ORAL ARGUMENT NOT YET SCHEDULED OR REQUESTED

No. 13-1260

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NYE COUNTY, NEVADA; STATE OF SOUTH CAROLINA; AND AIKEN COUNTY, SOUTH CAROLINA;

Petitioners.

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, and ALLISON M. MACFARLANE, Chairman of the United States Nuclear Regulatory Commission,

Respondents.

RESPONSE IN OPPOSITION TO NRC'S MOTION TO DISMISS

ROBERT M. ANDERSEN
CHRISTOPHER B. CLARE*
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, D.C. 20004
**not admitted*

Attorneys for Nye 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*

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 South Carolina

THOMAS R. GOTTSHALL
S. ROSS SHEALY
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889

Attorneys for Aiken County

I. BACKGROUND

On August 13, 2013, this Court granted a writ of mandamus requested by the Petitioners herein, and others, requiring the Nuclear Regulatory Commission ("NRC") to resume its Congressionally-mandated review of the Yucca Mountain license application. *In re Aiken County*, 725 F.3d 255, 267 (D.C. Cir. 2013) (hereinafter "*In re Aiken County II*"). On August 23, 2013, Nye County, Nevada, the State of South Carolina, and Aiken County, South Carolina (collectively the "Petitioners") filed a motion in the recently-resumed licensing proceeding that sought the recusal of NRC Chairman Allison M. Macfarlane from *any action* relating to the licensing proceeding. On September 9, 2013, the Chairman issued a decision denying the Petitioners' August 23, 2013, Motion for Recusal/Disqualification of NRC Chairman Allison M. Macfarlane. *In re U.S. Dep't of Energy*, NRC No. 63-001-HLW (Sept. 9, 2013) (hereinafter the "Recusal Decision").

On September 26, 2013, the Petitioners filed a Petition for Expedited Review or in the Alternative Writ of Mandamus (Doc. #1458323, hereinafter "Petition") seeking review of the Recusal Decision by this Court under three different prongs of the Nuclear Waste Policy Act's ("NWPA") judicial review provision, Section 119 of the NWPA, 42 U.S.C. § 10139(a)(1). Petition at 5. Under 42 U.S.C. § 10139(a)(1), the U.S. Courts of Appeals has 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 subtitle [42 U.S.C. 10131 *et seq*.]; (B) alleging the failure of the Secretary, the President, or the Commission to make any decision, ***or take any action***, required under this subtitle [42 U.S.C. 10131 *et seq*.]; [or] (C) challenging the constitutionality of any decision made, ***or action taken***, under any provision of this subtitle [42 U.S.C. 10131 *et seq*.] . . . ." (emphasis added). Petition at 5. Alternatively, Petitioners sought a writ of mandamus pursuant to this Court's authority under the All Writs Act, 28 U.S.C. § 1651, and noted the Court's authority and jurisdiction to enforce its previously issued writ of mandamus in *In re Aiken County II*. Additionally, Petitioners simultaneously filed an Emergency Motion for Preliminary Injunction (Doc. #1458337, hereinafter "EMPI") asking the Court to enjoin Macfarlane from participating in any way in the licensing proceeding until the Court reached a decision on the Petition for Review.

Following Court-ordered[1] briefing on the writ of mandamus and the EMPI,[2] this Court ordered "that the petition for writ of mandamus be denied." The Court noted that "[m]andamus is available only if there is no other adequate remedy

[1] *See* Doc. #1458407.

[2] *See* Respondents' Consolidated Opposition to Petitioners' Petition for Writ of Mandamus and Emergency Motion for Preliminary Injunction, Doc. 1460350 (hereinafter "Opposition"); and Petitioners' Reply to Respondents' Consolidated Opposition, Doc. 1461389 (hereinafter "Reply").

available to petitioners." Doc. #1462418 (the "Order"). The Court also denied the EMPI and ordered that "the request for expedited consideration of the petition for review be deferred pending further order of the court." *Id*.

On December 3, 2013, the NRC and Chairman Macfarlane (collectively "Respondents") filed a Motion to Dismiss the Petition for Review. Doc. #1468732 (hereinafter "Motion to Dismiss"). The Motion to Dismiss is based upon an alleged lack of jurisdiction and upon Respondents' claim that the case is unripe for judicial review. However, in their Motion to Dismiss, Respondents misstate the Petitioners' asserted bases for jurisdiction as well as the Court's Order.

