

1 CHARLES G. LA BELLA (SBN 183448)
 2 charles.labela@btlaw.com
 3 ERIC BESTE (SBN 226089)
 4 eric.beste@btlaw.com
 5 ZACHARY P. HELLER (CA Admission pending)
 6 zachary.heller@btlaw.com
 7 **BARNES & THORNBURG LLP**
 8 655 West Broadway, Suite 900
 9 San Diego, California 92101
 10 Telephone: 619.321.5000
 11 Facsimile: 619.284.3894

12 Attorneys for Plaintiff,
 13 Public Watchdogs

14 **UNITED STATES DISTRICT COURT**
 15 **SOUTHERN DISTRICT OF CALIFORNIA**

16 PUBLIC WATCHDOGS, a
 17 California 501(c)(3) corporation,

18 Plaintiff,

19 v.

20 SOUTHERN CALIFORNIA
 21 EDISON COMPANY; SAN DIEGO
 22 GAS & ELECTRIC COMPANY;
 23 SEMPra ENERGY; HOLTEC
 24 INTERNATIONAL; UNITED
 25 STATES NUCLEAR
 26 REGULATORY COMMISSION;
 27 and DOES 1 through 100,

28 Defendants.

Case No.: 3:19-cv-01635-JM-MSB

**AMENDED MOTION FOR
 PRELIMINARY INJUNCTION AND
 TEMPORARY RESTRAINING
 ORDER, AND MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 SUPPORT**

Complaint Filed: August 28, 2019
 Judge: Jeffrey T. Miller

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Federal Cases

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People v. Oliver,
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Preliminary Statement

1
2 Plaintiff Public Watchdogs has filed a Complaint alleging federal and state
3 claims against Defendants, who are in the process of burying toxic nuclear waste in
4 defective containment vessels on a site that is in a tsunami inundation zone, between
5 two seismic fault lines, a mere 108 feet from the Pacific Ocean. Because there is an
6 imminent danger that the canisters will fail and release deadly radioactivity into a
7 highly populated region of Southern California, immediate equitable relief is
8 warranted.

I. NATURE OF THE MOTION

9
10 By way of this Motion, Plaintiff Public Watchdogs¹ seeks a preliminary
11 injunction and temporary restraining order enjoining Defendants Southern California
12 Edison Company (“Edison”), San Diego Gas & Electric Company (“SDG&E”),
13 Sempra Energy (“Sempra”)², Holtec International (“Holtec”), and the United States
14 Nuclear Regulatory Commission (“NRC”) from transferring toxic nuclear waste into
15 defective Holtec storage canisters at the defunct San Onofre Nuclear Generating
16 Station (“SONGS”) and burying those canisters. Due to the Defendants’
17 mismanagement and mishandling of the nuclear waste, the design and manufacturing
18 defects of the Holtec canisters, and the dangerous burial site, there is an imminent
19 danger that the canisters will fail, releasing deadly nuclear waste into the surrounding
20

21 ¹ Public Watchdogs is a 501(c)(3) non-profit corporation that operates as a public
22 safety advocate to ensure that government agencies and special interests comply with
23 all applicable laws, including public-safety and environmental-protection laws,
24 especially in the public utilities industry. Plaintiff has at least one member who lives
25 within the zone of exposure for a potentially catastrophic release of radioactive
26 material from Defendant’s actions. *See* Declaration of Nina Babiarz (“Babiarz
27 Decl.”), ¶¶ 2-3.

28 ² Edison and SDG&E are public utilities that own 78.2 % and 20% of SONGS,
29 respectively. Sempra is the parent company of SDG&E. Complaint ¶¶ 5-7;
30 Declaration of Charles G. La Bella (“La Bella Decl.”), ¶ 2, Ex. 1. Edison, SDG&E
31 and Sempra shall be collectively referred to hereinafter as the “SONGS Defendants.”

