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Via Electronic and First Class Mail

Annette L. Vietti-Cook, Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff
Electronic Mail: Rulemaking.Comments@nrc.gov

RE: Natural Resources Defense Council Comments on the Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule (Docket IDs 2008-0482, 2008-0404)

Dear Secretary Vietti-Cook:

The Natural Resources Defense Council (NRDC) writes today to comment on the Nuclear Regulatory Commission's (NRC) Consideration of Environmental Impacts of Temporary Storage of Spent Fuel After Cessation of Reactor Operation (hereinafter "Proposed Temporary Storage Rule"), 73 Fed. Reg. 59547 (October 9, 2008), and the NRC's Waste Confidence Decision Update, (hereinafter "Proposed Waste Confidence Rule"), 73 Fed. Reg. 59551 (October 9, 2008).

I. Summary of Comments

Over the next several years, the NRC is likely to have before it several relicensing decisions for existing reactors and, potentially, several decisions on whether to license new nuclear facilities. In these proposed actions, the NRC is revisiting whether or not (1) there is an adequate technical and legal foundation for "confidence" that there will be a final disposal option for spent nuclear fuel; (2) there is an adequate regime for temporary storage of spent nuclear fuel during the pendency prior to final disposal; and (implicitly) (3) if there is confidence in the related conclusion that the entire uranium fuel cycle has no significant impact on the environment. The NRC has failed to provide an in-depth analysis of the underlying technical, institutional, and legal bases that could serve as a justification for these proposed conclusions.

The Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule fail to comply with the requirements of the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et*

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seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. The two agency actions are, in effect, generic licensing decisions that allow for the production of additional spent reactor fuel and other radioactive waste associated with the uranium fuel cycle – essentially in perpetuity.

In contrast to the NRC proposals, there is no basis for confidence in the ultimate disposal of spent nuclear fuel; there is no basis for a safety finding that temporarily stored nuclear waste will have no significant impact on the environment; and there is no basis for continued reliance on an outdated uranium fuel cycle rule – which itself is contingent upon the Waste Confidence Rule – that depends on assumptions long since proven wrong or, simply, no longer applicable by virtue of current law. Generic licensing decisions such as these must be accompanied by thorough, supported, and well-documented safety findings. Any generic licensing decision that allows for the production of spent nuclear fuel and other associated waste streams from the uranium fuel cycle must also be accompanied by a Generic Environmental Impact Statement (GEIS) that fully assesses the environmental impacts of the entire uranium fuel cycle, including health and environmental impacts and costs, and that examines a reasonable array of alternatives, including the alternative of not producing any additional radioactive waste.

II. NRDC Statement of Interest

NRDC is a national non-profit membership environmental organization with offices in Washington, D.C., New York City, San Francisco, Chicago, Los Angeles and Beijing. NRDC has a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the nuclear facilities operated by DOE and the civil nuclear facilities licensed by the NRC and their predecessor agencies.

III. Background on Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule

The issue of whether or not the availability of permanent geologic disposal should factor into the NRC licensing of commercial nuclear power plants has been with us for decades. A compromise on how the issue would be addressed in a scientific and publicly acceptable manner was reached nearly twenty five years ago and the basic framework of that compromise has not changed substantially over the years.

But the basis for that compromise – what was at that time a thorough, ongoing and technical review of the safety and environmental impacts of storing spent fuel until such time as a permanent geologic repository was available – lacks legal and scientific foundation. For a host of technical, institutional, and social reasons (none of which bears sole responsibility) this country is no closer to a solution for spent fuel than it was 30 years ago and the NRC is wrong to assert confidence in the ultimate safe management

and disposal of nuclear waste without a new, thorough, and searching environmental review.

A. Initial History of the Waste Confidence Decision

In June of 1977, the NRC denied a NRDC petition that forced the question of whether there should be (1) a rulemaking proceeding to determine whether high-level radioactive wastes generated in nuclear power reactors can be permanently disposed of without undue risk to public health and safety; and (2) withholding of action on pending and future applications for operating licenses for nuclear power reactors until such time as an affirmative determination has been made. We then petitioned the United States Court of Appeals for the Second Circuit to review the NRC decision. The 2nd Circuit found in pertinent part:

[I]t is neither necessary nor reasonable for the Commission to insist on proof that a means of permanent waste disposal is on hand at the time reactor operation begins, so long as the Commission can be reasonably confident that permanent disposal (as distinguished from continued storage under surveillance) can be accomplished safely when it is likely to become necessary. Reasonable progress towards the development of permanent disposal facilities is presently being accomplished. Under these circumstances a halt in licensing of nuclear power plants is not required to protect public health and safety.

Natural Resources Defense Council v. NRC, 582 F.2d 166, 169 (2nd Cir. 1978). And so it was in 1978. A similar situation remains in place today – *i.e.*, that there is “reasonable confidence” in the progress and development of a permanent disposal facility – and the NRC’s decisions under review in these comments would engrave such confidence in stone.

That sense of “progress” noted by the 2nd Circuit on the development of permanent disposal facilities provided the basis for what would become the “Waste Confidence Determination” and the compromise described above. In a parallel action only one year later, the State of Minnesota challenged an NRC decision granting two operators of nuclear plants amendments to licenses to expand on-site spent fuel-storage without first determining whether the federal government could permanently dispose of the nuclear waste. The United States Court of Appeals for the D.C. Circuit held that NRC could properly consider the complex issue of nuclear waste disposal in a generic proceeding such as a rulemaking and then apply its determinations in subsequent adjudicatory proceedings, noting the NRC’s “reasonable assurance” a permanent solution would be found. Minnesota v. NRC, 602 F.2d 412, 416 (D.C. Cir. 1979).

Importantly, the D.C. Circuit remanded the matter before the particular parties to the NRC for further proceedings to determine whether those reasonable assurances existed. Id. at 419.