First, the Motion to Dismiss misstates the contents of the Court's Order, claiming: "This Court…issued an order governing review of the filing for a Petition for Review under section 119(a)(1)(A) of the Nuclear Waste Policy Act, 42 U.S.C. §10139(a)(1)(A)." Motion to Dismiss at 3. Nothing in the Court's Order directly mentions the NWPA jurisdictional provisions, let alone instructs the parties that the Court intended to limit its consideration to the first jurisdictional prong, subsection 119(a)(1)(A), as implied by Respondents.[3] Respondents also incorrectly assert that the Court has denied Petitioners request for expedited review, when in fact the Court simply ordered "that the request for expedited

[3] Petitioners understood the Order only as the Court's refusal to invoke its authority to issue a writ of mandamus at this time because Petitioners had other available remedies in the form of NWPA's judicial review provisions.

consideration of the petition for review be deferred pending further order of the court." Judge Henderson would have granted the petition for expedited review. *Compare* Motion to Dismiss at 1,3 *with* Court Order of October 22, 2013 at 1-2, Doc. # 13-1260.

The Respondents further misstate the Petitioners' asserted bases for jurisdiction, claiming that the Respondents "understand the Petition to invoke the Court's authority [solely] under subsection (A) to review 'final decisions' of the Commission…," Motion to Dismiss at 4, even though Petitioners have not abandoned their original claim that this Court has jurisdiction to review the Recusal Decision under all three prongs of the NWPA's judicial review provision, 42 U.S.C. § 10139(a)(1)(A)-(C), not just subsection (A). Petition at 5; *see also* Petitioners' Motion for Summary Reversal at 4, Doc. # 1468732 (hereinafter "Motion for Summary Reversal").

Pursuant to Rule 27 of the United States Court of Appeals for the D.C. Circuit, Petitioners hereby file their response to the Motion to Dismiss and request that the Court deny the Motion because this Court clearly has jurisdiction to review the Recusal Decision under the NWPA, and because the Petition is ripe for review now. Instead of dismissing the Petition, this Court should proceed to render a decision on the merits of the Petition for Expedited Review based upon Petitioners' Motion for Summary Reversal filed on December 5, 2013.

II. THE COURT HAS JURISDICTION TO REVIEW THE RECUSAL DECISION.

A. The Recusal Decision by the Chairman is Final Agency Action.

The NWPA was designed by Congress to allow for expedited judicial review of agency actions in the licensing process. *See* Petition at 3-4. The NWPA provides this Court's jurisdiction over any civil actions seeking review of "any final decision *or action* of … the Commission under this subtitle [42 U.S.C. 10131 *et seq*.];" or "(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this subtitle [42 U.S.C. 10131 *et seq*.]." Chairman's Macfarlane's Recusal decision and her refusal to recuse herself is both a final decision and action by the Commission under (A)[4] and a failure to take required action under (B).

The NRC Rules of Practice and Procedures do not provide for further administrative appeal from a Commissioner's decision denying recusal; therefore, Chairman Macfarlane's decision is a final action on behalf of the NRC. *See generally* 10 C.F.R. Part 2. Moreover, as discussed in detail below, her refusal to grant the recusal has had, and will continue to have immediate and concrete

[4] Contrary to Respondents' assertions, the jurisdictional provision in Section 119(a)(1)(A) is *not* identical to the grant of jurisdiction for appellate review of district court decisions in 28 U.S.C. § 1291, discussed in *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 86 n.3 (5th Cir. 1992). NWPA jurisdiction reaches both final decisions *and actions*, unlike 28 U.S.C. § 1291, which is limited to decisions by the district court.

impacts on the rights of Petitioners during the Yucca Mountain licensing process.[5] Thus, the Recusal Decision is subject to this Court's jurisdiction under subsections (A) and (B), and is consistent with the requirements of Rule 15(a) of the Federal Rules of Appellate Procedure ("FRAP").[6]

The Recusal Decision is certainly final in the context of the Yucca Mountain licensing proceeding. As in *Bennett v. Spear*, 520 U.S. 154,178 (1997), the Recusal Decision is binding on the parties to the licensing proceeding, and is having "direct and appreciable legal consequences" on the Yucca Mountain proceedings. For example, Chairman Macfarlane has already taken unilateral action, and participated in NRC collective actions, that have delayed or fundamentally impacted the license adjudication, including the re-suspension of the license adjudication.[7] Absent reversal by this Court, the Recusal Decision will stand and Macfarlane, who has clearly prejudged numerous dispositive issues in the licensing proceeding, will continue to participate in all *actions* and *decisions*

[5] *See* discussion at Section III.B. *infra*.

