

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1271

IN RE AIKEN COUNTY, ET AL.

On Petition for Writ of Mandamus (Agency Action Unreasonably Withheld)

RESPONDENTS' SECOND STATUS REPORT

On August 3, 2012, this Court issued an order holding this case in abeyance and directing “that the parties file, no later than December 14, 2012, updates on the status of Fiscal Year 2013 appropriations with respect to the issues presented.” *See In re Aiken Co.*, 2012 WL 3140360 at *1. At Respondents’ request, this Court extended that deadline until January 4, 2013, and both Petitioners and Respondents filed status reports. Petitioners also filed a preliminary status report on September 28, 2012 (to which Respondents and Intervenor replied), when Congress passed a Continuing Resolution (“CR”) funding government operations for six months. As Respondents’ status report noted, the CR did not appropriate any funds from the Nuclear Waste Fund for the Department of Energy (“DOE”) to support – or for the Nuclear Regulatory Commission (“NRC”) to review – the DOE application to construct a High Level Waste Repository at Yucca Mountain.

By its terms, the CR only funded government activities through March 27, 2013. Congress has now enacted legislation funding government operations through September 30, 2013. *See* H.R. 933, Consolidated and Further Continuing Appropriations Act, 2013, P.L. 113-__ (March 26, 2013). This legislation funds both DOE and NRC for the rest of Fiscal Year (“FY”) 2013. *See* Division F, Title I, § 1101. A copy of the relevant pages of this legislation is included as Exhibit 1.

Subsection (a) of Section 1101 funds all agencies funded in FY 2012 by a list of specific, previous appropriations acts. *See* Pub. L. 113-___, Div. F, Tit. I, § 1101(a). Subsection (a)(1) funds agencies that were funded by the FY 2012 Energy and Water Appropriations Act. *Id.* This provision covers both DOE and NRC, which received FY 2012 funding under this provision, *i.e.*, Division B of Public Law 112-74. *See generally* Respondents’ Brief at 21-23; 45-46.

Subsection (a) funds covered agencies “at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2012” *Id.* Subsection (c) in turn provides “[t]he level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations” Pub. L. 113-___, Div. F, Tit. I, § 1101(c). Thus, the FY 2013 Appropriations Act specifies that all agencies funded by the Energy and Water Appropriations Act

in FY 2012, including both DOE and NRC, are now funded at the FY 2012 level and under the same “authority and conditions,” *i.e.*, the same funding sources, as in FY 2012 for the remainder of FY 2013. But that is the same funding level and sources Congress adopted when passing the CR for the first half of FY 2013. Therefore, this legislation continues the CR that was in effect for the first half of FY 2013 for both DOE and NRC for the entire year.

As our brief notes, both NRC and DOE may only fund activities associated with the Yucca Mountain project with funds appropriated from the Nuclear Waste Fund. *See* Respondents’ Brief at 6-7; 18-23; 41-49. And as we noted above, Congress did not appropriate any Waste Fund money for DOE in Fiscal Years 2011 and 2012 or for NRC in Fiscal Year 2012. Thus, because it funded both agencies for the full year at existing levels and from the same sources as in FY 2012, Congress did not appropriate any Waste Fund money for either DOE or NRC during Fiscal Year 2013. Accordingly, both DOE and NRC are limited to using their limited carryover Waste Fund money from previous years to fund any Yucca Mountain-related activities.

The preservation of the status quo means that DOE continues to lack the funds necessary to support the application to construct the Yucca Mountain repository and NRC continues to lack the funds necessary to complete the

proceedings necessary to review the application. By its funding decisions, Congress has demonstrated its intent that the federal government should not complete the Yucca Mountain project at this time. And any further expenditure of the remaining, limited Waste Fund money on this project would still not yield a completed review and adjudication of the Yucca Mountain application.

For the foregoing reasons, and for the reasons stated in our brief, at oral argument, and in our first status report, this Court should deny the Petition for the Writ of Mandamus.

Respectfully submitted,

 s/Andrew P. Averbach
ANDREW P. AVERBACH
Solicitor

 s/Jeremy M. Suttenger
JEREMY M. SUTTENBERG
Attorney

 s/Charles E. Mullins
CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852
(301) 415-1618

Dated March 27, 2013
Filed by EC/CMF

EXHIBIT 1

H. R. 933

**One Hundred Thirteenth Congress
of the
United States of America**

AT THE FIRST SESSION

*Begun and held at the City of Washington on Thursday,
the third day of January, two thousand and thirteen*

An Act

Making consolidated appropriations and further continuing appropriations for the
fiscal year ending September 30, 2013, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

SHORT TITLE

SECTION 1. This Act may be cited as the "Consolidated and
Further Continuing Appropriations Act, 2013".

TABLE OF CONTENTS

SEC. 2. The table of contents of this Act is as follows:

Sec. 1. Short title.
Sec. 2. Table of contents.
Sec. 3. References.
Sec. 4. Explanatory statement.
Sec. 5. Availability of funds.