1 area and causing catastrophic harm to the environment and residents of San Diego
2 County, including members of Public Watchdogs. Despite these clear warning signs,
3 Defendants have already buried 31 defective canisters and are in the process of filling
4 and burying 42 more. Defendants are planning to bury the next canister **this week**—
5 on August 29, 2019—and a second canister by September 6, 2019. Immediate
6 injunctive relief is necessary to stop Defendants from filling and burying additional
7 canisters. This is so because once a defective canister is buried, there is no existing
8 method to (1) unearth the canister, (2) transfer the nuclear waste to either a safer
9 canister or a safer location, or (3) inspect the canister to determine whether or not its
10 critical systems are functioning properly. In other words, the peril looms and
11 consequences are irreparable, and only a Temporary Restraining Order can prevent
12 this harm from occurring.

13 II. FACTUAL BACKGROUND

14 A. The SONGS Defendants are burying deadly nuclear waste in a 15 tsunami inundation zone, near a fault line, 108 feet from the ocean, in 16 a heavily populated area.

17 Due in large part to the safety and regulatory failures described in detail in the
18 Complaint, SONGS ceased operations on June 12, 2013, and began the process of
19 “decommissioning” its then-existing electric generating facilities.³ There was no
20 objective, independent risk assessment performed before the SONGS Defendants’
21 decommissioning plan was adopted, approved by the NRC, and implemented in this
22 high-risk location. Under this decommissioning plan, the SONGS Defendants are to
23 dispose of “Spent Nuclear Fuel” (SNF)—high-level nuclear waste lethal to humans
24 and toxic to the environment—by burying it onsite in a containment system that will
25 store SNF nearly 20 feet underground.⁴ This containment system, also referred to as
26 the Independent Spent Fuel Storage Installation (hereinafter “ISFSI”), is ill-

27 ³ Complaint ¶¶ 18-32.

28 ⁴ *Id.*

1 conceived and dangerously located.⁵

2 **B. Current Wet Storage.**

3 From the inception of operations at SONGS, and continuing during the period
4 of active electricity generation, SNF has been stored in “wet storage” holding pools
5 in Units 2 and 3. When operations ceased at the plant, the SONGS Defendants
6 continued to use wet storage to maintain the SNF. These wet storage pools and their
7 external structures were specifically designed and built to ensure the relatively safe
8 storage of this toxic and radioactive material. Today, the wet storage units in Units 2
9 and 3 are as safe to the public or the environment as when the plant was fully
10 operational, and the risks remain the same.

11 **C. Ill-Conceived Idea of Transferring SNF Out of Wet Storage.**

12 Once operations ceased at the plant, the SONGS Defendants led a group of
13 corporate interests in formulating a “Decommissioning Plan” that envisioned, among
14 other things, moving the SNF from the relatively safe wet storage in Units 2 and 3
15 into “dry storage” canisters that would hold the SNF during an extended cooling
16 process. Under the initial plan proposed by the SONGS Defendants, the SNF was to
17 be moved from the relatively safe wet storage pools, loaded into 72 self-cooling “dry
18 storage” canisters, and transported to an undetermined permanent storage facility.
19 Although this initial idea morphed into the current Decommissioning Plan – with
20 extended storage now occurring at the inherently dangerous SONGS location – the
21 transfer of SNF from wet storage to dry storage canisters remains a cornerstone of
22 the SONGS Defendants’ scheme. And it is the root cause of the current dangers to
23 life, health, and property that triggered this request for injunctive relief.

24 In the initial decommissioning plan, the SONGS Defendants acknowledged
25 that it wanted to move SNF from SONGS to a yet undetermined site. The desire was
26 explicitly stated on numerous occasions by SONGS Defendants. For example, in a
27

28 ⁵ Complaint ¶ 52; La Bella Decl. ¶¶ 4-6, Exs. 3-5.

1 September 2014 “Post –Shutdown Report” transmitted to the NRC, Palmisano,
2 (Edison’s Vice President and Chief Nuclear Officer) stated:

3 As discussed in the Spent Fuel Management Period details and the
4 currently submitted IFMP (Irradated Fuel Management Plan), it will be
5 necessary to further expand the current ISFSI (Independent Spent Fuel
6 Storage Installation) capacity to store the complete inventory of Units 2
and 3 spent fuel. The location, capacity, and technology to be employed
have yet to be finalized.