[6] FRAP 15(a)(1) simply provides that review of "an agency order" is commenced by filing "a petition for review with the clerk of a court of appeals authorized to review the agency order." FRAP 15 defines the term "petition for review" broadly and includes "whatever form is indicated by the applicable statute," but 42 U.S.C. § 10139 contains no mandate (aside from providing this Court with original and exclusive jurisdiction over all civil actions filed under that statute) regarding the proper form of civil actions filed pursuant to that provision. Thus, based upon the broad scope of the term "petition for review" and the lack of restrictions in 42 U.S.C. § 10139 regarding proper form, Petitioners styled their civil action based upon all three prongs of 42 U.S.C. § 10139(a)(1)(A)-(C), as a Petition for Review.

[7] *See* discussion at Section III.B. *infra*.

related to the licensing proceeding. As detailed later, Macfarlane, in her role as Chairman, also has unilateral authority to take administrative actions that will greatly affect the licensing proceeding and Petitioners rights.

B. In Any Event, A Petition for Review of a Commissioner's Action in Violating Constitutional Rights During the Licensing Process Does Not Require Finality.

As Petitioners demonstrated in a different context,[8] the NWPA not only grants this Court original jurisdiction over final NRC actions,[9] but also provides for review of civil actions "challenging the constitutionality of ***any* decision** made, ***or action taken***, under any provision of this subtitle. . . ." 42 U.S.C. § 10139(a)(1)(C) (emphasis added; finality not a condition). Similar to the statute at issue in *Gulf Oil Corp v. DOE*, 663 F.2d 296, 311 (D.C. Cir. 1981), the judicial review provision of 42 U.S.C. § 10139(a)(1)(C) contains "nothing specifically indicating that Congress meant to rule out all judicial intervention before a final [order] is issued where the basic integrity of the agency proceeding is at issue." To the contrary, the NWPA's legislative history provides that "[e]xpedited judicial review of court challenges to the program *as it is implemented*" is an "[e]ssential element of the program." Petition at 3–4 (quoting H.R. Rep. No. 97-491(I), at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 3796)) (emphasis added). Although 42

[8] Petition at 5; Reply at 10–11 ; Motion for Summary Reversal at 15–18.
[9] As discussed above, 42 U.S.C. § 10139(a)(1)(A) condition for final agency action has been satisfied. *See also* Petition at 5–7.

U.S.C. § 10139(a)(1)(A) is limited to review of "final" decisions, neither 42 U.S.C. § 10139(a)(1)(B) nor 42 U.S.C. § 10139(a)(1)(C) contain any such finality requirements. Petitioners maintain that Chairman Macfarlane's Recusal Decision triggers this Court's jurisdiction under each of these three prongs for judicial review under the NWPA.

Further, Respondents fail to provide a single case supporting the position that a Petition for Review is unavailable for parties seeking redress under sections 119(a)(1)(B) or (C). FRAP (15)(a)(4) also provides that "petition for review" is defined to include "a petition to enjoin, suspend, modify, or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute." (Emphasis added). Having enacted three jurisdiction provisions together in the NWPA, one with a finality requirement and two without such a requirement, Congress clearly intended to allow judicial challenges to both final and non-final NRC actions under the NWPA.[10] In this case, Petitioners have shown that her failure to recuse herself is a fundamental violation of procedural due process

[10] *See Keene Corp. v. U.S.*, 508 U.S. 200, 208 (1993) ("where Congress includes particular language in one section of a statute but omits it another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. U.S.*, 464 U.S. 16, 23 (1983)); *Bates v. U.S.*, 522 U.S. 23, 29 (1997) (noting that the Court will "ordinarily resist reading words or elements into a statute that do not appear on its face" when language was included in one provision of statute but excluded in a parallel provision).

rights,[11] falling squarely under the purview of 42 U.S.C. § 10139(a)(1)(C) regarding violations of constitutional rights during the licensing process. Petition at 5; Motion for Summary Reversal at 14-16. Thus, review by the Court is warranted now.

