

From: [Jeff Skov](#)
To: [RulemakingComments.Resource](#)
Subject: [External_Sender] Petition for Rulemaking
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Attachments: [PRM - Definitional Framework for Shortcomings, FINAL, Signed.pdf](#)

Please accept the attached Petition for Rulemaking.

Thank you.

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[ML19161A159]

1321 Cavalier Lane
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May 17, 2019

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

Subject: **Petition for Rulemaking: Definitional Framework for Use in Identifying and Characterizing Shortcomings in NRC's Regulations; Conforming Change for Requests for Special Master**

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—Requirements for Filing*.¹

I. Introduction

The U.S. Court of Appeals for the District of Columbia Circuit ruled in *In re: Aiken County* that the NRC had been "defying" and "flouting" the Nuclear Waste Policy Act (NWPA).² The NWPA section at issue was enacted to protect the public from the hazards posed by high-level radioactive waste and spent nuclear fuel.³ To *defy* and *flout* that section of the NWPA is therefore to commit a willful nuclear safety violation. The NRC Commissioners subsequently, unanimously concluded that this willful nuclear safety violation did not evidence any shortcomings in the NRC's regulations.⁴ That conclusion reflects an apparent belief that the violation was inevitable, and not susceptible to NRC's power to stop it in the event or prevent its recurrence in the future.

However, beyond the *In re: Aiken County* ruling, the reluctance or inability to recognize shortcomings in the agency's regulations has profound adverse consequences. First, it defeats the ability for interested persons meaningfully to petition the NRC for changes. If willful nuclear safety violations do not suffice, it is unknown what sort of egregiousness could rise to a level sufficient for recognition as a shortcoming and therefore prompt meaningful, enduring corrective action through rulemaking.

An unachievable definition of a shortcoming also undermines the agency's nuclear safety culture and the effective implementation of the NRC's Nuclear Safety Culture Policy Statement⁵ within the agency. For example, "problem identification and resolution" is a key trait of a positive safety culture. Might

¹ See here: <https://www.govinfo.gov/content/pkg/CFR-2018-title10-vol1/pdf/CFR-2018-title10-vol1-sec2-802.pdf>

² 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); search for "defying" and "flouting".

³ See here: <https://www.nrc.gov/docs/ML1536/ML15364A497.pdf>; search for "provide a reasonable assurance that the public and the environment will be adequately protected" (at p. 418).

⁴ 83 F.R. 50533; see here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>; search for "petitioner has not identified shortcomings in the NRC's current regulations".

⁵ See here: <https://www.govinfo.gov/content/pkg/FR-2011-06-14/pdf/2011-14656.pdf>.

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NRC employees conclude that problem identification is futile if the established standard is that not even willful nuclear safety violations merit meaningful corrective action? Likewise for the trait "Environment for Raising Concerns"—the concept is meaningless if agency personnel see that no degree of apprehension on their part can prevail in a culture where even willful nuclear safety violations can be summarily "Commission-splained" away.

And consider the pervasiveness of this culture. The Commissioners' documented conclusion⁶ regarding the import of the *In re: Aiken County* ruling noted that *not* the NRC's Office of the General Counsel (OGC),⁷ and *not* the NRC's Office of the Inspector General (OIG)—which even opened up a case to investigate the matter⁸—and *not* the active participation of U.S. Department of Justice (DOJ) attorneys,⁹ and obviously *not* the Commission itself were of a mind to (1) stop the willful nuclear safety violation or (2) see any shortcoming revealed by its commission.

The Commissioners and rulemaking staff would do well to read Diane Vaughan's insightful book *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* for a sense of how deviance (willful nuclear safety violations, for example) can be institutionally "normalized" such that it need no longer trigger any acknowledgement of a shortcoming.

Finally, by way of introduction, we need to talk about the blood and treasure expended by Washington's generation to establish and by Lincoln's generation to preserve and extend *popular sovereignty* as the quintessential American birthright. The bedrock importance of popular sovereignty in America—that ours is a government *of the people, by the people, and for the people*—is literally carved in stone in our nation's capital, in one of freedom's most cherished landmarks.¹⁰ To break the link between the will of the people and its fulfillment, that is, *to willfully defy and flout the laws of the United States*, is to assail popular sovereignty. It is an *extraordinary* affront to freedom. The U.S. Court of Appeals for the District of Columbia Circuit was correct to issue the *extraordinary* Writ of Mandamus as a remedy.

