IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60191

In re TEXAS,
Petitioner.

RESPONSE OF UNITED STATES NUCLEAR REGULATORY COMMISSION, CHAIRMAN KRISTINE L. SVINCKI, UNITED STATES NUCLEAR REGULATORY COMMISSION ATOMIC SAFETY AND LICENSING BOARD, AND JUDGES THOMAS MOORE, PAUL REYERSON, AND RICHARD WARDWELL TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT REGARDING ORAL ARGUMENT

The U.S. Nuclear Regulatory Commission is prepared to participate in oral argument if this Court decides that oral argument will assist it in reaching a decision. However, the agency believes that the issues raised by Texas's petition may be efficiently resolved on the basis of the parties' written submissions.

INTRODUCTION

Texas seeks mandamus and related relief against the Nuclear Regulatory Commission ("NRC" or "Commission"),[1] claiming that the agency has failed to comply with both the writ of mandamus issued by the U.S. Court of Appeals for the D.C. Circuit in *In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013), and provisions of the Nuclear Waste Policy Act (NWPA), 42 U.S.C. §§ 10101-10270. But Texas's claims for relief have been mooted by recent events, have been filed in the wrong court, are untimely, and are plagued by both a mischaracterization of the D.C. Circuit's decision in *Aiken County* and a failure to account for the agency's actions after that decision. This Court should dismiss this case for lack of jurisdiction or, in the alternative, deny the petition because Texas has failed to demonstrate a clear right to the relief requested.

The linchpin of Texas's request for relief against NRC in this matter—that the Court direct the agency to seek funds from Congress to complete the adjudicatory proceedings related to a nuclear waste repository at Yucca Mountain, Nevada—is moot. Such a request for funds, including $30 million for NRC to restart the adjudication and perform additional Yucca Mountain activities, has already been submitted to Congress by the President. To the extent that Texas

[1] This pleading uses "NRC" to refer to the agency and "Commission" to refer to the 5-member body that manages the agency.

seeks to require a request that Congress appropriate money from the Nuclear Waste Fund so that the suspension of the adjudicatory proceedings can be lifted, there is no need to litigate the matter further. This result has already been obtained.

Texas also asserts that NRC has violated the D.C. Circuit's direction in *Aiken County* that the agency "complete" the licensing process (including the adjudication) for the proposed repository, and the State seeks declaratory and mandamus relief to this effect. But Texas is in the wrong forum to pursue this argument. Only a court that has issued an order has jurisdiction to enforce that order. And, in this context, a request for a "declaration" of a party's rights and duties under an order is the functional equivalent of a request for enforcement. Texas's arguments premised upon a violation of the mandamus order are properly raised before the court that issued the order—the D.C. Circuit.

On the merits, Texas's arguments fall woefully short of establishing the violation by the agency of any duty, let alone the violation of a clear duty to act necessary for mandamus. Despite Texas's repeated assertions to the contrary, the *Aiken County* court did not order NRC to "complete" the licensing proceedings or even to "resume" the adjudication related to Yucca Mountain. Rather, the court ordered the agency to "*continue* with the legally mandated *licensing process*,"

"unless and until Congress [directs] otherwise or there are no appropriated funds remaining." 725 F.3d at 267 (emphasis added).

And that is precisely what NRC has done. Exercising the very discretion that the D.C. Circuit contemplated in *Aiken County*, NRC prioritized, as best as it could, the tasks it is called upon to perform by statute with the limited funds that Congress made available to it. The agency determined more than three years ago—without any objection by the parties to the adjudication or by Texas and well beyond the NWPA's 180-day statute of limitations—to use its limited funds so as to ensure completion of safety and environmental analyses that are prerequisites to the completion of the adjudication. Now, having expended virtually all of the money available to it, it must now await additional funding from Congress before it can resume the adjudication. The agency acted reasonably in determining how to proceed in light of the D.C. Circuit's order and its obligations under the NWPA, and Texas's petition, in addition to being untimely, fails to demonstrate a clear violation of any duty, statutory or otherwise, by the agency.

We stress that there would be no impediment to the agency moving forward with the adjudicatory process in the event that it receives money from Congress and the Department of Energy (DOE) provides notice that it is prepared to pursue the license application. But a request for such funds has already been made, and the decision to fund such proceedings belongs to Congress, not to this Court. At

this point, there is simply nothing to compel NRC to do and, as a consequence, mandamus does not lie.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction to review "any final decision or action" of the Commission, or any failure of the Commission "to make any decision, or take any action, required under" sections 111 through 125 of the NWPA (42 U.S.C. §§ 10121-10145) within 180 days of that action or failure to take action. 42 U.S.C. § 10139(a), (c). This Court is empowered to issue a writ of mandamus to compel action unreasonably delayed or denied under 28 U.S.C. § 1651(a). This Court may also declare the rights and legal relations of any interested party under 28 U.S.C. § 2201(a).

QUESTIONS PRESENTED

1. Whether Texas has demonstrated that it has suffered an injury-in-fact that is (a) traceable to NRC's decision to suspend the adjudicatory portion of the licensing process; and (b) redressable by the relief requested against the NRC.

2. Whether Texas's requests that NRC seek additional funds from Congress are moot.

3. Whether this Court can and should declare the NRC's obligations under, or otherwise enforce, a writ of mandamus issued by a different tribunal.

4. Whether Texas has identified any action or change in circumstance in its petition that falls within the NWPA's 180-day statute of limitations.

5. Whether NRC violated any clear duty to reopen and complete the adjudicatory portion of the licensing process relating to the proposed Yucca Mountain repository when (a) it lacked appropriated funds to do so; and (b) in accordance with the D.C. Circuit's instructions, it prioritized the expenditure of appropriated funds in a reasonable manner to which no party to the adjudicatory proceeding objected.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework.

A. The Nuclear Waste Policy Act.

The NWPA establishes the federal government's policy to dispose of high-level radioactive waste in a deep geologic repository. *See* 42 U.S.C. §§ 10101-10270. The NWPA designates DOE as the agency responsible for designing, constructing, operating, and decommissioning a repository, *id.* § 10134(b); the Environmental Protection Agency ("EPA") as the agency responsible for developing radiation protection standards for the repository, *id.* § 10141(a); and NRC as the agency responsible for developing regulations to implement EPA's standards and for licensing and overseeing construction, operation, and closure of the repository, *id.* §§ 10134(c)-(d), 10141(b). The NWPA directs NRC to issue a

decision approving or disapproving an application to construct a repository within three years from the date the application is submitted, but it allows the agency a one-year extension. *Id.* § 10134(d).

In 1987, Congress designated Yucca Mountain as the single site for further study. *Id.* § 10172. Subsequently, Congress designated Yucca Mountain for the development of a geologic repository in a joint resolution passed over the State of Nevada's disapproval. *Id.* § 10135 note.

B. Review of a Repository Application before NRC.

The NWPA directs NRC to "consider an application for construction authorization for all or part of a repository in accordance with the laws applicable to such applications." *Id.* § 10134(d); *see also id.* § 10145. The "laws applicable" are the regulations governing the NRC's hearing process, which appear at 10 C.F.R. Part 2. They provide, at the outset, for the NRC Staff to review a submitted application to determine whether it contains sufficient information for docketing and further review. 10 C.F.R. § 2.101. After docketing an application, NRC issues a notice of hearing, which allows members of the public to petition for leave to intervene in the licensing proceeding and seek a hearing before a licensing board. *Id.* § 2.104. Those members of the public who can demonstrate an "interest" (i.e., that they have "standing"), and who submit a valid "contention" (i.e., a legal or factual claim challenging a specific portion of the application) will be admitted as

parties to the proceeding. *Id.* § 2.309(a). And once such contentions are admitted, further proceedings, including discovery, evidentiary hearings, and appeals to the Commission of decisions of the licensing boards, are governed by specific procedures enacted by the Commission (codified in Subpart J of Part 2) for issuance of an authorization to construct, and a license to possess and receive radioactive waste at, a geologic repository. *See* 10 C.F.R. §§ 2.1000-2.1027; *id.* pt. 2 app. D.

NRC has also issued regulations governing construction, operation, and closure of the repository. *See* 10 C.F.R. Part 63. DOE must obtain a license to construct the repository, which is the purpose of the current proceeding. *Id.* §§ 63.31-63.33. DOE must also obtain clear title to the land involved (which is owned by the Federal government) and obtain sufficient water rights to construct and operate the repository. *Id.* § 63.121(a), (d). And, after substantially constructing the repository, DOE must obtain a second license to "receive and possess" spent fuel, i.e., to operate the repository. *Id.* § 63.41.

C. Congressional Funding of Nuclear Waste Disposal Activities.

The NWPA created the Nuclear Waste Fund ("Waste Fund") specifically to fund nuclear waste disposal activities. 42 U.S.C. § 10222(c), (d). The NWPA specifically states that the federal government's authority to obligate finds provided under the Act is "only to such extent or in such amounts as are provided

in advance by appropriation Acts." 42 U.S.C. § 10105. Waste Fund monies are carried over on the agency's account from year to year until expended.

II. Statement of Facts.

A. The DOE Application and Initial Proceedings.

On June 3, 2008, DOE submitted an application for authorization to construct a permanent high-level waste repository at Yucca Mountain. *See* 73 Fed. Reg. 34,348 (June 17, 2008), *corrected*, 73 Fed. Reg. 40,883 (July 16, 2008). On review, the NRC Staff found the application contained sufficient information to be docketed. *See* 73 Fed. Reg. 53,284 (Sept. 15, 2008). The Staff then initiated an in-depth review of the application to determine whether it complied with applicable NRC requirements. *Id*.

Subsequently, NRC issued a notice of hearing, allowing persons with an interest in the proceeding to seek intervention. 73 Fed. Reg. 63,029 (Oct. 22, 2008). In January 2009, the Chief Administrative Judge of the Commission's Atomic Safety and Licensing Board Panel established three separate Boards (each comprised of three administrative judges) to review the requests to intervene in the proceeding and the numerous proposed contentions primarily challenging specific portions of the application. 74 Fed. Reg. 4477 (Jan. 26, 2009). In May 2009, the Boards issued a consolidated decision that admitted eight "persons" as parties to the proceeding, admitted two governmental units as "interested governmental

bodies" (*see* 10 § C.F.R. 2.315(c)), and admitted for adjudicatory hearing approximately 300 contentions. *U.S. Department of Energy* (High-Level Waste Repository), LBP-09-06, 69 N.R.C. 367 (2009). The Commission affirmed most of the Boards' rulings on appeal. *U.S. Department of Energy* (High-Level Waste Repository), CLI-09-14, 69 N.R.C. 580 (2009).

