

ARGUED MAY 2, 2012

NO. 11-1271

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

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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.

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On Petition For Writ Of Mandamus (Agency Action Unreasonably Withheld)

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**PETITIONERS' RESPONSE TO BRIEF  
OF THE UNITED STATES AS *AMICUS CURIAE***

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**GLOSSARY OF ABBREVIATIONS**

ASLB	Atomic Safety and Licensing Board
DOE	United States Department of Energy
DOJ	United States Department of Justice
NRC	Nuclear Regulatory Commission
NWPA	Nuclear Waste Policy Act

## I. ARGUMENT

The Executive Branch's<sup>1</sup> position can be boiled down to this: The Nuclear Regulatory Commission (NRC) should not be required to comply with its undisputed statutory duty to consider and issue a decision on the Yucca Mountain license application because the Executive does not believe it has sufficient funding now to fully adjudicate the licensing process, and speculates it will not in the future have sufficient funding to satisfy its statutory duty. This position is unsupported by the facts and runs directly contrary to binding authority from this Court. If accepted, this position would do irreparable harm to the separation of powers by giving the Executive carte blanche to ignore statutory duties on the basis of speculation regarding future funding. It would also mean that an agency cannot be compelled to meet a clear multi-year statutory duty unless it has sufficient funds in the current year to complete that duty.

This Court should grant mandamus and order Respondents to resume their consideration of the license application and issue a decision on the merits, as required by the Nuclear Waste Policy Act (NWPA). The Executive Branch has conceded that there are approximately \$27 million in appropriations<sup>2</sup> available to

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<sup>1</sup> The term "Executive Branch" will be used when referring collectively to the position taken by both the Respondents in this case, NRC and its Chairman, and by the Department of Justice (DOJ) on behalf of the United States.

<sup>2</sup> The most recent filings demonstrate that at least \$10 million is available to NRC and \$17 million available to Department of Energy (DOE), for a total of \$27 million. Amicus Br. at 6; NRC Resp. Br. at 4. NRC now informs the Court that it has an additional \$3.2 million in obligated but unexpended Nuclear Waste Fund money (in addition to the \$9.995 million asserted in its previous brief and \$10.4

resume the licensing process. This available funding ensures that meaningful licensing activities can be accomplished that would substantially advance the goal of the NWPA repository program.<sup>3</sup>

In addition, NRC should not be rewarded for having intentionally ignored its statutory duty to conduct the licensing proceeding. The Court should not allow Respondents to violate the NWPA, squander appropriations provided for the repository licensing proceeding by instead closing down facilities and halting the licensing process, and then bootstrap its position that the federal government has insufficient funds to meaningfully proceed with the licensing process.

DOJ's and NRC's speculation about what Congress may do in the future is irrelevant to this proceeding.<sup>4</sup> The NWPA has not been amended to eliminate Yucca Mountain as the sole designated site for the repository, or NRC's duty to consider the license application and render a decision on the merits.<sup>5</sup> The NWPA expressly granted this Court jurisdiction "over any civil action . . . alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under [42 U.S.C. §§ 10131-10145] . . . ." 42 U.S.C.

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million asserted at oral argument). *See* NRC Resp. Br. at n.3. This is not to mention tens of millions of dollars reported this year by DOE to Congress (*see* May 9, 2012, 28(j) Letter (ECF No. 1373032)), and funds from other sources (*see* n.13 *infra*).

<sup>3</sup> *See generally* Section C *infra*.

<sup>4</sup> Case law indicates that the Executive Branch should assume Congress will, in fact, provide future funding to allow an agency to carry out mandatory duties. Other assumptions are constitutionally unworkable. *See* discussion *infra* at 4-5.

<sup>5</sup> *See* Brief of Petitioners (Pet. Br.) at 21-22, 34-35, 49-50.

§ 10139(a)(1). That grant of jurisdiction<sup>6</sup> undeniably anticipates civil actions based upon procedural violations of the NWPA and carries with it the authority to remedy NRC's unlawful halting of the proceeding and failure to consider the Yucca Mountain license application on the merits when appropriations are available.

