No.

IN THE

Supreme Court of the United States

PUBLIC WATCHDOGS, A CALIFORNIA 501(C)(3) CORPORATION,

Petitioner,

v.

SOUTHERN CALIFORNIA EDISON COMPANY; SAN DIEGO GAS & ELECTRIC COMPANY; SEMPRA ENERGY; HOLTEC INTERNATIONAL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The burial and storage of nuclear waste in faulty canisters on a California beach significantly threatens public health and safety. Petitioner sought to enjoin the tortious conduct of private entities decommissioning the San Onofre nuclear plant, but the courts below dismissed its claims in favor of a Nuclear Regulatory Commission ("NRC") forum that cannot provide appropriate relief.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), this Court addressed an "important" issue "affect[ing] both the states' traditional authority to provide tort remedies to its citizens and the federal government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power," and concluded that state law claims and remedies are not wholly displaced by federal regulation. *See also Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1098 (10th Cir. 2015) (Gorsuch, J.) (same).

Recently, four Justices warned against allowing the Hobbs Act to exceed constitutional bounds and swallow up viable claims. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057 (2019) (Kavanaugh, J., concurring). The decision below strips district courts of jurisdiction over private litigation against NRC licensees, contrary to the Hobbs Act's language and purpose, this Court's precedents, and multiple circuit courts. The question presented is:

Whether the Hobbs Act deprives a federal district court of subject matter jurisdiction over state law and Price-Anderson Act claims asserted by a private actor against private party NRC licensees, on the ground such claims are "ancillary or incidental to" an NRC final order.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Public Watchdogs was the plaintiff in the district court and appellant in the Ninth Circuit Court of Appeals. Respondents Southern California Edison Company, San Diego Gas & Electric Company, Sempra Energy, and Holtec International were defendants in the district court and appellees in the court of appeals. The NRC, which is not a respondent here, was also a defendant in the district court and an appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner certifies that it is a California 501(c)(3) corporation. It has no parent corporation, and, as a non-profit corporation, it has no stock.

STATEMENT OF RELATED PROCEEDINGS

Public Watchdogs v. S. Cal. Edison Co. et al., No. 19-CV-1635, U.S. District Court for the Southern District of California. Judgment entered Dec. 31, 2019.

Public Watchdogs v. S. Cal. Edison Co. et al., No. 19-56531, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 29, 2020.

Public Watchdogs v. NRC, No. 19-72670, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 20, 2019.

Public Watchdogs v. NRC, No. 20-70899, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Jan. 13, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Public Watchdogs respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (App., *infra*, 1a) is reported at 984 F.3d 744. The district court's opinion (App., *infra*, 62a) is unpublished and at 2019 WL 6497886.

The decision of the Ninth Circuit Court of Appeals dismissing Public Watchdogs' petition for judicial review (App., *infra*, 50a) is unpublished and reported at 833 F. App'x 460. The NRC's decision denying Public Watchdogs' 10 C.F.R. § 2.206 petition (App., *infra*, 54a) is also unpublished.

STATEMENT OF JURISDICTION

The Ninth Circuit's judgment was entered on December 29, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely pursuant to this Court's March 19, 2020 order.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Administrative Orders Review Act ("Hobbs Act"), 28 U.S.C. § 2341 *et seq.*, and the Price-Anderson Act ("PAA"), 42 U.S.C. § 2011 *et seq.*, are reproduced in the Appendix (App., *infra*, 117a-174a).

INTRODUCTION

Spent nuclear fuel ("SNF") "poses a dangerous, long-term health and environmental risk. It will remain dangerous for time spans seemingly beyond human comprehension." *New York v. NRC*, 681 F.3d 471, 474

(D.C. Cir. 2012) (internal quotations omitted). As of 2012, there were "tens of thousands of tons of spent fuel at more than 70 nuclear power plant sites around this country—and … the United States currently has no physical capacity to do anything with this spent fuel other than to continue to leave it at the sites where it was first generated." Blue Ribbon Commission on America's Nuclear Future, *Report to the Secretary of Energy* vii (2012) ("Blue Ribbon Commission").[1] Because of the sheer danger presented by nuclear waste, including SNF, Congress created a series of interconnected statutes, regulations, and agencies to manage facilities storing radioactive material and, in the worst-case scenario, provide remedies for those harmed by its mishandling.

Congress established the NRC in 1973 and tasked it with all the licensing and related regulatory functions of the now-defunct Atomic Energy Commission ("AEC"). 42 U.S.C. § 5841(a), (f); *id.* § 5801. This includes the oversight of licensing and regulating civilian storage and use of radioactive material. *Id.* § 2201(b), (h), (i); *id.* §§ 2131-33. Congress gave the NRC administrative tools to address licensee noncompliance and violations. *See, e.g.*, 42 U.S.C. § 2282 (authorizing the NRC to issue civil penalties for licensing or certification violations). The NRC has established procedures for modifying, suspending, or revoking a license to remedy license violations. 10 C.F.R. § 2.202. Any person may file a request with the NRC to "institute a proceeding pursuant to § 2.202[.]" 10 C.F.R. § 2.206(a). Congress further envisioned private parties holding licensees accountable for licensed activity under state and federal causes of actions, with the NRC indemnifying licensees for judgments exceeding a certain

[1] https://www.energy.gov/sites/prod/files/2013/04/f0/brc_finalreport_jan2012.pdf (last visited May 27, 2021).

threshold. 42 U.S.C. § 2210; *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 250-55 (1984); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088 (10th Cir. 2015) (Gorsuch, J.). The Ninth Circuit's decision would expand the administrative reach of the NRC and disrupt the overlapping enforcement regime Congress has established over nuclear oversight, regulation, and remedy.

As every nuclear power plant in the country generates SNF, Congress long ago realized that a safe and long-term storage plan was essential. Despite the incalculable hazards posed by SNF, no viable solution for the long-term storage and management problem has been developed.

Congress, federal agencies, and other stakeholders have long wrestled with deciding how, when, and where to safely deposit nuclear waste. All the while, the dangerous stockpile continues to grow. Over the years and much unproductive political discourse, any potential plans for a permanent site have been all but scrapped. Yucca Mountain in Nevada was once a possibility but lost both support and funding more than ten years ago. *In re Aiken County*, 645 F.3d 428, 443 (D.C. Cir. 2011) (Kavanaugh, J., concurring). This leaves nuclear facilities with no long-term plan for storing mounting caches of SNF. "At this time, there is not even a prospective site for a repository, let alone progress toward the actual construction of one." *New York*, 681 F.3d at 474. The federal government's failure to create a long-term solution for SNF leaves facilities like the San Onofre Nuclear Generating Stations ("SONGS") in limbo. *See* Rob Nikolewski, *Trump takes Yucca Mountain off the table. What's that mean for San Onofre nuclear waste?*, San Diego Union-Tribune, Feb. 7, 2020 (discussing unclear fate of 3.55 million pounds of SNF at SONGS).

This Court should grant certiorari to hear this case for four reasons.

1. This case raises an issue concerning the interpretation of the Hobbs Act that is even more fundamental than the one four Justices found troubling in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051 (2019). There, Justices Thomas and Gorsuch expressed concern that, if the Hobbs Act is read "to prevent courts from applying the governing statute to a case or controversy within its jurisdiction, the Act conflicts with the 'province and duty of the judicial department to say what the law is.'" *Id.* at 2057 (Thomas, J., concurring) (quoting *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803)). Justice Kavanaugh, writing for four Justices, acknowledged that "[t]he Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action." *Id.* at 2058.

In *PDR Network*, neither the parties nor the Court questioned whether a private party could assert a claim against another private party even though an agency's order touches on that claim—plainly it can. Here, however, the Ninth Circuit concluded that the Hobbs Act precludes *any* judicial review of a private party's state and federal claims against other private parties, even when an agency's order and interpretation are not directly at issue. If the Hobbs Act precludes district courts from adjudicating claims in private party litigation simply because of the presence of agency orders, a host of otherwise private litigation may be barred wholesale.

2. The Ninth Circuit's view effectively renders the PAA a dead letter. The PAA expressly creates a federal cause of action against entities licensed by the NRC, 42 U.S.C. § 2210(n)(2), and vests exclusive jurisdiction over such

claims in federal district court. *Id.*; *Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). The Ninth Circuit nonetheless held that the Hobbs Act precluded Petitioner from asserting a PAA claim against other private entities, simply because they hold NRC licenses. That decision contradicts five circuits' interpretation of the PAA, including a prior decision of the Ninth Circuit. *Cook*, 790 F.3d at 1090 ("any lawsuit asserting liability for a 'nuclear incident' is automatically considered a federal action that can be brought in (or removed to) federal court."); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 997 (9th Cir. 2008); *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000); *Roberts*, 146 F.3d at 1307; *In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 853-54 (3d Cir. 1991). If the Hobbs Act precludes a private party from suing an NRC licensee, the PAA is functionally a dead letter.

3. The opinion conflicts with this Court's decision in *Silkwood*, reaffirmed recently by the Tenth Circuit in *Cook*, that private parties can bring state law claims or seek state law remedies against NRC licensees despite federal regulation of nuclear safety.

4. The management of the nation's SNF stockpile is a matter of national importance that becomes even more urgent as it grows with no long-term solution for its safe storage or disposal. Whether the citizens most affected by the decisions (or lack thereof) on this issue can have their claims addressed in federal court is an important federal question that should be addressed now. The legal issues associated with an increasing SNF stockpile along the beach at SONGS, and elsewhere nationwide, should not be left to percolate in the lower courts or, worse, be postponed until a nuclear incident occurs. However, under

the Ninth Circuit's reasoning, the Hobbs Act effectively shuts the courthouse door and deprives private parties from asserting state or federal claims in court against private party NRC licensees regardless of legal theory, the egregiousness of their conduct, and the views of five circuit courts.

STATEMENT OF THE CASE

I. Factual Background

This case revolves around the dangerous handling and indefinite storage of nuclear materials at SONGS. The facility is operated by Southern California Edison ("Edison"), and partially owned by San Diego Gas & Electric Company ("SDG&E"), and Sempra Energy, Inc. ("Sempra"). The private contractor selected by Edison to handle the movement and burial of SNF at Songs is Holtec International ("Holtec") (collectively, the "SONGS Defendants").

In 1963, Congress authorized the construction, operation, and use of a nuclear power plant on Marine Corps Base Camp Pendleton in San Diego County, California. *See* Pub. L. No. 88-82, 77 Stat. 115. Three nuclear electric generating units were constructed at the base, collectively known as SONGS. The SONGS Defendants are licensed by the NRC either to operate SONGS or provide services at SONGS.

In 2013, the SONGS Defendants notified the NRC that they planned to cease operations and begin the decommissioning process. The decommissioning plan called for the "temporary" storage of SNF on-site at SONGS. Underlying that plan was the SONGS Defendants' false assumption that the Department of

Energy would begin accepting SNF in 2024 and that all SNF would be removed from the SONGS site as of 2049. In July 2015, the NRC approved the plan and amended the SONGS licenses to begin the decommissioning process ("2015 License Amendments") and allow the licensees to "maintain the facility, including, where applicable, the storage, control and maintenance of the spent fuel, in a safe condition[.]" Appellees' Record, R. 29-1 at 15. These amendments clearly state that the licensees are responsible for the "overall safe handling and storage of nuclear fuel and shall have control over those onsite activities necessary for safe handling and storage of the nuclear fuel." *Id.* at 54.

While SONGS was operational, SNF was kept in water-cooled wet storage encased in hardened structures. As part of its decommissioning plan, the SONGS Defendants, relying on Congress' long-awaited, permanent nuclear waste repository, proposed temporarily storing the 3.55 million pounds of stockpiled SNF in thin-walled canisters on-site in an Independent Spent Fuel Storage Installation ("ISFSI"). The ISFSI is in a precarious location; it is only 108 feet from the Pacific Ocean, lies near multiple active earthquake fault lines, and sits within a tsunami inundation zone.

In February 2018, as part of the decommissioning plan, the SONGS Defendants began transferring SNF from wet storage into thin, dry-storage canisters manufactured by defendant Holtec. These canisters were purportedly Holtec Hi-Storm Umax canisters, which the NRC approved and certified for at least some uses (though not specifically for use at SONGS nor for permanent interment of SNF) in 2015. *See* 10 C.F.R. § 72.214 (Certificate of Compliance No. 1040). The SONGS

Defendants planned to bury these canisters in the Holtec ISFSI's underground silos.

Shortly after transfer began in 2018, design and manufacturing flaws in the Holtec canisters became apparent. After four canisters were buried, the SONGS Defendants discovered that another canister had broken, impairing its ability to cool SNF. Additionally, every single canister was found to be gouged or scratched during the downloading process. Some of these flaws occurred because Holtec did not manufacture the canisters as required by its NRC Certificate of Compliance.

Then, in the summer of 2018, the SONGS Defendants caused two separate "near misses" at the site that were nearly nuclear disasters. First, a 49-ton canister full of SNF was almost dropped more than 18 feet to the concrete floor of one of these beachside silos. Less than two weeks later, employees at the site snagged another 49-ton canister on a narrow steel outcropping, leaving the canister hanging 20 feet in the air for almost an hour. Had either of these canisters dropped, nuclear waste could have been released. On neither occasion did the SONGS Defendants inform either the NRC (or the public) within 24 hours, as NRC regulations require.

On August 6, 2018, Edison notified the NRC that it was "voluntarily" suspending the movement and dry storage of SNF at SONGS, and would continue to maintain SNF in wet storage. However, the public was not informed of these near misses until a whistleblower came forward at a public hearing on August 9, 2018. After that public disclosure, the SONGS Defendants maintained their voluntary suspension of SNF fuel transfers until mid-2019.

The NRC ultimately issued two notices of violation to the SONGS Defendants in connection with these incidents. On November 29, 2018, the NRC found Holtec violated 10

C.F.R. §§ 72.146(a) and 72.48 because of the faulty design of its canisters and its failure to notify the NRC that it had changed the design of those canisters. On March 25, 2019, the NRC notified Edison that it had violated NRC safety requirements in its handling of the Holtec canisters.

On July 15, 2019, the SONGS Defendants notified the NRC and the public that they were resuming transfer of SNF from wet storage to dry canisters, and burying the canisters near the San Onofre beach even though they had not materially changed Holtec's defective canisters, or the processes for transferring SNF to dry canisters, transporting the canisters, or burying them. The original SONGS decommissioning plan approved by the NRC in its 2015 Licensing Amendments did not contemplate the permanent interment of SNF, much less the indefinite storage of SNF in structures only 108 feet from the Pacific Ocean, between major earthquake fault lines, in a tsunami inundation zone. The burial and interment of the SNF has continued ever since.

II. Procedural Background

Public Watchdogs, a non-profit public safety advocate, repeatedly asked the SONGS Defendants to suspend their "downloading" activities, as they had voluntarily done for eleven months in 2018 and 2019. Its requests were rejected or ignored.

On August 28, 2019, Public Watchdogs filed a Complaint against the SONGS Defendants alleging violations of California's public nuisance law, Cal. Civ. Code §§ 3479-80 and California's product liability law.[2] On

[2] That suit also alleged that the NRC violated the Administrative Procedures Act, 5 U.S.C. § 702 *et seq.* ("APA"). The NRC is not a Respondent here.

September 24, 2019, Public Watchdogs filed a First Amended Complaint adding a public-liability action pursuant to the PAA, 42 U.S.C. § 2210(n). Public Watchdogs sought primarily to enjoin the SONGS Defendants from continuing with the decommissioning process insofar as it violated the Price-Anderson Act or state nuisance laws.

On December 3, 2019, the district court issued an order dismissing Petitioner's action with prejudice after concluding that the Hobbs Act deprived it of subject matter jurisdiction over the entire case, including the state and federal claims against the private party SONGS Defendants. (App., *infra*, 83a-94a). Specifically, the court concluded that the alleged actions were all "taken pursuant to" or "incidental to" the 2015 License Amendments or the Holtec Certificate of Compliance and thus Petitioner's state and federal claims could not be litigated in the district court. (App., *infra*, 94a). Public Watchdogs timely appealed the court's order on December 31, 2019.

On September 24, 2019, Petitioner separately petitioned the NRC (which licensed all the SONGS Defendants), under 10 C.F.R. § 2.206 seeking an injunction to (1) halt the movement and burial of spent fuel at SONGS, and (2) order the SONGS Defendants to prepare and submit an amended decommissioning plan. While some underlying facts in the administrative petition overlapped with those set forth in the Amended Complaint, the legal theories and bases for relief were separate and distinct. Specifically, the 2.206 Petition focused only on the *NRC's* actions and orders, contending that the SONGS decommissioning plan rested on a fundamentally false underlying premise—namely, that the Department of Energy would begin accepting SNF for

long-term storage in 2024, and that all SNF would be removed from SONGS by 2049. In fact, the Department of Energy has no plan to begin accepting SNF in 2024, or any time in the foreseeable future, because there is no place to put it. This false assumption resulted in a gross understatement of the actual costs to store and monitor spent nuclear fuel at SONGS. The NRC denied Public Watchdogs' 2.206 Petition *via* letter on February 26, 2020, because it "[did] not meet the acceptance criteria" for review, allegedly because the issues Public Watchdogs raised have been "the subject of a facility-specific or generic NRC staff review," and "none of the circumstances in Section III.C.1(b) applies." (App., *infra*, 61a).[3]

In its appeal from the dismissal of the Complaint, Public Watchdogs argued that the district court erred in dismissing Public Watchdogs' claims under Rules 12(b)(1) and 12(b)(6). On December 29, 2020, the Ninth Circuit affirmed the district court's decision. (App., *infra*, 1a-49a). The court grounded its analysis on the premise that the Hobbs Act deprived the district court of subject matter jurisdiction over the state law nuisance and federal PAA claims against the SONGS Defendants as well as the APA claim against the NRC. The court focused on the effect of the "2015 License Amendments, the Certificate of Compliance for the Holtec System, and actions taken by the licensees under the authority of both of those final NRC orders." (App., *infra*, 47a). According to the court,

[3] Public Watchdogs sought review of the NRC's decision in the Ninth Circuit. (App., *infra*, 50a-53a). The Ninth Circuit dismissed Public Watchdogs' petition for review, holding that the NRC's decision was presumptively unreviewable, and Public Watchdogs had not shown that the NRC "abdicated its statutory duties" or "point[ed] to any specific language indicating an intent to circumscribe the NRC's discretion." (App., *infra*, 52a-53a).

the existence of the NRC licenses transformed Public Watchdogs' claims against the SONGS Defendants into claims precluded by the Hobbs Act, because the SONGS Defendants' conduct was "inextricably intertwined" with, or "ancillary" or "incidental" to, those licensing orders. (App., *infra*, 48a). The Ninth Circuit thus extended the Hobbs Act's exclusive jurisdiction provision beyond its statutory bounds, locking the courtroom door to private parties' claims against other private parties, even when those claims are not directed at the agency in question or challenging agency orders.

The Ninth Circuit has precluded private parties from suing other private parties regarding their dangerous activities at SONGS.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Erred in Holding that the Hobbs Act Divests District Courts of Jurisdiction over Claims Brought by Private Parties against NRC Licensees.

A. The Hobbs Act confers on the courts of appeals "exclusive jurisdiction" over actions seeking to "enjoin, set aside, suspend" or "determine the validity of" final agency orders; nothing more.

Congress passed the Hobbs Act in 1950 to channel certain challenges to agency action directly to the courts of appeals, which are granted "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of ... all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). Section 2239 provides for Hobbs Act review of "[a]ny final order entered in any proceeding" "for the

granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees." 42 U.S.C. § 2239(b), (a)(1)(A).[4]

Congress' purpose in channeling direct challenges into the courts of appeals was to help administrative agencies act more efficiently. As the House Report explained, "submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court on review, and thus going over the same ground twice." H.R. Rep. No. 2122, at 3-4 (1950); *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 740 (1985) (describing similar purpose).

This Court "has commanded 'strict fidelity to the[] terms' of judicial review provisions" that create or limit jurisdiction, such as those contained in the Hobbs Act. *Brodsky*, 578 F.3d at 180 (quoting *Stone v. INS*, 514 U.S. 386, 405 (1995)). Courts of appeals have thus held that the "exclusive jurisdiction" language of the Hobbs Act applies only to direct challenges to agency action—namely, for "requests to enjoin, set aside, suspend," or "invalidate" agency action or orders; in other words, to challenges directed at an agency proper. *See id.* (Hobbs Act did not apply to regulatory exemptions); *United States v. Any & All Radio Station Transmission Equip.*, 204 F.3d 658, 667 (6th Cir. 2000) (reversing district court's decision that it

[4] The Hobbs Act references the AEC, but the AEC was abolished and its licensing functions were transferred to the NRC. NRC orders are thus reviewable under the Hobbs Act. 42 U.S.C. §§ 5841(f), 5871(g); *General Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 538 n.2 (9th Cir. 1996); *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 179 n.2 (2d Cir. 2009).

lacked subject matter jurisdiction "for the simple reason that no [agency] order is being challenged"); *Manuel v. NRA Group LLC*, 722 F. App'x 141, 144 n.5 (3d Cir. 2018) (private suit did "not address the validity of the [agency's] orders" and was thus outside the Hobbs Act).

Four Justices of this Court, concurring in the judgment in *PDR Network*, recently rejected the Government's argument, as an *amicus*, that the Hobbs Act deprives a federal district court of jurisdiction to interpret an agency order in private party litigation. *See* 139 S. Ct. at 2057-67 (Kavanaugh, J., concurring). The Government in *PDR Network* stressed the "exclusive jurisdiction" provision, but, as Justice Kavanaugh queried, "'exclusive jurisdiction' to do what?" *Id.* at 2063. The answer is simple: only to "issue an injunction or declaratory judgment regarding the agency's order." *Id.* While the Government might prefer to "choke off all litigation at the pass," Justice Kavanaugh observed, *id.* at 2066, that reading would contradict the APA's "'basic presumption of judicial review for one suffering legal wrong because of agency action.'" *Id.* at 2060 (quoting *Weyerhauser Co. v. US Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quotation altered by Court)); *Bowen v. Mich. Acad. of Fam. Physicians*, 476 U.S. 667, 670 (1986) (unless "there is persuasive reason to believe that Congress intended to preclude judicial review, the Court will not preclude review") (internal quotation marks omitted).

The Government's interpretation of the Hobbs Act in *PDR Network* would also create serious constitutional problems—including depriving litigants of their day in court, in contravention of due process, and expanding the authority of agencies, in contravention of the separation of powers. *See PDR Network*, 139 S. Ct. at 2062-64, 2066

(Kavanaugh, J., concurring); *Gorss Motels, Inc. v. Safemark Systems, LP*, 931 F.3d 1094, 1106-10 (11th Cir. 2019) (Pryor, J., concurring, joined by Newsom and Branch, JJ.) ("The Hobbs Act, correctly construed, does not require district courts adjudicating cases within their ordinary jurisdiction to treat agency orders that interpret federal statutes as binding precedent. Our precedents' interpretation of the Hobbs Act ignores the statutory context, generates absurd results, and raises serious constitutional doubts. In the earliest appropriate case, we should correct our mistake en banc.").[5]

B. The Ninth Circuit's decision extends the scope of Hobbs Act review to an unwarranted and unprecedented degree.

The Ninth Circuit's decision misinterprets and misapplies the Hobbs Act two ways. First, it reads the statute to preclude litigation between private parties, simply because some private parties were NRC licensees. Second, it interprets the Hobbs Act so broadly that it precludes claims arising from conduct that is merely "incidental" to a final agency order.

1. The Hobbs Act does not apply to litigation among private parties, and has never been applied to such litigation until now.

This case does not raise the issue left undecided in *PDR Network*—namely, whether a district court may interpret an agency order in a case between private

[5] Citing *PDR Network*'s concurrences, Judge Pryor urged the Eleventh Circuit to reconsider its precedents precluding district courts from adjudicating an agency's interpretation of its own orders: "Unsurprisingly, if the Hobbs Act meant what we have said it means, its constitutionality would be in doubt." *Id.* at 1110.

parties that entails application of the order. *See id.* at 2053-56.

This case raises the even more fundamental question of whether private parties can bring state law tort claims or federal PAA claims *at all* against private parties who misuse their NRC licenses to the detriment of the public. Neither this Court nor any other court of appeals has ever read the Hobbs Act so broadly, much less held that possession of an agency license or certificate insulates a private party from suit in a district court. That is because nothing in the Hobbs Act strips district courts of jurisdiction to adjudicate disputes among private parties—that much is implicit in the *PDR Network* decision: neither the Justices nor the parties themselves questioned the district court's jurisdiction over the parties' dispute.

The court of appeals in this case relied on this Court's decision in *Lorion* to justify stripping the jurisdiction of the district court and the rights of parties to sue other private parties in the district court. *Lorion* justifies no such thing.

In *Lorion*, this Court considered "whether the [NRC's] denial of a § 2.206 request should be considered a final order initially reviewable exclusively in the court of appeals." *Lorion*, 470 U.S. at 734. The appellate court had determined it lacked subject matter jurisdiction to review the NRC's decision denying petitioner's request for a hearing, on the grounds it was not an NRC "final order." *Id.* at 733.

This Court concluded that the court of appeals had misconstrued the interrelation between the review and hearing provisions of the Hobbs Act and reversed, holding that the jurisdiction conferred by the Hobbs Act on the courts of appeals does not turn on whether or not an

agency held a hearing, or could have held a hearing, in the first instance. *Id.* at 734, 739-42. "If initial review in the courts of appeals hinged on whether a hearing before the agency *actually occurred*, then some licensing proceedings will be reviewed in the courts of appeals while others will not[.]" *Id.* at 741.

"[E]qually irrational consequences follow" "[i]f initial review in the courts of appeals hinged on whether a hearing *could have taken place* had an interested party requested one." *Id.* at 742. If that were the rule, some final orders—for the "granting, suspending, revoking, or amending of a license"—would be heard in the courts of appeals, while other final orders—like summary proceedings or rulemaking authorized by § 2239(a)—would be "initially reviewed in the district court because the Commission does not currently provide for a hearing in such situations." *Id.* (footnote omitted).

This Court thus held that all challenges seeking to modify, suspend, or revoke an NRC license should be heard in the courts of appeals, including final orders "resolving issues preliminary or ancillary" to the core issue. *Id.* at 743-44. This solution streamlines the process and makes sense practically because the "factfinding capacity of the district court is ... typically unnecessary to judicial review of agency decisionmaking." *Id.* at 744.

Two important things emerge from this decision. First, the case began with a 2.206 petition challenging the NRC's decision. It was not a private party's claim as asserted in district court. And second, it reasoned that, absent this conclusion, some final orders "would be reviewed initially in the district court." *Id.* at 742 (emphasis added). *Lorion* in no way read the Hobbs Act to limit the judicial review available to private litigants asserting claims against other private litigants. Instead, it began with the presumption

that claims outside the purview of the Hobbs Act are reviewable in district court.

PDR Network confirmed that the presence of an FCC final order did not deprive private litigants of jurisdiction in federal district court. No one doubted that the district court had jurisdiction over the dispute. The concurring Justices stated so clearly. *PDR Network*, 130 S. Ct. at 2056 (Thomas, J., concurring) ("[T]he Hobbs Act would have no role to play in this case" precisely because "[t]his suit is a dispute between private parties, and petitioners did not ask the District Court to 'enjoin, set aside, suspend' or 'determine the validity of any [agency] order.'"); *id.* at 2058 (Kavanaugh, J., concurring) ("The Hobbs Act does not expressly preclude judicial review of an agency's statutory interpretation in an enforcement action.").