In June 2009, the Chief Administrative Judge established a new (fourth) three-judge Board (replacing the initial panels) to review discovery disputes, late-filed contentions, and other case-management matters during the next phase of the adjudication. 74 Fed. Reg. 30,644 (June 26, 2009). That panel, which managed the case until its suspension, subsequently admitted additional parties and both admitted and dismissed additional contentions.[2] *See, e.g.*, *U.S. Department of Energy* (High-Level Waste Repository), LBP-09-29, 70 N.R.C. 1028 (2009).

B. The DOE Motion to Withdraw.

On March 3, 2010, DOE filed a motion to withdraw its application with prejudice, citing its determination that a repository at Yucca Mountain was "not a workable option" and explaining that the project was "being terminated."[3] Five groups sought intervention in the proceeding to oppose the motion. After expedited proceedings, the Board issued an order (1) granting all five intervention

[2] This panel was composed of Judges Moore, Ryerson, and Wardwell.

[3] DOE's motion is available at https://www.nrc.gov/docs/ML1006/ML100621397.pdf.

petitions; (2) admitting one contention submitted by each new intervenor, i.e., that DOE lacked authority to withdraw the application; and (3) denying DOE's motion to withdraw. *U.S. Department of Energy* (High-Level Waste Repository), LBP-10-11, 71 N.R.C. 609 (2010).

The Commission immediately issued an order inviting all participants to file simultaneous briefs and responses addressing (1) whether the Commission should take review of LBP-10-11; and (2), if so, whether the Commission should affirm the decision or reverse it. On September 9, 2011, the Commission issued a decision announcing that it found "itself evenly divided on whether to take the affirmative action of overturning or upholding the Board's decision." *U.S. Department of Energy* (High-Level Waste Repository), CLI-11-07, 74 N.R.C. 212 (2011).[4] The Commission also directed the Board to "complete all necessary and appropriate case management activities, including disposal" of the matters before it. *Id*. at 212. The Board subsequently issued a decision suspending the proceeding in accordance with the Commission's direction. *U.S. Department of Energy* (High-Level Waste Repository), LBP-11-24, 74 N.R.C. 368 (2011).

[4] One Commissioner had recused himself from the Yucca Mountain proceeding. Thus, only four Commissioners participated in the case.

C. Appropriations for NRC and DOE from the Nuclear Waste Fund.

Funding for the Yucca Mountain project, both for NRC and DOE, was at a high level when DOE submitted its application, but it declined over the next four years, ultimately reaching zero funding for both in Fiscal Year ("FY") 2012. For FY 2008 (October 1, 2007 through September 30, 2008), Congress appropriated approximately $29 million to NRC from the Waste Fund. Meanwhile, for FY 2008, Congress appropriated $189 million from the Waste Fund for DOE, designated for "Nuclear Waste Disposal," and it appropriated $201 million designated for "Defense Nuclear Waste Disposal," for a total appropriation for DOE activities related to Yucca Mountain for FY 2008 of $390 million.[5] For FY 2009, Congress increased NRC's Waste Fund appropriation to $49 million.

Congress steadily cut the Waste Fund appropriations for both NRC and DOE thereafter, culminating in the FY 2011 appropriations legislation, which funded both NRC and DOE for the full year following a series of continuing resolutions. That legislation appropriated $10 million to NRC from the Waste Fund but $0 to the DOE from the Waste Fund and $0 for the "defense" component. The FY 2012 appropriations legislation contained no Waste Fund appropriation for Yucca

[5] The NWPA supports the storage of nuclear waste from civilian reactors only. 42 U.S.C. § 10107(a). Thus, federal government pays the costs of disposal of defense high-level nuclear waste into a special fund. *Id.* § 10107(b)(2). Congress then appropriates additional funds to DOE from that special fund to support the storage of defense waste.

Mountain-related activities by either NRC or DOE. Congress has not appropriated any money for either NRC or DOE from the Waste Fund in subsequent appropriations.

D. The *Aiken County* Lawsuit and Subsequent Actions.

In late summer of 2011, the parties that had opposed the DOE motion to withdraw its application before the agency filed a petition for mandamus in the D.C. Circuit. The two lead petitioners were Aiken County, South Carolina and the State of Washington. The petitioners alleged that NRC had improperly withheld agency action required by the NWPA by refusing to continue the proceeding while it still had carryover funds available to it that had been appropriated from the Waste Fund. NRC responded that while it did have some carryover funds (at the time, approximately $11 million in unobligated funds), it did not have sufficient funds to make significant progress toward completing the proceeding and wished to preserve the remaining funds for the resumption of full Congressional funding.

Following briefing and oral argument, the D.C. Circuit held the case in abeyance to allow Congress the opportunity to appropriate additional funds for FY 2013. When Congress did not act, the court issued a writ of mandamus directing NRC to continue the proceeding. *In re Aiken Cty.*, 725 F.3d 255 (D.C. Cir. 2013). With the Chief Judge dissenting (on the ground that, in light of the limited funding available, a mandamus order would not achieve its intended result), the court

directed NRC to resume processing the application "unless and until Congress [directs] otherwise or there are no appropriated funds remaining." *Id.* at 267, 269-70.

In November 2013, the Commission issued an order requesting that the parties to the adjudicatory proceeding provide their views on how to proceed. After reviewing their responses, the Commission issued a decision charting a path forward. *U.S. Department of Energy* (High-Level Waste Repository), CLI-13-8, 78 N.R.C. 219 (2013).[6] The Commission adopted the suggestion of all parties expressing an opinion that it direct the NRC Staff to complete its review of the application and issue the appropriate volumes of the Safety Evaluation Report ("SER"), the next step in NRC's licensing process and a necessary antecedent to completion of the adjudication. *Id.* at 224-29.

The Commission also directed the Staff to place the documents that comprised the record in the adjudicatory proceeding in the non-public portion of NRC's on-line records system, with the possibility of moving them to the public portion should funds permit. *Id*. at 229-30. Next, the Commission requested that DOE submit a Supplemental Environmental Impact Statement (SEIS) associated with the proposed repository's potential impacts on groundwater and from surface

[6] The Commission also accepted and considered "limited appearance statements" from persons and entities who were not parties to the adjudicatory proceeding. 78 N.R.C. at 223 n.15; *see* 10 C.F.R. § 2.315. Texas did not file such a statement.

discharges of groundwater. *Id*. at 230-32 (noting that completion of this analysis was also required prior to the completion of the adjudication). Finally, the Commission declined to resume the adjudicatory proceeding. *Id*. at 232-34; *see also id.* at 236 (anticipating that completion of the SER and adoption of the SEIS would "likely expend nearly all the funds currently available").

In accordance with CLI-13-8, the Staff completed the remaining volumes of the SER in late 2014 and early 2015. The Staff also subsequently completed the SEIS. In addition, NRC placed the millions of items of discovery material from the adjudicatory proceeding in the public portion of NRC's on-line records system, and the agency continues to perform various administrative and knowledge management tasks associated with the application. These expenditures have effectively exhausted the available carryover funds, leaving less than $700,000 in unobligated funds currently available.[7]

E. The Fiscal Year 2018 Budget Request.

On May 23, 2017, the Office of Management and Budget ("OMB") submitted the President's FY 2018 Budget to Congress with a proposed appropriation of $30 Million from the Waste Fund to NRC for continuation of the

[7] NRC's most recent monthly report to Congress cataloguing the agency's repository-related activities since the *Aiken County* decision and reflecting the current available balance is available in the Appendix to this Response (A-1).

Yucca Mountain licensing proceeding.[8] NRC has published a Congressional Budget Justification supporting the request for this amount and explaining:

> Fiscal year (FY) 2018 resources will support the continuation of the licensing proceeding for the potential construction authorization of a repository. Principal activities would include support to, and restart of, the adjudicatory proceeding. The resources budgeted assume that the applicant (U.S. Department of Energy) is prepared to participate as a party to the adjudication.[9]

ARGUMENT[10]

I. Texas Lacks Standing to Maintain This Action.

To establish standing, a petitioner must show "(1) a concrete and particularized injury-in-fact; (2) [that] the injury is fairly traceable to the defendant's conduct; and (3) [that] a favorable judgment is likely to redress the injury." *Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 617 (5th Cir. 2007); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "To satisfy the injury-in-fact requirement, a plaintiff must allege an injury that is 'actual or imminent, not conjectural or hypothetical.'" *Cruz v. Abbott*, 849 F.3d

[8] A-6 to A-7. Supporting documentation for the budget request relating to "other independent agencies," including NRC, is available at https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/oia.pdf.

[9] A-9. The Justification is available in its entirety at https://www.nrc.gov/docs/ML1713/ML17137A246.pdf.

[10] Our arguments on behalf of NRC apply equally to Texas's claims against the Atomic Safety and Licensing Board, the Chairman, and the three Board judges named in Texas's petition.

594, 598 (5th Cir. 2017) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

1. Texas claims that the mere presence of spent nuclear fuel, which is stored at two reactor sites within the State, constitutes a harm sufficient to create standing. Petition at 13-17. But Texas's petition does not demonstrate that the presence of spent fuel constitutes a radiological hazard to residents of the State. Instead, the petition merely alleges—without any explanation or support—that its efforts to regulate the production of electricity are "undercut" by the continued storage of spent fuel within the State. Petition at 16.

But spent fuel stored anywhere in the United States is stored in accordance with NRC regulations, and Texas does not claim that these regulations are somehow inadequate to protect public health and safety. Texas's vague claim that its efforts to produce electricity are being "undercut" likewise provides no explanation of how such an injury might occur and thus provides no plausible reason to believe that continued storage of spent nuclear fuel at secure locations, subject to NRC regulatory oversight, constitutes an injury, i.e., a threat to the public health and safety or a harm to the State.[11] Thus, any injury alleged by Texas

[11] Texas is an Agreement State under 42 U.S.C. § 2021(b), which means it has an agreement with NRC that allows it to regulate certain types of radioactive materials normally within NRC's jurisdiction, including "naturally-occurring materials, low-level radioactive waste, and other by-product materials." Petition at

resulting from the storage of spent fuel at an NRC-regulated facility is inherently speculative and "hypothetical," not "concrete" or "particularized," and is thus insufficient to establish standing.