**A. The Executive Branch's Argument That it May Unilaterally Terminate NWPA Duties Based on Its View of Future Funding Runs Contrary to This Court's Decisions and Violates the Separation of Powers Doctrine**

NRC's and DOJ's principal argument is that the Executive Branch is free to disregard its statutory duties, even if appropriations are available to continue work on those duties, whenever the Executive believes current and potential future funding is not enough to sufficiently advance and complete its statutory duty.<sup>7</sup>

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<sup>6</sup> To avoid rendering this judicial review provision a nullity, the Court should recognize standing by parties who challenge NRC inaction or delay based upon legal, equitable, and procedural grounds. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.8 (1992). The Court stated during oral argument on May 2, 2012, Tr. at 44-45, that it would take the issue of standing on the briefs that had already been filed. Nevertheless, DOJ and NRC attempt to reopen the standing issue, with DOJ challenging standing based upon unrelated statements at oral argument: "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." *See* Amicus Br. at 2. Petitioners, however, did not base standing on the prospect of future Congressional funding, but rather on multiple affidavits and briefings previously submitted to the Court demonstrating that Petitioners are within the zone of interests protected by the NWPA and that their concrete interests will be harmed unless NRC actions are reviewed by this Court pursuant to 42 U.S.C. § 10139(a)(1)(B). *See* Pet. Br. at 24-32; Reply Brief of Petitioners (Pet. Reply Br.) at 2-6.

<sup>7</sup> NRC Resp. Br. at 4; *see, e.g.*, Amicus Br. at 6: "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

Yucca Mountain, like other major federal projects, has always been funded by single year appropriations or continuing resolutions. If the Executive Branch's position is adopted, every multi-year statutory obligation is subject to unilateral Executive Branch termination.

NRC's and DOJ's argument runs directly contrary to this Court's decision in *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977). Instead of recognizing an agency's duty to "effectuate the original statutory scheme as much as possible" when there are funding shortfalls, as this Court held in *Adams*, the position taken by NRC and DOJ would allow the Executive Branch to *project* a shortfall and terminate any project mid-stream, using the excuse of allegedly insufficient current and future appropriations. *See also Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1347-48 (D.C. Cir. 1996). As this Court recognized in *Adams* and *Ramah Navajo*, when Congress reduces appropriations but does not explicitly reverse its substantive legislative mandate, the Executive Branch must advance the program as much as possible with the appropriations available.<sup>8</sup>

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money after bad." After misstating Petitioners' case as being predicated solely on the hope of Congressional appropriations in the future, DOJ urges the Court to "at least" hold the case in abeyance until Congress has acted on FY-2013 appropriation. Amicus Br. at n.5. This would only continue the already unconscionable delaying tactics taken by NRC and DOE to date.

<sup>8</sup> *See Salazar v. Ramah Navajo Chapter*, No. 11-551, 2012 WL 2196799, at \*11-12 (U.S. June 18, 2012) (Agency faced with insufficient funds to meet an obligation may not ignore that obligation, and will be ordered to fulfill it; the agency's remedies are either to go to Congress and have the substantive obligation changed, or to ask for additional appropriations). *See, e.g.*, Department of Education FY 2013 Budget Request: Student Aid Administration, <http://www2.ed.gov/about/overview/budget/budget13/justifications/aa-saadmin.pdf>, at AA-23. Department of

The Executive Branch's argument would, if accepted, also violate separation of powers. It would do so by giving the Executive Branch virtually unlimited authority to overturn legislative mandates with which it apparently disagrees, whenever it believes there are not enough current funds to complete that mandate. It would also undermine the judiciary's authority by removing its ability to issue mandamus to compel compliance with clear statutory duties.

DOJ tries to avoid the inevitable conclusion that naturally flows from its argument by assuring the Court that "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 . . . ." Amicus Br. at 14. This is simply false and is exactly what would occur if this Court accepts and adopts DOJ's argument.

None of the recent actions in Congress related to Yucca Mountain appropriations cited by NRC and DOJ have repealed the NWPA, the designation of Yucca Mountain as the sole nuclear waste repository site, or NRC's duty to consider the license application and render a decision on the merits. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978); *Firebaugh Canal Co. v. U.S.*, 203 F.3d 568, 575 (9th Cir. 2000). This Court should not decline to enforce a clear

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Human and Health Services' FY 2013 Budget Request: General Department Management, <http://www.hhs.gov/budget/hhs-general-budget-justification-fy2013.pdf>, at 4. The Executive Branch took neither of these actions in this case. Moreover the funds available here are "any year" funds—they do not lapse at the end of a given fiscal year.

statutory duty based on speculation about what Congress might do in the future, but rather should issue the requested mandamus to enforce the undisputed statutory duty for which Respondents admit they have current funds.