B. The Original Waste Confidence Findings

These cases gave rise to the NRC's "waste confidence" rulemaking. In 1984, after varying rounds of development, the NRC made the five following findings that constituted the waste confidence decision:

- (1) The Commission finds reasonable assurance that safe disposal of high level radioactive waste and spent fuel in a mined geologic repository is technically feasible.
- (2) The Commission finds reasonable assurance that one or more mined geologic repositories for commercial high-level radioactive waste and spent fuel will be available by the years 2007-09, and that sufficient repository capacity will be available within 30 years beyond expiration of any reactor operating license to dispose of existing commercial high level radioactive waste and spent fuel originating in such reactor and generated up to that time.
- (3) The Commission finds reasonable assurance that high-level radioactive waste and spent fuel will be managed in a safe manner until sufficient repository capacity is available to assure the safe disposal of all high-level radioactive waste and spent fuel.
- (4) The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of that reactor's operating licenses at that reactor's spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.
- (5) The Commission finds reasonable assurance that safe independent onsite or offset spent fuel storage will be made available if such storage capacity is needed.

49 Fed. Reg. 34659 (Aug. 31, 1984) (emphasis added). On the basis of these findings, the NRC made a generic determination that spent fuel generated at any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the expiration of any Commission license. The NRC amended 10 CFR § 51 by adding this generic determination as 10 CFR § 51.23(a).

C. Waste Confidence Revisions

The NRC revised the waste confidence rule in 1990, leaving much in place but amending the second and fourth findings as follows:

Finding 2: The Commission finds reasonable assurance that at least one mined geologic repository will be available within the first quarter of the twenty-first century, and that sufficient repository capacity will be available within 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level radioactive waste and spent fuel originating in such reactor and generated up to that time.

Finding 4: The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 30 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.

55 Fed. Reg. 38474 (Sept. 18, 1990), see also a revised 10 CFR § 51.23(a).

In 1999 the NRC again confirmed these findings and stated that it would revisit the Waste Confidence issue if “significant and pertinent unexpected events occur, raising substantial doubts about the Decisions continued viability.” 64 Fed. Reg. 68005 (Dec. 6, 1999).

D. The Proposed Waste Confidence Rule

The NRC is revisiting waste confidence again and this time specifically seeks to amend finding (2) to read:

The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level nuclear waste and spent fuel originating in such reactor and generated up to that time.

73 Fed. Reg. 59551 (emphasis added).

The Commission seeks to amend finding (4) to read:

The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.

73 Fed. Reg. 59551 (emphasis added). Findings 1, 3, and 5 of the Waste Confidence Decisions remain unchanged.

E. The Proposed Temporary Storage Rule

Published the same day as the proposed Waste Confidence Decision, the NRC has issued the Proposed Temporary Storage Rule that, in essence, acts a “finding of no significant impact” (FONSI). Reflecting and tracking closely the past and currently proposed findings of the Proposed Waste Confidence Rule, the Proposed Temporary Storage Rule proposes to find that if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent fuel storage installations until a disposal facility can reasonably be expected to be available. 73 Fed. Reg. 59547 (Oct. 9, 2008).

F. The Uranium Fuel Cycle Rule

Contemporaneous with the initial efforts at a Waste Confidence policy, the NRC performed an analysis of the environmental impacts of the uranium fuel cycle in WASH-1248, Environmental Survey of the Reprocessing and Waste Management Portion of the LWR Fuel Cycle, a Task Force Report (October 1976). The NRC’s initial Waste Confidence policy concluded that spent fuel could be disposed of in a bedded salt repository without causing any radioactive releases after the repository was sealed. Based on that assumption, the NRC concluded in WASH-1248 that radioactive releases from a repository, after it was sealed, would be zero. The NRC codified this finding in the Uranium Fuel Cycle Rule and Table S-3. Final Rule, Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts From Spent Fuel Reprocessing and Radioactive Waste Management, 44 Fed. Reg. 45,362 (August 12, 1979). Table S-3 also estimated negligible releases from other forms of radioactive waste in the uranium fuel cycle. The table was incorporated into NRC regulation 10 C.F.R. § 51.51(a), which provides that:

Under § 51.50, every environmental report prepared for the construction permit stage or early site permit stage or combined license stage of a light-water-cooled nuclear power reactor, and submitted on or after September 4, 1979, shall take Table S-3, Table of Uranium Fuel Cycle Environmental Data, as the basis for evaluating the contribution of the environmental effects of uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials and high-level wastes related to uranium fuel cycle activities to the environmental costs of licensing the nuclear power reactor. Table S-3 shall be included in the environmental report and may be supplemented by a discussion of the

environmental significance of the data set forth in this table as weighed in the analysis for the proposed facility.

The Uranium Fuel Cycle Rule's finding of no significant health impacts fundamentally supports the Waste Confidence Decision because its estimate of zero radioactive releases from a repository is based on the Commission's then-current Waste Confidence finding, that "a suitable bedded-salt repository site or its equivalent will be found." 44 Fed. Reg. at 45,332. As the Commission explained in a subsequent policy statement, it based that finding on its "confidence" in the integrity of a repository:

As the Commission noted in promulgating the [final uranium cycle rule], events which might lead to major releases from the bedded-salt repository used as the model for the S-3 rule appear remote in probability while any releases which might reasonably be expected eventually to occur appear very small. Accordingly, the Commission found that the staff's assumption that the integrity of the repository would be maintained after sealing was a reasonable description of the performance of a properly sealed repository and, when taken together with the staff's highly conservative assumption that all volatile fission products in reactor spent fuel would be released to the atmosphere prior to repository sealing, left Table S-3 overall a conservative description of fuel cycle impacts. *See* 44 FR 45369, col. 2. Considering the rule's limited purpose and taking into account the Commission's "waste confidence" proceeding, the Commission continues to believe that the record of the final S-3 rulemaking contains adequate information on waste disposal uncertainties to support continued use of the fuel cycle rule.

Policy Statement, Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts, 47 Fed. Reg. 50,591, 50,593 (Nov. 11, 1982). In the 1990 update to the Waste Confidence Rule, the Commission also acknowledged that if it were to change its waste confidence decision, it would have to revisit the adequacy of Table S-3. 55 Fed. Reg. at 38,490.

The NRC has not meaningfully updated Table S-3 or WASH-1248 for decades. As the Commission recently explained, a planned update:

[w]as delayed because, by the mid-1980's, there were no new applications for construction of nuclear power plants, nor, at that time, were any future ones predicted. Consequently, there was no regulatory need to update Table S-3 and competing priorities for rulemaking resources eventually resulted in the cessation of activities on the table. Since the mid-1980's, the NRC has revisited the issue of revising the value for radon-222 in Table S-3 on more than one occasion, but in each case higher priority rulemakings led to a halt in these efforts.