Petitioners are not asserting that all alleged due process violations warrant immediate review in all situations. However, in enacting the NWPA, Congress expressly chose to allow for immediate review of challenges to the constitutionality of any decision or action taken during the NWPA's repository process. It is undeniable that due process is among the constitutional challenges Congress considered when it provided for review of civil actions challenging the constitutionality of *any decision or action taken* during the NWPA's repository licensing process.

III. THE PETITION IS RIPE FOR REVIEW.

A. The Petition for Review of the Recusal Decision is Ripe for Adjudication and Need not Await Final Adjudication of the Yucca Mountain License Application.

In applying ripeness to agency actions, this Court has balanced "the interests of the court and the agency in delaying review against the petitioner's interest in prompt consideration of allegedly unlawful agency action." *In re Aiken County*, 645 F.3d 428, 434 (D.C. Cir. 2011) (citations omitted). The interests of the court

[11] Reply at 7–10.

and agency will ordinarily depend on the "fitness of the issues for judicial decision," which is based on "whether the issues are purely legal, whether consideration of the issues would benefit for a more concrete setting, and whether the agency's actions are sufficiently final." *Id*. Here, the issues are both legal and concrete. There is no dispute concerning the facts in the case. The only dispute is whether those facts warrant the recusal of Chairman Macfarlane under the applicable legal standards. The impacts on Petitioners rights in the proceeding are also both concrete and ongoing. The Chairman has taken, and will continue to take, actions that impact the licensing process such as assignment of staff, allocation of budget, and participation in NRC decision-making, including the Commission's recent re-suspension of the licensing adjudication.[12] Finally, the Recusal Decision is also sufficiently final. This Court is the only forum where Petitioners' claims can be authoritatively reviewed. Absent reversal by this Court, the Recusal Decision will stand and Macfarlane, who has clearly prejudged numerous dispositive issues in the licensing proceeding, will continue to participate in and oversee the licensing proceeding.

The Petitioners' interest in the prompt review of the Recusal Decision cannot be understated. The procedural due process rights of the Petitioners require impartial Commissioners to manage the licensing process and participate in NRC

[12] Her actions and decisions in the ongoing Yucca Mountain licensing process are analyzed in detail in Section III. B. *infra*.

decisions during consideration of DOE's Yucca Mountain license. *See, e.g., Cinderella Career & Finishing Schools, Inc.*, 425 F.2d 583, 591 (D.C. Cir. 1970) ("an administrative hearing 'must be attended, not only with every element of fairness but with the very appearance of complete fairness'") (internal citations omitted). Chairman Macfarlane's unilateral actions in administering the budget and licensing process have already negatively impacted Petitioners rights.[13]

This is neither a "premature" nor "abstract disagreement over administrative policies," but rather a challenge to a discrete final agency decision that has already been rendered. Macfarlane's Recusal Decision itself cannot be reviewed other than by this Court, and is having immediate and ongoing impact on the licensing proceeding. Thus, Respondents reliance on *Abbott Labs v. Gardner*, 387 U.S. 136, 148–49 (1967), is misplaced.

Respondents concede that this Court will entertain extraordinary instances of prejudgment even prior to final agency action. Motion to Dismiss at 9 and Opposition at 13.[14] Respondents simply disagree that the circumstances of the Petition are "truly extraordinary." Opposition at p. 10. It is difficult to imagine

[13] Her actions and decisions in the ongoing Yucca Mountain licensing process are analyzed in detail in Section III. B. *infra*.

[14] While Petitioners continue to maintain that Macfarlane's decision is final agency action, the matter is justiciable even if no final agency action exists. Reply at 7-11; Petition at 5: "Chairman Macfarlane's Recusal Decision triggers this Court's jurisdiction under each of these three prongs for judicial review under the [Nuclear Waste Policy Act, 42 U.S.C. §§10139(a)(1) (A), (B), (C)]."

more extraordinary circumstances in the context of a recusal. No recusal case cited by either party presents a more consistent, well-documented, and public indicia of prejudgment by the adjudicator with respect to the very issues that are under adjudication. Motion for Summary Reversal at 2–7.