The Ninth Circuit, however, concluded that the Hobbs Act precluded *all* judicial review of a private party's claims against other private parties, even when no agency's "final order" is being directly challenged. That contravenes *PDR Network*. In fact, if the Ninth Circuit were correct, district courts could not oversee private litigation in any case that arises from conduct by parties acting under cover of "final agency orders" (including FCC orders in many cases like *PDR Network*).

2. The Hobbs Act does not deprive district courts of jurisdiction over claims that do not seek to invalidate a final agency order and simply address licensee actions that are "incidental" to final agency orders.

The Ninth Circuit determined that the Hobbs Act must be read "broadly to encompass not only all final NRC actions in licensing proceedings, but also all decisions that are preliminary, ancillary, or incidental to those licensing

proceedings," (App., *infra*, 28a), based on its misreading of *Lorion*, 470 U.S. 729, and the court of appeals' own decision in *General Atomics*, which likewise misread *Lorion*.

The word "incidental"—which does not appear at all in *Lorion*—appears in the Ninth Circuit's 1996 opinion in *General Atomics*, which held that the district court lacked jurisdiction to determine a challenge to the NRC's non-final decision ordering the appellant to clean up a nuclear facility. 75 F.3d at 539. In reaching this decision, the court mistakenly stated that *Lorion* "held that the Hobbs Act is to be read broadly to encompass all final NRC decisions that are preliminary or *incidental* to licensing." *Id.* (emphasis added). But "incidental" is not "ancillary."

The word "ancillary" is defined as something that is "subordinate" or "auxiliary."[6] It is derived from a Latin word indicating service or support, and "picks up on the notion of providing aid or support in a way that supplements something else. In particular, the word often describes something that is in a position of secondary importance, such as the 'ancillary products in a company's line.'"[7] The word "incidental," by contrast, is defined as something "minor," or "likely to ensue merely by chance or without intention or calculation."[8] An event or object that is incidental thus has a far more attenuated relationship to something than one that is ancillary. An "ancillary" order, therefore, is one that supplements or supports a final order covered by the Hobbs Act; whereas,

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[6] *Ancillary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ancillary (last visited May 27, 2021).

[7] *Id.*

[8] *Incidental*, Merriam-Webster, https://www.merriam-webster.com/dictionary/incidental (last visited May 27, 2021).

an "incidental" order is one bearing an attenuated or even accidental relationship to a relevant final agency order.

The Ninth Circuit's opinion takes the mistake made in *General Atomics*—the substitution of the word "incidental" for the word "ancillary"—and compounds it significantly by replacing the words "final order" with "licensing proceedings." (App., *infra*, 28a). In so doing, the court expands the exclusive jurisdiction language of the Hobbs Act to cover not only suits against the NRC challenging NRC final orders (as in *General Atomics*), but also suits (even against private parties) that do not challenge NRC final orders, if they bear some "incidental" or "ancillary" relationship to NRC licensing proceedings. According to the Ninth Circuit, a claim is barred by the Hobbs Act if a defendant's challenged actions are merely "related to" or "inextricably intertwined" with final agency orders. (App. *infra*, 48a) (quoting *Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193 (9th Cir. 2008)). This strained reading of the Hobbs Act is not supported by the language of the Act, by *Lorion*, or anything else.

Contrary to the Ninth Circuit's view, *Lorion* did not read the Hobbs Act so broadly as to confer exclusive jurisdiction on courts of appeals over anything more than *final agency orders*, in keeping with the language of the Hobbs Act itself. This Court used the terms "preliminary or ancillary" to describe orders related to final agency orders, not to factual scenarios giving rise to state law or PAA claims. It did not address, much less hold, that claims raising issues "*incidental*" to agency decisionmaking must be adjudicated in the courts of appeals.

No court—until now—has precluded private parties from bringing state law tort and federal PAA claims against other private parties in federal district court, simply because defendants are NRC licensees whose

misconduct bears some ancillary or *incidental* relation to their licensed activities. The court here barred Petitioner from asserting claims against the SONGS Defendants, based on allegations that these defendants are engaging in negligent, reckless, or intentional conduct that abuses their NRC licenses and threatens the lives and well-being of the residents of Southern California. NRC licenses do not render these defendants untouchable in court. The federal courts should not abdicate their responsibility to adjudicate private party claims simply because an agency also oversees defendant licensees.

II. The Ninth Circuit's Decision Disregards The Price-Anderson Act And Creates A Conflict With The Hobbs Act Where None Exists.

The Ninth Circuit's interpretation of the Hobbs Act directly conflicts with the text and purpose of the PAA, 42 U.S.C. §§ 2014(hh), 2210(n)(2) and the interpretation of five circuit courts. In fact, it effectively eliminates PAA public liability actions against NRC licensees—the intended defendants in such actions.

The PAA was intended to strike a balance between protecting the public and fostering nuclear energy and technology. 42 U.S.C. §§ 2012(a), (i); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 64 (1978). In doing so, it established a framework for managing claims and funding liability arising from nuclear incidents.[9] *Duke Power*, 438 U.S. at 65. The PAA did not displace state

[9] Petitioner maintained below that the term "nuclear incident" includes not just accidents, but conditions that creating significant risk of a nuclear accident. If this were not so, conditions could not be corrected, including by injunction, in time to avoid such accidents. That interpretation is not at issue because the Ninth Circuit's decision was based exclusively on subject matter jurisdiction.

causes of action. *Silkwood*, 464 U.S. at 251-54; *accord Cook*, 790 F.3d at 1098. This Court stressed that the PAA's legislative history contained "ample evidence" that Congress did not intend to preclude state tort remedies for harm related to nuclear activity. *Silkwood*, 464 U.S. at 250-51.

Four years after *Silkwood*, Congress amended the PAA to create a federal cause of action—*i.e.*, a "public liability action." 42 U.S.C. §§ 2210(n)(2), 2014(hh) ("1988 Amendments"). A public liability action is one "arising out of or resulting from a nuclear incident." 42 U.S.C. § 2210(n)(2). The Act provides that the substantive rules of a public liability action are derived from state law, unless state law is "inconsistent" with § 2210. *See* 42 U.S.C. § 2014(hh); *Cook*, 790 F.3d at 1095.

The PAA creates an "exclusive federal cause of action" which, according to at least five circuit courts, is properly litigated in federal district court. *Roberts*, 146 F.3d at 1307; *Cook*, 790 F.3d at 1090 ("any lawsuit asserting liability for a 'nuclear incident' is automatically considered a federal action that can be brought in (or removed to) federal court."); *In re Hanford Nuclear Reservation Litig.*, 534 F.3d at 997; *Acuna*, 200 F.3d at 340; *In re TMI Litig. Cases Consol. II*, 940 F.2d at 853-54.

A "nuclear incident" is defined as "any occurrence, including an extraordinary nuclear occurrence, within the United States ... arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C. § 2014(q). That definition references 42 U.S.C. § 2210(c), which governs the PAA indemnification plan for NRC licensees. Under that provision, "a contract of indemnification shall cover *public liability arising out of*

or in connection with the licensed activity." 42 U.S.C. § 2210(c) (emphasis added).

In turn, the PAA defines "public liability" as "*any legal liability* arising out of or resulting from a nuclear incident ... except ... (iii) whenever used in subsections (a), (c), and (k) of [section 2210], claims for loss of, or damages to, or loss of use of property which is located at the site of and used in connection with the *licensed activity where the nuclear incident occurs*." 42 U.S.C. § 2014(w) (emphasis added).

Both the PAA's indemnification plan and public liability action explicitly provide for claims arising out of, or in connection with, licensed activity and the harmful actions of a licensee. The 1988 Amendments also explicitly vested jurisdiction over public liability actions in district courts. 42 U.S.C. § 2210(n)(2) ("With respect to any public liability action ... the United States district court in the district where the nuclear incident takes place ... shall have original jurisdiction[.]"). In summary, the PAA created a public liability action for nuclear incidents, including incidents arising out of, or in connection with, licensed activity against NRC licensees, and provided district courts with original jurisdiction over those claims.

That is precisely the claim Petitioner asserted. Petitioner brought a PAA claim against the SONGS Defendants, alleging that they are burying and storing SNF improperly in defective canisters inappropriate to the location selected for burial and in a manner that endangers public health and safety. According to the Ninth Circuit, however, the Hobbs Act deprives a district court of jurisdiction to hear any PAA claim against an NRC licensee that *challenges the licensees' activities* when "NRC licensing orders or NRC decisions that were ancillary or incidental to NRC licensing decisions" are

involved. (App., *infra*, 49a). This effectively guts the PAA's public liability claim against its primary intended defendant—an NRC licensee.

To the contrary, at least five circuit courts (Third, Fifth, Tenth, Eleventh, and the Ninth, previously) have permitted PAA claims to be adjudicated against NRC licensees in federal district court. *See supra* pp. 4-5.

Such a decision contradicts the text and purpose of the PAA and renders it toothless. As discussed, the PAA's text contemplates actions against NRC licensees for activities "arising out of or in connection with the *licensed activity*." 42 U.S.C. § 2210(c) (emphasis added); *In re TMI Litig.*, 940 F.2d at 853-54 (PAA "channel[s] liability to licensees") (citing 42 U.S.C. § 2014(t)). As the Ninth Circuit interprets the Hobbs Act, the proper jurisdiction for PAA actions that "challenge" those licensed activities would be through the NRC's administrative process and then subject to the exclusive jurisdiction of the Court of Appeals. (App., *infra*, 48a). Congress, however, clearly intended these actions would be brought in district court. 42 U.S.C. § 2210(n)(2) (original jurisdiction in the district court for public liability claims); *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 477 (1999) (describing Congress' "unmistakable preference for a federal forum" for PAA public liability actions).

The Ninth Circuit's decision deprives federal district courts of jurisdiction over claims holding licensees responsible for tortious conduct relating to nuclear activities in favor of the NRC's administrative process because any such conduct would, by definition, be "preliminary, ancillary, or incidental to [the NRC's] licensing proceedings." (App., *infra*, 28a). This interpretation effectively makes the PAA a dead letter. *See Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010)

(interpreting any statutory provision to render another provision superfluous "of course, applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times").

The 1988 Amendments vested jurisdiction over nuclear incidents arising out of and in connection with licensed activity in the district courts. A 2.206 Petition is not how Congress envisioned these claims should be brought nor is it the functional equivalent of a PAA claim. Under 10 C.F.R. § 2.206, a petitioner is not guaranteed a hearing, but merely requests that the NRC institute a proceeding. *Eddleman v. NRC*, 825 F.2d 46, 48 (4th Cir. 1987) (no right to a hearing under 10 C.F.R. § 2.206); *Morris v. NRC*, 598 F.3d 677, 703 (10th Cir. 2010). If the NRC refuses to institute a proceeding, as it did here, then what follows is a deferential review in the Court of Appeals. (App., *infra*, 51a) (characterizing the NRC's denial of Petitioner's 2.206 petition as "a decision not to institute an enforcement proceeding" and noting such a decision is "presumptively unreviewable") (citing *Heckler v. Cheney*, 470 U.S. 821, 833 n.4, 834 (1985)).

Further, the NRC lacks the authority to manage the logistics associated with a PAA claim. It cannot consolidate PAA actions, manage them once consolidated, or distribute limited compensatory funds. *Neztsosie*, 526 U.S. at 477 (describing 42 U.S.C. §§ 2210(n)(2), (n)(3), and (o)).

The Ninth Circuit reasoned that Petitioner's 2.206 Petition "bolstered" the court's conclusion because it purportedly "addressed the same conduct of the [SONGS] Defendants and sought the same remedy as the district court action[.]" (App., *infra*, 48a). However, that logic is flawed three ways.

First, Petitioner asserted different claims against different parties in the two fora. In its 2.206 Petition, Petitioner addressed the NRC's actions, asserting that the NRC violated its own regulations, the APA, and the NEPA, 42 U.S.C. §4332(2)(C). Petitioner's claims against the SONGS Defendants (not the NRC) in the district court include a PAA claim and state law nuisance claim, asserted against NRC licensees based on *their* conduct. These claims do not seek to "enjoin, set aside, suspend (in whole or in part)" or invalidate any NRC order, including the 2015 License Amendments or the NRC Certificate of Compliance.

Second, the NRC cannot award all the relief available under the PAA. *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 244 (3d Cir. 1980) (permitting federal claim and holding there would have to be "rather compelling evidence of congressional intent before [the court] would hold that there was no opportunity to resort to either preventative or make-whole judicial remedies" while the NRC considers "the underlying problem"). For example, the NRC cannot impose liability pursuant to the PAA; only district courts do that. 42 U.S.C. § 2210(n), (o). It cannot award damages under the PAA, *id.*, § 2210(o), nor under state law. Its ability to issue penalties is limited by both statute and regulation. 42 U.S.C. § 2282; 10 C.F.R. § 2.206(j) (limiting penalty amount to $298,211 per violation).

And third, even if similar relief were available in the agency action, it would not deprive the district courts of subject matter jurisdiction. While the relief Petitioner sought from the NRC in its unsuccessful 2.206 Petition was similar to that sought in the district court, that is no different than the parallel forms of relief available in numerous types of private litigation and agency

proceedings. NRC review also does not guarantee a day in court for plaintiffs asserting PAA claims against NRC licensees arising out of or in connection with licensed activity, or anything comparable to the PAA.

Quite simply, the Ninth Circuit's interpretation creates a statutory conflict where none exists. *See Bilski*, 561 U.S. at 607-08. The Hobbs Act is directed at invalidating, enjoining, or setting aside agency action (*i.e.*, final orders), which only the agency and the appellate courts can do. The PAA, by contrast, is directed at *licensee* actions. The Ninth Circuit's reliance on *American Bird* and *Yeutter* therefore was entirely off-point because in those cases plaintiffs' claims challenged agency action by asserting claims against administrative agencies, not private parties. *American Bird Conservancy v. FCC*, 545 F.3d 1190 (9th Cir. 2008); *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908 (9th Cir. 1989).

A licensee has day-to-day control over how it handles dangerous materials. When the licensee's action involving those materials becomes tortious and constitute a nuclear incident, it is subject to public liability, the remedies of which are determined by state law. 42 U.S.C. § 2014(hh). Even if a conflict existed between these statutes, 42 U.S.C. § 2014 would control as the later-in-time act of Congress. *Compare* 1988 Amendments, Pub. L. No. 100-408, 102 Stat. 1066 (enacted 1988) *to* Hobbs Act, Pub. L. 89-554, § 2342, 80 Stat. 378, 622 (enacted 1966).[10] The Ninth Circuit's Hobbs Act interpretation creates an unnecessary conflict and eviscerates a federal cause of action that plays a key role in Congress' plan in for remediating nuclear incidents.

[10] The Hobbs Act was amended after its inception, but 42 U.S.C. § 2342(4) has not changed since 1966. *See* Pub. L. 89-554, § 2342, 80 Stat. 378, 622 (1966).

III. The Ninth Circuit's Reasoning Contradicts this Court's Decision in *Silkwood* and the Tenth Circuit's in *Cook*.

The Ninth Circuit's decision also conflicts with this Court's reasoning in *Silkwood* and the Tenth Circuit's analysis in *Cook* (authored by then-Judge Gorsuch). Both cases recognize that plaintiffs can assert traditional state law claims and seek state law remedies, both when a "nuclear incident" as defined by the PAA has, and has not, been proven. The PAA thus leaves room for litigants to seek state law remedies despite the pervasive federal regulatory scheme involving nuclear safety. That could not be the case if the Hobbs Act deprives federal district courts of subject matter jurisdiction over claims asserted against NRC licensees.

In *Silkwood*, this Court addressed an "important" issue: the PAA's effect on both states' traditional tort remedies and the federal government's express desire to maintain regulatory authority over nuclear safety. *Silkwood*, 464 U.S. at 248. It ultimately found it "clear that in enacting and amending the Price-Anderson Act, Congress assumed that state-law remedies, *in whatever form they might take*, were available to those injured by nuclear incidents." *Id.* at 256 (emphasis added). Evidence supporting plaintiff's state law negligence and strict liability claims against Kerr-McGee, an NRC licensee, included that the licensee "complied with most federal regulations," but "did not always comply with NRC regulations." *Id.* at 243-44.

Nothing in the PAA's text has changed since *Silkwood* to preclude the traditional state law injunctive remedies Petitioner requests here. The PAA's history suggests Congress sought to "minim[ize] interference with State

law" so "the only interference with State law is ... in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity." S. Rep. No. 89-1605 (1966); H.R. Rep. No. 100-104, pt. 1, at 20 (1987).

The 1988 Amendments' creation of the public liability action did not displace traditional state law remedies from the PAA. Instead, the action was designed to "smooth and speed the recovery process" following the disastrous response to the Three Mile Island incident.[11] *Cook*, 790 F.3d at 1096. Because that accident was not an "extraordinary nuclear occurrence," within the meaning of the PAA, "there was no mechanism for consolidating the claims in federal court." *Neztsosie*, 526 U.S. at 477 (quotation omitted). Congress responded by providing for public liability actions so parties can bring such claims. 42 U.S.C. § 2210(n)(2), (n)(3); *Estate of Ware v. Hosp. of the Univ. of Pa.*, 871 F.3d 273, 279 (3d Cir. 2017) ("These 1988 amendments … deliberately increased the scope of the Act's coverage."); *Acuna*, 200 F.3d at 339 ("'Nuclear incident' is not limited to a single, catastrophic accident: indeed, one purpose behind the 1988 amendments was to expand the scope of federal jurisdiction beyond actions arising from 'extraordinary nuclear occurrences' only.").

The PAA's purpose is to "improve the manageability of complex litigation, to ensure that liabilities arising from large nuclear incidents don't shutter the nuclear industry, and to guarantee compensation for victims who otherwise might be left trying to squeeze damages out of firms

[11] The Three Mile Island incident spurred over 150 cases, from over 3,000 claimants, throughout state and federal courts. *See* S. Rep. No. 100-218, at 13 (1987).

bankrupted by enormous awards." *Cook*, 790 F.3d at 1096 (citing *Duke Power*, 438 U.S. at 83); *Neztsosie*, 526 U.S. at 486 ("The Act provides clear indications of the congressional aims of speed and efficiency."). To avoid duplicative claims by the multitude of plaintiffs nuclear incidents can create, Congress created mechanisms to consolidate cases and gave district courts power to encourage the "equitable, prompt, and efficient resolution" of claims. *Neztsosie*, 526 U.S. at 486-87 (citing 42 U.S.C. § 2210(n)(3)(C)).

None of these goals requires stripping district courts of jurisdiction over traditional state law claims. In fact, stripping district courts of jurisdiction contravenes these goals. Instead, the amendments arm the district court with an additional tool. *In re TMI Litig.*, 940 F.2d at 858 ("Through the Amendments Act, Congress has placed an overlay of federal law upon the *rights and remedies previously available under state law.*") (emphasis added). The PAA preempts remedies that are inconsistent with section 2210, *see* 42 U.S.C. § 2014(hh), but nothing in section 2210 conflicts with or precludes injunctive relief against licensees. The Court's reasoning in *Silkwood* still stands and, if anything, has been reinforced by the 1988 Amendments' explicit reliance on state law for the substantive rules of decision. *See* 42 U.S.C. § 2014(hh).

In 2015, the Tenth Circuit reaffirmed that the PAA leaves room for state law claims, including nuisance claims like Petitioner's that do not rise to the level of a PAA "nuclear incident." *Cook*, 790 F.3d at 1095 ("Where does any of [the PAA's] language—expressly—preempt and preclude all state law tort recoveries for plaintiffs who plead but do not prove nuclear incidents? We just don't see it."); *id.* at 1103 ("the [PAA] does not preempt and preclude a freestanding state law nuisance claim when a

nuclear incident is alleged but unproven."). And in *Virginia Uranium, Inc. v. Warren*, this Court again interpreted *Silkwood* to mean that "state tort law … fell beyond any fair understanding of the NRC's reach under the AEA." 139 S. Ct. 1894, 1905 (2019). This is true even though in *Silkwood* "state tort law sought to regulate the safety of a nuclear plant's operations." *Id.*

Under *Silkwood* and *Cook*, plaintiffs can successfully assert claims against NRC licensees—PAA claims if they can prove a "nuclear incident," or state law claims, like nuisance, if the occurrence does not rise to the level of a "nuclear incident." Either way, a private plaintiff can assert some kind of claim against an NRC licensee. According to the Ninth Circuit, the Hobbs Act bars litigation of both species of claims in federal court. This Court should grant certiorari to resolve this contradiction.

IV. This Petition Raises Urgent Issues That Must Be Addressed Now.

This is not a "wait and see" case that would benefit from further percolation in the lower courts. This Court will likely need to address the breadth of the Hobbs Act in this and other contexts; and waiting until after a nuclear release to address whether the Hobbs Act precludes a PAA claim against NRC licensees will have profound human and economic consequences.

Whether or not private parties can assert a PAA claim in federal court is all the more pressing because Congress' continued failure to develop any long-term plan for SNF storage makes future PAA litigation increasingly likely. *New York*, 681 F.3d at 474; *In re Aiken County*, 645 F.3d at 430-31 (compiling cases regarding the long-term storage and disposal of nuclear waste). Without a long-term solution, stockpiles at these "temporary" sites continue to grow. 86

nuclear facilities across the United States are being decommissioned now, and 34 states have at least one ISFSI location.[12] By 2050, the national SNF stockpile will reach 150,000 metric tons by conservative estimates. Blue Ribbon Commission, *supra*, at 14. It is hard to overstate the dangers posed by the sheer mass of SNF and its long-lasting effects. *New York*, 681 F.3d at 474. But under the Ninth Circuit's view, those most likely to be affected by tortious activities associated with the storage or transport of SNF have no judicial forum, state or federal, to assert claims against private parties potentially responsible for those activities.

The Ninth Circuit's view also has implications beyond nuclear power regulation. This Court has already seen the growing body of case law interpreting the Hobbs Act to reach well beyond its text and Congress' intentions. *See PDR Network*, 139 S. Ct. at 2057-67 (Kavanaugh, J., concurring); *Gorss Motels*, 931 F.3d at 1106-10. The Ninth Circuit's interpretation expands the breadth of the Hobbs Act even further. Instead of simply precluding district courts from reviewing an agency interpretation of a federal statute—hereby undermining "the 'province and duty of the judicial department to say what the law is,'" *PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring) (quoting *Marbury,* 5 U.S. 137)—the Ninth Circuit would deprive federal courts from *reviewing* the conduct of *any* private parties licensed by a federal agency.

The decision also improperly expands the putatively-exclusive jurisdiction of each of the Hobbs Act's listed

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[12] *Sites Undergoing Decommissioning*, Nuclear Regulatory Commission, https://www.nrc.gov/info-finder/decommissioning/index.html (last visited May 27, 2021); *U.S. Independent Spent Fuel Storage Installations*, Nuclear Regulatory Commission, https://www.nrc.gov/waste/spent-fuel-storage/map-fuel-storage-facilities.pdf (last visited May 27, 2021).

agencies, *i.e.*, the Federal Communications Commission, the Departments of Agriculture and Transportation, the Federal Maritime Commission, the Surface Transportation Board, and the Federal Railroad Administration. By the Ninth Circuit's logic, "decisions that [a]re ancillary or incidental to" these agencies' "final orders" effectively deprive private litigants of state and federal causes of action where those decisions are simply in the background of the dispute. (App., *infra*, 49a). This has far-reaching consequences for countless areas of administrative law.

This petition enables the Court to address the overbreadth of the Hobbs Act and the time-sensitive issue of nuclear regulation and public safety.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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May 2021

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED DECEMBER 29, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-56531

PUBLIC WATCHDOGS, A CALIFORNIA 501(C)(3) CORPORATION,

Plaintiff-Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY; SAN DIEGO GAS & ELECTRIC COMPANY; SEMPRA ENERGY; HOLTEC INTERNATIONAL; U.S. NUCLEAR REGULATORY COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California.
D.C. No. 3:19-cv-01635-JLS-MSB
Janis L. Sammartino, District Judge, Presiding.

June 3, 2020, Argued and Submitted,
Pasadena, California
December 29, 2020, Filed

Appendix A

Before: Johnnie B. Rawlinson and N. Randy Smith, Circuit Judges, and Edward R. Korman,* District Judge. Opinion by Judge N. Randy Smith.

Opinion by Judge N. Randy Smith

SUMMARY**

Hobbs Act

The panel affirmed the district court's dismissal of a complaint for lack of subject-matter jurisdiction under the Administrative Orders Review Act, frequently referred to as the Hobbs Act.

Under the Hobbs Act, courts of appeals have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of all final orders of the United States Nuclear Regulatory Commission made reviewable by section 2239 of title 42. Section 2239 also provides for Hobbs Act review of "[a]ny final order entered in any proceeding," 42 U.S.C. § 2239(b)(1), "for the granting, suspending, revoking, or amending of any license . . . and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees," *id.* § 2239(a)(1)(A).

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* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Appendix A

Plaintiff-Appellant Public Watchdogs, a non-profit corporation advocating for public safety, brought an action against the NRC and others alleging claims related to the decommissioning of two nuclear generating units at San Onofre Nuclear Generating Station (SONGS). In 2015, after the units ceased operating, the NRC approved changes to the Facility Operating Licenses by amending the licensing agreements with Southern California Edison Company and San Diego Gas & Electric Company. The 2015 License Amendments required the utility defendants to take actions necessary to decommission the plants and continue to maintain the facility, including the storage, control and maintenance of the spent nuclear fuel, in a safe condition. As part of the decommissioning plan, the utility defendants elected to use private defendant Holtec International's HI-STORM UMAX Canister Storage System ("Holtec System"), a canister-based spent nuclear fuel storage system that had been approved for the storage of spent nuclear fuel by the NRC in a Certificate of Compliance. Public Watchdog sought to enjoin the defendants' allegedly negligent decommissioning activities at SONGS and challenged, among other things, the NRC's selection of Holtec International as the supplier of the spent nuclear fuel storage system and the NRC's grant of the 2015 License Amendments.

The panel held that the Hobbs Act must be interpreted broadly to encompass not only all final NRC actions in licensing proceedings, but also all decisions that are preliminary, ancillary, or incidental to those licensing proceedings. Because Public Watchdogs's complaint challenged final orders of the NRC related to licensing,

the NRC's enforcement decisions related to NRC licenses and certifications, and conduct licensed or certified by the NRC, Public Watchdogs's action fell squarely within the scope of the Hobbs Act.

Specifically, the panel held that the district court correctly determined that Public Watchdogs's claim under the Administrative Procedure Act ("APA") directly challenged the grant of the 2015 License Amendments and the Certificate of Compliance for the Holtec System. The panel held that the 2015 License Amendments and the Certificate of Compliance were final orders of the NRC and related to the grant or amendment of a license or the issuance or modification of rules and regulations dealing with the activities of licensees. Accordingly, under the Hobbs Act, the court of appeals had exclusive jurisdiction to enjoin, set aside, suspend or to determine the validity of those orders. The district court therefore correctly found that it lacked subject-matter jurisdiction over Public Watchdogs's claim brought under the APA against the NRC to the extent it challenged the 2015 License Amendments and the Certificate of Compliance for the Holtec System.

The panel rejected Public Watchdog's argument that the district court had subject-matter jurisdiction over its APA claim because other agency actions, including a decision exempting Holtec from certain pre-approval requirements for canister design changes, fell outside the scope of the Hobbs Act. The panel held that even assuming Public Watchdogs's APA claim did not challenge the grant of the 2015 License Amendments or the Certificate of

Compliance for the Holtec System, Public Watchdogs's APA claim related to other agency actions still fell within the scope of the Hobbs Act because it challenged the NRC's enforcement "decisions *not* to suspend" a license or licensed operations and sought relief that should have first been pursued before the NRC pursuant to 10 C.F.R. § 2.206.

