ARGUED MAY 2, 2012

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

No. 11-1271

IN RE AIKEN COUNTY, et al.,
Petitioners

ON PETITION FOR WRIT OF MANDAMUS
AGAINST THE NUCLEAR REGULATORY COMMISSION

BRIEF OF THE UNITED STATES AS *AMICUS CURIAE*, SUBMITTED ON INVITATION OF THE COURT

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On May 2, 2012, this Court invited the Department of Justice to file a brief "expressing the views of the United States on whether this court should issue a writ of mandamus ordering the Nuclear Regulatory Commission ["NRC"] to act on the Department of Energy's ["DOE's"] pending Yucca Mountain license application." The United States as *amicus curiae* submits that the Court should not issue a writ of mandamus against NRC.[1/]

A. Petitioners Lack Article III Standing

The United States agrees with and joins NRC's argument that Petitioners fail to satisfy the injury, causation, and redressability criteria for Article III standing. *See* NRC Br. 28-38. An order requiring NRC to expend the remainder of its carryover funds on the licensing proceeding clearly would not satisfy the redressability criterion. As explained by NRC and conceded by Petitioners' counsel at oral argument (Tr. 70), the approximately $10 million of carryover funds available to NRC are not enough to adjudicate fully the license application. Only if Congress

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[1/]At oral argument the Court asked NRC's counsel why the Department of Justice had not joined NRC's brief or filed a separate brief. 5/2/2012 Transcript ("Tr.") at 24. The answer is that Petitioners sought mandamus relief only against NRC, did not file a petition for review under the Hobbs Act, and did not name as a party the United States or any other federal agency that lacks independent litigating authority and thus would be represented by the Department of Justice. In Hobbs Act petitions, Department of Justice attorneys represent the United States, a statutorily-required party; NRC, an agency with independent litigating authority in the courts of appeals, is represented by its own attorneys. *See* 28 U.S.C. §§ 2342, 2344, 2348.

decided to appropriate additional funds for this purpose could Petitioners' alleged procedural injury conceivably be redressed. Petitioners cannot demonstrate standing based on the hope that ordering NRC to resume the licensing proceeding until the carryover funds are exhausted would make it more likely that Congress would enact appropriations needed to complete the proceeding. *Cf.* Tr. 15 (Petitioners' counsel opines that Congress "is waiting for this Court to rule"); *The Wilderness Society v. Norton* , 434 F.3d 584, 593-94 (D.C. Cir. 2006) (standing cannot be predicated on the theory that compelling Interior to prepare evaluations and recommendations respecting wilderness suitability within statutory deadlines would increase the likelihood that Congress would enact legislation needed to redress plaintiffs' injuries).

Petitioners' counsel stated at oral argument their hope that available carryover funds would enable NRC "to complete [its] safety evaluation reports" regarding the Yucca Mountain facility. Tr. 8,9; *see also* Tr. 70. But where "reports themselves trigger no legal consequences," any injury allegedly incurred by the absence of reporting "is . . . not redressable." *Guerrero v. Clinton*, 157 F.3d 1190, 1191 (9th Cir.1998).

B. This Court Should Exercise Its Discretionary Authority to Deny the Mandamus Relief Sought by Petitioners

The NRC regards the June 29, 2010, order by NRC's hearing tribunal, the Atomic Safety and Licensing Board, denying DOE's motion to withdraw the Yucca

Mountain license application, as the current law of the case, given that the Commission split 2-2 on whether to take affirmative interlocutory action overturning or upholding the Board's decision. Tr. 26-27; JA 637-38. Therefore, both NRC and Petitioners have assumed, as the Licensing Board held, that the Nuclear Waste Policy Act requires NRC to consider and to render a decision approving or disapproving the application. NRC Br. 39; Pet. Br. 34-35. The United States submits that the Licensing Board's decision is incorrect. *See* Final Brief for Respondents, filed Feb. 8, 2011, *In re Aiken*, D.C. Cir. No. 10-1050, *et al*., at 47-73. Nevertheless, even assuming *arguendo* that NRC has a mandatory duty to approve or disapprove the license application, it is the United States' view that this Court should deny Petitioners' mandamus request.