Now comes the NRC with its conclusion that defying and flouting the laws of the nation—defying and flouting the will of the American people—does not even register as a shortcoming at the agency. This

⁶ 83 F.R. 50533; see here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>.

⁷ *Id.* at 50535. ("[T]he Agency's Office of the General Counsel (OGC) ensures that the Commission and pertinent staff offices are informed of court decisions [*e.g.*, the "clear warning" to which the *Aiken County* court referred] and the need for any responsive action to ensure compliance.")

⁸ *Id.* ("Indeed, the IG opened a report to investigate wrongdoing associated with the NRC's decision to halt progress on DOE's Yucca Mountain application and the *Aiken County* court was aware of the findings.")

⁹ *Id.* ("[T]he DOJ is a party to, or has some involvement in, virtually all of the program-related cases in which the agency is named as a defendant.")

¹⁰ See at the Lincoln Memorial, here: https://www.nps.gov/featurecontent/ncr/linc/interactive/deploy/html/still_photos/gettysburg-address.jpg. Note especially the concluding sentence: "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead *we take increased devotion* to that cause for which they here gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and *that government of the people, by the people, for the people, shall not perish from the earth.*" (Emphasis added.) – A. Lincoln, Address at Gettysburg, November 19, 1863.

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conclusion has the effect of institutionalizing the agency's affront to our freedom. Who is the NRC to, under color of authority, dishonor the memory of the countless dead who heroically delivered our government of the people, by the people, and for the people to us, now; to our posterity; and, by America's brave and noble example, to mankind?

Who is the NRC to steal the American birthright?

Next consider that *defying* and *flouting* the laws of the United States cannot be done accidentally or inadvertently. It is just not possible to accidentally flout the law. Some design was therefore at work. And some architect or architects crafted that design. So, not only has the NRC broken the link between the will of the American people and its fulfilment, it has facilitated the insinuation of another will above that of "We the People."¹¹

Finally, and worst of all, by not recognizing (as a shortcoming) the usurpation of the will of the American people by unadmitted agents, the NRC has in effect condoned and rewarded that usurpation. That in turn invites and encourages additional efforts by the same and additional parties who would sooner see their will fulfilled over that of the American people. The spirit of lawlessness is emboldened. The rule of law is forfeit. "Wherever Law ends, Tyranny begins" (John Locke, 1690).

To understand and appreciate these issues, and to establish a paradigm within which they can be addressed, this PRM proposes a definitional framework for use in identifying and characterizing shortcomings in the NRC's regulations. The intent is that it should be a fixed, common, published, reasonable, and Commission-endorsed framework. The framework is additionally supported by a practical remedy that would be exercised in cases where grave shortcomings in the NRC's regulations are followed by (1) indicia of faithlessness in executing U.S. law or (2) conduct toward the execution of U.S. law that is patently *in mala fide*.

The enclosure provides the information specifically required by 10 CFR 2.802(c).

II. Proposed Rulemaking

Please add the following six definitions to 10 CFR 2.4, "Definitions":

Shortcomings in the NRC's Regulations means, at a minimum, that the agency's regulations are inadequate reasonably to prevent unlawful agency conduct, whether such unlawful conduct is inadvertent or willful. That is, unlawful agency conduct is indicative, *per se*, of *Shortcomings in the NRC's Regulations*. To contend otherwise is in effect to *condone, invite, encourage, and reward* unlawful agency conduct, and is anathema to the NRC's core values and guiding principles. In addition, to be clear for counsel for NRC, to contend otherwise is presumptively *frivolous* in accordance with Rule 3.1 ("Meritorious Claims & Contentions") of the American Bar Association (ABA)

¹¹ U.S. Constitution, Preamble, first three words.

Model Rules of Professional Conduct ("Model Rules")¹² and presumptively *professional misconduct* in accordance with Rule 8.4 ("Misconduct"), paragraphs (c) and (d), of the *ABA Model Rules*.¹³ To contend otherwise is also presumptively violative of an NRC attorney's duty *to the American public*, as distinct from his or her duty to the NRC.

Where the unlawful agency conduct is attended by strict adherence to the NRC's internal adjudicatory processes, active participation by the NRC's Office of the General Counsel, oversight by the NRC's Office of the Inspector General, active coordination and participation by attorneys from the U.S. Department of Justice, and reputed abidance by all participating attorneys to the American Bar Association's *Model Rules*—none of which prevented the unlawful agency conduct—then *each* of these failed barriers shall itself constitute a shortcoming in the NRC's regulations.