7 In other words, the Decommissioning Plan was conceived and put into play by
8 the SONGS Defendants before it knew whether the “location, capacity and
9 technology” existed to safely store SNF outside of the current wet storage. Nor did
10 the original decommissioning plan contemplate the long-term burial of SNF on the
11 SONGS site. Rather, it was only by virtue of the NRC’s failure to approve a
12 permanent storage facility that the SONGS Defendants’ plan morphed into one
13 involving the removal of SNF from wet storage in Units 2 and 3, transportation into
14 dry canisters, and burial of the SNF near the beach in San Onofre. By altering the
15 Decommissioning Plan to permit moving SNF from Units 2 and 3, placing this
16 dangerous substance into thin, inferior, and untested canisters, and dropping them
17 into holes dug into the beach at the San Onofre, the SONGS Defendants, with the
18 NRC’s concurrence, substantially increased the danger of a nuclear disaster involving
19 SNF.

20 **D. The Transfer Debacle.**

21 The process of transferring SNF out of wet storage – overseen from the outset
22 by Thomas J. Palmisano, Defendant Edison’s Vice President and Chief Nuclear
23 Officer – has been riddled with negligence, flawed management, inadequate
24 oversight and performance, errors, miscues, and “near misses” of a nuclear disaster.
25 The NRC’s own analysis, in scientific and technical jargon, is the best evidence of
26 the total breakdown that has occurred at SONGS during the removal of SNF from
27 the relative safety of wet storage in Units 2 and 3 and transfer into dangerous dry
28 storage.

1 On July 22, 2018, on Palmisano's watch, the SONGS Defendants nearly
2 dropped a 49-ton canister full of deadly radioactive nuclear waste more than 18 feet
3 into the ISFSI when it was caught on a quarter inch thick steel guide ring. The
4 SONGS Defendants referred to this event as an "unsecured load event." In actuality,
5 this event could have turned San Onofre State Beach Park and much of Southern
6 California into a permanently uninhabitable nuclear wasteland.

7 Pursuant to 10 C.F.R. § 72.75, any incident involving nuclear waste must be
8 reported to the NRC within twenty-four hours. And yet despite this clear and
9 unambiguous directive, Palmisano and the SONGS Defendants never filed a written
10 report of this incident to the NRC. As a result, the public was kept in the dark about
11 the potentially disastrous incident on July 22, 2018. And, if the NRC and SONGS
12 Defendants had their way, the public would still be in the dark about this incident.

13 It wasn't until ten days later when there was yet another potentially
14 catastrophic event at SONGS that the NRC was notified orally by the SONGS
15 Defendants of another incident. The facts surrounding this second event – as
16 recounted by the NRC – are equally troubling:

17 On Friday, August 3, 2018, at approximately 1:30 pm (PST), SONGS
18 was engaged operations involving movement of a loaded spent fuel
19 storage canister into its underground ISFSI storage vault (HI-STORM
20 UMAX storage system). As the loaded spent fuel canister was being
21 lowered into the storage vault using lifting and rigging equipment, the
22 licensee's personnel failed to notice that the canister was misaligned and
23 was not being properly lowered. The licensee continued to lower the
24 rigging and lifting equipment until it believed that the canister had been
25 fully lowered to the bottom of the storage vault. However, a radiation
26 protection technician identified elevated radiation readings that were not
27 consistent with a fully lowered canister. The licensee then identified
28 that the loaded spent fuel canister was hung up on a metal flange near
the top of the storage vault, preventing it from being lowered, and that
the rigging and lifting equipment was slack and no longer bearing the
load of the canister.

In this circumstance, with the important to safety (ITS) rigging and
lifting equipment completely down in the lowest position, the ITS
equipment was disabled from performing its designed safety function of
holding and controlling the loaded canister from a potential canister
drop condition. . . . The estimated time the canister was in an unanalyzed
credible drop condition was approximately 45 minutes to 1 hour in
duration.