### **B. Equitable Principles Clearly Support Issuance of Mandamus**

Petitioners agree with DOJ's assertion that issuance of a mandamus order is guided by equitable considerations. *Weber v. U.S.*, 209 F.3d 756, 760 (D.C. Cir. 2000). It is hard to imagine a case where the rule of reason and equities more strongly support issuance of mandamus. NRC admits it has failed to meet its duty to consider the Yucca Mountain license application and render a decision within three years.<sup>9</sup> Respondents intentionally undermined the licensing proceeding by prematurely dismantling the hearing process while full funding was available and the Atomic Safety and Licensing Board (ASLB) decision required continuation.

NRC tries to rewrite the history of the proceeding and ignores its own Inspector General's Report by disingenuously asserting that "NRC **has not of its own will** refused to proceed in the face of a meaningful possibility of reaching the statutory goal . . . ." NRC Resp. Br. at 5 (emphasis added). That is exactly what

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<sup>9</sup> We do not ask the Court to direct NRC to arbitrarily complete the licensing process, regardless of funding, without full consideration of the safety issues, as implied by DOJ. Amicus Br. at 9. NRC established timelines for completing steps in the licensing process, 10 C.F.R. Part 2, Appendix D, that have been intentionally disregarded and abandoned by NRC, which also failed to ask Congress for additional time to complete the licensing process pursuant to 42 U.S.C. § 10134(e)(2). Petitioners proposed a 14 month period as a target for completion of the licensing process based upon NRC's own timeline and the amount of time DOE and NRC wasted in closing down the Yucca Mountain program.

the NRC did. *See* Pet. Br. at 8-16. NRC ignores the record and erroneously suggests that the Yucca Mountain license application review was terminated based on acts of Congress. *See* NRC Resp. Br. at 2-5. Limited funding is an after-the-fact excuse, not the reason for NRC's intentional termination of its review of the Yucca Mountain license application.

Respondents' willful actions to halt the licensing proceeding and undermine its own ASLB's decision began with the NRC Chairman's "orderly closure" in October 2010. At that time (1) NRC had carryover funds **and** a continuing resolution providing appropriations of \$23 million; (2) the ASLB had ruled earlier that DOE could not withdraw its application; (3) a majority of NRC's Commissioners believed closure was improper; and (4) the Commissioners had cast final votes and it was known that the ASLB order would not be overturned. *See* Pet. Br. at 8-16. Petitioners tried to stop Respondents from dismantling key facilities and taking actions designed to halt the licensing process, both in filings with this Court in *Aiken I* and in filings before NRC. Despite Petitioners' efforts, Respondents continued to divert funds available to advance the licensing process to instead dismantle the licensing process.<sup>10</sup> Respondents' actions inexorably led to the reduction of available funds about which they now complain.

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<sup>10</sup> Actions included dismantling the licensing support network, reassigning staff, closing Yucca Mountain offices, selling computers and equipment, and closing the Las Vegas hearing facility. Pet. Br. at 10-20; Pet. Reply Br. at 11-14.

DOJ now cites some of these same unlawful actions as reasons why the federal government cannot proceed,<sup>11</sup> even though it assured this Court that the licensing process could be readily restarted if NRC and DOE were required to do so. *Aiken I*, 645 F.3d 428 (D.C. Cir. 2011) (Respondents' Response in Opposition to Petitioner's Motion for Preliminary Injunction, ECF No. 1241457, at 2 (Apr. 23, 2010)). Moreover, DOJ, acting on behalf of DOE, chose not to challenge the September 9, 2011 decision of the NRC, which left the ASLB decision intact as law of the case. Therefore, DOJ should not be permitted to contest the validity of NRC's action in leaving the ASLB decision intact.<sup>12</sup> The only inequitable conclusion to this case would be if the Executive Branch is rewarded for its conduct.

