NO. 20-70899

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Public Watchdogs,

Petitioner,

v.

U.S. Nuclear Regulatory Commission and United States of America,

Respondents,

Southern California Edison Company,

Intervenor.

On Petition for Review of an Order of
the U.S. Nuclear Regulatory Commission

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR REVIEW

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INTRODUCTION

The Answering Briefs of Respondent Nuclear Regulatory Commission ("NRC") and Intervenor Southern California Edison Company ("SCE") seek to obscure the heart of this matter. Defendants' lengthy discussions of the NRC's regulatory authority and oversight functions, the NRC's generic analysis of the technical feasibility of long-term and indefinite spent nuclear fuel storage, and its various strawman arguments distort Petitioner Public Watchdogs' objective—that is, to hold the NRC and SCE accountable for the dire public health and safety hazards posed by their negligent decommissioning, spent fuel transfer operations, and oversight of the San Onofre Nuclear Generating Station ("SONGS"). But once this diversionary clutter is stripped away, it is abundantly clear that the salient facts of this case are both undisputed and alarming.

Neither the NRC nor SCE disputes that there is currently no permanent repository for spent nuclear fuel in the United States or any viable plan to construct one in the foreseeable future. Nevertheless, the NRC has adopted a general policy of allowing

nuclear power plant licensees to store spent nuclear fuel at on-site "temporary" storage facilities throughout the country based on the false assumption that this hazardous waste will be transferred to a non-existent permanent repository in the relatively near future. Significantly, neither the NRC nor SCE actually disputes that the SONGS decommissioning plan is predicated on this false assumption, or that the NRC routinely allows nuclear power plant licensees to implement decommissioning plans based on such false assumptions. Instead, the NRC and SCE contend that it is reasonable and appropriate for the NRC to allow nuclear power plant licensees to store one of the deadliest substances known to humankind at locations throughout the United States pursuant to falsely predicated plans because they are hopeful that a permanent solution will someday manifest itself and that the NRC will be able to nimbly address any problems that may arise in the interim.

Public Watchdogs acknowledges that the NRC is not solely, or even primarily, responsible for the United States' failure to find a permanent storage solution for its ever-growing stockpile of spent nuclear fuel. However, that does not absolve the NRC of its

paramount responsibility to protect the public from the hazards of spent nuclear fuel, nor does it excuse the NRC's feckless hope-for-the-best approach to managing the spent nuclear fuel stored at SONGS and the dozens of other nuclear power plants across the country.

Although the NRC's denial of a 10 C.F.R. § 2.206 petition is often unreviewable, the NRC's denial of Public Watchdogs' 2.206 petition (the "2.206 Petition") is subject to review by this Court because, in denying the 2.206 Petition, the NRC reaffirmed its general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans. This action is tantamount to an abdication of the NRC's paramount statutory responsibility to protect the public from the hazards of spent nuclear fuel. In addition, the NRC's denial of the 2.206 Petition is reviewable because the NRC's own regulations and policies provide a meaningful standard by which the Court can evaluate the NRC's exercise of discretion.

Ultimately, the NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to address Public

Watchdogs' primary arguments regarding the falsely predicated SONGS decommissioning plan and it failed to adhere to its own regulations and policies regarding long-term and indefinite storage and retrievability of spent nuclear fuel at reactor sites. Accordingly, the Court should set aside the NRC's decision and require the agency to perform its congressionally-mandated duties.

ARGUMENT

I. THE NRC'S ARBITRARY AND CAPRICIOUS DENIAL OF THE 2.206 PETITION IS REVIEWABLE.

The Administrative Procedure Act ("APA") authorizes judicial review of final agency actions by "conferring a general cause of action upon persons adversely affected or aggrieved by agency action within the meaning of the relevant statute." *Perez v. Wolf*, 943 F.3d 853, 860 (9th Cir. 2019). Judicial review of final agency action is prohibited only when: (1) Congress expressly bars review by statute; or (2) an agency action is committed to agency discretion by law. *Id.* (citing 5 U.S.C. §§ 701(a)(1) and (a)(2)).