1 Exhibit 36 to Complaint, at 2.

2 **E. The Admission of Negligence.**

3 In its initial reaction to the August incident, the NRC appeared to understand
4 the chaos resulting from mismanagement by Palmisano and others at the SONGS
5 Defendants. In its Special Inspection Report and Notice of Violation dated
6 November 28, 2018, the NRC notified the SONGS Defendants:

7 The NRC is concerned about apparent weaknesses in management
8 oversight of the dry cask storage operations. Your staff did not perform
9 adequate direct observational oversight of downloading activities
10 performed by your contractor, insuring adequate training of individuals
11 responsible for performing downloading operations, provide adequate
12 procedures for downloading operations, or ensure that conditions
adverse to quality were entered into the corrective action program. The
NRC identified that a causal factor for the misalignment incident
involved management weakness in the oversight of dry cask storage
operations.

13 (Ex. 37 to Complaint at page 2). These observations would be troubling enough if
14 they were discovered at a child day care center, or at a fertilizer manufacturing
15 facility. In the context of the highly dangerous activity of transporting deadly nuclear
16 fuel, they are terrifying.

17 The NRC further found that in addition to experiencing “difficulty in aligning
18 canister 28 for downloading into the independent spent fuel installation vault,” and
19 repeatedly causing “contact between the canister and vault components” for months,
20 the SONGS Defendants did not even include mention of these failures in any
21 corrective action program, or perform an assessment to prevent such dangerous
22 events from happening in the future.⁶ Thus, months after the dangerous events of
23 July and August 2018, the SONGS Defendants still did not have post-incident
24 measures in place to avoid future incidents.

25 Notwithstanding the gross negligence demonstrated by Palmisano and his
26 team, NRC left it to the SONGS Defendants to address training and other related
27 failures, and did not require an objective and independent analysis of how to avoid

28 ⁶ Exhibit 37 to Complaint, at 5 (“Enclosure 1”).

1 future incidents. Yet even Edison recognized the malfeasance of its personnel, as it
2 soon thereafter replaced Palmisano as SONGS' Chief Nuclear Officer and reassigned
3 him to a "Community Engagement Panel" position. Thus, Defendant Edison itself
4 has acknowledged the gross negligence of Palmisano and his management team at
5 SONGS – the same team that has been in place from the inception of the
6 Decommissioning Plan to its recent execution. But this stunning admission by
7 Defendant Edison of a systemic and deep-rooted concern about safety and
8 supervisory management concerns at SONGS does nothing to address either the root
9 cause of the problem – that is, the transportation of SNF from relatively safe wet
10 storage to relatively unsafe dry canisters – or obviate the need for a dispassionate and
11 independent analysis of the risks.

12 **F. Calamitous Canisters.**

13 In addition to the dangerous manner in which the SONGS Defendants are
14 executing the Decommissioning Plan, the safety of the canisters into which they are
15 loading SNF are highly questionable. Even if the already buried canisters had not
16 been compromised by scratches and other damage, these receptacles were never
17 intended for long term storage or transportation to a permanent storage facility. The
18 canisters cannot be opened safely, and the fuel cannot be transferred to another
19 canister or back into wet storage should its tomb fail. Indeed, the canisters themselves
20 are guaranteed by Defendant Holtec for a mere 25 years, and they are buried into
21 silos or sleeves that are guaranteed for only 10 years. These factors alone are
22 sufficient to justify a temporary cessation of transportation to dry storage.

23 In January 2018, the SONGS Defendants began transferring the SNF from
24 refrigerated "wet storage" holding pools into 73 passively cooled "dry storage"
25 canisters designed and manufactured by Holtec.⁷ A single Holtec canister contains
26 hazardous radioisotopes (collectively, the canisters hold thousands of spent fuel
27

28 ⁷ Complaint ¶ 66; La Bella Decl. ¶ 3, Ex. 2.

1 rods), including more radioactive Cesium-137 than what was released globally
 2 during the Chernobyl disaster.⁸ Among the problems with the design and
 3 manufacture of these canisters are:

4 First, the Holtec canisters are not guaranteed to function long enough for any
 5 of the stored nuclear waste to be transferred safely. Indeed, Holtec warrants the
 6 canisters for only 25 years despite the radioisotopes in each canister remaining
 7 radioactive and deadly for centuries.⁹ Similarly, the system used to store the canisters
 8 in steel-lined, underground concrete holes in the ISFSI is guaranteed for only 10
 9 years.¹⁰

10 Second, the Holtec canisters are problematically designed and manufactured
 11 for the purpose of storing nuclear waste.¹¹ Specifically, the Holtec canisters are so-
 12 called “thin-wall” canisters, with only a 5/8 inch thick stainless steel wall that is
 13 susceptible to “gouging” and attendant failure.¹² By contrast, the vast majority of
 14 international nuclear decommissioning projects employ thick-walled dry casks with
 15 anywhere between 9 and 18-inch thick walls.¹³ These casks are made of lead, steel,
 16 concrete and/or copper to create a strong radiation barrier.¹⁴

17 Third, and perhaps most troubling, many of the canisters have broken
 18 components called stand-off shims. These shims were designed to enhance

19 ⁸ Complaint ¶ 50.