Extraordinary Shortcomings in the NRC's Regulations means *Shortcomings in the NRC's Regulations* for which (1) a Writ of Mandamus issued from a court of competent jurisdiction and (2) such Writ was not contested or was unsuccessfully contested. A Writ of Mandamus is by definition an *extraordinary* writ.¹⁴ The U.S. Supreme Court has emphasized the extraordinariness of the Writ of Mandamus by characterizing it as a "drastic and *extraordinary* remedy reserved for really *extraordinary* causes."¹⁵ This is settled law.

Grave Shortcomings in the NRC's Regulations means *Extraordinary Shortcomings in the NRC's Regulations* for which the Court additionally found:

¹² See here: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_1_meritorious_claims_contentions/; search for "frivolous".

¹³ See here: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/; search for "dishonesty" and "prejudicial to the administration of justice".

¹⁴ See, e.g., Rule 20, "Procedure on a Petition for an Extraordinary Writ" (where instructions for mandamus reside) of the *RULES OF THE Supreme Court of the United States*, effective November 13, 2017, here: <https://www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf>. In the same document, see "MANDAMUS" in the "INDEX TO RULES," where it simply says: "See Extraordinary Writs." See also, e.g., Title V "EXTRAORDINARY WRITS" (where instructions for mandamus reside) of the *CIRCUIT RULES of the UNITED STATES COURT OF APPEALS for the DISTRICT OF COLUMBIA CIRCUIT (Together with the corresponding Federal Rules of Appellate Procedure)*, effective January 1, 1994, and as amended through December 1, 2018 (Circuit Rules), and effective July 1, 1968, and as amended through December 1, 2018 (Federal Rules), here: [https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Circuit%20Rules/\\$FILE/RulesFRAP20181201.pdf](https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Circuit%20Rules/$FILE/RulesFRAP20181201.pdf).

¹⁵ *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380 (2004) (internal quotation marks omitted; emphasis added).

- (1) an element of contempt in the NRC's unlawful conduct (as by use, by the Court, of phrases like "the Commission is simply defying a law"¹⁶ or "the Commission is simply flouting the law"¹⁷);
- (2) Constitutional violence in the NRC's unlawful conduct (as by use, by the Court, of phrases like "[t]his case has serious implications for our constitutional structure"¹⁸ or "[i]t is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case"¹⁹);
- (3) one or more prior warnings by the Court had been disregarded (as by use, by the Court, of phrases like "[s]ince then, despite the clear warning, the Commission has still not complied with the statutory mandate"²⁰); or
- (4) coordination or orchestration of agency resources to advance the agency's unlawful conduct (as by use, by the Court, of phrases like "[the] former Chairman . . . orchestrated a systematic campaign of noncompliance"²¹).

Fundamental Breakdown in the NRC's Regulatory Regime means *Grave Shortcomings in the NRC's Regulations* for which the agency exhibits post-judgment (1) indicia of faithlessness in executing U.S. law or (2) conduct toward the execution of U.S. law that is patently *in mala fide*.

Faithlessness in Executing U.S. Law means conduct that evidences that the NRC is failing to *faithfully* execute U.S. law, which is the Constitutional (*i.e.*, supreme) requirement.²² To *faithfully* execute the law requires the exercise of intangible, noble

¹⁶ See, e.g., *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013) at <https://www.gpo.gov/fdsys/pkg/USCOURTS-caDC-11-01271/pdf/USCOURTS-caDC-11-01271-0.pdf>; search for "defying".

¹⁷ See, e.g., *id.*; search for "flouting".

¹⁸ See, e.g., *id.*; search for "serious implications for our constitutional structure".

¹⁹ See, e.g., *id.*; search for "our constitutional system of separation of powers would be significantly altered".

²⁰ See, e.g., *id.*; search for "clear warning".

²¹ See, e.g., *id.*; search for "orchestrated a systematic campaign of noncompliance".

²² The word "faithfully" appears in the U.S. Constitution in only two places, both in Article 2, and both in relation to the character of the duty that is required of the Executive Branch. First in Article II, Section 1, the Presidential oath of office is prescribed. Before taking office, the President must affirm that he (or she) "will *faithfully* execute the Office of President of the United States" (emphasis added). Then, Section 3 prescribes one of the duties of that Office: to "take Care that the Laws be *faithfully* executed" (emphasis added). Thus, the Executive Branch agencies, including the independent agencies, are tasked to *faithfully* take Care that the Laws be *faithfully* executed. It is reasonable to assume that the word was not inadvertently or accidentally included, twice, in the Constitution; that it has meaning; and that its meaning carries the force of law—supreme law—in the United States. Although not emphasized here, it is worthwhile to note further that the words "take Care" also speak to the character of the duty owed. The Constitutional requirement is thus thrice wrapped in language in the Constitution that lifts it—to