The panel held that Public Watchdogs's claims against private defendants, Holtec International and the utility defendants, fell within the scope of the Hobbs Act. The panel held that despite Public Watchdogs's artful pleading, it was clear its claims against these private defendants were an attempt to challenge the 2015 License Amendments, the Certificate of Compliance for the Holtec System, and actions taken by the licensees under the authority of both of those final NRC orders. Public Watchdogs, therefore, could not avoid the Hobbs Act's exclusive avenue of judicial review by pleading its challenge to the 2015 License Amendments and the Certificate of Compliance for the Holtec System as a public liability action under the Price-Anderson Act, or as a public nuisance claim or a strict products liability claim under California law.

Appendix A

OPINION

N.R. SMITH, Circuit Judge:

Under the Administrative Orders Review Act—frequently referred to as the Hobbs Act—courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [United States Nuclear Regulatory Commission ("NRC")] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). Section 2239 also provides for Hobbs Act review of "[a]ny final order entered in any proceeding," 42 U.S.C. § 2239(b)(1), "for the granting, suspending, revoking, or amending of any license . . . and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees," *id.* § 2239(a)(1)(A). Because the scope of the Hobbs Act must be read broadly, the Hobbs Act thus encompasses not only all final NRC orders in licensing proceedings, but all NRC decisions that are preliminary, ancillary, or incidental to those licensing proceedings. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 743, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985); *Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 539 (9th Cir. 1996).

Plaintiff—Appellant Public Watchdogs, a non-profit corporation advocating for public safety, appeals the district court's dismissal with prejudice of its first amended complaint for a lack of subject-matter jurisdiction under the Hobbs Act. Because Public Watchdogs's complaint challenges final orders of the NRC related to licensing, NRC enforcement decisions related to NRC licenses and

certifications, and conduct licensed or certified by the NRC, Public Watchdogs's action falls squarely within the scope of the Hobbs Act. Therefore, we affirm the district court's dismissal of Public Watchdogs's first amended complaint with prejudice for a lack of subject-matter jurisdiction under the Hobbs Act.

I. BACKGROUND

A. The NRC Regulates the Construction and Operation of Nuclear Power Plants and Spent Fuel Storage Facilities, and the Storage of Spent Nuclear Fuel

The NRC is an independent regulatory commission established by Congress in the Energy Reorganization Act of 1974 ("ERA"). *See* 42 U.S.C. § 5841(a)(1). The ERA transferred "all the licensing and related regulatory functions of the Atomic Energy Commission" to the NRC. *Id.* § 5841(f). Under the Atomic Energy Act of 1954 ("AEA"), the NRC is tasked with licensing and regulating civilian storage and use of radioactive material to promote the common defense and security and public health and safety. *See id.* § 2201(b), (h), (i); *see also id.* §§ 2131-33. "Consistent with its administrative mandate, the NRC is empowered to promulgate rules and regulations governing the construction and operation of nuclear power plants." *Cnty. of Rockland v. U.S. Nuclear Regulatory Comm'n*, 709 F.2d 766, 769 (2d Cir. 1983); *see also* U.S. Nuclear Regulatory Comm'n, NUREG-1350, vol. 31, 2019-2020 Information Digest 34 (2019) [hereinafter NRC Information Digest] ("The NRC establishes requirements

for the design, construction, operation, and security of U.S. commercial nuclear power plants."). Accordingly, the NRC has promulgated extensive regulations governing the agency's issuance of licenses to construct and operate nuclear power plants and fuel storage facilities and to possess spent nuclear fuel. *See* 10 C.F.R. Parts 50, 52, 72.

If a person's interests will be affected by an NRC proceeding "for the granting, suspending, revoking, or amending of any license or construction permit" or by a "proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees," then that person may request a hearing before the NRC. 42 U.S.C. § 2239(a)(1)(A). However, the hearing request must state "that one or more of the acceptance criteria in the . . . license ha[s] not been, or will not be met, and the specific operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety." *See id.* § 2239(a)(1)(B)(ii). Regardless of whether a hearing is requested or actually held, the NRC's final order in these proceedings is subject to initial judicial review in the courts of appeals under the Hobbs Act. *See id.* § 2239(b)(1); 28 U.S.C. § 2342(4); *see also Lorion*, 470 U.S. at 737 ("Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings whether or not a hearing before the [NRC] occurred or could have occurred.").

Aside from the NRC's licensing and rule-making responsibilities, the agency is also responsible for: (1) "conducting criminal, civil, and administrative

investigations of alleged violations by NRC licensees"; (2) "inspecting NRC licensees to ensure adequate performance of safety and security programs"; and (3) "enforcing NRC regulations and the conditions of NRC licenses and imposing, when necessary, civil sanctions and penalties." NRC Information Digest at 5; *see also* 42 U.S.C. § 2282 (authorizing the NRC to issue civil penalties for licensing or certification violations). Relatedly, the NRC may issue orders modifying, suspending, or revoking a license to remedy license violations or other "potentially hazardous conditions." *See* 10 C.F.R. § 2.202. The NRC regulations also provide a mechanism through which "[a]ny person" may file a request with the NRC to "institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." 10 C.F.R. § 2.206(a).

The NRC also regulates the storage of spent nuclear fuel ("SNF"), which is the radioactive byproduct that results from the "burning" of nuclear fuel (i.e., uranium fuel rods bundled into fuel assemblies) in nuclear reactors. *See* U.S. Nuclear Regulatory Comm'n, NUREG/BR-0528, Safety of Spent Fuel Storage at 1 (April 2017) [hereinafter NRC Spent Fuel Storage]; *see generally* 10 C.F.R. Part 72. After SNF is removed from a nuclear reactor, it is first stored in deep pools of continuously flowing water that cool the spent fuel. NRC Information Digest at 70-71; NRC Spent Fuel Storage at 1. Once the SNF has cooled sufficiently, it is often transferred into dry casks. Information Digest 71-72; NRC Spent Fuel Storage at 1-2. Dry casks are "typically made of leak-tight, welded, and bolted steel and concrete surrounded by another layer of

steel or concrete." NRC Information Digest at 68. There are two basic designs of dry casks that are widely used to store SNF: (1) a canister-based system that utilizes an inner steel canister that contains the SNF that is then surrounded by three feet or more of steel and concrete; and (2) a "bolted cask system" that does not have an inner canister but instead encases the SNF in "thick steel shells, sometimes with several inches of radiation shielding inside." NRC Spent Fuel Storage at 2. The dry casks are normally stored on site in facilities called independent spent fuel storage installations ("ISFSI"). NRC Information Digest at 68.

The NRC regulates the on-site storage of SNF in one of two ways: (1) it grants a site-specific license based on a safety review of the technical requirements and operating conditions for the specific ISFSI; or (2) it issues a general license that authorizes the licensee to store SNF in dry storage casks certified by the NRC for the storage of SNF. *See id.*; *see also* 10 C.F.R. § 72.210 (issuing a general license for the storage of spent fuel in an ISFSI for individuals "authorized to possess or operate nuclear power reactors under" 10 C.F.R. Parts 50 or 52). The NRC regulations impose several conditions on a general licensee, including requiring the licensee to use only "casks approved under the provisions of this part" and ensuring the cask used by the licensee "conforms to the terms, conditions, and specifications of a [Certificate of Compliance] or amended [Certificate of Compliance] listed in § 72.214." 10 C.F.R. § 72.212(a)(2), (b)(3). Once the NRC approves a dry cask for the storage of SNF under the specific conditions noted in the Certificate of Compliance, it adds the approved

cask system to a list of approved storage systems. *See id.* § 72.214 (listing approved casks for storage of SNF).

Prior to the NRC's approval of a cask for storage of SNF in a Certificate of Compliance, the agency subjects the storage system to a rigorous review process, including public scrutiny through notice-and-comment rule making. *See, e.g., id.* § 72.232 (requiring the applicant for a Certificate of Compliance to: (1) allow the NRC "to inspect the premises and facilities where a spent fuel storage cask is designed, fabricated, and tested"; (2) "make available to the NRC for inspection . . . records kept by them pertaining to the design, fabrication, and testing of spent fuel storage casks"; and (3) "perform . . . tests that the [NRC] deems necessary or appropriate"); *id.* § 72.236 (listing the specific requirements for spent fuel storage casks). Ultimately, the NRC only certifies for use those systems that meet certain requirements for safely storing SNF. *See id.* § 72.238 (providing that a Certificate of Compliance for a storage cask will be issued by the NRC if the requirements in § 72.236(a though (i)) are satisfied).

Thus, under the terms of its operating license and the relevant Certificate of Compliance, an NRC nuclear power reactor licensee may store SNF on site in an ISFSI in a dry storage cask certified by the NRC. *See id.* §§ 72.210, 72.212.

B. The NRC's Grant of a License Amendment to the SONGS Licensees and Certification of Holtec International's HI-STORM UMAX Canister Storage System for the Storage of Spent Nuclear Fuel at SONGS

In August 1963, Congress enacted Public Law 88-82 that authorized the "construction, operation, maintenance, and use" of a nuclear power plant on the Camp Pendleton military base in Southern California. Act of July 30, 1963, Pub. L. No. 88-83, 77 Stat. 115. Thereafter, three nuclear electric generating units were constructed and operated at San Onofre Nuclear Generating Station ("SONGS") pursuant to permits and licenses issued by the NRC. The NRC issued three separate Facility Operating Licenses—one for each unit—to Southern California Edison Company ("Edison") and San Diego Gas & Electric Company ("SDG&E"), the co-licensees of SONGS.[1] All three licenses permitted the Utility Defendants to possess and store spent fuel at SONGS.

The first nuclear generating unit operated from 1968 until 1992. The second and third units operated from 1983 and 1984, respectively, until both units ceased operation and began the decommission process in 2013. In 2015, after the Utility Defendants ceased operation of the second and third nuclear generating units, the NRC approved changes to the Facility Operating Licenses for Units 2 and 3 by amending the license agreements ("2015

1. Edison, SDG&E, and SDG&E's parent company, Sempra Energy ("Sempra"), are collectively referred to as the "Utility Defendants."

License Amendments"). The 2015 License Amendments require the Utility Defendants to "[t]ake actions necessary to decommission the plant and continue to maintain the facility, including . . . the storage, control and maintenance of the spent fuel, in a safe condition."

The NRC's review of the 2015 License Amendments was open to public comment and intervention. *See* Biweekly Notice, Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 79 Fed. Reg. 55,507, 55,508, 55,513-14 (Sept. 16, 2014) (soliciting comments on the NRC's determination that the 2015 License Amendments involved "no significant hazards consideration" and informing the public they could request a hearing before the NRC). However, the NRC received no comments. *See* Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 46,345, 46,354 (Aug. 4, 2015).

Although the SNF at SONGS had historically been stored in wet-storage pools, the Utility Defendants' decommissioning plan required the SNF to be buried in dry casks in the SONGS ISFSI. The Utility Defendants elected to use Holtec International's ("Holtec") HI-STORM UMAX Canister Storage System ("Holtec System"), a canister-based SNF storage system that had been approved for the storage of SNF by the NRC in a Certificate of Compliance. The Holtec System consists of three components: "(1) interchangeable multi-purpose canisters . . . , which contain the fuel; (2) underground

Vertical Ventilated Modules . . . , which contain[] the [canisters] during storage; and (3) a transfer cask . . . , which contains the [canisters] during loading, unloading and transfer operations."

Like the 2015 License Amendments, the public had the opportunity to provide comments concerning the NRC's evaluation and approval of the Holtec System. *See* List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM Underground Maximum Capacity Canister Storage System, Certificate of Compliance No. 1040, 80 Fed. Reg. 12,073, 12,074-76 (Mar. 6, 2015) (codified at 10 C.F.R. § 72.214) (responding to public comments related to the addition of the Holtec System to the list of approved spent fuel storage casks); *see also* List of Approved Spent Fuel Storage Casks: Holtec International HI-STORM UMAX Canister Storage System, Certificate of Compliance No. 1040, Amendment No. 1, 80 Fed. Reg. 35,829, 35,829-30 (June 23, 2015) (codified at 10 C.F.R. § 72.214) (soliciting public comments related to the direct final rule amending the certificate of compliance to include the "seismically enhanced version of the HI-STORM UMAX Canister Storage System"); List of Approved Spent Fuel Storage Casts: Holtec International HI-STORM UMAX Canister Storage System; Certificate of Compliance No. 1040, Amendment No. 2, 81 Fed. Reg. 73,335, 73,336 (Oct. 25, 2016) (codified at 10 C.F.R. § 72.214) (soliciting public comments related to the direct final rule amending the Certificate of Compliance to include new fuel types).

The Preliminary Safety Evaluation Report, issued in connection with the Certificate of Compliance for the Holtec System, documented the NRC's review and evaluation of the Holtec System. Therein, the NRC considered the Holtec System's shielding and radiation protection; its susceptibility to chemical, galvanic, or other reactions; and its potential performance in the event of an accident. Ultimately, the NRC concluded that the activities authorized by the Holtec System Certificate of Compliance could "be conducted without endangering the health and safety of the public" and could "be conducted in compliance with the applicable regulations of [10 C.F.R. Part 72]."

In response to public comments, the NRC reiterated that "the design [of the Holtec System] is robust, and contains numbers of layers of acceptable confinement systems in compliance with [10 C.F.R. Part 72] requirements." 80 Fed. Reg. at 12,074-75. The NRC also emphasized that it "evaluated the susceptibility to and effects of stress corrosion cracking and other corrosion mechanisms on safety significant systems" and concluded that the Holtec System "will safely store SNF and prevent radiation releases and exposure consistent with regulatory requirements." *Id.* at 12,075.

C. The Decommissioning of SONGS

On August 29, 2019, Public Watchdogs brought suit against Edison, SDG&E, Sempra, Holtec, and the NRC (collectively, "Defendants"), seeking to enjoin Defendants' allegedly negligent decommissioning activities at SONGS. In its First Amended Complaint ("FAC"), Public

Watchdogs challenges the NRC's selection of Holtec as the supplier of the SNF storage system and the NRC's grant of the 2015 License Amendments. For example, Public Watchdogs alleges that: (1) the NRC's selection of Holtec as the supplier of the SNF storage system was done recklessly or in conscious disregard for the safety and competency issues that have surrounded Holtec for years; and (2) the NRC's grant of the 2015 License Amendments was arbitrary, capricious, or otherwise unlawful.

Public Watchdogs's allegations also challenge the Holtec SNF canisters that were certified for the storage of SNF by the NRC in a Certificate of Compliance. In fact, Public Watchdogs alleges that: (1) the design of the Holtec SNF canisters "deviates from the acceptable minimum safety thresholds required for the design and manufacture of nuclear waste storage containers"; and (2) Holtec made changes to the design of the Holtec SNF canisters after the NRC's certification of the Holtec System without the authorization of the NRC and those design changes rendered several of the Holtec SNF canisters defective.[2] Despite the NRC learning of the allegedly defective Holtec SNF canisters, Public Watchdogs argues the NRC "failed to act" and permitted the Utility Defendants to continue loading the Holtec SNF canisters.

Public Watchdogs's FAC also complains of the Utility Defendants' allegedly negligent decommissioning conduct,

2. Public Watchdogs complains that the NRC declined to impose a civil fine on Holtec for its failure to seek pre-authorization of the design change that allegedly rendered several Holtec SNF canisters defective.

including allegations that: (1) the Utility Defendants negligently "gouged" a number of Holtec SNF canisters as they buried them in the SONGS ISFSI; and (2) many Holtec SNF canisters were negligently scratched during transportation to the SONGS ISFSI. Public Watchdogs's allegations related to decommissioning conduct also highlight two instances (one in July 2018 and one in August 2018) where the Utility Defendants mishandled loaded Holtec SNF canisters as they were transferred into the SONGS ISFSI and subsequently failed to report those incidents to the NRC.

In response to the August incident where the Utility Defendants mishandled a loaded Holtec SNF canister, the NRC issued an Inspection Charter for SONGS. The scope of the special inspection sought to evaluate, *inter alia*, the adequacy of the Utility Defendants' loading procedures, corrective actions, and reporting procedures. In the Inspection Charter, the NRC noted that the Utility Defendants voluntarily committed to not resuming their SNF transfer operations until the NRC's inspection and review was complete. Public Watchdogs argues, however, that the NRC should have ordered the Utility Defendants to cease SNF transfer operations.

Public Watchdogs also points to a number of NRC issued Inspection Reports that identified various violations related to the Utility Defendants' and Holtec's decommissioning conduct at SONGS. For example, in March 2019, the NRC issued a Notice of Violation and NRC Special Inspection Report to Edison for two safety violations that occurred at SONGS on August 3, 2018, the

date of the second incident where the Utility Defendants mishandled a loaded Holtec SNF canister as it was loaded into the ISFSI. The two violations allegedly related to the Utility Defendants "failure to make certain that safety equipment was operating" and their "failure to report the safety incident to the NRC." Ultimately, the NRC imposed on Edison a $116,000 fine.

Finally, on July 15, 2019, the Utility Defendants informed the public that they were resuming the movement of SNF from wet storage to the Holtec SNF canisters and were resuming the burial of the canisters in the SONGS ISFSI.

D. Procedural History

Based on the above allegations, Public Watchdogs asserted: (1) the NRC violated the Administrative Procedure Act, 5 U.S.C. §§ 702 *et seq.*; (2) Edison, SDG&E, Sempra, and Holtec (collectively, "the Private Defendants") violated the Price—Anderson Act, 42 U.S.C. § 2210(n)(2); (3) the Private Defendants violated California's public nuisance laws, Cal. Civ. Code §§ 3479-80; and (4) Holtec was liable under a strict products liability theory. Public Watchdogs also filed a motion for preliminary injunction and a temporary restraining order that sought to restrain Defendants from transferring additional SNF into the Holtec SNF canisters and, in turn, the SONGS ISFSI.

Defendants opposed Public Watchdogs's request for a temporary restraining order and moved to dismiss the FAC for a lack of subject-matter jurisdiction and for

failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

After commencing proceedings in the district court, Public Watchdogs also filed a petition with the NRC pursuant to 10 C.F.R. § 2.206, requesting the NRC suspend all decommissioning operations at SONGS and require Edison and SDG&E to submit an amended decommissioning plan that accounted for the long term storage of SNF at SONGS. In addition to arguing the requested relief was appropriate, because the NRC permitted Edison and SDG&E "to implement their decommissioning plan based on the unreasonable assumption that spent nuclear fuel will be stored at SONGS only temporarily," Public Watchdogs also argued it was entitled to the requested relief, because Edison and SDG&E's burial of SNF at SONGS posed "an imminent threat to public safety."

Public Watchdogs's allegations supporting its petition with the NRC pursuant to 10 C.F.R. § 2.206 closely mirror those allegations in the FAC. For example, Public Watchdogs alleges in the § 2.206 petition that the "Holtec dry storage canisters . . . are defective and unfit for the indefinite storage of [SNF]" and that Holtec "secretly modified the design and manufacture of the canisters" so that they are no longer "design[ed], manufacture[d], [or] supplie[d]" in conformity with the Certificate of Compliance approving their use. Public Watchdogs's petition also complains that, due in part to the defective design of the Holtec System, "extensive gouging [of the canisters] occur[ed] during routine loading into the

storage system" and there is no way to monitor, inspect, or fix the canisters once they are in the ground. As with the FAC, Public Watchdogs alleges in the petition that Edison and SDG&E "negligently gouged and then buried . . . fully loaded [Holtec] canisters at SONGS" and "many (if not all) of the canisters were negligently scratched during transportation to the ISFSI." Also similar to the FAC, Public Watchdogs's petition complains of Edison and SDG&E's failure to disclose the two mishandling incidents discussed above and the NRC's inadequate response thereto.

While Defendants' motions to dismiss in the instant suit and the § 2.206 petition before the NRC were still pending, Public Watchdogs filed an emergency petition for writ of mandamus with the Ninth Circuit Court of Appeals that sought to immediately suspend decommissioning operations at SONGS until the NRC resolved Public Watchdogs's pending § 2.206 petition. We denied the writ of mandamus, reasoning that "the petition requesting suspension ha[d] only been before the NRC for a short period of time, and the NRC ha[d] represented to the Court in its response that it [was] processing the petition and ha[d] not engaged in delay." *In re Public Watchdogs*, No. 19-72670, Dkt. No. 19, at 4.

On December 3, 2019, the district court granted Defendants' motions to dismiss, denied Public Watchdogs's motion for preliminary injunction, and dismissed Public Watchdogs's FAC with prejudice. The district court held Public Watchdogs had standing to pursue injunctive relief against the Private Defendants, reasoning the allegations

in the FAC were sufficient to allege Article III standing and satisfy the injury-in-fact requirement, because the allegations tended to show "there is a 'credible threat' that a probabilistic harm will materialize."[3] *Pub. Watchdogs v. S. Cal. Edison Co.*, No. 19-CV-1635 JLS (MSB), 2019 U.S. Dist. LEXIS 208372, 2019 WL 6497886, at *7 (S.D. Cal. Dec. 3, 2019) (unpublished) (quoting *Nat. Res. Def. Council v. U.S. Envtl. Prot. Agency*, 735 F.3d 873, 878 (9th Cir. 2013)).

The district court next concluded that all of Public Watchdogs's claims challenged NRC decisions that fell within the scope of the Hobbs Act, thereby depriving it of subject-matter jurisdiction over the action. *See* 2019 U.S. Dist. LEXIS 208372, [WL] at *8-12. With respect to Public Watchdogs's claim against the NRC, the district court found it lacked subject-matter jurisdiction: (1) because the claim challenged the grant or amendment of 2015 License Amendments and the Certificate of Compliance for the Holtec System (both final orders of the NRC relating to the grant or amendment of a license for the purpose of the Hobbs Act); and (2) because the claim's challenge to "the Other Agency Actions" touched upon "issues preliminary or ancillary to" the 2015 License Amendments and the Certificate of Compliance for the Holtec System. 2019 U.S. Dist. LEXIS 208372, [WL] at *9-10.

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3. The district court also concluded that Public Watchdogs did not have standing to contest the NRC's grant of two exemptions related to the use of decommissioning trust funds and certain insurance requirements. Public Watchdogs does not challenge these conclusions on appeal.

Similarly, with respect to Public Watchdogs's various claims against the Private Defendants, the district court determined it lacked subject-matter jurisdiction, because all of Public Watchdogs's claims "trace[d] back to actions that were taken pursuant to or that were incidental to the NRC's issuance of the . . . 2015 License Amendment or the [C]ertificate of [C]ompliance for the Holtec canisters, actions that must be challenged before the Ninth Circuit pursuant to the Hobbs Act." 2019 U.S. Dist. LEXIS 208372, [WL] at *11.

After concluding it lacked subject-matter jurisdiction over the action, the district court proceeded to grant the Private Defendants' motions to dismiss for failure to state a claim, finding all of Public Watchdogs's claims against the Private Defendants were preempted or failed to allege facts sufficient to state a claim for relief. *See* 2019 U.S. Dist. LEXIS 208372, [WL] at *13-18. Finally, the district court denied Public Watchdogs's motion for a preliminary injunction, because it was unlikely to succeed on the merits considering the district court lacked subject-matter jurisdiction over the action, and Public Watchdogs failed to state a plausible claim for relief. *See* 2019 U.S. Dist. LEXIS 208372, [WL] at *19. Public Watchdogs appealed the district court's decision to us.

After Public Watchdogs appealed the district court's order dismissing the instant action, the NRC denied Public Watchdogs's § 2.206 petition, and Public Watchdogs filed a Petition for Judicial Review directly with us

challenging the NRC's denial of its § 2.206 petition.[4] *See Pub. Watchdogs v. Nuclear Regulatory Comm'n*, No. 20-70899 (9th Cir. Mar. 30, 2020).[5]

II. STANDARD OF REVIEW

"We review de novo the district court's determination that it lacked subject matter jurisdiction because of the Hobbs Act." *Carpenter v. Dep't of Transp.*, 13 F.3d 313, 314 (9th Cir. 1994).

III. DISCUSSION

We must first determine whether the district court correctly held that it lacked subject-matter jurisdiction over Public Watchdogs's suit against Defendants. To answer this question, we must determine the appropriate scope of the Hobbs Act and then consider whether Public Watchdogs's claims challenged decisions that fall within the scope of the Hobbs Act.

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4. While Public Watchdogs's initial § 2.206 petition was pending, Public Watchdogs filed another § 2.206 petition that sought to "immediately suspend decommissioning operations at [SONGS] Units 2 and 3 on the grounds that the present ISFSI is operating in an unanalyzed condition," i.e., a potential flooding threat.

5. This petition is pending review.

A. The Scope of the Hobbs Act Encompasses All Final Orders of the NRC Related to Licensing and All Decisions of the NRC Preliminary, Ancillary, or Incidental Thereto

"[T]he Administrative Orders Review Act, 28 U.S.C. § 2342, commonly referred to as the Hobbs Act," *Gen. Atomics*, 75 F.3d at 538, provides courts of appeals with "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [NRC] made reviewable by section 2239 of title 42," 28 U.S.C. § 2342(4).[6] Section 2239, in turn, provides for Hobbs Act review of "[a]ny final order entered in any proceeding," 42 U.S.C. § 2239(b)(1), "for the granting, suspending, revoking, or amending of any license . . . , and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees," *id.* § 2239(a)(1)(A).

The district court held that the Hobbs Act must be read broadly to encompass issues preliminary or ancillary to licensing proceedings. Public Watchdogs, however, argues that the Hobbs Act should be construed narrowly to exclude from district court review only actions where the NRC is called upon to grant, suspend, revoke, or

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6. The language of the statute "actually refers to final orders of the Atomic Energy Commission . . . , which has been abolished and whose functions have been transferred in large part to the NRC." *Gen. Atomics*, 75 F.3d at 538 n.2. However, "final orders entered by the NRC in the performance of functions transferred from the [Atomic Energy Commission] are reviewable as if they had been made by the [Atomic Energy Commission]." *Id.*

amend a license. We disagree; the Hobbs Act must not be construed so narrowly.

In *Lorion*, the Supreme Court addressed whether the NRC's denial of a § 2.206 petition "should be considered a final order initially reviewable exclusively in the court of appeals" under the Hobbs Act. 470 U.S. at 734-35. After determining that the language of § 2239 was ambiguous, *id.* at 736, the Court examined certain "indicia of congressional intent" and concluded that "Congress intended to provide for initial court of appeals review of all final orders in licensing proceedings," regardless of whether a formal hearing occurred, *id.* at 737. Looking to the relevant legislative history, the Court found that the evolution of the judicial review provision, which evolved independently of the hearing provision, supported its conclusion that Congress intended "to provide for initial court of appeals review of *all* final orders in licensing proceedings," including "Commission decisions *not* to suspend, revoke, or amend" a license. *Id.* at 738-39 (first emphasis added). The Court explained that, "[w]hen Congress decided on the scope of judicial review, it did so solely by reference to the subject matter of the Commission action and not by reference to the procedural particulars of the Commission action." *Id.* at 739. Thus, after also crediting the "basic congressional choice of Hobbs Act review" in § 2239, *id.* at 740, the Supreme Court held that § 2239 vests in the federal courts of appeals initial subject-matter jurisdiction over NRC orders denying § 2.206 petitions, *id.* at 746.