1. The limited funds available to NRC and DOE for the Yucca Mountain licensing proceeding and other equitable factors weigh strongly against issuance of a writ of mandamus

The existence of a mandatory duty does not necessarily lead to the conclusion that a writ of mandamus should issue. "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-312 (1917). Issuance of the writ "is guided by equitable principles. It is not to be granted in order to command a gesture. [It is] inappropriate to issue a writ of mandamus to compel the [agency] to make what would amount to a purely hortatory statement." *Weber v.*

United States, 209 F.3d 756, 760 (D.C. Cir. 2000). Even "unreasonable" delay by an agency that violates a statutory mandate "does not, alone, justify judicial intervention." *In re Barr Labs.*, 930 F.2d 72, 75 (D.C. Cir. 1991); *see also In re United Mine Workers of America Intern. Union*, 190 F.3d 545, 551 (D.C. Cir. 1999). Rather, this Court applies a rule of reason and may decline to grant the writ if the circumstances, practical difficulties, and other equitable factors, such as existence of competing agency priorities and the nature of the interests at stake, counsel against it. *See In re Barr Labs.*, 930 F.2d at 75; *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984); *In re International Chemical Workers Union*, 958 F.2d 1144, 1149-1150 (D.C. Cir. 1992); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1100 (D.C. Cir. 2003).

In this case, funding constraints, competing priorities, and the interests at stake counsel against issuance of mandamus. The limited funds available to both NRC and DOE for the Yucca Mountain licensing proceeding weigh strongly against mandamus. The Nuclear Waste Policy Act established the "Nuclear Waste Fund" to cover the costs of disposal activities related to commercial radioactive waste. *See* 42 U.S.C. § 10222(c) & (d). The Act provides that spending authority under its provisions "shall be effective for any fiscal year only to such extent or in such amounts as are provided in advance by appropriation Acts." *Id*. § 10105. Congress has funded all Yucca Mountain activities, for both NRC and DOE, with specific

appropriations.[2/] However, as NRC explained (NRC Br. 18-23, 41-42), Congress appropriated zero dollars to DOE for this purpose in FY2011 and FY2012 and likewise appropriated zero dollars to NRC from the Nuclear Waste Fund in FY2012.

While both NRC and DOE have available a limited amount of carryover funds for Yucca Mountain activities, the existence of these carryover funds does not warrant the extraordinary remedy of mandamus. NRC has approximately $10 million

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[2/] In the past, NRC's funding for Yucca Mountain licensing activities came from specific appropriations from the Nuclear Waste Fund. *E.g.*, Energy and Water Development and Related Agencies Appropriations Act, 2010 ("2010 Appropriations Act"), Pub. L. No. 111-85, tit. IV, "Nuclear Regulatory Commission," 123 Stat. 2845, 2877-78 (Oct. 28, 2009).

DOE's funding for Yucca Mountain activities came both from specific appropriations payable from the Nuclear Waste Fund and a specifically-appropriated "Defense" component. *E.g.*, 2010 Appropriations Act, tit. III, "Nuclear Waste Disposal," "Defense Nuclear Waste Disposal," 123 Stat. at 2864-65 ("For nuclear waste disposal activities to carry out the purposes of the Nuclear Waste Policy Act of 1982 . . . $98,400,000, to remain available until expended, and to be derived from the Nuclear Waste Fund."). Because the federal government (rather than nuclear utilities through the Nuclear Waste Fund) bears the disposal costs of defense-related waste that it generates, DOE received specific appropriations for Yucca Mountain-related activities from the general Treasury for purposes of "Defense Nuclear Waste Disposal." *E.g.*, 2010 Appropriations Act, 123 Stat. at 2868 ("Defense Nuclear Waste Disposal – For nuclear waste disposal activities to carry out the purposes of Public Law 97–425, as amended, including the acquisition of real property or facility construction or expansion, $98,400,000, to remain available until expended."). From these funds "made available . . . for nuclear waste disposal and defense nuclear waste disposal," DOE was required to make payments to other parties, such as the State of Nevada "to conduct scientific oversight responsibilities and participate in licensing activities pursuant to the NWPA" and to affected local governments. 123 Stat. at 2864-65; *cf. Nevada v. Dep't of Energy*, 400 F.3d 9, 11-12 (D.C. Cir. 2005).

of carryover funds from appropriations in prior fiscal years that it can legally expend on the Yucca Mountain licensing proceeding. NRC has represented that this carryover money falls far short of its estimated costs for completion of the proceeding. NRC's carryover funds would be substantially depleted by just re-establishing the information data base required by NRC regulations for the adjudicatory hearing. Tr. 46. Although it is theoretically possible that Congress could appropriate additional funds to allow the licensing proceeding to continue after the $10 million is expended, the theoretical possibility of that *deus ex machina* ending is insufficient reason to compel the NRC to throw good money after bad.