human characteristics like honor, integrity, duty, honesty, forthrightness, and trustworthiness. Faithlessness is conduct that impugns these characteristics and thereby diminishes the agency, the agency's leadership, our nation, the rule of law, and the human condition. It is conduct that "games" statutory compliance, for narrow and improper purposes, and appalls the conscience of reasonable minds. To allow for error and inadvertence, and to give the benefit of the doubt to the integrity of the NRC's personnel and regulatory regime, the NRC only entertains the possibility of *Faithlessness in Executing U.S. Law* after *Grave Shortcomings in the NRC's Regulations* are present. Indicia²³ of *Faithlessness in Executing U.S. Law* include the following:²⁴

- (1) failure promptly to determine and report the cause of unlawful agency conduct;
- (2) failure promptly to formulate and implement corrective actions to prevent the recurrence of unlawful agency conduct;
- (3) failure promptly to determine whether NRC's conduct relative to other applicable law is similarly affected and, if so, corrected;
- (4) failure to request sufficient funding required to faithfully execute the law;
- (5) failure to disclose the circumstances and consequences of such funding request omissions;
- (6) pronouncements to the effect that a court must *order* the agency to request sufficient funding to faithfully execute the law;²⁵

paraphrase the eminent jurist Benjamin Cardozo (from *Meinhard v. Salmon*, 249 N.Y. 458, 1928)—above the characteristic workaday attentiveness of the federal bureaucracy. Indeed, in cases, as here, of statutes that protect the public from the hazards of radiation, which were unknown at the founding and are pernicious because they are not directly perceptible to the senses, it is reasonable to hold NRC to at least as high a standard of behavior as the duty of faithful service Justice Cardozo established in that famous 1928 ruling: "Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."

²³ Once it is acknowledged and accepted that NRC's duty is not just to execute the laws, but to *faithfully* take care that they be *faithfully* executed, in accordance with the U.S. Constitution, then that very duty drives a need to identify indicia of faithlessness in executing U.S. law; i.e., to define "what bad looks like."

²⁴ The NRC's conduct before and after the 8/13/13 *In re: Aiken County* ruling by the U.S. Court of Appeals for the District of Columbia Circuit provides a case study of faithlessness in executing U.S. law, exhibiting all the listed indicia. Readers are encouraged to review that ruling ([https://www.cadc.uscourts.gov/internet/opinions.nsf/BAEOCF34F762EBD985257BC6004DEB18/\\$file/11-1271-1451347.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/BAEOCF34F762EBD985257BC6004DEB18/$file/11-1271-1451347.pdf)), the subsequent Petition for Rulemaking that sought redress (<https://www.nrc.gov/docs/ML1531/ML15314A075.pdf>), its supplements (<https://www.nrc.gov/docs/ML1534/ML15342A005.pdf>, <https://www.nrc.gov/docs/ML1606/ML16063A026.pdf>, <https://www.nrc.gov/docs/ML1608/ML16082A020.pdf>, and <https://www.nrc.gov/docs/ML1711/ML1711A657.pdf>), and the notification of its denial by the NRC (<https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>).

²⁵ See, e.g., former NRC Chairman Allison Macfarlane's December 9, 2013, letter to U.S. Representative Whitfield, response to Question 6, here: <https://www.nrc.gov/docs/ML1333/ML13337A196.pdf> (search for "Nothing"). See

- (7) failure to acknowledge when Court-adjudged unlawful agency conduct constitutes willful nuclear safety violations—as by subsequent anodyne characterizations like "adverse decision" and "loss sustained in court";²⁶
- (8) failure to track and address agency-committed willful nuclear safety violations through the NRC's Lessons-Learned Program;²⁷
- (9) evincing a view that agency-committed willful nuclear safety violations are neither "unique" nor "unlikely to recur" in the future;²⁸
- (10) responding to Congressional requests for monthly updates on actions that the agency is, in its own words, "promptly" taking by producing reports that evidence neither any sense of promptness nor any discernable commitment to the faithful execution of the law at issue;²⁹
- (11) insouciance toward multibillion dollar U.S. Treasury Department Judgment Fund disbursements that derive from unlawful agency conduct;³⁰

also NRC's responses transmitted to U.S. Representative Shimkus on February 26, 2014, here:

<https://www.nrc.gov/docs/ML1416/ML14163A084.pdf> (search for "does not include").

