the NWPA violation documented in [Ref. 1](#) and therefore no corrective actions to prevent recurrence tailored to address that cause have or can be formulated.) The latter notion—that there is no applicant for the Yucca Mountain licensing proceeding—has been rejected by the NRC itself. See [Ref. 34](#), which documented the assigned licensing board's conclusion that the DOE cannot lawfully withdraw the application, and [Ref. 35](#), the Order by the Commission that sustained the conclusion of its licensing board (the tie vote documented in [Ref. 35](#) preserves the licensing board's conclusion in accordance with NRC's rules).

Fifth, there have been other costly collateral impacts caused by protracted frustration of the NWPA. See the D.C. Circuit Court's 6/8/12 ruling in *New York v. NRC* ([Ref. 36](#)), which states: "Due to the government's failure to establish a final resting place for spent fuel, SNF [spent nuclear fuel] is currently stored on site at nuclear plants. This type of storage, optimistically labeled 'temporary storage,' has been used for decades longer than originally anticipated. The delay has required plants to expand storage pools and to pack SNF more densely within them. The lack of progress on a permanent repository has caused considerable uncertainty regarding the environmental effects of temporary SNF storage and the reasonableness of continuing to license and relicense nuclear reactors." [Ref. 36](#) precipitated a lengthy moratorium on reactor plant licensing and license renewals ([Ref. 37](#)), and a rulemaking ([Ref. 38](#)) that is still being litigated ([Ref. 39](#), Enclosure, p. 6). This expensive litigation/rulemaking/litigation train highlights the importance of NWPA implementation and the significance of NRC's violation documented in [Ref. 1](#).

Sixth, nothing proposed to be added to the CFR by this rulemaking constitutes anything that NRC should not reasonably be doing anyway. Therefore, this proposed rulemaking adds no additional burden to the agency.

Finally, again, please let me reemphasize the estimable degree of forthrightness and probity that the agency normally exhibits. The failure documented in the extraordinary 8/13/13 *In re: Aiken County* ([Ref. 1](#)) ruling stands in such stark contrast to NRC's normal prudent, principled prosecution of its mission and its record of laudable accomplishments that it merits extraordinary attention. The proposed rules are intended to provide that attention. I hope they will be received in the constructive spirit of continuous improvement that has inspired their development.

Enclosure 4 provides information specifically to address 10 CFR 2.802(c).

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I would be pleased to discuss at your convenience.

Thank you.

Very respectfully,

A handwritten signature in blue ink, appearing to read "Jeffrey M. Skov", with a long horizontal flourish extending to the right.

Jeffrey M. Skov

Enclosures

**Enclosure 1
References**

1. *In re: Aiken County*, decided August 13, 2013, by the United States Court of Appeals for the District of Columbia Circuit, Docket No. 11-1271; see here:

[https://www.cadc.uscourts.gov/internet/opinions.nsf/BAE0CF34F762EBD985257BC6004DEB18/\\$file/11-1271-1451347.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/BAE0CF34F762EBD985257BC6004DEB18/$file/11-1271-1451347.pdf)
2. *Comment as Requested by the U.S. Nuclear Regulatory Commission (NRC) Relative to the NRC's Proposed Rule, "Waste Confidence—Continued Storage of Spent Nuclear Fuel" (78 FR 56775), and Associated Draft Generic Environmental Impact Statement (DGEIS) (78 FR 56621)*, December 20, 2013; see here:

<http://pbadupws.nrc.gov/docs/ML1336/ML13360A288.pdf>
3. *Comment (Supplemental) as Requested by the U.S. Nuclear Regulatory Commission (NRC) Relative to the NRC's Proposed Rule, "Waste Confidence—Continued Storage of Spent Nuclear Fuel" (78 FR 56775), and Associated Draft Generic Environmental Impact Statement (DGEIS) (78 FR 56621)*, March 12, 2014; see here:

<http://pbadupws.nrc.gov/docs/ML1408/ML14084A050.pdf>
4. *Comments as Requested by the U.S. Nuclear Regulatory Commission (NRC) On the Agency's Draft Document NUREG-1614, Volume 6, "U.S. Nuclear Regulatory Commission Strategic Plan, Fiscal Years 2014-2018," Submitted Under Docket ID NRC-2013-0230, Pursuant to 79 FR 12531*, April 4, 2014; see here:

<http://pbadupws.nrc.gov/docs/ML1411/ML14114A417.pdf>
5. *Strategic Plan, Fiscal Years 2014-2018*, U.S. Nuclear Regulatory Commission, NUREG-1614, Volume 6, September 2014; see here:

<http://pbadupws.nrc.gov/docs/ML1424/ML14246A439.pdf>
6. *Final Safety Culture Policy Statement*, U.S. Nuclear Regulatory Commission, 76 FR 34773, June 14, 2011; see here:

<http://www.gpo.gov/fdsys/pkg/FR-2011-06-14/pdf/2011-14656.pdf>
7. Title 18, Section 1505 of the United States Code, "Obstruction of Proceedings Before Departments, Agencies, and Committees"; see here:

<http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partl-chap73-sec1505.pdf>

8. Title 18, Section 371 of the United States Code, "Conspiracy to Commit Offense or to Defraud United States"; see here:

<http://www.gpo.gov/fdsys/pkg/USCODE-2013-title18/pdf/USCODE-2013-title18-partl-chap19-sec371.pdf>

9. *Model Rules of Professional Conduct*, "Preamble & Scope," American Bar Association, through changes approved in February 2013; see here:

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Enclosure 2
Proposed Text for New 10 CFR 2.1601,
"Agency Procedure for Responding to Adverse Court Rulings"

§ 2.1601 Agency procedure for responding to adverse court rulings.

(a) *General requirements.* For each instance where a court of competent jurisdiction ("Court") rules that the Commission violated applicable law, the Commission shall require the following:

- (1) An evaluation to determine the cause or causes for each violation;
- (2) An evaluation to determine whether implementation of other statutes and regulations—*i.e.*, statutes and regulations beyond those identified by the Court in its ruling—are similarly affected;
- (3) Implementation of immediate corrective actions to address any violations identified by the evaluation performed under paragraph (a)(2) of this section;
- (4) Formulation and implementation of corrective actions to prevent recurrence of the violation that are based on the evaluations performed under paragraphs (a)(1) and (a)(2) of this section; and
- (5) Preparation and issuance of a report to the public that documents the above.

(b) *Coordination with U.S. Department of Justice.* Contemporaneously with the actions required under paragraph (a) of this section, the Commission shall request review by the U.S. Department of Justice:

- (1) Of the adequacy of Commission oversight mechanisms and whether enhancements are warranted therefor, which enhancements the Commission shall promptly implement; and
- (2) Of whether criminal offenses proscribed by Title 18 of the United States Code formed the basis of or contributed to the adverse Court ruling.

(c) *Court ruling in repose.* The actions required under paragraphs (a) and (b) of this section shall be initiated only after all rehearing and appeal opportunities for the matter have been forgone or exhausted, and are in addition to actions mandated by order of the Court. Decisions on whether to pursue rehearing and appeal opportunities shall be guided by the principles established in the American Bar Association's *Model Rules of Professional Conduct*.

(d) *First initiating Court ruling.* This section is effective beginning with the August 13, 2013, *In re: Aiken County* ruling by the U.S. Court of Appeals for the District of Columbia Circuit, which held that the Commission had been "defying" and "flouting" federal law.

Enclosure 3
Proposed Text for New 10 CFR 2.1602,
"Agency Procedure for Addressing Funding Shortfalls"

§ 2.1602 Agency procedure for addressing funding shortfalls.