2. Even assuming *arguendo* that continued waste storage creates some form of imminent or actual harm, Texas also fails to establish redressability. As one court has explained, "standing to challenge a government policy cannot be founded merely on speculation as to what third parties will do in response to a favorable ruling." *Renal Physicians Ass'n v. U.S. Dep't. of Health & Human Servs.*, 489 F.3d 1267, 1274 (D.C. Cir. 2007). Instead, a favorable ruling must "generate a significant increase in the likelihood" that the absentee third party will redress petitioner's harm. *Town of Barnstable v. FAA*, 659 F.3d 28, 32 (D.C. Cir. 2011).

Any injury based on the presence of spent fuel within the State can only be redressed by removing the fuel from the State. But even if this Court grants Texas's petition, a number of significant hurdles still would remain before nuclear waste would leave Texas for disposal in a repository.

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15. But 42 U.S.C. § 2021(c) provides that NRC retains sole jurisdiction over nuclear power reactors and all related operations, which includes the storage of spent nuclear fuel. Thus, contrary to its assertions, Texas does *not* have "direct authority" with respect to the storage of spent fuel and high level waste within the State. *Id.* at 14. As such, the implication in its petition—that its regulatory interest in high-level waste is somehow directly affected by the presence of spent fuel in the State—is misguided.

Most importantly, a third party—Congress—that is not under NRC's control or within this Court's jurisdiction in this lawsuit, would need to take action. NRC cannot conduct activities related to Yucca Mountain except as funded by Congressional appropriations from the Waste Fund; it cannot use general appropriation funds for this purpose. 42 U.S.C. § 10105.[12] Thus, DOE cannot prosecute its application, and NRC cannot adjudicate it, unless until Congress appropriates sufficient funds. But "only Congress can do that, and nothing that [the Court] could order . . . can make Congress do anything." *Guerrero v. Clinton*, 157 F.3d 1190, 1194 (9th Cir. 1998).

Even if Congress eventually re-funds the proceeding, it must ultimately enact yet another statute withdrawing the federal lands on which the repository will be built from other federal entities and transferring those lands to DOE's control.[13] And all the while, NRC will retain the statutory authority to "approv[e] or disapprov[e]" DOE's application for a construction authorization. 42 U.S.C. § 10134(d). In fact, even after construction of the repository is complete, DOE

[12] This issue is further addressed *infra* pages 29-30.

[13] *See* 10 C.F.R. § 63.121(a). Various bills to this effect have been introduced in Congress, but none has been enacted. *See, e.g.*, Eight Steps to Energy Sufficiency Act, S. 3523, 110th Cong. (2008), Nuclear Waste Access to Yucca Act, S. 37, 110th Cong., (2007); Nuclear Fuel Management and Disposal Act, S. 2589, 109th Cong., (2006). In addition, the State of Nevada must grant DOE the necessary water rights for the repository. 10 C.F.R. § 63.161(d).

must go through a second proceeding to obtain a license to operate the repository and receive spent fuel. 10 C.F.R. § 63.41; *see also* 42 U.S.C. § 10145. Then—and only then—could the fuel be disposed of outside of Texas. These facts graft Congress as an additional (and mercurial) actor into the equation and render redressability too remote and speculative to satisfy the constitutional standing requirement.

II. Texas's Claims Related to NRC's Budget Requests Are Moot.

The primary requests for relief that Texas seeks against NRC are its prayers for (1) a declaratory judgment that NRC has violated the Nuclear Waste Policy Act and the *Aiken County* decision by not requesting appropriations from Congress to complete the proceedings, Petition at 25, Request No. 4; and (2) a writ of mandamus ordering NRC "to request funding from Congress to complete the Yucca Mountain licensure process." Petition at 26, Request No. 7. Indeed, without funds, NRC cannot accomplish any of the tasks that Texas would have the agency complete.

But, as described above, the request for funding that Texas would have the Court force NRC to make has already been made to Congress. And in support of the President's budget request, the agency itself has specifically informed Congress that it intends to use these funds to continue the licensing process, principally for the restart of the adjudication. Thus, insofar as Texas's petition seeks relief from

this Court in the form of a requirement that the agency seek funds from Congress for this purpose, its request for relief is moot. *See, e.g.*, *Fontenot v. McCraw*, 777 F.3d 741, 747-48 (5th Cir. 2015) (request for injunction seeking correction by state officials of driving records was moot, and case or controversy therefore no longer existed, where agency director had corrected the records at issue and "ha[d] already done for plaintiffs all that they could ask").

III. This Court Lacks Jurisdiction over Any Claims for Relief Based on the *Aiken County* Decision.

To the extent that Texas bases its claims for relief on the mandamus order issued in *Aiken County* (whether styled as a request for a declaratory judgment, *see*, *e.g.*, Petition at 25, Request No. 4, or as a second mandamus petition, *see, e.g.*, *id.* at 26, Requests Nos. 14-15), it is in the wrong court. To bring a claim based on a "violat[ion of] the ruling in *In re Aiken County*," *id.*, Texas must seek relief from the D.C. Circuit, the court that issued that decision.

Mandamus is a form of injunctive relief, and it is axiomatic that "the court that issued the injunctive order *alone* possesses the power to enforce compliance with and punish contempt of that order. *Other courts are without jurisdiction to do so*." *Alderwoods Group, Inc., v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012) (emphasis added; citations omitted). This Court has adopted that principle. "Enforcement of an injunction through a contempt proceeding *must occur in the issuing jurisdiction* because contempt is an affront to the court issuing the order."

Waffenschmidt v. MacKay, 763 F.2d 711, 716 (5th Cir. 1985) (emphasis added); *see also Suntex Dairy v. Bergland*, 591 F.2d 1063, 1068 (5th Cir.1979) ("If [conduct] is found by the Missouri court to be in violation of its injunction, it may be in contempt of that court. The appropriate response to such contempt, if it exists, is a matter for the Missouri district court under that court's continuing jurisdiction to enforce or protect its injunction order.").

Here, Texas alleges that NRC, including (apparently) its Chairman and three judges of its Licensing Board *see* Petition at 27, Requests Nos. 14-15, have violated the mandamus order issued by the D.C. Circuit by holding the adjudicatory portion of the licensing proceedings in abeyance. But only the D.C. Circuit has authority to issue a contempt order for violating that order because the D.C. Circuit—not this Court—is the tribunal to adjudicate any alleged violation of the mandamus order. Thus, to the extent that Texas's petition seeks to "enforce" or to hold a person or party in contempt for an alleged failure to comply with the *Aiken County* order, this Court lacks jurisdiction over the petition, and it should be dismissed.

The fact that Texas styles a portion of the relief it seeks as a request for a declaratory judgment does not change the applicability of this principle to Texas's petition. The D.C. Circuit issued the writ in *Aiken County*; thus, it is the most appropriate body to determine what was intended by that decision and to declare a

party's "rights and duties" under that decision. So, just as this Court is not the proper forum to "enforce" the D.C. Circuit's mandamus order through issuance of a second writ, it likewise is not the most appropriate forum to issue a declaratory judgment evaluating the agency's compliance with that decision. Instead, the proper forum is the D.C. Circuit.

IV. Texas Is Not Entitled on the Merits to Mandamus Relief against NRC.

The "drastic" remedy of mandamus is only available to "enforce[] clear, non-discretionary duties" upon a demonstration that (1) the [petitioner] has a clear right to relief, (2) the [respondent has] a clear duty to act, and (3) no other adequate remedy exists." *Wolcott v. Sebelius*, 635 F.3d 757, 767 (5th Cir. 2011); *Plekowski v. Ralston-Purina Co.*, 557 F.2d 1218, 1220 (5th Cir. 1977). Texas fails to meet this heavy burden with respect to any of these elements.

A. Texas Has Not Demonstrated the Violation of a Clear Duty to Act Because Neither the D.C. Circuit Nor Congress Has Imposed the Obligations that Texas Identifies.

Texas's requests for a writ of mandamus seek to require NRC to resume and complete the adjudicatory process for the Yucca Mountain license application using money from the Waste Fund and to seek additional funds for this purpose. (Petition at 26, Request Nos. 5-7). Texas bases its requests upon its assertion that, in *Aiken County*, the D.C. Circuit mandated that the agency "complete adjudication of the Yucca application." Petition at 5.

But this is not what the D.C. Circuit ordered the agency to do. The D.C. Circuit did not require that NRC perform any work on the adjudication itself or that it complete this task; it simply ordered the "continu[ation]" of the "licensing process"—of which the adjudication is only one part. *See* 725 F.3d at 267. In fact, the court distinguished between the *completion* and the *continuation* of this process, specifically explaining that the fact that an agency cannot complete work required by statute is not a reason to discontinue that work altogether. *Id.* The D.C. Circuit's direction that NRC merely "continue" the "licensing process" "unless and until Congress [directs] otherwise or there are no appropriated funds remaining," *id.* at 267, clearly refutes Texas's assertions concerning the scope of the agency's obligations.

The absence of any language in the court's order—and of any authority in Texas's petition—suggesting that NRC has an obligation to seek funds from Congress once the funds have been depleted, similarly forecloses any conclusion that the agency was under a "clear duty" to act in this regard. In any event, recognition of such an obligation would embroil the Court in a quintessentially political question, resolvable only between the executive and legislative branches with no meaningful standard for judicial measurement, of whether and to what extent a repository should be funded. *Baker v. Carr,* 369 U.S. 186, 217 (1962); *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 948-49 (5th Cir. 2011).

