

NO. 11-1271

**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.

**RESPONSE TO “NOTICE OF UNDERLYING DECISION”
AND MOTION FOR EXPEDITED CONSIDERATION**

I. RESPONSE TO NOTICE OF UNDERLYING DECISION

On July 29, 2011, Petitioners filed a Petition for Writ of Mandamus (Agency Action Unreasonably Withheld) (Petition). The Petition alleges, *inter alia*, that the Nuclear Regulatory Commission (NRC) has unreasonably withheld consideration of the Department of Energy's (DOE) license application for the Yucca Mountain high-level waste repository, notwithstanding the fact that on June 29, 2010, the NRC's Atomic Safety and Licensing Board (ASLB or Board) denied DOE's motion to withdraw its application. *See* Petition at 22-26 (ECF Doc. #1321792). The Petition further alleges that the NRC has unreasonably withheld a decision approving or disapproving DOE's application, which decision was required to be issued in June 2011 pursuant to the Nuclear Waste Policy Act (NWPA), 42 U.S.C. § 10134(d). *See* Petition at 27-28 (ECF Doc. #1321792).

The Petition is based in part on the fact that for more than a year, the NRC had failed to issue a decision on whether it would review the ASLB's June 29 decision, and if so whether it would reverse or uphold that decision. *See* Petition at 23-25 (ECF Doc. #1321792). On Friday, September 9, 2011, the NRC issued a Memorandum and Order that addresses this review. On the same day, counsel for the NRC submitted the Memorandum and Order to this Court through a "Notice of Underlying Decision in Case" (ECF Doc. #1328539).

On the merits of whether DOE can withdraw its application, the Memorandum and Order states that “the Commission finds itself evenly divided on whether to take the affirmative action of overturning or upholding the Board’s decision.” Under the Commission’s Internal Commission Procedures, the effect of a deadlocked vote is “no action.” Petition ¶ 41 (ECF Doc. #1321792). The Memorandum and Order thus leaves the ASLB decision intact and undisturbed as the final decision of the NRC. Under the ASLB’s decision, DOE’s motion to withdraw its application with prejudice is denied.¹

However, rather than now moving forward to consider DOE’s application and issue a decision on its merits, the NRC is doing the opposite. The NRC is finalizing the close out of both its internal staff review of DOE’s application and the ASLB adjudication of that application, as previously alleged in the Petition. See Petition ¶¶ 43, 45-47 (ECF Doc. #1321792). The Memorandum and Order directs the ASLB to, “by the close of the current fiscal year [i.e., September 30, 2011], complete all necessary and appropriate case management activities,

¹ The ASLB’s June 29, 2010, order further declares that “submission of [DOE’s] Application triggered a duty on the NRC’s part to consider and render a decision on the Application pursuant to section 114(d) of the NWPA.” Exhibit 1, Order of ASLB, *In re U.S. Dep’t of Energy*, NRC No. 63-001, ASLBP No. 09-892-HLW-CAB04 (June 29, 2010) at 7; see also, *id.* at 14 (section 114(d) is an “explicit mandate” to the NRC to “consider and decide the merits of the Application”), 16 (section 114(d) is an “unambiguous command of Congress” that the NRC “‘shall consider’ the Application and ‘shall issue a final decision approving or disapproving the issuance of a construction authorization.’”).

including disposal of all matters pending before it. . .” On September 12, 2011, the NRC staff gave notice to the ASLB that the staff is unable to provide issuance dates for pending volumes of the Safety Evaluation Report “due to orderly closure activities” and other uncertainty. *See* Exhibit 2; *see also*, Petition ¶¶ 21-22, 46 (ECF Doc. #1321792), and 10 C.F.R. Part 2, Appendix D. A September 13, 2011, NRC press release documents that the agency “is nearing the successful completion of its orderly closure of the licensing review process,” including transferring or donating project infrastructure to other federal agencies or outside the federal government. *See* Exhibit 3.

As a result, the NRC’s Memorandum and Order does not moot the Petition. A writ of mandamus should still issue. The Petition specifically requests that NRC be ordered to consider and issue a final decision on the merits of DOE’s license application. Petition at 28-29 (ECF Doc. #1321792). Despite the ASLB’s order denying DOE’s motion to withdraw, the NRC continues to unreasonably delay consideration of the license application and violate its duty to render a decision approving or disapproving the application. 42 U.S.C. § 10134(d). This is contrary to the plain mandates of the NWPA. *See* Petition ¶¶ 1, 3 (ECF Doc. #1321792); *see also id.* at 22-28. The Memorandum and Order leaves no doubt that the NRC has no intention of complying with its statutory duties to consider

the Yucca Mountain license application and render a final decision on that application within the timeframe established by Congress.²

II. MOTION FOR EXPEDITED CONSIDERATION

In light of the NRC's continued unreasonable delay, Petitioners request that the Court grant expedited consideration of their Petition. The issue of how to manage and dispose of high-level waste is an issue of great public significance that has gripped hundreds of communities around the United States. *See, e.g.*, Petition ¶¶ 8-11, 13 (ECF Doc. #1321792). Congress enacted the NWPA to establish a "definite Federal policy" for the disposal of high-level radioactive waste and spent nuclear fuel. 42 U.S.C. § 10131(b)(2); *see also, Cuomo v. United States NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985) ("the public interest should be gauged [by the decrees of] Congress, the elected representatives of the entire nation . . ."). In the NWPA, Congress outlined a detailed, prescriptive, and