New England Coalition on Nuclear Pollution; Denial of Petition for Rulemaking, 73 Fed. Reg. 14,946, 14,947 (March 20, 2008).

G. The Baltimore Gas & Electric Decision

As described above, in 1979, the NRC published its final Table S-3 rule. 44 Fed. Reg. 45362 *et seq.* (1979). Table S-3 is, in brief, a numerical compilation of the NRC's estimates of resources used and effluents released by fuel cycle activities supporting a year's operation of a typical light water reactor. From this, the NRC decided that NRC Licensing Boards should assume, for the purposes of NEPA review, that permanent storage of nuclear waste would have no significant environmental impact (the so-called "zero release assumption"), reactor operations would have no significant impact on the environment, and thus none of these issues should affect the decision whether to license nuclear power plants. NRDC and the State of New York challenged Table S-3 as a violation of NEPA and the Administrative Procedures Act (APA), the proceedings were combined, and ultimately, the Supreme Court ruled on the issue. At the "heart of the dispute" was the viability of Table S-3, 44 Fed. Reg. 45362 *et seq.* (1979). Baltimore Gas & Electric v. NRDC, 462 U.S. 87 (1983).

The Supreme Court reversed a Court of Appeals ruling for NRDC and New York, finding that the NRC, in its final S-3 Table, "summarized the major uncertainties of long-term storage of nuclear wastes, noted that the probability of intrusion was small, and found the evidence 'tentative but favorable' that an appropriate storage site could be found." *Id.* at 87. The central holding of BG&E is straightforward – the NRC complied with NEPA's requirements of consideration and disclosure of the environmental impacts of its licensing decisions. *Id.* at 88. But as discussed in comments below, the fundamental bases upon which the Supreme Court relied to find the NRC's actions lawful are no longer valid or applicable, and such a situation has a significant impact on the NRC's NEPA obligations for the relicensing of existing facilities and licensing of new facilities.

IV. The Proposed Waste Confidence Rule and the Temporary Storage Rule Fail To Comply with the AEA and NEPA

A. Legal Requirements

1. Safety determination under the AEA

The AEA precludes the NRC from licensing any new nuclear power plant or re-licensing any existing nuclear power plant if it would be "inimical . . . to the health and safety of the public." 42 U.S.C. § 2331(d). In conformance with this requirement, the Commission has stated that it will only license a new nuclear power plant "so long as the Commission can be reasonably confident that permanent disposal (as distinguished from continued storage under surveillance) can be accomplished safely when it is likely to become necessary." NRDC v. NRC, 582 F.2d 166 (2d Cir. 1978). In the Proposed Waste Confidence Rule, the Commission has repeated its commitment not to license new nuclear power plants unless it can make this finding ("[The Commission] would not continue to

license reactors if it did not have reasonable confidence that the wastes can and will in due course be disposed of safely.”) 73 Fed. Reg. at 59,552. In licensing nuclear power plants, the Commission must also make a predictive finding that spent fuel can be stored safely pending ultimate disposal. Proposed Waste Confidence Findings 3, 4 and 5 address this requirement and effectively constitute a licensing determination that spent fuel storage risks are not inimical to public health and safety.

2. NEPA environmental review

Separate from the AEA, NEPA requires that before licensing or re-licensing nuclear power plants, the NRC must evaluate the environmental impacts of its licensing decision in an EIS. 42 U.S.C. § 4332(C); 10 C.F.R. § 51.20(b)(2). An EIS must address the environmental impacts of the proposed action and connected actions, including cumulative impacts. 10 C.F.R. § 51.71(d). It must also weigh the costs and benefits of a reasonable array of alternatives for avoiding or mitigating the consequences of the proposed action. *Id.*

Thus, in proposing to license or re-license nuclear power plants, the NRC must examine the environmental impacts of the radioactive waste generated by the plants. It must also evaluate the relative costs and benefits of alternatives for avoiding or mitigating those impacts, including denying licenses so that the radioactive waste is not produced. *Id.* The environmental impacts that must be examined by the NRC include the risks posed by spent fuel storage and disposal.

3. Procedural requirements for compliance with AEA and NEPA

While the NRC may make a licensing determination through a notice-and-comment rulemaking, it must provide adequate support for its determination to satisfy the requirements of the Administrative Procedures Act. *State of Minnesota*, 602 F.2d at 419. And while the NRC may make environmental determinations generically, it must comply with the procedural requirements of NEPA, including preparation of an environmental impact statement EIS for actions having a significant adverse impact on the human environment. *BG&E v. NRDC*, 462 U.S. 87, 99 (1983). Where the NRC considers environmental impacts to be insignificant to warrant preparation of an EIS, it must show that it has taken a “hard look” at those impacts, and it must comply with the procedural requirements for an environmental assessment (“EA”). 10 C.F.R. §§ 51.30-51.35.

B. There is no basis for confidence that the ultimate disposal of spent nuclear fuel will be achieved – What is technically feasible is not necessarily institutionally achievable

1. The proposed amendment to Finding 2

The NRC proposes to amend Finding 2 of the Proposed Waste Confidence Rule to read:

The Commission finds reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level nuclear waste and spent fuel originating in such reactor and generated up to that time.

73 Fed. Reg. 59551 (emphasis added).

2. The history of the repository program demonstrates that there should be no assurance that there will be sufficient mined geologic repository capacity at any time

a. The first failed efforts

In 1957-1958, the Atomic Energy Commission (AEC) conducted the first site specific study of the disposal of high-level radioactive waste in salt at Hutchinson, Kansas. Between 1961 and 1963, the AEC conducted experiments at the Cary salt mine at Lyons, Kansas. In 1970 the AEC, along with the Kansas governor, announced tentative selection of the Cary salt mine for a demonstration high-level waste repository. Opposition, primarily by the Kansas Geological Survey, and concerns over conditions in the mine, the presence of numerous oil and gas well in the vicinity, and the fact that there was solution mining at an operating adjacent salt mine operated by American Salt Company forced the AEC to abandoned the site by 1972.