**C. Mandamus Should be Issued Since Current Funding is Sufficient to Allow NRC to Resume Compliance with its Statutory Obligations**

Petitioners request the Court order Respondents to resume their consideration of the license application. The \$27 million DOE and NRC concede is available is

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<sup>11</sup> For example, DOJ inaccurately asserts that the money available to NRC would be depleted by merely reestablishing the information data base (LSN) for the hearing. *See* Amicus Br. at 6. 10 C.F.R. § 2.1007(a)(2) required that the LSN be maintained by NRC with no provision for dismantling it. DOJ conveniently ignores the fact that the LSN was not just simply "shut off" but improperly dismantled by Respondents at a substantial cost, over Petitioners' objection. Nonetheless, as explained in Section C, *infra*, records preserved by the ASLB are available for use when discovery is resumed.

<sup>12</sup> DOJ asserts that the ASLB decision is incorrect. Amicus Br. at 3.

undeniably sufficient to do this.<sup>13</sup> Resumption of these obligations could include any number of activities, such as the issuance of the NRC Staff Safety Evaluation Reports (SERs) and continuation of discovery ordered by the ASLB.

The SERs contain the conclusions of NRC staff regarding whether a repository can be safely operated. Issuance of the SERs with the safety conclusions intact is at the heart of the NRC licensing process and would be far from a “fruitless” or a hollow “gesture” as DOJ has intimated.<sup>14</sup> Issuance of the full SERs undeniably can be accomplished with available funds. Moreover, the SERs are public goods, not the private property of the NRC. The SERs and the full licensing record, paid for by billions of dollars of public funds, will inform all future repository efforts, regardless of whether Yucca Mountain is ever built, as even the Executive Branch has admitted.

Available funds can also be used to conduct discovery. Although NRC reported at oral argument that re-establishing the LSN would cost approximately \$5

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<sup>13</sup> DOJ incorrectly argues that funds from general appropriations and reprogrammed funds from unrestricted sources may not be used to advance the Yucca licensing proceeding. Amicus Br. at 12-14. The availability of funds under the NWPA and other general appropriations is addressed in detail in Pet. Reply Br. at 20-25. No statute or principle of law prohibits NRC from utilizing general appropriated funds if funds from the Nuclear Waste Fund have not been specifically appropriated. Moreover, the Executive Branch cannot, on the one hand, claim that appropriated funds can be administratively diverted to improperly close facilities and to halt a licensing proceeding without also accepting the principle that all available means, including reprogramming, must be used to remedy the harm caused by those actions.

<sup>14</sup> The SERs were previously stripped of their safety conclusions at the direction of the NRC Chairman and released as Technical Evaluation Reports. See Pet. Br. at 15-16; Brief of Respondents at 15-16.

million, the ASLB took the precaution of preserving records needed for discovery in another format. Therefore, contrary to DOJ's assertion that the LSN would have to be re-established at great cost as a prerequisite to discovery,<sup>15</sup> NRC properly informed the Court that discovery could resume without the LSN. *See* Tr. at 49:12-18. In addition, witnesses had already been identified and depositions scheduled when the process was brought to a halt by Respondents.<sup>16</sup> Rescheduling discovery could be overseen by a single ASLB Judge assigned to the task. The cost of discovery will be borne primarily by the parties, including DOE.<sup>17</sup> What remains clear is that DOE has approximately \$17 million available to conduct the already planned discovery.

## II. CONCLUSION

For all of the above-stated reasons, mandamus should be issued directing Respondents to resume consideration of the DOE license application and to continue that process until a decision is reached on the merits as required by the NWPA.

RESPECTFULLY SUBMITTED this 6th day of July 2012.

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<sup>15</sup> Amicus Br. at 6.

<sup>16</sup> Pet. Br. at 8, 11-12; Tr at 51, 49; JA 324, 627, 631, 633.

<sup>17</sup> Despite DOJ's vague assertion that \$14 million a month is required for DOE Yucca Mountain activities, discovery is but one of many activities that DOJ lists, Amicus Brief at n.3, and many of the other listed functions have been completed or abandoned. DOJ could have used the opportunity afforded by the Court to provide a specific accounting of how Yucca funds have actually been spent or redirected, and to precisely state what scheduled discovery for Phase I would cost. It chose instead to hide behind a general appropriation figure.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 6th day of July 2012, 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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I further certify that, a copy of the foregoing was served on the following via first class U.S. Mail:

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DATED this 6th day of July 2012, in Olympia, Washington.