20 ⁹ Complaint ¶ 67; La Bella Decl. ¶ 9, Ex. 8.

21 ¹⁰ *Id.*

22 ¹¹ The standards used to evaluate the design and manufacture of nuclear waste
 23 storage canisters include several set by the American Society Mechanical Engineers
 (ASME), such as the standards for Boiler and Pressure Vessels (the standard
 allegedly applicable to the Holtec canisters).

24 ¹² Complaint ¶¶ 68-71.

25 ¹³ A leading alternative, the CASTOR thick-wall canister, is the containment and
 26 transportation product of choice for the majority of decommission projects across
 the world. *See Castor*, Eur. Nuclear Soc’y,
 27 <https://www.euronuclear.org/info/encyclopedia/castor.htm> (last visited July 24,
 2019).

28 ¹⁴ Complaint ¶ 70.

1 convection cooling of the hot fuel assemblies by creating additional space for helium
 2 gas to flow throughout the canister so that the stored spent nuclear fuel does not over-
 3 heat and unleash a deadly nuclear reaction. But these same shims render the canisters
 4 particular susceptible to leakage, especially if jostled during a tsunami or earthquake.

5 **G. SONGS Defendants narrowly avoided a radioactive disaster by**
 6 **nearly dropping two 49-ton canisters full of deadly radioactive**
 7 **nuclear waste, then attempting to cover it up.**

8 As if the canister defects were not enough, the process for handling the
 9 canisters is itself flawed. As outlined above, on July 22, 2018, the SONGS
 10 Defendants nearly dropped a 49-ton canister full of deadly radioactive nuclear waste
 11 more than 18 feet into the ISFSI when it was caught on a quarter inch thick steel
 12 guide ring.¹⁵ Ten days later, on August 3, 2018, the SONGS Defendants once again
 13 lost control of a 49-ton canister full of radioactive nuclear waste while it was being
 14 lowered into a below-ground storage silo. In both instances, the relevant Defendants
 15 failed to provide timely notice to the NRC of these nears misses.¹⁶ And in response
 16 to these potentially catastrophic events, the NRC merely imposed a financially
 17 insignificant fine on one of the SONGS Defendants. Predictably, the SONGS
 18 Defendants offered nothing more than vague assurances of greater care going
 19 forward. These are but two specific examples of the NRC's abdication of its
 20 regulatory and supervisory obligation to ensure public safety at SONGS, thereby
 21 requiring Plaintiff to bring this action and seek immediate injunctive relief.

22 **H. Suspect Site Selection.**

23 Aside from the flawed transfer process and the loading of deadly SNF into
 24 questionable dry storage canisters, the suspect site chosen by the SONGS Defendants
 25 for this entombing is itself enough to warrant injunctive relief. Defendants seek to
 26 continue the burial of dangerous SNF in questionable canisters in a tsunami zone that

27 ¹⁵ Complaint ¶¶ 84-86; La Bella Decl. ¶ 13, Ex. 12 [Nov. 28, 2018 Letter, at 7-8].

28 ¹⁶ Complaint ¶ 91; Babiarz Decl. ¶ 4; La Bella Decl. ¶ 12, Ex. 11 [August 9, 2018
 Community Engagement Panel Transcript at 104:12 – 107:18].

1 sits atop several fault lines, yards away from the Pacific Ocean. Given the numerous
2 dangerous incidents and repeated management failures at this particular site, Plaintiff
3 is entitled to a temporary reprieve of the hazardous activities to allow for a more
4 objective analysis of the risks be conducted.

