

NO. 11-1271

Oral Argument Held on May 2, 2012

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In Re: AIKEN COUNTY, SOUTH CAROLINA; ROBERT L.
FERGUSON; WILLIAM LAMPSON; GARY PETERSEN; STATE
OF SOUTH CAROLINA; STATE OF WASHINGTON; NATIONAL
ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS;
NYE COUNTY, NEVADA, Petitioners.

UNITED STATES NUCLEAR REGULATORY COMMISSION,
and GREGORY B. JACZKO, Chairman of the United States Nuclear
Regulatory Commission, Respondents.

**PETITIONERS' MOTION TO LIFT ABEYANCE ORDER
AND PROCEED TO JUDGMENT**

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Petitioners in the above-captioned case hereby move the Court to lift the August 3, 2012, Order holding this matter in abeyance, and issue a decision on the merits in this case. (ECF No. 1387350). As will be detailed below, the conditions the Court set under the August 3, 2012, Order have been met. Therefore, consistent with the Nuclear Waste Policy Act's ("NWPA") emphasis on expediting consideration of the Yucca Mountain license application and that statute's judicial review provision, the Petitioners respectfully request that the Court lift its abeyance order, render a decision on the merits, and issue the requested mandamus.

ARGUMENT IN SUPPORT OF PETITIONERS' MOTION

On November 4, 2011, this Court granted Petitioners' Motion to Expedite. (ECF No. 1340095), and an expedited briefing and oral argument schedule was followed. On August 3, 2012, this Court ordered that this mandamus case be held in abeyance pending appropriations decisions by Congress to be made by December 14, 2012, that might change the existing clear duty of the U.S. Nuclear Regulatory Commission ("NRC") to restart and move forward with the Yucca Mountain Licensing process under the NWPA, 42 U.S.C. §§ 10101-10270 (1982) as amended. Order at 1 (ECF No. 1387350) ("August 2012 Order").

The Court later extended that date to January 4, 2013, at the request of the NRC. (ECF No. 1409722).

As discussed in various previously filed status reports, Congress has taken three relevant actions since the Court's August 2012 Order. (ECF Nos. 1397206, 1408627, 1413458, 1427658). In September 2012, Congress passed and the President signed a Continuing Resolution which expired in March 2013. This Continuing Resolution made no change in the NWPA as it relates to the NRC's obligation to resume the Yucca Mountain licensing proceeding. On January 2, 2013, the President signed the American Taxpayer Relief Act of 2012 (Pub. L. No. 112-240, 126 Stat. 2313 (2013)). Like the earlier Continuing Resolution, the American Taxpayer Relief Act does not prohibit the NRC from using available funding for the Yucca Mountain licensing process. Indeed, it made no reference to Yucca Mountain. Finally, following further Congressional debate and action, on March 26, 2013, the President signed the Consolidated and Further Continuing Appropriations Act, 2013 ("CFCA") (Pub. L. No. 113-6, 127 Stat. 198 (2013)), which also made no change in the NWPA as it relates to the NRC's obligation to resume the Yucca Mountain licensing proceeding.

None of these Congressional appropriations decisions contain "statutory text that makes clear that the Nuclear Regulatory Commission may not use any appropriated money (including previously appropriated funds) for the Yucca

Mountain licensing process” See August 2012 Order at 2 (Kavanaugh, J. concurring) (ECF No. 1387350). Nothing in the most recently enacted CFCA provides for any rescission or other limit on the use or availability of millions of dollars in *prior* appropriated funds (from the Nuclear Waste Fund) for the NRC to meet clear legal obligations under the NWPA, and the NRC does not suggest otherwise. The NWPA remains the law and NRC’s obligations under that Act are unaltered.

Petitioners request that the Court lift its abeyance order and proceed to decision on the merits of the case, consistent with the mandates of the NWPA. That statute makes clear that consideration of the Yucca Mountain license application is to be expedited by all agencies and officials involved in the process:

All actions of a Federal agency or officer with respect to consideration of applications or requests for the issuance or grant of any such authorization shall be expedited, and any such application or request shall take precedence over any similar applications or requests not related to such repositories.^[1]

The NWPA also provides deadlines that were to be strictly adhered to by the Department of Energy and the NRC.² Any delays from any quarter were to be reported, explained, and rectified.³ As detailed in Petitioners’ briefs in this case, both the Department of Energy and NRC have, with impunity and without legal

¹ 42 U.S.C. § 10140(a)(1).

² See, e.g., 42 U.S.C. § 10134(d), (e).

³ 42 U.S.C. § 10134(e)(2).

justification, disregarded their respective duties under the NWPA to expeditiously proceed with the license application and adjudication process for the Yucca Mountain repository.

The NWPA provides for original jurisdiction and direct review by this Court for just such improper delays and failures to act on the repository license application. 42 U.S.C. § 10139(a)(1)(B). This direct review provision is intended to keep the NWPA's process on track: the NWPA's legislative history declares that "[e]xpeditious judicial review of court challenges *to the program as it is implemented*" is an "[e]ssential element of the program." H.R. Rep. No. 97-491(I), at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 3796 (emphasis added). Reflecting the importance of expediting this case, on November 4, 2011, this Court granted Petitioners' Motion to Expedite. (ECF No. 1340095).