*s/ Andrew A. Fitz*  
\_\_\_\_\_  
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**(d) Preliminary activities**

Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be considered a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to<sup>3</sup> require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(Pub. L. 97-425, title I, § 113, Jan. 7, 1983, 96 Stat. 2211; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(e)-(g), Dec. 22, 1987, 101 Stat. 1330-228.)

## REFERENCES IN TEXT

Subsection (b)(1), referred to in subsec. (a), probably means subsec. (b)(1) of section 10132 of this title, which relates to nomination of repository sites for radioactive waste and submission of environmental assessments for those sites.

The National Environmental Policy Act of 1969, referred to in subsec. (c)(1), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

## AMENDMENTS

1987—Subsec. (a). Pub. L. 100-202 and Pub. L. 100-203, § 5011(e)(2), which contained identical amendments directing that “at the Yucca Mountain site” be substituted for “beginning” and all that follows through “geological media”, were executed by substituting “at the Yucca Mountain site” for “beginning with the candidate sites that have been approved under section 10132 of this title and are located in various geologic media” as the probable intent of Congress.

Pub. L. 100-202 and Pub. L. 100-203, § 5011(e)(1), amended subsec. (a) identically, substituting “State of Nevada” for “State involved or the governing body of the affected Indian tribe involved”.

Subsec. (b)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(1), amended par. (1) identically, substituting “the Yucca Mountain site” for “any candidate site” and “the Governor or legislature of the State of Nevada” for “either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be”.

Subsec. (b)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(2), amended par. (2) identically, substituting “the Yucca Mountain site” for “any candidate site”.

Subsec. (b)(3). Pub. L. 100-202 and Pub. L. 100-203, § 5011(f)(3), amended par. (3) identically, substituting “the Yucca Mountain site” for “a candidate site”, striking “either” before “the Governor”, and substituting “the State of Nevada” for “the State in which such candidate site is located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be”.

Subsec. (c)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(1), amended par. (1) identically, substituting “the Yucca Mountain site” for “any candidate site”, “suitability of such site” for “suitability of such candidate site”, and “repository at such site” for “repository at such candidate site”.

Subsec. (c)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(2), amended par. (2) identically, striking out “candidate” before “site” in two places in subpar. (A) and in two places in subpar. (B).

<sup>3</sup> So in original. The word “to” probably should not appear.

Subsec. (c)(3), (4). Pub. L. 100-202 and Pub. L. 100-203, § 5011(g)(3), amended subsec. (c) identically, adding par. (3) and striking out former pars. (3) and (4) which read as follows:

“(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.

“(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities.”

**§ 10134. Site approval and construction authorization****(a) Hearings and Presidential recommendation**

(1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site, for the purposes of informing the residents of the area of such consideration and receiving their comments regarding the possible recommendation of such site. If, upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation, including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared for the Yucca Mountain site pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to con-

sider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site;

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada.

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

(3)(A) The President may not recommend the approval of the Yucca Mountain site unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a statement for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or to<sup>1</sup> require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

#### **(b) Submission of application**

If the President recommends to the Congress the Yucca Mountain site under subsection (a) of this section and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada a copy of such application.

#### **(c) Status report on application**

Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b) of this section, and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of—

(1) any major unresolved safety issues, and the explanation of the Secretary with respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

#### **(d) Commission action**

The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that 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, except that the Commission may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection (e)(2) of this section. The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to part C of this subchapter, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

#### **(e) Project decision schedule**

(1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository, within the time periods specified in this part. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to take action, including an identification of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its stat-

<sup>1</sup> So in original. The word "to" probably should not appear.

utory directives or authority, so that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

**(f) Environmental impact statement**

(1) Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this chapter shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and this section, the Secretary need not consider alternate sites to the Yucca Mountain site for the repository to be developed under this part.

(4) Any environmental impact statement prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this chapter shall be construed to amend or otherwise detract from the licensing requirements of the Nuclear Regulatory Commission established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the repository to be constructed under this part, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or non-geologic alternatives to such site.

(Pub. L. 97-425, title I, § 114, Jan. 7, 1983, 96 Stat. 2213; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5011(h)-(l), Dec. 22, 1987, 101 Stat. 1330-229, 1330-230.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsecs. (a)(1)(D) and (f), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

The Atomic Energy Act of 1954, referred to in subsec. (f)(4), is act Aug. 1, 1946, ch. 724, as added by act Aug. 30, 1954, ch. 1073, § 1, 68 Stat. 921, and amended, which is classified generally to chapter 23 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 2011 of this title and Tables.