5 **III. ARGUMENT**

6 **A. Plaintiff easily clears the temporary equitable relief bar.**

7 The standards for obtaining a preliminary injunction or temporary restraining
8 order are well established: a plaintiff must establish that (1) it will likely suffer
9 irreparable harm in the absence of preliminary relief; (2) it is likely to succeed on the
10 merits of its claims; (3) the balance of equities tips in its favor; and (4) an injunction
11 is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).
12 The Ninth Circuit approaches these factors with a sliding scale: so long as the
13 plaintiff establishes a likelihood of irreparable injury and an injunction is in the public
14 interest, it need only show “serious questions going to the merits” and “a balance of
15 hardships that tips sharply towards the plaintiff.” *All. for the Wild Rockies v. Cottrell*,
16 632 F.3d 1127, 1135 (9th Cir. 2011).

17 As federal courts throughout the nation have recognized, the disposal of
18 hazardous materials is a paradigmatic fact-pattern demonstrating the necessity and
19 propriety of temporary injunctive relief. *Interfaith Cmty. Org. v. Honeywell Int'l,*
20 *Inc.*, 399 F.3d 248 (3d Cir. 2005) (injunctive relief granted to non-profit community
21 organization against chemical manufacturer to require clean-up of contaminated
22 chromium); *FiberMark N. Am., Inc. v. Jackson*, No. CIV. A. 07-839 (MLC), 2007
23 WL 4157235, at *1 (D.N.J. Mar. 28, 2007) (TRO granted to enjoin defendant from
24 causing or allowing discharge of solid waste into river); *Hirt v. Richardson*, 127 F.
25 Supp. 2d 833 (W.D. Mich. 1999) (court granted TRO to enjoin Department of
26 Energy’s shipment of plutonium, but ultimately denied preliminary injunction as an
27 impermissible intrusion on executive branch's authority over foreign policy).

28 ///

1 **B. Irreparable harm is self-evident.**

2 “Environmental injury, by its nature, can seldom be adequately remedied by
3 money damages and is often permanent or at least of long duration, *i.e.*, irreparable.”
4 *All. for the Wild Rockies*, 632 F.3d at 1135. Here, once a defective Holtec canister is
5 buried, there is no way to (1) unearth the canister, (2) transfer the nuclear waste to
6 either a safer canister or a safer location, or (3) inspect the canister to determine
7 whether or not its critical systems are functioning properly. Indeed, the Chief
8 Nuclear Officer at SONGS, Tom Palmisano, admitted that *there is no existing method*
9 *for safely opening the defectively designed canisters*.¹⁷ He also stated that it would
10 be at least three years before the techniques necessary to unload and inspect a canister
11 *could possibly* be developed.¹⁸ And yet—in the face of this stunning admission and
12 *before* the technique is developed—the NRC has permitted the burying to resume.
13 Greg Jacsko, the former head of the NRC in 2012 when SONGS shut down, has also
14 stated that the SONGS Defendants should stop burying nuclear waste at SONGS
15 because “once they get loaded, I don’t see them ever taking those canisters out of
16 there.”¹⁹ In short, Defendants are creating what one scientific commentator has
17 called a “trash heap deadly for 250,000 years.”²⁰

18 **C. An injunction is in the public interest.**

19 There is a strong “public interest in preserving nature and avoiding irreparable
20 environmental injury.” *All. for the Wild Rockies*, 632 F.3d at 1138. Given the nature
21 of the environmental—indeed, human—costs associated with the burial of
22

23 ¹⁷ La Bella Decl. ¶ 10, Ex. 9 [March 22, 2018 Community Engagement Panel
Meeting Transcript at 85:16–86:18].

24 ¹⁸ *Id.*

25 ¹⁹ <https://www.kpbs.org/news/2018/aug/02/former-nrc-chief-says-edison-should-stop-burying-n/> (embedded video of Jacsko statements).

26 ²⁰ David Biello, *Spent Nuclear Fuel: A Trash Heap Deadly for 250,000 Years or a*
27 *Renewable Energy Source?*, *Sci. Am.* (Jan. 28, 2009),
28 <https://www.scientificamerican.com/article/nuclear-waste-lethal-trash-or-renewable-energy-source>.