DOE has approximately $17 million in unobligated nuclear waste disposal carryover funds, as well as approximately $8 million in obligated carryover funds, that it could use for the Yucca Mountain licensing proceeding, if the proceeding were ordered resumed. This amount is quite small compared to the annual cost that participation in the licensing proceeding would entail (and minuscule compared to the total cost of a multi-year proceeding). To put the numbers in perspective, DOE previously calculated (in its FY 2010 budget request) that it would need approximately $14 million *per month* to support the Yucca Mountain licensing proceeding.[3/] The size of that figure reflects the enormous complexity of the

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[3/] Department of Energy, FY 2010 Congressional Budget Request, Vol. 5, at 504 (May 2009) ("DOE FY 2010 Budget Request") ("The budget request includes the minimal funding needed to explore alternatives for nuclear waste disposal . . . and

proceeding, which involves an 8,600-page license application, 12 parties, almost 300 contentions, and over 100 expert witnesses.

Petitioners suggest that DOE's budget constraints are irrelevant to whether this Court should order NRC to resume its consideration of the license application because DOE has represented that it will go forward with the license application if ordered to do so. *E.g.*, Pet. Reply Br. 27. In fact, DOE has repeatedly made clear before this Court that its participation in the licensing proceeding in that circumstance

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to continue participation in the Nuclear Regulatory Commission (NRC) license application (LA) process, consistent with the provisions of the Nuclear Waste Policy Act."). Consistent with DOE's request, Congress appropriated $196.8 million in FY 2010 for nuclear waste disposal, which included $5 million "to create a Blue Ribbon Commission to consider all alternatives for nuclear waste disposal" and approximately $24 million for financial assistance to the State of Nevada, the affected Indian tribe, and affected units of local government *See* Pub. L. No. 111-85, 123 Stat. 2845, 2864-65, 2868 (2009). The remaining $168 million – approximately $14 million per month - was to support the Yucca Mountain licensing proceeding. Funding was requested to support the following activities: "Undertake additional preclosure and post-closure analytical activities, as required, to respond to potentially multiple rounds of highly technical, detailed NRC RAIs [Requests for Additional Information]; Provide technical, scientific, and legal support for court challenges; Maintain and update the LA and supporting documents as issues resulting from contentions are resolved and RAIs are responded to; Ensure effective LA configuration control and consistency with supporting documents; Assist NRC in its review and acceptance of the Supplemental Environmental Impact Statement (SEIS) providing additional groundwater analysis; Preparation and review of depositions; Preparation of DOE witnesses and testimony for ASLB [Atomic Safety and Licensing Board] hearings; Addressing discovery, including derivative discovery; Preparation and response to interrogatories, and; Support for motions and other legal actions." DOE FY 2010 Budget Request at 521.

would be subject to the availability of appropriated funding.[4/] And it could be no other way. DOE has no authority to continue prosecuting the license application once it runs out of appropriated funds available for that purpose. *See Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 424-26 (1990); 31 U.S.C. §§ 1341, 1350; *U.S. Dept. of Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1346-50 (D.C. Cir. 2012).

In practice, there is reason to anticipate that DOE's lack of available funding could quickly impair its ability to participate in the licensing proceeding. DOE's expenses for resumption of the licensing proceeding would depend on case management orders issued by the NRC Licensing Board. However, if the Board's adjudicatory hearing resumed where it left off, given that the next phase in the adjudicatory proceeding is discovery, DOE's near-term expenses would likely be much higher than NRC's. Accordingly, DOE's carryover funds could be exhausted more quickly than NRC's, creating the very real possibility that if Petitioners' requested relief were granted, the licensing proceeding would be forced to proceed

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[4/] *See, e.g.*, JA 101 (Transcript of oral argument for *In re Aiken County*, D.C. Cir. No. 10-1050); "Respondents' Response in Opposition to Petitioners' Motion to Lift Stay and Set Expedited Briefing Schedule" at 11, filed October 12, 2010, in *In re Aiken County*, D.C. Cir. No. 10-1050; *see also* Department of Energy's Response to GAO's Conclusions and Technical Misstatements at 8 (GAO-11-229 (March 30, 2011) ("As DOE has made clear in public filings, it could and would resume an active licensing proceeding if required to do so. DOE has taken numerous steps to ensure that it can support an active licensing proceeding, provided Congress appropriates it funds with which to do so.").