Following the demise of the Lyons repository effort, the AEC announced in 1972 that it intended to develop a 100-year Retrievable Surface Storage Facility (RSSF). This proposal was opposed by the Environmental Protection Agency (EPA) and others because in their view it would divert attention and resources from efforts to find a permanent means of geologic disposal. As a consequence of this opposition the Energy Research and Development Agency (ERDA) gave up its plans for a RSSF in 1975. Between 1975 and 1982, ERDA and the DOE continued to search for potential repository sites in various rock types in the states of Michigan, Ohio, New York, Utah, Texas, Louisiana, Mississippi, Washington, and Nevada. Various degrees of resistance from state and local representatives combined with geological and technical problems stalled efforts to find a repository site. In 1976 President Gerald Ford halted the reprocessing of commercial nuclear fuel. In the following year President Jimmy Carter reinforced the ban on commercial reprocessing and tried to halt the development of commercial breeder reactor development. These actions reinforced the need for prompt development of a geologic repository. In 1977 ERDA also announced that it would accept custody of commercial spent fuel and store it at Away From Reactor (AFR) storage facilities. It never happened.

b. The IRG Process

In the mid-1970s it became clear that commercial spent fuel reprocessing was uneconomical, environmentally unsound, and represented a serious proliferation risk.

President Gerald Ford refused to subsidize the completion of the Barnwell reprocessing plant, and then President Jimmy Carter pulled the plug on reprocessing. The actions by Presidents Ford and Carter gave a new urgency to finding a site suitable for geologic disposal of both spent fuel and high-level radioactive waste. In the late 1970s President Carter initiated an Interagency Review Group (IRG) process to solve once and for all the nuclear waste problem in the United States. The IRG process involved numerous scientists, extensive public involvement, and a consultation and concurrence role for the states. The outcome of the IRG effort was a two-track program. The DOE was tasked with the responsibility for identifying the best repository site in the country, and the EPA and the NRC were tasked with developing nuclear waste disposal criteria against which the selection and development of the final repository site would be judged.

c. The Nuclear Waste Policy Act

In 1982, Congress enacted the NWPA, which embodied in law the principal recommendations that grew out of the IRG process, including a commitment to geologic disposal, two repositories, and characterization of three sites before final selection of the first repository. The NWPA established a comprehensive program for the disposal of spent nuclear fuel and high-level radioactive waste (HLW) from the nation's commercial reactors and nuclear weapons complex.

At the time the NWPA was passed nearly 25 years ago, the U.S. Government enjoyed fairly widespread support from within the Congress, the environmental community and state governments for the site selection and development process proposed by the IRG.¹ Now, decades later, the U.S. Government has little, if any, support from the State of Nevada, and virtually no public support from the environment and public health community for the proposed Yucca Mountain project.

d. What else went wrong

A whole host of things, but suffice to say that over the last twenty years, a substantial segment of the environmental community believes the process of developing, licensing, and setting environmental and oversight standards for the proposed repository have been, and continue to be rigged or dramatically weakened to ensure the licensability of the site rather than provide safety for the length of time the waste is dangerous. The site selection process and the radiation standards are examples that illuminate this perspective and conclusively demonstrate that the NRC has no basis for finding reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available at any time, even within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the

¹ Importantly, this sense of fairly widespread support from Congress, the public interest community, a number of states and other entities for the nascent repository effort was well understood at approximately the time the Supreme Court was deciding the BG&E matter. Indeed, see note 14 in the Court's 1983 decision where in a discussion of the "separate and comprehensive series of programs" to address these issues, the Court takes note of the ongoing waste confidence proceeding and the (at that time) recently enacted NWPA. BG&E v. NRDC, 462 U.S. at 102.

commercial high-level nuclear waste and spent fuel originating in such reactor and generated up to that time.

i. Site Selection

First, DOE and then the Congress corrupted the site selection process. The original strategy contemplated DOE choosing the best four or five geologic media, then selecting a best candidate site in each media alternative, then narrowing the choices to the best three alternatives, and then picking a preferred site for the first of two repositories. Site selection guidelines were strongly criticized as DOE was accused of selecting sites that they had previously planned to pick. In May of 1986 DOE announced that it was abandoning a search for a second repository, and it had narrowed the candidate sites from nine to three, leaving in the mix the Hanford Reservation in Washington (in basalt), Deaf Smith Co., Texas (in bedded salt), and Yucca Mountain in Nevada (in unsaturated volcanic tuff).

All equity in the site selection process was lost in 1987, when the Congress, confronted with a potentially huge cost of characterizing three sites, amended the NWPA of 1982, directing DOE to abandon the two-repository strategy and to develop only the Yucca Mountain site. At the time, Yucca Mountain was DOE's preferred site. The abandonment of the NWPA site selection process led directly to the loss of support from the State of Nevada, diminished Congressional support (except to ensure that the proposed Yucca site remains the sole site), and less meaningful public support for the Yucca Mountain project. The situation has only deteriorated since that time.

ii. Radiation Standards

The second track of the process has, if possible, fared worse. Section 121 of the NWPA of 1982 directs EPA to establish generally applicable standards to protect the general environment from offsite releases from radioactive materials in repositories and directs the NRC to issue technical requirements and criteria. Unfortunately, it has been clear for years that the projected failures of the geologic isolation at Yucca Mountain are the determining factor in EPA's standards.

EPA repeatedly issued standards that are concerned more with licensing the site than establishing protective standards. EPA's original 1985 standards were vacated in part because the EPA had failed to fulfill its separate duty under the Safe Drinking Water Act, 42 U.S.C. §300h, to assure that underground sources of water will not be "endangered" by any underground injection. Natural Resources Defense Council v. Environmental Protection Agency (NRDC v. EPA), 824 F.2d 1258 (1st Cir. 1987).

EPA's second attempt to at setting standards that allow for a projected failure of geological isolation was again vacated, this time by the United States Court of Appeals for the D.C. Circuit. The D.C. Circuit found that EPA's Yucca Mountain rule (and the corresponding NRC standard), which ended its period required compliance with the terms of those rules at 10,000 years was not "based upon or consistent with" the

recommendations of the National Academy of Sciences (“NAS”) as required by the 1992 Energy Policy Act and therefore must be vacated. Nuclear Energy Institute, Inc. v. EPA, 373 F.3d 1251 (2004).