The Court bolstered its conclusion by examining the irrational consequences that would flow from the adoption of the contrary rule announced by the lower court—i.e., that § 2239 vested the courts of appeals with initial subject-matter jurisdiction only over proceedings where a hearing took place or over proceedings where a hearing could have taken place. *Id.* at 741. If initial review in the courts of appeals depended on whether a hearing actually occurred before the agency, then some licensing proceedings would be reviewed in the courts of appeals while others would not based solely on "the 'fortuitous circumstance' of whether an interested person requested a hearing." *Id.* at 741-42 (quoting *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193, 196-97, 100 S. Ct. 1093, 63 L. Ed. 2d 312 (1980) (per curiam)). "Absent a far clearer expression of congressional intent," however, the Court was unwilling to sanction "such a seemingly irrational bifurcated system." *Id.* at 742 (quoting *Crown Simpson Pulp Co.*, 445 U.S. at 197). The Court further explained that, "[i]f initial review in the court of appeals hinged on whether a hearing *could have taken place* had an interested person requested one," this could "cause bifurcation of review of orders issued in the same proceeding." *Id.* at 742-43. Again, absent specific evidence of a contrary congressional intent, the Court "held that review of orders resolving *issues preliminary or ancillary to the core issue* in a proceeding should be reviewed in the same forum as the final order resolving the core issue." *Id.* at 743 (emphasis added). Ultimately, recognizing there was no "firm indication that Congress intended to locate initial [Administrative Procedure Act ("APA")] review of agency action in the district courts," the Court refused to "presume that Congress intended to

depart from the sound policy of placing initial APA review in the courts of appeals." *Id* at 745.

Relying on *Lorion*, we held in *General Atomics* that "the Hobbs Act is to be read *broadly* to encompass all final [NRC] decisions that are *preliminary or incidental* to licensing." 75 F.3d at 539 (emphasis added). We further explained that § 2239 should be "read liberally." *Id.* Thus, reading the Hobbs Act broadly and interpreting § 2239 liberally, we concluded that a district court action challenging an NRC order that a parent company must "assure the cleanup costs" of its subsidiary (the actual NRC licensee) fell within the auspices of the Hobbs Act. *Id.* at 537, 539. We explained that the goal of the NRC hearing (which had been initiated but not yet completed at the time the appellant filed the district court action) was to determine whether the parent company was, in fact, a licensee. *Id.* at 539. Such a hearing, we determined, fell squarely within the Hobbs Act, because it "directly involve[d] the granting and possible amending of the license." *Id.*[7]

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7. Public Watchdogs points to no caselaw of our circuit or of the Supreme Court that calls into question *General Atomic*'s conclusion—which is anchored by the Supreme Court's *Lorion* decision—that the Hobbs Act must be construed broadly to encompass decisions that are preliminary or incidental to licensing. Our circuit precedent remains binding until the Supreme Court "undercut[s] the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Public Watchdogs principally relies on Justice Kavanaugh's concurring opinion in *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2057-67, 204 L. Ed. 2d 433 (2019), to argue that the district court's "sweeping

Thus, in view of *Lorion* and *General Atomics*, it is clear we must read the Hobbs Act broadly to encompass not only all final NRC actions in licensing proceedings, but also all decisions that are preliminary, ancillary, or incidental to those licensing proceedings. *See Lorion*, 470 U.S. at 737, 743; *Gen. Atomics*, 75 F.3d at 539.[8]

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interpretation of the Hobbs Act" is incorrect. However, aside from the fact that concurring opinions have no binding precedential value, *see Maryland v. Wilson*, 519 U.S. 408, 412-13, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997), nothing in Justice Kavanaugh's concurrence undercuts the reasoning of *General Atomics* such that the cases are "clearly irreconcilable," *Miller*, 335 F.3d at 900. In fact, Justice Kavanaugh's concurrence addressed a question wholly irrelevant to the case at hand—whether the Hobbs Act required a district court to accept the Federal Communication Commission's legal interpretation of the Telephone Consumer Protection Act in a subsequent private enforcement action. *See PDR Network, LLC*, 139 S. Ct. at 2058 (Kavanaugh, J., concurring).

8. Our sister circuits have reached similar conclusions. *See, e.g., Citizens Awareness Network, Inc. v. United States*, 391 F.3d 338, 346-47 (1st Cir. 2004) (recognizing that *Lorion* requires courts to interpret the Hobbs Act "broadly" to "maximize the availability of initial circuit court review of licensing proceedings" and holding that "original jurisdiction in the courts of appeals is proper to review any NRC action that could be cognizable in a petition for review from a proceeding under [§] 2239"); *N.J., Dep't of Envtl. Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 410 (3d Cir. 1994) (recognizing the Hobbs Act is to be "liberally construed to allow exclusive jurisdiction in the court of appeals" (quoting *Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1214 (3d Cir. 1992))); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 612 (7th Cir. 1987) (recognizing that "issues preliminary or ancillary to the core issue" in a licensing proceeding should be reviewed in the same forum as the final order resolving the core licensing issue).

B. Public Watchdogs's Claim Challenged Decisions that Fall Within the Scope of the Hobbs Act

Having determined the appropriate scope of the Hobbs Act, we must now determine whether Public Watchdogs's causes of action against the NRC and the Private Defendants challenge final NRC actions in licensing proceedings or challenge decisions preliminary, ancillary, or incidental thereto.

i. Public Watchdogs's Claim Against the NRC Challenges NRC Licensing Decisions or Decisions Ancillary or Incidental to Licensing Decisions

Public Watchdogs asserted a single cause of action against the NRC for the violation of the APA, 5 U.S.C. § 702 *et seq.* The district court held it lacked subject-matter jurisdiction over this claim, because the claim directly challenged the grant of the 2015 License Amendments and the Certificate of Compliance for the Holtec System and the complained-of "Other Agency Actions"[9] raised issues preliminary or ancillary to those orders. Public Watchdogs first argues the district court "misconstrued" its APA claim as a challenge to the 2015 License Amendments, because "any fair reading" of the FAC reveals that the APA claim challenged the NRC's failure to halt Holtec

9. In the FAC, Public Watchdogs alleged that a category of other "final action[s]" of the NRC violated the APA and vaguely defined these "Other Agency Actions" to include "accepting amendments to certificates of compliance and granting exemptions from other statutory and regulatory requirements."

and the Utility Defendants allegedly dangerous transfer of SNF. We disagree.

On its face, Public Watchdogs's FAC challenges the grant of the 2015 License Amendments and the Certificate of Compliance for the Holtec System—both final orders of the NRC for the purposes of the Hobbs Act. *See* 10 C.F.R. § 72.210 (granting "[a] general license . . . for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors"); *id.* § 72.212(a)(2) (limiting the general license in § 72.210 "to storage of spent fuel in [approved] casks"); *id.* § 72.214 (listing casks "approved for storage of spent fuel," including the Holtec System at issue in this case). For example, Public Watchdogs alleges in its FAC that "[t]he NRC's grant of the [Utility] Defendants' application for a License Amendment [in July 2015] was in violation of the [APA]." Public Watchdogs further alleges that the NRC issued the 2015 License Amendments without complying with the adjudicative rule-making requirements of 5 U.S.C. §§ 554, 556, 557, and the NRC's grant of the 2015 License Amendments was arbitrary, capricious, and an abuse of discretion. Ultimately, Public Watchdogs seeks to enjoin "the NRC from allowing the [Utility] Defendants to proceed with the decommissioning as provided for *in the License Amendment*." Public Watchdogs's FAC also challenges the Certificate of Compliance for the Holtec System, alleging that, *inter alia*, the Holtec SNF canisters "deviate[ ] from the acceptable minimum safety thresholds required for the design and manufacture of waste storage containers," and the NRC has accepted amendments

to the Certificate of Compliance for the Holtec System without satisfying the above-referenced adjudicative rule-making requirements. Thus, the district court correctly determined that Public Watchdogs's APA claim directly challenged the grant of the 2015 License Amendments and the Certificate of Compliance for the Holtec System.

Accordingly, because the 2015 License Amendments and the Certificate of Compliance for the Holtec System are final orders of the NRC and relate to the grant or amendment of a license or the "issuance or modification of rules and regulations dealing with the activities of licensees," 42 U.S.C. § 2239(a)(1)(A), "[t]he court of appeals . . . ha[d] exclusive jurisdiction to enjoin, set aside, suspend . . . , or to determine the validity of" those orders, 28 U.S.C. § 2342(4). Therefore, the district court correctly found that it lacked subject-matter jurisdiction over Public Watchdogs's APA claim against the NRC to the extent it challenged the 2015 License Amendments and the Certificate of Compliance for the Holtec System. *See Gen. Atomics*, 75 F.3d at 539; *see also N.J., Dep't of Envtl. Prot. & Energy*, 30 F.3d at 410, 412-13 (affirming the district court's dismissal of a plaintiff's National Environmental Policy Act claim against the NRC for lack of subject-matter jurisdiction under the Hobbs Act where the claim challenged a license amendment and a Certificate of Compliance for radioactive material canisters and therefore could not "be maintained in the district court").

Next, Public Watchdogs argues that the district court had subject-matter jurisdiction over its APA claim,

because the following five "Other Agency Actions" fall outside of the scope of the Hobbs Act: (1) the NRC's exemption of Holtec from the requirement it receive pre-approval of its design change to the Holtec SNF canisters; (2) the NRC's decision to relieve Holtec from the responsibility of complying with the Certificate of Compliance for the Holtec SNF canisters; (3) the NRC's exemption of the Utility Defendants from the requirement they file an event report after the mishandling incident in July 2018; (4) the NRC's decision permitting Holtec to continue moving SNF from wet to dry storage in 2019; and (5) the NRC's decision permitting the Utility Defendants to resume transferring SNF from wet to dry storage, despite the two safety violations that occurred in 2018.

Public Watchdogs implies that three of the five complained-of NRC actions fall outside the scope of the Hobbs Act, because the actions relate to the issuance of an "exemption"—a type of NRC action that the Second Circuit in *Brodsky v. U.S. Nuclear Regulatory Commission*, 578 F.3d 175, 182 (2d Cir. 2009) held escapes the reach of the Hobbs Act. We need not decide whether *Brodsky* was correctly decided, however, because none of the identified actions involve the actual grant of an exemption by the NRC.

An "exemption" is a formal NRC action that relieves an NRC licensee of the duty to comply with a certain regulatory requirement. *See id.* at 177-78 (explaining "NRC regulations also permit the agency to grant 'exemptions from the requirements of regulations,' as long as" certain requirements are met (quoting 10

C.F.R. § 50.12(a)). Exemptions are granted by the NRC pursuant to specific regulations if certain requirements contained therein are met. For example, the regulations addressing licensing requirements for the independent storage of spent nuclear fuel allow the NRC to "grant such exemptions from the requirements of the regulations" if it determines the exemption is "authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest." 10 C.F.R. § 72.7; *see also id.* § 50.12 (authorizing the NRC to grant exemptions to regulations related to the licensing of production and utilization facilities).

Here, none of the NRC actions identified by Public Watchdogs involve the grant of an "exemption" under an NRC regulation. For instance, although Public Watchdogs argues the NRC "exempted" Holtec from the requirement that it obtain pre-approval from the NRC for its purported design change to the Holtec SNF canisters, the identified allegations do not detail the NRC's grant of an exemption to Holtec. Instead, the allegations complain of the NRC's reluctance "to censure the [Utility] Defendants for their repeated disregard of NRC regulations" and the NRC's decision not to impose a fine for the alleged violation.

Similarly, despite arguing that the NRC exempted Holtec from complying with the Certificate of Compliance for the Holtec System, Public Watchdogs fails to identify any "exemption" granted by the NRC that excused Holtec from complying with the Certificate of Compliance. Public Watchdogs's complaint at best contains a generic and conclusory allegation that the NRC has periodically

"accept[ed] amendments to certificates of compliance and grant[ed] exemptions from other statutory and regulatory requirements." Even this allegation does not take issue with an alleged exemption related to a Certificate of Compliance, but instead challenges the NRC's alleged grant of exemptions from "*other* statutory and regulatory requirements." In response, Public Watchdogs points to allegations that, after learning the Holtec SNF canisters had been scratched, gouged, or dented, the NRC failed to "independently evaluate[ ] the increased risks posed by this damage to the canisters." But, again, these allegations do not describe the NRC's grant of an exemption.

Public Watchdogs finally implies that the NRC "exempted" the Utility Defendants from the requirement that they file an "Event Notification Report" after the Utility Defendants mishandled a fully-loaded Holtec SNF canister in July of 2018. Again, however, these allegations do not describe the NRC's grant of an exemption relieving the Utility Defendants of the requirement to file an "Event Notification Report." Instead, Public Watchdogs appears to object either to the NRC's decision not to take enforcement action against the Utility Defendants for their failure to file the appropriate reports after the mishandling incidents in July and August of 2018 or the sufficiency of the penalty imposed for such violations.[10]

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10. The final two NRC "actions" Public Watchdogs contends fall outside the scope of the Hobbs Act also do not involve the grant of an exemption. Rather, these "actions" relate to the NRC's alleged decisions to permit Holtec and the Utility Defendants to continue the movement of SNF from wet to dry storage, despite safety violations or potential safety violations at SONGS.

In sum, none of the complained-of "Other Agency Actions" involve the issuance of an exemption by the NRC, but instead focus on either the NRC's decisions not to take enforcement action against Holtec and the Utility Defendants or the sufficiency of the NRC's selected enforcement action. Thus, *Brodsky* is not implicated here.

Public Watchdogs also argues the five "Other Agency Actions" fall outside of the scope of the Hobbs Act, because they are not actions for the "granting, suspending, revoking, or amending of any license" and were taken after the grant of the 2015 License Amendments and after the issuance of the Certificate of Compliance for the Holtec System. This argument is not persuasive, because the Hobbs Act not only encompasses all final NRC actions in licensing proceedings but also all issues that are preliminary, ancillary, or incidental to those licensing proceedings. *See Lorion*, 470 U.S. at 737, 743; *Gen. Atomics*, 75 F.3d at 539. As discussed above, Public Watchdogs's APA claim is properly viewed as a challenge to the grant of the 2015 License Amendments and the Certificate of Compliance for the Holtec System over which the court of appeals had exclusive jurisdiction. Those final orders permitted the Utility Defendants to remove SNF from wet storage at SONGS and transfer it into the Holtec System as part of the decommissioning process. Public Watchdogs's challenge to the "Other Agency Actions" addresses the propriety of the NRC's subsequent decisions that permitted Holtec and the Utility Defendants to continue the transfer of SNF to the Holtec System at SONGS under the authority of the 2015 License Amendments and the Certificate of Compliance for the

Holtec System. Thus, because the "Other Agency Actions" raise issues related to NRC actions that permitted Holtec and the Utility Defendants to *continue* transferring SNF to the Holtec System *under the authority of the 2015 License Amendments and Certificate of Compliance*, we agree with the district court that Public Watchdogs's challenge to the "Other Agency Actions" presents issues incidental or ancillary to its challenge to the grant of 2015 License Amendments and the Certificate of Compliance for the Holtec System. *Cf. Commonwealth Edison Co.*, 830 F.2d at 612-13 (finding, in an action where the "core issue" presented was "whether to grant operating licenses in a section 2239(a) proceeding," the court of appeal had jurisdiction over "[t]he 'ancillary or preliminary' issue [of] whether to uphold the NRC's bill for review costs incurred during the section 2239(a) proceeding considering [the licensee's] license application").

ii. Even if Public Watchdogs's APA Claim Did Not Challenge the 2015 License Amendments or the Certificate of Compliance for the Holtec System, the Claim Still Falls Within the Scope of the Hobbs Act, Because It Seeks Relief that Should Have First Been (and Later Was) Pursued Before the NRC in a § 2.206 Petition

Further, even assuming Public Watchdogs's APA claim did not challenge the grant of the 2015 License Amendments or the Certificate of Compliance for the Holtec System, Public Watchdogs's APA claim related to

the "Other Agency Actions" still falls within the scope of the Hobbs Act, because it challenges NRC enforcement "decisions *not* to suspend" a license or licensed operations and seeks relief that should have first been pursued before the NRC in a § 2.206 petition. *See Lorion*, 470 U.S. at 738.

In *Lorion*, the Supreme Court held that § 2239 "vests in the courts of appeals initial subject-matter jurisdiction over [NRC] orders denying § 2.206 citizen petitions." *Id.* at 746. A citizen petition under § 2.206 "is but the first step in a process that will, if not terminated for any reason, culminate in a full formal proceeding under 42 U.S.C. § 2239(a)(1)." *Id.* at 745 n.11. This mechanism allows "[a]ny person" to file a request with the NRC to "institute a proceeding pursuant to [10 C.F.R.] § 2.202 to modify, suspend, or revoke a license, or for any other action as may be proper." 10 C.F.R. § 2.206(a). Therein, a petitioner can allege "a license violation or 'potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action.'" *N.J., Dep't of Envtl. Prot. & Energy*, 30 F.3d at 413 (quoting 10 C.F.R. § 2.202(a)(1)). The *Lorion* Court—recognizing that Congress defined the scope of review for § 2239 "solely by reference to the subject matter of the [NRC] action and not by reference to the procedural particulars of the [NRC] action"—determined that the courts of appeals had initial subject-matter jurisdiction over the denial of a § 2.206 petition, because Congress intended "to provide for initial court of appeals review of *all* final orders in licensing proceedings," including "[NRC] decisions *not* to suspend, revoke, or amend" a license. 470 U.S. at 738-39, 746 (first emphasis added).

The five "Other Agency Actions" identified by Public Watchdogs all focus on either the NRC's decisions not to take enforcement action based on the alleged misconduct related to the 2015 License Amendments and Certificate of Compliance for the Holtec System or the NRC's failure to take (in Public Watchdogs's opinion) the appropriate enforcement action related to those orders. In briefing, Public Watchdogs makes plain the appropriate enforcement action that it believes the NRC failed to take was the suspension of the Private Defendants' decommissioning activities carried out under the 2015 License Amendments and the Certificate of Compliance for the Holtec System. Indeed, Public Watchdogs states that "any fair reading" of its APA claim shows it was a challenge to the NRC's failure to "halt" the Private Defendants' decommissioning activities. In that sense, like the denial of a § 2.206 petition, Public Watchdogs's APA claim challenged "[NRC] decisions *not* to suspend" the 2015 License Amendments or licensed operations over which the court or appeals had exclusive jurisdiction. *See id.* at 738, 746. Ultimately, to remedy these alleged failures, Public Watchdogs asked the district court to do, in effect, what the NRC declined to do with its enforcement actions—suspend the Private Defendants' licensed and certified operations at SONGS conducted under the authority of the 2015 License Amendments and the Certificate of Compliance for the Holtec System. In other words, Public Watchdogs's FAC sought relief identical to that which could have been requested in a § 2.206 petition.

Indeed, if Public Watchdogs wanted the NRC to take additional enforcement action related to the alleged decommissioning misconduct at SONGS or to suspend the Private Defendants' decommissioning activities under the 2015 License Amendments, the proper course under NRC regulations was to first file a citizen petition pursuant to 10 C.F.R. § 2.206. *See Cnty. of Rockland*, 709 F.2d at 773-74 (recognizing a county's petition for review of an NRC order declining to shut down or take additional enforcement action at a nuclear plant must be dismissed, because the county failed to exhaust its administrative remedies by failing to, *inter alia*, file a § 2.206 petition). If the agency denied the petition, then Public Watchdogs could have appealed directly to this court. *See Lorion*, 470 U.S. at 746.

In fact, *after* Public Watchdogs filed its FAC, it chose to follow the path outlined above by submitting a § 2.206 petition to the NRC that addressed the *same* conduct and sought the *same* remedy from the NRC that it sought before the district court—a temporary suspension of decommissioning activities at SONGS. The NRC declined to take the requested action, and Public Watchdogs filed a petition for review of the denial of the § 2.206 petition *directly* with us.

Public Watchdogs's decision to file a § 2.206 petition that addressed the *same* conduct and sought the *same* remedy that it sought before the district court *and* its decision to appeal that action *directly* to us reinforces our conclusion that the district court did not have subject-matter jurisdiction over Public Watchdogs's APA claim.

Public Watchdogs's APA claim challenged NRC "decisions *not* to suspend" a license or licensed conduct based on alleged decommissioning misconduct that also formed the basis of its § 2.206 petition. *See id.* at 738. If Public Watchdogs could divert review of this type of challenge to the district court from the court of appeals simply by choosing not to file (or belatedly filing) a § 2.206 petition, we would be endorsing a "seemingly irrational bifurcated system" where the court of review would be predicated on the "procedural particulars of the [NRC] action" rather than the "subject matter of the [NRC] action." *See id.* at 739, 741-42. Moreover, this "seemingly irrational bifurcated system" would result in some NRC decisions related to licensing receiving two layers of judicial review while others received one. *See id.* at 742. "One crucial purpose of the Hobbs Act and other jurisdictional provisions that place initial review in the courts of appeals is to avoid the waste attendant upon this duplication of effort." *Id.* at 744. Like *Lorion*, we decline to endorse such an irrational approach that is at odds with this "crucial purpose of the Hobbs Act." *See id.* at 741-42, 744-45.

Finally, basic principles of administrative law also support our decision to allow the NRC to first address Public Watchdogs's § 2.206 petition that raises concerns related to the safety of NRC licensees' nuclear decommissioning activities—an area that is unquestionably within the NRC's special competence. *See Parisi v. Davidson*, 405 U.S. 34, 37, 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972) ("The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record,

to apply its expertise, and to correct its own errors so as to moot judicial controversies."); *McKart v. United States*, 395 U.S. 185, 194, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969) ("[I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.").

For the foregoing reasons, we hold the district court correctly determined it lacked subject-matter jurisdiction under the Hobbs Act, because Public Watchdogs's APA claim challenged final orders of the NRC related to licensing or challenged decisions incidental or ancillary thereto.[11]

11. Because we conclude Public Watchdogs's challenge to the "Other Agency Actions" falls within the scope of the Hobbs Act, we do not reach the district court's alternative holding that it lacked jurisdiction to review those actions under 5 U.S.C. § 701(a)(2), because those actions constituted "presumptively unreviewable" enforcement decisions. *See Heckler v. Chaney*, 470 U.S. 821, 832, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (recognizing that an "agency's decision not to take enforcement action" is "presumptively unreviewable").

iii. Public Watchdogs's Claims Against Holtec and the Utility Defendants Challenge NRC Licensing Decisions or Decisions Ancillary or Incidental Thereto, and Challenge Conduct That Also Forms the Basis of Its § 2.206 Petition to the NRC

We must also determine whether Public Watchdogs's claims against the Private Defendants[12] fall within the scope of the Hobbs Act. To do this, we must once again ascertain whether Public Watchdogs's claims challenge final NRC orders in licensing proceedings or challenge decisions that are preliminary, ancillary, or incidental to those licensing proceedings. *See Lorion*, 470 U.S. at 737, 743; *Gen. Atomics*, 75 F.3d at 539.

Public Watchdogs asserted three causes of action against the Private Defendants: (1) a public liability action under the Price—Anderson Act; (2) a public nuisance claim under California law; and (3) a strict product liability claim under California law. The district court held that all three causes of action fell within the Hobbs Act's scope, because they "trace back to actions that were taken pursuant to or that were incidental to the NRC's issuance of the July 2015 License Amendment or the [C]ertificate of [C]ompliance for the Holtec canisters." However, Public Watchdogs argues the district court's holding cannot be squared with the narrow scope of the Hobbs Act that only grants the court of appeals "exclusive jurisdiction" over

12. We previously defined "Private Defendants" to include the Utility Defendants and Holtec.

actions *against the NRC* challenging its orders "granting, suspending, revoking, or amending" a license. *See* 28 U.S.C. 2342(4); 42 U.S.C. § 2239(a)(1)(A).

In the FAC, Public Watchdogs alleges the NRC improperly granted the Utility Defendants' request for a license amendment that permitted them to decommission SONGS. Public Watchdogs further alleges that the NRC selected Holtec as the supplier of the SNF containment system with reckless disregard for the safety and competence issues surrounding Holtec. Public Watchdogs's FAC also takes aim at the Holtec SNF canisters, alleging: (1) they do not comply with acceptable minimum safety requirements for the design and manufacture of SNF storage containers; and (2) they are defective as a result of a design change made by Holtec without the NRC's approval. Additionally, Public Watchdogs complains of the Utility Defendants' allegedly negligent decommissioning conduct, including using less personnel than necessary to ensure that Holtec SNF canisters are safely loaded into the SONGS ISFSI, scratching or gouging several Holtec SNF canisters prior to burying them at SONGS, and mishandling two loaded Holtec SNF canisters as they were loaded into the SONGS ISFSI.

Based on these allegations, Public Watchdogs claims the Private Defendants violated the Price—Anderson Act by "burying SNF in defective canisters that are destined to fail." Public Watchdogs's public nuisance claim, in turn, is predicated on the Private Defendants' reckless handling of the SNF, their failure to investigate and replace the defective Holtec SNF canisters, and their

intent to continue to store additional SNF in the Holtec SNF canisters despite the known defects of the canisters. Finally, Public Watchdogs's strict products liability claim against Holtec is predicated on the allegedly defective design of the Holtec SNF canisters. To remedy these alleged violations, Public Watchdogs sought to enjoin any further decommissioning efforts by the Private Defendants.

Although Public Watchdogs frames its claims against the Private Defendants as a challenge to private entities' alleged mishandling of nuclear waste, it alleges the 2015 License Amendments (which permits the storage of SNF at SONGS in the storage systems certified by the NRC) were improperly granted and the Holtec SNF canisters (which were certified for the storage of SNF at SONGS by the NRC in a Certificate of Compliance) do not comply with minimum safety requirements for SNF storage containers and are defective. Thus, it is clear from the allegations in the FAC that Public Watchdogs's claims against the Private Defendants are properly viewed, in part, as a veiled challenge to the 2015 License Amendments and the Certificate of Compliance for the Holtec System.

We have previously rejected litigants' attempts to disguise their claims to avoid an exclusive avenue of judicial review selected by Congress. For example, in *American Bird Conservancy v. FCC*, 545 F.3d 1190, 1195 (9th Cir. 2008), we held that a plaintiff could not avoid the Communications Act's and the Hobbs Act's exclusive avenue of judicial review in the courts of appeals by "characterizing its suit as a challenge to the agency's

compliance with federal environmental laws rather than to the agency's ultimate order." There, to avoid Hobbs Act review in the court of appeals, the plaintiff attempted to use the Endangered Species Act's citizen-suit provision—which grants district courts subject-matter jurisdiction over suits by a person to enjoin any person that is violating the Endangered Species Act—to challenge the Federal Communication Commission's ("FCC") grant of registration applications for seven communication towers. *Id.* at 1191-92. The plaintiff "carefully disclaim[ed] any intent to challenge the tower registrations themselves" and instead framed its challenge "as an objection solely to the FCC's *failure to consult* with the Secretary [of the Interior] before granting the tower registrations." *Id.* at 1193. We rejected this attempt, however, and agreed with the FCC that, "despite [the plaintiff]'s artful pleading, [the plaintiff's] core objections [were] to the tower registrations themselves and to the FCC's policy of delegating to applicants its responsibilities under the [Endangered Species Act]." *Id.* Therefore, recognizing that, "[i]n analogous contexts, we ha[d] concluded that a plaintiff may not escape an exclusive avenue of judicial review through artful pleading," *id.* at 1194, we declined to let the plaintiff "avoid the strict jurisdictional limits imposed by Congress," *id.* at 1195 (quoting *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989)).