in the absence of full participation by the license applicant. Under NRC's hearing process, the license applicant has the burden to demonstrate that the application meets NRC's regulatory requirements. *See* 10 C.F.R. § 2.325 ("the applicant . . . has the burden of proof"); NRC Br. 40. If DOE was unable to participate in the NRC licensing proceeding, Nevada and other license opponents reasonably might seek a denial of the application based either or on default or the applicant's inability to carry its burden of proof. *See, e.g.*, Tr. at 77 (Garland, J.); NRC Br. 42 n.7. And, if NRC were ordered to make a decision on the license application, regardless of funding, within the 14-month time period requested by Petitioners, the NRC may be unable to find affirmatively that the application meets NRC regulatory requirements, leaving it no choice but to disapprove the application.

The Court should not second-guess NRC's decisions on how best to manage its funds by directing that carryover funds be exhausted on a short-term resumption of the licensing proceeding that would not result in any meaningful advancement. Directing fruitless spending is not a sensible use of this Court's equitable mandamus posers. And directing NRC to restart the proceedings and spend every last available dollar of Nuclear Waste Fund carryover money without permitting it to reserve funds to ensure continued preservation of information or to shut down the process responsibly would improperly interfere with the agency's internal processes. *Cf. In re United Mine Workers of America*, 190 F.3d at 553 (court should take care not to

craft a remedy that could, among other things, "interfere with the agency's internal processes").

To the extent that the mandamus relief requested by Petitioners would indirectly require DOE to expend remaining carryover funds on resumption of the NRC licensing proceeding, that too may interfere with expenditures for competing priorities related to preservation of expertise, information, and infrastructure that may be necessary to support a waste disposal strategy once authorized and funded by Congress. For example, DOE informs us that with carryover funds from the appropriations made prior to FY2011, DOE has funded management and oversight of the Nuclear Waste Fund (approximately $2 million per year); overhead and security at the Yucca Mountain site (approximately $1.2 million per year); and preservation of licensing-related capabilities at Sandia National Laboratories (approximately $700,000 per year). In future fiscal years, DOE would need to draw on the $17 million in unobligated carryover money to continue these activities.

In addition, the interests at stake do not warrant mandamus. Petitioners concede that NRC's carryover funds would not enable completion of the licensing proceeding. Tr. 70. And, even if the NRC were to complete the proceeding and grant a construction authorization license for a repository at Yucca Mountain, that would not provide Petitioners with what they actually desire, which is the opening of a repository at Yucca Mountain and the movement of waste there from other locations.

Even if the NRC approved the license application for construction authorization, actual construction and operation of a repository could occur only if Congress took affirmative action. For example, Congress would have to enact legislation permanently withdrawing lands, a necessary prerequisite for a repository at Yucca Mountain. *See* 10 C.F.R. § 63.21. And, Congress would have to appropriate large sums of money for construction. Yet in recent years, Congress has declined to enact bills proposing the requisite land withdrawal and decided to appropriate zero money for Yucca Mountain. Moreover, DOE has made clear that it does not intend to build the repository even if a construction authorization license is granted.

Under these circumstances, granting mandamus would be a fruitless exercise and would serve no health or safety interests. Indeed, health and safety issues associated with a permanent geologic repository for high-level nuclear waste are not issues that are appropriately considered on a shoestring budget or without thorough consideration. Petitioners' purely procedural interest in the licensing process continuing to the point of complete exhaustion of carryover funds is not sufficiently weighty to warrant mandamus.

Denial of mandamus here does not suggest that agencies may simply ignore congressional mandates while they have limited remaining appropriations. Rather, it reaffirms the long-standing principle that mandamus is an equitable remedy that will

only be granted when the interests at stake demand it, not as a "gesture." *Weber*, 209 F.3d at 760.

2. Contrary to Petitioner's contention, general appropriations cannot be used to fund the Yucca Mountain licensing proceeding

Petitioners assert that Congress's decision not to appropriate money from the Nuclear Waste Fund for the licensing process is inconsequential because NRC may use its general appropriations for the Yucca Mountain licensing process. Pet. Reply Br. 21-24; Tr. 10. That is incorrect. This Court has recognized – in the context of appropriations from the Nuclear Waste Fund – the principle that "'[a]n appropriation for a specific purpose is exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation.'" *Nevada* , 400 F.3d at 16 (quoting 4 Comp. Gen. 476, 476 (1924)). *See also* U.S. General Accounting Office, Office of the General Counsel, Principles of Federal Appropriations Law, at 2-21 to 2-23 (3d ed.); JA 1300-1302. "Established from time immemorial . . . this rule makes applicable to appropriations bills the general principle of statutory construction . . . that a more specific statute will be given precedence over a more general one." *Nevada*, 400 F.3d at 16 (quotation omitted).

