

No. 20-70899

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PUBLIC WATCHDOGS,

Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION,

Respondent.

**PETITIONER'S OPPOSITION TO RESPONDENT'S MOTION
FOR 31-DAY EXTENSION TO RESPOND TO PETITIONER'S
MOTION FOR TEMPORARY INJUNCTIVE RELIEF**

Petitioner Public Watchdogs files this Opposition to Respondent U.S. Nuclear Regulatory Commission's ("NRC") Motion for 31-Day Extension to Respond to Petitioner's Motion for Temporary Injunctive Relief. Because Public Watchdogs' Motion for Temporary Injunctive Relief raises urgent public health and safety matters that require resolution without delay, Public Watchdogs respectfully submits that the Court should deny any extension of time for the NRC to respond. Alternatively, if the Court is inclined to grant an extension, Public

Watchdogs respectfully submits that any extension should not exceed 7 days.

In support of this Response, Public Watchdogs states as follows:

1. While all of humanity faces the harrowing threat of the COVID-19 pandemic, the residents of Southern California are forced to confront an additional threat to their lives and futures. Specifically, the NRC is allowing the burial of hundreds of tons of spent nuclear fuel—one of the deadliest substances known to humankind—a mere 108 feet from the Pacific Ocean, near one of California’s most populated public beaches, within a tsunami inundation zone surrounded by active fault lines, in damaged and defective canisters, and pursuant to a decommissioning plan that falsely assumes that spent nuclear fuel will only be entombed in this perilous location temporarily.

2. On September 24, 2019, Public Watchdogs filed a petition with the NRC pursuant to 10 C.F.R. § 2.206, requesting that the NRC: (1) immediately suspend all decommissioning activities at San Onofre Nuclear Generating Station Units 2 and 3 (“SONGS”); and (2) require the SONGS licensees to submit an amended decommissioning plan that accounts for the reality that spent nuclear fuel will remain buried at

SONGS indefinitely. On February 26, 2020, the NRC arbitrarily and capriciously denied Public Watchdogs' 2.206 Petition, and Public Watchdogs timely sought review of the NRC's decision in this Court.

3. In addition, Public Watchdogs filed a Motion for Temporary Injunctive Relief pending this Court's review of the NRC's decision, in which it requested a temporary suspension of all spent nuclear fuel transfer operations at SONGS to allow this Court time to address the exigent issues raised in Public Watchdogs' Petition for Judicial Review.¹ The Motion for Temporary Injunctive Relief was necessary because, notwithstanding the serious public health and safety hazards posed by the continued burial of spent nuclear fuel at SONGS, the NRC and the

¹ The NRC's suggestions that Public Watchdogs was dilatory in seeking injunctive relief and that it failed to disclose related proceedings are simply false. The NRC's decision on the 2.206 Petition did not become final until March 23, 2020. *See* 10 C.F.R. § 2.206(c)(1); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 164 (2d Cir. 2004) (holding that NRC director's decision on 2.206 petition "became final and therefore the decision of the NRC twenty-five days after its issuance"). Public Watchdogs worked diligently to prepare and file the Motion for Temporary Injunctive Relief as quickly as possible after the decision became final, and, despite the ongoing public health crisis, was able to file the Motion in only 9 days. In addition, contrary to the NRC's arguments, Public Watchdogs fully disclosed its related proceedings involving SONGS in its Motion for Temporary Injunctive Relief, even including a statement of related cases. *See* Dkt. Entry 2-1 at p. 4, n. 1, p. 13, n. 2, and p. 26.

SONGS licensees are determined to bury all spent nuclear fuel at SONGS, and demolish the only other viable storage location, as quickly as possible. Every eight days, the SONGS licensees are able to load another defective canister with deadly spent nuclear fuel and bury it on the Pacific Coastline, imperiling the lives of millions of Southern California residents. Thus, absent temporary injunctive relief, all fuel will be buried at SONGS, and all alternative storage options will be demolished, long before the Court has the opportunity to resolve the serious issues presented in Public Watchdogs' Petition for Judicial Review. Although Public Watchdogs understands and appreciates the challenges imposed on the NRC and its counsel by the COVID-19 pandemic—indeed, Public Watchdogs and its counsel face the same challenges—the imminent threat of irreparable harm to Public Watchdogs, millions of Southern California residents, and the environment in Southern California counsel against any delay in the resolution of Public Watchdogs' Motion for Temporary Injunctive Relief.