Whether a request for funding should be made by an agency, and whether Congress should accommodate that request, is a matter within the collective discretion of the political branches of government. *See Aiken Cty.*, 725 F.3d at 267 ("Congress . . . is under no obligation to appropriate additional money for the Yucca Mountain project."). It does not give rise to a judicially enforceable right, and certainly not one that can form the basis for mandamus relief.[14]

Moreover, the court in *Aiken County* endorsed the view that, if faced with budgetary constraints, the agency should prioritize the tasks it is otherwise required to complete. Specifically, the D.C. Circuit quoted its own prior decision in *City of Los Angeles v. Adams*, 556 F.2d 40, 50 (D.C. Cir. 1977), for the proposition that "when a statutory mandate is not fully funded, 'the agency administering the statute is required to effectuate the original statutory scheme as much as possible, within the limits of the added constraint.'" 725 F.3d at 259. And in *Adams*, the court explained that, in such circumstances, "the law sensibly allows the

[14] Texas claims in its response to Nevada's countermotion to dismiss that 42 U.S.C. § 5877 requires NRC to seek funds for repository-related activities. *See* Document 00514045617, at 4. Beyond being waived, this argument fails because that statute merely requires NRC to file an annual report with Congress describing its activities for the preceding year; it says nothing about the agency's obligation to seek funding. Moreover, Texas's extended discussion of this issue fails to cite a single case in which any court required any agency, independent or otherwise, to request funds from Congress. In any event, Texas's assertion on page 6 of its response that NRC has requested no NWPA appropriations since FY 2011 wholly ignores the current request for Waste Fund appropriations for NRC and, as described above, the consequent mootness of this entire line of argument.

administering agency to establish reasonable priorities" in attempting to carry out its statutory mission. 556 F.2d at 49-50. Thus, as the D.C. Circuit recognized, in the event of a funding shortfall, the agency must necessarily be afforded *discretion* in achieving the maximum mission-related bang for its limited buck.

But this conclusion itself bars mandamus here. As a matter of law, when an agency is afforded discretion to choose among legal options, the selection of any one of them, to the exclusion of others, does not constitute the violation of a "clear duty to act" and cannot support a request for mandamus relief. *See Wolcott*, 635 F.3d at 767; *cf. Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004) (mandamus does not lie under Administrative Procedure Act to direct how an agency should exercise discretionary authority).

B. Texas's Petition Fails to Identify Any Conduct That Violates the Mandamus Order or Applicable Law or that Is Not Barred by the Statute of Limitations.

The *Aiken County* decision afforded NRC the discretion to establish "reasonable priorities" in response Congress's failure to appropriate sufficient funds to complete a required project. And, as we establish below, there is no serious dispute that NRC did exactly that. Thus, even assuming that Texas has identified either in the mandamus order or the NWPA a legal requirement that could form the basis of a clear duty to act, Texas has still not established that NRC has violated its obligations.

1. Unsurprisingly, Texas makes no mention of NRC's actions complying with the writ issued in *Aiken County*. Following the decision, the Commission solicited input from the participants in the adjudicatory proceeding concerning how the agency might proceed as efficiently and fairly as possible, particularly given the budgetary constraints it faced. The Commission then issued a decision charting a course forward. *U.S. Dep't of Energy*, CLI-13-8, 78 N.R.C. 219. Notably, *all* parties to the Yucca Mountain proceeding who expressed an opinion requested that the Commission direct the NRC Staff to complete the SER. *Id*. at 224-26.

After reviewing the responses and possible options, the Commission adopted an "incremental approach, since the agency [could not] engage in all of the licensing activities that [it] would undertake if fully funded." *Id*. The Commission recognized that the adjudication, including discovery and an evidentiary hearing, could itself not be conducted until NRC Staff had completed work on the SER and the SEIS had been finished. *Id*. at 227. Accordingly, the Commission directed those discrete steps be undertaken next. *Id*. The Commission concluded that these activities "likely would expend all of the funds currently available to the NRC." *Id*. at 236.

The Commission further directed that the agency perform additional recordkeeping activities designed to facilitate completion of the Staff's work, including making the documents that DOE had generated available in its ADAMS

records database. *Id.* at 230. Finally, the Commission explained that, to ensure to ensure that the SER and SEIS would be completed without funds being devoted to other activities, it would continue to hold the adjudication in abeyance. *Id*. at 233 & n.69; *see also id.* at 236.

By October 2016, NRC had substantially completed the tasks identified above (including the SEIS, which had originally been requested of DOE). These efforts expended approximately $12.1 million out of the $13.5 million in funds appropriated from the Waste Fund and available to the Commission.[15] In November 2016, the Commission elected to use a portion of the small remaining balance to make the relevant documents available to the public and to perform certain knowledge management activities.[16] These efforts, as well as certain administrative activities (including defense of federal court litigation arising under the NWPA), are still ongoing but are nearly complete. And, since 2013, NRC has provided monthly updates to Congress concerning its progress and the available Waste Fund balance (which is currently less than $700,000).[17] Texas's request for

[15] *See* A-2 to A-4. The total amount available to the agency has changed from the $11.1 figure referenced in *Aiken County* and in CLI-13-8 because of the deobligation of certain previously appropriated funds. The agency received no Waste Fund appropriation during the intervening years.

[16] *Id.*

[17] These reports are available at https://www.nrc.gov/waste/hlw-disposal/key-documents.html#status.

mandamus relief does not even attempt to explain, much less conclusively demonstrate, how the prudent, incremental, and transparent approach that NRC adopted somehow constitutes a violation of a "clear duty to act."

2. Texas also suggests that NRC is in violation of its statutory duties under the NWPA, in addition to the *Aiken County* mandamus order. *See* Petition at 25, Request No. 4. But there is simply no basis for this Court to reconsider the agency's conduct pre-dating 2013, given that that conduct is both the subject of another court's injunction and took place well outside the 180-day statute of limitations period. *See* 42 U.S.C. § 10139(c). And to the extent that Texas's petition questions NRC's failure to restart the adjudicatory proceeding in 2013 after the mandamus order, Texas likewise had "actual or constructive knowledge of such decision, action or failure to act," *id.*, years before it filed this lawsuit.

The fact that NRC has exceeded the time limit contained in the NWPA to issue a construction authorization, Petition at 5, does not change the untimeliness of Texas's claims or result in an "ongoing breach," *id.* at 21, that is effectively immune from statute of limitations considerations. NRC charted its course of action years ago, and no development has occurred within the limitations period (certainly not one that is mentioned in the Petition) that could conceivably constitute a discrete failure to act that would itself warrant mandamus relief. *See S. Utah Wilderness All.*, 52 U.S. at 64.

3. While Texas implies throughout its petition that NRC should have conducted the adjudicatory proceeding using general appropriations (i.e., with money not appropriated from the Waste Fund), such a claim was squarely rejected in *Aiken County*. The petitioners there contended that the agency could use sources other than the Waste Fund to continue its work on the license application.[18] But as NRC explained in its brief,[19] both general Federal appropriations law and the specific appropriation that Congress provided to the agency require NRC to fund its activities related to Yucca Mountain through its specific appropriations under the NWPA. *See generally* 1 General Accounting Office, *Principles of Federal Appropriations Law* (3d ed. 2004), at 2-21 to 2-23, 4-21 to 4-22 (explaining that agencies cannot usurp Congress's power of the purse by augmenting a specific appropriation with other funds, and setting forth the "necessary expense" doctrine, which prevents the use of general funds for expenditures that fall within the scope of some other appropriation or statutory scheme).[20] The D.C. Circuit rejected the argument that NRC could fund repository

[18] *See, e.g.*, Reply Brief of Petitioners, *In Re Aiken Cty.* (D.C. Cir. 11-1271), 2012 WL 460267, at *21 (section of brief entitled "Neither the NWPA nor principles of appropriations law prohibit the use of general appropriations").

[19] *See* Final Brief of Respondents, *In Re Aiken Cty.* (D.C. Cir. 11-1271), 2012 WL 460268, at *43-*49.

[20] *See* A-10 to A-20.

activities using general appropriations and expressly conditioned its command that the agency continue its work upon the existence of money that Congress had specifically appropriated for this purpose.[21] Texas provides no argument or authority to the contrary.

4. Finally, Texas's petition can be construed as a challenge to NRC's decision in CLI-13-8 to use its money to focus on aspects of the licensing process other than the adjudication. For the reasons expressed above, such a challenge is untimely. Moreover, Texas is not a proper challenger, because it did not participate either in *Aiken County* or in the proceedings leading up to CLI-13-8. Nonetheless, to the extent the issue is properly before the Court at all, the reasonableness of the agency's decision not to continue the adjudicatory proceeding must be viewed not only in light of the funding constraints discussed above, but also in light of DOE's attempt to withdraw its application and its failure to reverse its position—at least during the events described in Texas's petition.

Congress created NRC as an independent regulator of nuclear safety and empowered it to preside as a neutral arbiter over hearings to adjudicate contentions

[21] *See* 725 F.3d at 267 (requiring that the agency continue the process "*until and unless* . . . there are no *appropriated* funds remaining") (emphasis added).

challenging the issuance of license applications.[22] As such, the Commission's adjudicatory procedures, including the ones to be used to resolve the contentions raised in the Yucca Mountain adjudication, are premised upon the existence of an applicant who is willing and able to participate and to defend its license application against contentions raised by intervenors. In light of the circumstances confronting the agency at the time (including the lingering uncertainty about DOE's participation), NRC's discretionary decision to keep the adjudication suspended and, instead, to use its existing funds to ensure completion of tasks that are prerequisites to the completion of a meaningful adjudication was (and remains)

[22] See Energy Reorganization Act §§ 104, 201-02, 42 U.S.C. §§ 5814, 5841-42; Atomic Energy Act § 189a., 42 U.S.C. § 2239; NWPA § 114(d); 42 U.S.C. § 10134(d).

wholly reasonable under the circumstances.[23] It certainly does not provide a basis for mandamus relief.[24]

V. The Claims Against the Individual Defendants Should Be Dismissed.

Texas's petition includes a request that the individual NRC defendants named "in their official capacity"—Chairman Kristine L. Svinicki and three judges on the Atomic Safety and Licensing Board Panel, Thomas Moore, Paul Ryerson,

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[23] Underlying Texas's suggestion that NRC improperly kept the adjudicatory proceedings suspended is its none-too-subtle implication that NRC should have, instead, blindly resolved all outstanding contentions in favor of DOE. Indeed, Texas even goes so far as to suggest now that, upon any resumption of the adjudication, the Court should consider imposing remedies "[i]f NRC disapproves of the license." Petition at 25. But approval of an application was (and is) hardly a guaranteed result, particularly in the absence of a fully committed applicant. Under the applicable rules, *see* 10 C.F.R. § 2.1000, DOE is defined as "party" to the proceeding. *Id.* § 2.1001. And any nonparticipation by DOE could have led to an adverse determination with respect to the application, including dismissal with prejudice. *See id.* § 2.108 (generally applicable provision permitting denial of an application for failure to supply information); *see also id.* § 2.320 (conferring discretion upon Licensing Board and Commission to take action following the default of any party). Moreover, Commission precedent is clear that, because the applicant bears the burden of proof in NRC adjudicatory proceedings, *see* 10 C.F.R. § 2.325, the fact that the NRC Staff has completed a safety review is not determinative of whether an application should be approved. *See Curators of Univ. of Mo.*, CLI-15-1, 41 N.R.C. 71, 121 (1995).