Here, Congress's decision to appropriate no monies from the Nuclear Waste Fund is a specific denial of funding – an appropriation of zero. As such, it is "exclusive of other appropriations in general terms which might be applicable in the absence of the specific appropriation." *Id*. In light of Congress's history of funding

Yucca Mountain through specific appropriations from the Nuclear Waste Fund – and the statutory framework under which the Fund is the exclusive source of appropriations for commercial nuclear waste disposal, *see infra* at 12-14 – it is evident that zeroing out appropriations from the Fund in FY 2011 (for DOE) and FY 2012 (for both DOE and the NRC) was no mere oversight. Rather, it was a denial of funding for Yucca Mountain. Indeed, Congress specifically considered a House proposal to appropriate $25 million to NRC for the Yucca Mountain licensing process in FY2012 and rejected it. Instead, the conferees adopted the Senate version "provid[ing] $0 for nuclear waste disposal." H. Rep. No. 112-331, 112th Cong., 1st Sess. (2011) at 855. That is the version that Congress passed and the President signed. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786. Included in the Act is an express prohibition against NRC's use of funds appropriated by the act for another activity for which Congress denied funds. *Id*. at § 401; *see* NRC Br. 22-23, 46.

Petitioners' argument for the use of general appropriations is also contrary to the purpose of the Nuclear Waste Fund. That Fund was created precisely to "ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be *borne by the persons responsible for generating such waste and spent fuel*." 42 U.S.C. § 10131(b)(4) (emphasis added); *Nevada*, 400 F.3d at 15; *Commonwealth Edison Co. v. Dep't of Energy*, 877 F.2d 1042, 1047 (D.C. Cir. 1989).

Congress intended the statutory scheme to ensure that disposal-related costs for used nuclear fuel would be borne by nuclear utilities through fees based on the amount of electricity that utilities generated and sold using that fuel. By contrast, the costs for defense nuclear waste are borne by the taxpayers through appropriations from the general Treasury. Licensing of a repository is among the limited activities for which expenditures from the Nuclear Waste Fund can be made. 42 U.S.C. §10222(d). If general appropriations were used to fund Yucca Mountain licensing activities, taxpayers – rather than persons responsible for generating spent nuclear fuel – would bear the disposal costs for commercial spent nuclear fuel in contravention of Congress's specific intention that taxpayers *not* bear this cost.

* * * * *

In sum, declining to issue mandamus here would not signify that an agency with presently-available funding can decline to carry out a mandatory duty based on the agency's assessment of the likelihood of future congressional appropriations. This case presents unique circumstances. Those circumstances include: (1) carryover funds currently available to NRC and the DOE are but a small fraction of the estimated annual cost for a multi-year licensing process; (2) there are potentially significant costs associated with restarting the licensing process for a short period and then shutting the process down again; (3) Congress created a fund to pay for the licensing process related to disposal of commercial spent nuclear fuel, has always heretofore

funded those activities out of specific appropriations from that fund, and yet in recent appropriations has chosen not to do so; and (4) the relevant statutory scheme expressly provides that expenses for the activities in question are to be borne by particular entities and not by the taxpayers at large.[5/] In these circumstances, issuance of the writ could not redress Petitioners' alleged injuries and would amount to precisely the type of hortatory statement or gesture that provides insufficient reason to issue the writ.

CONCLUSION

It is the United States' view that this Court should deny the petition for mandamus.

Respectfully submitted,

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[5/] If the Court does not deem these circumstances sufficient to deny the petition for mandamus outright, at the very least these factors warrant holding the case in abeyance pending Congress's decisions on FY2013 appropriations for NRC and DOE. (Appropriations under a continuing resolution would, of course, mean continued zero funding under the FY2012 appropriations.)

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c), D.C. Circuit Rule 25(c), and this Court's May 15, 2009 Administrative Order, I hereby certify that on this date, June 22, 2012, I caused the foregoing brief to be filed upon the Court through the use of the D.C. Circuit CM/ECF electronic filing system, and thus also served counsel of record. The resulting service by e-mail is consistent with the preferences articulated by counsel of record in the Service Preference Report. I have also served two copies by U.S. Mail to the following addresses:

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As required by the rules, I have also caused an original and eight paper copies of this brief to be filed with the Court.

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