NO. 10-1050, 10-1052, 10-1069, 10-1082 *Consolidated*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1050

IN RE AIKEN COUNTY, Petitioner

No. 10-1052

ROBERT L. FERGUSON, *et al.*, Petitioners,

v.

BARACK OBAMA, President of the United States, *et al.*, Respondents.

No. 10-1069

STATE OF SOUTH CAROLINA, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

No. 10-1082

STATE OF WASHINGTON, Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*, Respondents.

PETITIONERS' MOTION TO LIFT STAY AND
SET EXPEDITED BRIEFING SCHEDULE

Petitioners move this Court to lift the stay it imposed in this matter on July 28, 2010, and to set an expedited briefing schedule as outlined herein. Such action is necessary because the apparent basis for the stay has been shown to be illusory in the time since its imposition. In addition, an expedited briefing schedule is warranted given the federal government's continuing dismantling of the Yucca Mountain project in clear violation of Congressional directives embodied in several statutes, including the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270.

I. STATEMENT OF THE CASE

The United States' efforts at investigating the viability of a permanent repository for high-level nuclear waste at Yucca Mountain, Nevada, have been ongoing since the late 1970s and represent billions of dollars of investment to date. The legal framework guiding the Yucca Mountain project is the NWPA, enacted by Congress in 1982.

The work at Yucca Mountain culminated in 2002 with the Department of Energy's (DOE) recommendation that Yucca Mountain is a suitable site for a permanent repository and Congress' adoption of that recommendation and subsequent identification of Yucca Mountain as the sole site for the nation's

permanent repository.[1] Consistent with this, in 2008 DOE filed with the Nuclear Regulatory Commission (NRC) its application for a license to begin construction of the repository. This is the final step in the NWPA's siting process.

Less than a year later, in January 2009, DOE abruptly announced its intention to withdraw the license application and forever terminate the Yucca Mountain project. DOE determined that the appropriate course is essentially to go back to the drawing board, a decision reflected in the creation of a study group rather than the identification of another repository site. This decision was not made based on any allegation that Yucca Mountain is unsafe (and, indeed, DOE does not allege this), but rather on general and vague statements that there may be better ways to store high-level waste.

The response to DOE's decision by various interested parties was two-fold. First, numerous parties, including three of the four Petitioners in this matter, filed motions before the NRC's Atomic Safety and Licensing Board (Board) opposing DOE's withdrawal of the license application.[2] In addition, the Petitioners in this case filed original actions in the Courts of Appeals challenging both the decision

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[1] U.S. Dept. of Energy, Recommendation by the Secretary of Energy Regarding the Suitability of the Yucca Mountain Site for a Repository Under the Nuclear Waste Policy Act of 1982, 4 (2002); P.L. 107-200.

[2] The Petitioners in this matter who are involved in the NRC litigation are Aiken County, South Carolina, and the states of South Carolina and Washington.

to withdraw the license application, as well as the larger decision by DOE to forever terminate the Yucca Mountain project. These original actions are expressly authorized by the NWPA, *see* 42 U.S.C. § 10139(a)(1)(A), (B), (D), and were consolidated by this Court in this matter.

As explained in Petitioners' prior status report, these consolidated actions present two distinct issues: (1) whether the decision by the President and Secretary of Energy to irrevocably shut down and abandon Yucca Mountain as a permanent repository for high level nuclear waste violates the NWPA, the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA); and (2) whether the NWPA permits DOE to withdraw its license application to construct the Yucca Mountain project. Only the second, narrower issue is before the NRC.

Since the inception of this action, Petitioners have pressed for a speedy consideration and determination of the lawfulness of DOE's actions for the simple reason that DOE has since its January 2010 announcement continued to dismantle the Yucca Mountain project. Petitioners have noted DOE's termination actions, including:

- February 8, 2010: DOE withdraws water permit applications necessary to the Yucca Mountain project.