Giving significant deference to the agency, the D.C. Circuit did not vacate EPA’s strangely configured compliance boundary for the Yucca Mountain site. See Appendix A to these comments for a map of EPA’s compliance boundary (inside the oddly drawn line, the repository need not protect water quality and radiation can leak in any amount). The dramatically irregular line that represents the point of compliance has little precedent in the realm of environmental protection, and its shape is perhaps more reminiscent of gerrymandered political districts. Rather than promulgate protective groundwater standards, EPA pieced together a “controlled area” that both anticipates and allows for a plume of radioactive contamination that will spread several miles from the repository toward existing farming communities that depend solely on groundwater and perhaps through future communities closer to the site.

EPA’s next proposed and revised rule, issued in 2005, retained the 15 millirem/year and groundwater standards for the first 10,000 years, but then establishes 350 millirem/year standard for the period after 10,000 years and does away with the groundwater standard entirely. This two-tiered standard failed to comply with the law and fails to protect public health, especially if the repository’s engineered barriers were to fail earlier than DOE predicts. On October 15, 2008, EPA published the final version of its revised Yucca Mountain rule in the Federal Register (“2008 Yucca Mountain rule,” 73 Fed. Reg. 61255-61289). The 2008 Yucca Mountain rule’s two-tiered individual protection annual dose standard establishes an initial 15 millirem first-tier limit, but weakens that limit to 100 millirem in the period after 10,000 years, when EPA projects peak dose to occur. Peak dose could occur significantly earlier if engineered barriers fail earlier than DOE and EPA have projected.

The final status of EPA’s most recent two-tiered rule remains fundamentally uncertain. In an action pending in the District of Columbia Circuit (State of Nevada v. Environmental Protection Agency, No. 08-1327, consolidated with No. 08-1345), Nevada has challenged EPA’s 2008 Yucca Mountain rule as once again failing to honor EPA’s statutory duty to protect public health and safety, and to proceed consistently with the National Academy of Science’s recommendations.

iii. Limits of the repository and a potential need for a second repository

Even more troubling, the NRC’s continued confidence in a reasonable assurance of a repository being available 50 or 60 years after license expiration of any commercial reactor is contingent entirely upon Congress revising (1) the current law that limits the United States to one repository, the proposed Yucca Mountain site; and (2) the spent fuel and high-level waste stored at this one repository will be limited to 70,000 metric tons of heavy metal equivalent. Therefore, the current, and only repository under review in this country, could not even accommodate all of the spent fuel from existing reactors without

new legislation, much less spent fuel from any new reactors that might be built.² A second repository would also require new legislation and, as the proposals acknowledge, such a situation would almost certainly require new NRC regulations. Moreover, the NRC has failed to analyze the impact on future repository requirements of this proposed decision which would potentially place no limits on the total inventory of spent fuel generated by existing and future reactors.

iv. The NRC's proposed assurance that there will be sufficient mined geologic repository capacity at some point in the future is without merit

Finally, there is no assurance – nor should there be as the matter has yet to be adjudicated – that the proposed Yucca Mountain repository will ever be licensed. The DOE has only recently submitted a license application to the NRC and the State of Nevada has submitted hundreds of contentions. We are not involved in the licensing proceeding and at this juncture take no position on the merits, but if Yucca Mountain is found not to be a suitable site for a repository, this would leave the country (in whatever year that decision is made), with no agreed upon disposal site at all. Ironically, such a decision will come more than sixty years after the federal government began its search for a suitable site, the precise time frame of the NRC's continued confidence that a site for the disposal of waste will be identified, sited, and developed.

Since geologic disposal of high-level radioactive waste was first proposed by the National Academy of Sciences just over 50 years ago, there have been two institutional – as opposed to technical – failures related to the disposal of high-level radioactive waste and spent fuel. First, there was the abandonment of Project Salt Vault at Lyons, Kansas by the AEC in 1972. Second, there was the abandonment of the proposed Retrievable Surface Storage Facility (RSSF) by the Energy Research and Development Agency (ERDA) in 1975. We are now potentially on the verge of the third institutional failure – the problematic Yucca Mountain project. There is no basis for assuming that there will not be one, two, or three similar institutional failures during the next 50, 100, or 150 years, and there is no in-depth analysis by the Commission to conclude that similar institutional failures will not prevent the licensing of a geologic disposal facility for a period well beyond that contemplated by the proposed Finding 2.

² DOE has already generated 12,800 tons of waste, and commercial power reactors have generated over 58,000 tons, and this figure increases by approximately 2,000 tons per year. See, The Report to the President and the Congress by the Secretary of Energy on the Need for a Second Repository, December 2008, at 5. DOE estimates the total waste from current fleet of operating reactors will total between 109,300 and 130,000 tons, depending on license extensions. We are betting on the high side of those figures. Yucca Mountain is statutorily limited to hold only 77,000 tons of waste. 42 U.S.C. § 10101 et seq., § 114(d). Just this past year, the head of DOE's civilian nuclear waste disposal program told Congress that within two years (2010), the amount of waste produced by the countries current operating reactors (plus defense waste) will exceed Yucca Mountain's statutory limits. DOE has requested that Congress lift the cap on the amount of waste to be emplaced at Yucca Mountain.

NRDC and the public do not bear the burden of demonstrating either the feasibility or the infeasibility of a proposed repository. Rather, the NRC has not provided sound factual or analytical basis for its finding that there is reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level nuclear waste and spent fuel originating in such reactor and generated up to that time. Had NRC performed even a cursory analysis of the institutional failures surrounding spent fuel disposal, the agency would have taken note of the fact that the original Waste Confidence Finding 2 was in error. Thus, why are we to believe that the current proposal – the second modification of Finding 2 – is not in error?

C. There is no basis for a safety finding that “temporarily” stored nuclear waste will have no significant impact on the environment

1. The proposed amendment to Finding 4 reflects the proposed Temporary Storage Rule

The Commission seeks to amend finding (4) to read:

The Commission finds reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts for at least 60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin, or at either onsite or offsite independent spent fuel storage installations.