In reaching this decision, we relied on our earlier decision in *California Save Our Streams Council, Inc.*, where the Federal Energy Regulatory Commission ("FERC") granted Alternative Energy Resources a

license to construct and operate a hydroelectric power facility in the Sierra National Forest. 887 F.2d at 909. The Federal Power Act required FERC to solicit and accept conditions for the license determined by the Forest Service (the agency responsible for the protection and use of the Sierra National Forest). *Id.* at 910. The plaintiffs proceeded to challenge the FERC license conditions in administrative proceedings held before the Forest Service and in district court. *Id.* In the district court, the plaintiffs argued FERC's grant of the license violated the National Environmental Policy Act ("NEPA") and the American Indian Religious Freedom Act ("AIRFA"); thus, it argued the district court had subject-matter jurisdiction over the dispute under 28 U.S.C. §§ 1331, 1343, and 1362. *Id.* The district court disagreed, finding the language of the Federal Power Act vested exclusive jurisdiction over the plaintiffs' action in the courts of appeals. *See id.*

On appeal, we held that the Federal Power Act "vest[ed] sole jurisdiction over questions arising under the FERC licenses in the [c]ourts of [a]ppeals." *Id.* at 911. Undeterred, the plaintiffs argued that the Federal Power Act's exclusive judicial review provisions were simply not applicable, because: (1) "their suit was filed against the Forest Service and arose under the provisions of NEPA and AIRFA"; and (2) "they [were] not attacking the licensing decision made by FERC but instead [were] seeking review only of the Forest Service's failure to follow the procedural and substantive steps outlined in statutes outside the purview of power and energy regulation." *Id.* We rejected this argument, reasoning that,

> although [the plaintiffs] seek to characterize the proceedings as an attack on the Forest Service's actions, it is clear that the suit is an attempt to restrain the licensing procedures authorized by FERC. The . . . conditions imposed by the [Forest] Service have no significance outside the licensing process, and we do not believe that the jurisdictional remedy prescribed by Congress hangs on the ingenuity of the complaint. . . . Thus, even if they attempt to style [their complaint] as an independent claim against the Forest Service, the practical effect of the action in district court is an assault on an important ingredient of the FERC license.

Id. at 912. Ultimately, we agreed with the district court that it lacked subject-matter jurisdiction over the dispute. *Id.*

Despite Public Watchdogs's artful pleading, it is clear its claims against the Private Defendants are an attempt to challenge the 2015 License Amendments, the Certificate of Compliance for the Holtec System, and actions taken by the licensees under the authority of both of those final NRC orders. *See id.*; *Am. Bird Conservancy*, 545 F.3d at 1193-95. Thus, like the plaintiffs in *American Bird Conservancy* and *California Save Our Streams Council, Inc.*, Public Watchdogs cannot avoid the Hobbs Act's exclusive avenue of judicial review by artfully pleading its challenge to the 2015 License Amendments and the Certificate of Compliance for the Holtec System as a Price—Anderson, public nuisance, or strict products liability claim.

Moreover, to the extent Public Watchdogs's claims against the Private Defendants also challenge the Private Defendants' conduct that is expressly licensed, certified, and regulated by the NRC, any such challenge falls within the scope of the Hobbs Act. Put differently, the 2015 License Amendments and the Certificate of Compliance are "inextricably intertwined" with the NRC's regulatory and enforcement decisions that are in turn related to the challenged conduct of the Private Defendants. *See Am. Bird Conservancy*, 545 F.3d at 1193. Thus, reading § 2239 "liberally" and the Hobbs Act "broadly" to encompass not only all final NRC actions in licensing proceedings, but all issues that are preliminary, ancillary, or incidental to those licensing proceedings, we agree with the district court that Public Watchdogs's claims against the Private Defendants fall within the scope of the Hobbs Act. *See Gen. Atomics*, 75 F.3d at 539.

Our conclusion that Public Watchdogs's claims against the Private Defendants fall within the scope of the Hobbs Act is, again, bolstered by Public Watchdogs's decisions to file a § 2.206 petition that addressed the *same* conduct of the Private Defendants and sought the *same* remedy as the district court action *and* its decision to appeal that order *directly* to us. *See Lorion*, 470 U.S. at 746 (holding that § 2239 places initial subject-matter jurisdiction over NRC orders denying § 2.206 petitions in the courts of appeals).

Therefore, we hold that the district court correctly found it lacked jurisdiction over Public Watchdogs's claims against the Private Defendants, because they

challenged NRC licensing orders or NRC decisions that were ancillary or incidental to NRC licensing decisions.

IV. CONCLUSION

Because Public Watchdogs's FAC challenged NRC licensing orders or NRC decisions that were ancillary or incidental to NRC licensing decisions, the district court correctly determined that it did not have subject-matter jurisdiction under the Hobbs Act.[13] Accordingly, the district court's dismissal of Public Watchdogs's FAC with prejudice is **AFFIRMED**.

13. Because we conclude that the district court correctly determined it lacked subject-matter jurisdiction over Public Watchdogs's complaint, we do not reach the district court's alternative holding that Public Watchdogs failed to allege facts sufficient to state a claim for relief under the Price—Anderson Act, California public nuisance law, or California strict products liability law.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JANUARY 13, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-70899

PUBLIC WATCHDOGS,

Petitioner,

v.

U.S. NUCLEAR REGULATORY COMMISSION;
UNITED STATES OF AMERICA,

Respondents,

SOUTHERN CALIFORNIA EDISON COMPANY,

Intervenor.

On Petition for Review of an Order of the
Nuclear Regulatory Commission

Argued and Submitted September 1, 2020,
Pasadena, California

Appendix B

MEMORANDUM[*]

Before: SILER,[**] BERZON, and LEE, Circuit Judges.

Public Watchdogs petitions for review of the U.S. Nuclear Regulatory Commission's ("the NRC's") denial of its petition under 10 C.F.R. § 2.206 for an order suspending decommissioning operations at the San Onofre Nuclear Generating Station ("SONGS"). We dismiss the petition for review.

Public Watchdogs does not dispute the NRC's characterization of the denial of the § 2.206 petition as a decision not to institute an enforcement proceeding. Such a decision is presumptively unreviewable unless the NRC "has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities" or there is law providing "meaningful standards for defining the limits of [the NRC's] discretion" in declining to take enforcement action. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4, 834, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (internal quotation marks omitted).

Public Watchdogs has not demonstrated that the NRC has abdicated its duty to ensure that spent nuclear

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

fuel is stored safely at SONGS. The NRC addressed the issues raised by Public Watchdogs, including the possibility that the federal government might never develop a permanent repository for spent nuclear fuel and, consequently, that spent fuel might be stored at nuclear reactor sites indefinitely, in its Generic Environmental Impact Statement for Continued Storage of Spent Nuclear Fuel (the "Continued Storage GEIS"). The Continued Storage GEIS recognized that spent fuel maintained in dry storage would eventually need to be transferred to new containers, but it estimated that the transfer would need to be made only once every one hundred years. The D.C. Circuit upheld the Continued Storage GEIS, concluding, among other things, that the NRC reasonably determined that the "identified risks [were] essentially common to all reactor sites." *New York v. NRC*, 824 F.3d 1012, 1019, 423 U.S. App. D.C. 1 (D.C. Cir. 2016) (internal quotation marks omitted).

Additionally, the NRC addressed safety concerns relating to the specific dry cask storage system used at SONGS in its notice-and-comment rulemaking issuing a certificate of compliance for that storage system and in its inspection reports reviewing the decommissioning activities at SONGS. Finally, the NRC requires SONGS's operator to provide updated financial assurances every year, along with an updated estimate of the costs required to complete decommissioning. *See* 10 C.F.R. § 50.82(a)(8)(v). Whatever validity Public Watchdogs' critiques of the NRC's analyses and determinations may have, those critiques fall far short of demonstrating that the NRC has abdicated its statutory duties.

Appendix B

Public Watchdogs' contention that the NRC's regulations and policies provide a meaningful standard against which to judge the NRC's exercise of discretion also fails. Public Watchdogs does not point to any specific language indicating an intent to circumscribe the NRC's discretion in deciding whether to take an enforcement action. *See Heckler*, 470 U.S. at 833-35.

Public Watchdogs has not overcome the presumption that the NRC's denial of the § 2.206 petition is unreviewable. We therefore must dismiss the petition for review.

PETITION DISMISSED.

APPENDIX C — RULING OF THE UNITED STATES NUCLEAR REGULATORY COMMISSION, FILED JUNE 18, 2020

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

February 26, 2020

Mr. Charles G. La Bella
Barnes & Thornburg LLP
655 West Broadway, Suite 900
San Diego, California 92101

SUBJECT: PETITION REQUESTING ENFORCEMENT ACTION UNDER SECTION 2.206 OF TITLE 10 OF THE *CODE OF FEDERAL REGULATIONS* AGAINST SOUTHERN CALIFORNIA EDISON RELATED TO DECOMMISSIONING OEPRATIONS AT THE SAN ONOFRE NUCLEAR GENERATING STATION UNITS 2 AND 3

Dear Mr. La Bella:

On behalf of the U.S. Nuclear Regulatory Commission (NRC), I am responding to the petition submitted pursuant to Title 10 of the *Code of Federal Regulations* (10 CFR), Section 2.206, "Requests for action under this subpart," dated September 24, 2019 (Agencywide Documents Access and Management System [ADAMS] Accession Nos. ML 19309D323 and ML 19311C699), as

supplemented on January 21, 2020 (ADAMS Accession No. ML20023A182). The NRC's Executive Director for Operations referred your petition to the Office of Nuclear Material Safety and Safeguards (NMSS) for appropriate review or action.

Petition

In the petition, you requested that the NRC immediately suspend all decommissioning operations at the San Onofre Nuclear Generating Station (SONGS) and require Southern California Edison (SCE or the licensee) to submit an amended decommissioning plan to account for spent nuclear fuel being placed in storage at SONGS. As the basis for the request you stated: burial of spent nuclear fuel at SONGS poses an immediate threat to public safety (for example, integrity of fuel canisters); the licensee's estimated cost of decommissioning SONGS is based on unreasonable and fundamentally flawed assumptions; and the NRC has not considered the environmental and safety effects of sea level rise caused by climate change and has not addressed the environmental impacts of decommissioning on environmental justice, threatened and endangered species, offsite land use, offsite aquatic and terrestrial ecology, and certain cultural and historic resources.

Staff Action

On October 25, 2019, the NRC provided a response to Public Watchdogs by e-mail (ADAMS Accession No. ML 19326A969) stating that the NRC staff concluded, in

accordance with Section II.B.1 of Management Directive (MD) 8.11 "Review Process for 10 CFR 2.206 Petitions" (ADAMS Accession No. ML 18296A043), that the request does not warrant immediate action. The NRC staff has determined that the decommissioning activities at SONGS do not constitute an immediate threat to public health and safety.

On December 18, 2019, the NRC informed you via e-mail (ADAMS Accession No. ML 19353A048) that the petition review board (PRB) concluded that the petition did not meet the criteria for consideration under 10 CFR 2.206 because it appears that all of the issues raised in the petition have previously been the subject of NRC staff review, and do not raise concerns that the NRC staff has not previously considered and resolved. On January 21, 2020, the PRB conducted a public teleconference with Public Watchdogs at your request, to discuss the PRB's initial assessment and any supplemental information for the PRB's consideration. The transcript for the January 21st public meeting can be found at ADAMS Accession No. ML20028E467. The PRB considered the information presented during the January 21, 2020, discussion, as well as the original petition and the supplemental information submitted in reaching its final determination, as discussed below.

NRC Staff Response to Specific Concerns

Protection of Public Health and Safety. The NRC has continued to carefully regulate the licensee's decommissioning activities at SONGS, which include

its review of the fuel storage facility design, inspections encompassing the physical facility as well as the licensee's operational performance, and appropriate enforcement actions. More specifically, the NRC performed a thorough review of the UMAX Independent Spent Fuel Storage Installation (ISFSI) design used at SONGS, a design the NRC approved in 2017 through a public rulemaking (ADAMS Accession No. ML 16341B061). In addition, NRC staff continually performs oversight to ensure that the storage of spent nuclear fuel at SONGS does not pose a threat to public health and safety. NRC inspections of decommissioning activities at SONGS, including inspections related to the ISFSI, are documented in inspection reports that are publicly available. See for example ADAMS Accession Nos. ML 18200A400 and ML 19316A762.

The NRC staff has also considered the events described in the petition regarding the licensee's fuel loading operations and potential scratching of the fuel canisters. See ADAMS Accession No. ML 19190A217. The NRC's regulatory review and oversight actions included a detailed assessment of the significance of the events, specific enforcement actions, and subsequent consideration of the licensee's corrective actions. Specifically, regarding integrity of the fuel canisters, NRC inspectors concluded that localized scratches (peak stresses) on the canisters are not a safety concern (using the ASME Code Section Ill, Subsection NB stress intensity limits as reference). NRC inspectors also concluded that canister evaluations performed by SCE using visual scratch assessments and statistical evaluations acceptable. These evaluations were

adequate to demonstrate that canister scratches from incidental contact for previous and future canisters, will continue to meet the confinement design functions as specified in the UMAX Final Safety Analysis Report and ASME Code Section Ill canister wall thickness tolerances.

As a result, the NRC remains confident that reasonable assurance of adequate protection of the public health and safety can be maintained for as long as fuel is stored in accordance with the requirements of the SONGS license, the certificate of compliance for the UMAX system (and any other licensed systems that may be implemented in the future at the SONGS site), and other applicable requirements.

Decommissioning Cost Estimate. Regarding your concern about the estimated cost of completing decommissioning at SONGS, the NRC staff concluded in its review of the SONGS Decommissioning Cost Estimate (DCE) (ADAMS Accession No. ML 15204A383) that the site-specific DCE and the cost of long-term storage of spent fuel for SONGS, Units 2 and 3, are reasonable and provide a sufficient level of detail on the funding mechanisms to meet the requirements of 10 CFR 50.82(a)(4)(i). In addition, the NRC staff reviewed the 2019 Decommissioning Funding Status (DFS) report for SONGS and determined that the licensee complies with the decommissioning funding assurance requirements of 10 CFR 50.75 and 10 CFR 50.82, as applicable, for the 2019 DFS reporting cycle (ADAMS Accession No. ML 19346E375). The SONGS DFS reports are submitted and reviewed annually by the NRC staff to ensure continued

compliance with the decommissioning financial assurance requirements. Finally, the NRC safety evaluation for the SONGS Irradiated Fuel Management Plan (IFMP) (ADAMS Accession No. ML 15182A256) states that "the NRC staff finds the SONGS IFMP estimates to be reasonable, based on a cost comparison with similar decommissioning reactors ...."

Environmental Impacts. Regarding your concern about the environmental impacts of the decommissioning activities, the NRC staff concluded in its review of the SONGS Post Shutdown Decommissioning Activities Report (ADAMS Accession No. ML 15204A383) that these activities are bounded by the previously issued NUREG-0586, "Final Generic Environmental Impact Statement [GElS] on Decommissioning of Nuclear Facilities," and its supplements, and did not find any deviations from the previously issued Environmental Statement for SONGS (ADAMS Accession No. ML 18239A414). Therefore, the NRC is confident that the environment can be adequately protected, and all impacts bounded, during decommissioning activities at SONGS.

Retrievabilitv of Spent Fuel. On January 21, 2020, you raised concerns regarding spent nuclear fuel currently stored at SONGS being non-retrievable, in violation of 10 CFR 72.122(I), and with potential impacts from flooding. Specifically, you stated that "although the Holtec Final Safety Analysis Report and Certificates of Compliance clearly contemplate a potential flooding event and state that a site-specific analysis will be submitted by Licensees, Public Watchdogs is not aware that any such analysis has been performed or submitted."

Appendix C

Interim Staff Guidance No. 2, Revision 2, "Fuel Retrievability in Spent Fuel Storage Applications" (ADAMS Accession No. ML 16117A080), defines ready retrieval as "the ability to safely remove the spent fuel from storage for further processing or disposal." A licensee can demonstrate the ability for ready retrieval by demonstrating that it can remove a canister loaded with spent fuel assemblies from a storage cask/overpack. As discussed in NRC Supplemental Inspection Report 2018-002 for SONGS (ADAMS Accession No. ML 19190A217), the NRC inspection team observed the licensee implementing all the corrective action enhancements to download and retrieve a simulated canister at the SONGS ISFSI pad, during exercises conducted between January 28-30, 2019. SCE was fully successful in downloading and retrieving the canister during the exercises, and the corrective actions taken were determined by the NRC inspectors to be adequate.

Flood Analysis. Regarding your concerns with flooding at the SONGS ISFSI, SCE's flood analyses determined that the UMAX maximum design flood parameters envelope the SONGS site flooding parameters. The NRC staff verified this flood evaluation in the SONGS 10 CFR 72.212 report to qualify the use of the UMAX system at SONGS, and the NRC documented this in an inspection report (ADAMS Accession No. ML 18200A400). The NRC did not identify any issues as a result of its review of the flood evaluation for SONGS.

Having considered the results of recent inspections, the NRC's evaluation of past SONGS DFS reports, the

applicable environmental documents, and the supplemental information provided, the PRB's final determination is that your petition does not meet the acceptance criteria in MD 8.11, Section III.C.1 (b), because the issues raised in the petition have been "the subject of a facility-specific or generic NRC staff review," and none of the circumstances in Section III.C.1 (b)(ii) applies. The NMSS Office Director was briefed on and supported this conclusion.

Thank you for bringing these issues to the attention of the NRC.

Sincerely,

/s/ Kevin Williams
Kevin Williams, Deputy Director
Division of Materials Safety, Security, State, and Tribal Programs
Office of Nuclear Material Safety and Safeguards

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, FILED DECEMBER 3, 2019

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Case No.: 19-CV-1635 JLS (MSB)

PUBLIC WATCHDOGS, A CALIFORNIA 501(C)(3) CORPORATION,

Plaintiff,

v.

SOUTHERN CALIFORNIA EDISON COMPANY; SAN DIEGO GAS & ELECTRIC COMPANY; SEMPRA ENERGY; HOLTEC INTERNATIONAL; UNITED STATES NUCLEAR REGULATORY COMMISSION; AND DOES 1 THROUGH 100,

Defendants.

December 3, 2019, Decided
December 3, 2019, Filed

Appendix D

ORDER (1) GRANTING DEFENDANTS' MOTIONS TO DISMISS, (2) DISMISSING PLAINTIFF'S FIRST AMENDED COMPLAINT WITH PREJUDICE, AND (3) DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

(ECF Nos. 2, 5, 41, 42, 47)

Presently before the Court are Plaintiff Public Watchdogs' Amended Motion for Preliminary Injunction and Temporary Restraining Order ("Mot. for Prelim. Inj.," ECF No. 5) and the Motions to Dismiss filed by Defendants Holtec International, Inc. ("Holtec") ("Holtec MTD," ECF No. 41); Southern California Edison Company ("SCE"), San Diego Gas & Electric Company ("SDG&E"), and Sempra Energy ("Sempra") (together, the "Utility Defendants"; with Holtec, the "Private Defendants") ("Utility MTD," ECF No. 42); and the United States Nuclear Regulatory Commission ("NRC") ("NRC MTD," ECF No. 47). The Court heard oral argument on November 25, 2019. *See* ECF Nos. 58, 59. Having considered the Parties' arguments and the law, the Court **GRANTS** Defendants' Motions to Dismiss, **DISMISSES WITH PREJUDICE** Plaintiff's First Amended Complaint, and **DENIES** Plaintiff's Motion for Preliminary Injunction, as follows.

Appendix D

BACKGROUND[1]

I. Plaintiff's Allegations

Plaintiff "is a 501(c)(3) non-profit corporation that advocates for public safety by ensuring that government agencies and special interests comply with all applicable laws, including public-safety and environmental protection laws, especially in the public-utilities industry." FAC ¶ 4. "Plaintiff has at least one member who lives within the zone of exposure to a catastrophic release of radioactive material from SONGS." *Id.*

SCE and SDG&E are public utilities doing business in California. *Id.* ¶¶ 5-6. Sempra is the parent company of SDG&E. *Id.* ¶ 7.

In August 1963, Congress enacted Public Law 88-82, which authorized the "construct[ion], operate[ion], maintain[enance], and use" of a nuclear power plant on the Camp Pendleton military base. *Id.* ¶ 18. The Utility Defendants operated three nuclear electric generating units in that area—which is located within a tsunami

1. The facts alleged in Plaintiff's First Amended Complaint ("FAC") are accepted as true for purposes of the Defendants' Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6). *See Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1249 (9th Cir. 2007) (holding that, in ruling on a motion to dismiss, the Court must "accept all material allegations of fact as true"). The Court also considers those materials outside the First Amended Complaint that are proper subjects of judicial notice, such as other court and administrative filings. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2615, 204 L. Ed. 2d 264 (2019).

inundation zone and between two active fault lines, *see id.* ¶¶ 1, 48—at the San Onofre Nuclear Generating Station ("SONGS"). *Id.* ¶ 19. SCE owned 78.2% of SONGS, *id.* ¶ 5, while SDG&E owned approximately 20% of SONGS. *Id.* ¶ 6. The first nuclear generating unit at SONGS operated between 1968 and 1992, while the second and third units operated from 1983 and 1984, respectively, until June 12, 2013, when they were shut down. *Id.*

Plaintiff alleges that, throughout this time, "SONGS has had numerous instances of poor safety and regulatory compliance." *Id.* ¶ 20; *see also id.* ¶¶ 21-28. These led to the announcement on June 7, 2013, that SONGS would be permanently shut down. *Id.* ¶ 29. The Utility Defendants permanently ceased operation of SONGS Units 2 and 3 on June 12, 2013. *Id.* ¶ 41. Plaintiff contends, however, that issues of mismanagement have continued to plague the decommissioning process, which has led to "a continuing liability and an ever-present existential threat." *See id.* ¶ 30.

For example, the NRC—which is "federal government agency that is mandated by Congress to license and regulate the Nation's civilian use of radioactive materials to protect public health and safety, promote the common defense and security, and protect the environment," *id.* ¶ 10—"has repeatedly failed to exercise any meaningful oversight of SONGS and has abdicated its role to regulate [the Private Defendants]." *Id.* ¶ 32. The NRC has declined to perform an independent seismic hazard assessment of SONGS, *see id.* ¶ 33, and has frequently allowed the Utility Defendants to violate NRC rules and regulations.

See id. ¶¶ 34-36. The NRC also has granted several exemptions to the Utility Defendants from the emergency response regulations, *see id.* ¶¶ 37-38, and allowed the Utility Defendants to use the $4.7 billion decommissioning trust fund for purposes other than decommissioning activities. *See id.* ¶ 39. Finally, the NRC granted the Utility Defendants a license amendment on July 17, 2015 (the "July 2015 License Amendment"), which permitted them to decommission the SONGS facility. *See id.* ¶ 43. In granting the July 2015 License Amendment, however, the NRC "relied on the [Utility] Defendants' own analysis instead of objective criteria or independent analysis." *Id.*

Although the Utility Defendants previously had stored spent nuclear fuel ("SNF") at SONGS in wet storage pools, *see id.* ¶ 45, the Utility Defendants' decommissioning plan allows for the burial of SNF in an onsite containment system called an Independent Spent Fuel Storage Installation ("ISFSI"). *Id.* ¶ 48. The ISFSI is located in a tsunami inundation zone located between two seismic fault lines and only 108 feet from the Pacific Ocean. *See id.* ¶ 48. Consequently, the ISFSI "is only about 18 feet above the Pacific Ocean's median high tide," and "[t]he bottom of the structure is a mere three feet above the underground water table." *Id.* ¶ 49. Accordingly, "[c]limate-change experts predict that the bottom of each silo located in the ISFSI will be inundated with salt water as early as 2035." *Id.* ¶ 51.

Designed by Holtec, *id.* ¶ 52, and guaranteed only for ten years, *id.* ¶ 55, the ISFSI calls for the burial of 73 canisters filled with 3.6 million pounds of SNF, *see*

id. ¶¶ 49, 54, approximately 20 feet underground. *See id.* ¶ 48. Like the ISFSI itself, the canisters were designed and manufactured by Holtec, *id.* ¶ 54, who warrants them only for 25 years. *See id.* ¶ 55. In contrast to the thick-walled dry casks used by many international nuclear decommissioning projects, *see id.* ¶ 57, Holtec's "thin-wall" canisters have "only a 5/8-inch thick stainless[-]steel wall with an aluminum egg-crate structure designed to hold up to 37 spent fuel assemblies." *Id.* ¶ 56. Holtec made design changes to its canisters without the authorization of the NRC, which rendered four canisters already loaded into the ISFSI at SONGS potentially defective. *See id.* ¶¶ 60-62. The NRC declined to impose a civil fine for the failure to seek pre-authorization of the change in the design of the Holtec canisters. *See id.* ¶ 62. Independent risk assessments of the decommissioning plan and the Holtec canisters, if performed, have not been made publicly available. *See id.* ¶¶ 50, 52, 58.

Despite the lack of independent analyses and NRC oversight, the Utility Defendants began burying the canisters at the SONGS ISFSI on January 31, 2018. *See id.* ¶ 53. Workers discovered a defective Holtec canister on March 5, 2018, *see id.* ¶ 63, and the Utility Defendants admitted that four potentially defective canisters had already been filled and buried at a Community Engagement Panel Meeting on March 22, 2018. *See id.* ¶ 64. Because "Defendants have consistently used [fewer] personnel than necessary to ensure that the Holtec canisters are safely and effectively loaded into the ISFSI," *id.* ¶ 66, they have "negligently gouged and then buried twenty-nine (29) fully loaded canisters at SONGS." *Id.* ¶ 67. "[T]his gouging may

lead to deeper, through-the-wall cracks," which may "be exacerbated, *inter alia*, by the presence of salt air, fog, rain, and salt water—the precise weather conditions that the canisters will be exposed to at the current location just steps from the Pacific Ocean." *Id.* Further, "many (if not all) of the canisters were negligently scratched during transportation to the ISFSI." *Id.* ¶ 68.

On July 22, 2018, the Utility Defendants "nearly dropped a 49-ton canister full of deadly radioactive nuclear waste more than 18 feed into the ISFSI when it was caught on a quarter inch thick steel guide ring." *Id.* ¶ 69. They failed to report the incident to the NRC. *See id.* ¶¶ 70-71. On August 3, 2018, the Utility Defendants "once again lost control of a 49-ton canister full of deadly radioactive nuclear waste while it was being lowered into a below-ground storage silo," *id.* ¶ 72, which resulted in a work stoppage. *See id.* ¶ 74. The Utility Defendants informally informed the NRC on August 6, 2018, *see id.* ¶ 76, and a whistleblower reported the event at a Community Engagement Panel Meeting on August 9, 2018. *See id.* ¶ 73. As a result of the August 3, 2018 incident, "[o]n March 25, 2019, the NRC issued a 'Notice of Violation' and 'NRC Special Inspection Report' to Edison for two safety violations." *Id.* ¶ 91. The first violation concerned "a failure to make certain that safety equipment was operating," while the second was for "failure to report the safety incident to the NRC." *Id.* "[T]he NRC issued an Inspection Charter for SONGS, which found five violations that were ultimately penalized [by] the imposition of a . . . fee of $116,000 on [SCE]." *Id.* ¶ 79; *see also id.* ¶ 91.