² Under the Congressional Continuing Resolution (CR) currently in place, the NRC has been given \$10 million in spending authority related to its Yucca Mountain activities without Congressional restriction. *See* Pub. L. No. 112-10, 125 Stat. 38 § 1423 (Apr. 15, 2011). Prior CRs in place when and after the NRC began its "orderly closure" nearly a year ago also provided for continued spending authority at even higher FY 2010 levels, again without Congressional restriction. *See* Pub. L. No. 111-242, 124 Stat. 2607 (Sept. 30, 2010), Pub. L. No. 111-290, 124 Stat. 3063 (Dec. 4, 2010), Pub. L. No. 111-317, 124 Stat. 3454 (Dec. 18, 2010), Pub. L. No. 111-322, 124 Stat. 3518 (Dec. 22, 2010), Pub. L. 112-4, 125 Stat. 6 (Mar. 2, 2011), Pub. L. No. 112-6, 125 Stat. 23 (Mar. 18, 2011), Pub. L. 112-8, 125 Stat. 34 (Apr. 9, 2011). Any "budgetary limitations" purportedly mandating "orderly closure" are of the NRC's own making. *See* Petition, Exhibit 7 (OIG Report) at 7-11 (ECF Doc. #1321792).

stepwise process for the “siting, construction, and operation of repositories” to provide a “reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-level radioactive waste” 42 U.S.C. § 10131(b)(1). The law gives the NRC three years to consider and rule upon DOE’s license application. 42 U.S.C. § 10134(d). The NRC has now done *nothing* for well over a third of that time, except to move toward an “orderly closure” of its review. Without the intervention of this Court, it will abdicate its duties indefinitely.

The actions and inactions that have been brought to the Court’s attention, both in the current Petition and the Petitioners’ prior suit, represent a concerted effort to completely dismantle the Congressionally-mandated NWPA process while evading judicial review. Over the past 16 months, this process has been abandoned first by the President, then by DOE, and now through delay by the NRC, despite nothing having changed in the governing law and millions of dollars in appropriated funds remaining available for the program. *See note 2 supra.* This abandonment has been the subject of countless expressions of concern by citizens and officials in Washington, South Carolina, and elsewhere; numerous

Congressional hearings; and repeated calls for resolution of the legal issues involved.³

The NRC continues to refuse to perform its duties and is actively disassembling its program infrastructure. *See* Exhibit 3; Petition ¶ 47 (ECF Doc. #1321792). Any statements suggesting that the NRC can ‘revive’ the program in the future are irrelevant, since it is clear the NRC has no intent to ever make a decision on the license application unless this Court directs it to do so. Any statements pointing to the authority of Congress to revive the program are similarly irrelevant, since Congress has *already* mandated a process in law and *already* appropriated funding for that process, and been ignored. After convincing this Court that the question of whether it must decide the license application was not ripe, *In re Aiken County*, 645 F.3d 428 (D.C. Cir. 2011), and then taking 14 months to simply announce it was taking *no action* with respect to the ASLB decision, the NRC appears poised to now seek to avoid judicial review again by hiding behind “budgetary limitations” of its own making, or by ending the program and arguing the issue is now moot. Absent this Court’s intervention, a decades long, multi-billion dollar process to address one of our nation’s most

³ Attached hereto as Exhibit 4 is a print-out of the first ten pages of results from a Google.com search performed on September 15, 2011, using the search terms “Yucca Mountain termination OR cancel OR withdraw.” These results are representative of the statements asserted above and the public interest surrounding the subject of the Petition.

intractable problems will simply vanish, despite a law compelling it, Congressional funding to facilitate it, and an ASLB decision denying DOE's attempt to end it.

Every day of delay translates into longer and longer exposure of citizens to dangers that the NWPA was intended to end. Based on the national significance of and public interest in the issue, the fact that the NRC is not going to make a decision on the license application, and the fact the NRC will have dismantled the process for doing so by the end of this month, expedited consideration of the legality of the NRC's inaction is warranted.

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant expedited review of the Petition for Mandamus, and after such review, order the NRC to consider the merits of the license application and render a decision on the merits of that application in a timely manner as required by the NWPA, among the other relief requested in the Petition.

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RESPECTFULLY SUBMITTED this 16th day of September 2011.

s/ Thomas R. Gottshall
THOMAS R. GOTTSALL
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
ROBIN J. LUNT
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
JOHN ENGLERT*
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20005-1600
**not admitted*

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

ROBERT M. MCKENNA*
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
Akerman Senterfitt LLP
750 9th Street, N. W.
Suite 750
Washington DC 20001

Attorneys for Nye County

CERTIFICATE OF SERVICE

I herby certify that on the 16th day of September 2011, 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	robert.andersen@akerman.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
Lunt, Robin Kimlin Jensen	rlunt@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

I further certify that I have served the same on the following counsel via email and First Class U.S. Mail as follows:

Martin G. Malsch mmalsch@nuclearlawyer.com
John W. Lawrence jlawrence@nuclearlawyer.com
Charles J. Fitzpatrick cfitzpatrick@nuclearlawyer.com
Egan Fitzpatrick, Malsch & Lawrence, PLLC
1750 K Street, Suite 350, Washington, D.C. 20006

DATED this 16th day of September 2011, in Olympia, Washington.

s/ Andrew A. Fitz

ANDREW A. FITZ
Senior Counsel
(360) 586-6752