73 Fed. Reg. 59551 (emphasis added). Tracking the proposal for amending Finding 4 closely, but with no limitation with respect to time, the Proposed Temporary Storage Rule proposes to find that if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts beyond the licensed life for operation (which may include the term of a revised or renewed license) of that reactor at its spent fuel storage basin or at either onsite or offsite independent fuel storage installations until a disposal facility can reasonably be expected to be available. 73 Fed. Reg. 59547 (Oct. 9, 2008).

2. The NRC lacks foundation for the finding that there is reasonable assurance that, if necessary, spent fuel generated in any reactor can be stored safely and without environmental impact for 60 years

As a first point, the issue is not whether spent fuel “can” be stored safely. The issue is whether spent fuel “will” be stored safely. We agree that spent fuel can be stored safely, but that’s not what should be before the Commission. In concluding that spent fuel “will” be stored safely and without significant environmental impacts for at least 60 years (or without any time limits whatsoever) beyond the expiration of that reactor’s operating license, the Commission considered four major issues: (1) the long-term integrity of spent

fuel under water pool storage conditions; (2) structure and component safety for extended facility operation; (3) the safety of dry storage; and (4) potential risks of accidents and acts of sabotage at spent fuel storage facilities.

a. Numerous examples of problems at operating spent fuel pools require a “hard look” at the long-term environmental impacts

Several commenting parties have cited examples of unsafe or environmentally damaging practices at densely crowded spent fuel pools at operating nuclear facilities. For example, the State of New York has submitted this day an extensive listing of leaking spent fuel pools at facilities around the country. See Comments from the State of New York.³ Specifically, the State of New York identifies leaks of radioactive concern at Indian Point Units One and Two, Brookhaven National Laboratories, Seabrook, Point Beach Nuclear Power Plant, and the Salem Nuclear Station in Delaware. Those leaks have contaminated groundwater and public waterways and have called into serious question the integrity of spent fuel under water storage conditions. The crucial issue is the NRC’s continued acceptance of the premise that high-density fuel storage pools pose no risks. Without a searching and public environmental review of the current technical and regulatory safety regime, this acceptance is unfounded.

b. Security concerns must be taken into account in the NEPA examination and licensing of spent fuel storage facilities

In both the proposed Waste Confidence Decision and in the Proposed Temporary Fuel Storage Rule, the NRC continues to deny that temporary spent fuel storage poses significant environmental risks, ignoring a wealth of government reports showing that high-density fuel storage pools are vulnerable to catastrophic fires that may be caused by accidents or intentional attacks. Instead of confronting this information in a detailed GEIS (and in a site-specific supplemental EIS), the NRC terms these issues a security matter and shrouds them in an unjustifiably broad mantle of security-related secrecy.

As the State of California correctly points out in comments on these matters:

[T]he NRC, in its discussion of the justification for its proposed changes to the Waste Confidence findings at 73 Fed. Reg. 59548-59549, appears to base its proposed regulation principally on information it cited in its decision to deny the petitions of California and Massachusetts. That decision heavily relied on the “Sandia Studies,” 73 Fed. Reg. 46207, fn 6 (August 8, 2008). The NRC states that these studies performed after September 11, 2001, support its finding that the risk of a successful terrorist attack is very low. This study has been withheld from the public, and a version that was made available to the public via a response to a

³ Testimony submitted today on behalf of Texan’s for a Sound Energy Policy by Dr. Gordon Thompson also addresses this issue in detail.

Freedom of Information Act request is so redacted as to be worthless. Instead of solely relying on studies that the public is not allowed to see and whose conclusions are not reviewable, the NRC should have, as Commissioner Jaczko noted in his dissenting view, considered the information supplied by the petitioners and should have used the information as part of its analysis.” 73 Fed. Reg. 46212 (August 8, 2008).

State of California, Department of Justice, Comments on Proposed Waste Confidence Decision Update (Docket ID-2008-0482), February 5, 2009, at 3.

The NRC may not use security concerns as an excuse for failing to comply with the basic requirements of NEPA for a FONSI, such as addressing the regulatory requirements for an EA, identifying the documents on which it relies for its decision, and disclosing all portions of its decision-making documents that are non-exempt under the FOIA. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016, 1034-35 (9th Cir. 2006).

In these proposed actions the NRC fails to explain why it is justified in continuing to allow licensees to use dangerous high-density fuel storage pools to store spent fuel under protective measures whose adequacy is, at best, suspect. Equally important, none of these contentions can be publicly verified, when it would be possible to virtually eliminate the danger by using low-density pool storage for appropriate periods of time and then hardened on-site dry storage of spent fuel once that fuel could be removed from the pools. This is a matter that could be rectified by a transparent public process and the NRC's stance is unlawful, corrosive to the NRC's system of accountability through open decision-making, and potentially dangerous because the decision-making process was both secret and restricted to a limited group of individuals with a vested interest in minimizing the cost of safety and environmental protection measures.

c. The Proposed Temporary Storage rule is contrary to NRC regulations

The Proposed Temporary Storage Rule proposes to find that if necessary, spent fuel generated in any reactor can be stored safely and without significant environmental impacts ... until a disposal facility can reasonably be expected to be available. 73 Fed. Reg. 59547. This formulation of the proposed Temporary Storage Rule dispenses with a time limit on the Commission's finding that any current – or yet to be generated spent fuel – can be stored safely and without significant environmental impacts. As described in comments above, it's been nearly 60 years since the first efforts began in this country to identify a geologic repository for spent fuel and HLW, and it could easily be another 30, 40, or even many more years, if ever, if the proposed Yucca Mountain site is found unsuitable.⁴

⁴ Even the NRC tacitly acknowledges this fact in its discussion of the proposed rule. See 73 Fed. Reg. 59549.

Such a finding – a finding that essentially exists in perpetuity – is contrary to the NRC’s long-standing policy of at least some minimal time limitation on the actions of its licensees with respect to active institutional controls at nuclear facilities. In its Technical Requirements for Land Disposal Facilities, the regulations state in pertinent part: “The period of institutional controls will be determined by the Commission, but institutional controls may not be relied upon for more than 100 years following transfer of control of the disposal site to the owner.” 10 C.F.R. § 61.59(b). A proposed rule that finds that spent nuclear fuel can be safely managed, for all intents and purposes in perpetuity, is contrary to law.