1 radioactive waste in defective containers on dangerous grounds, public interest can
2 be served only by equitable relief.

3 **D. The balance of hardships tips sharply in Plaintiff’s favor.**

4 Courts considering whether or not to grant a motion for preliminary injunction
5 or temporary restraining order “must balance the competing claims of injury and
6 consider the effect of granting or withholding the requested relief, paying particular
7 regard to the public consequences.” *Winter*, 555 U.S. at 129. Here, just as there
8 would be no harm to the public in halting the transfer and burial of the defective
9 Holtec canisters, so would it be with respect to Defendants. Maintaining the *status*
10 *quo* will cause Defendants little or no harm as this matter is reviewed by the Court
11 on a full record.²¹ In the meantime, the spent fuel can remain in the pools that were
12 designed and tested for this very purpose.

13 **E. Plaintiff Will Likely Succeed on the Merits.**

14 Plaintiff’s Complaint raises “serious questions” regarding the propriety of
15 Defendants’ actions, and is likely to prevail on each of its claims for (1) violation of
16 the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*), (2) public nuisance, and
17 (3) strict products liability.

18 1. Violation of Administrative Procedure Act

19 Plaintiff alleges that the NRC violated multiple provisions of the
20 Administrative Procedure Act (“APA”) by granting the SONGS Defendants’
21 application to amend its license and decommission the SONGS Facility.²²

22 _____
23 ²¹ Any assertion that Defendants *would* be harmed is quickly disproven by the fact
24 that they themselves halted the transfer and burial of Holtec canisters for thirteen
25 months. Given the expedited nature of this litigation, Defendants can hardly
26 complain about an extension of this moratorium while the Court assesses the
27 allegations in the Complaint.

28 ²² An agency action must be “reviewable by statute” or be a “final agency action for
which there is no other adequate remedy[.]” 5 U.S.C. § 704. The NRC’s License
Amendment, as promulgated, is a final enactment, subject to immediate challenge
and action by reason of current, subsisting, and binding effect.

1 The APA governs the manner in which federal administrative agencies may
 2 propose and establish regulations, and grants federal courts oversight over all agency
 3 actions. “In enacting the APA, Congress made a judgment that notions of fairness
 4 and informed administrative decision-making require that agency decisions be made
 5 only after affording interested persons notice and an opportunity to comment.”
 6 *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *see also Riverbend Farms, Inc.*
 7 *v. Madigan*, 958 F.2d 1479, 1485 (9th Cir. 1992) (“[T]he notice and comment
 8 requirements ... are designed to ensure public participation in rulemaking.”).

9 The NRC violated the Sections 553, 554, 556, 557 and 706 of the APA by,
 10 *inter alia*, (1) failing to give the public and all interested parties an opportunity to
 11 participate in the decision to approve the License Amendment, (2) approving the
 12 License Amendment and the associate plan for storage of SNF in an “arbitrary” and
 13 “capricious” manner “in excess of statutory jurisdiction, authority, or limitations, or
 14 short of statutory right”, and (3) failing to perform proper oversight of the
 15 decommissioning process.²³

16 2. Public Nuisance

17 Plaintiff alleges that Edison, SDG&E, Sempra, and Holtec’s (collectively, the
 18 “Nuisance Defendants”) implementation of the current decommissioning plan and
 19 the associated threat of nuclear disaster constitute a public nuisance.

20 Under California law, a “nuisance” is “[a]nything which is injurious to health
 21 ... or is indecent or offensive to the senses, or an obstruction to the free use of
 22 property, so as to interfere with the comfortable enjoyment of life or property[.]” Cal.
 23 Civ. Code § 3479. The “mere apprehension of injury from a dangerous condition
 24 may constitute a nuisance where it interferes with the comfortable enjoyment of
 25 property[.]” *McIvor v. Mercer-Fraser Co.*, 76 Cal. App. 2d 247, 254 (1946); *see also*
 26 *People v. Oliver*, 86 Cal. App. 2d 885, 889 (1948) (“A fire hazard, at least when
 27

28 ²³ Complaint ¶¶ 107-18.