[24] Texas does not address the third element necessary for mandamus relief—the absence of another adequate remedy. *See Wolcott*, 635 F.3d at 767. This failure independently warrants denial. But in motion practice related to Nevada's motion to intervene, Texas itself has recognized an alternate, and more appropriate, means of securing funding to resume the adjudication: the State "and her citizens can engage in that great First Amendment exercise of lobbying Members of Congress." Doc. No. 00513965625, at 5.

and Richard Wardwell—be held in civil contempt. Petition at 27, Requests Nos. 14, 15. Beyond the improper forum and the absence of any violation of the mandamus order (as discussed above), this request for relief is also barred because the *Aiken County* mandamus order (the only conceivable existing basis Texas identifies for a contempt citation[25]) was directed solely at the agency. Thus, even if the Commission were somehow violating the D.C. Circuit's order or the NWPA, there would be no basis to hold any particular employee in civil contempt, whether in his or her official capacity (as these respondents are identified in the petition), or otherwise (which appears to be an implication of Texas's contempt request). Accordingly, to the extent Texas seeks remedies against the individual respondents (or against the Atomic Safety and Licensing Board, which is not a distinct legal entity) that are not subsumed within the relief it seeks against the agency, its claims should be dismissed.

CONCLUSION

For the forgoing reasons, Texas's petition should be dismissed for lack of jurisdiction or denied.

[25] To the extent Texas seeks conditional remedies for future conduct, Petition at 24, its complaints are, by its own admission, premature.

Respectfully submitted,

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General Counsel

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ANDREW P. AVERBACH
Solicitor

/s/ Charles E. Mullins
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June 29, 2017

CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case and is available through the court's CM/ECF System.

Dated: June 29, 2017

/s/Charles E. Mullins
Charles E. Mullins

Counsel for NRC and Associated Respondents

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with (1) the type-volume limit of Fed. R. App. P. 21(d) because, excluding the parts of the document exempted by Rule 32(f), it contains 7,792 words; and (2) the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2013.

Dated: June 29, 2017

/s/Charles E. Mullins
Charles E. Mullins

Counsel for NRC and Associated Respondents

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-60191

In re TEXAS,
Petitioner.

APPENDIX SUPPORTING RESPONSE OF UNITED STATES NUCLEAR REGULATORY COMMISSION AND ASSOCIATED RESPONDENTS TO PETITION FOR WRIT OF MANDAMUS

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June 29, 2017

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UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

CHAIRMAN

June 22, 2017

The Honorable Greg Walden
Chairman, Committee on Energy
and Commerce
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On behalf of the Commission, I am transmitting the May 2017 monthly status report on the U.S. Nuclear Regulatory Commission (NRC) activities and use of unobligated carryover funds appropriated from the Nuclear Waste Fund. This report describes NRC activities in May 2017 to address the remand by the U.S. Court of Appeals for the District of Columbia Circuit in the case *In re Aiken County* regarding the licensing process for the U.S. Department of Energy's Yucca Mountain license application.

Please feel free to contact me or Eugene Dacus, Director of the Office of Congressional Affairs, at 301-415-1776, if you have questions or need more information.

Sincerely,

Kristine L. Svinicki

Enclosure:
As stated

cc: Representative Frank Pallone, Jr.

U.S. Nuclear Regulatory Commission Monthly Status Report
Activities Related to the Yucca Mountain Licensing Action
Report for May 2017

Background

On August 13, 2013, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued its decision in the case *In re Aiken County* directing the U.S. Nuclear Regulatory Commission (NRC) to "promptly continue with the legally mandated licensing process" for the U.S. Department of Energy's application to construct a geologic repository for high-level waste at Yucca Mountain, NV. The NRC promptly began taking steps to comply with the court's direction following the issuance of the decision. On November 18, 2013, the Commission approved a memorandum and order that set a course of action for the Yucca Mountain licensing process that is consistent with the Appeals Court decision and with the resources available. The Commission also issued a related staff requirements memorandum on November 18, 2013, which, among other things, directed the NRC staff to complete and issue the Safety Evaluation Report (SER) associated with the construction authorization application.

On February 3, 2015, the Commission directed the staff to develop an environmental impact statement supplement and undertake certain SER "wrap-up" activities, including records retention and the development of a lessons-learned report. The Commission also approved a path forward for making Licensing Support Network (LSN) documents publicly available in the Agencywide Documents Access and Management System (ADAMS).

On November 8, 2016, the Commission directed the staff to update the collection of knowledge management reports on the staff's Yucca Mountain review activities, in order to capture new insights. The previous knowledge management reports were completed in 2011.

Table 1 provides a breakdown of estimates and expenditures for all of the Commission-directed activities.

Accomplishments and Ongoing Work

The LSN Public Library project was completed in March. The agency now projects that the cost of this effort should total just over $1.14 million. The April LSN-related expenditures of $1,195 reflected in Table 1 of this report are contract costs that lag other costs due to contractor billing cycles and represent the remaining contract costs for the project.

During the month of May, the staff continued updating the collection of knowledge management reports. These reports will cover technical topics in preclosure and postclosure safety assessments, and climate and hydrology, as discussed in SECY-16-0122, "Status of Yucca Mountain Program Activities," dated October 19, 2016 (available at http://www.nrc.gov/docs/ML16201A110).

Also during May, NRC attorneys continued litigation work associated with a petition for a writ of mandamus filed by the State of Texas pursuant to the Nuclear Waste Policy Act seeking to compel the NRC to complete the Yucca Mountain adjudicatory proceedings.

Enclosure

Nuclear Waste Fund Expenditures

During the month of May 2017, the NRC expended $119,083 of Nuclear Waste Fund (NWF) funds on its actions in direct response to the court's decision. Cumulative expenditures since the August 13, 2013, U.S. Court of Appeals decision are $12,467,968. The August 13, 2013, balance of $13,549,315 of unexpended NWF funding, less the cumulative expenditures of $12,467,968, results in a remaining unexpended balance of $1,081,347. Total unobligated NWF funds remaining as of May 31, 2017, are $697,737. Table 1 provides further details on the NRC's expenditure of NWF funds since August 13, 2013.

Table 1 Status of NRC NWF Funds since the August 13, 2013, Court Decision

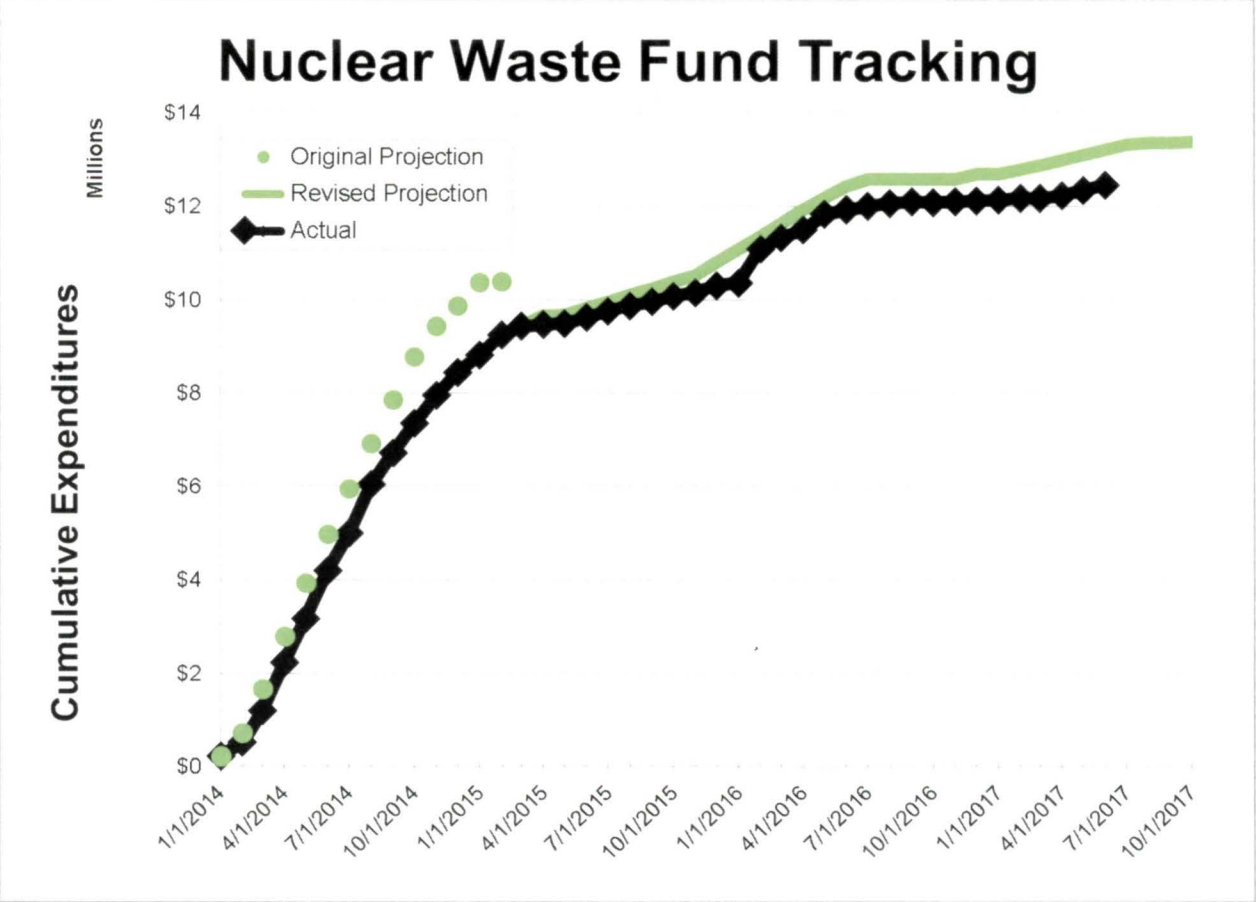
Yucca Mountain Licensing Activities	Cost Estimate	May Expenditures	Cumulative Expenditures
Completion of the SER	$8,310,000	$0	$8,364,877
Loading of Licensing Support Network documents into a nonpublic ADAMS library	$350,000	$0	$277,670
Loading of Licensing Support Network documents into a public ADAMS library	$1,100,000	$1,195	$1,142,745
Development of the EIS supplement	$2,000,000	$0	$1,551,211
SER wrap-up activities	$100,000	$0	$53,548
Knowledge management reports	$700,000	$95,800	$219,126
Program planning and support	$825,000	*$460*	*$480,633*
Response to the August 30, 2013, Commission order		*$0*	*$137,518*
Federal court litigation*		*$21,628*	*$218,866*
Support and advice in NRC proceedings		*$0*	*$35,535*
Subtotal, other support costs chargeable to NWF funds		$22,088	$872,552
Adjustments to close out contracts funded by previous NWF appropriations		$0	($13,761)
Total	$13,385,000	$119,083	$12,467,968