DIVISION A—AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG
ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2013

Title I—Agricultural Programs
Title II—Conservation Programs
Title III—Rural Development Programs
Title IV—Domestic Food Programs
Title V—Foreign Assistance and Related Programs
Title VI—Related Agency and Food and Drug Administration
Title VII—General provisions

DIVISION B—COMMERCE, JUSTICE, SCIENCE, AND RELATED AGENCIES
APPROPRIATIONS ACT, 2013

Title I—Department of Commerce
Title II—Department of Justice
Title III—Science
Title IV—Related agencies
Title V—General provisions

DIVISION C—DEPARTMENT OF DEFENSE APPROPRIATIONS ACT, 2013

Title I—Military Personnel
Title II—Operation and Maintenance
Title III—Procurement
Title IV—Research, Development, Test and Evaluation
Title V—Revolving and Management Funds
Title VI—Other Department of Defense Programs
Title VII—Related agencies
Title VIII—General provisions
Title IX—Overseas contingency operations

DIVISION D—DEPARTMENT OF HOMELAND SECURITY APPROPRIATIONS
ACT, 2013

Title I—Departmental management and operations

H. R. 933—215

of the corporation and made a determination that this further action is not necessary to protect the interests of the Government.

SEC. 516. Such sums as may be necessary for fiscal year 2013 for pay raises for programs funded by this Act shall be absorbed within the levels appropriated in this Act.

SEC. 517. None of the funds made available in this Act may be used to send or otherwise pay for the attendance of more than 50 employees from a Federal department or agency that are stationed within the United States at any single conference occurring outside a state of the United States, except for employees of the Department of Veterans Affairs stationed in the Philippines, unless the relevant Secretary reports to the Committees on Appropriations of both Houses of Congress at least 5 days in advance that such attendance is important to the national interest.

This division may be cited as the "Military Construction and Veterans Affairs, and Related Agencies Appropriations Act, 2013".

DIVISION F—FURTHER CONTINUING APPROPRIATIONS ACT, 2013

The following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated, and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for fiscal year 2013, and for other purposes, namely:

TITLE I

GENERAL PROVISIONS

SEC. 1101. (a) Such amounts as may be necessary, at the level specified in subsection (c) and under the authority and conditions provided in applicable appropriations Acts for fiscal year 2012, for projects or activities (including the costs of direct loans and loan guarantees) that are not otherwise specifically provided for, and for which appropriations, funds, or other authority were made available in the following appropriations Acts:

(1) The Energy and Water Development and Related Agencies Appropriations Act, 2012 (division B of Public Law 112–74).

(2) The Financial Services and General Government Appropriations Act, 2012 (division C of Public Law 112–74).

(3) The Department of the Interior, Environment, and Related Agencies Appropriations Act, 2012 (division E of Public Law 112–74).

(4) The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2012 (division F of Public Law 112–74).

(5) The Legislative Branch Appropriations Act, 2012 (division G of Public Law 112–74).

(6) The Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012 (division I of Public Law 112–74).

(7) The Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2012 (division C of Public Law 112–55), except for the appropriations designated by the Congress as being for disaster relief under the heading

H. R. 933—216

“Department of Transportation, Federal Highway Administration, Emergency Relief” and in the last proviso of section 239 of such Act.

(8) The Disaster Relief Appropriations Act, 2012 (Public Law 112-77), except for appropriations under the heading “Corps of Engineers—Civil”.

(b) For purposes of this division, the term “level” means an amount.

(c) The level referred to in subsection (a) shall be the amounts appropriated in the appropriations Acts referred to in such subsection, including transfers and obligation limitations, except that such level shall be calculated without regard to any rescission or cancellation of funds or contract authority, other than—

(1) the 0.16 percent across-the-board rescission in section 436 of division E of Public Law 112-74 (relating to the Department of the Interior, Environment, and Related Agencies); and

(2) the 0.189 percent across-the-board rescission in section 527 of division F of Public Law 112-74, (relating to the Departments of Labor, Health and Human Services, and Education, and Related Agencies).

SEC. 1102. Appropriations made by section 1101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.

SEC. 1103. Appropriations provided by this division that, in the applicable appropriations Act for fiscal year 2012, carried a multiple-year or no-year period of availability shall retain a comparable period of availability.

SEC. 1104. No appropriation or funds made available or authority granted pursuant to section 1101 shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during fiscal year 2012.

SEC. 1105. Except as otherwise expressly provided in this division, the requirements, authorities, conditions, limitations, and other provisions of the appropriations Acts referred to in section 1101 shall continue in effect through the date specified in section 1106.

SEC. 1106. Unless otherwise provided for in this division or in the applicable appropriations Act, appropriations and funds made available and authority granted pursuant to this division shall be available through September 30, 2013.

SEC. 1107. Expenditures made pursuant to the Continuing Appropriations Resolution, 2013 (Public Law 112-175) shall be charged to the applicable appropriation, fund, or authorization provided by this division.

SEC. 1108. Funds appropriated by this division may be obligated and expended notwithstanding section 10 of Public Law 91-672 (22 U.S.C. 2412), section 15 of the State Department Basic Authorities Act of 1956 (22 U.S.C. 2680), and section 313 of the Foreign Relations Authorization Act, Fiscal Years 1994 and 1995 (22 U.S.C. 6212).

SEC. 1109. (a) For entitlements and other mandatory payments whose budget authority was provided in appropriations Acts for fiscal year 2012, and for activities under the Food and Nutrition Act of 2008, the levels established by section 1101 shall be the amounts necessary to maintain program levels under current law and under the authority and conditions provided in the applicable appropriations Acts for fiscal year 2012.

CERTIFICATE OF SERVICE

I certify that I served a copy of *Respondents' Second Status Report* on all parties to this case by filing the same with the Court's EC/CMF system and by mailing 4 copies of the same to:

Mark Langer, Clerk
U.S. Court of Appeals for the
District of Columbia Circuit
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W.
Washington, D.C. 20001

Respectfully submitted,
____s/Charles E. Mullins____
CHARLES E. MULLINS
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
(301) 415-1618

Date: March 27, 2013