²⁶ For example, compare the language in the purpose statement of the NWSA that it was enacted to "provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste and ... spent nuclear fuel" (see here: <https://www.nrc.gov/docs/ML1536/ML15364A497.pdf>; at p. 418, under the heading "PURPOSES") and the language in the 8/13/13 *In re: Aiken County* ruling stating that the NRC had been "defying" and "flouting" that statute (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); search for "defying" and "flouting") with the language in the denial notification for PRM-2-15 that characterized the Court-adjudged willful nuclear safety violation as only an "adverse decision" and as a "loss" (see here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>; search for "adverse decision In re Aiken County" and "loss it has sustained in court").

²⁷ Administered through NRC Management Directive 6.8, "Lessons-Learned Program"; see here:

<https://www.nrc.gov/docs/ML0622/ML062220175.pdf>

²⁸ See, e.g., here: <https://www.nrc.gov/docs/ML1825/ML18254A388.pdf>. Note that three of five Commissioners (Svinicki, Baran, and Caputo) expressly rejected the view (by striking it out) that the agency's willful violation of a nuclear safety statute, which drew a Writ of Mandamus from the U.S. Court of Appeals for the District of Columbia Circuit, was "unique" or "unlikely to recur."

²⁹ See, e.g., here: <https://www.nrc.gov/docs/ML1717/ML17172A310.pdf> (June 2017), <https://www.nrc.gov/docs/ML1735/ML17353A132.pdf> (December 2017), <https://www.nrc.gov/docs/ML1817/ML18171A003.pdf> (June 2018), and <https://www.nrc.gov/docs/ML1835/ML18353A485.pdf> (December 2018). Search for "promptly" in each report and compare that with the changes in each report's Figure 1. None of the reports comment in areas where the *faithful* execution of U.S. law would reasonably warrant; e.g., efforts made to secure sufficient funding, emphasis on the *nuclear safety purpose* of the law at issue, discussion of the *consequences* of the insufficient funding, discussion of the multi-million dollar per day Treasury Department Judgment Fund disbursements that result from the failure faithfully to execute the law, etc.

³⁰ See, e.g., here: <https://www.gpo.gov/fdsys/pkg/FR-2018-10-09/pdf/2018-21804.pdf>; search for, e.g., "judgment fund" or "disbursements" or "damages" or "settlements" (no instances in each case). Compare by searching for

- (12) touting the independence, openness, efficiency, clarity, and reliability of the NRC—as in speeches by individual Commissioners,³¹ or in published multiyear strategic planning documents³²—without reference to unlawful agency conduct³³ that reasonably belies the agency's independence, openness, efficiency, clarity, and reliability;
- (13) issuing multiyear strategic planning documents that reflect the agency's intent *not* to faithfully execute the law,³⁴ despite having already defied and flouted the same law, as determined by a court of competent jurisdiction;³⁵
- (14) issuing multiyear strategic planning documents that reflect the agency's intent *not* to faithfully execute the law,³⁶ despite having already defied and flouted the same law, as determined by a court of competent jurisdiction,³⁷ *and* despite timely public comments to the effect that the agency *should* faithfully execute the law;³⁸
- (15) dismissing key principles as applied to the NRC itself that the agency assiduously upholds as concerns its licensees—for example, that "[i]ssues potentially impacting safety are promptly identified, fully evaluated, and promptly addressed and corrected"; or that "[i]ndividuals avoid complacency and continuously challenge existing conditions and activities in order to identify discrepancies that might result in error or inappropriate action"; or that "[o]pportunities to learn about ways to

the same terms in PRM-2-15 (here: <https://www.nrc.gov/docs/ML1531/ML15314A075.pdf>) and the 2017 supplement to the PRM (here: <https://www.nrc.gov/docs/ML1711/ML17111A657.pdf>).

³¹ See generally the discussion under Sec. II of the 2017 supplement to PRM-2-15 (here: <https://www.nrc.gov/docs/ML1711/ML17111A657.pdf>).

³² See, e.g., NUREG-1614, Volume 6, dated Sept. 2014 (here: <https://www.nrc.gov/docs/ML1424/ML14246A439.pdf>); search for "To be successful". And see NUREG-1614, Volume 7, dated Feb. 2018 (here: <https://www.nrc.gov/docs/ML1803/ML18032A561.pdf>); search for "The NRC adheres to the Principles of Good Regulation".

³³ See FN 16, FN 17, *supra*.