The Energy Reorganization Act of 1974, referred to in subsec. (f)(5), is Pub. L. 93-438, Oct. 11, 1974, 88 Stat. 1233, as amended. Title II of the Energy Reorganization Act of 1974 is classified generally to subchapter II (§ 5841 et seq.) of chapter 73 of this title. For complete classification of this Act to the Code, see Short Title note set out under section 5801 of this title and Tables.

AMENDMENTS

1987—Subsec. (a)(1). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(A)-(E), amended par. (1) identically, in introductory provisions substituting “vicinity of the Yucca Mountain site” for “vicinity of each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository”, striking out “in which such site is located” after “residents of the area”, substituting “activities at the Yucca Mountain site” for “activities at not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories” [sic] and “of Nevada” for “in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be”, and struck out before last sentence “In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste.”

Subsec. (a)(1)(D). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(F), generally amended subpar. (D) identically. Prior to amendment, subpar. (D) read as follows: “a final environmental impact statement prepared pursuant to subsection (f) of this section and the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository [sic] or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed under this chapter shall not be required to consider the need for a repository or the alternatives to geologic disposal.”

Subsec. (a)(1)(H). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(1)(G), amended subpar. (H) identically, substituting “the State of Nevada” for “the State in which such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be”.

Subsec. (a)(2). Pub. L. 100-202 and Pub. L. 100-203, § 5011(h)(2), amended subsec. (a) identically, adding par. (2) and striking out former par. (2) which required submission of recommendation of one site for repository not later than Mar. 31, 1987, and recommendation of second site not later than Mar. 31, 1990, and permitted subsequent recommendations for other sites and extension of deadlines.

(5)<sup>1</sup> An affected Indian tribe may not receive any grant under paragraph (1) after the expiration of the 1-year period following—

(i) the date on which the Secretary notifies such Indian tribe of the termination of site characterization activities at the candidate site involved on the reservation of such Indian tribe;

(ii) the date on which such site is disapproved under section 10135 of this title;

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;<sup>2</sup>

(iv) December 22, 1987;

whichever occurs first, unless there is another candidate site on the reservation of such Indian tribe that is approved under section 10132(c) of this title and with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken.

(B) An affected Indian tribe may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any license to receive and possess for a repository at a site on the reservation of an affected Indian tribe, no Federal funds shall be made available under paragraph (1) or (2) to such Indian tribe, except for—

(i) such funds as may be necessary to support activities of such Indian tribe related to any other repository where a license to receive and possess has not been in effect for more than 1 year; and

(ii) such funds as may be necessary to support activities of such Indian tribe pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such Indian tribe with the Secretary during such 2-year period.

(6) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund established in section 10222 of this title.

(Pub. L. 97-425, title I, § 118, Jan. 7, 1983, 96 Stat. 2225; Pub. L. 100-202, § 101(d) [title III, § 300], Dec. 22, 1987, 101 Stat. 1329-104, 1329-121; Pub. L. 100-203, title V, § 5033, Dec. 22, 1987, 101 Stat. 1330-243.)

#### AMENDMENTS

1987—Subsec. (b)(5)(iv). Pub. L. 100-202 and Pub. L. 100-203 amended par. (5) identically, adding cl. (iv).

### § 10139. Judicial review of agency actions

#### (a) Jurisdiction of United States courts of appeals

(1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action—

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10155(c)(1) of this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10155(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

#### (c)<sup>1</sup> Deadline for commencing action

A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

(Pub. L. 97-425, title I, § 119, Jan. 7, 1983, 96 Stat. 2227.)

#### REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (a)(1)(D), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, as amended, which is classified generally to chapter 55 (§ 4321 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of this title and Tables.

### § 10140. Expedited authorizations

#### (a) Issuance of authorizations

(1) To the extent that the taking of any action related to the site characterization of a site or the construction or initial operation of a repository under this part requires a certificate, right-of-way, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer. All actions of a Federal agency or officer with respect to consideration of applications or requests for the issuance or grant of any such au-

<sup>1</sup> So in original. Probably should be designated “(5)(A)”.

