

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.

PETITIONERS' THIRD SUPPLEMENTAL STATUS REPORT

On August 3, 2012, this Court ordered that this case be held in abeyance pending appropriations decisions by Congress that might change the otherwise clear duty of the U.S. Nuclear Regulatory Commission ("NRC") to move forward with the Yucca Mountain Licensing process under the Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.* (1982) ("NWPA"). Order at 1 (filed Aug. 3, 2012) ("Aug. 2012 Order"). The Consolidated and Further Continuing Appropriations Act, 2013 ("CFCA") signed by the President yesterday made no change in the NWPA as it relates to the NRC's obligation to resume the Yucca Mountain

Licensing process. *See* Consolidated and Further Continuing Appropriations Act, H.R. 933, 2013, P.L. 113-____ (Mar. 26, 2013). The millions of dollars in previously appropriated funds that were available on the date the Court issued its August 3, 2012 Order still remain and the NRC does not suggest otherwise. These moneys were available to the NRC in September, 2012, when Congress enacted a six-month Continuing Resolution (“CR”); on January 2, 2013, when Congress enacted the American Taxpayer Relief Act, 2012, H.R. 8, 112th Congress (2013); and again today, now that Congress has enacted and the President signed the CFCA that concludes appropriations decisions for FY 2013. *See* Petitioners’ Status Report at 2 (filed Sept. 28, 2012); Petitioners’ Second Supplemental Status Report at 1 (filed Jan. 4, 2013); CFCA.

None of these Congressional appropriations decisions contain “statutory text that makes clear that the Nuclear Regulatory Commission may not use any appropriated money (including previously appropriated funds) for the Yucca Mountain licensing process” *See* Aug. 2012 Order at 2, Kavanaugh, J. concurring. Nothing in the most recently enacted CFCA provides for any rescission or other limit on the use or availability of these millions of dollars in *prior* appropriated funds (from the Nuclear Waste Fund) for the NRC to meet its

clear legal obligations under the NWPA, and the NRC does not suggest otherwise.¹

These decisions have not rendered this case moot or otherwise brought “additional clarity” to the current dispute. *See* Aug. 2012 Order at 3, Kavanaugh, J. concurring. The reason why the Court delayed issuing mandamus—waiting to see whether Congress’s Fiscal Year 2013 appropriations decisions would affect the case—is now resolved. Congress took no action that affects this case. The CFCA will be effective through the remainder of this fiscal year. The parties remain in the same position they were in at oral argument. *See id.* at 2, Kavanaugh, J. concurring (“In that circumstance, I believe mandamus likely would have to be granted.”); *id.* at 5, Randolph, J. dissenting (“There is no reason to delay issuing a writ of mandamus to correct this transparent violation of law.”).

Mandamus should issue immediately.

¹ The NRC’s reference to section 1101 of the CFCA is irrelevant to this inquiry. That Congress did not appropriate new funds for the Yucca Mountain licensing project for FY 2013 is no different than the circumstances in existence when the Court issued its August 3, 2012 Order. The question has not been whether new funds would be appropriated; the question is whether Congress changed the law in a way that would impact the clear duty of the NRC to resume the Yucca Mountain Licensing process with remaining prior appropriated funds.

RESPECTFULLY SUBMITTED this 27th day of March 2013,

s/ Thomas R. Gottshall
THOMAS R. GOTTSHALL
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
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
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20006-1600
**not admitted*
*Attorneys for Robert L. Ferguson,
William Lampson, and Gary Petersen*

ROBERT W. FERGUSON*
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
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, DC 20004
Attorney for Nye County

CERTIFICATE OF SERVICE

I herby certify that on the 27th day of March 2013, 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	randersen@clarkhill.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
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
Cottingham, Anne W.	awc@nei.org
Stouck, Jerry	stouckj@gtlaw.com
Fitzpatrick, Charles J.	cfitzpatrick@nuclearlawyer.com
Lawrence, John W.	jlawrence@nuclearlawyer.com
Malsch, Martin Guilbert	mmalsch@nuclearlawyer.com
Durkee, Ellen J.	ellen.durkee@usdoj.gov
Avila, Aaron Peter	aaron.avila@usdoj.gov; efile_app.enrd@usdoj.gov; aaronpavila@yahoo.com
Averbach, Andrew P.	andrew.averbach@nrc.gov
Holly Rachel Smith	hsmith@naruc.org
Robin Kimlin Jensen Lunt	rlunt@naruc.org

And served by First Class Mail upon the following:

William Henry Davidson	Davidson Morrison & Lindeman, PA 11611 Devonshire Dr., Second Floor P.O. Box 8568 Columbia, SC 29202-8568
Stephen Gilbert Burns	U.S. Nuclear Regulatory Commission 11555 Rockville Pike One White Flint North Rockville, MD 20852

DATED this 27th day of March 2013, in Washington, DC.

s/ *Barry M. Hartman*
BARRY M. HARTMAN
Counsel for Petitioners Ferguson and
Lampson
(202) 778-9338