The millions of dollars in previously appropriated funds that were available on the date the Court issued its August 2012 Order still remain available after passage of a Continuing Resolution, the American Taxpayer Relief Act, 2012, and most recently the CFCA. The NRC does not suggest otherwise. *See* Petitioners' Status Report at 2 (ECF No. 1397206); Petitioners' Second Supplemental Status Report at 1 (ECF No. 1413458).

This case, which focuses on unreasonably delayed agency action, should not be delayed any longer. As properly noted by Judge Randolph: "There is no

reason to delay issuing a writ of mandamus to correct this transparent violation of law.” *See* August 2012 Order at 5 (Randolph, J. dissenting) (ECF No. 1387350).

The parties remain in the same position they were in at oral argument.

See August 2012 Order at 2 (Kavanaugh, J. concurring) (ECF No. 1387350)

(“In that circumstance, I believe mandamus likely would have to be granted.”).

Petitioners therefore respectfully request that a writ of mandamus now issue.

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RESPECTFULLY SUBMITTED this 24th day of May 2013.

s/ Thomas R. Gottshall

THOMAS R. GOTTSBALL
S. ROSS SHEALY
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
Attorneys for Aiken County

ALAN WILSON*
Attorney General for the State of
South Carolina
JOHN W. MCINTOSH*
ROBERT D. COOK*
Post Office Box 11549
Columbia, SC 29211
**not admitted*

s/ Kenneth Paul Woodington

WILLIAM HENRY DAVIDSON, II
KENNETH PAUL WOODINGTON
Davidson & Lindemann, P.A.
1611 Devonshire Dr., 2nd Floor
Post Office Box 8568
Columbia, SC 29202-8568
*Attorneys for the State of
South Carolina*

s/ James Bradford Ramsay

JAMES BRADFORD RAMSAY
National Assoc. of Regulatory Utility
Commissioners
1101 Vermont Ave. N.W., Suite 200
Washington, DC 20005
Attorneys for NARUC

s/ Barry M. Hartman

BARRY M. HARTMAN
CHRISTOPHER R. NESTOR
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20006-1600
**not admitted*

*Attorneys for Robert L. Ferguson,
William Lampson, and Gary Petersen*

ROBERT W. FERGUSON*
Attorney General

s/ Andrew A. Fitz

ANDREW A. FITZ
TODD R. BOWERS
State of Washington
Office of the Attorney General
Post Office Box 40117
Olympia, WA 98504-0117
**not admitted*

Attorneys for State of Washington

s/ Robert M. Andersen

ROBERT M. ANDERSEN
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, DC 20004

Attorney for Nye County

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of May 2013, a copy of the foregoing was filed using the CM/ECF system which will serve the same on all parties of record as follows:

Mullins, Charles	charles.mullins@nrc.gov
Nestor, Christopher R.	christopher.nestor@klgates.com, dottie.messimer@klgates.com, klgateseservice@klgates.com
Andersen, Robert Michael	randersen@clarkhill.com
Cordes, John F., Jr.	John.Cordes@nrc.gov
Ramsay, James Bradford	jramsay@naruc.org
Hartman, Barry M.	barry.hartman@klgates.com, klgateseservice@klgates.com
Smith, Holly Rachel	hsmith@naruc.org
Gottshall, Thomas Rush	tgottshall@hsblawfirm.com, lgantt@hsblawfirm.com, bvaldes@hsblawfirm.com
Woodington, Kenneth Paul	kwoodington@dml-law.com, sstafford@dml-law.com, jangus@dml-law.com, nbouknight@dml-law.com
Bowers, Todd R.	toddb@atg.wa.gov, TORSeaEF@atg.wa.gov, aaronw@atg.wa.gov, taliaz@atg.wa.gov, jenniferd4@atg.wa.gov
Fitz, Andrew Arthur	andyf@atg.wa.gov, ecyolyef@atg.wa.gov, dianam@atg.wa.gov

Suttenberg, Jeremy	jeremy.suttenberg@nrc.gov
Shealy, Samuel Ross	rshealy@hsblawfirm.com
Cottingham, Anne W.	awc@nei.org
Stouck, Jerry	stouckj@gtlaw.com
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com
Lawrence, John W.	jlawrence@nuclearlawyer.com
Malsch, Martin Guilbert	mmalsch@nuclearlawyer.com
Durkee, Ellen J.	ellen.durkee@usdoj.gov
Avila, Aaron Peter	aaron.avila@usdoj.gov; efile_app.enrd@usdoj.gov; aaronpavila@yahoo.com

DATED this 24th day of May 2013, in Olympia, Washington.

s/ Andrew A. Fitz
ANDREW A. FITZ
Senior Counsel
(360) 586-6752