The presumption against judicial review of discretionary agency actions is quite narrow and subject to exceptions. *Id.* For instance, the presumption against reviewability may be overcome

when an agency "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities." *Heckler v. Chaney*, 470 U.S. 821, 823 n.4 (1985). In addition, "[a]s long as there is a meaningful standard against which to judge the agency's exercise of discretion, judicial review is available." *Perez Perez*, 943 F.3d at 862.

A. The NRC's general policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans is an abdication of the NRC's fundamental statutory responsibilities.

The presumption against reviewability of discretionary agency actions "does not place the agency above the law," and the NRC's denial of a 2.206 petition may be reviewed and set aside if the NRC is "inexcusably defaulting on its fundamental responsibility to protect the public safety from nuclear accidents." *Commonwealth of Mass. v. NRC*, 878 F.2d 1516, 1525 (1st Cir. 1989). Although federal courts have not exhaustively catalogued all the ways in which an agency can abdicated its statutory responsibilities, the Second Circuit has explained that this standard is met if the NRC had indisputable proof of a known risk

and "nonetheless decided that it would do nothing to address the situation." *Riverkeepter, Inc. v. Collins*, 359 F.3d 156, 168 (2d Cir. 2004). That is precisely what the NRC has done in this case.

It is undisputed that there is currently no permanent repository for spent nuclear fuel in the United States or any viable plan to construct one in the foreseeable future. Despite the lack of a permanent repository, it is also undisputed that the NRC routinely allows nuclear power plant licensees to store spent nuclear fuel at locations across the United States pursuant to decommissioning plans that are predicated on the false assumption that all spent nuclear fuel will be transferred to a non-existent permanent repository by a date certain in the relatively near future. [ER 19, 21, 25, 77, 82, 99.] Finally, it is undisputed that the SONGS decommissioning plan is based on the false assumption that all spent nuclear fuel will be collected by the Department of Energy ("DOE") and transferred to a non-existent permanent repository by 2049. [ER 77, 82, 100.] The NRC is well aware that there is no permanent repository for spent nuclear fuel in the United States or any viable plan to construct one in the foreseeable

future. But rather than require licensees to plan for long-term and indefinite on-site storage of spent nuclear fuel, the NRC has adopted a policy of allowing licensees to store spent nuclear fuel at locations throughout the United States pursuant to decommissioning plans that expressly and falsely assume that on-site storage will only be temporary.

The NRC argues its general policy of allowing licensees to implement falsely predicated decommissioning plans does not amount to an abdication of its statutory responsibilities because: (1) the false predicate for licensees' plans is only one aspect of the NRC's decision making; (2) potential development of private interim storage facilities may provide a post hoc justification for the falsely predicated plans; (3) the NRC has generically considered the technical feasibility of long-term and indefinite on-site storage; and (4) the NRC will be able to nimbly adjust licensees' storage plans and obligations if a permanent repository does not become available. *See* Federal Respondents' Ans. Br. at 29-34. Each of these arguments is without merit.

First, the assumption that spent nuclear fuel will be transferred from on-site "temporary" storage to a permanent repository by a date certain is not some insignificant aspect of licensees' decommissioning plans. Rather, it is the fundamental assumption on which the plans are based. Indeed, the assumption that spent nuclear fuel will only be stored on-site for a finite, relatively short period of time necessarily impacts determinations as to the feasibility of the "temporary" on-site storage facility's location, the type of storage facility design, the type of storage canisters to be used, and the amount of money required to carry out the licensees' decommissioning and spent fuel management plans. By falsely assuming that spent nuclear fuel will be transferred to a permanent repository in the relatively near future, the NRC allows licensees like SCE to select storage locations, facilities, and canisters that are unsuitable for long-term or indefinite use, and it does nothing to ensure that licensees have any plan or capability to replace this critical safety infrastructure in the event that a permanent repository does not become available and the on-site storage infrastructure becomes necessary beyond the fanciful date

set forth in the licensee's decommissioning plan. This is a paradigmatic example of an agency having indisputable proof of a known risk, but simply failing to address the problem. [1]