The Petition clearly presents an "extraordinary prejudgment claim" which is properly adjudicated prior to final agency action. *See Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1156 (D.C. Cir. 1979). The record thoroughly demonstrates that Chairman Macfarlane has investigated and prejudged dispositive issues in the adjudication and has determined that the site is unsuitable. Petition at 12–25. Motion for Summary Reversal at 2–7. Thus, the Recusal Decision constitutes a "patent" or "clear violation of the law" governing mandatory recusals warranting immediate review by this Court. *See American Train Dispatchers Assn. v. Interstate Commerce Comm'n*, 949 F.2d 413, 414 (D.C. Cir. 1991); *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972). [15]

Additionally, the context of this license proceeding further increases the degree to which the circumstances of the Petition represent an "extraordinary" case for this Court's review. The Yucca Mountain licensing proceeding was designated by Congress as nationally significant to the future of the nuclear energy in United States, and the NRC licensing is resuming only because this Court issued a writ of

[15] *See also Public Utility Commissioner of Oregon v. Bonneville Power Authority*, 767 F.2d 622 (9th Cir. 1985).

mandamus following years of illegal delays and a wasteful shutdown of the licensing proceeding. *In re Aiken County II* at 266. The Yucca Mountain licensing proceeding is also one of the most complex tasks NRC has ever undertaken and may take years to adjudicate.[16] Petition at 10–12. This is certainly the type of "exceptional" or "extraordinary" case which requires immediate action.[17]

Indeed, this Court has taken action in similar cases "where the agency proceedings suffer from a fundamental infirmity requiring a court to act immediately to protect [parties'] rights to a fair proceeding." *Gulf Oil Corp.*, 663 F.2d at 313.[18] *See also Amos Treat & Co. v. SEC*, 306 F.2d 260 (D.C. Cir. 1962). Macfarlane's failure to recuse herself is not curable by attempting to put the genie back in the bottle after a final, but fundamentally infirm, adjudication on the Yucca Mountain license many years later. *See* Petition pp. 26-29; Reply at 13-15.

The rationale for not waiting for a final decision in the underlying dispute can be found in *Cobell v. Norton*, 334 F.3d 1128, 1130 (D.C. Cir. 2003), where

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[16] In fact, the NRC's latest Order attempts to modify the licensing proceeding schedule once again, and indicates that it will be another year before the Staff Evaluation Reports ("SERs") are released.

[17] *Nader v. Volpe*, 466 F.2d 261 (D.C. Cir. 1972); *Public Utility Commissioner of Oregon v. Bonneville Power Authority*, 767 F.2d 622 (9th Cir. 1985).

[18] *See also Fitzgerald v. Hampton*, 467 F.2d 755 (D.C. Cir. 1972) (where this Court cited due process concerns and upheld the District Court's jurisdiction to order the U.S. Civil Service Commission to grant the plaintiff an open and public hearing).

this Court explained its justification for disqualifying a judicial officer:

> The ordinary route to relief from an adverse interlocutory order is to appeal from the final judgment. When the relief sought is recusal of a disqualified judicial officer, however, the injury suffered by a party required to complete judicial proceedings overseen by that officer is by its nature irreparable. As the Supreme Court has explained: The remedy by appeal is inadequate. It comes after the trial and, if prejudice exists, it has worked its evil and a judgment of it in a reviewing tribunal is precarious. It goes there fortified by presumptions, and nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient. *Berger v. United States*, 255 U.S. 22, 36, 65 L. Ed. 481, 41 S. Ct. 230 (1921); *see In re United States*, 666 F.2d 690, 694 (1st Cir. 1981) ("A case involving a motion for disqualification is clearly distinguishable from those where a party alleges an error of law that . . . may be fully addressed and remedied on appeal"). *Id.*

Furthermore, Respondents themselves cite authority that specific, applicable statutory procedures will provide a basis for immediate review by this Court. Opposition at 11 (quoting *San Luis Obispo Mothers for Peace v. Hendrie*, 502 F. Supp. 408, 411 (D.D.C. 1981)). This is exactly what the NWPA judicial review provision applicable to the repository program provides: review of civil actions "challenging the constitutionality of *any* decision made, *or action taken*, under any provision of this subtitle [42 U.S.C. 10131 et seq.] . . . ." 42 U.S.C. § 10139(a)(1)(C) (emphasis added; finality not a condition). In fact, the Nuclear Waste Policy Act's legislative history provides that "[e]xpedited judicial review of court challenges to the program *as it is implemented*" is an "[e]ssential element of

the program." Petition at 3-4 (quoting H.R. Rep. No. 97-491(I), at 30 (1982), as reprinted in 1982 U.S.C.C.A.N. 3796.)) (emphasis added).