<sup>2</sup> So in original. Probably should be followed by “or”.

<sup>1</sup> So in original. No subsec. (b) has been enacted.

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- (d) Press clippings and press releases;
- (e) Junk mail;
- (f) References cited in contractor reports that are readily available;
- (g) Classified material subject to subpart I of this part;
- (h) Readily available references, such as journal articles and proceedings, which may be subject to copyright.
- (i) Correspondence between a potential party, interested governmental participant, or party and the Congress of the United States.

[63 FR 71738, Dec. 30, 1998, as amended at 69 FR 32848, June 14, 2004]

### § 2.1006 Privilege.

(a) Subject to the requirements in § 2.1003(a)(4), the traditional discovery privileges recognized in NRC adjudicatory proceedings and the exceptions from disclosure in § 2.390 may be asserted by potential parties, interested States, local governmental bodies, Federally-recognized Indian Tribes, and parties. In addition to Federal agencies, the deliberative process privilege may also be asserted by States, local governmental bodies, and Federally-recognized Indian Tribes.

(b) Any document for which a claim of privilege is asserted, but is denied in whole or in part by the Pre-License Application Presiding Officer or the Presiding Officer, must be provided in electronic form by the party, interested governmental participant, or potential party that asserted the claim to—

(1) The other participants; or

(2) To the Pre-License Application Presiding Officer or to the Presiding Officer, for entry into a Protective Order file, if the Pre-License Application Presiding Officer or the Presiding Officer so directs under §§ 2.1010(b) or 2.1018(c).

(c) Notwithstanding any availability of the deliberative process privilege under paragraph (a) of this section, circulated drafts not otherwise privileged shall be provided for electronic access pursuant to § 2.1003(a).

[63 FR 71738, Dec. 30, 1998; 64 FR 15920, Apr. 2, 1999, as amended at 69 FR 2265, Jan. 14, 2004]

### § 2.1007 Access.

(a)(1) A system to provide electronic access to the Licensing Support Network shall be provided at the headquarters of DOE, and at all DOE Local Public Document Rooms established in the vicinity of the likely candidate site for a geologic repository, beginning in the pre-license application phase.

(2) A system to provide electronic access to the Licensing Support Network shall be provided at the NRC Web site, <http://www.nrc.gov>, and/or at the NRC Public Document Room beginning in the pre-license application phase.

(3) [Reserved]

(b) Public availability of paper and electronic copies of the records of NRC and DOE, as well as duplication fees, and fee waiver for those records, is governed by the regulations of the respective agencies.

[63 FR 71738, Dec. 30, 1998, as amended at 64 FR 48949, Sept. 9, 1999]

### § 2.1008 [Reserved]

### § 2.1009 Procedures.

(a) Each potential party, interested governmental participant, or party shall—

(1) Designate an official who will be responsible for administration of its responsibility to provide electronic files of documentary material ;

(2) Establish procedures to implement the requirements in § 2.1003;

(3) Provide training to its staff on the procedures for implementation of the responsibility to provide electronic files of documentary material;

(4) Ensure that all documents carry the submitter's unique identification number;

(5) Cooperate with the advisory review process established by the NRC under § 2.1011(d).

(b) The responsible official designated under paragraph (a)(1) of this section shall certify to the Pre-License Application Presiding Officer that the procedures specified in paragraph (a)(2) of this section have been implemented, and that to the best of his or her knowledge, the documentary material specified in § 2.1003 has been identified and made electronically available. The initial certification must be made at the time the participant is required to

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reflect electronic filing and service in accordance with 10 CFR 2.305. The only discovery provided is the mandatory disclosure made by each party pursuant to 10 CFR 2.336.