Second, it is ineffective and disingenuous for the NRC to invoke recent applications for private interim storage facilities as a post-hoc justification for its policy of allowing licensees to implement falsely predicated decommissioning plans in the first place. Nothing in the record even suggests the NRC considered these nascent and still uncertain projects in allowing SCE or any other licensee to implement their falsely predicated decommissioning plans. In fact, the applications for these hypothetical facilities were filed approximately four years ***after***

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[1] Notably, the NRC's prior predictions as to when a long-term storage solution will be completed have proven to be wholly unreliable. In 1984, the NRC predicted a permanent repository would become available in 2007-2009. *See* 79 Fed. Reg. 56,240 (2014). In 1990, the NRC predicted that a permanent repository would become available "within the first quarter of the twenty-first century." *See* 79 Fed. Reg. 56,241 (2014). Finally, in 2010, the NRC waived the proverbial white flag and predicted a permanent repository would become available "when necessary." *Id.* The NRC's current prediction that a permanent repository will become available in or about 2049 is no less arbitrary and inaccurate than its previous predictions.

SCE submitted the SONGS decommissioning plan. So, it is not even possible that the NRC considered these fledgling projects when it approved the falsely predicated SONGS decommissioning plan. In addition, both applications for interim storage facilities will have to overcome the enormous legal, political, and logistical obstacles that have heretofore prevented the construction of a permanent repository in the United States. Thus, it is far from certain, or even likely, that either of these sites will ever become operational.

Third, the NRC is wrong to argue that it has fully analyzed the risks associated with allowing licensees to implement falsely predicated decommissioning plans merely because it has generically considered the feasibility of long-term and indefinite on-site storage in the Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel, NUREG-2157 (the "Continued Storage GEIS"). The Continued Storage GEIS concludes that safe long-term and indefinite on-site storage is technically feasible, but only under certain conditions and only if licensees undertake certain costly measures, such as replacing the

ISFSI, constructing a dry transfer station, and developing the technological capability to repackage spent nuclear fuel when necessary. [ER 189-95.]. By allowing licensees to implement decommissioning plans based on the false assumption that spent nuclear fuel will be transferred to a permanent repository in the relatively near future, the NRC eschews any responsibility or accountability for ensuring that licensees will be able to execute the various costly measures that the NRC has expressly concluded would be *necessary* for safe long-term and indefinite storage. In this way, the NRC has made the Continued Storage GEIS effectively irrelevant to its approval of licensees' decommissioning plans and its regulation and oversight of the millions of pounds of spent nuclear fuel being stored at reactor sites throughout the United States, and has reverted to having "no long-term plan other than hoping for a geologic repository." *New York v. NRC*, 681 F.3d 471, 474 (D.C. Cir. 2012).

Finally, the NRC's suggestion that licensees need not plan for long-term or indefinite storage at the outset of decommissioning because the NRC can nimbly adjust on the fly simply ignores

reality. The process of siting, designing, and constructing a storage facility takes years. Moreover, the technology necessary to repackage spent nuclear fuel in the event of a canister failure or the expiration of a canister's useful life does not currently exist. What's more, there is no guarantee that any licensee will be able to access sufficient capital to pay for long-term or indefinite storage in the likely event that a permanent repository never becomes available, and the NRC's suggestion that taxpayers will simply fund long-term and indefinite storage operations through payment of judgments entered against the DOE is pure speculation. Far from a reasoned exercise of the agency's discretion, the NRC's "figure it out later" approach is a textbook example of arbitrary and capricious behavior.

In sum, it is undisputed that the NRC is fully aware there is currently no permanent repository for the nation's ever-growing stockpile of spent nuclear fuel, and that there is a high probability one will never be constructed. Although the NRC has generically analyzed what would be required to safely store spent nuclear fuel long-term and indefinitely at nuclear power plants across the

country, it does nothing to ensure that licensees actually plan for or have the capability to meet the necessary safety requirements for long-term or indefinite storage. Instead, the NRC allows licensees to falsely assume that spent nuclear fuel will be transferred to a non-existent permanent repository by a date certain, and it eschews any responsibility to prepare for storing and managing spent nuclear fuel on-site beyond that date. This is a clear example of the NRC burying its head in the sand in the face of a known risk, which is an abdication of its statutory responsibilities. Accordingly, the presumption against reviewability of the NRC's denial of the 2.206 Petition does not apply in this case.