Appendix D

"On August 24, 2018, the NRC issued an Inspection Report to the [Utility] Defendants," in which "the NRC determined that [SCE] had committed a Severity IV violation of the NRC's safety requirements between June 2017 and June 2018." *Id.* ¶ 85. "The violation related to the design control of field changes made to the safety equipment the [Utility] Defendants used to loan SNF into storage canisters." *Id.*

"On November 29, 2018, the NRC issued an Inspection Report to Holtec," in which the NRC "informed Holtec that it was being considered for 'Escalated Enforcement Action' for two apparent violations" related to the change in the design of the spent fuel storage casks. *See id.* ¶ 87. Plaintiff believes that the first violation relates to Holtec's "failure to establish adequate design control measures," which resulted in the defect that may have rendered the first four canisters deployed at SONGS unsafe. *See id.* ¶ 88. Plaintiff believes that the second violation relates to Holtec's failure to provide the NRC with prior authorization of its design changes. *See id.* ¶ 89.

On July 15, 2019, after voluntarily suspending the transfer of SNF following the August 3, 2018 incident, the Utility "Defendants notified the public that Defendant Holtec was again moving SNF from wet storage to canisters[] and burying canisters near San Onofre beach." *Id.* ¶ 93. Additional canisters have continued to be buried during the pendency of this action. *See id.* ¶¶ 95-97.

II. Procedural Background

On November 15, 2017, Plaintiff filed an action for declaratory and injunctive relief against the United States; the United States Department of Defense; James Mattis, Secretary of Defense; the United States Department of the Navy; Richard V. Spencer, Secretary of the Navy; SCE; and SDG&E, alleging a single cause of action for violation of Public Law 88-82. *See generally* Complaint, *Pub. Watchdogs v. United States ("Pub. Watchdogs I")*, No. 17-CV-2323 JLS (MSB) (S.D. Cal. filed Nov. 25, 2017), ECF No. 1. On August 30, 2018, the Court dismissed *Public Watchdogs I* on the grounds that Plaintiff had failed to establish Article III standing because "Plaintiff ha[d] not shown that the alleged future harm or diminishment of the area [wa]s 'certainly impending' or even that there [wa]s a 'substantial risk' or 'credible threat' that immediate harm w[ould] occur." Order Granting Defendants' Motions to Dismiss at 7-8, *Pub. Watchdogs I* (filed Aug. 30, 2018), ECF No. 24; *see also* 2018 U.S. Dist. LEXIS 148501, 2018 WL 4153302, at *4. Although Plaintiff filed an amended complaint, *see* Amended Complaint, *Pub. Watchdogs I* (filed Sept. 28, 2018), ECF No. 25, it voluntarily dismissed *Public Watchdogs I* on July 3, 2019. *See* Notice of Voluntary Dismissal Without Prejudice, *Public Watchdogs I* (filed July 3, 2019), ECF No. 50.

On August 29, 2019, Plaintiff filed the instant action against SCE, SDG&E, Sempra, Holtec, and the NRC, alleging three causes of action: (1) violation of the Administrative Procedures Act, 5 U.S.C. §§ 702 *et seq.*, against the NRC; (2) public nuisance in violation of

California Civil Code §§ 3479-3480 against the Private Defendants; and (3) strict products liability against Holtec. *See generally* ECF No. 1. Plaintiff also filed a motion for preliminary injunction and temporary restraining order seeking to restrain Defendants from transferring further SNF into the Holtec canisters or storing additional spent nuclear fuel in the ISFSI at SONGS pending a full hearing on the decommissioning plan. *See generally* ECF No. 2. Plaintiff amended its motion the following day, *see* ECF No. 5, and the case was reassigned to this Court based on its relation to *Public Watchdogs I*. *See* ECF No. 16.

In response to Defendants' notification of their intent to oppose Plaintiff's request for a temporary restraining order, *see* ECF Nos. 6, 17, the Court set a briefing schedule. *See* ECF No. 18. Soon thereafter, Defendants filed motions to dismiss that raised, among other concerns, the Court's lack of subject-matter jurisdiction. *See* ECF Nos. 19, 28, 29. These concerns were echoed in Defendants' oppositions to Plaintiff's motion for a preliminary injunction. *See* ECF Nos. 36, 37.

Seemingly in response to Defendants' jurisdictional arguments, Plaintiff filed the operative First Amended Complaint, which added an additional cause of action for a public liability action pursuant to the Price-Anderson Act, 42 U.S.C. § 2210(n)(2). *See generally* ECF No. 38. The Court therefore denied as moot and without prejudice the pending motions to dismiss. *See* ECF No. 39. The instant Motions to Dismiss followed. *See* ECF Nos. 41, 42, 47.

Appendix D

On October 21, 2019, shortly before filing its oppositions to Defendants' Motions to Dismiss, *see* ECF Nos. 51, 52, Plaintiff filed with the NRC a 10 C.F.R. § 2.206 Petition to Immediately Suspend Decommissioning Operations at San Onofre Nuclear Generating Station Unites 2 and 3. *Pub. Watchdogs v. S. Cal. Edison Co.*, No. 19-72670 (N.R.C. filed Oct. 21, 2019), DE 1; *see also* ECF No. 54 Ex. 47. The same day, Plaintiff also filed an Emergency Petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. *Pub. Watchdogs v. U.S. Nuclear Regulatory Comm'n*, No. 19-72670 (9th Cir. filed Oct. 21, 2019), DE 1; *see also* ECF No. 55 Ex. 48.

DEFENDANTS' MOTIONS TO DISMISS

I. Federal Rule of Civil Procedure 12(b)(1)

A. Legal Standard

Federal courts are courts of limited jurisdiction, and as such have an obligation to dismiss claims for which they lack subject-matter jurisdiction. *Demarest v. United States*, 718 F.2d 964, 965 (9th Cir. 1983). Because the issue of standing pertains to the subject matter jurisdiction of a federal court, motions raising lack of standing are properly brought under Federal Rule of Civil Procedure 12(b)(1). *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "The party asserting jurisdiction bears the burden of establishing subject matter jurisdiction on a motion to dismiss for lack of subject matter jurisdiction." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 984 (9th Cir. 2008) (citing *Kokkonen*

v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994); *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989)). "Dismissal for lack of subject matter jurisdiction is appropriate if the complaint, considered in its entirety, on its face fails to allege facts sufficient to establish subject matter jurisdiction." *Id.* (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1990)).

Rule 12(b)(1) motions may challenge jurisdiction facially or factually. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack is one where "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* In evaluating such a challenge, the court accepts the factual allegations in the complaint as true. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n.1 (9th Cir. 2001). In contrast, where the defendant challenges the factual basis underlying the allegations, the court need not accept the allegations as true and may instead make factual determinations. *White*, 227 F.3d at 1242. "In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co. v. Gen. Tel. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). When making such a ruling, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment. *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003) (citing *White*, 227 F.3d at 1242).

The decision whether to grant leave to amend rests in the discretion of the trial court. *See Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185-86 (9th Cir.1987)). Leave to amend is properly denied where leave would be futile, *id.* (citing *DCD Programs*, 833 F.2d at 185-86), such as where "the alleged facts, even if true, provide[] no basis for subject matter jurisdiction." *Id.* (citing *DCD Programs*, 833 F.2d at 185-86).

B. Analysis

1. Plaintiff's Standing

"[B]efore a federal court can consider the merits of a legal claim, the person seeking to invoke the jurisdiction of the court must establish the requisite standing to sue." *Whitmore v. Arkansas*, 495 U.S. 149, 154, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990). The Private Defendants challenge Plaintiff's standing to seek injunctive relief because "Plaintiff does not have Article III standing to bring any claim because it has not suffered an injury in fact."[2] Holtec

2. The Private Defendants also contend that "Plaintiff does not have standing to bring a public nuisance claim because it has not alleged it has suffered a unique injury," Holtec MTD at 21, and Holtec urges that "Plaintiff does not have standing to bring a strict products liability claim against Holtec because it does not allege it suffered personal injury or incurred property damage as a result of an alleged safety-related design defect." *See* Holtec MTD at 21; *see also id.* at 22. But "[t]he requirements to allege standing are not the same as the requirements to plead injury under the substantive law." *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1038 (N.D. Cal. 2014) (citing *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1027 (N.D.

MTD at 21; *see also id.* at 21-23; Utility MTD at 19-22. The NRC also disputes Plaintiff's standing to challenge "two exemptions concerning the use of the decommissioning trust fund and insurance requirements" on the grounds that Plaintiff has failed to allege any injury-in-fact or redressability. ECF No. 53 at 9-10.

"Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.' One component of the case-or-controversy requirement is standing, which requires a plaintiff to demonstrate the now-familiar elements of injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007) (per curiam) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). To satisfy the requirements of "injury in fact," a plaintiff must show that she suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citations omitted).

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks

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Cal. 2012)); *see also Andrews v. Plains All Am. Pipeline, L.P.*, No. CV154113PSGJEMX, 2017 U.S. Dist. LEXIS 225018, 2017 WL 10543401, at *15 (C.D. Cal. Aug. 25, 2017) (noting distinction between the "special injury" requirement for public nuisance and Article III standing). Consequently, the Court addresses these arguments in the context of the Public Defendants' Rule 12(b)(6) motions. *See infra* Sections II.B.3.b.i, II.B.3.c.

to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Claims for declaratory and injunctive relief do not require individualized proof, thereby satisfying the third prong. *See id.* at 344.

a. The NRC

The NRC contends that "Plaintiff lacks standing to challenge" the "two exemptions concerning the use of the decommissioning trust fund and insurance requirements," ECF No. 53 at 9; *see also* NRC MTD at 13-14. Plaintiff does not address the NRC's standing argument in its Opposition. *See generally* ECF No. 52. Under Ninth Circuit precedent, the Court therefore may consider Plaintiff to have conceded the issue. *See Ramirez v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210-11 (N.D. Cal. 2013) (granting motion to strike and concluding that the defendant had conceded that certain affirmative defenses could not be saved by amendment where the defendant had failed to respond to the plaintiffs' arguments); *see also id.* at 1210 n.7 (collecting cases).

Even if Plaintiff had not conceded its lack of standing as to the two exemptions concerning the use of the decommissioning trust fund and insurance requirements, the Court concludes that Plaintiff has failed to establish any injury in fact. Here, Plaintiff alleges that "[t]he NRC . . . issued a series of exemptions to requests by the SONG

Defendants to use the decommissioning trust funds for purposes other than decommissioning activities." FAC ¶ 39. Specifically, on September 5, 2014, the "NRC grant[ed] exemptions from 10 C.F.R. §§ 50.82(a)(8)(i)(A) and 50.75(h)(2), which allows the SONGS Defendants to use decommissioning trust funds for purposes other than decommissioning activities," *id.* ¶ 39(f), and on January 5, 2018, the "NRC grant[ed] an exemption to 10 C.F.R. § 50.54(w)(1), which requires the operator of a nuclear power plant to maintain property insurance in the amount of $1.06 billion to ensure adequate funds for decontamination and stabilization in the event of an accident." *Id.* ¶ 39(g). Among other things, Plaintiff prays for "[a] full and complete accounting of the decommissioning trust fund to ensure that the funds collected are adequate to permit the safe decommissioning of SONGS," *id.* at Prayer ¶ 4, and "[t]he appointment of an independent monitor at SONGS to provide independent oversight and accountability regarding the decommissioning taking place at SONGS." *Id.* at Prayer ¶ 6.

Although the Court concludes that the relief Plaintiff requests would redress any alleged injury, the Court concludes that Plaintiff has failed to allege any such injury resulting from the NRC's issuance of these two exemptions.[3] The NRC contends that "Plaintiff fails to

3. To the extent Plaintiff's claim is premised on the exemptions detailed in paragraph 39 subparagraphs (a) through (e), which were granted between February 22, 1983, and December 21, 2001, the Court concludes that Plaintiff's challenge is untimely. *See* ECF No. 53 at 2-3 (citing 28 U.S.C. § 2401(a); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713-14 (9th Cir. 1991); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56, 262 U.S. App. D.C. 325 (D.C. Cir. 1987)).

show . . . that either the use of the decommissioning trust fund for other purposes represents a direct harm to Plaintiff or that the fund will be insufficient" or, regarding the insurance exemption, that "any kind of accident is imminent" or "how [Plaintiff] specifically would have to bear a pecuniary impact in such a circumstance." ECF No. 53 at 9-10. The Court agrees. *See, e.g.*, *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 954 (9th Cir. 2006) ("[The organizational plaintiff] fails to show that its members' concrete interest is threatened by *the challenged regulation*, rather than by 'unregulated transportation of radioactive material' in the abstract. The declarations simply express undifferentiated 'concerns'—the same concerns about nuclear hazards shared by the public at large—and speculate that unregulated transportation of radioactive material in general—*not this regulation in particular*—may present unspecified threats to their health.") (emphasis in original); *Texans Against Gov'tal Waste & Unconstitutional Gov'tal Conduct v. U.S. Dep't of Treasury*, 619 F. Supp. 2d 274, 280 (N.D. Tex. 2009) (concluding that the plaintiffs did not have standing to challenge the Department of the Treasury's distribution of funds to U.S. automobile manufacturers from Troubled Asset Relief Program because the alleged injury was a generalized grievance that did not satisfy Article III's injury-in-fact requirement); *see also Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 593, 127 S. Ct. 2553, 168 L. Ed. 2d 424, (2007) ("It has long been established . . . that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345, 126 S. Ct. 1854, 164 L.

Ed. 2d 589 (2006) ("The . . . rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."). Accordingly, the Court concludes that Plaintiff has failed to allege standing as to its first cause of action to the extent it is predicated on the exemptions related to the use of the decommissioning trust funds. The Court therefore **GRANTS** the NRC's Motion in that respect.

b. The Private Defendants

The Private Defendants argue that Plaintiff has failed to establish Article III standing because it "does not allege an injury in fact to itself that is distinct and palpable, or that is based on anything other than its own speculation that a harm *may occur* in the future." Utility MTD at 21 (emphasis in original); *see also* Holtec MTD at 22-23. Plaintiff responds that "a 'credible threat that a probabilistic harm will materialize is enough' to establish injury-in-fact," ECF No. 51 at 18 (quoting *Nat. Res. Def. Council v. EPA*, 735 F.3d 873, 878 (9th Cir. 2013)), and that "[t]he Amended Complaint amply details—and supports with citations—the conditions that will lead to probabilistic harm, including: (1) the various design and manufacture defects in Holtec canisters . . . ; (2) the negligent and ongoing mishandling of the Holtec canisters by the Private Defendants . . . ; and (3) the precarious location of the ISFSI, which . . . credibly establish that probably harm will materialize." *Id.* at 19 (footnotes omitted). The Private Defendants respond that "Plaintiff's failure to allege any actual radioactive leak is a hurdle to Article III standing" and "Plaintiff's conclusory assertions regarding

imminent harm are also speculative because . . . Plaintiff . . . alleges a 'speculative chain of possibilities,' and 'relies only on alleged hypothetical conditions that might lead to certain consequences.'" ECF No. 54 at 8-9 (quoting *Pub. Watchdogs I*, 2018 U.S. Dist. LEXIS 148501, 2018 WL 4153302, at *4); *see also* ECF No. 55 at 8.

Defendants rely heavily on the Court's prior ruling dismissing Plaintiff's 2017 lawsuit for lack of standing. *See* Utility MTD at 20-22; ECF No. 54 at 8-9. That determination, however, was made on the basis of the allegations in Plaintiff's November 15, 2017 complaint in *Public Watchdogs I*. Whether Plaintiff adequately alleges standing for purposes of this suit depends on the allegations in its operative First Amended Complaint, which contains additional factual details. For example, in addition to alleging that it "has at least one member who lives within the zone of exposure to a catastrophic release of radioactive material from SONGS," FAC ¶ 4, Plaintiff now alleges that "Defendants have already committed grievous errors in their management and handling of spent nuclear waste," which "creates an imminent risk that deadly nuclear waste will be released, resulting in the death, injury, illness, and/or significant bodily harm to millions of California residents, as well as damage to and destruction of wildlife, agriculture, public and private property, and critical transportation infrastructure." *Id.* ¶ 2; *see also id.* ¶ 94 ("Given the SONGS Defendants' track record, the continued operation of the current decommissioning plan presents an imminent danger to the Plaintiff, the public, and the environment of Southern California."). Specifically, Plaintiff alleges that the Utility

Defendants have compromised the structural integrity of the cannisters, *see id.* ¶¶ 66-68, and nearly dropped two 49-ton canisters of SNF, *see id.* ¶¶ 69-80, and that the NRC has abdicated meaningful supervision at SONGS. *See id.* ¶¶ 31-44, 85-94.

Accepting Plaintiff's allegations as true and construing them in favor of Plaintiff, as the Court must in ruling on Defendants' Rule 12(b)(1) motions, *see Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)), the Court concludes that Plaintiff's allegations suffice to establish Article III standing. Even after the Supreme Court's decision in *Clapper v. Amnesty International USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013), the Ninth Circuit has "consistently held that an injury is 'actual or imminent' where there is a 'credible threat' that a probabilistic harm will materialize." *Nat. Res. Def. Council v. U.S. E.P.A.*, 735 F.3d 873, 878 (9th Cir. 2013); *see also In re Zappos.com, Inc.*, 888 F.3d 1020, 1027-29 (9th Cir. 2018) (concluding that the plaintiffs had alleged a credible threat of real and immediate harm sufficient to establish standing where hackers had stolen their personal information from the defendant's servers, thereby exposing the plaintiffs to an increased risk of identity theft), *cert. denied*, 139 S. Ct. 1373, 203 L. Ed. 2d 609 (2019); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 645 n.49 (9th Cir. 2014) ("[A] credible threat of harm is sufficient to constitute actual injury for standing purposes, whether or not a statutory violation has occurred.") (quoting *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950

(9th Cir. 2002)). Indeed, the Ninth Circuit has recognized that "[t]he ability to challenge actions creating threatened environmental harms is particularly important because in contrast to many other types of harms, monetary compensation may well not adequately return plaintiffs to their original position," given that "[t]he extinction of a species, the destruction of a wilderness habitat, or the fouling of air and water are harms that are frequently difficult or impossible to remedy." *Cent. Delta Water Agency*, 306 F.3d at 950, *abrogated on other grounds by Clapper*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264.

This reasoning is equally applicable in the context of nuclear contamination. The Court therefore concludes that Plaintiff adequately has alleged Article III standing to seek injunctive relief against the Private Defendants. *See, e.g.*, *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 860 (9th Cir. 2005) (finding that the plaintiff had established standing where "the [challenged] dock extension risks increased tanker traffic and a . . . corresponding increase in the risk of an oil spill" and concluding that "the alleged injury is not conjectural or hypothetical, as 'an increased risk of harm can itself be injury in fact for standing,' and nothing necessitates a showing of existing environmental harm") (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1151 (9th Cir. 2000)); *US Citrus Sci. Council v. U.S. Dep't of Agric.*, No. 117CV00680LJOSAB, 2017 U.S. Dist. LEXIS 177230, 2017 WL 4844376, at *8 (E.D. Cal. Oct. 25, 2017) ("Plaintiffs have established environmental standing by showing that there is a significant risk of environmental injury [through the spread of disease from the importation

of Argentine lemons] that would be caused by the Final Rule and remedied by its reversal."); *Levine v. Johanns*, No. C 05-04764 MHP, 2006 U.S. Dist. LEXIS 63667, 2006 WL 8441742, at *4 (N.D. Cal. Sept. 6, 2006) (concluding that the plaintiffs had standing to assert APA claim premised on theory that the "USDA's interpretation of, or failure to interpret, the 1958 HMSA causes an increased risk of contracting food-borne illnesses from inhumanely slaughtered animals").

2. The Court's Subject-Matter Jurisdiction

Defendants also contend that the Court lacks subject-matter jurisdiction because Plaintiff's causes of action all challenge actions taken pursuant to the Atomic Energy Act of 1954 ("AEA"), 42 U.S.C. §§ 2011-2021, 2022-2286i, 2296a-2297h-13, and NRC regulations and therefore must be brought in the Ninth Circuit under the Hobbs Act, *see* Holtec MTD at 7-9; Utility MTD at 22-25; NRC MTD at 6-11, pursuant to which "[t]he court of appeals . . . has exclusive jurisdiction to . . . determine[] the validity of . . . all final orders of the [NRC] made reviewable by section 2239 of title 42." 28 U.S.C. § 2342(4). Section 2239, in turn, applies in relevant part to "proceeding[s] . . . for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and . . . proceeding[s] for the issuance or modification of rules and regulations dealing with the activities of licensees." 42 U.S.C. § 2239(a)(1)(A).

The Hobbs Act is to be read broadly. *See Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 539 (9th

Cir. 1996). The Supreme Court has recognized that, "[i]n the absence of specific evidence of contrary congressional intent, . . . review of orders resolving issues preliminary or ancillary to the core issue in a proceeding should be reviewed in the same forum as the final order resolving the core issue." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985).

a. The NRC

Plaintiff alleges a single cause of action for violation of the APA against the NRC. *See generally* FAC ¶¶ 100-08. Specifically, Plaintiff alleges that "[t]he NRC's grant of the SONG Defendants' application for a License Amendment [in July 2015] was in violation of the Administrative Procedures Act," *id.* ¶ 101, and that, "[s]ince the License Amendment, Defendant NRC has periodically taken final action on various requests by the SONGS Defendants to continue the removal of SNF from wet storage and burial in defective canisters, including by accepting amendments to certificates of compliance and granting exemptions from other statutory and regulatory requirements (. . . "Other Agency Actions")." *Id.* ¶ 102. Plaintiff alleges that the NRC "failed to fulfill the procedural and adjudicative rule-making requirements" with respect to the License Amendment and Other Agency Actions, *see id.* ¶ 104, and that "[t]he License Amendment and Other Agency Actions were contrary to and in excess of authority of law, and were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law." *Id.* ¶ 105. Consequently, "[t]he NRC . . . has acted contrary to and in excess of its authority," *id.* ¶ 106, and "in violation and

contravention of obligations incumbent by operation of law or in excess of duly delegated authority." *Id.* ¶ 107.

The NRC contends that, "[b]y its own terms, Plaintiff's cause of action against the NRC is a challenge to a license amendment issued in July 2015 . . . [, a]nd the basis for the injunctive relief Plaintiff seeks against the NRC is the irreparable harm allegedly caused by the License Amendment." NRC MTD at 8 (citing FAC ¶¶ 101-06, 109). Consequently, "[o]nly the Court of Appeals may hear Plaintiff's claim that the NRC improperly granted the License Amendment, which forms the basis for its request for injunctive relief." *Id.* at 6. As for Plaintiff's allegations concerning Other Agency Actions, those challenges "cannot be bifurcated and reviewed by this Court under a separate jurisdictional theory," *id.* at 11 (citing *Lorion*, 470 U.S. at 742-43), and largely "'flow[ed] from' and occurr[ed] 'after' the License Agreement." *Id.* at 13. Further, "the [challenged] decisions, which Plaintiff characterizes as 'exemptions enforcement actions,' are examples of the Agency exercising its discretion to develop the remedies it considers appropriate in instances where SCE may have acted inconsistently with the requirements of its license of Agency regulations," which are not exemptions or, "in any event, . . . []reviewable because [they are] committed to agency discretion by law." *Id.* at 12 (collecting cases). The NRC urges that Plaintiff's remedy is to file a petition for review pursuant to 10 C.F.R. § 2.206 or a petition for rulemaking pursuant to 10 C.F.R. § 2.802, either of which provides for judicial review before the Ninth Circuit pursuant to the Hobbs Act. *See id.* at 10-11, 13 n.4.

Plaintiff counters that the Hobbs Act does not apply to all NRC actions, such as "final orders issued in [NRC] proceedings involving exemptions," ECF No. 52 at 12 (alteration in original) (quoting *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 578 F.3d 175, 180 (2d Cir. 2009)), and that the "NRC's many failures involving SONGS fall outside the Hobbs Act." *Id.* (emphasis omitted). For example, Plaintiff indicates that the NRC has granted numerous exemptions, some of which involve use of the decommissioning trust funds, *see id.* at 13, or defects in or changes to the design of the Holtec cannisters, *see id.* at 14-15, or the filing of event reports. *See id.* at 15. Finally, "the relief Public Watchdogs seeks—a temporary halt to the movement of nuclear fuel and performance of an independent risk assessment—cannot be secured in a proceeding before the NRC." *Id.* at 16-17.

Noting that Plaintiff does not dispute that its challenges to the July 2015 License Amendment is untimely and subject to the Hobbs Act, the NRC responds that "this Court should dismiss, with prejudice, for lack of jurisdiction Plaintiff's claim relating to the License Amendment." ECF No. 53 at 2. As for the Other Agency Actions, "none . . . support the Court exercising jurisdiction in this case." *Id.* First, several of the exemptions Plaintiff challenges are time-barred under the APA's six-year statute of limitations. *Id.* at 2-3. Second, "any challenge by Plaintiff to the Certificate of Compliance for the Holtec system is before the wrong court (and untimely)." *Id.* at 4. Third, "[m]uch of the conduct that Plaintiff identifies in the Opposition relates to the Agency's approach to enforcement, which is neither an 'exemption,' as Plaintiff

contends, nor subject to judicial review," *id.*; *see also id.* at 5-7, because "an agency's enforcement decision, including refusal to pursue enforcement action, is presumptively unreviewable." *Id.* at 7 (citing *Heckler v. Chaney*, 470 U.S. 821, 837, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985); *City & Cnty. of S.F. v. U.S. Dep't of Transp.*, 796 F.3d 993, 1001 (9th Cir. 2015)).

It is clear that the Court lacks jurisdiction over Plaintiff's challenges related to the July 2015 License Amendment and the Certificate of Compliance for the Holtec system, both of which are final orders of the NRC relating to the grant or amendment of a license for purposes of the Hobbs Act. *See, e.g.*, 10 C.F.R. § 72.210 (granting "[a] general license . . . for the storage of spent fuel in an independent spent fuel storage installation at power reactor sites to persons authorized to possess or operate nuclear power reactors"); 10 C.F.R. § 72.212 (limiting the general license in 10 C.F.R. § 72.210 to "storage of spent fuel in casks approved under the provisions of this part"); 10 C.F.R. § 72.214 (listing approved spent fuel storage casks, including certificates for several manufactured by Holtec); *N.J. Dep't of Envt'l Prot. & Energy v. Long Island Power Auth.*, 30 F.3d 403, 410 (3d Cir. 1994) (affirming district court's dismissal of challenges to NRC's approval of license amendment and issuance of a certificate of compliance for radioactive material cannisters for lack of jurisdiction and concluding that "[t]hese challenges cannot be maintained in the district court" under the Hobbs Act); *Skull Valley Band of Goshute Indians v. Leavitt*, 215 F. Supp. 2d 1232, 1252 (D. Utah 2002) ("Pursuant to the [Hobbs Act], the proper

forum for the review of issues concerning the NRC's authority to license the proposed [privately owned] facility [for storage of spent nuclear fuel] or the propriety of such a license is the federal courts of appeals."), *aff'd*, 376 F.3d 1223 (10th Cir. 2004); *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Comm'n*, 854 F. Supp. 16, 18-19 (D. Mass. 1994) (denying motion for preliminary injunction and dismissing for lack of jurisdiction complaint alleging that NRC violated the National Environmental Policy Act by failing to conduct an environmental impact study prior to approving decommissioning of nuclear power plant because "the court must address NRC's decision that [the operator of the nuclear plant] did not have to amend its license in order to engage in extensive early component removal prior to NRC's approval of a decommissioning plan," judicial review of which "must rest with the court of appeals" pursuant to the Hobbs Act). Plaintiff appears to have conceded as much by filing a 2.206 petition before the NRC and an emergency petition for writ of mandate before the Ninth Circuit.[4] *See* ECF No. 54 Exs. 47-48.