³⁴ See, e.g., NUREG-1614, Volume 6, dated Sept. 2014 (here: <https://www.nrc.gov/docs/ML1424/ML14246A439.pdf>); search for "Yucca Mountain" or "Nuclear Waste Policy Act" or "NWPA" (no instances in each case). And see NUREG-1614, Volume 7, dated Feb. 2018 (here: <https://www.nrc.gov/docs/ML1803/ML18032A561.pdf>); search for "Yucca Mountain" or "Nuclear Waste Policy Act" or "NWPA" (no instances in each case).

³⁵ See FN 16, FN 17, *supra*.

³⁶ See NUREG-1614, Volume 6, dated Sept. 2014 (here: <https://www.nrc.gov/docs/ML1424/ML14246A439.pdf>); search for "Yucca Mountain" or "Nuclear Waste Policy Act" or "NWPA". And see NUREG-1614, Volume 7, dated Feb. 2018 (here: <https://www.nrc.gov/docs/ML1803/ML18032A561.pdf>); search for "Yucca Mountain" or "Nuclear Waste Policy Act" or "NWPA".

³⁷ See FN 16, FN 17, *supra*.

³⁸ See at <https://www.nrc.gov/docs/ML1411/ML14114A417.pdf> relative to NRC's 2014-18 Strategic Plan and at <https://www.nrc.gov/docs/ML1731/ML17312A271.pdf> relative to NRC's 2018-22 Strategic Plan.

ensure safety are sought out and implemented"; or that "[l]eaders demonstrate a commitment to safety in their decisions and behaviors";³⁹

- (16) concealing faithlessness in the execution of U.S. law (as by deliberately not requesting funding required to execute a law, or by not disclosing the circumstances or the public health and safety consequences of such funding request omissions) by reference to Office of Management and Budget (OMB) Circulars—*e.g.*, OMB Circular A-11⁴⁰—which are neither Constitutional law nor U.S. statutory law;⁴¹ and
- (17) failing to acknowledge or seek to address the betrayal of the public trust that flows from committing a willful nuclear safety violation⁴² and failing meaningfully to address the violation;⁴³

Conduct toward the execution of U.S. law that is patently in mala fide means conduct toward the execution of U.S. law that is not merely faithless, and not merely susceptible to interpretation by reasonable minds as being in bad faith, but conduct toward the execution of U.S. law that is so apparent and egregious as to dispel any doubt among reasonable minds that the conduct is *in mala fide*. The touchstone here is the NRC's treatment of any petition for rulemaking (PRM) that seeks agency action to address *Extraordinary Shortcomings in the NRC's Regulations* or *Grave Shortcomings in the NRC's Regulations*. Allowing any such PRM to languish for years,⁴⁴ withholding the PRM from public comment,⁴⁵ and dismissing the PRM with an absurd rationale—to the effect that a willful violation of a nuclear safety statute does not present "any safety, environmental, or security issues"⁴⁶—are each examples of conduct toward the execution of U.S. law that is patently *in mala fide*.

In addition to the above, please add the following as a new Sec. 2.1603 in 10 CFR Part 2, to be entitled "Agency Requests for a Special Master":

³⁹ See at <https://www.nrc.gov/about-nrc/safety-culture/sc-policy-statement.html#traits>

⁴⁰ See, *e.g.*, <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>; search for "A-11".

⁴¹ "The safety of the people [and not OMB Circulars] shall be the highest law." – Cicero.

⁴² See FN 16, FN 17, *supra*.

⁴³ 83 F.R. 50533, 50534. ("The NRC is denying the petition because the petitioner has not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes.")

⁴⁴ See, *e.g.*, PRM-2-15, which was docketed on 11/10/15 and denied on 10/9/18. The PRM is available here: <https://www.nrc.gov/docs/ML1531/ML15314A075.pdf>. The denial notification is available here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>.

⁴⁵ See, *e.g.*, the denial notification for PRM-2-15 ("[t]he NRC elected not to request public comment on PRM-2-15"). The denial notification is available here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>.

⁴⁶ See, *e.g.*, the denial notification for PRM-2-15 ("the NRC did not identify any safety, environmental, or security issues associated with the petitioner's concerns [that the NRC had defied and flouted a nuclear safety statute]"). The denial notification is available here: <https://www.govinfo.gov/content/pkg/FR-2018-10-09/pdf/2018-21804.pdf>.