B. The NRC's own regulations and policies supply a meaningful standard for the Court to apply in reviewing the NRC's decision.

An agency's discretionary decision is unreviewable under the APA only in the rare instances "where there is truly no law to apply." *Perez Perez*, 943 F.3d at 861. "As long as there is a meaningful standard against which to judge the agency's exercise of discretion, judicial review is available." *Id.* Significantly, the Court may "look to 'regulations, established agency policies, or

judicial decisions' for a meaningful standard to review." *Pinnacle Armor, Inc. v. United States*, 648 F.3d 708, 719 (9th Cir. 2011) (quoting *Mendez-Guiterrez v. Ashcroft*, 340 F.3d 865, 868 (9th Cir. 2003)); *see also Perez Perez*, 943 F.3d at 856; *Mass Pub. Interest Research Group*, 852 F.2d at 16.

The NRC suggests, without any meaningful argument, that Public Watchdogs did not preserve for the Court's review the issue of whether the NRC's own regulations and policies supply a meaningful standard against which to review the NRC's denial of the 2.206 Petition. *See* Fed. Respondents' Ans. Br. at 39. This argument is without merit. Although Public Watchdogs set forth the applicable law on this point in a footnote, *see* Pet.'s Op. Br. at 27, it then spent the next thirteen pages of its opening brief identifying the applicable regulations and policies that should guide the Court's review and explaining how the NRC failed to adhere to its own regulations and policies. *Id.* at 27-40. Public Watchdogs' extensive argument on this point is more than sufficient to preserve the issue.

In addition, the NRC argues the agency's own regulations and policies cannot supply a meaningful standard of review because "[i]f a regulated party's alleged violation of some substantive agency regulatory requirement were sufficient to rebut the presumption of unreviewability applicable to agency exercise of enforcement discretion, that exception would swallow the rule." *See* Fed. Respondents' Ans. Br. at 40. This argument fails for two reasons. First, Public Watchdogs does not argue that SCE's violation of NRC regulations is the basis for overcoming the presumption against reviewability; rather, it argues that NRC regulations and policies supply a meaningful standard against which the Court can evaluate the NRC's exercise of discretion in denying the 2.206 Petition. Second, the NRC's argument flatly ignores and is contrary to this Court's well-established precedent, which holds that regulations, established agency policies, and judicial decisions may supply a meaningful standard of review. *See, e.g., Pinnacle*, 648 F.3d at 719; *Perez Perez*, 943 F.3d at 856. Thus, the NRC's denial of the 2.206 Petition is reviewable both because the NRC has adopted a general policy that amounts to an abdication of its

statutory responsibilities and because the NRC's own regulations and policies supply a meaningful standard against which the Court may evaluate the NRC's exercise of its discretionary authority.

II. THE NRC'S DENIAL OF THE 2.206 PETITION WAS ARBITRARY AND CAPRICIOUS.

A. The NRC's denial of the 2.206 Petition was not based on highly technical issues and therefore is not entitled to heightened deference.

The deference owed to an agency decision "is at its highest where a court is reviewing an agency action that required a high level of technical expertise." *San Luis & Delta-Mendota Water Authority v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). Nevertheless, the deference owed to an agency "is not unlimited." *Id.* Rather, the Court's review "must be sufficiently probing to ensure that the agency has not . . . entirely failed to consider an important aspect of the problem" or failed to adhere to its own regulations and policies. *Id.*; *see also Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 851 (9th Cir. 2003) (explaining that an agency must adhere to its own regulations and policies).

Although the NRC and SCE spend the vast majority of their briefs arguing that the NRC's denial of the 2.206 Petition is

unreviewable, they both argue in the alternative that the decision is not arbitrary and capricious. In so doing, the NRC and SCE suggest the NRC's decision is entitled to heightened deference because it concerns highly technical issues uniquely within the expertise of the NRC.