1 coupled with other conditions, can be found to be a public nuisance and abated.”).
2 And a public nuisance is a nuisance “which affects at the same time an entire
3 community or neighborhood, or any considerable number of persons[.]” Cal. Civ.
4 Code § 3480. Pollution and damage to the environment caused by defendants’
5 actions are classic examples of public nuisance. *See, e.g., Cal. Dep’t of Toxic*
6 *Substances Control v. Campbell*, 138 F.3d 772, 780 (9th Cir. 1998) (groundwater
7 contamination constitutes a public nuisance).

8 Here, the Nuisance Defendants’ acts pose an imminent, significant, and
9 unreasonable threat to the public health and safety of millions of people that live and
10 work anywhere near SONGS. In addition to the catastrophic impact on the
11 environment and neighboring communities, this potential disaster would also cause
12 significant, unreasonable, and irreparable harm to Public Watchdogs in its role as a
13 public safety advocate working to ensure that government agencies and special
14 interests comply with public-safety and environmental-protection laws.

15 3. Strict Products Liability

16 Plaintiff alleges that Holtec is strictly liable for negligently designing,
17 manufacturing, and/or assembling the defective canisters used to store the SNF.

18 “The elements of a strict products liability cause of action are a defect in the
19 manufacture or design of the product or a failure to warn, causation, and injury.” *Cty.*
20 *of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 318 (2006) (citing *Soule*
21 *v. Gen. Motors Corp.*, 8 Cal. 4th 548, 560 (1994)). Under California law, the doctrine
22 of strict liability is not “limited either ‘on a theory of privity of contract’ or ‘on the
23 theory that no representation of safety is made to the bystander.’” *Price v. Shell Oil*
24 *Co.*, 2 Cal. 3d 245, 251 (1970). In other words, bystanders may recover in strict
25 liability.

26 In our case, Holtec owed a duty to Plaintiff and California residents to design
27 and manufacture the Holtec canisters in such a way that made the canisters safe for
28 their intended purpose of permanently storing spent nuclear fuel at the SONGS

1 ISFSI. Holtec breached this duty by delivering canisters that (1) are not guaranteed
2 to function long enough for any of the stored radioisotopes to be transferred safely,
3 (2) fail to meet the acceptable industry standards for the design and manufacture of
4 nuclear waste storage containers, and (3) have broken components.

5 **F. Plaintiff need not provide an undertaking.**

6 Rule 65(c) of the Federal Rules of Civil Procedure invests the Court “with
7 discretion as to the amount of security required, if any” to pay the costs and damages
8 sustained by any party found to have been wrongfully enjoined or restrained.
9 *Barahona–Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (citing *Doctor's*
10 *Assoc., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996)). “The district court may
11 dispense with the filing of a bond when it concludes there is no realistic likelihood
12 of harm to the defendant from enjoining his or her conduct.” *Jorgensen v. Cassidy*,
13 320 F.3d 906, 919 (9th Cir. 2003). Since there is no likelihood of harm to the SONGS
14 Defendants in halting the transfers of SNF to the defective Holtec canisters and
15 burying them pursuant to the decommissioning plan, Plaintiff requests that it not be
16 required to post a bond.

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1 **IV. CONCLUSION**

2 Defendants are taking a dangerous course without adequately considering the
3 grave risks, or alternative courses of action. Because their movement and storage of
4 dangerous nuclear waste could irreparably harm Southern California for centuries,
5 their current course of recklessness must be stopped in its tracks. Temporary
6 equitable relief is a fair and necessary to avoid a quickly materializing disaster.

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8 Respectfully submitted,

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10 Dated: August 30, 2019

BARNES & THORNBURG LLP

11
12 By: /s/ Charles G. La Bella
13 Charles G. La Bella
14 Attorneys for Plaintiff
15 Public Watchdogs
16 charles.labella@btlaw.com

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 300, Los Angeles, CA 90067. On August 30, 2019 I served the foregoing document(s) described as: **AMENDED MOTION FOR PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT** on the interested party(ies) below, using the following means:

All parties identified for Notice of Electronic Filing generated by the Court's CM/ECF system under the referenced case caption and number

BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the respective e-mail address(es) of the party(ies) as stated above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 30, 2019 at Los Angeles, California.

Laurie A. Rossi

Laurie A. Rossi

Print Name

Signature