

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.

**REPLY IN SUPPORT OF MOTION
FOR EXPEDITED CONSIDERATION**

I. INTRODUCTION

The response of the Nuclear Regulatory Commission (NRC) and its Chairman, Gregory Jaczko, to the Petitioners' motion for expedited review of the Petition for Writ of Mandamus richly illustrates the need for this Court to promptly consider this matter. The response asks the Court to ignore the unusual public interest in this case, glosses over the real and continuing dangers posed by the failure to continue with the licensing process for the Yucca Mountain repository, and dubiously asserts that budget challenges present an intractable "practical" problem justifying Respondents' refusal to follow their statutory obligation to consider and issue a decision on the merits of the license application. The facts demonstrate that expedited review in this case is warranted given the unusual public interest in the matter and the danger of irreparable harm stemming from further delay.

II. EXPEDITED REVIEW IS WARRANTED

Expedited review of this Petition is warranted due to the national significance of the issue, the manifest violations of the Nuclear Waste Policy Act (NWPA) involved, and the distinct and undisputed threat posed by the temporary storage of high-level nuclear waste and spent nuclear fuel. This matter easily satisfies this Court's criteria governing expedited review.

First, there is unusual public interest in prompt disposition of this case. *Handbook on Practice and Internal Procedures*, Part VIII.B (D.C. Cir.) (Apr. 14, 2011) at 33. This public interest stems from the fact that the nation has invested billions of dollars, the efforts of thousands of our best scientific minds, and several decades in the Yucca Mountain siting and licensing process. This process was set up by Congress to address the question of how to permanently dispose of our high-level nuclear waste and spent nuclear fuel—a question that is of critical importance to the health of the nation’s citizens, environment, and commerce given the incredibly hazardous nature of such waste. Just when this process has reached the penultimate step of considering the application to construct the repository, the Respondents have brought the process to an indefinite halt.

This action is a direct violation of the NWPA as detailed in the Petition. *Petition for Writ of Mandamus (Agency Action Unreasonably Withheld) (Petition)* (ECF Doc. #1321792) at 20-28. Given the grave importance of the issues involved and the egregious nature of the violations of the NWPA committed by the Respondents, there is an unusual degree of public interest in this case and in ensuring its prompt resolution. This is demonstrated by the unprecedented report by the Respondents’ own Inspector General detailing Respondent Jaczko’s unilateral and inappropriate actions to terminate Yucca Mountain, Congressional hearings into Respondents’ actions, and the

accompanying media coverage of this. *See, e.g.*, Petition, Ex. 7 (ECF Doc. #1321792); Response to “Notice of Underlying Decision” and Motion for Expedited Consideration, Ex. 4 (ECF Doc. #1330128) (hereafter, Response to Motion for Expedited Consideration).

In addition, Respondents blithely dismiss the dangers associated with the continued storage of high-level radioactive waste at temporary storage sites, arguing there is no danger of irreparable harm in any delay that may result if expedited review is not granted. Response to Motion for Expedited Consideration (ECF Doc. #1330128) at 2-3. Respondents cite no authority in support of this contention. Nor can they, since the record shows that the temporary storage of high-level waste has already failed and millions of gallons of such waste has leaked into the environment.¹ Petition (ECF Doc. #1321792) at 6.

¹ Indeed, the recent earthquake and subsequent tidal wave in Japan showed the vulnerability of temporary on-site storage of spent nuclear fuel to natural disasters, which can obviously occur at any time and are unpredictable. *See e.g.*, Meltdown 101: What Are Spent-Fuel Pools and Why Are They a Threat?, Christian Science Monitor (Mar. 15, 2011), available at <http://www.csmonitor.com/USA/2011/0315/Meltdown-101-What-are-spent-fuel-pools-and-why-are-they-a-threat> (last accessed Oct. 6, 2011). *See also* Quake Shifted Nuclear Storage Containers at Virginia Plant, Washington Post (Sept. 1, 2011), available at http://www.washingtonpost.com/national/health-science/quake-shifted-nuclear-storage-containers-at-virginias-north-anna-plant/2011/09/01/gIOA1OeUuJ_story.html (last accessed Oct. 6, 2011) (25 spent nuclear fuels casks holding 32 fuel rods each shifted one to four inches during magnitude 5.8 earthquake on August 23, 2011).

III. RESPONDENTS' BUDGETARY CONCERNS

Respondent's budgetary concerns are irrelevant for purposes of expedited review and do not excuse their violation of their clear duty under the NWPA. Respondents also cite to the reduced funding available to the Department of Energy (DOE) and the NRC for the Yucca Mountain licensing process as a reason expedited review is not warranted. Respondents' arguments are irrelevant to this Court's decision on expedited review and cannot overcome their clear statutory mandate to consider and issue a final decision on the license application.

First, it should be noted that Respondents fail to explain how the budgets of the DOE and NRC relate to this Court's consideration of the motion for expedited review. The likely answer is that Respondents do not do so because these budgetary concerns are irrelevant to the standard governing expedited review. In addition, even if appropriations legislation conflicted with the NWPA, which it does not, that would not suffice to amend the NWPA's substantive provisions. *Calloway v. Dist. of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000). And while DOE (or the President) is free to recommend amendments to the NWPA, only Congress can amend its provisions. *Cf. McCready v. Nicholson*, 465 F.3d 1, 12 (D.C. Cir. 2006).

Any budgetary concerns DOE or NRC have cannot overcome the clear and express language of the NWPA. That language unequivocally provides that the NRC “shall” consider the Yucca Mountain license application submitted in 2008 and “shall” issue a decision on the merits of that application within three years of its submission, a date that has now passed. *In re Aiken County*, 645 F.3d 428, 435, citing 42 U.S.C. § 10134(d) (“The Commission shall consider an application for a construction authorization for all or part of a repository”); *see also*, 42 U.S.C. § 10134(d) (“the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later than the expiration of 3 years after the date of the submission of such application”). The NRC’s abandonment of these duties has been laid bare by the Petition and Respondents’ subsequent pleadings to this Court.

Finally, it should be noted that even if DOE has not been provided with money to defend the license application in the adjudicatory portion of the NRC’s licensing proceeding, the NRC nevertheless has sufficient funds to continue with its technical review of the application. Petition (ECF Doc. #1321792) at 11. Specifically, NRC has been provided with \$10 million in the current fiscal year for the Yucca Mountain licensing process and, as Respondents admit, also has access to “carryover” funds from the Nuclear Waste Fund that can be employed. Response to Motion for Expedited Consideration (ECF Doc. #1330128) at 7, n.2.

Respondents' claim that even this funding is not sufficient to complete its portion of the licensing application process is a red herring as that is immaterial to any determination of whether expedited review is warranted or, indeed, the merits of whether NRC has an underlying duty to consider and issue a merits decision on the application.

IV. CONCLUSION

Expedited review of this matter of great and unusual public concern is warranted. The Petitioners ask that the Court grant its motion for such expedited review.

RESPECTFULLY SUBMITTED this 6th day of October 2011.

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CERTIFICATE OF SERVICE

I herby certify that on the 6th day of October 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:

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