- February 17: DOE advises Congress of its intent to use funding expressly granted for use in the license application process to begin closing down the Yucca Mountain project.
- March 1: DOE ends data collection and performance confirmation activities at the Yucca Mountain site.
- March 10: DOE issues a notice of expected separation to all employees of the Office of Civilian Radioactive Waste Management (OCRWM), the federal agency responsible for overseeing and implementing the Yucca Mountain siting process.
- March 18: DOE and its Yucca Mountain contractors draft plans for the termination of Yucca Mountain related contract work.
- July 21: DOE's Inspector General issues report reflecting DOE's rush to terminate Yucca Mountain project on an "expedited" basis without the benefit of a master plan.

Petitioners' Status Report (Aug. 27, 2010) at 8-9; Brief of Petitioners (June 18, 2010) at 15-16; Motion for Preliminary Injunction (Apr. 13, 2010) at 5-7.

Presumably in response to the pace of DOE's termination activities, as well as the national importance of the future of the Yucca Mountain project, this Court initially granted on May 3, 2010, the request of two of the Petitioners herein for expedited briefing and argument. Consistent with this order, the Petitioners submitted their merits brief on June 18, 2010.

On June 29, 2010, the NRC's Board denied DOE's motion to withdraw the license application, agreeing with Petitioners' argument in this matter that DOE is without authority to do so pursuant to the plain language of the NWPA. The following day, the NRC asked the parties involved in the Board proceeding to

submit briefing on a greatly accelerated schedule on the issues of whether the NRC should review the Board's decision and, if so, whether it should be affirmed. Briefing by all the parties before the NRC was completed on July 18, 2010.

Relying on what appeared at the time to be the NRC's commitment to a swift determination of the issue before it, the Respondents in this matter filed on July 2, 2010, a motion to vacate the expedited briefing and argument schedule ordered by the Court. Respondents argued that this Court should await a decision by the NRC since it could "crystallize, narrow or even wholly eliminate the issues" before the Court, thereby serving the interests of judicial economy. Federal Respondents' Motion to Vacate Briefing and Oral Argument Schedule and Hold Cases in Abeyance (July 2, 2010) at 2. On July 28, 2010, the same date the Respondents' merits brief was due, this Court granted this motion.

The NRC has stated publicly that it "is moving with all due haste in arriving at a decision relative to review." Petitioners' Status Report (Aug. 27, 2010) at 6. However, in the time since this Court vacated the expedited briefing and argument schedule, the NRC has not issued a decision in the licensing application matter. Indeed, it has not issued any order in that matter on any subject (such as indicating whether it will, in fact, even review the Board's decision).

Unlike the NRC, DOE has continued to take action: action to terminate the Yucca Mountain project. For example, on September 20, 2010, DOE announced

that as of September 30, 2010, the OCRWM, a Congressionally-created agency that oversees the Yucca Mountain project, will "cease to exist." Ex. A.

II. ARGUMENT

This Court should lift the stay previously imposed in this matter and enter an expedited briefing and argument schedule for several reasons. First, it is apparent that the NRC will not issue a decision any time soon, and not before DOE has succeeded in completely dismantling the Yucca Mountain project. A speedy NRC decision appears to have been one of the reasons the stay was imposed in this matter. Briefing before the NRC was complete in mid-July, more than two months ago. The issue should be capable of a relatively swift resolution, as it is an issue of statutory construction and does not involve any factual disputes. Indeed, the NRC ordered the Board to consider the matter and decide it "as expeditiously . . . as possible" and the Board issued a 61-page decision 33 days after briefing was complete (and just 26 days after hearing oral argument). Petitioners' Status Report (Aug. 27, 2010) at 6-7. If anything, with the benefit of the Board order and yet another round of briefing, the NRC should be able to decide the case even more quickly than the Board. The NRC, however, has proven unable to act within the schedule it imposed on the Board. Despite the NRC's promise to "mov[e] with all due haste" to reach a decision, the NRC has

remained utterly silent since this Court vacated the expedited briefing and argument schedule.