As for the "exemptions from other statutory and regulatory requirements" comprising the Other Agency

4. As indicated at the November 25, 2019 hearing, the Court is troubled by Plaintiff's decision to seek the same relief—a temporary cessation of the decommissioning efforts at SONGS—simultaneously before this Court, the NRC, and the Ninth Circuit. Plaintiff's scattershot approach has resulted in duplicative review of issues that may be rendered moot by the NRC's action on Plaintiff's 2.206 petition. *See Sierra Club v. U.S. Nuclear Regulatory Comm'n*, 825 F.2d 1356, 1362 (9th Cir. 1987) (expressing disfavor of entertaining judicial review of issues that may be mooted by further agency action).

Actions—to the extent that they are not time-barred and that Plaintiff has standing to pursue them, *see supra* Section I.B.1.a—they tend to touch on "issues preliminary or ancillary to the" July 2015 License Amendment and the Certificate of Compliance for the Holtec system, thereby rendering the Ninth Circuit the appropriate forum pursuant to the Hobbs Act. *See, e.g.*, *Gen. Atomics*, 75 F.3d at 539 (affirming district court's dismissal of lawsuit concerning the NRC's imposition of reclamation costs against an entity without a license granted by the NRC under the Hobbs Act); *Commonwealth Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 830 F.2d 610, 613 (7th Cir. 1987) (concluding that Court of Appeal had jurisdiction over challenge to the NRC's license fee regulations); *F.A.C.T.S, Inc. v. U.S. Nuclear Regulatory Comm'n*, No. 98-CV-0354E(H), 1998 U.S. Dist. LEXIS 16288, 1998 WL 748340, at *2 (W.D.N.Y. Sept. 11, 1998) (transferring action to Court of Appeals for lack of jurisdiction where the plaintiff challenged the NRC's "determination that it lacks jurisdiction over certain radioactive materials located at the [subject] site," which is a "determination . . . necessarily preliminary to the type of licensing proceeding reviewable only in the court of appeals"). Were the Court to conclude otherwise, this proceeding would result in the "irrational" "duplication of judicial review in the district court and court of appeals, with its attendant delays." *See Lorion*, 470 U.S. at 742.

Even if the Other Agency Actions were not ancillary to matters properly before the Ninth Circuit Court of appeals, the Court concludes that it lacks jurisdiction to review those decisions of the NRC under 5 U.S.C. § 701(a)(2),

which exempts from review under the APA "agency action . . . committed to agency discretion by law." The Supreme Court has clarified that this provision applies where "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985). "[A]n agency's decision not to . . . enforce . . . is a decision generally committed to an agency's absolute discretion," *id.* at 831 (collecting cases); consequently, "an agency's decision not to take enforcement action should be presumed immune from judicial review under § 701(a)(2)." *Id.* at 832. The Supreme Court clarified, however, that "the decision is only presumptively unreviewable," *id.*, and "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Id.* at 833. The Court intimated that an agency's decision may also be reviewable where "the agency has 'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 156 U.S. App. D.C. 267 (D.C. Cir. 1973) (en banc)).

Here, the Other Agency Actions are largely "exemptions from the rules and regulations promulgated to ensure that nuclear facilities are operated and decommissioned safely." *See* FAC ¶ 31. In *Riverkeeper, Inc. v. Collins*, 359 F.3d 156 (2d Cir. 2004), for example, the Second Circuit concluded that the NRC's decision to not, among other things, change the nuclear power plant's spent-fuel storage to a dry-cask system was a

denial of enforcement. *See id.* at 166 & n.11. Consequently, the NRC's "decision [wa]s presumptively not reviewable unless the presumption [wa]s overcome by one of the means recognized by *Chaney*." *Riverkeeper, Inc.*, 359 F.3d at 166. The Court concludes that Plaintiff has failed to meet this burden here. *See id.* at 166-71. Accordingly, the Court **GRANTS** the NRC's Motion and **DISMISSES WITH PREJUDICE** Plaintiff's first cause of action against the NRC. *See Berka v. U.S. Nuclear Regulatory Comm'n*, No. 17-CV-02836 (APM), 2018 U.S. Dist. LEXIS 213142, 2018 WL 7269949, at *2 (D.D.C. Dec. 19, 2018) (dismissing with prejudice complaint against the NRC where district court lacked jurisdiction under the Hobbs Act and the plaintiff's challenge was not timely pursuant to 28 U.S.C. § 2344).

b. The Private Defendants

Similarly, the Private Defendants contend that the Court lacks jurisdiction over Plaintiff's Price-Anderson Act, public nuisance, and strict products liability causes of action because Plaintiff is "trying to use [those] laws to challenge the NRC's final licensing and certification decisions regarding spent fuel storage at SONGS," while "original jurisdiction to review such NRC licensing activity is vested exclusively in the United States Courts of Appeals" pursuant to the Hobbs Act. *See* Holtec MTD at 7-8; Utility MTD at 22-25. "Further, even if this Court did have original subject matter jurisdiction to hear Plaintiff's claims, it would nevertheless lack jurisdiction because (1) Plaintiff did not challenge either NRC's issuance in 2015 of an amendment to the SONGS operating license . . . or

the Holtec [Certificate of Compliance ("COCs")] within 60 days of the Amendment or the CoCs becoming final . . . ; and (2) Plaintiff has not exhausted its administrative remedies." Holtec MTD at 8-9.

Plaintiff responds that the July 2015 License Amendment and the Certificate of Compliance for the Holtec system are "not the basis of Plaintiff's claims against the Private Defendants" and that Plaintiff's claims are instead predicated on, "among other things, . . . Private Defendants['] . . . secret and material modifications to the existing canister design (previously approved by the NRC) without telling the NRC; . . . Holtec['s] design[of] a product[that] doesn't conform to its Certificate of Compliance ("CoC"); and . . . the Private Defendants['] further damage[to] the canisters while downloading them." ECF No. 51 at 8. Further, not "everything they have done (and continue to do) is under the aegis of the NRC," *id.*, and the Private Defendants' "failure to disclose noncompliance with material statutory, regulatory, or contractual requirements" is actionable. *Id.* at 9 (citing *Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 901 (9th Cir. 2017)).

The Private Defendants reply that Plaintiff's challenged actions amount to "conduct taken under license, under the NRC's regulation, and encompassed by the Hobbs Act." ECF No. 54 at 7; *see also* ECF No. 55 at 2-5. Further, "Plaintiff's 10 C.F.R. § 2.206 Petition is a tacit concession that this Court does not have subject matter jurisdiction to hear this dispute," ECF No. 55 at 2, and the Court should "not entertain a petition where

pending administrative proceedings or further agency action might render the case moot and judicial review completely unnecessary." *Id.* at 4 (emphasis omitted) (quoting *Sierra Club*, 825 F.2d at 1362); *see also* ECF No. 54 at 7-8.

As with Plaintiff's cause of action against the NRC, *see supra* Section I.B.2.a, the Court agrees with the Private Defendants that the causes of action Plaintiff against alleges them are premised on conduct that falls under the Hobbs Act, thereby depriving this Court of jurisdiction. Plaintiff alleges that, "on July 17, 2015, the NRC granted the SONGS Defendants' request for a license amendment and permitted the SONGS Defendants[] to decommission the SONGS facility," FAC ¶ 43, and that the NRC "accept[ed] amendments to certificates of compliance" for the Holtec canisters, *id.* ¶ 102, the design of which has been changed without the approval of the NRC, *id.* ¶ 62, and is defective, *id.* ¶ 60, and of which the Private Defendants have compromised the structural integrity by negligently scratching the gouging the walls prior to burial. *Id.* ¶¶ 66-68. Plaintiff's second cause of action under the Price-Anderson Act is premised on the Private Defendants' "burying of SNF in defective canisters that are destined to fail." *Id.* ¶ 116. Plaintiff's third cause of action for public nuisance is premised on the Private Defendants' "failing to investigate and replace the substandard canisters" and "inten[tion] to store additional SNF in these substandard canisters, despite the well-known defects that render these canisters insufficient for the task." *Id.* ¶ 121. Finally, Plaintiff's fourth cause of action for strict products liability is premised on "Holtec's

defectively designed canisters." *Id.* ¶ 135. Ultimately, these causes of action all trace back to actions that were taken pursuant to or that were incidental to the NRC's issuance of the July 2015 License Amendment or the certificate of compliance for the Holtec canisters, actions that must be challenged before the Ninth Circuit pursuant to the Hobbs Act. *See supra* Section I.B.2.a.

Because the Court concludes that it lacks jurisdiction over Plaintiff's causes of action against the Private Defendants, the Court **GRANTS** their Motions and **DISMISSES WITH PREJUDICE** Plaintiff's second, third, and fourth causes of action. *See Berka*, 2018 U.S. Dist. LEXIS 213142, 2018 WL 7269949, at *2.

II. Federal Rule of Civil Procedure 12(b)(6)

A. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a party may file a motion to dismiss on the grounds that a complaint "fail[s] to state a claim upon which relief can be granted." A motion to dismiss under Rule 12(b)(6) "tests the legal sufficiency of a claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001); *Bryan v. City of Carlsbad*, 209 F. Supp. 3d 1107, 1114 (S.D. Cal. Mar. 20, 2018).

Because Rule 12(b)(6) focuses on the "sufficiency" of a claim rather than the claim's substantive merits, "a court may [ordinarily] look only at the face of the complaint to decide a motion to dismiss," *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002), including

the exhibits attached to it. *See* Fed. R. Civ. P. 10(c) ("A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426 (9th Cir. 1978) (holding that "material which is properly submitted as part of the complaint may be considered" in ruling on a Rule 12(b)(6) motion to dismiss). Exhibits that contradict the claims in a complaint, however, may fatally undermine the complaint's allegations. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (a plaintiff can "plead himself out of a claim by including . . . details contrary to his claims") (citing *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998) ("[Courts] are not required to accept as true conclusory allegations [that] are contradicted by documents referred to in the complaint."))); *see also Nat'l Assoc. for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) (holding that courts "may consider facts contained in documents attached to the complaint" in determining whether the complaint states a claim for relief).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *Villa v. Maricopa Cnty.*, 865 F.3d 1224, 1228-29 (9th Cir. 2017). A claim is facially plausible "when the plaintiff

pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plausibility requires pleading facts, as opposed to conclusory allegations or the "formulaic recitation of the elements of a cause of action," *Twombly*, 550 U.S. at 555, which rise above the mere conceivability or possibility of unlawful conduct. *Iqbal*, 556 U.S. at 678-79; *Somers v. Apple, Inc.*, 729 F.3d 953, 959-60 (9th Cir. 2013). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. While a pleading "does not require 'detailed factual allegations,'" Rule 8 nevertheless "demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555).

Therefore, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (citation and quotes omitted); *accord Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (en banc). "In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences [drawn] from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 678).

B. Analysis

1. Sempra

Sempra contends that Plaintiff's second and third causes of action against it should "be dismissed because it is not a proper party to the case" given that "Sempra is not a direct owner of SONGS and is not a licensee" and "there are no allegations in the FAC as to Sempra's conduct separate from it simply being the ultimate parent company of SDG&E[,] which is insufficient for liability." Utility MTD at 1 n.1 (citing *Maple Leaf Adventures Corp. v. Jet Tern Marine Co.*, No. 15-CV-02504-AJB-BGS, 2016 U.S. Dist. LEXIS 76157, 2016 WL 3063956, at *6 (S.D. Cal. Mar. 11, 2016) ("As a general principle, corporate separateness insulates a parent corporation from liability created by its subsidiary, notwithstanding the parent's ownership of the subsidiary.") (quoting *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015))). Plaintiff counters that "[t]he Amended Complaint alleges that Sempra, as one of the SONGS Defendants, is equally responsible for the unlawful activity described therein" and "that Sempra's conduct establishes a pattern of corporate conduct relevant to its claims." ECF No. 51 (citing FAC ¶ 7 & n.3).

"It is a general principle of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *United States v. Bestfoods*, 524 U.S. 51, 61, 118 S. Ct. 1876, 141 L. Ed. 2d 43 (1998).

"[A]ctivities that involve the facility but which are consistent with the parent's investor status, such as monitoring of the subsidiary's performance, supervision of the subsidiary's finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability." *Id.* at 72 (alteration in original). But a parent company may be "directly liable for its own actions" where "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management" and "the parent is directly a participant in the wrong complained of." *See id.* at 64-65. Additionally, "the corporate veil may be pierced and the [parent company] held liable for the [subsidiary] corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the [parent company]'s behalf." *Id.* at 62.

Here, Plaintiff alleges that "[Sempra] is the parent company of SDG&E doing business within the state of California," FAC ¶ 7, and that "Sempra is currently under investigation for its role in the massive natural gas leak in Aliso Canyon." *Id.* n.3. Although there are many allegations pertaining to the "SONGS Defendants," *see, e.g.*, *id.* ¶¶ 18-19, 21-26, 29-30, 32-39, 41-44, 50, 52-53, 56, 58-59, 62-69, 71-74, 76-80, 85, 93-94, 96-99, which Plaintiff defines to include Sempra, *see id.* ¶ 8, there are only passing references to Sempra in the Amended Complaint, none of which allege particular actions taken by Sempra. *See id.* ¶ 116, 119. Consequently, Plaintiff's Amended Complaint contains no allegations supporting Sempra's liability, either directly or vicariously.

Further, a review of Plaintiff's voluminous exhibits indicates that the filings and correspondence from the NRC neither mentions nor is addressed to—or even copied to—anybody identified as working at Sempra. *See generally* FAC Exs. 8, 10, 13-23, 37. Given the absence of any allegations concerning Sempra's direct involvement in the actions underlying Plaintiff's second and third causes of action or any allegations supporting the piercing of the corporate veil such that Sempra may be held liable for the actions of SDG&E, the Court concludes that Plaintiff has failed to state a claim against Sempra. *See, e.g.*, *Saaiman v. Am. Gen. Life Ins. Co., Inc.*, No. 18-CV-596-BTM-AGS, 2019 U.S. Dist. LEXIS 70265, 2019 WL 1864858, at *2 (S.D. Cal. Apr. 25, 2019) (concluding that the plaintiff had failed to state a claim against parent company under theories of direct or vicarious liability where the plaintiff failed to allege any wrongful actions taken by the parent company or any facts supporting agency or alter ego theories). Accordingly, the Court **GRANTS** Sempra's Motion and **DISMISSES** Plaintiff's second and third causes of action against it.

2. Second Cause of Action: Violation of the Public Liability Action for Violation of the Price-Anderson Act, 42 U.S.C. § 2210(n), Against the Private Defendants

The Price-Anderson Act provides, in relevant part:

> With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in

> the district where the nuclear incident takes place . . . shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy.

42 U.S.C. § 2210(n)(2). The Act defines "public liability" as "any legal liability arising out of or resulting from a nuclear incident," 42 U.S.C.A. § 2014(w), and "nuclear incident" as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." 42 U.S.C.A. § 2014(q).

Plaintiff alleges that the Private Defendants "have caused an 'occurrence' and thereby created a 'nuclear incident' and 'public liability' within the meaning of the Price Anderson Act" by "burying SNF in defective canisters that are destined to fail." FAC ¶ 116. The Private Defendants contend that Plaintiff cannot state a cause of action under the Price-Anderson Act because there has not been a "nuclear incident" as defined by the statute. *See* Holtec MTD at 9-17; Utility MTD at 13-14. Specifically, Plaintiff has not alleged that anybody has been exposed to radiation in excess of the federal dose limits, *see* Holtec MTD at 11-15, or that anybody has suffered physical harm to their person or property as a result of such exposure. *See id.* at 15-17.

Plaintiff counters that "the PAA does not require a completed nuclear catastrophe before public intervention becomes appropriate." ECF No. 51 at 10. Plaintiff urges that "[t]he PAA claim must—statutorily—be considered in light of the nuisance claim," which "allows a court to step-in and step-on a prospective nuisance." *Id.* at 12. Plaintiff contends that it "alleges that Holtec's defective cannisters and their negligent installation will lead to 'lethal' and 'deadly' releases of radiation, which would never be allowed under any reasonable reading of federal regulations." *Id.* at 14 (quoting FAC ¶¶ 45-46). Further, "a completed radiation injury is not a prerequisite to equitable PAA relief." *Id.*

On reply, the Private Defendants note that "[n]o authority cited in the Opposition contradicts binding Ninth Circuit precedent which holds that a viable PAA [claim] requires 1) physical harm to persons and property; and 2) the release of radiation above the federal limits." ECF No. 54 at 8 (citing *In re Berg Litig.*, 293 F.3d 1127, 1131 (9th Cir. 2002); *O'Connor v. Boeing N. Am.*, Nos. CV 97-1554 DT (RCx) *et al.*, 2005 U.S. Dist. LEXIS 46226, 2005 WL 6035255, at *39-40 (C.D. Cal. Aug. 18, 2005)); *see also* ECF No. 55 at 5-8.

The Court agrees with the Private Defendants. Despite Plaintiff's arguments to the contrary, the Ninth Circuit has recognized that "[p]hysical harm to persons or property is . . . a jurisdictional prerequisite" to a cause of action under the Price-Anderson Act. *In re Berg Litig.*, 293 F.3d at 1131. Plaintiff's attempt to dispense with this requirement under the anticipatory

nuisance doctrine "would be inconsistent with the Act's 'bodily injury' requirement." *See id.* (rejecting argument that the plaintiffs could assert claims for emotional distress under the Price-Anderson Act despite not having suffered a physical injury because Washington law permits emotional distress claims in the absence of physical injury). Further, "[e]very Court of Appeals that has decided the duty or standard of care issue has held that the plaintiff must prove a dose in excess of the federal permissible dose limits in order to show a breach of duty in a Price-Anderson Act [public liability action ("PLA")]." *O'Connor*, 2005 U.S. Dist. LEXIS 46226, 2005 WL 6035255, at *40 (collecting cases). This means that "[a]n essential element of any [public liability action] is that the plaintiff's exposure exceed the federal dose limits." 2005 U.S. Dist. LEXIS 46226, [WL] at *39 (collecting cases). Because Plaintiff alleges neither that Defendants have caused exposure to radiation in excess of the federal limits nor that Plaintiff or any of its members has suffered physical harm, *see* FAC ¶¶ 112-17, the Court **GRANTS** the Private Defendants' Motions and **DISMISSES** Plaintiff's second cause of action.

3. State Law Causes of Action

a. Preemption

The Supreme Court has recognized that "state law can be preempted in either of two general ways." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). First, "[i]f Congress evidences an intent to occupy a given field, any state law falling within

that field is preempted." *Id.* (collecting cases). Second, "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . , or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id.* (citation omitted).

The Private Defendants contend that Plaintiff's state law causes of action for public nuisance and strict products liability are preempted by the AEA, which occupies the field of nuclear safety. *See* Holtec MTD at 17-20; Utility MTD at 14-18. Plaintiff counters that "the source of any preemption must be the PAA specifically rather than the AEA generally" and that the Price-Anderson Act does not preempt state-law claims for plaintiffs who cannot plead nuclear incidents under the Price-Anderson Act. *See* ECF No. 51 at 15-16. Consequently, "Plaintiff is entitled to relief either under the PAA (using California tort law to supply the rules of decision) or directly under California tort law." *Id.* at 16. The Private Defendants reply that "Plaintiff fails to address *any* of [their] case law concerning preemption under the Atomic Energy Act, including law holding that nuisance and strict liability claims dealing with nuclear safety are preempted." ECF No. 54 at 2 (citing *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1003 (9th Cir. 2008); *Laine v. Weinberger*, 541 F. Supp. 599, 604 (C.D. Cal. 1982)); *see also* ECF No. 55 at 2 (citing *United States v. Manning*, 527 F.3d 828 (9th Cir. 2008); *Laine*, 541 F. Supp. at 604).

The Court finds that Plaintiff's state law claims are preempted by the AEA, which occupies the field for protection against hazards of radiation and the disposal of radioactive materials. According to Congress, the AEA was intended, among other purposes, to provide for "a program for Government control of the possession, use, and production of atomic energy and special nuclear material." 42 U.S.C. § 2013 (c). Although recognizing the interests of the States, *see* 42 U.S.C. § 2021(a), Congress explicitly reserved to the NCR the responsibility to regulate "the disposal of . . . nuclear material as the Commission determines by regulation or order should, because of the hazards or potential hazards thereof, not be so disposed of without a license from the Commission," *see* 42 U.S.C. § 2021(c)(4), and "activities for . . . protection against radiation hazards." *See* 42 U.S.C. § 2021(k).

Here, Plaintiff's state law causes of action are predicated on potential radiation hazards that may result from the disposal of nuclear material. *See, e.g.*, FAC ¶¶ 121 ("Unless restrained by this Court, the Nuisance Defendants intend to and will continue to maintain the nuisance by failing to investigate and replace the substandard canisters, which are currently used to store SNF. Worse still, the Nuisance Defendants intend to store additional SNF in these substandard canisters, despite the well-known defects that render these canisters insufficient for the task."), 125 ("Unless the public nuisance activities of the Nuisance Defendants' remediation plan are restrained by a preliminary and permanent injunction, Plaintiffs and the citizens of the surrounding area will suffer great and irreparable injury in that additional

nuclear waste will be stored in containers significantly more prone to malfunction."), 135 ("As a direct and proximate cause of Holtec's defectively designed canisters, Plaintiff and the citizens of and visitors to California have suffered and will suffer damage including, but not limited to, imminent threat of harm in the form of a catastrophic release of deadly nuclear waste."). As such, they are preempted by the AEA. *See, e.g.*, *Brown v. Kerr-McGee Chem. Corp.*, 767 F.2d 1234, 1242 (7th Cir. 1985) ("[P]laintiffs' request for an injunction ordering the [nuclear] wastes moved elsewhere is preempted because, if granted, the injunction would stand 'as an obstacle to the accomplishment of the full purposes and objectives' of federal regulation of radiation hazards.") (quoting *Silkwood*, 464 U.S. at 248); *Pennsylvania v. Gen. Pub. Utils. Corp.*, 710 F.2d 117, 120 (3d Cir. 1983) ("Private litigants therefore may not obtain by way of injunctive relief pursuant to state law an order abating as a public nuisance, because of public safety hazards, activity of a duly licensed nuclear energy electric generating plant."); *Dailey v. Bridgeton Landfill, LLC*, 299 F. Supp. 3d 1090, 1099 (E.D. Mo. 2017) ("The allegations of the [plaintiffs]' nuisance claims fall within the purview of PAA and are therefore preempted like any other state-law claims."); *Lawson v. Gen. Elec. Co.*, 140 F. Supp. 3d 968, 974 (N.D. Cal. 2015) ("Plaintiff's second and third causes of action are preempted by Price-Anderson because they are based on the theory of strict liability.") (citing *O'Connor*, 2005 U.S. Dist. LEXIS 46226, 2005 WL 6035255 at *43); *Osarczuk v. Associated Univs., Inc.*, 36 A.D.3d 872, 830 N.Y.S.2d 711, 714 (N.Y. App. Div. 2007) ("[T]he Act and Act Amendments preempt all state common-law causes

of action and theories of relief which might otherwise address radiological exposure from nuclear facilities, including negligence, strict liability based on engagement in an ultrahazardous activity, and nuisance."); *Md. Heights Leasing, Inc. v. Mallinckrodt, Inc.*, 706 S.W.2d 218, 222-23 (Mo. Ct. App. 1985) ("Private litigants may not obtain state law injunctive relief against nuclear facilities for radiation hazards since public protection from radiation hazards is exclusively a federal concern."); *Marshall v. Consumers Power Co.*, 65 Mich. App. 237, 247, 237 N.W.2d 266 (1975) (concluding that action for nuisance based on radioactive hazard was preempted by the AEA). Consequently, the Court **GRANTS** the Private Defendants' Motions and **DISMISSES** Plaintiff's third and fourth causes of action as preempted by the AEA.

b. Third Cause of Action: Public Nuisance in Violation of California Civil Code §§ 3479-3480 Against the Private Defendants

In addition to arguing that the claim is preempted by the AEA, *see supra* Section II.B.3.a, the Private Defendants contend that "Plaintiff lacks standing to bring a public nuisance claim under California law because Plaintiff has not alleged a special injury to its person property," Utility MTD at 19; *see also* Holtec MTD at 21-22, and "Plaintiff's public nuisance claim is barred by California Civil Code section 3482, which provides that 'nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.'" Holtec MTD at 20 (quoting *Friends of H St. v. City of*

Sacramento, 20 Cal. App. 4th 152, 160, 24 Cal. Rptr. 2d 607 (1993)); Utility MTD at 18 (same).

i. Special Injury

Under California law, "a private individual . . . does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different *in kind* from that suffered by the general public." *Brown v. Petrolane, Inc.*, 102 Cal. App. 3d 720, 725, 162 Cal. Rptr. 551 (1980) (emphasis in original) (collecting cases). "Under this rule[,] the requirement is that the plaintiff's damage be different in kind, rather than in degree, from that shared by the general public." *Id.* (collecting cases).

The Private Defendants contend that "Plaintiff lacks standing to bring a public nuisance claim under California law because Plaintiff has not alleged a special injury to its person or property." Utility MTD at 19; *see also id.* at 19-20; Holtec MTD at 21-22. Plaintiff responds that "a public nuisance that interferes with a not-for-profit organization's ability to fulfill its corporate mission (as Private Defendants' public nuisance does) can—and does—constitute a special injury for the purposes of California's public nuisance laws." ECF No. 51 at 22. "Furthermore, Plaintiff's allegations in the instant case establish that Private Defendants' conduct creates a credible risk of probabilistic harm to Plaintiff that is different in kind from the harm suffered by the general public" because "[t]he Private Defendants' conduct constitutes a public nuisance of the precise type that Plaintiff was created to

prevent." *Id.* at 22-23. The Private Defendants note that "Plaintiff concedes that it has not alleged any property damage or any injury to itself [or] any of its members" and that "Plaintiff has not cited a single case for the proposition that injury to its 'organization[al] mission . . . ' is a cognizable injury under California law." ECF No. 55 at 9; *see also* ECF No. 54 at 9. Further, "Plaintiff does not, and cannot, make an argument that the public does not have an interest in government agencies and special interests following all applicable laws." ECF No. 55 at 9.

The Court concludes that Plaintiff has failed to allege a special injury as required to maintain a cause of action for public nuisance. The Private Defendants are correct that Plaintiff has identified no authority in support of its proposition that injury to its "organization[al] mission" suffices as a "special injury" for purposes of California's public nuisance law. In the absence of contrary authority, the Court must conclude that Plaintiff's concerns are shared by "the entire community of the Southern District of California," *see* FAC ¶ 119, including "all those living or working near the temporary storage area, including the major metropolitan areas of San Diego, Irvine, Riverside, San Clemente, and others." *Id.* ¶ 122. Accordingly, the Court concludes that Plaintiff has failed to allege a special injury as required to maintain an action for public nuisance; the Court therefore **GRANTS** the Private Defendants' Motion and **DISMISSES** Plaintiff's third cause of action. *See, e.g.*, *Koll-Irvine Ctr. Prop. Owners Ass'n v. Cnty. of Orange*, 24 Cal. App. 4th 1036, 1040-41, 29 Cal. Rptr. 2d 664 (1994) (affirming dismissal of action for public nuisance asserted by property owners'

association alleging that it would suffer special injury due to its proximity to alleged nuisance because its "proximity arguably exposes it to a higher degree of these damages, but not to a different kind altogether"); *see also Simpson v. Cal. Pizza Kitchen, Inc.*, 989 F. Supp. 2d 1015, 1025 (S.D. Cal. 2013) (dismissing public nuisance claim for lack of standing where the "[p]laintiff has failed to allege sufficient facts to demonstrate a special injury").

ii. Section 3482

The Private Defendants also contend that "Plaintiff's public nuisance claim is barred by California Civil Code section 3482, which provides that 'nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.'" Utility MTD at 18 (quoting *Friends of H St.*, 20 Cal. App. 4th at 160); Holtec MTD at 20 (same). Specifically, the Private Defendants note that the NRC certified the Holtec System as "approved for storage of spent fuel" in 10 C.F.R. § 72.214 and the construction of the SONGS ISFSI in 10 C.F.R. § 72.210. *See* Holtec MTD at 21; Utility MTD at 19. Because Plaintiff's allegations relate to activities authorized by regulation, they cannot be a public nuisance. *See id.* (citing *Dina v. People ex rel. Dep't of Trans.*, 151 Cal. App. 4th 1029, 1053, 60 Cal. Rptr. 3d 559 (2007); *Friends of H St.*, 20 Cal. App. 4th at 163; *Orpheum Bldg. Co. v. S.F. Bay Area Rapid Transit Dist.*, 80 Cal. App. 3d 863, 876, 146 Cal. Rptr. 5 (1978); *Lombardy v. Peter Kiewit Sons' Co.*, 266 Cal. App. 2d 599, 605, 72 Cal. Rptr. 240 (1968)).