Respondents do not convincingly dispute that the Recusal Decision is a clear violation of the law or that Macfarlane's participation as Commissioner (and Chairman) injects a fundamental infirmity requiring action now to protect Petitioners' due process rights. Because the merits are clear on the issue of justiciability, a summary reversal of the Recusal Decision is appropriate now.

B. The Petition is Ripe for Review Despite the "Suspension" of the Adjudication.

Respondents' Motion to Dismiss introduces new facts[19] based upon recent action of the NRC in again suspending the adjudication of the Yucca Mountain license, arguing that the suspension renders the case unripe for review and implying that Macfarlane's obvious prejudgments cannot yet influence the licensing proceeding. Motion to Dismiss at 16. In fact, just the opposite is true. Her participation in yet another NRC-ordered suspension of the licensing proceeding clearly demonstrates that this recusal case is in fact ripe for review. Petitioners and other parties to the licensing proceeding have moved that the

[19] While Petitioners maintain that the material facts in this case are undisputed, in ruling on NRC's Motion to Dismiss, the Petitioners assertions of facts must be "construed liberally in the [Petitioners'] favor," and Petitioners are granted "the benefit of all inferences that can be derived from the facts alleged." *U.S. ex rel. Williams-Baker Aircraft Co.*, 389 F.3d 1251, 1259–60 (D.C. Cir. 2004) (internal quote and citations omitted) (reviewing de novo a district court's order to dismiss).

Commission to reconsider, modify, or clarify the Nov. 18, 2013 Order to come into compliance with this Court's Order in *In re Aiken County* and to effectuate the NWPA "as much as possible".[20] Chairman Macfarlane will continue to participate in the decision on whether or not NRC should reconsider its Order and any later NRC *actions* or *decisions* to either lift or modify the suspension unless she is recused from the proceeding. Notably, NRC Commissioner George Apostolakis, who has recused himself from the Yucca Mountain licensing proceeding, did not participate in the Nov. 18, 2013 Order. This is a clear indication that the Order was not merely administrative in nature but one in which a properly disqualified adjudicator should not have participated.

Respondents also ignore the fact that as Chairman, Macfarlane has enormous influence over the licensing process whether it is "suspended" or not. The Chairman of the NRC not only participates in making substantive decisions regarding licenses adjudicated under the NWPA, but is responsible for key executive and administrative functions of the NRC, including personnel and financial decisions, that can dramatically impact the licensing process.[21] Macfarlane must respond to Congressional requests for testimony and information

[20] Motion for Reconsideration of Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Nov. 27, 2013). *See also* Hearing on Oversight of NRC Management and the Need for Legislative Reform Before the H. Comm. On Energy and Commerce, 113th Cong. (2013) (opening statement of Subcommittee Chairman John Shimkus questioning delays in licensing proceeding).

[21] *See* 10 C.F.R. § 1.11.

regarding the progress being made on the licensing proceeding, and prepare NRC budgets, including deciding whether to request additional Congressional funding for Yucca Mountain licensing and or to take actions to recoup funds illegally spent in the past. She has the authority to take other unilateral action that will greatly impact the licensing proceeding even if it remains "suspended." In fact, if the adjudication remains "suspended," Macfarlane possesses the primary NRC authority to influence the proceeding while it is suspended, and the need for recusal is arguably even greater.

Nor is Chairman Macfarlane's authority to influence the proceeding merely speculative. On August 23, 2013, Petitioners moved the Commission to take immediate action to effectuate this Court's August 13, 2013 Order, and resume the licensing process (including lifting the Commission's suspension of, or reinstating, the ASLB). Instead, Chairman Macfarlane either directed or allowed the Secretary of the Commission to unilaterally issue an order extending the time for response to the Motion beyond the time allowed in NRC rules. *See* Order of the Secretary, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Aug. 30, 2013).

Moreover, on September 10, 2013, Macfarlane, in her executive capacity, testified before Congress regarding staff Safety Evaluation Reports ("SERs") for Yucca Mountain and stated they could be completed at a cost of $6.5 million, even though the SERs were nearly complete when the proceeding was illegally

suspended in 2011. *See generally, Hearing on Implementing the Nuclear Waste Policy Act – Next Steps Before the H. Comm. On Energy and Commerce*, 113th Cong. (2013) (testimony of Allison M. Macfarlane). Following her testimony, and despite no discernable change in circumstance, NRC's suspension order stated that the nearly completed SERs would require another full year to complete at an increased price of up to $8.3 million.[22] *See* Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Nov. 18, 2013). Furthermore, the Nov. 18, 2013 Order re-suspended the adjudication despite the availability of remaining funds even if one accepts NRC's highest estimates to complete the SERs and take other actions outlined in the NRC Order.