D. There is no basis for continued reliance on an outdated uranium fuel cycle rule – which itself is contingent upon the Waste Confidence Rule – that depends on assumptions long since proven wrong or, simply, no longer applicable by virtue of current law

Finally, the NRC’s lack of a basis for any determination that there is “confidence” in a final disposal option for some or all of the nation’s spent fuel fatally undermines Table S-3 of the NRC’s Uranium Fuel Cycle Rule, which depends on the assumption that radioactive releases from a repository will be zero. Final Rule, Licensing and Regulatory Policy and Procedures for Environmental Protection; Uranium Fuel Cycle Impacts From Spent Fuel Reprocessing and Radioactive Waste Management, 44 Fed. Reg. 45,362 (August 12, 1979).

1. The rationale for the BG&E decision no longer spares NRC from having to perform a GEIS/NEPA review for addressing the environmental impacts of the storage of nuclear waste

In 1983, the Supreme Court found that the NRC, in its final S-3 Table, “summarized the major uncertainties of long-term storage of nuclear wastes, noted that the probability of intrusion was small, and found the evidence ‘tentative but favorable’ that an appropriate storage site could be found.” *BG&E v. NRDC*, 462 U.S. at 87. The central holding of *BG&E* is straightforward – the NRC complied with NEPA’s requirements of consideration and disclosure of the environmental impacts of its licensing decisions.” *Id.* at 88. But in dicta, the Supreme Court explained that the zero-release assumption and, indeed, the entirety of Table S-3 rule was made for a limited purpose, and that it would be supplemented with an explanatory narrative. *Id.* at 101. Also, a separate and comprehensive set of programs has been undertaken to serve the broader purposes of long-term waste disposal technology and site selection. *Id.* See note 1, *supra*. Second, the Court emphasized that the zero-release assumption is but a single figure in an entire Table, which the Commission expressly designed as a risk-averse estimate of the environmental impact of the fuel cycle. *Id.* at 102 and 103. And third, the Court was careful not to tread into the area of the NRC’s special expertise. *Id.*

The crucial bases for the Supreme Court’s decision to uphold the NRC’s defense of the validity of Table S-3 are no longer valid, and the NRC must revisit this decades-old Table S-3 and all associated decisions regarding the environmental impacts of the uranium fuel

cycle with new, “hard look” NEPA review. As the Court itself noted, “no one suggests that the uncertainties are trivial or the potential effects insignificant if time proves the zero-release assumption to have been seriously wrong. After confronting the issue, though, the Commission has determined that the uncertainties concerning the development of nuclear waste storage facilities are not sufficient to affect the outcome of any individual licensing decision.” *Id.* at 98 (emphasis added).

a. The bases for Table S-3, including the zero release assumption, are no longer technically supportable, accurate or consistent with policy

At the time of BG&E decision, the NRC considered bedded salt as suitable for disposal either of reprocessed high-level waste or un-reprocessed spent fuel. Yet, the Proposed Waste Confidence rule of 2008 states that salt formations are not being considered for spent fuel disposal for technical reasons. Hence, the technical underpinning of Table S-3 is inconsistent with current law and the NRC’s own understanding of salt repositories. Indeed, disposal in salt, which was the original basis for the S-3 Table in estimating the environmental impact of high-level waste or spent fuel disposal, is only considered suitable for high-level waste resulting from reprocessing, but reprocessing is not the current policy, and nor should it be.⁵ Rather, direct disposal of spent fuel, for which the NRC would not consider salt formation, is now the current policy.

More pointedly, presuming “zero release” of radioactivity when disposing of spent fuel runs directly counter to all established scientific understanding of the expected performance of any geologic setting. One glance at Appendix A to this filing demonstrates this fact. Radioactivity will be released from a repository – the dose and timing of such release is a matter for standards and licensing, but the point remains. Radioactive dose is the result of positive releases of radionuclides into the human environment. As far back as 1983, the report on geologic isolation prepared for the DOE by the National Research Council shows positive doses attributable to both fission products as well as actinides in un-reprocessed spent fuel as well as from fission products in reprocessed high-level waste in all settings other than salt that were evaluated – tuff, granite, and basalt. The Supreme Court’s concerns – that the problems would be neither trivial nor insignificant if the zero-release assumption turned out to be wrong – were well taken. Where, for example, is the Commission’s analysis of the estimated range in the collective dose from the proposed Yucca Mountain repository, and what is the basis for concluding that the Table S-3 is still valid in light of this collective dose range?

⁵ Spent-fuel reprocessing and plutonium-fueled fast reactors are well-proven commercial disasters. The United States, Europe, and Japan spent tens of billions of dollars in the 1970s and 1980s trying to develop plutonium fast-breeder reactors (like the proposed Global Nuclear Energy Partnership “advanced burner reactors,” but with uranium “blankets” added to “breed” more plutonium than is consumed in the reactor). These fast reactors proved to be uneconomical, highly unreliable, and prone to fires due to leaking liquid sodium coolant, which burns spontaneously when it comes in contact with air or water. For a full discussion, see <http://www.nrdc.org/nuclear/gnep/agnep.asp>.

Moreover, the original scope of Table S-3 (and the underlying document in WASH-1248) is inadequate and outdated. Along with failing to address the environmental impacts of spent fuel disposal, the table looks only at the health impacts of an individual plant licensing decision. The Table fails to account for the cumulative impacts of licensing many plants, the economic costs of disposing of all waste generated by the uranium fuel cycle, or even adding those costs to the other costs of a nuclear power plant. Nor does the Table compare the total costs of building and operating a new nuclear facility (and ultimately disposing of associated waste and funding the decommissioning costs) with the costs of the no action alternative or with other alternative sources of energy.

b. Development of the repository has proven to be problematic

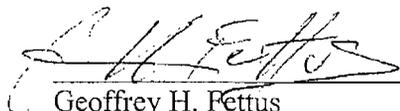
The separate and comprehensive set of programs that the Supreme Court in 1983 relied upon in the BG&E decision led us to where we are today. This history is detailed in Sections IV.B.2. of these comments, which make clear there is no reasonable assurance that sufficient mined geologic repository capacity can reasonably be expected to be available within 50-60 years beyond the licensed life for operation (which may include the term of a revised or renewed license) of any reactor to dispose of the commercial high-level nuclear waste and spent fuel originating in such reactor and generated up to that time.