Without question, many of the NRC's regulatory functions involve highly technical issues at the frontiers of science. Here, however, the NRC's decision was arbitrary and capricious because it failed to address the primary issues raised by Public Watchdogs—namely, the false predicates underlying the SONGS decommissioning plan and the health and safety risks of allowing SCE to continue implementing a falsely predicated plan—and because it failed to adhere to its own regulations and policies. Public Watchdogs is not asking the Court to second-guess highly technical determinations or complicated analyses by the agency. Rather, it is simply asking the Court to review the NRC's decision in the context of the issues presented in the 2.206 Petition and the NRC's regulations and policies, and determine whether the NRC addressed the important aspects of the problem and adhered to its

own regulations. As such, the NRC's denial of the 2.206 Petition is not entitled to the heightened deference reserved for highly technical agency actions.

B. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to consider Public Watchdogs' primary arguments regarding the false assumptions underlying the SONGS decommissioning plan.

It is well-established that an agency decision is subject to reversal under the arbitrary and capricious standard when the agency "entirely failed to consider an important aspect of the problem." *Greater Yellowstone Coalition v. Lewis*, 628 F.3d 1143, 1148 (9th Cir. 2010); *Environmental Defense Cntr., Inc. v. E.P.A.*, 344 F.3d 832, 858 n.36 (9th Cir. 2003); *Brower v. Evans*, 257 F.3d 1059, 1065 (9th Cir. 2001).

As explained in Public Watchdogs' opening brief, the NRC's decision denying the 2.206 Petition does not address Public Watchdogs' primary arguments regarding the false assumptions underlying the SONGS decommissioning plan and the concomitant health and safety hazards posed by the NRC allowing SCE to implement its falsely predicated decommissioning plan. The NRC

argues it did consider these issues by stating generally that all issues raised by Public Watchdogs had been "previously considered and resolved," and that the issues had already been "the subject of a facility-specific or generic NRC staff review." *See* Fed. Respondents' Ans. Br. at 42. These conclusory statements plainly do not demonstrate that the NRC actually and meaningfully considered Public Watchdogs' primary arguments. And nothing in the NRC's decision or the agency record shows the NRC has *ever* considered the public health and safety hazards posed by its policy of allowing nuclear power plant licensees to implement falsely predicated decommissioning plans.

Apparently realizing these generic statements are insufficient, the NRC also argues it actually did consider Public Watchdogs' primary arguments in the 2.206 proceeding because it made a passing reference to the safety evaluation of the SONGS Irradiated Fuel Management Plan (the "Safety Evaluation"), which, in turn, references the Continued Storage GEIS. *See* Fed. Respondents' Ans. Br. at 43. Notably, however, the NRC cited the Safety Evaluation solely for the proposition that the SONGS cost

estimates are "reasonable based on a cost comparison with other decommissioning reactors." [ER 3.] As other decommissioning plans are similarly predicated on the false assumption that the storage of spent nuclear fuel at these power plants will be "temporary," it is unsurprising that the SONGS cost comparisons appeared reasonable.

More importantly, the Safety Evaluation itself perfunctorily approves the very false predicates that Public Watchdogs challenged in the 2.206 Petition. Indeed, the Safety Evaluation states: "The SONGS Units 2 and 3 IFMP is based on the commencement of industry-wide acceptance of spent fuel by DOE in 2024 and SONGS' priority ranking in that queue. *As such, SCE is assuming that all fuel will be removed from the SONGS site by 2049.*" [SER 146 (emphasis added).] The Safety Evaluation further states: "The anticipated date to transfer fuel to DOE and subsequent decommissioning of the ISFSIs are scheduled to be completed in 2051. This supports the requirement to complete decommissioning within the 60-year timeframe, as required by 10 CFR 50.82." [SER 146.] Nothing in the Safety Evaluation shows

the NRC ever considered or addressed what would happen if spent nuclear fuel is not removed from SONGS by the arbitrary date predicted by SCE. Thus, the NRC contends it actually considered Public Watchdogs' primary arguments challenging the false assumptions underlying the SONGS decommissioning plan by referencing a document in which the NRC perfunctorily approved of those very same false assumptions. This argument is without merit and betrays the weakness of the NRC's position.

Because the NRC failed to consider the most important aspect of the problem presented to it—namely, Public Watchdogs' arguments regarding the false assumptions underlying the SONGS decommissioning plan and the dangers inherent in allowing SCE to implement its falsely predicated plan—its decision was arbitrary and capricious and should be set aside.

C. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own policies regarding long-term and indefinite storage of spent nuclear fuel.

An agency decision will be set aside as arbitrary and capricious if the agency fails to adhere to its own regulations and policies. *See Norton*, 340 F.3d at 851; *see also Nat'l Environmental*

Development Assoc.'s Clean Air Project v. E.P.A., 752 F.3d 999, 1009 (D.C. Cir. 2014). The Continued Storage GEIS is expressly incorporated into the NRC's Continued Storage Regulation, and is therefore a formal policy and/or regulation that the NRC must follow. *See* 10 C.F.R. 51.23.

In denying the 2.206 Petition and rejecting Public Watchdogs' request that SCE be required to submit an amended decommissioning plan that accounts for the reality that spent nuclear fuel will likely be stored at SONGS indefinitely, the NRC reaffirmed its decision to allow SCE to implement the falsely predicated SONGS decommissioning plan. In so doing, the NRC failed to adhere to its own policies articulated in the Continued Storage GEIS, which specify the necessary conditions for safe long-term and indefinite storage of spent nuclear fuel at on-site storage facilities.

The NRC argues its decision does not run afoul of the Continued Storage GEIS because the Continued Storage GEIS does not specifically require licensees to plan for long-term or indefinite storage when they commence decommissioning. *See* Fed.

Respondents' Ans. Br. at 46. But Public Watchdogs does not contend the Continued Storage GEIS contains any such requirement. Rather, Public Watchdogs argues the Continued Storage GEIS sets forth the specific conditions under which the NRC has concluded long-term and indefinite storage of spent nuclear fuel may be accomplished safely, and that the NRC ignored its own requirements in denying the 2.206 Petition.

By allowing licensees to implement decommissioning plans based on the false assumption that spent nuclear fuel will be transferred to a permanent repository by a date certain in the relatively near future, the NRC completely avoids any consideration of the conditions for long-term and indefinite storage set forth in the Continued Storage GEIS, such as the inevitable necessity for licensees to be able to repackage spent nuclear fuel, build a dry transfer station, and replace the on-site ISFSI. Instead, the NRC allows licensees to pretend they will store spent nuclear fuel for a finite and relatively short period of time, which obviates the need for the NRC or licensees to consider whether the necessary conditions for long-term or indefinite storage could ever be met.

Thus, by denying the 2.206 Petition and reaffirming its approval of the falsely predicated SONGS decommissioning plan, the NRC ignored and failed to follow its own policies and conclusions regarding the necessary conditions for safe long-term and indefinite storage of spent nuclear fuel at reactor sites. The reality is that spent nuclear fuel will likely be stored at SONGS indefinitely, but the NRC is intentionally avoiding making any determination as to whether such indefinite storage can be safely accomplished. For this additional reason, the NRC's denial of the 2.206 Petition was arbitrary and capricious and should be set aside.

D. The NRC's denial of the 2.206 Petition was arbitrary and capricious because the NRC failed to adhere to its own regulation, which requires spent nuclear fuel stored at on-site facilities to be readily retrievable for further processing or disposal.

NRC regulations expressly require that "storage systems must be designed to allow ready retrieval of spent fuel . . . for further processing or disposal." 10 C.F.R. 72.122(l).

After the NRC approved the falsely predicated SONGS decommissioning plan, SCE admitted it lacks the technological capability to repackage the spent nuclear fuel being buried at

SONGS if a canister fails or otherwise needs to be replaced, and that any technology that might be developed in the future would require a dry transfer station or spent fuel pool. [ER 146-47.] In denying the 2.206 Petition and in responding to Public Watchdogs' opening brief, the NRC contends SCE's admitted inability to repackage spent nuclear fuel does not show non-compliance with the retrievability regulation because SCE has shown it can retrieve a canister filled with spent nuclear fuel from the SONGS ISFSI. *See* Fed. Respondents' Ans. Br. at 51. The NRC contends this is sufficient under its Interim Staff Guidance interpreting the retrievability regulation because the regulation itself does not specify what demonstration a licensee must make to establish compliance. *Id.*