In the case of a *Fundamental Breakdown in the NRC's Regulatory Regime*, the Commission shall request that the U.S. Circuit Court of Appeals for the District of Columbia Circuit appoint a Special Master to oversee (1) the prompt and final cessation of the identified unlawful agency conduct; (2) the determination of whether and to what extent the NRC's conduct in relation to other applicable statutes and regulations is unlawful; (3) the determination of the reasons for the unlawful agency conduct; (4) the affirmative and maximal reduction of the prospect for future, similar unlawful agency conduct, whether willful or inadvertent, *via rulemaking*; (5) the restoration of the integrity of the agency's petition for rulemaking process; (6) the internal recognition, embrace, inculcation, and institutionalization of the key principles that the agency applies to its licensees; (7) the restoration of the agency's appreciation of its Constitutional duty to *take Care that the Laws be faithfully executed*; and (8) the ultimate restoration of the public's trust in the agency.

Further, the Commission shall recommend to the Special Master measures the agency will employ to apprise and warn the public during the oversight period. Such measures may include one or more of the following:

- Affixing the following standard footer to each page of outgoing agency correspondence and presentation materials:

NOTE: The U.S. Nuclear Regulatory Commission ("NRC") has experienced a fundamental breakdown in its regulatory regime and, upon its own request, has been assigned a Special Master by the U.S. Court of Appeals for the District of Columbia Circuit ("Court"). Please report any instances where NRC personnel or the Commissioners (1) defy or flout federal law; (2) coordinate or orchestrate agency resources to advance unlawful agency conduct; or (3) otherwise exhibit conduct toward the execution of U.S. law that fails to exemplify the Constitutional standard—*i.e.*, to "*take Care that the Laws be faithfully executed*" (emphasis added). See the Court's *In re: Aiken County* ruling of August 13, 2013 (available at this link: [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)), for examples. Reports should be made to the Offices of the Special Master at 1(800) xxx-xxxx.

- Orally reciting the same caveat as above at the beginning of public meetings at which the NRC is a participant, including public gatherings where NRC personnel or Commissioners make presentations or speeches.
- Modifying the official seal of the NRC such that a broad, black *bar sinister* is superimposed across its entire extent for the duration of the oversight period.

The assigned Special Master is free to accept, or ease or bolster, the Commission's recommendations at his or her discretion.

Secretary
Attention: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
May 17, 2019
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III. Conclusion

The U.S. Court of Appeals for the District of Columbia Circuit held in *In re: Aiken County* that the NRC had been "defying" and "flouting" the NWPA. The NRC did not contest that determination. Therefore, as a matter of law, the NRC defied and flouted the NWPA. The Court's words "defying" and "flouting" denote willfulness. The NWPA section at issue was enacted to protect the public and the environment from the hazards posed by high-level radioactive waste and spent nuclear fuel. To defy and flout that section of the NWPA is therefore to commit a willful nuclear safety violation. A prior PRM (PRM-2-15) proposed that the NRC address the willful nuclear safety violation by, among other things, determining why the violation occurred, and formulating and implementing appropriate corrective actions to prevent recurrence. These are the same actions the NRC would require of its licensees were they to commit a willful nuclear safety violation.

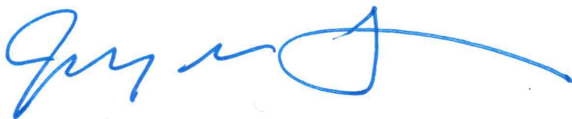
The NRC denied the prior petition "because the petitioner [had] not identified shortcomings in the NRC's current regulations or demonstrated a need for the requested changes."

It is critical for the NRC to be able to recognize that agency unlawfulness—including politically motivated unlawfulness—is a shortcoming; to appreciate when a shortcoming is extraordinary or grave; to grasp when a shortcoming signals a fundamental breakdown in the agency's regulatory regime; and to take appropriate action in each instance. The proposed rulemaking fulfills these critical needs. I urge the NRC quickly to approve its adoption.

I would be pleased to discuss at your convenience.

Thank you.

Very respectfully,



Jeffrey M. Skov
972-953-8823
jmskov@earthlink.net

Enclosure
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.

(c) Content of petition. (1) Each petition for rulemaking filed under this section must clearly and concisely:

(i) Specify the name of the petitioner, a telephone number, a mailing address, and an email address (if available) that the NRC may use to communicate with the petitioner;

Name of Petitioner: Jeffrey M. Skov
Telephone Number: 972-953-8823 (cell)
Mailing Address: 1321 Cavalier Lane, San Luis Obispo, California 93405
Email Address: jmskov@earthlink.net

(ii) If the petitioner is an organization, provide additional identifying information (as applicable) including the petitioner's organizational or corporate status, the petitioner's State of incorporation, the petitioner's registered agent, and the name and authority of the individual who signed the petition on behalf of the organizational or corporate petitioner.