In addition, another apparent reason for the stay—that a decision by the NRC may assist this Court and promote judicial economy—is simply illusory. Petitioners have presented this Court with fully-crystallized legal issues that are ripe for disposition and go beyond the more narrow issue before the NRC. Even if the NRC affirms the Board's denial of DOE's motion to withdraw its license application, the broader issue before this Court will not be resolved, and indeed DOE would likely seek judicial review of the second.

As Petitioners have consistently maintained, DOE is without authority to withdraw its license application to construct the Yucca Mountain project because it contravenes the NWPA, NEPA, and the APA, and it violates the separation of powers doctrine. *See e.g.* Brief of Petitioners (June 18, 2010) at 35-59. The NWPA expressly provides that upon Congressional approval of the Yucca Mountain site, which as noted occurred in 2002: (1) "the Secretary *shall submit* to the [Nuclear Regulatory] Commission an application for a construction authorization for a repository at such site"; (2) the Commission "*shall consider*" such application; and (3) the Commission "*shall issue* a *final decision approving or disapproving*" a construction authorization within a prescribed timeframe. 42 U.S.C. § 10134(b), (d) (emphasis added). Therefore, Petitioners' actions to

forever terminate the Yucca Mountain project are in clear violation of the plain language of the NWPA.

There simply is no reason for this Court to defer in any fashion to the NRC on these legal issues.

Finally, there is an imperative need for a speedy resolution of this matter. In contrast to the NRC, DOE has been anything but inactive. DOE has continued its efforts to terminate all aspects of the Yucca Mountain project, including its most recent statement that by September 30, 2010, it intends to completely eliminate the entire agency responsible for the Yucca Mountain project, the OCRWM. The OCRWM, however, is an agency created by Congress as part of the NWPA. *See* 42 U.S.C. § 10224(a) ("There is hereby established within the Department of Energy an Office of Civilian Radioactive Waste Management . . ."). In its latest action to eliminate an entire Congressionally-created office without express Congressional approval, DOE has continued to engage in behavior that forms the basis of Petitioners' complaint in this matter. Put another way, DOE's apparent intent to abolish the OCRWM is just the latest example of their violation of the NWPA and the Congressional intent expressed in that statute, as well as a violation of the doctrine of separation of powers.

The basis for imposing the stay and vacating the expedited briefing and argument schedule does not exist, as demonstrated by the inaction of the NRC.

The issues involved in this matter are of paramount national importance and in each month of delay, DOE continues to take actions that violate the plain language of the NWPA and other statutes. As a result, the Petitioners respectfully request that the Court lift the stay and impose an expedited briefing schedule as follows: The Respondents' joint merits brief would be due 15 days after the date upon which the Court enters an expedited briefing schedule. Reply briefs would then be due 15 days after Respondents' merits brief. Argument would then be held before the Court at a date to be set by the Court. Such a schedule should be easy to sustain, since Respondents presumably have completed their brief as it was due the same date the Court imposed the stay in this matter.

RESPECTFULLY SUBMITTED this 27th day of September, 2010.

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September 20, 2010

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POINT-OF-CONTACT FOR YUCCA MOUNTAIN REPOSITORY LICENSE APPLICATION (LA) FOR CONSTRUCTION AUTHORIZATION

Our transmittal letter for the subject application dated June 3, 2008, specified the Director, Regulatory Authority Office, Office of Civilian Radioactive Waste Management, as the point-of-contact for any questions regarding NRC staff review and acceptance of the application. Because of the Administration's decision not to pursue development of a repository at Yucca Mountain, the Office of Civilian Radioactive Waste Management will cease to exist as of September 30, 2010. Any future correspondence or questions regarding the license application should be directed to the Department of Energy's outside counsel at the following address:

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Sincerely,

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CERTIFICATE OF SERVICE

I herby certify that on the 27th day of September 2010, a copy of the foregoing Petitioners' Motion to Lift Stay and Set Expedited Briefing Schedule was filed electronically using the CM/ECF system, which will provide service on the following parties:

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