*Includes a $59,000 expenditure in May 2014 for the agency's agreement to settle the Equal Access to Justice Act claim of one of the *Aiken County* petitioners. On October 23, 2014, the Court of Appeals for the District of Columbia Circuit denied the motion from other parties requesting reimbursement for attorneys' fees.

The unexpended NWF balance of $1,081,347 includes $383,610 of unexpended obligations. These unexpended obligations are primarily on contracts with the Center for Nuclear Waste Regulatory Analyses and on contracts related to the loading of LSN documents into public ADAMS.

Figure 1 shows the cumulative projected and actual expenditures. Projected expenditures include cost estimates shown in Table 1. The actual cumulative expenditures reflect costs through May 31, 2017, as given in Table 1.

Figure 1. Nuclear Waste Fund Tracking



Stakeholder Communications and Interactions

No stakeholder communications or interactions occurred in May 2017.

Identical letter sent to:

The Honorable Greg Walden
Chairman, Committee on Energy
and Commerce
United States House of Representatives
Washington, DC 20515
cc: Representative Frank Pallone, Jr.

The Honorable John Shimkus
Chairman, Subcommittee on Environment
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515
cc: Representative Paul Tonko

The Honorable John A. Barrasso
Chairman, Committee on Environment
and Public Works
United States Senate
Washington, DC 20510
cc: Senator Thomas R. Carper

The Honorable Shelley Moore Capito
Chairman, Subcommittee on Clean Air
and Nuclear Safety
Committee on Environment
and Public Works
United States Senate
Washington, DC 20510
cc: Senator Sheldon Whitehouse

The Honorable Fred Upton
Chairman, Subcommittee on Energy
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515
cc: Representative Bobby L. Rush

The Honorable Rodney Frelinghuysen
Chairman, Committee on Appropriations
United States House of Representatives
Washington, DC 20515
cc: Representative Nita Lowey

The Honorable Mike Simpson
Chairman, Subcommittee on Energy
and Water Development
Committee on Appropriations
United States House of Representatives
Washington, DC 20515
cc: Representative Marcy Kaptur

The Honorable Lamar Alexander
Chairman, Subcommittee on Energy
and Water Development
Committee on Appropriations
United States Senate
Washington, DC 20510
cc: Senator Dianne Feinstein

Case: 17-60191 Document: 00514054176 Page: 8 Date Filed: 06/29/2017

PAYMENT TO THE NEIGHBORHOOD REINVESTMENT CORPORATION—Continued

Program and Financing—Continued

Identification code 082–1300–0–1–451		2016 actual	2017 est.	2018 est.
3020	Outlays (gross)	–175	–175	–27
	Budget authority and outlays, net:			
	Discretionary:			
4000	Budget authority, gross	175	175	27
	Outlays, gross:			
4010	Outlays from new discretionary authority	175	175	27
4180	Budget authority, net (total)	175	175	27
4190	Outlays, net (total)	175	175	27

The Neighborhood Reinvestment Corporation (NRC), doing business as "NeighborWorks America," was established by Federal charter in 1978 as a community/public/private partnership providing financial support, technical assistance, and training for affordable housing and community-based revitalization efforts nationwide. The Budget proposes to end Federal support of NRC and requests $27.4 million solely to prepare for the discontinuation of Federal funding.

NORTHERN BORDER REGIONAL COMMISSION

Federal Funds

NORTHERN BORDER REGIONAL COMMISSION

For necessary expenses of the Northern Border Regional Commission, as authorized by subtitle V of title 40, United States Code, $850,000, notwithstanding section 15751(b) of title 40, United States Code: Provided, That such amounts shall be available only for the closure of the Commission: Provided further, That unobligated balances appropriated under this heading in this and prior years will be available for the ongoing administration, oversight, and monitoring of grants previously awarded by the Commission.

Note.—A full-year 2017 appropriation for this account was not enacted at the time the budget was prepared; therefore, the budget assumes this account is operating under the Further Continuing Appropriations Act, 2017 (P.L. 114–254). The amounts included for 2017 reflect the annualized level provided by the continuing resolution.

Program and Financing (in millions of dollars)

Identification code 573–3742–0–1–452		2016 actual	2017 est.	2018 est.
	Obligations by program activity:			
0001	Northern Border Regional Commission	13	7	1
0900	Total new obligations (object class 41.0)	13	7	1
	Budgetary resources:			
	Unobligated balance:			
1000	Unobligated balance brought forward, Oct 1	5		1
	Budget authority:			
	Appropriations, discretionary:			
1100	Appropriation	8	8	1
1930	Total budgetary resources available	13	8	2
	Memorandum (non-add) entries:			
1941	Unexpired unobligated balance, end of year		1	1
	Change in obligated balance:			
	Unpaid obligations:			
3000	Unpaid obligations, brought forward, Oct 1	4	13	1
3010	New obligations, unexpired accounts	13	7	1
3020	Outlays (gross)	–4	–19	–2
3050	Unpaid obligations, end of year	13	1	
	Memorandum (non-add) entries:			
3100	Obligated balance, start of year	4	13	1
3200	Obligated balance, end of year	13	1	
	Budget authority and outlays, net:			
	Discretionary:			
4000	Budget authority, gross	8	8	1
	Outlays, gross:			
4010	Outlays from new discretionary authority	2	7	1
4011	Outlays from discretionary balances	2	12	1
4020	Outlays, gross (total)	4	19	2
4180	Budget authority, net (total)	8	8	1
4190	Outlays, net (total)	4	19	2

The Budget proposes to eliminate funding for several independent agencies, including the Northern Border Regional Commission (NBRC). The Budget requests $0.9 million to conduct an orderly closeout of the agency in fiscal year 2018, which includes sufficient funding for personnel costs during shutdown activities and for severance or retirement pay, and for non-personnel costs associated with the agency's closure such as lease termination, equipment disposal, and compliance with recordkeeping requirements. The Budget also proposes statutory authority to transfer outstanding grant obligations and associated administrative and oversight responsibilities to the Department of Agriculture.

Employment Summary

Identification code 573–3742–0–1–452		2016 actual	2017 est.	2018 est.
1001	Direct civilian full-time equivalent employment	2	3	3

NUCLEAR REGULATORY COMMISSION

Federal Funds

SALARIES AND EXPENSES

For expenses necessary for the Commission in carrying out the purposes of the Energy Reorganization Act of 1974 and the Atomic Energy Act of 1954, $939,137,000, including official representation expenses not to exceed $25,000, to remain available until expended: Provided, That of the amount appropriated herein, $30,000,000 shall be derived from the Nuclear Waste Fund: Provided further, That of the amount appropriated herein, not more than $9,500,000 may be made available for salaries, travel, and other support costs for the Office of the Commission, to remain available until September 30, 2019: Provided further, That revenues from licensing fees, inspection services, and other services and collections estimated at $803,409,000 in fiscal year 2018 shall be retained and used for necessary salaries and expenses in this account, notwithstanding 31 U.S.C. 3302, and shall remain available until expended: Provided further, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2018 so as to result in a final fiscal year 2018 appropriation estimated at not more than $135,728,000.

Note.—A full-year 2017 appropriation for this account was not enacted at the time the budget was prepared; therefore, the budget assumes this account is operating under the Further Continuing Appropriations Act, 2017 (P.L. 114–254). The amounts included for 2017 reflect the annualized level provided by the continuing resolution.