V. Conclusion

For the reasons noted above, NRDC requests that the Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule be withdrawn until such time as they comply with AEA and NEPA. To comply with the law, both actions must be supported by thorough, publicly available, and well-documented safety findings and accompanied by a Generic Environmental Impact Statement that fully assesses the environmental impacts of the entire uranium fuel cycle, including health and environmental impacts and costs, and that examines a reasonable array of alternatives, including the alternative of not producing any additional radioactive waste.

We appreciate the opportunity to comment. If you have any questions, please do not hesitate to contact us.

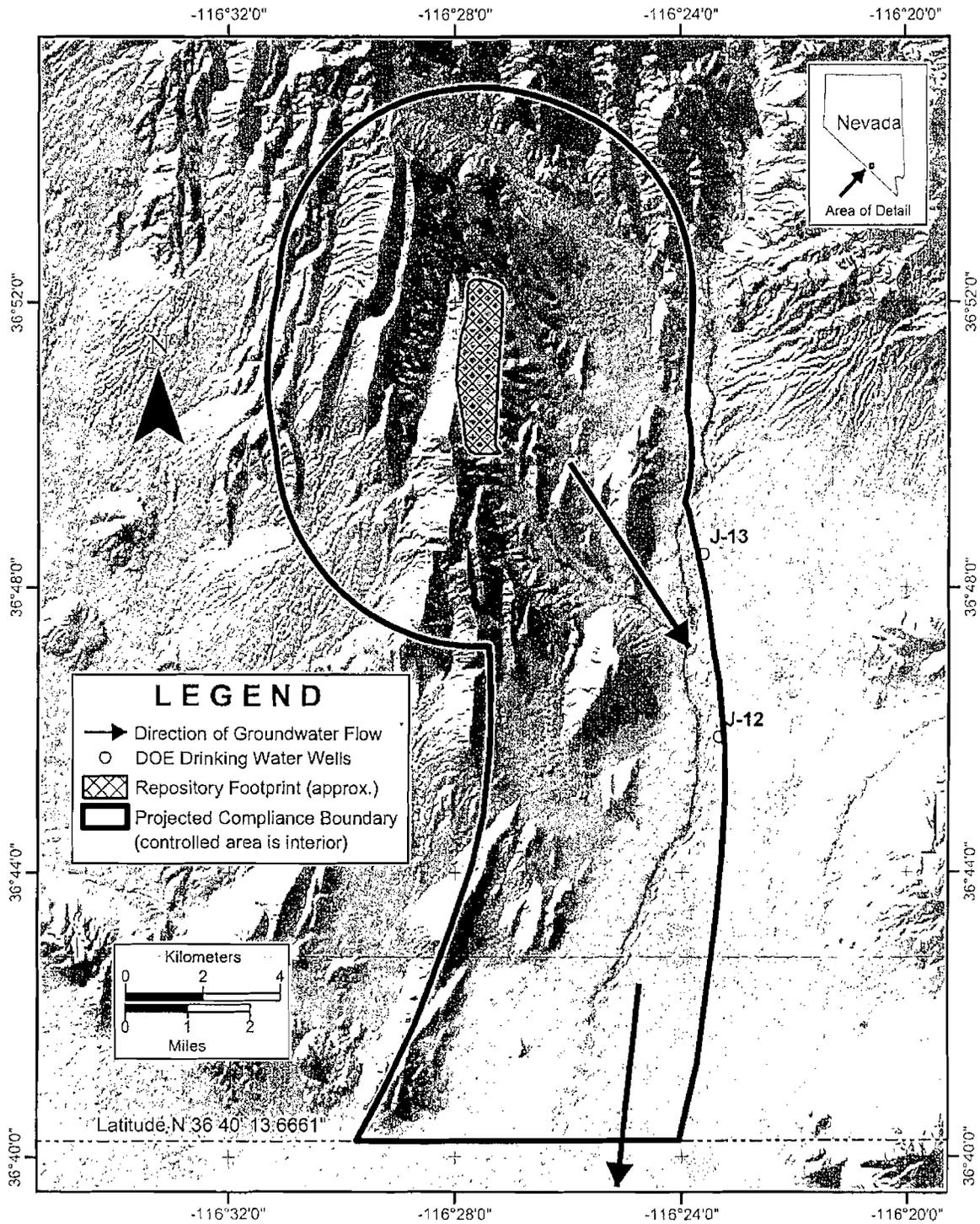
Sincerely,



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Projected Groundwater Standards Compliance Boundary for Spread of Radioactive Contamination at the Yucca Mountain Project

Measurement of Radioactive Contamination Takes Place Outside of Controlled Area



NRDC produced this visual representation from the following information:
 "The controlled area may extend no more than 5 km in any direction from the repository footprint, except in the direction of groundwater flow. In the direction of groundwater flow, the controlled area may extend no farther south than latitude 36°40'13.6661" North ... [T]he size of the controlled area may not exceed 300 square km." 66 Fed Reg. at 32117 (June 13, 2001). The direction of groundwater flow is from FEIS (February 2002) at 5-21, Figure 5-3. The repository footprint is from the Yucca Mountain Science and Engineering Report, DOE/RW-0539, at 1-17, Figure 1-3, and the area is approximately 4.27 square km. The area within the projected compliance boundary, as shown in this map, is about 230 square km. The relief image was created from a 1 arc-second Digital Elevation Model from the USGS National Elevation Dataset, April 2002. This map is based on a Nevada State Plane Central projection, North American Datum 1927.

Rulemaking Comments

From: Go, Alyssa [ago@nrdc.org]
Sent: Friday, February 06, 2009 5:59 PM
To: Rulemaking Comments
Cc: Fettus, Geoffrey
Subject: NRDC Comments on the Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule
Attachments: NRDC Comments PWCR and PTSR 2009-2-6.PDF

Hello,

Please find attached a copy of NRDC's comments on the Proposed Waste Confidence Rule and the Proposed Temporary Storage Rule (Docket ID-2008-0482 and NRC-2008-0404).

This document was also sent via First Class Mail.

Please let me know if you have any problems with the file.

Alyssa Go

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Temporary Storage Rule
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From: "Go, Alyssa" <ago@nrdc.org>
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