Yet again, the NRC puts up a strawman to distract from the real issue. Public Watchdogs does not contend the retrievability regulation sets forth any specific requirements regarding what demonstration a licensee must make to establish compliance. Rather, Public Watchdogs contends SCE has *admitted* it is not in compliance with the regulation by acknowledging it is incapable of

retrieving and repackaging the spent nuclear fuel being stored at SONGS. The plain language of the retrievability regulation requires that "*spent fuel*" must be retrievable for further processing, not that a "*canister*" must be retrievable for further processing. Even if SCE is able to retrieve a canister, it has conceded it is not able to retrieve the "spent fuel" inside the canister for "further processing" (*i.e.* repackaging). Thus, Public Watchdogs does not seek any determination as to what particular demonstration a licensee must make to establish compliance with the retrievability regulation; rather, it argues SCE has admitted it is not in compliance with the regulation, and that the NRC is intentionally refusing to enforce this clear regulatory requirement.

Moreover, it is manifest that the Interim Staff Guidance's conclusion that a licensee can establish compliance merely by retrieving a dummy canister from an ISFSI is entitled to no deference because it "is clearly contrary to the plain meaning of the regulation." *Santamaria-Ames v. I.N.S.*, 104 F.3d 1127, 1132 n.7 (9th Cir. 1996). Again, the retrievability regulation requires that "*spent fuel*" must be retrievable for further processing, not that a

"*canister*" must be retrievable from an ISFSI. Thus, the NRC's reliance on the Interim Staff Guidance is misplaced and cannot save the NRC's decision to ignore its own regulations.

The ultimate problem is that SCE has no way to repackage spent nuclear fuel in the event of a canister failure, which is not a speculative or hypothetical risk. The SONGS ISFSI is in the most perilous location possible, surrounded by active fault lines and rising seas. Moreover, every canister that is downloaded into the SONGS ISFSI is damaged when it is downloaded, leaving it at greater risk of failure. And SCE has a documented history of negligence, if not recklessness, in carrying out fuel transfer operations at SONGS, having nearly dropped a fully loaded canister on two separate occasions. Thus, it is entirely possible, if not likely, that the spent nuclear fuel buried at SONGS will need to be retrieved and repackaged long before the canisters' license expires or there is an alternative location to store the fuel. Nevertheless, SCE does not have the technical capability to retrieve and repackage the spent nuclear fuel after a canister is buried, and once the SONGS spent fuel pools are demolished in the next few

months, there will be no alternative storage infrastructure or means to repackage spent nuclear fuel at SONGS, even if SCE is somehow able to eventually develop the technological capability to do so.

In denying the 2.206 Petition, the NRC confirmed that it is content to ignore its own retrievability regulation and risk the lives of millions of Southern California residents based on little more than a faint hope that nothing will go wrong and that the NRC and SCE will be able to figure it out if it does. This is not only incredibly dangerous, it is arbitrary and capricious. For this additional reason, the Court should set aside the NRC's denial of the 2.206 Petition.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Public Watchdogs' opening brief, Public Watchdogs respectfully requests that the Court set aside the NRC's arbitrary and capricious denial of the 2.206 Petition, and order the NRC to actually consider Public Watchdogs arguments concerning the false assumptions underlying the SONGS decommissioning plan and adhere to its

own regulations in resolving the 2.206 Petition. In addition, for the reasons discussed in Public Watchdogs' Motion for Temporary Injunctive Relief Pending Judicial Review of Agency Action, which was previously denied by this Court, Public Watchdogs respectfully requests that the Court order the NRC to temporarily suspend all fuel transfer operations at SONGS, including the planned destruction of the SONGS spent fuel pools, pending the NRC's reconsideration of the arguments raised in the 2.206 Petition in accordance with its own regulations and policies.

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Respectfully submitted,

By *__/S/ Charles G. La Bella__*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief in Support of Petition for Judicial Review complies with Ninth Circuit Rule 32-1 and the requirements of Federal Rule of Civil Procedure 32(a)(5) and (6) because it is proportionately spaced, has a typeface of 14 points, and has 5,249 words, excluding the items exempted by Fed. R. App. P. 32(f).

/s/ Charles G. La Bella
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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2020, I electronically filed the foregoing **Petitioner's Reply in Support of Petition for Judicial Review** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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