**MODEL MILESTONES**  
[10 CFR Part 2, Subpart N]

<ul style="list-style-type: none"> <li>• Within 20 of date of enforcement order:</li> </ul>	<p>Person subject to order files answer; if order immediately effective, motion to set aside immediate effectiveness due; requests for hearing due, including joint motion to use Subpart N procedures.</p>
<ul style="list-style-type: none"> <li>• Within 50 days of date of enforcement order:</li> </ul>	<p>Presiding officer decision on requests for hearing and confirms use of Subpart N procedures (note: if presiding officer concludes that Subpart N procedures should not be used, the Model Milestone for Enforcement Actions under Subpart G are applicable).</p>
<ul style="list-style-type: none"> <li>• Within 30 days of presiding officer decision granting hearing:</li> </ul>	<p>Mandatory disclosures complete.</p>
<ul style="list-style-type: none"> <li>• Within 40 days of presiding officer decision granting hearing:</li> </ul>	<p>Prehearing conference to specify issues for hearing and set schedules for remaining course of proceeding.</p>
<ul style="list-style-type: none"> <li>• Within 60 days of presiding officer decision granting hearing:</li> </ul>	<p>Evidentiary hearing begins.</p>
<ul style="list-style-type: none"> <li>• Within 30 days of end of evidentiary hearing and closing of record:</li> </ul>	<p>Presiding officer issues initial decision.</p>

[70 FR 20462, Apr. 20, 2005]

**APPENDIX C TO PART 2 [RESERVED]**

**APPENDIX D TO PART 2—SCHEDULE FOR THE PROCEEDING ON CONSIDERATION OF CONSTRUCTION AUTHORIZATION FOR A HIGH-LEVEL WASTE GEOLOGIC REPOSITORY.**

Day	Regulation (10 CFR)	Action
0	2.101(f)(8), 2.105(a)(5).	FEDERAL REGISTER Notice of Hearing.
30	2.309(b)(2) .....	Petition to intervene/request for hearing, w/contentions.
30	2.309(b)(2) .....	Petition for status as interested government participant.
55	2.315(c) .....	Answers to intervention & interested government participant Petitions.
62	2.309(h)(1) .....	Petitioner's response to answers.
70	2.1021 .....	First Prehearing conference.
100	2.309(h)(2) .....	First Prehearing Conference Order identifying participants in proceeding, admitted contentions, and setting discovery and other schedules.
110	2.1021 .....	Appeals from First Prehearing Conference Order.
120	.....	Briefs in opposition to appeals.

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Day	Regulation (10 CFR)	Action
150	2.1021, 2.329	Commission ruling on appeals for First Prehearing Conference Order.
548	.....	NRC Staff issues SER.
578	2.1022 .....	Second Prehearing Conference.
608	2.1021, 2.1022	Discovery complete; Second Prehearing Conference Order finalizes issues for hearing and sets schedule for prefiled testimony and hearing.
618	2.1015(b) .....	Appeals from Second Prehearing Conference Order.
628	2.1015(b), c.f. 2.710(a).	Briefs in opposition to appeals; last date for filing motions for summary disposition.
648	c.f. 2.710(a) ....	Last date for responses to summary disposition motions.
658	2.710(a) .....	Commission ruling on appeals from Second Prehearing Conference Order; last date for party opposing summary disposition motion to file response to new facts and arguments in any response supporting summary disposition motion.
698	2.1015(b) .....	Decision on summary disposition motions (may be determination to dismiss or to hold in abeyance).
720	c.f. 2.710(a) ....	Evidentiary hearing begins.
810	.....	Evidentiary hearing ends.
840	2.712(a)(1) .....	Applicant's proposed findings.
850	2.712(a)(2) .....	Other parties' proposed findings.
855	2.712(a)(3) .....	Applicant's reply to other parties' proposed findings.
955	2.713 .....	Initial decision.
965	2.342(a), 2.345(a), 2.1015(c)(1).	Stay motion. Petition for reconsideration, notice of appeal.
975	2.342(d), 2.345(b).	Other parties' responses to stay motion and Petitions for reconsideration.
985	.....	Commission ruling on stay motion.
995	2.1015(c)(2) ....	Appellant's briefs.
1015	2.1015(c)(3) ....	Appellee's briefs.
1055	2.1023 Supp. Info.	Completion of NMSS and Commission supervisory review; issuance of construction authorization; NWPA 3-year period tolled.
1125	.....	Commission decision.

[69 FR 2275, Jan. 14, 2004; 69 FR 25997, May 11, 2004]

**PART 4—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE FROM THE COMMISSION**

**GENERAL PROVISIONS**

- Sec.
- 4.1 Purpose and scope.
  - 4.2 Subparts.
  - 4.3 Application of this part.
  - 4.4 Definitions.
  - 4.5 Communications and reports.
  - 4.6 Maintenance of records.