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January 28, 2022

Mark Langer, Clerk of Court
United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., NW
Washington, DC 20001

Re: Response to NRC claim of Error in Docketing Statement in *Sierra Club v. NRC*,
Case No. 21-1229

Dear Mr. Langer:

Sierra Club and Don't Waste Michigan et al., Petitioners in this matter, hereby answer the Respondent Nuclear Regulatory Commission's (NRC) comments concerning Petitioners' Docketing Statement filed in this matter on December 15, 2021 (Doc. #1926848).

On December 20, 2021, Respondent NRC, on behalf of Federal Respondents, filed a letter with your office claiming an error in the Docketing Statement. (Doc. #1927330). According to the NRC, the "Docketing Statement fails to acknowledge related cases pending in this Court." That is incorrect; Petitioners did acknowledge, by signifying "yes" to the following question on the Docketing Statement form – "Are any other cases involving the same underlying agency order pending in this Court or any other?" – that there are other cases pending in the D.C. Circuit Court stemming from the same underlying agency order. Petitioners did not list those cases, and agrees that they are those the NRC cited, namely, *Sierra Club v. NRC*, 21-1227; *Don't Waste Michigan et al. v. NRC*, D.C. Cir. No. 21-1231, and *Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1230.

The NRC further asserted that "Petitioners fail to disclose that their Petition for Review in No. 21-1229 also involves substantially the same issues, and the same or related underlying orders and agency actions, as two other petitions that they filed in this Court on the same day (*Sierra Club v. NRC*, 21-1227; *Don't Waste Michigan et al. v. NRC*, D.C. Cir. No. 21-1231), as well as a third petition by a different entity (*Beyond Nuclear v. NRC*, D.C. Cir. No. 21-1230). And Petitioners fail to mention that this Court has consolidated those three petitions with four other related petitions, including two that they filed, under Case No. 21-1048 (*Don't Waste Michigan v. NRC*)."

The issues raised in Case No. 21-1229 differ significantly from those raised by the

petitions the NRC listed in the above paragraph. In those other petitioned reviews, the Nuclear Regulatory Commission ruled, essentially, that the NRC's interpretation of the National Environmental Policy Act (NEPA) promulgated as NRC rules at 10 CFR Part 51 are conclusive on contentions raising questions of environmental impact. Petitioners' position, by contrast, is that the NRC's NEPA rules are promulgated pursuant to the agency's powers under the Atomic Energy Act (AEA), and that where the AEA conflicts with NEPA, prevailing interpretations under NEPA are applicable and predominate where they conflict with the constrained NEPA regulations enacted by the agency.

The consolidated cases challenge the refusal of the NRC to admit Petitioners' contentions in the agency's licensing proceeding and the NRC's issuance of a license to ISP. Case No. 21-1229 challenges the final environmental impact statement and the record of decision under NEPA. Those are entirely different issues. The Court apparently recognized this when it *sua sponte* docketed the petition for review in 21-1229 as a separate case from the other consolidated cases.

Accordingly, it remains Petitioners' position that issues raised in Case No. 21-1229 are not "substantially the same issues" as those brought under challenge in the other petitions that they filed in this Court in opposition to the NRC issuance of a license for the WCS Consolidated Interim Storage facility.

Thank you.

Sincerely,

/s/ Terry J. Lodge
Co-Counsel for Petitioners