Thus, even if the licensing adjudication is "suspended," Petitioners' action is still ripe for review. [23] The ability of an NRC Chairman who is demonstrably impartial to abuse these administrative powers to delay, halt, or otherwise inappropriately influence a licensing proceeding while it is suspended is not

[22] Petitioners and others have asked NRC to reconsider these determinations as well. *See* Motion for Reconsideration of Memorandum and Order, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Nov. 27, 2013); State of Nevada Petition for Clarification of November 18, 2013 Restart Order and Related Staff Requirements Memorandum, *In re U.S. Dep't of Energy*, NRC No. 63-001 (Nov. 27, 2013).

[23] The Recusal Decision itself and Macfarlane's participation in the licensing proceeding are concrete actions that have impacted Petitioners' rights and will continue to do so. Therefore, contrary to Respondents' assertions, Petitioners' have actually met the standards established in *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007), in that their claim does not merely rest on contingent future events that may or may not occur, but in fact upon actions already taken or likely to be required in the near future. by NRC. *See supra* pp. 16–18.

hypothetical—it formed the factual basis for this Court's Order in *In re Aiken County II*. Former NRC Chair Gregory Jaczko's predisposition against the project resulted in delay, waste of taxpayer funds, termination of staff consideration of SERs, reassignment of staff, illegal halting of the licensing process, and dismantling of facilities and equipment used in the licensing process, all in violations of the NWPA.[24] *In re Aiken County II* at 267–68. There is therefore no question that Chairman Macfarlane has authority to exert great influence over the licensing process, regardless of any "suspension" of the adjudication. The Petition remains ripe for review.

Finally, judicial review of the recusal at this stage, before resumption of the adjudication by the NRC's Atomic Safety and Licensing Board, is actually what Petitioners' seek in its request for expedited review under the NWPA. Judicial review now is required to fully protect the parties' due process rights to a fair adjudication, and at the same time is less disruptive of the license adjudication. *See, e.g., Potomac Electric Power Co. v. Interstate Commerce Com.*, 702 F.2d 1026, 1030 (D.C. Cir. 1983) ("In administrative proceedings this requirement of

[24] NRC has previously contended that the Petitioners have implied that former Chairman Jaczko's conduct suggests Chairman Macfarlane will act improperly in the future. Opposition at 30. However, the Petitioners only cite the former Chairman's conduct to show that the Macfarlane possesses authority beyond the average Commissioner and can greatly influence the licensing proceeding even if it is technically suspended.

finality has been interpreted 'in a pragmatic way' to permit judicial review of agency actions that might not otherwise be administratively complete. . . . [One] consideration is whether judicial review will disrupt the orderly process of adjudication.") (internal citations omitted). As such, the fact that the adjudication is not ongoing does not support Respondents' claim of unripeness.

CONCLUSION

For the reasons set forth above, Petitioners ask that the Respondents' Motion to Dismiss be denied and that Petitioners' Motion for summary disposition, reversing Chairman Macfarlane's Recusal Decision, be granted.

___s/Robert M. Andersen___
ROBERT M. ANDERSEN
CHRISTOPHER B. CLARE*
Clark Hill PLC
601 Pennsylvania Ave. N.W.
North Building, Suite 1000
Washington, D.C. 20004
**not admitted*

Attorney for Nye County

___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 P. 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 South Carolina

DATED: Dec. 13, 2013

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of December, 2013, I filed with the Clerk's Office of the United States Court of Appeals for the District of Columbia Circuit, via hand delivery, an original and four copies of the foregoing *Response in Opposition to NRC's Motion to Dismiss*, and filed the same with the Court's CM/ECF filing system. This method is calculated to serve:

Andrew P. Averbach
Solicitor

Jeremy M. Suttenberg
Attorney

Charles E. Mullins
Senior Attorney
Office of the General Counsel
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

___s/Robert M. Andersen___
ROBERT M. ANDERSEN
Attorney for Nye County