Special and Trust Fund Receipts (in millions of dollars)

Identification code 031–0200–0–1–276		2016 actual	2017 est.	2018 est.
0100	Balance, start of year	903		
0198	FY 2015 Salaries and Expenses appropriation adjustment	–875		
0198	FY 2015 collections applied to FY 2014 Salaries and Expenses appropriation adjustment	–26		
0198	Rounding adjustment	–2		
0199	Balance, start of year			
	Receipts:			
	Current law:			
1120	Nuclear Facility Fees, Nuclear Regulatory Commission	851	866	793
1120	Nuclear Facility Fees, Nuclear Regulatory Commission	18	15	21
1199	Total current law receipts	869	881	814
1999	Total receipts	869	881	814
2000	Total: Balances and receipts	869	881	814
	Appropriations:			
	Current law:			
2101	Salaries and Expenses	–859	–871	–803
2101	Office of Inspector General	–10	–10	–11
2199	Total current law appropriations	–869	–881	–814
2999	Total appropriations	–869	–881	–814
5099	Balance, end of year			

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Program and Financing (in millions of dollars)

Identification code 031–0200–0–1–276		2016 actual	2017 est.	2018 est.
	Obligations by program activity:			
0001	Nuclear Reactor Safety	755	758	702
0005	Nuclear Materials and Waste Safety	173	172	165
0007	Decommissioning and Low-Level Waste	41	43	42
0008	High Level Waste			30
0010	Integrated University Program	15	15	
0799	Total direct obligations	984	988	939
0801	Salaries and Expenses (Reimbursable)	6	6	6
0900	Total new obligations, unexpired accounts	990	994	945
	Budgetary resources:			
	Unobligated balance:			
1000	Unobligated balance brought forward, Oct 1	26	39	58
1021	Recoveries of prior year unpaid obligations	8	14	14
1050	Unobligated balance (total)	34	53	72
	Budget authority:			
	Appropriations, discretionary:			
1100	Appropriation (General Fund)	131	117	106
1101	Appropriation (NRC receipts)	859	871	803
1101	Appropriation (special or trust fund)			30
1160	Appropriation, discretionary (total)	990	988	939
	Spending authority from offsetting collections, discretionary:			
1700	Collected	4	11	11
1701	Change in uncollected payments, Federal sources	1		
1750	Spending auth from offsetting collections, disc (total)	5	11	11
1900	Budget authority (total)	995	999	950
1930	Total budgetary resources available	1,029	1,052	1,022
	Memorandum (non-add) entries:			
1941	Unexpired unobligated balance, end of year	39	58	77
	Change in obligated balance:			
	Unpaid obligations:			
3000	Unpaid obligations, brought forward, Oct 1	326	328	271
3010	New obligations, unexpired accounts	990	994	945
3020	Outlays (gross)	–980	–1,037	–962
3040	Recoveries of prior year unpaid obligations, unexpired	–8	–14	–14
3050	Unpaid obligations, end of year	328	271	240
	Uncollected payments:			
3060	Uncollected pymts, Fed sources, brought forward, Oct 1	–2	–3	–3
3070	Change in uncollected pymts, Fed sources, unexpired	–1		
3090	Uncollected pymts, Fed sources, end of year	–3	–3	–3
	Memorandum (non-add) entries:			
3100	Obligated balance, start of year	324	325	268
3200	Obligated balance, end of year	325	268	237
	Budget authority and outlays, net:			
	Discretionary:			
4000	Budget authority, gross	995	999	950
	Outlays, gross:			
4010	Outlays from new discretionary authority	750	752	715
4011	Outlays from discretionary balances	230	285	247
4020	Outlays, gross (total)	980	1,037	962
	Offsets against gross budget authority and outlays:			
	Offsetting collections (collected) from:			
4030	Federal sources		–5	–5
4033	Non-Federal sources	–4	–6	–6
4040	Offsets against gross budget authority and outlays (total)	–4	–11	–11
	Additional offsets against gross budget authority only:			
4050	Change in uncollected pymts, Fed sources, unexpired	–1		
4070	Budget authority, net (discretionary)	990	988	939
4080	Outlays, net (discretionary)	976	1,026	951
4180	Budget authority, net (total)	990	988	939
4190	Outlays, net (total)	976	1,026	951

Nuclear Reactor Safety.—The Nuclear Reactor Safety Program of the U.S. Nuclear Regulatory Commission (NRC) encompasses licensing, regulating, and overseeing civilian nuclear power, research and test reactors, and medical isotope facilities in a manner that adequately protects public health and safety and the environment. This program also provides assurance of the physical security of facilities and protection against radiological sabotage. This program contributes to the NRC's safety and security strategic goals through the activities of the Operating Reactors and New Reactors Business Lines that regulate existing and new nuclear reactors to ensure their safe operation and physical security.

Nuclear Materials and Waste Safety.—The Nuclear Materials and Safety Program reflects the U.S. Nuclear Regulatory Commission's (NRC's) effort to license, regulate, and oversee nuclear materials in a manner that adequately protects the public health and safety and the environment. This program provides assurance of physical security of the most risk-significant materials and waste and protection against radiological sabotage, theft, or diversion of nuclear materials. Through this program, the NRC regulates uranium processing and fuel facilities, research and pilot facilities, nuclear materials users (medical, industrial, research, and academic),spent fuel storage, spent fuel and material transportation packaging, decontamination and decommissioning of facilities, and low-level and high-level radioactive waste. This program contributes to the NRC's safety and security strategic goals through the activities of the Fuel Facilities, Nuclear Materials Users, Spent Fuel Storage and Transportation, Decommissioning and Low-Level Waste, and High-Level Waste Business Lines.

High-Level Waste.—The High-Level Waste Business Line supports the NRC's activities for the proposed deep geologic repository for the disposal of spent nuclear fuel and other high-level radioactive waste at Yucca Mountain, Nevada, using appropriations from the Nuclear Waste Fund.

Object Classification (in millions of dollars)

Identification code 031–0200–0–1–276		2016 actual	2017 est.	2018 est.
	Direct obligations:			
	Personnel compensation:			
11.1	Full-time permanent	434	437	417
11.3	Other than full-time permanent	5	5	5
11.5	Other personnel compensation	8	8	8
11.8	Special personal services payments	1	1	1
11.9	Total personnel compensation	448	451	431
12.1	Civilian personnel benefits	140	141	135
13.0	Benefits for former personnel	3	3	
21.0	Travel and transportation of persons	21	21	19
22.0	Transportation of things	1	1	1
23.1	Rental payments to GSA	40	40	40
23.3	Communications, utilities, and miscellaneous charges	11	11	11
24.0	Printing and reproduction	2	2	2
25.1	Advisory and assistance services	49	49	49
25.2	Other services from non-Federal sources	82	82	80
25.3	Other goods and services from Federal sources	66	66	64
25.4	Operation and maintenance of facilities	6	7	7
25.5	Research and development contracts	1	1	1
25.7	Operation and maintenance of equipment	81	83	83
26.0	Supplies and materials	4	4	3
31.0	Equipment	8	8	8
32.0	Land and structures	3	3	3
41.0	Grants, subsidies, and contributions	18	15	2
99.0	Direct obligations	984	988	939
99.0	Reimbursable obligations	6	6	6
99.9	Total new obligations, unexpired accounts	990	994	945

Employment Summary

Identification code 031–0200–0–1–276		2016 actual	2017 est.	2018 est.
1001	Direct civilian full-time equivalent employment	3,480	3,532	3,221
2001	Reimbursable civilian full-time equivalent employment	7	9	9

Office of Inspector General

For expenses necessary for the Office of Inspector General in carrying out the provisions of the Inspector General Act of 1978, $12,859,000, to remain available until September 30, 2019: Provided, That revenues from licensing fees, inspection services, and other services and collections estimated at $10,555,000 in fiscal year 2018 shall be retained and be available until September 30, 2019, for necessary salaries and expenses in this account, notwithstanding section 3302 of title 31, United States Code: Provided further, That the sum herein appropriated shall be reduced by the amount of revenues received during fiscal year 2018 so as to result in a final fiscal year 2018 appropriation estimated at not more than $2,304,000: Provided further, That of the amounts appropriated under this heading, $1,131,000

NUREG-1100
Volume 33

CONGRESSIONAL BUDGET JUSTIFICATION

FISCAL YEAR 2018

HIGH-LEVEL WASTE

High-Level Waste by Product Line (Dollars in Millions)								
	FY 2016 Actuals		FY 2017 Annualized CR		FY 2018 Request		Changes from FY 2017	
Product Line	$ M	FTE	$ M	FTE	$ M	FTE	$ M	FTE
Licensing	1.6	1.8	0.0	0.0	24.0	53.0	24.0	53.0
Mission Support and Supervisors	0.2	1.3	0.0	0.0	2.5	14.0	2.5	14.0
Training	0.0	0.0	0.0	0.0	2.2	4.0	2.2	4.0
Travel	0.0	0.0	0.0	0.0	1.3	0.0	1.3	0.0
Total	**$1.8**	**3.1**	**$0.0**	**0.0**	**$30.0**	**71.0**	**$30.0**	**71.0**

$M includes FTE costs as well as contract support and travel. Numbers may not add due to rounding.

The High-Level Waste Business Line supports the NRC's activities for the proposed Yucca Mountain deep geologic repository for the disposal of spent nuclear fuel and other high-level radioactive waste using appropriations from the Nuclear Waste Fund.

Fiscal year (FY) 2018 resources will support the continuation of the licensing proceeding for the potential construction authorization of a repository. Principal activities would include support to, and restart of, the adjudicatory proceeding. The resources budgeted assume that the applicant (U.S. Department of Energy) is prepared to participate as a party to the adjudication.

CHANGES FROM FY 2017 ANNUALIZED CONTINUING RESOLUTION BUDGET

In FY 2018, the NRC budget request includes resources to support continuation of licensing activities, as well as an initial estimate of infrastructure and support costs. These resource needs represent a high level estimation based on historical costs. For the purposes of this budget request, incremental corporate support resources are being estimated in the Mission Support and Supervisors product line while the agency continues to formulate the underlying budget and activity plans and estimates. Following the development of these details, further decisions will be made and formulation activities completed.

All high-level waste activities in FY 2016 were funded by previously-appropriated and unexpended Nuclear Waste Funds.

MAJOR ACTIVITIES

The major activities within the High-Level Waste Business Line include the following:

- Continuation of licensing activities.
- Prepare for the resumption of the administrative adjudication.
- Prepare for and participate in related litigation

United States General Accounting Office

GAO

Office of the General Counsel

January 2004

Principles of Federal Appropriations Law

Third Edition

Volume I

This volume supersedes the Volume I, Second Edition of the Principles of Federal Appropriations Law, 1991.

On August 6, 2010, the web versions of the Third Edition of the Principles of Federal Appropriations Law, Volumes I, II and III, were reposted to include updated active electronic links to GAO decisions. Additionally, the Third Edition's web based Index/Table of Authorities (Index/TOA) was replaced by an Index/TOA that incorporated information from Volume I, II and III. These four documents can be used independently or interactively. To use the documents interactively, click on http://www.gao.gov/special.pubs/redbook1.html and you will be directed to brief instructions regarding interactive use.

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Chapter 2

The Legal Framework

2. Specific *versus* General Appropriations

a. General Rule

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation, which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation.[37] In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally established spending limits.

The cases illustrating this rule are legion.[38] Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up." A few cases are summarized as examples:

- A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps." 1 Comp. Dec. 126 (1894). The Comptroller of the Treasury referred to the rule as having been well established "from time immemorial." *Id.* at 127.