4. Significantly, there is no urgent need to hastily bury spent nuclear fuel at SONGS, and the NRC does not argue otherwise. To be sure, spent nuclear fuel has been safely stored in the SONGS wet storage

pools for years, and the NRC does not explain why it is imperative that spent nuclear fuel continue to be transferred from this safe storage location while this Court considers Public Watchdogs' Petition for Judicial Review. Fuel transfer operations are arduous endeavors that are exceedingly hazardous even under normal conditions. To wit, while attempting to carry out fuel transfer operations in 2018, the SONGS licensees nearly dropped two 49-ton canisters of spent nuclear fuel more than 18 feet to the concrete floor of the SONGS independent spent fuel storage installation. These brushes with nuclear catastrophe ultimately led to an 11-month suspension of fuel transfer operations at SONGS, during which time the NRC never indicated that it was unsafe to continue storing spent nuclear fuel in the wet storage pools. There is absolutely no reason, and the NRC has not even attempted to offer one, why spent nuclear fuel transfer operations must continue at a breakneck pace during this time of national crisis, when the workers executing the fuel transfer operations are inordinately stressed and distracted. Quite the contrary, this unprecedented time of crisis counsels in favor of a temporary suspension of fuel transfer operations at SONGS and counsels

against any delay in the resolution of Public Watchdogs' Motion for Temporary Injunctive Relief.

5. Furthermore, a 31-day extension of the NRC's response is not justified by the NRC's claim that it has considered the issues raised by Public Watchdogs and concluded that the continued burial of spent nuclear fuel at SONGS does not pose a threat to public health and safety. Indeed, whether the NRC has acted arbitrarily and capriciously and endangered public health and safety by allowing the continued burial of spent nuclear fuel at SONGS is precisely the issue that this Court will ultimately be asked to decide in resolving Public Watchdogs' Petition for Judicial Review. With all possible respect to the NRC, it is not an infallible agency, which is precisely why its decisions and actions are subject to review by the federal courts.² In other words, the Court is

² In fact, the NRC Inspector General recently released a scathing report regarding multiple failures by the NRC in responding to a 2.206 petition concerning the installation of a gas transmission line near the Indian Point Nuclear Power Plant. Among other things, the Inspector General found that the NRC suggested "additional analysis had been conducted when that was not the case," and that, in the face of the 2.206 petition, the NRC "failed to thoroughly reexamine the underlying premises of its analyses and did not accurately communicate its analytical work performed." The IG report is publicly available at: <https://oversight.gov/report/nrc/concerns-pertaining-gas-transmission-lines-indian-point-nuclear-power-plant>.

under no obligation to simply accept the NRC's word that fuel transfer operations at SONGS pose no public health and safety threat. If the NRC is permitted an extra 31 days to respond to Public Watchdogs' Motion for Temporary Injunctive Relief, and spent nuclear fuel continues to be buried during this time, there is a significant risk that the Court will be deprived of the ability to grant any effective relief once Public Watchdogs' Motion is ultimately ripe for decision.

6. Finally, the NRC is wrong to argue that the Court lacks authority to enjoin the continued burial of spent nuclear fuel at SONGS following its decision on Public Watchdogs' Petition for Judicial Review. Even assuming the NRC is correct that the "most extreme relief that the Court may award would be to vacate the NRC's response to Public Watchdogs' petition for review and remand the matter for the NRC to again consider Public Watchdogs' administrative petition," *see* Dkt. Entry. 4, this Court would still have the power to enjoin further spent nuclear fuel transfer operations at SONGS during the NRC's reconsideration of Public Watchdogs' 2.206 Petition. Indeed, because the Court would ultimately have jurisdiction to review the NRC's decision after a remand, it would also have the power to enjoin further fuel

transfer operations in the interim to preserve its jurisdiction. *See FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966) (holding that the All Writs Act “empowers federal courts to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

7. In sum, Public Watchdogs’ Motion for Temporary Injunctive Relief raises serious, exigent issues that warrant the Court’s attention without delay. Under these circumstances, the NRC has failed to show that there is good cause for granting a 31-day extension of its deadline to respond to Public Watchdogs’ Motion. Accordingly, the NRC’s Motion for Extension should be denied.

8. Alternatively, Public Watchdogs respectfully submits that, if the Court is inclined to grant the NRC an extension, it should be limited to no more than 7 days. A shorter extension of this length would strike a reasonable balance between the NRC’s stated need of additional time to respond to the Motion to Temporary Injunctive Relief and the countervailing urgent need to have Public Watchdogs’ Motion resolved before all spent nuclear fuel is buried at SONGS.

Dated: April 3, 2020

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Ninth Circuit Rules 27-1(d) and 32-3, and the requirements of Federal Rule of Appellate Procedure 27(d)(2), because it is proportionately spaced, has a typeface of 14 points, and has 1,581 words.

/s/ Charles G. La Bella
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