Not applicable (petitioner is not an organization).

(iii) Present the specific problems or issues that the petitioner believes should be addressed through rulemaking, including any specific circumstances in which the NRC's codified requirements are incorrect, incomplete, inadequate, or unnecessarily burdensome;

See discussion in Section I of this PRM.

(iv) Cite, enclose, or reference publicly-available technical, scientific, or other data or information supporting the petitioner's assertion of the problems or issues;

Internet Uniform Resource Locator (URL) addresses for supporting documents are provided in the PRM as appropriate.

(v) Present the petitioner's proposed solution to the problems or issues raised in the petition for rulemaking (e.g., a proposed solution may include specific regulations or regulatory language to add to, amend in, or delete from 10 CFR chapter I);

Specific language to be added to 10 CFR 2.4, "Definitions," and to be included in a new Section 2.1603 of 10 CFR Part 2, to be entitled "Agency Requests for a Special Master," is provided in Section II of this PRM.

(vi) Provide an analysis, discussion, or argument that explains how the petitioner's proposed solution solves the problems or issues identified by the petitioner; and

The definitional framework proposed in the PRM would establish a reasonable and appropriate paradigm within which agency personnel and the Commissioners can understand, appreciate, and address the profound adverse consequences wrought by an unshared and unachievable definition of what constitutes a "shortcoming" in the agency's regulations. The framework thus establishes a reasonable (minimum) definition of "shortcomings in the NRC's regulations" and a reasonable, graduated means to characterize when shortcomings are extraordinary or grave, or represent a fundamental breakdown in the NRC's regulatory regime.

The framework is additionally supported by a practical remedy that would be exercised in cases where grave shortcomings in the NRC's regulations are followed by (1) indicia of faithlessness in executing U.S. law or (2) conduct toward the execution of U.S. law that is patently *in mala fide*.

(vii) Cite, enclose, or reference any other publicly-available data or information supporting the petitioner's proposed solution; and

Internet URL addresses for supporting documents are provided in the PRM as appropriate.

(viii) If required by 10 CFR 51.68 of this chapter, submit a separate document entitled "Petitioner's Environmental Report," which contains the information specified in 10 CFR 51.45.

Not applicable (petitioner is not requesting amendments of 10 CFR Parts 30, 31, 32, 33, 34, 35, 36, 39, 40, or 70, nor does the PRM concern the exemption from licensing and regulatory requirements of, or authorizing general licenses for, any equipment, device, commodity, or other product containing byproduct material, source material, or special nuclear material).

(2) To assist the NRC in its evaluation of the petition for rulemaking, the petitioner should clearly and concisely:

(i) Explain why the proposed rulemaking solution is within the authority of the NRC to adopt; and

The NRC is free to add definitions to its regulations, and indeed has a responsibility to do so, if necessary to ensure a common understanding among all stakeholders in matters within the agency's regulatory purview. The agency's responsibility is heightened in cases, as here, where it is apparent that the agency harbors definitions of terms that diverge markedly and worrisomely from commonly accepted definitions of those terms.

Likewise, the agency is free, and, again, has a responsibility, to ask for oversight in cases where its regulatory regime experiences a fundamental breakdown.

(ii) Explain why rulemaking is the most favorable approach to address the problem or issue, as opposed to other NRC actions such as licensing, issuance of an order, or referral to another Federal or State agency.

The proposed approach is simple and straightforward. Actions that result from its adoption, including those driven by proposed new Sec. 2.1603 could only serve to improve the agency—both in terms of the agency's ability to accomplish its mission and of the public's confidence in that ability. More broadly, the proposed rulemaking would greatly facilitate the vision

expressed in the concurring opinion in *In re: Aiken County* that "the Commission's next chapter begin[] with adherence to the law." That vision is achievable in petitioner's view.

Other NRC actions such as those listed (licensing, issuance of an order, or referral to another Federal or State agency) are not applicable because the proposed rulemaking addresses NRC's own infirmities. That said, the Special Master empowered under proposed new Sec. 2.1603 could determine that certain of NRC's regulatory duties should best be farmed out to some other Federal agency—the Defense Nuclear Facilities Safety Board, for example—while the NRC is under the oversight of the Special Master.

(3) If the petition is signed by multiple petitioners, the petition must designate a lead petitioner who is responsible for disseminating communications received from the NRC to co-petitioners.

Not applicable (the petition is not signed by multiple petitioners).