The Commission shall report annually to the public instances, if any, where the agency does not receive sufficient funds reasonably necessary to implement in good faith its statutory mandates, including for each such instance:

(a) A discussion of whether the NRC was directed to request either no or insufficient funds and complied with that direction; did request sufficient funds, which were withheld by Congress; or did not request sufficient funds; and

(b) A discussion of the consequences of each instance with respect to:

- (1) Public safety and health;
- (2) Environmental protection;
- (3) The common defense and security;
- (4) The reputation and credibility of the agency as a trusted, independent, transparent, and effective regulator; and
- (5) Collateral fiscal impacts; for example, continuation of the U.S. Department of the Treasury's Judgment Fund disbursements as detailed in *Audit Report, Department of Energy's Nuclear Waste Fund's Fiscal Year 2014 Financial Statement Audit*, Report No. OAS-FS-15-03, dated November 2014, at Note (9), Commitments and Contingencies, Spent Nuclear Fuel Litigation.

Enclosure 4
Information Provided To Address 10 CFR 2.802(c)

The text of 10 CFR 2.802(c) is set out below in italics. Responses are provided using indented text without italics.

10 CFR 2.802(c)

(c) Each petition filed under this section shall:

(1) Set forth a general solution to the problem or the substance or text of any proposed regulation or amendment, or specify the regulation which is to be revoked or amended;

The discussions in the body of the petition under the headings "First Proposed Rule" and "Second Proposed Rule" describe the general solutions to the identified problems. In addition, specific text for proposed new NRC rules to address the problems is provided in Enclosures 2 and 3.

(2) State clearly and concisely the petitioner's grounds for and interest in the action requested;

The petition is grounded in the 8/13/13 *In re: Aiken County* ruling ([Ref. 1](#)) by the U.S. Court of Appeals for the District of Columbia Circuit. The petition argues that the Court's holding in [Ref. 1](#)—that the NRC violated the Nuclear Waste Policy Act—is both significant and unacceptable, and should therefore reasonably trigger certain actions. Those actions include determining why the violation occurred, determining whether other statutes might be implicated, and formulating and implementing corrective actions to prevent recurrence of the violation. The petition proposes a new rule that would ensure those actions are completed not just for [Ref. 1](#), but also for future instances where a court of competent jurisdiction rules that NRC violated applicable law.

The petition is additionally grounded in NRC's FY 2015 and FY 2016 Congressional Budget Justification documents, NUREG-1100, Vols. 30 ([Ref. 20](#)) and 31 ([Ref. 21](#)), respectively, which indicate that no additional funding has been requested to advance NRC's implementation of the NWPA, in spite of the ruling in [Ref. 1](#) and an earlier ruling ([Ref. 11](#)), which held that NRC has the onus to act (the "ball") under the NWPA. NRC therefore has insufficient funds to accomplish its statutory mandates. The petition notes that the NRC has been reluctant to disclose why no additional funding has been requested. The petition proposes a new rule that will require NRC to report both the circumstances and consequences of such shortfalls.

Petitioner's interest is in securing for the NRC and the nation the benefits described in the body of the petition under the heading "Benefits to NRC and the Nation."

(3) Include a statement in support of the petition which shall set forth the specific issues involved, the petitioner's views or arguments with respect to those issues, relevant technical, scientific or other data involved which is reasonably available to the petitioner, and such other

Secretary
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
October 22, 2015

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pertinent information as the petitioner deems necessary to support the action sought. In support of its petition, petitioner should note any specific cases of which petitioner is aware where the current rule is unduly burdensome, deficient, or needs to be strengthened.

The discussion in the body of the petition fairly sets forth the specific issues involved, and the views and arguments of the petitioner with respect to those issues. Technical and scientific data are not relevant to the petition. Some financial data related to disbursements from the Nuclear Waste Fund are discussed and are referenced to their source in the latest audited financial statement for the Nuclear Waste Fund prepared by the U.S. Department of Energy's Office of Inspector General.

Other pertinent information is provided in the body of the petition under the heading "Final Thoughts."

The petition notes that neither of two proposed new rules constitutes anything that NRC should not reasonably be doing anyway. Therefore, the proposed rulemaking adds no additional burden to the agency.

References are listed in Enclosure 1.