- The existence of a specific appropriation for the expenses of repairing the U.S. courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "Miscellaneous expenses, U.S. Courts" or "Support of prisoners, U.S. Courts." 4 Comp. Gen. 476 (1924).

[37] *See, e.g.*, B-272191, Nov. 4, 1997.

[38] A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925); B-289209, May 31, 2002; B-290011, Mar. 25, 2002.

- A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940). *See* B-235086, Apr. 24, 1991 (a specific appropriation for the construction and acquisition of a building precludes the Forest Service from using a more general appropriation to pay for such a purchase). *See also* B-278121, Nov. 7, 1997.

- Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense." 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision "including not to exceed $45,000 for the purchase and exchange … of … passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation. Similarly, a general appropriation for the Library of Congress contained the provision, "$9,619,000 is to remain available until expended for the acquisition of books, periodicals, newspapers and all other materials… ." The Comptroller General held that the $9,619,000 was an earmark requiring the Library to set aside that money to purchase books and other library materials. The earmark barred the Library from transferring or using those funds for another purpose. B-278121, *supra*. In deciding the proper appropriation to charge for administrative costs for Oil Pollution Act claims, the Comptroller General stated, "As a general rule, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered for the same object." B-289209, *supra* (citing 65 Comp. Gen. 881 (1986)); B-290005, July 1, 2002.

The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation

had received a specific appropriation, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. *E.g.*, 62 Comp. Gen. 617 (1983); B-277905, Mar. 17, 1998; B-152722, Aug. 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with nonappropriation statutes, the relationship between the two principles has been stated as follows:

> "Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable."

B-163375, Sept. 2, 1971. *See also* B-255979, Oct. 30, 1995.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer (discussed later in this chapter) and would improperly augment the specific appropriation (discussed in Chapter 6).

b. Two Appropriations Available for Same Purpose

Although rare, there are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. The rule in this situation is this: Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency at the beginning of the fiscal year informs the Congress of its intent to change for the next fiscal year. *See* U.S. General Accounting Office, *Unsubstantiated DOE Travel Payments*, GAO/RCED-96-58R (Washington, D.C.: Dec. 28, 1995). Of course, where statutory language clearly demonstrates congressional intent to make one appropriation available to supplement or increase a

Availability of Appropriations: Purpose

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a)

This chapter introduces the concept of the "availability" of appropriations. The decisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:

1. the purpose of the obligation or expenditure must be authorized;

2. the obligation must occur within the time limits applicable to the appropriation; and

3. the obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount will be covered in Chapters 5 and 6. This chapter discusses availability as to purpose.

One of the fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a):

> "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Simple, concise, and direct, this statute was originally enacted in 1809 (ch. 28, § 1, 2 Stat. 535, (Mar. 3, 1809)) and is one of the cornerstones of congressional control over the federal purse. Because money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. Anything less

Commission, Congress appropriated no funds for fiscal year 1997. ACIR had separate statutory authority, 42 U.S.C. § 4279, to receive and expend unrestricted contributions made to ACIR from state governments. In B-274855, Jan. 23, 1997, GAO held that this statute constituted an appropriation (a permanent, indefinite appropriation[12]) separate from ACIR's annually enacted fiscal year appropriation, and that from October 1, 1996, until such time as ACIR was awarded the research contract, ACIR could use its unconditional state government contributions.

Another situation may occur when an entity's authorizing legislation is set to terminate and Congress provides an appropriation but does not reauthorize the entity until months later. In 71 Comp. Gen. 378 (1992), the U.S. Commission on Civil Rights was set to terminate by operation of law on September 30, 1991. The Commission was not reauthorized until November 26, 1991. However, during the interim and prior to the expiration date, Congress provided the Commission with appropriations for fiscal year 1992. Once a termination or sunset provision for an entity becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date.[13] However, when Congress desires to extend, amend, suspend, or repeal a statute, it can accomplish its purpose by including the requisite language in an appropriations or other act of Congress. After viewing the legislative actions, in their entirety, on the Commission's reauthorization and appropriation bills, GAO determined that Congress clearly intended for the Commission to continue to operate after September 30, 1991. GAO held that the specific appropriation provided to the Commission served to suspend its termination until the Commission was reauthorized.

B. The "Necessary Expense" Doctrine

1. The Theory

The preceding discussion establishes the primacy of 31 U.S.C. § 1301(a) in any discussion of purpose availability. The next point to emphasize is that

[12] See Chapter 2 for a discussion of permanent, indefinite appropriations.

[13] 71 Comp. Gen. at 380 n.7, citing *inter alia* B-182081, Jan. 26, 1977, *aff'd upon reconsideration*, B-182081, Feb. 14, 1979.

31 U.S.C. § 1301(a) does not require, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason.

The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the "necessary expense doctrine," has been around almost as long as the statute itself. An early statement of the rule is contained in 6 Comp. Gen. 619, 621 (1927):

> "It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority."

The necessary expense rule is really a combination of two slightly different but closely related concepts:

1. An appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for. For example, an appropriation to erect a monument at the birthplace of George Washington could be used to construct an iron fence around the monument where administratively deemed necessary to protect the monument. 2 Comp. Dec. 492 (1896). Likewise, an appropriation to purchase bison for consumption covers the slaughtering and processing of the bison as well as the actual purchase. B-288658, Nov. 30, 2001.

2. Appropriations, even for broad categories such as salaries, frequently use the term "necessary expenses." As used in this context, the term refers to "current or running expenses of a miscellaneous character arising out of and directly related to the agency's work." 38 Comp. Gen. 758, 762 (1959); 4 Comp. Gen. 1063, 1065 (1925).

Although the theory is identical in both situations, the difference is that expenditures in the second category relate to somewhat broader objects.

The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis.

In addition to recognizing the differences among agencies when applying the necessary expense rule, we act to maintain a vigorous body of case law responsive to the changing needs of government. In this regard, our decisions indicate a willingness to consider changes in societal expectations regarding what constitutes a necessary expense. This flexibility is evident, for example, in our analysis of whether an expenditure constitutes a personal or an official expense. As will be discussed more fully later in the chapter, use of appropriations for such an expenditure is determined by continually weighing the benefit to the agency, such as the recruitment and retention of a dynamic workforce and other considerations enabling efficient, effective, and responsible government. We recognize, however, that these factors can change over time. B-286026, June 12, 2001 (overruling GAO's earlier decisions based on reassessment of the training opportunities afforded by examination review courses); B-280759, Nov. 5, 1998 (overruling GAO's earlier decisions on the purchase of business cards). *See also* 71 Comp. Gen. 527 (1992) (eldercare is not a typical employee benefit provided to the nonfederal workforce and not one that the federal workforce should expect); B-288266, Jan. 27, 2003 (GAO explained it remained "willing to reexamine our case law" regarding light refreshments if it is shown to frustrate efficient, effective, and responsible government).

When applying the necessary expense rule, an expenditure can be justified after meeting a three-part test:

1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

E.g., 63 Comp. Gen. 422, 427–28 (1984); B-240365.2, Mar. 14, 1996; B-230304, Mar. 18, 1988.

a. Relationship to the Appropriation

The first test—the relationship of the expenditure to the appropriation—is the one that generates by far the lion's share of questions. On the one hand, the rule does not require that a given expenditure be "necessary" in the strict sense that the object of the appropriation could not possibly be fulfilled without it. Thus, the expenditure does not have to be the only way to accomplish a given object, nor does it have to reflect GAO's perception of the best way to do it. Yet on the other hand, it has to be more than merely desirable or even important. *E.g.*, 34 Comp. Gen. 599 (1955); B-42439, July 8, 1944. An expenditure cannot be justified merely because some agency official thinks it is a good idea, nor can it be justified simply because it is a practice engaged in by private business. *See* B-288266, Jan. 27, 2003.

The important thing is not the significance of the proposed expenditure itself or its value to the government or to some social purpose in abstract terms, but the extent to which it will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. For example, the Forest Service can use its appropriation for "Forest Protection and Utilization" to buy plastic litterbags for use in a national forest. 50 Comp. Gen. 534 (1971). *See also* 72 Comp. Gen. 73 (1992) (the Environmental Protection Agency (EPA) can purchase buttons promoting indoor air quality for its conference since the message conveyed is related to EPA's mission); 71 Comp. Gen. 28 (1991) (the Internal Revenue Service (IRS) can cover cost of its employees filing electronic tax returns because it trains employees); B-257488, Nov. 6, 1995 (the Food and Drug Administration is permitted to purchase "No Red Tape" buttons to promote employee efficiency and effectiveness and thereby the agency's purpose). However, operating appropriations of the Equal Employment Opportunity Commission (EEOC) are not available to pay IRS the taxes due on judgment proceeds recovered by EEOC in an enforcement action. While the payment would further a purpose of the IRS, it would not contribute to fulfilling the

purposes of the EEOC appropriation. 65 Comp. Gen. 800 (1986).[14] *See also* 70 Comp. Gen. 248 (1991) (purchasing T-shirts for Combined Federal Campaign (CFC) contributors is not permitted because T-shirts are not essential to achieving the authorized purpose of CFC).

If the basic test is the relationship of the expenditure to the appropriation sought to be charged, it should be apparent that the "necessary expense" concept is a relative one. As stated in 65 Comp. Gen. 738, 740 (1986):

> "We have dealt with the concept of 'necessary expenses' in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved."

The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. In other words, the agency's administrative determination of necessity will be given considerable deference.

Generally, the interpretation of a statute by the agency that Congress has charged with the responsibility for administering it is entitled to considerable weight. This discretion, however, is not without limits. The agency's interpretation must be reasonable and must be based on a permissible construction of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–238 (2001); *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also* B-286661, Jan. 19, 2001 (expansive

[14] It should be noted, however, that settlement payments in discrimination suits could be paid from an agency's general operating funds when the suit and settlement are incident to the agency's operation. B-257334, June 30, 1995.

CERTIFICATE OF SERVICE

I hereby certify that on the date below a copy of the foregoing was filed electronically with the Clerk and served upon all counsel of record in the case and is available through the court's CM/ECF System.

Dated: June 29, 2017

/s/Charles E. Mullins
Charles E. Mullins

Counsel for NRC and Associated Respondents