Plaintiff counters that "a regulatory scheme that 'impose[s] the design, siting, operation, and safety requirements' will not" bar Plaintiff's nuisance claim under Section 3482. ECF No. 51 at 16 (quoting *Wilson v. S. Cal. Edison Co.*, 234 Cal. App. 4th 123, 157, 184 Cal. Rptr. 3d 26 (2015)). Consequently, "Private Defendants must hunt for and find a statute that expressly permits them to defectively design canisters and negligently install them." *Id.*

Defendants rejoin that, "[u]nder the AEA, the NRC regulatory authority covers the field of nuclear safety, and pursuant to the statutory authority, NRC certified via rulemaking the Holtec System at issue herein, as well as the 2015 License Amendment approval for SONGS." ECF No. 55 at 10; *see also* ECF No. 54 at 10. To the extent Plaintiff attempts to avoid Section 3482 "by alleging flaws in the NRC licensing and certification processes . . . Plaintiff's remedy lies with a petition under 10 C.F.R. § 2.[2]06 and an action before the Ninth Circuit Court under the Hobbs Act — not with a public nuisance claim." ECF No. 55 at 10.

Again, the Court agrees with the Private Defendants. To the extent that Plaintiff's nuisance cause of action is predicated on the Private Defendants' actions pursuant to licenses and certificates issued by the NRC, it is barred by Section 3482. *See supra* Section I.B.2.b; *see also, e.g., Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 888 (9th Cir. 2001) ("Here, the Water Quality Board issued NPDES permits to the Government Defendants in 1990 and 1996. Those permits authorized the discharge of storm

water containing pollutants, and there is no evidence that there was any lead-contaminated storm water runoff to the property prior to 1994 or a violation of the permits. Therefore, the district court properly granted summary judgment to the Government Defendants on the state law claims."); *SF Chapter of A. Philip Randolph Inst. v. U.S. E.P.A.*, No. C 07-04936 CRB, 2008 U.S. Dist. LEXIS 27794, 2008 WL 859985, at *5 (N.D. Cal. Mar. 28, 2008) ("Case law interpreting § 3482 suggests that a nuisance claim cannot lie against a state agency that issues permits allowing the discharge of pollutants so long as the permits are issued pursuant to statutory authority.") (citing *Carson Harbor Vill.*, 270 F.3d at 888); *Union City v. S. Pac. Co.*, 261 Cal. App. 2d 277, 281, 67 Cal. Rptr. 816 (1968) ("What is Required by a statute, including what is required by an authorized commission acting under authority of statute, cannot be a nuisance."); *see also North Carolina ex rel. Cooper v. Tenn. Valley Auth.*, 615 F.3d 291, 310 (4th Cir. 2010) ("TVA's plants cannot logically be public nuisances under Alabama and Tennessee law where TVA is in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them."); *N.Y. State Energy Research & Dev. Auth. v. Nuclear Fuel Servs., Inc.*, 102 F.R.D. 18, 26 (W.D.N.Y. 1983) ("[T]he mere shipment of such nuclear fuel, without more, cannot be found to constitute common law nuisance in light of the express authorization for such transportation under federal law.").[5]

5. A decision from the California Court of Appeal, Third District, which was depublished when the Supreme Court of California granted review, supports this conclusion. *See Akins v. Sacramento Mun. Util. Dist.*, 6 Cal. App. 4th 1605, 12 Cal. App.

The California Supreme Court has recognized that, "although an activity authorized by statute cannot be a nuisance, the *manner* in which the activity is performed may constitute a nuisance," *Greater Westchester Homeowners Ass'n v. City of L.A.*, 26 Cal. 3d 86, 101, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979) (emphasis in original) (quoting *Venuto*, 22 Cal. App. 3d at 129); however, to the extent Plaintiff wishes to challenge the NRC's authorization of the Utility Defendants' and Holtec's alleged safety violations under these licenses and certificates, *see* FAC ¶¶ 31-44, 85-108, Plaintiff's recourse lies under 10 C.F.R. § 2.206(a). *See* ECF No. 54 Ex. 47. Consequently, the Court **GRANTS** the Private Defendants' Motions as to Plaintiff's nuisance cause of action and **DISMISSES** Plaintiff's third cause of action.

c. Fourth Cause of Action: Strict Products Liability Against Holtec

Plaintiff alleges a cause of action for strict products liability against Holtec, *see* FAC ¶¶ 127-35, and alleges that, "[a]s a direct and proximate cause of Holtec's defectively designed canisters, Plaintiff and the citizens of and visitors to California have suffered and will suffer

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4th 208, 8 Cal. Rptr. 2d 785 (1992) ("[A] plaintiff cannot predicate a nuisance case upon the mere existence of a facility or activity which is statutorily authorized or upon anxiety caused by mere knowledge of its presence.") (citing *Varjabedian v. City of Madera*, 20 Cal. 3d 285, 292, 142 Cal. Rptr. 429, 572 P.2d 43 (1977); *Venuto v. Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 129, 99 Cal. Rptr. 350 (1971)), *review granted & opinion superseded*, 11 Cal. Rptr. 2d 329, 834 P.2d 1147, 834 P.2d 329 (Cal. 1992).

damage including, but not limited to, imminent threat of harm in the form of a catastrophic release of deadly nuclear waste." *Id.* ¶ 135. Holtec argues that "Plaintiff does not have standing under California strict liability law" because "California law bars [plaintiffs] who have not suffered personal injury of incurred property damage as a result of an alleged safety-related design defect from asserting a strict liability action" and "Plaintiff does not allege that it, or any of its members, actually suffered injury to its person or property." Holtec MTD at 22 (alteration in original) (quoting *Bishop v. Saab Auto. A.B.*, No. CV 95-0721 JGD(JRX), 1996 U.S. Dist. LEXIS 22890, 1996 WL 33150020, at *5 (Feb. 16, 1996)).

Plaintiff does not respond to Holtec's argument in its Opposition. *See generally* ECF No. 51. Under Ninth Circuit precedent, the Court therefore considers Plaintiff to have abandoned its strict liability cause of action. *See Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005) (dismissing causes of action as abandoned where plaintiff did not oppose dismissal in her opposition); *Shull v. Ocwen Loan Servicing, LLC*, No. 13-CV-2999 BEN (WVG), 2014 U.S. Dist. LEXIS 50686, 2014 WL 1404877, at *2 (S.D. Cal. Apr. 10, 2014) ("Where a party fails to address arguments against a claim raised in a motion to dismiss, the claims are abandoned and dismissal is appropriate."); *see also Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) (holding that the plaintiff forfeited her right to raise an issue on appeal because her opposition to a motion to dismiss failed to suggest a continuing interest in pursuing the claim and therefore "effectively abandoned" it).

In any event, Holtec is correct that, "[u]nder the product liability law of California, injury to the plaintiff from a defective product is an essential element of a cause of action." *Kanter v. Warner-Lambert Co.*, 99 Cal. App. 4th 780, 790, 122 Cal. Rptr. 2d 72 (2002) (collecting cases); *see also Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1054 (N.D. Cal. 2014) ("[R]ecovery under the doctrine of strict liability is limited solely to 'physical harm to person or property.'") (quoting *Jimenez v. Super. Ct.*, 29 Cal. 4th 473, 482, 127 Cal. Rptr. 2d 614, 58 P.3d 450 (2002)); Restatement (Third) of Torts: Prod. Liab. § 1 cmt. d (1998) ("The rule stated in this Section applies only to harm to persons or property, commonly referred to as personal injury and property damage."). Here, Plaintiff alleges no injury to itself or its members; rather, it alleges only an "imminent threat of harm." *See* FAC ¶ 135. Accordingly, the Court concludes that Plaintiff has failed to allege a strict products liability cause of action against Holtec and **DISMISSES** Plaintiff's fourth cause of action. *See, e.g.*, *Kanter*, 99 Cal. App. 4th at 790-91 (affirming dismissal where "[p]laintiffs acknowledge that their complaint does not allege any personal injury or injury to property as a result of using defendants' products").

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Because the Court concludes that it lacks jurisdiction over this action and that Plaintiff has failed to state a plausible claim for relief, the Court concludes that Plaintiff is unlikely to succeed on the merits. Accordingly, the Court **DENIES** Plaintiff's Motion for Preliminary Injunction. *See, e.g.*, *Sports Form, Inc. v. United Press Int'l, Inc.*, 686 F.2d 750, 753 (9th Cir. 1982) (affirming district court's denial of preliminary injunction where the plaintiff "had failed to show any chance of success on the merits," which "made a determination of potential injury or a balancing of hardships unnecessary"); *Kelley v. Mortg. Elec. Registration Sys., Inc.*, 642 F. Supp. 2d 1048, 1059 (N.D. Cal. 2009) (granting motions to dismiss and therefore denying motion for preliminary injunction for failure to show likelihood of success on the merits); *see also Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1088 (9th Cir. 2015) (reversing district court's grant of preliminary injunction where there was no "serious question" going to the merits of the claim and, consequently, reversing district court's denial of motion to dismiss as to that claim); *Washington v. O'Dell*, No. 3:17-CV-1615-MMA-PCL, 2018 U.S. Dist. LEXIS 69854, 2018 WL 1942372, at *10 (S.D. Cal. Apr. 25, 2018) (denying preliminary injunction when granting motion to dismiss); *Physician's Surrogacy, Inc. v. German*, No. 17CV718-MMA (WVG), 2018 U.S. Dist. LEXIS 16261, 2018 WL 638229, at *11 (S.D. Cal. Jan. 31, 2018) (same); *Wallace v. Sosa*, No. 16-CV-01501-BAS-BGS, 2017 U.S. Dist. LEXIS 15715, 2017 WL 469140, at *4-5 (S.D. Cal. Feb. 3, 2017) (same); *Ananiev v. Aurora Loan Servs., LLC*, No. C 12-2275 SI, 2012 U.S. Dist. LEXIS 95441, 2012 WL 2838689, at *8 (N.D. Cal. July 10, 2012) (same).

Appendix D

CONCLUSION

In light of the foregoing, the Court **GRANTS** Defendants' Motions to Dismiss (ECF Nos. 41, 42, 47). Specifically, the Court **CONCLUDES** that it lacks subject-matter jurisdiction as to all of Plaintiff's causes of action and that Plaintiff fails to allege facts sufficient to state a claim as to its second, third, and fourth causes of action. Because the Court concludes that the jurisdictional defects enumerated above cannot be cured by further amendment, the Court **DISMISSES WITH PREJUDICE** Plaintiff's First Amended Complaint. Accordingly, the Court **DENIES** Plaintiffs' Amended Motion for Preliminary Injunction (ECF Nos. 2, 5). The Clerk of Court **SHALL CLOSE** the file.

IT IS SO ORDERED.

Dated: December 3, 2019

/s/ Janis L. Sammartino
Hon. Janis L. Sammartino
United States District Judge

APPENDIX E — RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7 [7 USCS §§ 181 et seq. and §§ 501 et seq.], except orders issued under sections 210(e), 217a, and 499g(a) of title 7 [7 USCS §§ 210(e), 217a, and 499g(a)];

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56404, or 57109 of title 46 [46 USCS §§ 50501, 50502, 56101–56404, or 57109] or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49 [49 USCS §§ 13101 et seq., 15101 et seq., 31131 et seq., 31301 et seq., or 31501 et seq.]; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46 [46 USCS § 305, 41304, 41308, or 41309 or §§ 42101 et seq. or 44101 et seq.];

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title [28 USCS § 2321];

(6) all final orders under section 812 of the Fair Housing Act [42 USCS § 3612]; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title [28 USCS § 2344].

Appendix E

42 U.S.C. § 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this Act [42 USCS §§ 2011 et seq.]:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 54, 57, 64, 82, 91(c), 103, 104, or 144 [42 USCS § 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164], and made pursuant to section 123 [42 USCS § 2153].

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means—

(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material;

(2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content;

(3)

(A) any discrete source of radium-226 that is produced, extracted, or converted after extraction, before, on, or after the date of enactment of this paragraph [enacted Aug. 8, 2005] for use for a commercial, medical, or research activity; or

(B) any material that—

(i) has been made radioactive by use of a particle accelerator; and

(ii) is produced, extracted, or converted after extraction, before, on, or after the date of enactment of this paragraph for use for a commercial, medical, or research activity; and

(4) any discrete source of naturally occurring radioactive material, other than source material, that—

(A) the Commission, in consultation with the Administrator of the Environmental Protection Agency, the Secretary of Energy, the Secretary of Homeland Security, and the head of any other appropriate Federal agency, determines would pose a threat similar to the threat posed by a discrete source of radium-226 to the public health and safety or the common defense and security; and

(B) before, on, or after the date of enactment of this paragraph [enacted Aug. 8, 2005] is extracted or converted after extraction for use in a commercial, medical, or research activity.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of

source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 170 [42 USCS § 2210].

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(l) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United

States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to his obligations under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in an indemnity agreement entered into pursuant to section 170 [42 USCS § 2210].

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for cooperation.

(o) The term "Energy Committees" means the Committee on Energy and Natural Resources of the Senate and the Committee on Energy and Commerce of the House of Representatives.

(p) The term "licensed activity" means an activity licensed pursuant to this Act [42 USCS §§ 2011 et seq.] and covered by the provisions of section 170(a) [42 USCS § 2210(a)].

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within

the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 170(l) [42 USCS § 2210(l)], it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 170(d) [42 USCS § 2210(d)], it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 170 c. [42 USCS § 2210(c)], it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to chapters 6, 7, 8, and 10 of this Act [42 USCS §§ 2071 et seq., 2091 et seq., 2111 et seq., and 2131 et seq.], which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 170(c) [42 USCS § 2210(c)], and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 170(d) [42 USCS § 2210(d)] has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make,

produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission. Except with respect to the export of a uranium enrichment production facility, such term as used in chapters 10 and 16 [42 USCS §§ 2131 et seq. and §§ 2231 et seq.] shall not include any equipment or device (or important component part especially designed for such equipment or device) capable of separating the isotopes of uranium or enriching uranium in the isotope 235.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and

(k) of section 170 [42 USCS § 2210], claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided,* That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 [42 USCS § 2162].

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 61 [42 USCS § 2091] to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 [42 USCS § 2071], determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all Territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) The terms "high-level radioactive waste" and "spent nuclear fuel" have the meanings given such terms in section 2 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10101).

(ee) The term "transuranic waste" means material contaminated with elements that have an atomic number

greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to protect the public health and safety.

(ff) The term "nuclear waste activities", as used in section 170 [42 USCS § 2210], means activities subject to an agreement of indemnification under subsection d. of such section, that the Secretary of Energy is authorized to undertake, under this Act [42 USCS §§ 2011 et seq.] or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste, including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265) [unclassified].

(gg) The term "precautionary evacuation" means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is—

> **(1)** the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material,

byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes an evacuation; and

(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(hh) The term "public liability action", as used in section 170 [42 USCS § 2210], means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 170 [42 USCS § 2210], and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(ii) [Not enacted]

(jj) Legal costs. As used in section 170 [42 USCS § 2210], the term "legal costs" means the costs incurred by a plaintiff or a defendant in initiating, prosecuting, investigating, settling, or defending claims or suits for damage arising under such section.

Appendix E

42 U.S.C. § 2210. Indemnification and limitation of liability

(a) Requirement of financial protection for licensees. Each license issued under section 103 or 104 [42 USCS § 2133 or 2134] and each construction permit issued under section 185 [42 USCS § 2235] shall, and each license issued under section 53, 63, or 81 [42 USCS § 2073, 2093, or 2111] may, for the public purposes cited in section 2(i) [42 USCS § 2012(i)], have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) to cover public liability claims. Whenever such financial protection is required, it may be a further condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c). The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

(b) Amount and type of financial protection for licensees.

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time,

taking into consideration such factors as the following: (A) the costs and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: *Provided,* That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided,* That such insurance is available to, and required of, all of the licensees of such

facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than $95,800,000 (subject to adjustment for inflation under subsection (t)), but not more than $15,000,000 in any 1 year (subject to adjustment for inflation under subsection (t)), for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (o)(1)(D), payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this Act [42 USCS §§ 2011 et seq.] shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2)

(A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1)—

(i) for any facility, if more than one nuclear incident occurs in any one calendar year; or

(ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would result in undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the difference between the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry

and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4)

(A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the limitation on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds—

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations,

bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for such

purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, United States Code [31 USCS §§ 3101 et seq.], and the purposes for which securities may be issued under such chapter [31 USCS §§ 3101 et seq.] are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

(5)

(A) For purposes of this section only, the Commission shall consider a combination of facilities described in subparagraph (B) to be a single facility having a rated capacity of 100,000 electrical kilowatts or more.

(B) A combination of facilities referred to in subparagraph (A) is two or more facilities located at a single site, each of which has a rated capacity of 100,000 electrical kilowatts or more but not more than 300,000 electrical kilowatts, with a combined rated capacity of not more than 1,300,000 electrical kilowatts.

(c) Indemnification of licensees by Nuclear Regulatory Commission. The Commission shall, with respect to

licenses issued between August 30, 1954, and December 31, 2025, for which it requires financial protection of less than $560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed $60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

(d) Indemnification of contractors by Department of Energy.

(1)

(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until December 31, 2025, enter into agreements of indemnification under this subsection with any person who may conduct activities under a

contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) or agreements of indemnification under subsection (c) or (k).

(B)

(i)

(I) Beginning 60 days after the date of enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988], agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 [50 USCS §§ 1431 et seq.] entered into between August 1, 1987, and the date of enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988].

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)

(1) to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 302 of the Nuclear Waste Policy Act of 1982 (42 U.S.C. 10222) shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b).

(2) In an agreement of indemnification entered into under paragraph (1), the Secretary—

(A) may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity; and

(B) shall indemnify the persons indemnified against such liability above the amount of the financial protection required, in the amount of $10,000,000,000 (subject to adjustment for inflation

under subsection (t)), in the aggregate, for all persons indemnified in connection with the contract and for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person under this section shall be deemed to be amended, on the date of enactment of the Price-Anderson Amendments Act of 2005 [enacted Aug. 8, 2005], to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 202 of the Energy Reorganization Act of 1974 (42 U.S.C. 5842).

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed $500,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

(e) Limitation on aggregate public liability.

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (o)(1)(D), shall not exceed—

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) (plus any surcharge assessed under subsection (o)(1)(E));

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d), the amount of indemnity and financial protection that may be required under paragraph (2) of subsection (d); and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section—

(i) $500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds $60,000,000, $560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in section 170(i) [subsec. (i) of this section] and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b), to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) is applicable, such aggregate public liability shall not exceed the amount of $500,000,000, together with the amount of financial protection required of the contractor.

(f) Collection of fees by Nuclear Regulatory Commission. The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be $30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 103 [42 USCS § 2133]: *Provided,* That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above, a level of $60,000,000. For facilities licensed under section 104 [42 USCS § 2134], and for construction permits under section 185 [42 USCS § 2235], the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 104 [42 USCS § 2134], taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than $100 per year.

(g) Use of services of private insurers. In administering the provisions of this section, the Commission or the

Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 3709 of the Revised Statutes (41 U.S.C. 5) [41 USCS § 6101], as amended upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.

(h) Conditions of agreements of indemnification. The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified any may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this Act [42 USCS §§ 2011 et seq.]. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

(i) Compensation plans.

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1), the Secretary or the Commisison [Commission], as appropriate, shall—

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (o), that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) the President shall submit to the Congress—

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount of aggregate public liability under subsection (e)(1);

(B) recommendations for additional sources of funds to pay claims exceeding the applicable

amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1), which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a recommendation or recommendations as to the relief to be provided, including any recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3)

(A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Congress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection 170(e)(2) [subsec. (e)(2) of this section] unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to the Senate, the Senate passes a resolution described in paragraph 6 [paragraph (6)] of this subsection.

(5) For the purpose of paragraph (4) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6)

(A) This paragraph is enacted—

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the term "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the_____ approves the compensation plan numbered ____ submitted to the Congress on _____, 19 .", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D)

(i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee

from further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E)

(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution.

The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F)

(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

(j) Contracts in advance of appropriations. In administering the provisions of this section, the

Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31, United States Code [31 USCS §§ 1341, 1342, 1349, 1350, 1351, and 1511 et seq.].

(k) Exemption from financial protection requirement for nonprofit educational institutions. With respect to any license issued pursuant to section 53, 63, 81, 104(a), or 104(c) [42 USCS § 2073, 2093, 2111, 2134(a), or 2134(c)] for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a). With respect to licenses issued between August 30, 1954, and December 31, 2025, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of $250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed $500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located

at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and December 31, 2025, the requirements of this subsection shall apply to any license issued for such facility subsequent to December 31, 2025.

(l) Presidential Commission on Catastrophic Nuclear Accidents.

(1) Not later than 90 days after the date of the enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988], the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1).

(2)

(A) The study commission shall consist of not less than 7 and not more than 11 members, who—

(i) shall be appointed by the President; and

(ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under

subsection (e)(1), and shall submit to the Congress a final report setting forth—

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4)

(A) The chairperson of the study commission may appoint and fix the compensation of a staff of such persons as may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5, United States Code.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Director [Administrator] of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and services, including staff, as may be necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including

per diem in lieu of subsistence under sections 5702 and 5703 of title 5, United States Code.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on the date of the enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988].

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

(m) Coordinated procedures for prompt settlement of claims and emergency assistance. The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as

appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

(n) Waiver of defenses and judicial procedures.

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 53, 63, or

> 81 [42 USCS § 2073, 2093, or 2111], for which the Commission or the Secretary, as appropriate, has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a),
>
> **(E)** arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 53, 63, or 81 [42 USCS § 2073, 2093, or 2111], for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a), or
>
> **(F)** arises out of, results from, or occurs in the course of nuclear waste activities.[,]

the Commission may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense

shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforcible in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e).

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy.

Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on the date of the enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988]) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, United States Code, or within the 30-day period beginning on the date of the enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988], whichever occurs later.

(3)

(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(i) a court, acting pursuant to subsection (o), determines that the aggregate amount of

public liability is likely to exceed the amount of primary financial protection available under subsection (b) (or an equivalent amount in the case of a contractor indemnified under subsection (d)); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)

(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel—

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

(o) Plan for distribution of funds.

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of

liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1):

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with the plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time, and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine

the proportionate share of funds available for each claimant. The Commission or the Secretary as appropriate, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b).

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b), any licensee required to pay a standard deferred premium under subsection (b)(1) shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has—

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court—

(i) that such costs are reasonable and equitable; and

(ii) that such person has—

(I) litigated in good faith;

(II) avoided unnecessary duplication of effort with that of other parties similarly situated;

(III) not made frivolous claims or defenses; and

(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

(p) Reports to Congress. The Commission and the Secretary shall submit to the Congress by December 31, 2021, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of

private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(q) Limitation on awarding of precautionary evacuation costs. No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

(r) Limitation on liability of lessors. No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason of an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

(s) Limitation on punitive damages. No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

(t) Inflation adjustment.

(1) The Commission shall adjust the amount of the maximum total and annual standard deferred premium under subsection (b)(1) not less than once during each 5-year period following August 20, 2003,

in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) August 20, 2003, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) The Secretary shall adjust the amount of indemnification provided under an agreement of indemnification under subsection d. not less than once during each 5-year period following July 1, 2003, in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) that date, in the case of the first adjustment under this paragraph; or

(B) the previous adjustment under this paragraph.

(3) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.

Appendix E

42 U.S.C. § 2239. Hearings and judicial review

(a)

(1)

(A) In any proceeding under this Act [42 USCS §§ 2011 et seq.], for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections [section] 153, 157, 186(c), or 188 [42 USCS § 2183, 2187, 2236(c), or 2238], the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 103 or 104(b) [42 USCS § 2133 or 2134(b)] for a construction permit for a facility, and on any application under section 104(c) [42 USCS § 2134(c)] for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an

amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(B)

(i) Not less than 180 days before the date scheduled for initial loading of fuel into a plant by a licensee that has been issued a combined construction permit and operating license under section 185(b) [42 USCS § 2235(b)], the Commission shall publish in the Federal Register notice of intended operation. That notice shall provide that any person whose interest may be affected by operation of the plant, may within 60 days request the Commission to hold a hearing on whether the facility as constructed complies, or on completion will comply, with the acceptance criteria of the license.

(ii) A request for hearing under clause (i) shall show, prima facie, that one or more of the acceptance criteria in the combined license have not been, or will not be met, and the specific

operational consequences of nonconformance that would be contrary to providing reasonable assurance of adequate protection of the public health and safety.

(iii) After receiving a request for a hearing under clause (i), the Commission expeditiously shall either deny or grant the request. If the request is granted, the Commission shall determine, after considering petitioners' prima facie showing and any answers thereto, whether during a period of interim operation, there will be reasonable assurance of adequate protection of the public health and safety. If the Commission determines that there is such reasonable assurance, it shall allow operation during an interim period under the combined license.

(iv) The Commission, in its discretion, shall determine appropriate hearing procedures, whether informal or formal adjudicatory, for any hearing under clause (i), and shall state its reasons therefor.

(v) The Commission shall, to the maximum possible extent, render a decision on issues raised by the hearing request within 180 days of the publication of the notice provided by clause (i) or the anticipated date for initial loading of fuel into the reactor, whichever is later. Commencement of operation under a combined license is not subject to subparagraph (A).

(2)

(A) The Commission may issue and make immediately effective any amendment to an operating license or any amendment to a combined construction and operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this Act [42 USCS §§ 2011 et seq.].

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license or any amendment to a combined construction and operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

(b) The following Commission actions shall be subject to judicial review in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.], and chapter 7 of title 5, United States Code [5 USCS §§ 701 et seq.]:

(1) Any final order entered in any proceeding of the kind specified in subsection (a).

(2) Any final order allowing or prohibiting a facility to begin operating under a combined construction and operating license.

(3) Any final order establishing by regulation standards to govern the Department of Energy's gaseous diffusion uranium enrichment plants,

including any such facilities leased to a corporation established under the USEC Privatization Act.

(4) Any final determination under section 1701(c) [42 USCS § 2297f(c)] relating to whether the gaseous diffusion plants, including any such facilities leased to a corporation established under the USEC Privatization Act, are in compliance with the Commission's standards governing the gaseous diffusion plants and all applicable laws.